EFiled: Apr 25 2017 10:27AM HAST
Transaction ID 60517592
Case No. 16-CU-10-344, 16-CU-10-345

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of STACY K. PAIO; DAYTON YOSHIDA; ERNEST SUGUITAN; SAMUEL KAEO; DONNELL ADAMS; LONNIE A. MERRITT; MITSUO NAKAMOTO; ARDEN D. COSTALES; WALLACE KAHAPEA; and EMOSI MANAIA SEVAO, Complainants, and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Respondent.	CASE NO. 16 CU-10-344 ORDER NO. 3247 ORDER DENYING UPW'S MOTION FOR JUDGMENT ON PARTIAL FINDINGS AND FOR OTHER APPROPRIATE RELIEF AND SETTING THE CASE FOR FURTHER HEARING ON THE MERITS; NOTICE OF FURTHER HEARINGS ON THE MERITS
In the Matter of FERN KATHRYN WHEELESS, Complainant, and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Respondent.	CASE NO. 16 CU-10-345

ORDER DENYING UPW'S MOTION FOR JUDGMENT ON PARTIAL FINDINGS AND FOR OTHER APPROPRIATE RELIEF AND SETTING THE CASE FOR FURTHER HEARINGS ON THE MERITS; NOTICE OF FURTHER HEARINGS ON THE MERITS

I. BACKGROUND AND PROCEDURAL HISTORY

A. CASE NO. 16 CU-10-344

On October 12, and 17, 2016, Complainants STACY K. PAIO; DAYTON YOSHIDA; ERNEST SUGUITAN, SAMUEL KAEO; DONNELL ADAMS; LONNIE A. MERRITT; MITSUO NAKAMOTO; ARDEN D. COSTALES; WALLACE KAHAPEA; and EMOSI MANAIA SEVAO (collectively Complainants), who are represented by Fern Kathryn Wheeless, individually filed Prohibited Practice Complaints in Case No. 16 CU-10-344 (collectively 16 CU-10-344 Complaints) against Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Respondent, UPW, or Union) with the Hawaii Labor Relations Board (Board). The 16 CU-10-344 Complaints alleges, among other things, that:

> The United Public Workers and the Department of Public Safety management have entered into an agreement which is in violation of Section 89-13 Prohibited Practices; evidence of bad faith by (8) and (b) (5) violating the terms of a collective bargaining unit (Unit 10 contract).
>
> The Unit 10 contract (July 1, 2013 - June 30, 2017) subsection 26.12 specifically states "The employer shall endeavor to assign overtime work on a fair and equitable basis giving due consideration to the needs of the work operation".
>
> The UPW and the Public Safety Management entered an agreement to reduce overtime by excluding one class of workers (ACO IV Sergeants) from the overtime equation. ACO V (Lieutenants) and ACO III (correctional staff) are still allowed to work the overtime. ACO III's are to be temporarily assigned to all overtime openings for ACO IVs. This is a violation of HRS 89-9(d) which states "the employer and the exclusive representative shall not agree to any proposal which would be inconsistent with the merit principle or the principle of equal pay for equal work persuant [sic] to Section 76-1....". Past practice was that when adequate staffing allowed TA assignment of ACO III to IV without creating overtime, but allow ACO IV work when overtime would occur.
>
> Continued: This practice denies Sergeants equitable access to overtime work and thereby discriminates against them for fair and equitable pay. This practice is so bizarre that they are forcing ACO III staff to involuntary hold-

> backs and working them 16 hour shifts repeatedly to the point of exhaustion, even though there are ACO IV staff requesting and willing to work the shifts. This practice endangers the good operation of the facility and the safety of inmates, staff and the public.
>
> Equally important is the fact that the practice does not save money. If you TA up an ACO III to ACO IV you pay them the ACO IV pay. If doing so creates overtime work to fill the post they left vacant, you are paying an ACO III overtime to cover than [sic] post. So you pay overtime plus TA pay instead of simply paying overtime to an ACO IV.
>
> These are examples of the problems associated with this practice. Morale issues and security risks from frequent and extended lockdown of inmates are others.

On October 24, 2016, the UPW filed UNION'S ANSWER TO COMPLAINTS FILED ON OCTOBER 17, 2016 (16 CU-10-344 Answer) generally denying the 16 CU-10-334 Complaints allegations and providing more specific denials to certain allegations. The 16 CU-10-344 Answer further alleges as defenses that the complaint is barred by the applicable statute of limitations and untimely; failure to state a claim for relief for an alleged violation of the collective bargaining agreement and the breach of the duty of fair representation; failure to exhaust contractual remedies; the Board lacks subject matter jurisdiction of the complaint; failure to exhaust internal union procedures and remedies; the Union has fully complied with its duty of fair representation; justification, waiver, estoppel, and other equitable defenses; lack of standing by Complainants to assert the rights of the employer under Hawaii Revised Statutes (HRS) 89-9(d); no justiciable controversy with respect to certain matters alleged in the complaint; and mootness. The UPW further demands judgment against Complainants, dismissal of the complaint, and attorney's fees and costs.

On October 24, 2016, UPW filed a MOTION TO DISMISS (16 CU-10-344 MTD) asserting lack of jurisdiction due to untimely filing under HRS § 377-9(l), and Hawaii Administrative Rules (HAR) § 12-42-42(a); failure to state a hybrid claim for relief for breach of the duty of fair representation by the Union and willful breach of the collective bargaining agreement (CBA) by the employer; and lack of standing to represent the interest of the employer under the management rights clause of HRS § 89-9(d).

B. CASE NO. CU-10-345

On October 19, 2016, FERN KATHRYN WHEELESS, *Self-Represented Litigant*, (Complainant or Ms. Wheeless, collectively Complainants with CU-10-344 Complainants) filed a Prohibited Practice Complaint in Case No. 16 CU-10-345 (16 CU-10-345 Complaint, collectively with the CU-10-344 Complaint as Complaints) against UPW with claims identical to those alleged in the 16 CU-10-344 Complaints.

On October 28, 2016, Respondent filed UNION'S ANSWER TO COMPLAINT FILED ON OCTOBER 19, 2016 with similar defenses to those asserted in the 16 CU-10-344 Answer.

On October 28, 2016, the Respondent filed its MOTION TO DISMISS (16 CU-10-345 MTD, collectively MTDs) with the Board on similar grounds to those asserted in the 16 CU-10-344 MTD.

C. CONSOLIDATION OF CASES CU-10-344 AND CU-10-345

On November 7, 2016, at the Pre-Hearing Conference on the Complaints, the Board, on its own initiative pursuant to HAR § 12- 42-8(g)(13), raised the issue of consolidation of the above-referenced cases, which was not opposed by the parties.

On November 9, 2016, the Board issued Order No. 3207 CONSOLIDATING CASE FOR DISPOSITION; NOTICE OF HEARING ON RESPONDENT UPW'S MOTION TO DISMISS AND RELEVANT DEADLINES; NOTICE OF DEADLINES RELEVANT TO THE HEARING ON THE MERITS; and NOTICE OF THE HEARING ON THE MERITS, ordering the consolidation of the above cases 16 CU-10-344 and 16 CU-10-345, including all pending motions, and deadlines for the MTDs and deadlines relevant to the hearing on the merits.

D. MOTIONS TO DISMISS

After the filing of the MTDs referenced above, on November 10, 2016, UPW filed SUPPLEMENTAL SUBMISSIONS BY RESPONDENT IN SUPPORT OF MOTIONS TO DISMISS COMPLAINT FILED OCTOBER 24 & 27, 2016, which further supported the MTDs by asserting the additional ground of failure to exhaust contractual remedies.

On November 17, 2016, Complainants filed OPPOSITION TO RESPONENT'S [SIC] MOTION(S) TO DISMISS THE COMPLAINT FILED OCTOBER 24 AND 27, 2016, in which Complaints asserted that: Sgt. Taum (Taum) filed a grievance regarding the settlement agreement (SA) but received no response; the offering of overtime (OT) to the Sergeants was inconsistent and confusing until the OT fell off from July 2016 and the Complaints were filed on October 24, 2016; the Union representative gave conflicting information regarding the OT offerings; Taum had concerns regarding ACO III burnout from repeated holdbacks, increase in sick and family leave, creation of more OT openings, drop in morale, jeopardy of staffing for gender specific posts (PREA) and false federally mandated reporting forms, and ACO III's refusing promotion. More specifically regarding timeliness, the Complainants contended that the Complaints were filed in a timely manner and referenced the UPW representative's response to the filing for a CBA violation that "this is a done deal: and the Union steward's response to a question about filing around the Union that "I don't know how you would do that." Regarding culpability, Complainants asserted that the "original complaint" was filed with both employer and Union and was not responded to and that Complainants don't expect that the Union will go along with any employer scheme in violation of the CBA or which denies any class of employees represented by the Union from

rights or benefits of the CBA. On the issue of jurisdiction, Complainants argued that the Union has declined to respond to the grievance filed and have refused to file grievances. Finally, Complainants asserted that the "parties" violated HRS § 89-9 by agreeing to a proposal inconsistent with the merit principle of the principle of equal pay for equal work pursuant to HRS § 76-1, and in doing so, the "parties" discriminated against the ACO IVs and impacted ACO Vs and ACO IIIs.

On November 18, 2016, Respondent filed RESPONDENT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS COMPLAINTS. In its Reply, UPW argued that: the claims in this case accrued on July 14, 2015 when Taum submitted his memorandum regarding the SA, and that Complainants were aware of the change in working conditions by the June 12, 2015 SA rendering the Complaints filed on October 12, 16 [sic], and 19 untimely; the union does not violate its duty of fair representation by negotiating terms and conditions more favorable for certain bargaining unit employees over others; and that the criteria and procedures governing TA do not violate merit principles.

On November 21, 2016, the Board held a hearing on the UPW's MTDs and took the matter in abeyance pending a hearing on the merits.

On November 21, and 22, 2016, the Board held the hearing on the merits in this consolidated case.

After the Complainants rested at the November 22, 2016 hearing on the merits, UPW hand-delivered a previously filed UPW'S MOTION FOR JUDGMENT ON PARTIAL FINDINGS AND FOR OTHER APPROPRIATE RELIEF (Motion for Judgment) pursuant to HAR §§ 12-42-8(g)(3)(A) and 12-42-8(g)(16) and Hawaii Rules of Civil Procedure Rule 52(c). Respondent submitted that Complainants had been fully heard on the merits on all claims for relief and failed to meet their burden of proof regarding that: the Complaints were filed in a timely manner under HRS Section 377-9(1) and HAR § 12-42-42(a)(2) affording the Board with jurisdiction; the employer wilfully violated the collective bargaining agreement by entering into on June 12, 2015 and enforcing on or after July 1, 2016 the SA; Respondent violated their duty to bargain in good faith; Complainants have standing to contest the SA and exhausted their contractual remedies prior to filing the Complaints. At the hearing, Respondent presented oral argument on all of the issues noted in their Motion for Judgment, except for the violation to bargain in good faith, and further supplemented their argument regarding standing by asserting that Complainants failed to meet their burden of showing that Complainants suffered any injury as a result of the SA and the conduct of the Union or the employer. Board Member J N. Musto adjourned the hearing on the merits pending consideration of the Respondent's Motion for Judgment and afforded Complainants with an opportunity to respond to UPW's Motion within five days from the date of receipt by the Board of the transcribed testimony of the hearing to date.

On December 15, 2016, Respondent filed MEMORANDUM IN SUPPORT FOR UPW'S MOTION FOR JUDGMENT ON PARTIAL FINDINGS AND FOR OTHER APPROPRIATE RELIEF, which further supplemented the arguments made in its Motion for Judgment and during the oral argument thereon with the following assertions. UPW contends

that Complainants failed to meet their burden regarding the following issues. As to the timeliness, UPW argues that Complainants knew immediately of the June 12, 2015 SA, and that the claims against UPW and PSC [sic] accrued on July 14, 2015 when Taum submitted his Memorandum. Regarding the burden of establishing the hybrid claim, UPW maintains that the Complaints failed to state a claim for relief that the employer breached the collective bargaining agreement by showing that OT is a right superseding the right to TA; and that the Union breached the duty of fair representation based on Humphrey v. Moore, 374 U.S. 335 (1964) (The United States Supreme Court refused to expand the duty to regulate bargaining based on seniority to some employees over others.), Air Line Pilots Ass'n, Intl v. O'Neill, 499 US. 65, 78 (1991) (The U.S. Supreme Court rejected the claim that a settlement is discriminatory because it favored one group and disfavored another.), and Hoopai v. Civil Service Comm'n., 106 Hawaii 205, 221, 103 P.3d 365, 381 (2004) (The Hawaii Supreme Court held that there was no HRS § 89-9(d) violation by a UPW agreement authorizing promotions and a grievance procedure to enforce the criteria and procedure for promotions.) Regarding standing, UPW argues that despite Complainants' contention that Taum filed a complaint for them on or about July 14, 2015, neither Respondent nor the employer responded; no follow-up action was taken for over a year; at no time on or after December 31, 2015 did Complainants request the Union to file a complaint or grievance; and the Unit 10 collective bargaining agreement allows any employee to process a grievance without union representation, which the Complainants have not attempted to exhaust.

On December 23, 2016, Complainants filed their OPPOSITION TO UPW'S MOTION FOR JUDGEMENT [SIC] ON PARTIAL FINDING AND FOR OTHER APPROPRIATE RELIEF. After setting forth the facts in support of their Opposition, Complainants maintain that a complaint was timely filed based on Kahapea's attempt to file within 18 days, and Sloan's response that "nothing can be done"; Sloan's response to Wheeless that "[T]his is a done deal[,]" and the Union Steward Dennis Kauka's (Kauka) response, "I don't know how you would do that[,]" to Wheeless's question regarding how filing can be done around the Union; Taum's filing around the Union was ignored by the UPW and the employer; the Complaints were filed within 90 days of the enforcement of the agreement; CBA § 26.12 clearly states "the employer shall endeavor to assign overtime work on a fair and equitable basis, giving due consideration to the needs of the work operation"; and HRS § 89-13(a)(1) and (5) have been wilfully and intentionally violated by the UPW in this case. As to the culpability (hybrid claim), Complainants contend that: the UPW's indication that the union's breach must also be tied to an employer's breach "goes without saying"; the original complaint was filed with both the employer and the Union with no response; in September 2016 when the offer of OT finally stopped, the Sergeants decided to name the UPW specifically; it is expected that the employer will come up with schemes and plans to cut OT and costs, which appears to be the proposed settlement of the grievances, however, the Union is not expected to go along with a scheme in violation of the CBA or which specifically denies any class of employees represented from the rights or benefits expressed by the CBA; and finally, if the employer must also be culpable, Complainants request an amendment be entered by the Board prior to final decision. In support of Board jurisdiction, Complainants argue that: the Union and its representatives have declined to respond to the complaint (grievance) filed; refused to file additional grievances indicating that union members are supposed to know that there are other means through the Union to

file despite the union steward not being aware; and Complainants filed in good faith with the Board believing that "this is our last and best resort 'around the union,'" which will not be ignored by the Union or the Employer; Complainants have demonstrated that the UPW breached its duty of fair representation because HCCC was not operating on an "either TA or Overtime" theory, but offered TA first when doing so did not create OT, cause a hardship, or involuntary hold back of staff, the employer (Watch Commander) utilized the CBA language by using their judgment regarding whether TA was necessary, immediate, and for the public good, however, by discriminating against the Sergeants, and denying the Watch Commander the right under the CBA to utilize their judgment; "UPW climbed into bed with the Department" to bring OT down by closing posts and committing acts dangerous to the public, staff, and inmates; Complainants have not endeavored to supersede the right to TA with OT but both rights can be upheld and TA can be allowed as prescribed "while honoring the fair and equitable offering of" OT; Complainants are not against offering TA as long as the offer does not create OT or cause ACOs to be involuntarily held back; the variation in staffing levels from facility to facility and throughout the CCCs was not taken into consideration in the implementation of the SA; the grievances filed by Halawa and WCCC were specific to their facilities and did not require an agreement forced upon all the units which "masks an attempt by management to reduce" OT and does not take into consideration the differences between the various units; the crux is that the agreement excludes one entire class of ACOs (IV) from participating in the fair and equitable offerings of available OT and the Union's allowance of this CBA violation is specific to the complaint; and in doing so, the "parties" discriminated against the entire class of ACOs (Sergeants) impacting the ACO Vs by making it difficult to effectively fill the watch without involuntarily holding back ACO III staff resulting in exhausted workers, endangering other staff, inmates, and the public. Finally, Complainants contend that Humphrey v. Moore would be more acceptable to a situation like the one that they were following where lower rank was given preference for TA versus OT than to what occurred from the SA, which is complete discrimination against one ACO class and denial of OT and compensation. Complainants further argue that three-part standing has been established noting that the Complainants suffered an actual or threated injury based on Rosario's testimony that promotion to ACO IV with no OT would cut his annual salary by $35,000 and threatened injury is now a reality for Sergeants denied access to fair and equitable OT due to the actions of the UPW and the employer; the injury is traceable to the defendant's actions at the rate of $2,000 per sergeant; and a favorable decision would likely provide relief for Complainants' injury because while the complaint does not ask for monetary damages, the Board can allow amendment of the complaint to include the employer in such relief. Nonetheless, the Complainants contend that their preference is to reconcile this matter to resume the past practice of TA and fair and equitable OT to all classes. In opposition to the failure to exhaust, Complainants points out that there was no testimony that no grievances were filed, and there was testimony that requests were made to file grievances and the responses were "nothing can be done" and "it's a done deal" by the Union representatives; that members do not write grievances but go to the Union rep, who writes, has signed, files, and represents them in that filing; Taum filed a grievance; from the lack of enforcement of the SA, it appeared that the Union and Management had answered the specific HCCC complaint (this was not the first time that action was taken without notice to the rank and file); it was not until July to September 2016 that Complainants were aware of the intent of Management and the Union to enforce the SA; within 30 days of that awareness, the

Complaint was filed; the Wheeless and Kahapea testimonies show that it is untrue that Sloan and Watanabe were not approached to file a complaint or grievance; Taum filed a Step II grievance on July 14, 2015 and found out in July 2016 that lack of enforcement was not a response to his challenge; and Kauka told Wheeless in September 2016 that "I honestly don't know" how to file around the Union; the Complainants then filed with the Board exhausting all remedies that they had with no help from UPW or management. Complainants finally request "that our pleadings be heard and the [sic] you will rule on the plight of workers who are not being represented by their Union and who are being demeaned, discriminated against, and otherwise berated by both their employer and their Union."

IV. APPLICABLE RULES

HAR § 12-42-8(g)(3) states:

> (g) Hearings:
> ***
> (3) Motions:
> (A) All motions made during a hearing shall be made part of the record of the proceedings.
> ***
> (16) The charging party, in asserting a violation of chapter 89, HRS, or this chapter, shall have the burden of proving the allegations by a preponderance of the evidence. The party raising any subsequent issue shall have the burden of proving that issue by a preponderance of the evidence.

HRCP Rule 52(c) states:

> **(c) Judgment on partial findings**. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter 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, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

Regarding the standard for Rule 52(c), the federal courts[i] have stated:

> In considering whether to grant judgment under Rule 52(c), the district court applies the same standard of proof and weighs the evidence as it would at the conclusion of the trial. Accordingly, the court does not view the evidence through a particular lens or draw inferences favorable to either party. The district court should also make determinations of witness credibility where appropriate. Finally, if the court enters judgment under Rule

52(c), it must make findings of fact and conclusions of law pursuant to Rule 52(a).

EGC, Inc. v. Clark Bldg. Sys., 618 F.3d 253, 272 (3rd Cir. 2010). (Citations omitted) Further, the [Board] retains discretion under Rule 52(c) to "decline to render any judgment until the close of the evidence." JDI Holdings, LLC v. Jet Mgmt., 732 F.Supp.2d 1205, 1209 (D. Fla. 2010); Gaffney v. Riverboat Services, 451 F.3d 424, 451 n. 29 (7th Cir. 2006); Davis v. United States, 2009 U.S. Dist. LEXIS 43961 (D. Haw.), at *2 n. 2.

The Board in its discretion declines to render any judgment until the close of the evidence in this case. Accordingly, the UPW's Motion for Judgment on Partial Findings and for Other Appropriate Relief is denied and further hearings on the merits are to be set.

NOTICE OF FURTHER HEARINGS ON THE MERITS

NOTICE IS HEREBY GIVEN that the Board will conduct further hearing on the merits of the Complaint on May 22, 2017 at 10:00 a.m. to 4:30 p.m. and on May 23, 2017 at 9:00 a.m. to 4:30 p.m. on the Island of Hawaii at the Aging & Disability Center's training room at 1055 Kinoole Street, Hilo, Hawaii. All parties have the right to appear in person and to be represented by counsel or another representative. The purpose of the hearing is to receive further evidence and arguments regarding whether Respondent committed prohibited practices as alleged by Complainants.

Auxiliary aids and services are available upon request by calling Ms. Nora Ebata, Board Secretary, at (808) 586-8616, (808) 586-8847 (TTY), or 1 (888) 569-6859 (TTY neighbor islands). A request for reasonable accommodations should be made not less than ten (10) days before the needed accommodation.

DATED: Honolulu, Hawaii, April 25 2017.

HAWAII LABOR RELATIONS BOARD

HAWAII LABOR RELATIONS BOARD STATE OF HAWAII

Sesnita A. D. Moepono

SESNITA A.D. MOEPONO, Member

J.N. MUSTO, Member

Copy to:

Fern Kathryn Wheeless
Stacy K. Paio
Dayton Yoshida
Ernest Suguita
Samuel Kaeo
Donnell Adams
Lonnie A. Merritt
Mitsuo Nakamoto
Arden D. Costales
Wallace Kahapea
Emosi Maia Sevao
Herbert R. Takahashi, Esq.

[i] In prior decisions, the Board has applied or sought guidance from the Hawaii Rules of Civil Procedure and federal case law interpreting the analogous rule of the Federal Rules of Civil Procedure. *See, e.g.,* United Public Workers, AFSCME, Local 646, AFL-CIO v. Akana, Board Case No. CE-01-121, Decision No. 337, 5 HLRB 177, 182 (1993); United Public Workers, AFSCME, Local 646, AFL-CIO v. Cayetano, Board Case No., CE-01-301, Decision No. 406, 6 HLRB 81, 84 (2000); Hawaii Gov't Emp. Ass'n. v. Cayetano, Board Case No. CE-13-368, Decision No. 416A, 6 HLRB 128, 129 (2000); Poe v. Hawaii Gov't Emp. Ass'n., Board Case No. CU-03-214, Decision No. 446, 6 HLRB 361, 362 (2004); United Public Workers, AFSCME, Local 646, AFL-CIO v. Lingle, Board Case No. DR-01-93a, Decision No. 470, 7 HLRB 49, 52-53 (2007); Ballera v. Del Monte Fresh Produce Hawaii, Inc., Board Case No. 00-1(CE), Order No. 1978, at *5-6 (2001); Nakamoto v. Dep't of Defense, Board Case No. CE-01-802, Order No. 2010, at *14 (2013).