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Case No. CE 01-856 / CU 01-332

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

NATHAN MAKINO,

Complainant,

and

COUNTY OF HAWAII and UNITED
PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO,

Respondents.

CASE NOS.: CE-01-856

CU-01-332

ORDER NO. 3173

ORDER (1) GRANTING IN PART
AND DENYING IN PART
RESPONDENT UPW'S MOTION TO
DISMISS FOR FAILURE TO
ESTABLISH BREACH OF DUTY OF
FAIR REPRESENTATION FILED ON
JANUARY 4, 2016, AND (2)
GRANTING RESPONDENT COUNTY
OF HAWAII'S MOTION TO DISMISS
CONSPIRACY CLAIM FILED ON
JANUARY 4, 2016

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RESPONDENT UPW'S MOTION TO DISMISS FOR FAILURE TO
ESTABLISH BREACH OF DUTY OF FAIR REPRESENTATION FILED ON
JANUARY 4, 2016, AND (2) GRANTING RESPONDENT COUNTY OF HAWAII'S
MOTION TO DISMISS CONSPIRACY CLAIM FILED ON JANUARY 4, 2016

I. Background

A. The Complaint

On April 20, 2015, Complainant NATHAN MAKINO (Makino) filed with the Hawaii Labor Relations Board (Board) a Prohibited Practice Complaint against Respondents COUNTY OF HAWAII (County) and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW). On May 9, 2016, Makino filed his First Amended Prohibited Practice Complaint (the Amended Complaint). Attachment "1" (Attachment) to the Amended Complaint alleges, *inter alia*, that Makino 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 Makino was attacked from behind by one of the co-workers (Ivan Varize) and forced to defend himself from physical harm; and,

as a result of the assault and defending himself, he and Varize were both terminated from employment by the County. Makino also alleges that the County was aware that Makino was defending himself from a 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 Makino.

Makino further alleges that UPW filed a grievance with the County on his behalf and that from March 14, 2014 until March 19, 2015, Makino believed that UPW and the County were processing his grievance and engaging in negotiations to resolve his grievance. Makino alleges that on or about December 15, 2014, he was informed by UPW’s business agent, Mr. Alton Nosaka (Nosaka), that an agreement (the Last Chance Agreement) had been reached between the County and UPW such that the County had agreed to reinstate him, that he would not receive any back pay, however his seniority would be reinstated. Makino alleges that from December 15, 2014, through and including March 10, 2015, he was in contact with Nosaka and was told on numerous occasions that the agreement had been finalized and was waiting for approval by Mayor Billy Kenoi (Mayor). Makino also alleges that on or about March 20, 2015, he received a letter from UPW’s state director, Mr. Dayton Nakanelua (Nakanelua), informing him that his grievance was withdrawn.

With regard to claims against the County, the Amended Complaint alleges a prohibited practice by the County for the following:

1. The termination of Makino without “just and proper cause” was in violation of the collective bargaining agreement by and between the State of Hawaii, the Judiciary, the Hawaii Health Systems Corporation, the County of Kauai, the County of Maui, the County of Hawaii and the City and County of Honolulu, collectively as the Employer, and UPW, as the Union (Unit 1 CBA), and Section 89-13(a)(8), HRS. (See, Paragraphs 31 and 35 of the Amended Complaint.)
2. A conspiracy with UPW to extend “the applicable deadlines for arbitration until such time that on March 20, 2015, [Makino] did not have any opportunity to challenge his termination using the arbitration process” under the Unit 1 CBA and Chapter 89, HRS. (See, Paragraphs 33 and 34 of the Amended Complaint.)

With regard to claims against UPW, the Amended Complaint alleges a prohibited practice by UPW for the following:

1. A conspiracy with the County to extend “the deadline for arbitration and then unilaterally withdrawing the request for arbitration which left [Makino] without any available process to challenge his termination because any and all applicable deadlines to pursue arbitration on his own behalf under the collective bargaining agreement had expired.” (See, Paragraphs 49, 56, 57 and 59 of the Amended Complaint.)

2. A conspiracy with the County “by telling [Makino] that an agreement had been reached with the County that would result in [his] reinstatement, when no such agreement had been reached.” (*See*, Paragraphs 51, 52, 53 and 54 of the Amended Complaint.)
3. Violations of Section 89-13(b)(1),(4) and (5) HRS by breaching its duty of fair representation to Makino. (*See*, Paragraphs 58 and 62 of the Amended Complaint.) The specific acts of UPW which are alleged to have breached the union’s duty are as follows:
 - a. Nakanelua’s decision to not pursue arbitration of the grievance. (*See*, Paragraphs 13, 19, 24, 61 and 64 of the Amended Complaint.)
 - b. Nosaka’s manner in which he investigated, processed and handled the grievance and by his efforts to settle the dispute with the County. Makino claims that he was misled by Nosaka’s misrepresentations about the Last Chance Agreement¹ and that he detrimentally relied on the alleged misrepresentations.² Included in this claim against Nosaka is the conspiracy claim in Paragraphs 1 and 2 above.
4. A violation of Makino’s constitutional right to due process, which right entitles Makino to “having the Board hear his Prohibited Practice Complaint of whether or not the UPW lied and misrepresented to him about having an agreement with the County of Hawaii.” (*See*, Complainant’s Memorandum in Opposition to Respondent UPW’s Motion to Dismiss for Failure to Establish Breach of Duty of Fair Representation filed on January 4, 2016, at pages 8 through 10.)
5. Violations of the civil service statutes, HRS Chapter 76. (*See*, Paragraph 58.)

B. Motions to Dismiss

On January 4, 2016, (1) UPW filed Respondent UPW’s Motion to Dismiss for Failure to Establish Breach of Duty of Fair Representation (UPW’s Motion), together with a Memorandum in Support of Motion, Declaration of Alton Nosaka, Affidavit of Herbert Takahashi, and Exhibits 27 through 67, and (2) the County filed County of Hawaii’s Motion to Dismiss Conspiracy Claim (County’s Motion), together with a Memorandum in Support of Motion, Declaration of Counsel and Exhibit “A.”

On January 12, 2016, Complainant filed (1) Complainant’s Memorandum in Opposition to Respondent UPW’s Motion to Dismiss for Failure to Establish Breach of Duty of Fair

¹ *See*, Paragraphs 7, 8, 9, 11, 12, 15, 17, 18, 20, 21, 22, 23, 24, 49, 51, 52 and 53 of the Amended Complaint.

² *See*, Paragraphs 59 and 60 of the Amended Complaint.

Representation Filed on January 4, 2016, together with the Declaration of Nathan Makino (Opposition to UPW's Motion) and (2) Complainant's Memorandum in Opposition to Respondent County of Hawaii's Motion to Dismiss Conspiracy Claim Filed on January 4, 2015, together with the Declaration of Ted H. S. Hong and Exhibit "1" (Opposition to County's Motion).

On January 21, 2016, (1) the County filed County of Hawai'i's Reply to Complainant's Memorandum in Opposition to Respondent County of Hawai'i's Motion to Dismiss Conspiracy Claim (County's Reply) and (2) UPW filed (a) UPW's Reply Brief in Support of Motion to Dismiss for Failure to Establish Breach of the Duty of Fair Representation Filed on 1/4/16 (UPW's Reply), together with Exhibit 68 and Appendices 1 through 5, and (b) United Public Workers, AFSCME, LOCAL 646, AFL-CIO's Answer to First Amended Prohibited Practice Complaint (UPW's Answer to Amended Complaint) which contained additional arguments from UPW in support of UPW's Motion.

On January 26, 2016, oral arguments on the 1/4/16 UPW Motion and the County's Motion were held before the Board. On May 27, 2016, Makino filed Complainant's Declaration in Opposition to Respondent County of Hawai'i's Motion to Dismiss Conspiracy Claim filed on January 4, 2015 and Respondent UPW's Motion to Dismiss for Failure to Establish Breach of Duty of Fair Representation Filed on January 4, 2016, together with the Declaration of Nathan Makino (Makino's 5/27/16 Declaration).

II. Standards of Review

The Board adheres to the legal standards set forth by the Hawaii appellate courts for motions to dismiss under the HRCPP Rule 12(b).

For HRCPP Rule 12(b) motions to dismiss based on lack of subject matter jurisdictions, "a party who seeks to invoke the jurisdiction of the court has the burden of proving the actual existence of subject matter jurisdiction." *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996); *Trentacosta v. Frontier Pac. Aircraft Indus. Inc.*, 813 F.2d 1553, 1559 (9th Cir. 1987). The question of jurisdiction is a question of law which is reviewed de novo under the right/wrong standard. *Lingle v. Hawai'i Gov't Employees Ass'n*, 107 Hawai'i 178, 182, 111 P.3d 587, 591 (2005).

For HRCPP Rule 12(b) motions to dismiss based on a failure to state a claim, "dismissal is warranted only if the claim is clearly without any merit; and this want of merit may consist of an absence of law to support a claim of the sort 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 Hawai'i 104, 108, 253 P.3d 665, 669 (App. 2011) (*Fuddy*), (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 Hawai'i at 107-08, 253 P.3d at 668-669; *Young v. Allstate Ins. Co.*, 119 Hawai'i 403, 412, 198

P.3d 666, 675 (2008) (*Young*). The Board's consideration of a motion to dismiss for failure to state a claim is strictly limited to the allegations of the complaint, and the Board must deem those allegations to be true. However, in weighing the allegations of the complaint as against a motion to dismiss, the Board is not required to accept conclusory allegations on the legal effect of the events alleged. *Paysek v. Sandvold*, 127 Hawaii 390, 402-03, 279 P.3d 55, 67-68 (App. 2012) (citing *Marsland v. Pang*, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985)); *Young*, 119 Hawaii at 406, 198 P.3d at 669.

Additionally, when considering a motion to dismiss, the Board may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction., 111 *Yamane v. Pohlson* Hawaii 74, 81, 137 P.3d 980, 9987 (2006) (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)).

However, since matters outside of the pleadings were submitted by the parties in support of and in opposition to UPW's and the County's motions to dismiss and the Board considered such matters in rendering this decision, the Board has the discretion to treat such motions as motions for summary judgment.³ Since all of the parties were given ample opportunity to present all pertinent materials regarding the issues raised by the motions, the Board treats each motion as a motion for summary judgment.

HRCP Rule 56(b) provides that a party "may move with or without supporting affidavits for a summary judgment in the party's favor[.]" *Ralston v. Yim*, 129 Hawaii 46, 56, 292 P.3d 1276, 1286 (2013) (*Ralston*). "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) (*French*).

Where the non-movant bears the burden of proof at trial, as is the case here, the Hawaii Supreme Court 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

³ Hawaii Rules of Civil Procedure (HRCP) Rule 12(c).

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, supra*, 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, supra*, 129 Hawaii at 56-57, 292 P.3d at 1286 - 1287; *French, supra*, 105 Hawaii at 472, 99 P. 3d at 1056. However, "[w]hen a motion for summary judgment is made and supported as provided in [HRCF 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).

Finally, when a motion for summary judgment is made and supported as provided in this rule, 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 the adverse party does not so respond, summary judgment, if appropriate, shall be entered against him or her. *Foronda v. Hawaii International Boxing Club*, 96 Haw. 51, 58, 25 P.3d, 826, 833 (2001); *Tri-S Corp. v. Western World Insurance Co.*, 110 Haw. 473, 494 n. 9, 135 P.3d 82, 103 n. 9 (2006).

III. Findings of Fact

Based on the evidence submitted and the arguments of the parties in the hearing on UPW's Motion and the County's Motion, the Board finds the following:

1. The Board incorporates by reference the statements set forth in the section above regarding the Background of this case.
2. At all times relevant herein, the County was the "employer" of Makino within the meaning of HRS § 89-2.
3. UPW is, and was at all times relevant herein, (a) an employee organization within the meaning of HRS § 89-2, and (b) the duly certified exclusive bargaining representative of bargaining unit 1.
4. Makino was at all times relevant in this case an employee of the County and a Unit 1 member of UPW.

5. The Unit 1 CBA was in effect at all times relevant in this case, including Section 15.16 which states as follows:

“Step 3 Arbitration.

In the event the grievance is not resolved in Step 2, and *the union* desires to submit the grievance to arbitration, *the union* shall notify the employer within thirty (30) calendar days after receipt of the Step 2 decision.” (Emphasis add in italics)

IV. Discussion, Conclusions of Law and Order

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.

A. County’s Motion

In the County’s Motion, the County claims that Makino’s “conspiracy claim is not supported by any factual allegation set forth in the Complaint, or otherwise, and he has utterly failed to provide any grounds entitling him to relief under such a claim.” *See*, Memorandum in Support of Motion at page 4. Although the initial pleadings regarding Makino’s conspiracy claims are unclear and confusingly stated, the party’s respective positions regarding the factual basis of Makino’s conspiracy claims were clarified at the January 26, 2016 hearing held for both UPW’s Motion and the County’s Motion. Makino’s conspiracy claims are based on his factual allegation that UPW and the County conspired to “stretch out” the negotiations on the Last Chance Agreement past the deadline for Makino to assert his alleged right to arbitration pursuant to the Unit 1 CBA. Mr. Ted Hong, Makino’s attorney, stated at the hearing on January 26, 2016 the following:

“So what happened was when you look at the chronology of events, they stretched out the timeline of negotiating this last chance agreement, which prejudiced my client because at that point in time, by the time that Mr. Nakanelua made the decision not to pursue this any further, there were no remedies left for my client to pursue as an individual, which he’s entitled to pursue, under the Collective Bargaining Agreement. *But because they stretched it out, all the timeliness under the grievance arbitration process got blown.* (Italics added.)”⁴

Thus, Makino’s conspiracy claims are based on his alleged individual right (without the union) to take his grievance to arbitration. The Board does not agree with Makino’s reading and interpretation of the Unit 1 CBA. While the Unit 1 CBA provides that Makino or UPW could initiate a grievance with the employer, “only the union has the election to take the matter to

⁴ See, Transcript (TR) at page 74-37, Lines (L) 2 to 12.

arbitration" *Winslow v. State*, 2 Haw.App. 50, 55 (1981); and *Poe v. Haw. Labor Rels. Bd.*, 97 Hawaii 958, 538 ("the sole power to proceed to arbitration rested with the [union]"). Thus, only UPW had the right under the Unit 1 CBA to initiate a Step 3 arbitration. Makino had no such right. Therefore, his conspiracy claims which are based on the alleged right of an employee (as opposed to UPW) under the Unit 1 CBA to initiate a Step 3 arbitration pursuant to Section 15.16 of the Unit 1 CBA must fail simply because the County and UPW did not have to conspire to deny Makino the right to arbitrate -- he simply had no right as a matter of contract. Thus, Makino's conspiracy claims against the County are hereby dismissed.

Similarly, the conspiracy claims alleged against UPW must be, and hereby are, dismissed since there simply was no such conspiracy.

B. UPW's Motion

UPW argues in UPW's Motion that Makino has been afforded an opportunity to conduct pre-hearing discovery and that he "has failed to establish that [UPW's] conduct of the union representative was arbitrary, discriminatory, and/or in bad faith" UPW contends that Makino (1) "failed to prove a breach of the duty of fair representation by business agent Alton Nosaka,"⁵ and (2) "the decision not to arbitrate the grievance by the State Director was not arbitrary or discriminatory."⁶

In the Opposition to UPW's Motion, Makino argues that there is no legitimate grounds to dismiss the Complaint because Makino has sufficiently plead a breach of duty of fair representation that requires the Board to conduct an evidentiary hearing. Furthermore, Makino claims that his limited pre-hearing discovery indicates a "clear lying by both [UPW and the County]"⁷ and that "UPW's lies . . . violate its Duty of Fair Representation because of its fundamental, material and fraudulent representation to the Complainant"⁸ Prior court decisions and NLRB rulings have been cited by Makino for the proposition that where a union intentionally misrepresents the status of a grievance, it commits a breach of its duty of fair representation. *Citing, Morris v. Local 819, IBT*, 94 CIV. 8010, 1995 WL 293623 (S.D.N.Y. May 11, 1995) and *Faiola v. Youngstown Steel Door Company*, 1992 WL 135567, No. C85-2562 (N.D. Ohio April 16, 1992).

The lies alleged by Makino include Nosaka's statement to Makino that a Last Chance Agreement was given to the County and that Nosaka gave a copy of the Last Chance Agreement to Mayor Kenoi and Mr. Gonzalez (Deputy Director of the County's Public Work Department). Makino offers as evidence of this allegation the sworn statement from Mr. Gonzalez who denies ever being given the Last Chance Agreement and the sworn statement from Mr. Hermes (Deputy Director of the Department of Human Resources for the County) that he was never given or saw

⁵ See, UPW's Memorandum in Support of Motion at pages 16 – 20.

⁶ See, *Id.* at pages 20 – 27.

⁷ See, Memorandum in Opposition to UPW's Motion at pages 4 – 8.

⁸ *Id.* at page 5.

the Last Chance Agreement. UPW argues in opposition that Makino's claim fails "because there was no detrimental reliance by [Makino] in connection with a last chance agreement"⁹

UPW's Reply and UPW's Answer to Amended Complaint raises arguments similar to those raised in UPW's Motion, however, focused on the following arguments:

1. Makino failed to address in its Opposition to UPW's Motion the testimonial evidence contained in the Declaration of Nakanelua. Nakanelua is the person who made the decision to not arbitrate Makino's grievance and UPW argues that since Makino has not raised any factual challenge to Nakanelua's statements in support of UPW's Motion, Makino cannot meet his burden to prove UPW's decision to not arbitrate his grievance was a breach of UPW's duty of fair representation.¹⁰ Furthermore, UPW argues that Makino has failed to establish a causal nexus between the conduct of Nosaka and Nakanelua's decision to not arbitrate Makino's grievance, and as such, UPW contends that Makino cannot establish a breach of UPW's duty of fair representation.¹¹
2. UPW argues that all claims which occurred prior to January 20, 2015 (90 days prior to Nakanelua's letter informing Makino of UPW's decision to not arbitrate his grievance) are time barred by the 90-day statute of limitations set forth in Section 377-9(1), HRS, and Hawaii Administrative Rule Section 12-42-42(a).¹²
3. UPW argues that the alleged statements of Nosaka to Makino regarding the Last Chance Agreement was that he was "only waiting for approval by Mayor Billy Kenoi" is not a breach of the duty of fair representation, regardless of whether such a statement is false or not, because the statement was a fair attempt at making a last attempt to reach a settlement where winning the arbitration was unlikely. UPW cites *Antrium v. Burlington Northern, Inc.*, 847 F.2d 375 (7th Cir. 1988) (*Antrium*), and *Cleveland v. Porca Co.*, 38 F.2d 289 (7th Cir. 1984) (*Cleveland*) for the proposition that a union representative does not breach its duty of fair representation when making exaggerated claims, unfulfilled promises, or even by lying in attempting to negotiate settlements of claims in the collective bargaining process.¹³
4. UPW argues that Makino lacks standing to pursue claims in this case because he has not demonstrated "injury in fact" which is traceable to the challenged action. In essence, UPW argues that Makino's claims against "the employer should be

⁹ See, UPW's Answer to Amended Complaint at pages 23 – 26.

¹⁰ See, UPW's Reply at pages 7 - 14.

¹¹ See, Answer to Amended Complaint at pages 19 - 22.

¹² See, UPW's Reply at pages 14 – 19 and UPW's Answer to Amended Complaint at pages 32 – 33.

¹³ See, UPW's Reply at pages 19 – 22.

dismissed since Makino lacks standing to pursue such claims absent proof of a breach of the duty of fair representation by the union.”¹⁴

5. UPW argues that Makino failed to raise in the Complaint any claim that his constitutional right to due process was violated and that even if Makino had alleged a claim of due process, the Board lacks subject matter jurisdiction to decide constitutional issues.¹⁵
6. The Board lacks subject matter jurisdiction to decide issues regarding Hawaii’s civil service law.¹⁶
7. UPW argues that Makino failed to allege willful violations of HRS Chapter 89 and therefore fails to state claims for relief under Section 89-13, HRS, for prohibited practices.¹⁷

Nosaka, in his Response to First Request for Answers to Written Interrogatories Dated July 9, 2015 filed on August 7, 2015 (Nosaka Responses), stated that "the idea of a last chance agreement was first discussed in August 2014 with Mayor William Keno'i and Nathan Makino."¹⁸ In response, Makino states that Brandon Gonzalez (County witness) "testified" in his responses to interrogatories that "[o]ral presentation was made to reconsider termination and return work with strict conditions. No written plan was agreed to or finalized at the December 2014 meeting at the union office." Mr. Gonzalez goes on to testify that he did nothing with regard to the Last Chance Agreement.¹⁹ Apparently, Makino equates this to the County confirming that Nosaka lied to Makino about the existence of a Last Chance Agreement.

However, Mr. Gonzalez's responses clearly state that a proposal was discussed about Makino returning to work "with strict conditions." Mr. Gonzalez also made clear that nothing was agreed upon. Thus, there was, as of December 2014, at least a proposal "on the table." Further, it is undisputed that the proposal "on the table" was for reinstatement without back pay.²⁰

¹⁴ See, UPW’s Answer to Amended Complaint at pages 29 – 31.

¹⁵ See, UPW’s Reply at pages 22 – 24.

¹⁶ See, UPW’s Answer to Amended Complaint at page 31

¹⁷ See, UPW’s Answer to Amended Complaint at pages 34 – 35.

¹⁸ Nosaka Responses, Paragraph 4, p. 4.

¹⁹ Opposition to UPW's Motion at pp. 2-3.

²⁰ See, letter dated March 10, 2015 from Makino to Nosaka, Exhibit 7, filed on June 12, 2015. Makino stated that Nosaka "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."

Makino agreed with the proposal.²¹ Makino knew that the agreement with the County was awaiting approval by Mayor Billy Kenoi.²² There is nothing in any of the declarations provided by Makino which stated or asserted that Nosaka promised that Mayor Kenoi would sign the Last Chance Agreement or words to similar effect.

After about three months of waiting (Makino knew "that the agreement is sitting on the Mayor's desk"), Makino advised Nosaka in March 2015 that "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 The only settlement 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."²³ On March 19, 2015, UPW determined that it would not proceed to arbitration and Makino was then informed of the UPW's decision.²⁴ In effect, Makino was altering the terms of the proposed settlement with the County, knowing that the County would not accept a reinstatement with back pay.

Given the foregoing, there are serious issues regarding the bases of Makino's factual arguments. However, even on a motion for summary judgment and even though UPW has provided evidence negating Makino's claims against UPW, the Board should not make evidentiary findings at this stage and it is the better course to have this matter go to hearing so that a decision can be made on a full record of Makino's case in chief on most of his claims. Therefore, the Board finds as follows regarding UPW's Motion:

1. In order for Makino's hybrid case to prevail, he must prove his case against both the County for breach of the Unit 1 CBA when it terminated Makino from his job and UPW for a breach of its duty of fair representation in handling the negotiations with the County for Makino. Makino must prove that UPW's conduct was either arbitrary, discriminatory or in bad faith. After viewing Makino's duty of fair representation claim in a light most favorable to him, we find that the allegations in the Amended Complaint, that Nosaka misrepresented and lied to Makino about the settlement discussions with the County (i.e. Makino's claim that Nosaka "promised" that Mayor Kenoi would sign the Last Chance Agreement and lied to Makino that the Mayor agreed to the same), could warrant a finding of UPW's breach of its duty of fair representation to Makino. Although UPW cites legal authority in the *Antrium* and *Cleveland* cases to support the proposition that a union representative does not breach its duty of fair representation when making exaggerated claims, unfulfilled promises,

²¹ *Id.*

²² Declaration of Nathan Makino dated May 21, 2015 at Paragraph 15, and Declaration of Nathan Makino dated June 15, 2015 at Paragraph 11.

²³ Exhibit 7 (letter dated March 10, 2015 from Makino to Nosaka) filed on June 12, 2015.

²⁴ Declaration of Dayton Nakanelua dated June 6, 2015 at Paragraphs 5.d and 6.a.

or even by lying in attempting to negotiate settlements of claims in the collective bargaining process, the Board is not comfortable in dismissing Makino's duty of fair representation claims prior to a full hearing on the merits. Clearly in this case, Makino is not claiming that UPW discriminated against Makino since Varize was terminated from his job just as Makino. Thus the Board's focus is on whether Nosaka's alleged lies, misrepresentations and broken promises (if proven to be true by Makino) amounts to conduct that is deemed to be either arbitrary or in bad faith. As such, the Board must deny UPW's Motion to dismiss the duty of fair representation claim.

2. The Board has held on numerous occasions that it lacks subject matter jurisdiction to decide constitutional issues. *See In re Hawaii State Teachers Assoc. and Biven*, DR-05-99 (Dec. No. 2554) (Labor Board lacks jurisdiction in cases that present "constitutional issues") (App. 3) and *In re UPW, AFSCME, Local 646, and Lum, et al.*, Case No. CE-01-634 (Dec. No. 471) (App. 4) (Labor Board would not rule on allegation that employer action interfered with constitutional right to bargain because "with regard to constitutionality, as an administrative agency the Board is without jurisdiction to address such questions.") Makino has raised no argument as to why Makino's constitutional claim should be any different from the approach taken by the Board in Dec. Nos. 2554 and 471. Therefore, the Board grants in part UPW's Motion and hereby dismisses Makino's claim that UPW and the County violated his constitutional rights.
3. The Board has also held on numerous occasions that it lacks subject matter jurisdiction over violations of the civil service laws²⁵ and that violations of the civil service statutes are within the exclusive jurisdiction of the merit appeals board.²⁶ Accordingly, since subject matter jurisdiction of civil service laws are beyond the Board's subject matter jurisdiction, the Board hereby dismisses Makino's claims alleging violations of HRS Chapter 76.
4. Regarding UPW's argument that Makino's claims which occurred prior to January 20, 2015 (90 days prior to the date of the original complaint, April 20, 2015) are untimely, the Board disagrees to the extent that Makino is able to establish at the Hearing on the Merits that those claims are part of the "hybrid case" wherein Makino must prove both the County's wrongful termination and UPW's breach of the duty of fair representation in handling his grievance. All of Makino's claims for events that occurred prior to January 20, 2015, that were being addressed in the grievance process wherein Makino was exhausting his contractual remedies under the Unit 1 CBA, are not untimely since these claims have been brought under the Amended Complaint which was filed within the 90 days from March 20, 2015 (the day that UPW informed Makino that it would not take his case to arbitration).

²⁵ See, Section 89-5, HRS.

²⁶ See, Section 76-14, HRS.

A. Order

For all the reasons set forth above, the Board hereby grants the County's Motion to dismiss Makino's conspiracy claims. The only remaining claim against the County is Makino's claim that Makino's termination from his job with the County was without "just and proper cause" and in violation of the Unit 1 CBA and Section 89-13(a)(8), HRS.

Regarding UPW's Motion, the Board hereby grants in part UPW's Motion by dismissing Makino's conspiracy claims and civil service claims against UPW. The Board denies UPW's request to dismiss the remaining claims against UPW. As such, the only remaining factual issues to be determined at a hearing on the merits are the following: (i) Did Nosaka lie to Makino that the County agreed to the Last Chance Agreement that would give Makino his job back?, and (ii) Did Nosaka promise Makino that Mayor Kenoi would sign the Last Chance Agreement?

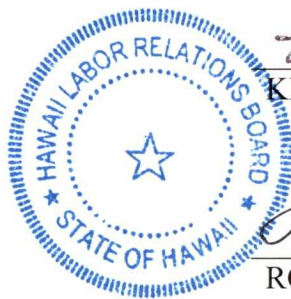
The Board will set this matter for a hearing on the merits on the remaining issues in this case.

NOTICE OF PRE-HEARING CONFERENCE

NOTICE IS HEREBY GIVEN that pursuant to HRS § 89-5(i)(4) and (5), and HAR § 12-42-49, the Board will conduct a pre-trial conference on **July 6, 2016, at 9:00 a.m.**, before Hearings Officer Paul H. Sato, in the Board's hearing room located at 830 Punchbowl Street, Room 434, Honolulu, Hawaii. The purpose of the pre-trial conference is to set this matter for a hearing on the merits and to establish a timetable and deadlines and for all pre-hearing matters. All parties have the right to appear in person and to be represented by counsel or a representative.

DATED: Honolulu, Hawaii, June 29, 2016.

HAWAII LABOR RELATIONS BOARD





KERRY M. KOMATSUBARA, Chair



ROCK B. LEY, Member

Opinion of Sesnita A.D. Moepono, Board Member, dissenting in part and concurring in part.

I dissent to the Board Majority's dismissal of the conspiracy claims against Respondents. These claims rely on facts to support the allegations. Since the Board Majority agrees to hold a hearing on the merits, then it is premature to dismiss the conspiracy claims.

I concur with the remaining Order.

HAWAII LABOR RELATIONS BOARD



SESNITA A.D. MOEPONO, Member

Copies sent to:

Ted H. S. Hong, Attorney for Complainant

Herbert R. Takahashi, Esq., Attorney for Respondent UPW

Melody A. Parker, Deputy Corporation Counsel for Respondent County of Hawaii