STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LEROY MAMUAD, Complainant, and DAYTON NAKANELUA, State Director, United Public Workers, AFSCME, Local 646, AFL-CIO, Respondent.	CASE NO. CU-10-331 ORDER NO. 3337F FINAL ORDER ADOPTING PROPOSED ORDER GRANTING RESPONDENT'S MOTION FOR DECISION AND ORDER BASED ON PARTIAL FINDINGS AGAINST THE COMPLAINANT FOR FAILING TO MEET HIS BURDEN OF PROOF BY CONCLUSION OF HIS CASE IN CHIEF

FINAL ORDER ADOPTING PROPOSED ORDER GRANTING RESPONDENT'S MOTION FOR DECISION AND ORDER BASED ON PARTIAL FINDINGS AGAINST THE COMPLAINANT FOR FAILING TO MEET HIS BURDEN OF PROOF BY CONCLUSION OF HIS CASE IN CHIEF

On April 5, 2018, the Hawaii Labor Relations Board (Board) issued Order No. 3337 Proposed Order Granting Respondent's Motion for Decision and Order Based on Partial Findings Against the Complainant for Failing to Meet his Burden of Proof by Conclusion of His Case in Chief (Proposed Order). The Proposed Order granted the Respondent DAYTON NAKANELUA, State Director, United Public Workers, AFSCME, Local 646, AFL-CIO's (UPW) Motion for Decision and Order on partial findings and dismissed the case. The Proposed Order included Proposed Findings of Fact and Conclusions of Law and further provided in pertinent part:

FILING OF EXCEPTIONS

> Any person adversely affected by the PROPOSED ORDER GRANTING RESPONDENT'S MOTION FOR DECISION AND ORDER BASED ON PARTIAL FINDINGS AGAINST THE COMPLAINANT FOR FAILING TO MEET HIS BURDEN OF PROOF BY CONCLUSION OF HIS CASE IN CHIEF may file exceptions with the Board, pursuant to HRS § 91-11, within ten days after service of a certified copy of this document. The exceptions shall specify which findings or conclusions are being excepted to with citations to the factual and legal

authorities therefor. A hearing for the presentation of oral arguments will be scheduled upon the filing of such exceptions, and the parties will be notified thereof.

On April 16, 2018, Complainant LEROY MAMUAD (Complainant) filed Complainant Leroy Mamuad's Exceptions from the April 5, 2018, Proposed Findings of Fact and Proposed Conclusions of Law (Complainant's Exceptions).

On April 24, 2018, the Board issued a Notice of Hearing on Complainant Leroy Mamuad's Exceptions from the April 5, 2018, Proposed Findings of Fact and Proposed Conclusions of Law scheduling a hearing on Complainant's Exceptions on May 4, 2018.

On May 4, 2018, the Board held the hearing on Complainant's Exceptions at which Complainant was given the opportunity to present further oral argument in support of his Exceptions, and Respondent UPW was given the opportunity to present oral argument in response.

Based on a full review of the record in this case, including a careful review of Complainant's Exceptions and UPW's response, the Board finds such exceptions to be without merit and are overruled.

The Board hereby adopts Order No. 3337 Proposed Order Granting Respondent's Motion for Decision and Order Based on Partial Findings Against the Complainant for Failing to Meet His Burden of Proof by Conclusion of His Case in Chief, including the Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order, filed on April 5, 2018 and attached hereto, as final and dismisses the Complaint. This case is closed.

DATED: Honolulu, Hawaii, May 7, 2018.

HAWAII LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A. D. MOEPONO, Member

LEROY MAMUAD, v. DAYTON NAKANELUA, State Director, UPW
CASE NO. CU-10-331
FINAL ORDER ADOPTING PROPOSED ORDER GRANTING RESPONDENT'S MOTION FOR DECISION AND ORDER BASED ON PARTIAL FINDINGS AGAINST THE COMPLAINANT FOR FAILING TO MEET HIS BURDEN OF PROOF BY CONCLUSION OF HIS CASE IN CHIEF
ORDER NO. 3337F

J.N. MUSTO, Member

Copies to: Sean A. Luiz, Esq.
Herbert R. Takahashi, Esq.

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STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LEROY MAMUAD, Complainant, and DAYTON NAKANELUA, State Director, United Public Workers, AFSCME, Local 646, AFL-CIO, Respondent.	CASE NO. CU-10-331 ORDER NO. 3337 PROPOSED ORDER GRANTING RESPONDENT'S MOTION FOR DECISION AND ORDER BASED ON PARTIAL FINDINGS AGAINST THE COMPLAINANT FOR FAILING TO MEET HIS BURDEN OF PROOF BY CONCLUSION OF HIS CASE IN CHIEF

PROPOSED ORDER GRANTING RESPONDENT'S MOTION FOR DECISION AND ORDER BASED ON PARTIAL FINDINGS AGAINST THE COMPLAINANT FOR FAILING TO MEET HIS BURDEN OF PROOF BY CONCLUSION OF HIS CASE IN CHIEF

Hawaii Labor Relations Board (Board) Chair Marcus R. Oshiro and Board Member J N. Musto did not participate in the hearings but have thoroughly reviewed the record in this matter, including the files, transcripts, and exhibits. Pursuant to Hawaii Revised Statutes (HRS) § 91-11,[i] the Board, therefore, renders the following Proposed Findings of Fact, Conclusions of Law, and Proposed Order.

On December 8, 2015, Respondent DAYTON NAKANELUA, State Director, United Public Workers, AFSCME, Local 646[ii] (Nakanelua) and United Public Workers, AFSCME, Local 646, AFL-CIO (collectively UPW, Union, Respondent, or Respondents) filed with the Board RESPONDENT'S MOTION FOR DECISION AND ORDER AGAINST THE COMPLAINANT FOR FAILING TO MEET HIS BURDEN OF PROOF BY CONCLUSION OF HIS CASE IN CHIEF (Motion for D & O) based on Hawaii Administrative Rules (HAR) § 12-42-8(g)(3)(A) and (C) and (g)(16) and Hawaii Rules of Civil Procedure (HRCP) Rule 52(c). At the December 9, 2015 hearing on the merits (HOM), the Board orally ruled that the Motion for D & O was premature because Complainant LEROY MAMUAD's (Mamuad or Complainant) testimony was not finished. On July 7, 2016, after Complainant rested his case at the HOM, Nakanelua renewed his Motion for D&O.

At this point in the proceedings after Complainant has rested, the Board grants the Motion for D & O based on partial findings for the following reasons.

Any proposed conclusion of law improperly designated as a proposed finding of fact shall be deemed or construed as a proposed conclusion of law; any proposed finding of fact improperly designated as a proposed conclusion of law shall be deemed or construed as a proposed finding of fact.

I. PROPOSED FINDINGS OF FACT AND PROCEDURAL BACKGROUND

A. PROCEDURAL BACKGROUND

1. The Prohibited Practice Complaint

On November 24, 2014, Complainant, a self-represented litigant (SRL), filed a prohibited practice complaint (Complaint) against Nakanelua with the Board. Paragraph 5 Allegations of the Complaint states verbatim:

> Complainant charges a violation of Hawaii Revised Statutes (HRS) Section 89-13(b)(1), (4), and (5) and a breach of duty of fair representation by failing to represent me when I repeatedly asked for representation relating to the termination of employment. My business agent Melanie Sa[i]to (UPW) said she would begin the process of recommending arbitration. In the middle of July, Melanie Sa[i]to called me and informed me that the paperwork for my arbitration was given to Maui UPW Director Lahela Aiwohi. [Also] she believed that same week Lahela traveled to Oahu and hand delivered he[r] paperwork to the Oahu UPW office. A month later Melanie called me and informed me that my paperwork for arbitration is still on Maui on Lahela's desk. Also Melanie said Lahela is NOT recommending arbitra[t]ion because the UPW has just represented someone on Molokai with similar accusations and lost the arbitration. The difference between both cases is that the person on Molokai got [c]onvicted in court and I got my charges expunged. If the UPW can represent someone who got convicted in a court of law, they should represent me who got the charges expunged and won an appeal from the unemployment department[.][iii]

The Complaint had attachments of a February 25, 2014 letter from Ted Sakai (Sakai), Director of the Department of Public Safety, State of Hawaii (respectively Director and PSD), to

Mamuad (Termination Letter); and an October 17, 2014 letter from Nakanelua to Mamuad (Nakanelua Letter).

2. Other Significant, Relevant Pleadings

On November 25, 2014, the Board issued a NOTICE TO RESPONDENT(S) OF PROHIBITED PRACTICE COMPLAINT; NOTICE OF PREHEARING/SETTLEMENT CONFERENCE AND NOTICE OF HEARING ON THE PROHIBITED PRACTICE to Nakanelua with a copy of the Complaint attached (Notice).

Despite the Notice, Nakanelua failed to file a written Answer to the Complaint within the required ten days after service of the Complaint, nor did he file a motion in lieu of an answer.

On December 18, 2014, Nakanelua filed both an untimely RESPONDENT'S ANSWER TO PROHIBITED PRACTICE COMPLAINT AND RESPONDENT'S PRE-HEARING STATEMENT.

On December 23, 2014, the Board issued ORDER NO. 3037. In that Order, the Board concluded "pursuant to HAR §12-42-45(g), the failure to file an answer constitutes an admission of the material facts alleged in the Complaint and a waiver of hearing. However, the rule does not require the Board to make any particular legal conclusion regarding whether a prohibited practice was or was not committed, nor does the rule prohibit the Board from holding a hearing on a complaint in its discretion." The Board then ordered that the December 24, 2014 hearing be deferred and taken off the Board's calendar and directed the parties to filed proposed conclusions of law and legal arguments in support of their position.

On December 26, 2014, Respondent filed a MOTION TO SET ASIDE ENTRY OF DEFAULT FOR FAILURE TO FILE TIMELY ANSWER AND FOR RELIEF FROM A JUDGMENT AND ORDER (Motion to Set Aside Default).

On January 14, 2015, the Board issued ORDER NO. 3042, which, among other things, denied the Motion to Set Aside Default based on its determination that Respondent's reasons for failing to file a timely answer did not rise to the level of "extraordinary circumstances".

On January 20, 2015, Nakanelua filed RESPONDENT DAYTON NAKANELUA'S PROPOSED CONCLUSIONS OF LAW AND LEGAL ARGUMENTS.

On January 26, 2015, Shawn A. Luiz, Esq., filed both a NOTICE OF APPEARANCE entering his appearance as counsel of record for Complainant and COMPLAINANT LEROY

MAMUAD'S PROPOSED CONCLUSIONS OF LAW AND LEGAL ARGUMENTS IN SUPPORT OF HIS POSITION.

On June 22, 2015, the Board issued ORDER NO. 3070, holding that: the November 24, 2014 Complaint was timely filed because the limitations period ran as of the October 17, 2014 letter from Nakanelua denying arbitration; Mamuad exhausted his contractual remedies because his grievance was processed up to the arbitration step; the Complaint was sufficient to allege the hybrid claim against the Union for breach of the duty of fair representation and against the Employer for breach of the collective bargaining agreement (CBA) (including a ruling that any alleged conduct by Nakanelua constituting breach of the duty were taken in his capacity as the State Director and a designated agent of UPW and not personally and that despite Nakanelua being named as the only respondent, the claim is against UPW itself); and Nakanelua's position that Complainant's failure to meet the burden of proof by the admission of material facts alleged in the Complaint requires that the Complaint be dismissed was rejected. For these reasons, the Board, in its discretion, among other things, ordered an HOM on the hybrid claim.

On November 18, 2015, UPW filed RESPONDENTS' MOTION TO DISMISS FOR WANT OF PROSECUTION (Motion to Dismiss) on the grounds that despite several Board orders, Complainant failed to file a pre-hearing statement identifying witnesses and exhibits to be presented at the HOM; and even with reminders, Complainant failed to submit an application for subpoenas of his first three witnesses and subpoena duces tecums by the deadline set by the Board.

On December 8, 2015, the Union filed RESPONDENTS' MOTION TO STRIKE COMPLAINANT'S EXHIBIT 6, an unsworn statement purportedly by Raquel Purdy for relevancy and an inability by Respondent to cross-examine her (Motion to Strike).

On December 8, 2015, the HOM began with the Board holding a hearing on the Motion to Dismiss and the Motion to Strike. At this motions hearing, Complainant made an oral motion to strike Exhibit G for lack of opportunity to cross examine. Then-Board Chair Kerry Komatsubara denied all the motions.

On December 8, 2015, the UPW filed the Motion for D & O.

At the December 9, 2015 HOM, UPW argued in support of its Motion for D & O that Mamuad's direct testimony failed to carry his burden of proof. The Board ruled the Motion premature because Mamuad's testimony was not completed, and Nakanelua's testimony not yet presented. The Board proceeded with further HOM on December 9, 2015, April 28, 2016, June 28, 2016, and July 7, 2016.

At the close of the Complainant's case on July 7, 2016, the UPW renewed its Motion for D & O. Mamuad's counsel requested an opportunity to respond, and the Union's counsel requested an opportunity to reply to that response. The Board orally set an August 31, 2016 deadline for submission of the Complainant's response, a September 15, 2016 deadline for the UPW's reply, and oral argument on the Motion for D & O on October 12, 2016 that were confirmed in writing by the NOTICE OF DEADLINES AND MOTION HEARING, issued on July 15, 2016.

On August 31, 2016, Mamuad filed COMPLAINANT LEROY MAMUAD'S OPPOSITION TO RESPONDENT'S MOTION FOR DECISION AND ORDER AGAINST THE COMPLAINANT FOR FAILING TO MEET HIS BURDEN OF PROOF BY CONCLUSION OF HIS CASE IN CHIEF.

On September 15, 2016, the Union filed UPW'S REPLY BRIEF IN SUPPORT OF RESPONDENT'S MOTION FOR DECISION AND ORDER AGAINST THE COMPLAINANT FOR FAILING TO MEET HIS BURDEN OF PROOF BY CONCLUSION OF HIS CASE IN CHIEF.

On October 12, 2016, the Board heard oral argument on the Motion for D & O under HAR § 12-42-8(g)(3)(C)(iv).

Based on the full record herein, the Board renders the following Proposed Findings of Fact and Proposed Conclusions of Law and Decision and Order.

B. PROPOSED FINDINGS OF FACT

Based on HAR § 12-42-45(g), the following allegations in the Complaint regarding violations of HRS § 89-13(b)(1), (4), and (5) and breaches of the duty of fair representation deemed admitted are summarized below:

> My business agent Melanie Sa[i]to (UPW) said she would begin the process of recommending arbitration[;]
>
> In the middle of July, Melanie Sa[i]to called Mamuad and informed him that the paperwork for his arbitration was given to Maui UPW Director Lahela Aiwohi and that same week Lahela traveled to Oahu and hand delivered the paperwork to the Oahu UPW office;
>
> A month later Melanie called Mamuad and informed him that his paperwork for arbitration is still on Maui on Lahela's desk;

Melanie said Lahela was not recommending arbitration because the UPW has just represented someone on Molokai with similar accusations and lost the arbitration;

The difference between both cases is that the person on Molokai got convicted in court and Mamuad had gotten his charges expunged; and

If the UPW can represent someone who got convicted in a court of law, they should represent me who got the charges expunged and won an appeal from the unemployment department[.]

2. The Parties, and Applicable Collective Bargaining Agreement and PSD Standards of Conduct

Mamuad was, for all relevant times, a "public employee", as defined in HRS § 89-2,[iv] and was included in Unit 10.[v]

Respondent Nakanelua is the State Director for UPW, which is the "exclusive representative", as defined in HRS § 89-2[vi] for Unit 10.

The relevant Unit 10 collective bargaining agreement between the Employers State of Hawaii, the Judiciary, the Hawaii Health Systems Corporation, and the City and County of Honolulu and the UPW, effective July 1, 2013 through June 30, 2017 (CBA), provides in relevant part:

SECTION 1. RECOGNITION.

1.01 EXCLUSIVE BARGAINING REPRESENTATIVE.

The Employer recognizes the Union as the exclusive bargaining representative for those public Employees in the Institutional, Health and Correctional Workers Unit, Non-Supervisory and Supervisory.

***

SECTION 11. DISCIPLINE.

11.01 PROCESS.

11.01 a. A regular Employee shall be subject to discipline by the Employer for just and proper cause.

11.01 b. An Employee who is disciplined, and the Union, shall be furnished the specific reason(s) for the discipline in writing on or before the effective

date of the discipline except where the discipline is in the form of an oral warning or reprimand. However, if the oral warning or reprimand is documented [or] recorded for future use by the Employer to determine future discipline the Employee who is disciplined shall be furnished the specific reason(s) for the oral warning or reprimand in writing.

***

11.01 d. In the event the need to impose discipline other than an oral warning or reprimand is immediate, the Employee and the Union shall be furnished the reason(s) in writing within forty-eight (48) hours after the disciplinary action is taken.

11.01 e. Written notifications of disciplinary actions involving suspension and discharge shall include the following:

11.0le.01 Effective dates of the penalties to be imposed and

11.0l e.2. Details of the specific reasons.

11.0lf. An Employee who is discharged shall be granted an opportunity to respond to the charges prior to the effective date of discharge.

11.02 MEETING

11.02a. In the event that an Employee is scheduled in advance by the Employer to answer questions, the Employee shall be informed of the purpose of the meeting.

11.02b. When the subject of the meeting is on a job related incident and the Employee reasonably feels that the disciplinary action may result from the meeting, the Employee may request that a Union representative or steward be present in the meeting.

***

SECTION 14. PRIOR RIGHTS, BENEFITS AND PERQUISITES

14.01 Nothing in this Agreement shall be construed as abridging, amending or waiving any rights, benefits or perquisites presently covered by constitutions, statutes or rules and regulations that Employees have enjoyed heretofore, except as expressly superseded by this Agreement.

SECTION 15. GRIEVANCE PROCEDURE.

15.01 PROCESS.
A grievance which arises out of alleged Employer violation, misinterpretation, or misapplication of this Agreement, its attachments, exhibits, and appendices shall be resolved as provided in Section 15.

15.02 DEFINITION.
The term grievance shall mean a complaint filed by a bargaining unit Employee, or by the Union, alleging a violation, misinterpretation, or misapplication of a specific section of this Agreement occurring after its effective date.

15.03 GRIEVANCE WITHOUT UNION REPRESENTATION.

15.03 a. An Employee may process a grievance and have the grievance heard without representation by the Union except as provided in Section 15.18.

15.03 b. No meeting shall be held to discuss the grievance without first making an attempt to arrange a mutually acceptable meeting time with the grieving party and the Union, provided that the meeting shall be held within the time limits as provided in Section 15.

15.03 c. No resolution of a grievance filed as provided in Section 15.03 shall be made at any step of the grievance procedure, which is inconsistent with this Agreement.

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15.05 REQUIREMENTS.

15.05 a. A grievance not filed as provided in Section 15 need not be considered by the Employer.

15.05 b. By mutual agreement between the Union and the Employer any requirement of Section 15 may be waived.

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15.07 INFORMAL RESOLUTION.
A grievance shall, whenever possible, be discussed and resolved informally between the grieving party and/or the Union with the immediate supervisor.

15.08 MEETING.
By verbal request, the grieving party and/or the Union representative shall be provided an opportunity to meet in Steps 1 and 2 in an attempt to resolve the grievance.

15.09 INFORMATION.
The Employer shall provide all information in the possession of the Employer, which is needed by the grieving party and/or the Union to investigate and/or process a grievance as follows:

15.09 a. Photocopy and give the material requested to the grieving party and/or the Union within seven (7) calendar days of the request; or

15.09 b. Make the material requested available to the grieving party and/or the Union within seven (7) calendar days of the request for the purpose of photocopying or review for five (5) calendar days on the condition that the grieving party and/or the Union agrees to sign Exhibit 15.09 and be responsible for the material until it is returned.

15.10 FORMAL GRIEVANCE.
In the event the grievance is not satisfactorily resolved on an informal basis, the grieving party and/or the Union may file a formal grievance by completing the grievance form provided by the Union.

15.11 STEP 1: GRIEVANCE.
The grievance shall be filed with the department head or the department head's designee in writing as follows:

15.11 a. Within eighteen (18) calendar days after the occurrence of the alleged violation.

The term “after the occurrence of the alleged violation" as provided in Section 15.11 a. shall mean:

15.11 a.1. Discharge: Eighteen (18) calendar days after the effective date of the discharge.
***

15.12 STEP 1: DECISION.
The decision of the department head or the department head's designee shall be in writing and shall be transmitted to the grieving party and/or the Union within thirteen (13) calendar days after receipt of the grievance.

15.13 STEP 2: APPEAL OR GRIEVANCE.

15.13 a. In the event the grievance is not resolved in Step 1, the grieving party and/or the Union may file a letter of appeal with the Employer or the Employer's designee specifying the reasons for the appeal together with a copy of the grievance and a copy of the Step 1 decision within nine (9) calendar days after receipt of the Step **1** decision.

15.13 b. In the event a grievance is filed at Step 2 as provided in Section 15.04, the grievance shall be filed as provided in Section 15 .11 except that the grievance shall be filed with the Employer or the Employer's designee instead of the department head or the department head's designee.

15.14 DIFFERENT ALLEGATIONS.
The Employer or the Employer's designee need not consider a Step 2 grievance, which encompasses different allegations than those alleged in Step 1.

15.15 STEP 2: DECISION.
The decision of the Employer or the Employer's designee shall be in writing and transmitted to the grieving party and/or the Union within nine (9) calendar days after receipt of the appeal.

15.16 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.
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SECTION 58 BILL OF RIGHTS.

58.01 STATEMENT.
No Employee shall be required to sign a statement of complaint filed against the Employee.

58.02 INVESTIGATION.

58.02a If the Employer pursues an investigation based on a complaint, the Employee shall be advised of the seriousness of the complaint.

58.02 b. The Employee shall be informed of the complaint, and will be afforded an opportunity to respond and/or refute the complaint.

58.03 When investigating complaints against Employees by patients, inmates, and residents, weight shall be given to the mitigating circumstances, including the difficulties of working with some types of patients, inmates, and residents.

58.04 Before making a final decision, the Employer shall review and consider all available evidence, data, and factors supporting the Employee, whether or not the Employee provides factors in defense of the complaint.

58.05 In the event the complaint is not substantiated or the Employee is not disciplined, the complaint and all relevant information shall be destroyed, provided that the Employer may retain a summary of such information outside of the official personnel file whenever such complaint may result in future liability to the Employer, including but not limited to, discrimination complaints.

Mamuad was employed as an Adult Correctional Officer (ACO) III at PSD's Maui Community Correctional Center (MCCC) from May 2000 until his termination on February 21, 2014.

During his Recruit Class, Mamuad was given a copy of and received training on the STANDARDS OF CONDUCT OF THE DEPARTMENT OF CORRECTIONS, STATE OF HAWAII (August 1, 1988) (SOC). His understanding was that the SOC required him to conduct himself as properly and professionally as possible while in the facility and off duty and that being professional with females and inmates included no searching of females and the two-man rule of having a witness present when speaking to a female.

The SOC provides in relevant part:

ARTICLE Ill
CONDUCT
I. GUIDE FOR DISCIPLINARY ACTION**.**

A. Disciplinary action for violations contained in Section 11 of this Article shall be determined by the Director of Department of Corrections and/or the Administrators.

B. Disciplinary action for violations contained in Section III of this Article shall be subject to progressive discipline; except where the severity of a single violation may warrant immediate discharge. Disciplinary action (s) shall be taken pursuant to the applicable sections of the bargaining unit agreements.

II. PROFESSIONAL CONDUCT AND RESPONSIBILITIES

A. **Standard of Conduct** - All employees shall conduct their private and professional lives in such a manner as to avoid bringing the Department into disrepute.

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E. General Responsibilities – Correctional employees shall at all times take appropriate action to:

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5. Observe constitutional guarantees.

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10. Enforce all Federal and statutory law violations as well as departmental and branch Rules, Directives, Policies and Procedures, and these Standards of Conduct and report any violations thereof.

***

H. **Performance of** Duty - Corrections Officers and employees shall perform their duties as required or directed by law, departmental rules or policies, or by order of a supervisor. All lawful duties required by competent authority shall be performed promptly as directed. Notwithstanding the general assignment of duties and responsibilities.

I. **Obedience** to **Laws and Regulations –** Corrections Officers and employees shall observe and obey all laws, Administrative Rules, Policies and Procedures, and Standards of Conduct of the Department.

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III. **RULES**

A. **Class A Rules**

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A5 Mistreatment of an **Inmate/Ward -** Corrections

· Officers and employees shall not mistreat an inmate/ward.

***

A9 Sexual Contact – No employee shall solicit, respond to any solicitation, or engage in any type of sexual contact with an inmate/ward.

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B. **Class B Rules**

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B9 Criminal Acts- Employees shall **not commit** a criminal act, on or off duty, when such **act** would constitute a felony, misdemeanor, or when such act would, by its nature, **be** inconsistent with the employee's fitness **or** capability of performing his duties.

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D. **Class D Rules**

D12 Truthfulness – Employees are required to be truthful at all times whether under oath or not. Falsification or incomplete submittal of any report, written or oral, is a violation of this rule.

Complainant was informed and knew that under the SOC Article III that a single, severe incident of violation could result in termination and that the SOC required him to enforce all federal and state laws under Article II.E., paragraph 10.

Since 2012, states are expected to comply with the federal Prison Rape Elimination Act (PREA), which outlaws any kind of sexual contact with inmates and establishes procedures and processes for handling staff accused and found guilty of a violation. PSD's Investigations and Inspections (IIO) investigate all potential PREA-related criminal allegations.

Based on his November 30, 2012 PSD PREA training, Mamuad knew that a male ACO should never be alone in a cell with a female inmate, there was zero tolerance for sexual assault on inmates by any correctional facility staff, to "just be careful", and inmates can make accusations within two years of the touching.

3. <u>February 1, 2013 Incident</u>

On February 1, 2013 and at the time of his discharge, Mamuad was an MCCC visitation officer responsible for scheduling visits and performing background check on all visitors.

On February 1, 2013, a female inmate B.M.[vii] complained that while she was in a cell in the MCCC intake area awaiting transport to court, ACO Mamuad entered the cell alone on three occasions. On the first occasion, he briefly rubbed her back and mentioned her visiting list. On the second occasion, Mamuad put her hand into her sports bra, grabbed her breast and tried to kiss her, but B.M. turned her head. On the third occasion, after her return from court, Mamuad apologized for taking it fast and asked her to contact him when she got out (Incident).

B.M. told a consistent version of the Incident to fellow inmates N.F. and C.K.,[viii] ACO Lopes, and a counselor Lindsay Melka (Melka). Melka reported the Incident to ACO Amaral (Amaral), Captain Jones (Jones), and Lieutenant Mirkovich (Mirkovich).

The Board finds B.M.'s HOM testimony regarding the Incident credible and consistent with her statements provided during the PSD investigation.

Mamuad denies any physical contact with B.M. However, he admits that on February 1, 2013, he entered the intake area into the holding cell out of the lines of sight of a surveillance camera in the hallway and the ACOs posted in the area on several occasions as shown on a video and in photographs. He further concedes that there was no reason for him to be in the intake area, the intake personnel cannot monitor cell 1 because of their inability to see from their post, and no reason for the ACOs to look inside the cell or for to be watching him. He finally confirms that despite there being at least four other ACOs and a sergeant in the holding area at the time, he went in alone and remained alone with the female inmate in the cell.

Mamuad does not deny that entering the cell alone with a female inmate is contrary to his training that there be two ACOs with a female inmate and that it is inappropriate, unacceptable, dangerous, and subject to allegations for a male ACO to be alone in a cell with a female inmate.

However, Complainant justified his actions on February 1, 2013 by stating that he remained in the doorway, had a legitimate reason for being in the cell with the inmate (talk to her about her visitations), and was authorized to be in the intake area without a request for him to be there.

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Mamuad further admitted, however, that "it was unlikely" that he would go to the holding area to talk to inmates regarding their visitors, B.M. had no visitation issues because her list had already been approved, and he never completed the investigation.

On February 4, 2013, Complainant was called into the Maui Police Department, shown a video depicting him going in and out of the room, gave a statement regarding the Incident, refused a polygraph test, was arrested for sexual assault in the third degree, and released pending investigation.

Mamuad applied for and received an Expungement Certificate, dated July 27, 2014 (Expungement Certificate), from the Department of the Attorney General, State of Hawaii, providing in relevant part:

Expungement Certificate

THIS IS TO CERTIFY that pursuant to Section 831-3.2, Hawaii Revised Statutes, an expungement order has been issued for LEROY B. MAMUAD by the Attorney General of the State of Hawaii which annuls the record of arrest for the following:

Offense	Date of Arrest
SEXUAL ASSAULT 3	02/04/2013

If digitized images were taken at the time of arrest, those images have been deleted by the law enforcement agency holding them, and therefore, those images cannot be returned to you.

Under the provisions of Section 831-3.2, Hawaii Revised Statutes, this certificate authorizes you to state in response to any question or inquiry, whether or not under oath, that you have no record regarding the specific arrest(s) listed above.

4. PSD Investigation

The PSD procedure is to assign the complaint for investigation to either PSD Internal Affairs (IA), the facility, or another division. Upon completion, the investigation goes from IA to the Director for review and transmittal to IIO [Inspection and Investigation Office], which assigns a hearings officer to review and determine whether more information or follow up is required, and whether there is sufficient information to proceed or insufficient information requiring closure of the case. If there is sufficient information, then a pre-disciplinary hearing notice is sent to the employee, and a hearing is held. After the hearing, the hearings officer or an investigator may follow up to get the required information. After acquiring the information, the hearings officer meets with the Director (and sometimes the Deputy Director) to review the facts and recommend discipline to the Director for final determination. If discharge is the sanction imposed, another hearings officer holds a pre-discharge hearing and meets with the Director to reach a final decision regarding the discharge.

According to Sakai, the procedure on Mamuad's complaint complied with PSD procedure, and the allegations in Mamuad's case involving a potential crime of sexual contact were referred to IA for investigation on February 4, 2013.

IA Investigator Garrett Medeiros (Medeiros) was assigned by IA Chief Investigator Patrick Nakashima (Nakashima) to conduct the investigation into the allegations against Mamuad. Medeiros and Nakashima collected documents and conducted interviews, including of

Mamuad, other ACOs, and inmates, to confirm and corroborate the inmate's allegations regarding the Incident.

Regarding the review of the video, Medeiros's practice is to watch the video before and after conducting the interviews and compile the still photos after the interviews.

In conducting interviews, Medeiros's practice is to interview the accused individual last. On March 1, 2013, Medeiros conducted a transcribed interview of Mamuad regarding the Incident. Prior to the interview, UPW Business Agent Melanie Saito (Saito) met with Mamuad and was present during the interview. Complainant was given the opportunity to make a statement, but he did not want to provide any additional information. Mamuad admitted entering the cell several times, asserted that he was authorized to be in the intake area, and denied kissing B.M. or touching her breast.

Medeiros further reviewed the Initial Reports from Mirkovich, Jones, Melka, and Amaral before conducting in-person interviews. Medeiros also conducted in-person, digitally recorded interviews of inmates B.M., C.K., N.F., and G.B.,[ix] ACOs who had contact with or talked to B.M. about the Incident; sheriffs involved in B.M.'s transportation; and MCCC Acting Warden James Hirano (Hirano).

Medeiros found that B.M.'s story remained consistent throughout the investigation.

Medeiros also reviewed B.M.'s Offendertrak and Sign-In Sheets, Policies and Procedures, and other documents.

Medeiros performed a criminal history for Mamuad, which showed only the February 1, 2013 Incident, and obtained inmate B.M.'s court records to confirm her attendance at court.

Medeiros determined that the video and photographs showed that: on the first occasion, Mamuad entered the holding cell for 44 seconds (the one during which inmate B.M. stated that Mamuad rubbed her back and told her that she looked good); on the second occasion, Mamuad was in the holding cell for 14 seconds (the one during which B.M. stated that was the occasion of the sexual contact); on the third occasion, Mamuad was in the cell for 39 seconds with B.M. and G.B. (the one during which BM stated that Mamuad made the inappropriate comments of taking it slow and waiting until she got released); and on the fourth occasion, Mamuad was in the cell with B.M. and G.B. for 1 minute, 19 seconds.

Medeiros concluded that Mamuad was authorized to use the Offendertrak as part of his visitor ACO responsibilities. However, his use of the CJIS Offendertrak during the Incident was unauthorized because his check was on B.M.'s already approved visitor list; there was no reason

for periodic updates; and his presence in the intake area and cell was without authorization and in violation of the SOC and rules and regulations (prohibiting him from being alone in the cell with a female inmate B.M).

After finishing the collection of evidence in accordance with PSD procedure, Medeiros wrote his report for review by Nakashima.

On May 8, 2013, after reviewing the Investigation Report, Nakashima forwarded the Report, dated May 3, 2013 (Investigation Report), to Sakai for final administrative review and disciplinary action. The Investigation Report concluded, among other things, that Mamuad entered the cell and was alone with the female inmate on four occasions in violation of PSD Policies and Procedures, including but not limited to COR.08.13 Duty Assignment for Corrections Officer and COR.12.01 Right to Safe and Policy and Procedures Right to Safe Custody 3.0 Policy, Duty Assignment for Corrections Officers 4.0 Procedures .4, which require a secondary witness when dealing with the opposite gender and to take precautions to protect inmates from imminent harm or abuse. The Report also concluded that the SOC was violated, including but not limited to Article III, II. A. Standard of Conduct (employees shall conduct their private and professional lives in such manner as to avoid bringing the Department into disrepute), E. General Responsibilities (correctional employees shall take appropriate action to observe constitutional guarantees, enforce all Federal and statutory law violations and departmental and branch Rules, Directives, Policies and Procedures, and the SOC), F. Knowledge of Laws and Regulations (correctional employees are expected to know Hawaii statutes, administrative rules, standards of conduct, and DPS Policies and Procedures applicable to their function as correctional employees), L. Obedience to Laws and Regulations (Correctional Employees shall observe and obey all laws, Administrative Rules, Policies and Procedures, and Standards of Conduct of the Department), and B. Class B Rules B8 Criminal Acts (employees shall not commit a criminal act, on or off duty, when such act would constitute a felony, misdemeanor, or when such act would by its very nature, be inconsistent with the employee's fitness or capability of performing his duties).

After being assigned the case and reviewing the investigation, on July 26, 2013, PSD Pre-Disciplinary Hearings Officer Laurie Nadamoto (Nadamoto) sent a Memorandum to Sakai requesting that inmate B.M. undergo a CVSA (Computer Voice Stress Analysis) test to determine her veracity regarding statements regarding the Incident with Mamuad, which was approved by Sakai.

5. PSD Disciplinary Proceedings

On February 5, 2013, Hirano notified Mamuad by letter of his placement on leave of absence without pay from MCCC, effective February 6, 2012 [sic] through March 19, 2013, in

accordance with CBA § 11A., pending outcome of an investigation into the sexual assault of an inmate allegations and of his right to file a grievance (February 5, 2013 Hirano letter).

On September 27, 2013, Nadamoto sent a NOTICE OF PRE-DISCIPLINARY DUE PROCESS HEARING (September 27, 2013 Notice) notifying Mamuad that PSD was in the process of determining whether there was just cause for disciplinary against him for SOC violations: Article III, § II Professional Conduct and Responsibilities, E. 5 General Responsibilities, E. 10. General Responsibilities, H. Performance of Duty and I. Obedience to Laws and Regulations; and Article III, § III, Rules A. Class A Rules, A5-Mistreatment of an Inmate, A9-Sexual Contact, B9-Criminal Acts, D12-Truthfulness. The Notice further alleged the following facts regarding Article III, § III, D-12 Truthfulness:

> To Wit: It is alleged that on February 1, 2013, you were on duty when you entered the Intake/Holding cell and approached inmate [B.M.] several different instances. It alleged that at approximately 12:26 hours, you entered the cell l and told inmate [B.M.] that she "looked good" and rubbed her back. It is alleged that at approximately 12:27 hours, you entered the cell and reached down inmate [B.M.]'s shirt, touched her nipple and tried to kiss her. It is alleged that at approximately 13:52 hours, you went into the cell and told inmate [B.M.] that you should've taken it slow and waited until she was released.
>
> It is alleged that you. were untruthful when you denied any of these actions with inmate [B.M.] to the investigators.

The Notice further notified Mamuad of his rights, among other things, to request a copy of the Investigation Report; appear at a pre-disciplinary due process hearing on October 17, 2013 via video conference; have union representation and/or witnesses on his behalf present; and bring supporting documents or other materials to the hearing.

Mamuad was provided a copy of the Investigation Report, including the transcript of his interview, and met with Saito prior to the pre-disciplinary proceedings about the Report.

Mamuad and Saito attended the October 17, 2013 pre-disciplinary hearing held by Nadamoto. Mamuad basically denied B.M.'s allegations that he put his hands down her shirt. Saito raised the issue of ACO Crowell not having been questioned during the investigation. Nadamoto followed up with a request to IA to interview ACO Crowell, which was done on November 5, 2013.

Under the SOC, Article III GUIDE FOR DISCIPLINARY ACTION, criminal activity, including sexual misconduct warrants immediate discharge. PSD procedure is to impose all

discipline with Director approval in accordance with the Unit 10 CBA standard for termination of just cause. In the past, other ACOs have been discharged for a first violation of the SOC and for sexual assault and similar violations, and consideration of years of service and personnel record do not mitigate egregious conduct.

Mamuad concurred that an ACO cannot engage in improper or unprofessional sexual conduct with an inmate, which constitutes cause for termination under the SOC. However, Complainant denied knowledge of any other ACOs being terminated or receiving a lesser discipline for sexual misconduct with an inmate.

Before meeting with Sakai, Nadamoto reviewed the file, listened to all the interviews, reviewed the case for compliance with the seven-step just cause standard (e.g. notice of the rule, fair investigation, equal application of penalties, and reasonably related to the violation,) and concluded that the standard had been met.

In reviewing the violation and discipline, Nadamoto relied on the investigation and the pre-disciplinary hearing. She found B.M. truthful regarding the allegations, which was corroborated by the CVSA, Mamuad's presence in an area by B.M.'s cell where he should not or did not have to be, and his unnecessary talking with B.M. in the morning and when she came back from court.

Sakai's review for imposing discipline was limited to whether there was sufficient evidence to show that the sexual contact occurred. Any sexual contact with an inmate by staff, regardless of whether there is a conviction or not, is a major offense warranting serious discipline. Although being personally aware of a women's facility officer and an OCCC nurse terminated for sexual contact with inmates, Sakai noted that each case is different.

Before reaching the decision to terminate Mamuad for just cause based on the information from the investigation and the hearing, Sakai met with Nadamoto, who reviewed the facts of the case. Sakai noted that this case was distinguishable from others for several reasons. There was compelling evidence that Mamuad was in an unassigned area and entered the cell during two separate blocks of time. During Mamuad's second entry into the cell, there was an inmate present, who corroborated B.M.'s version of the Incident. Despite the corrections principle that a male does not go into an area with women inmates alone, the videotape showed Mamuad entering the cell with the inmate several times within a short period of time. In addition, B.M.'s story and demeanor remained consistent from telling the first staff, the senior officers, and the IA. Sakai concluded that B.M. was ultimately more credible than Mamuad (his explanation appeared implausible because B.M.'s visitor list had already been approved two months before), and there was just cause for Mamuad's termination.

On January 30, 2014, Sakai sent a letter (January 30, 2014 Pre-Discharge Letter) informing Mamuad, among other things, of his discharge, effective February 21, 2014, his removal from service and placement on leave with full pay until the discharge date for the SOC violations set forth above in the September 27, 2013 Notice (with the omission of Article III, Section III, Rules B. Class B Rules, B9-Criminal Acts), his opportunity to contest this discharge before the PSD Hearing Officer on February 21, 2014 via videoconference, and a repetition of his rights previously provided in the September 27, 2013 Notice. The letter contained Supporting Facts and Conclusions, among other things:

1. On February 1, 2013, you were on duty in a Warden Select post. Your duties included taking care of inmate visits. Your post is located in the Visit Office, which is in the administration building.

2. At approximately 1221 hours, you entered the Intake area.

3. At approximately 1223 hours, Inmate [B.M.] was brought to the Intake/holding area. She was being prepared for transport to court for a traffic violation. She was placed in the Intake cell #1 alone.

4. At approximately 1226 hours, you entered the holding cell where Inmate [B.M.] was sitting. Inmate [B.M.] was waiting in the Intake area holding cell because she was going to court for a traffic violation. You said something to her about her parents visiting her. Inmate [B.M.] stated that you approached her, rubbed her back and told her that she "looked good."

5. At approximately 1227 hours, you again entered the cell where Inmate [B.M.] was waiting. At that time, Inmate [B.M.] stated that you put your hand down her shirt and touched her nipple. She stated that you attempted to kiss her, but she turned away.

***

7. Inmate [B.M.] and Inmate [B][x] returned from court at approximately 1352 hours and went into cell 1. You again entered the area and went into the Intake Office about 15 seconds later. You then entered cell 1 at approximately 1354:55 hours, and remained either in the cell or in the doorway to the cell until 1357:02 hours. At this time Inmate [B.M.] reported that you told her "you should've taken it slow" and "waited until she was released."

8. You denied that you put your hand down Inmate [B.M.]'s shirt or that you told her anything about "taking it slow" or "waiting" for her.

9. Investigator Nakashima conducted a computer voice stress analysis examination of Inmate[B.M.]. The results concluded that inmate [B.M.] was not deceptive about you rubbing her back, trying to kiss her and putting your hand down her shirt.

10. You justified going into the cell with Inmate [B.M.] because she asked you about who was visiting her that weekend. Her visit list was submitted on December 1, 2012, and approved December 7, 2012. A second request was submitted on December 23, 2012, and approved on December 28, 2012. There were no pending requests by Inmate [B.M.] and she denied asking you anything about her visits.

11. You were untruthful when you stated that: 1) you did not rub Inmate [B.M.]' s back, 2) you did not put your hand down her shirt, 3) you did not attempt to kiss her, and 4) you did not tell her that you "should've taken it slow" and would "wait" for her.

12. A video recording of the area shows that you were in the area at the above-mentioned times.

13. You received training on PREA and staff over familiarity on November 30, 2012.

14. As an Adult Corrections Officer, you are entrusted with the custody, care and control of an inmate population, which you misused and abused by engaging in improper and unprofessional sexual conduct with an inmate. You acted outside the scope of your employment as an Adult Corrections.

Mamuad and Saito attended the pre-discharge hearing held by hearings officer Penney Young assisted by Shelley Nobriga via video conference. Mamuad presented his position, which basically denied putting his hands down B.M.'s shirt.

On February 25, 2014, the Termination Letter was sent to Mamuad providing in relevant part:

> On Tuesday, February 25, 2014, your Pre-Discharge Hearing was held and the evidence presented by you and your representative was insufficient to overturn the sanction imposed by the dismissal letter dated January 30, 2014. Therefore, the discharge is sustained and your discharge date was Friday, February 21, 2014.

If you feel that this action is without just and proper cause, you have the right to process a grievance in accordance with the provisions of your Collective Bargaining Agreement.

PSD representatives conceded that Mamuad's presence in a holding cell with a female without any escort constitutes a violation, which alone would not have warranted termination.

6. Union Conduct Regarding The Disciplinary Action

Prior to the March 1, 2013 interview by Medeiros, Saito met with Mamuad to prepare him and obtain his knowledge of the allegations.

On or about September 27, 2013, after Mamuad received a copy of the Investigation Report, Saito met with him again.

For the October 17, 2013 pre-disciplinary hearing, Saito prepared Complainant, advising him to just answer the questions and allow her to do most of the work. Saito attended and participated at the hearing, including raising the issues of ACO Crowell not being interviewed and the timing of B.M's report of the Incident.

Sometime after March 5, 2014 and after Mamuad received the Termination Letter, Saito had Mamuad review and then filed UPW Case # MS-14-05 (Mamuad grievance) at Step 1 based on his termination. The Step 1 grievance alleged violations of CBA §§ 1, 11, 14, and 58 and requested rescission of his termination, a cease and desist order from any further action of a similar nature and prevention of future reoccurring violations, a make whole remedy, compliance with the CBA, and removal of derogatory information from his personnel file.

On March 5, 2014, Saito also sent Saito a request for information necessary for the proper investigation, processing, and review of Mamuad's grievance requiring a response within seven calendar days.

On March 18, 2014, Saito received a response from Sakai to that information request, including but not limited to the September 27, 2013 Notice, the January 30, 2014 Pre-Discharge Letter, the Termination Letter, a July 26, 2013 Memorandum from Nadamoto to Sakai requesting a CVSA for Mamuad, video and audio evidence, photographs, PREA attendance sheets, and documents from the Investigation Report.

By an April 29, 2014 letter, Saito notified Mamuad of the Step 1 grievance meeting to be held on May 6, 2014 by telephone conference.

On May 6, 2014, Mamuad attended this Step 1 grievance hearing with Saito, who raised Complainant's years of service, clean record, holding of a warden select post, and position of instructor in firearms and CPR.

On May 15, 2014, Sakai sent a letter denying the Mamuad Step 1 grievance.

Saito proceeded to pursue the grievance under the CBA up to the arbitration step.

Mamuad emailed the Expungement Certificate to Saito.

In mid-July 2014, Saito informed Mamuad that although paperwork was forwarded to UPW Division Director Lahela Aiwohi (Aiwohi), Aiwohi was not recommending arbitration based on the Union's failure to prevail on a similar case on Molokai involving an employee convicted of touching a girl.

Mamuad talked to Saito and Aiwohi, who expressed concern regarding the winning of his case based on the Molokai arbitration award, and informed him that the Union was communicating with PSD to allow him to resign from his position. Mamuad requested that the arbitration proceed because unlike the other employee, who was convicted, he was not prosecuted and had a clean disciplinary record.

Nakanelua was the UPW's sole and final decision maker regarding whether to take the case to arbitration. On October 17, 2013, he sent a letter to Mamuad, stating in relevant part:

> RE: **WITHDRAWAL OF GRIEVANCE- GRIEVANCE CASE #MS-14-05**
>
> Dear Mr. Mamuad:
>
> As the affected employee, the Union is informing you that it processed the above-cited grievance through the grievance procedure of the collective bargaining agreement (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 reaching this decision, Nakanelua complied with his usual practice of relying primarily on the information received during the grievance process, particularly the Investigation Report, the

investigation itself, transcripts of interviews, the grievance file, and Mamuad's personnel information.

The Investigation Report was controlling of Nakanelua's decision not to arbitrate. Nakanelua cited as critical factors that: Mamuad admitted that in spite of his training in the handling of a female inmate, he entered the cell unaccompanied by another ACO out of the view of the recording camera; Mamuad failed to call on other ACOs in the area of B.M.'s detention to accompany him to B.M.'s cell; Mamuad's statements regarding his activities and reasons for being in the cell, such as Mamuad's stated intent for directly contacting B.M. and being in the holding area, raised questions regarding his credibility; B.M.'s credibility was consistent and strong throughout the interviews regarding the allegations and specific times when Mamuad entered the cell; and finally, concern regarding retaliation against the inmates, who are under the ACOs' direct control and custody.

In making his decision, Nakanelua was aware of: the CVSA taken by B.M.; B.M.'s failure to call out for help at the time of the Incident; an inquiry regarding B.M.'s visitor list; the absence of other witnesses to the Incident (other than B.M. and Mamuad); the lack of immediacy of B.M.'s complaint; and the presence of other ACOs in the area.

Nakanaleua admitted that his review did not include the videotapes of the Incident or the video interviews of Mamuad or B.M. to determine credibility nor did he request his own interviews or meetings with Mamuad, B.M, or other witnesses to determine their credibility.

Nakanelua discounted the Molokai arbitration award, criminal proceedings (conviction or non-conviction), the unemployment insurance information and decision, and the month delay in the file arriving from Maui because such factors have very little bearing on his decision.

Ultimately, Nakanelua determined that the Union would not prevail at arbitration because PSD had done a complete, thorough, unbiased, objective, and impartial investigation of the complaint; and there were no CBA violations, such as in the imposition of discipline (CBA§ 11), a lack of due process (CBA §§ 14 and 58), or new policy or procedure promulgated without notice, consultation, or negotiation with the Union. In addition, there was compliance with the CBA grievance process because the UPW Business Agent had filed a grievance, requested and received all relevant information in the Employer's custody, and was present at Mamuad's investigatory review and the pre-disciplinary hearing.

II. APPLICABLE LEGAL STANDARDS

A. BURDEN OF PROOF

HRS § 91-10(5) states:

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

HAR § 12-42-8(g)(16) of the Board's rules states:

> (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.

See also: Hawaii Gov't Emp. Ass'n, Local 152 v. Keller, Board Case No. CE-13-597, Decision No. 456, 6 HLRB 421, 429 (2005); United Public Workers, AFSCME, Local 646 v. Waihee, Board Case No. CE-01-122, Decision No. 309, 4 HLRB 742, 750 (1990) (Waihee). The preponderance of the evidence is defined as "proof which leads the factfinder to find that the existence of the contested fact is more probable than its nonexistence." Minnich v. Admin. Dir. of the Courts, 109 Hawai'i 220, 228 (*citing* Masaki v. Gen. Motors Corp., 71 Haw. 1, 14, 780 P.2d 566, 574 (1989)); Coyle v. Compton, 85 Hawai'i 197, 202-03 (1997) (*citing* Strong, *McCormick on Evidence* § 339, at 439 (4th ed. 1992)). Further, "the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles." Waihee, 4 HLRB at 750.

The Board has further interpreted this section "to mean that the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles. Henceforth, if any party fails to present sufficient legal arguments with respect to any issue, the Board shall find that the party failed to carry its burden of proof and dispose of the issue accordingly." State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982) (Sanderson). *See also*: State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-63, Decision No. 162, 3 HPERB 47, 65 (1982).

B. MOTIONS UNDER THE HAR

HAR § 12-42-8(g)(3) provides in pertinent part:

> (3) Motions:
> (A) All motions made during a hearing shall be made part of the record of the proceedings.
> ***
> (C) All motions other than those made during a hearing shall be subject to the following:
> (i) Such motions shall be made in writing to the board, shall briefly state the relief sought, and shall be accompanied by affidavits or memoranda setting forth the grounds upon which they are based.
> (ii) The moving party shall serve a copy of all motion papers on all other parties and shall, within three days thereafter, file with the board the original and five copies with certificate of service on all parties.
> (iii) Answering affidavits, if any, shall be served on all parties and the original and five copies, with certificate of service on all parties, shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise.
> (iv) The board may decide to hear oral argument or testimony thereon, in which case the board shall notify the parties of such fact and of the time and place of such argument or the taking of such testimony.

C. HAWAII RULES OF CIVIL PROCEDURE (HRCP) RULE 52(c)

A review of the foregoing HAR § 12-42-8(g)(3) shows that there is no provision analogous to HRCP Rule 52(c) (Rule 52(c)), which Respondent are relying on for this Motion for D & O based on partial findings. When the Board rules are silent or ambiguous on procedural matters, the Board has looked for guidance to analogous provisions of court rules. Ballera v. Del Monte Fresh Produce Hawaii, Inc., Board Case No. 00-1 (CE), Order No. 1978, at *5 (January 11, 2001); United Public Workers, AFSCME, Local 646 v. Hannemann, Board Case No. CE-01-685, Order No. 2588, at *12 (February 12, 2009). HRCP Rule 52 states in relevant part:

> **Rule 52(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.

Rule 52(c) was patterned after the Federal Rules of Civil Procedure (FRCP) Rule 52(c). The Hawaii Supreme Court (Court) has held that "where we have patterned a rule of procedure after an equivalent rule within the FRCP[], interpretations of the rule by the federal courts are deemed to be highly persuasive in the reasoning of this court." Furuya v. Apartment Owners of Pacific Monarch, Inc., 137 Hawai'i 371, 382-83, 375 P.3d 150, 161-62 (2016). Rule 52(c) permits the [Board] to enter judgment as a matter of law with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue. "Rule 52(c) expressly authorizes the [Board] to resolve disputed issues of fact. In deciding whether to enter judgment on partial findings under Rule 52(c), the [Board] is not required to draw any inferences in favor of the non-moving party; rather the [Board] may make findings in accordance with its own view of the evidence." Ritchie v. United States, 451 F.3d 1019, 1023 (9th Cir. 2006). (citations omitted)

D. RELEVANT STATUTORY PROVISIONS

HRS § 89-13(b) provides in relevant part:

§89-13 Prohibited practices; evidence of bad faith.

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully 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.

III. PROPOSED CONCLUSIONS OF LAW, DISCUSSION, AND ORDER

A. POE v. HAWAII LAB. RELS. BD. AND THE HYBRID CASE

Complainant bases his HRS § 89-14(b)(1), (4), and (5) violations against the Union upon a breach of duty of fair representation. Relying on federal precedent, [xi] in Poe v. Hawaii Lab. Rels. Bd., 105 Hawai'i 97, 94 P.3d 653 (2004) (Poe), the Court established the context for a breach of duty of fair representation claim against the union and articulated the relevant analysis

for a "hybrid" case involving a claim against either the union for breach of the duty of fair representation and the employer for breach of the collective bargaining agreement, or both:

> 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 interest 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 grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement…
> ***
> If the individual employee could compel arbitration of his 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….
>
> 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, the Supreme Court noted:

> [A] situation when the employee may seek judicial enforcement of his 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 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 he 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 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 chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.

105 Hawai'i at 101-02, 94 P.3d at 656-57 (Citations omitted) (Emphases added)

Accordingly, based on Poe, while this case is brought against the Union alone, Complainant must carry the burden of showing not only the breach of the duty by the Union but also the breach of the CBA by PSD. UPW supports the Motion for D & O by arguing that after the conclusion of the Complainant's case in chief, no favorable findings can be made to support any wilfull breach of the duty of fair representation by the UPW, nor any wilfull violation of the CBA [by PSD].

B. UNION 'S DUTY OF FAIR REPRESENTATION

As stated in Poe, a union as the exclusive bargaining representative of the employees in the bargaining unit, has a duty to fairly represent all those employees, both in its collective bargaining and in its enforcement of the resulting collective bargaining agreement. 105 Hawai'i at 101, 94 P.3d at 656; Vaca v. Sipes, 386 U.S. 171, 177 (1967) (Vaca). "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38 (1953); Air Line Pilots v. O'Neill, 499 U.S. 65, 67, 78 (1991) (O'Neill). Unions must have wide discretion to act in what they perceive to be their members' best interests. To prevail on this showing, 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 interest.; Johnson v. United States Postal Serv., 756 F.2d 1461, 1465 (9th Cir. 1985) (Johnson). Any substantive examination of a union's performance must be highly deferential. O'Neill, 499 U.S. at 78.

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, 386 U.S. at 190. Poe, 105 Haw. at 104, 94 P.3d at 659 (*citing* Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44 (1998))) and DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. at 164 (1983). A union does not breach its duty of fair representation by acting negligently. Patterson v. Int'l. Bhd. Of Teamsters, Local 959, 121 F.3d 1345, 1349 (9th Cir. 1997) (Patterson).

1. The Arbitrary Standard

A union's actions are arbitrary "only if in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of 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, 1090 (9th Cir.

1978) (Robesky)). The "arbitrariness analysis looks to the objective adequacy of the union's conduct." Simo v. Union of Needletrades, 322 F.3d 602, 618 (9th Cir. 2003).

Applying these principles specifically to the handling of grievances, the courts have held that while a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, the individual employee has no absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement, and a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious. Vaca, 386 U.S. at 191; Poe, 105 Hawai'i at 101, 94 P.3d at 656 (*citing* Vaca, 386 U.S. at 191). Accordingly, under the wide degree of deference given to the union's actions, declining to pursue a grievance as far as a union member might like has been held not a violation of the duty of fair representation in the absence of arbitrariness, discriminatory, or in bad faith. Trnka v. Local Union No. 688, United Auto., Aerospace & Agric. Implement Workers, 30 F.3d 60, 61 (7th Cir. 1994); Yeftich v. Navistar, Inc., 722 F.3d 911, 916 (7th Cir. 2013). Moreover, in the handling of a grievance, an individual employee lacks direct control over a union's action taken on his behalf, and the union typically has broad discretion in its decision whether and how to pursue an employee's grievance against the employer. Chauffeurs, Teamsters & Helpers v. Terry, 494 U.S. 558, 567-568 (1990). While both intentional and unintentional conduct can constitute arbitrariness, a showing of mere negligence in grievance processing does not suffice. Eichelberger v. NLRB, 765 F.2d 851, 854 (9th Cir. 1985) (*citing* Robesky, 573 F.2d at 1089-1090).

A union has not been held to have acted in an arbitrary manner where the challenged conduct involved the union's judgment in the handling of a grievance. 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[.]" Patterson, 121 F.3d at 1349; Stevens v. Moore Business Forms, 18 F.3d 1443, 1447 (9th Cir. 1994) (Stevens). A union's decision not to arbitrate a grievance that it considers to be meritless is an exercise of its judgment. *Id.*; Wellman v. Writers Guild of Am., 146 F.3d 666, 671 (9th Cir. 1998) (Wellman).

The Ninth Circuit has adopted a two-step analysis to determine whether the union has breached the duty of fair representation. "First, we must decide whether the alleged union misconduct 'involved the union's judgment, or whether it was 'procedural or ministerial.' Second, if the conduct was procedural or ministerial, then the plaintiff may prevail if the union's conduct was arbitrary, discriminatory, or in bad faith. However, if the conduct involved the union's judgment, then 'the plaintiff may prevail only if the union's conduct was discriminatory or in bad faith.'" Marino v. Writers Guild of America, East, Inc., 992 F.2d 1480, 1486 (9th Cir. 1993); Stevens. 18 F.3d at 1448.

Regarding the first step, it appears undisputed that the UPW's conduct at issue in this case was an exercise of judgment. UPW asserts that Mamuad has failed to provide any evidence that

the handling of grievance in this case came within the scope of ministerial tasks subject to a challenge of arbitrariness. However, Wellman further clarified the relationship of a union's exercise of judgment and its ministerial duties regarding the handling of a grievance, stating:

> A union's decision not to arbitrate a grievance that it considers to be meritless is an exercise of its judgment. And, in general, a union's decision about how best to handle a grievance also is a matter of its judgment. But, to be sure that the union is employing some principled way of screening the meritorious grievances from the meritless ones, we have held that "a union must conduct some minimal investigation of grievances brought to its attention." Consequently, when a union member brings a meritorious grievance, the union's decision to ignore that grievance or to process it in a perfunctory manner is a ministerial action that we will overturn if it is arbitrary, discriminatory, or performed in bad faith. But we will not find that the union has exercised its duties perfunctorily unless it has treated the union member's claim so lightly as to suggest an "egregious disregard" of her rights.

146 F.3d at 672 (Citations omitted)

Accordingly, to ensure that its handling of a grievance is not arbitrary further requires the union to investigate the grievance, the thoroughness of which varies with the circumstances of each case. Tenorio v. NLRB, 680 F.2d 598, 601-02 (9th Cir. 1982) (Tenorio). For example, in Tenorio, the Ninth Circuit determined that the union's handling of the plaintiff's grievance was arbitrary and perfunctory because the union departed from its policy of interviewing all discharged employees to obtain their story before processing their grievances although the union had ample opportunity to ascertain the employees' version of the conversation leading to their discharge and whether there were potential conflicts of interest for the union.

In Truhlar v. U.S. Postal Service, 600 F.3d 888 (7th Cir. 2010), the Seventh Circuit considered whether the union acted arbitrarily and in bad faith for a failure to conduct a sufficiently thorough investigation before withdrawing the employee's grievance. Specifically, the grievant blamed the union representative for withdrawing the grievance while his separate appeal from an adverse Department of Labor (DOL) decision was still pending and refusing to reinstate the grievances after learning that the employee won his appeal. The court applied the standard that the union's duty requires some minimal investigation into a member's grievance, and only an investigation that reflects "an egregious disregard for union members' rights constitutes a breach of the union's duty[.]" Based on the information that before deciding to withdraw the grievances, the union met with the local postmaster, reviewed the Postal Service's Investigative Memorandum and the unfavorable DOL decision, and considered the U.S. Attorney's rationale for declining to bring criminal charges, the court determined that union's

reliance on the information conveyed by the postmaster was not irrational for the union. The court concluded that even if the union's failure to verify the information could be considered negligent, more was needed to establish a breach of fiduciary duty. "To demonstrate that the union acted arbitrarily, [the employee] must show that 'in the light of the factual and legal landscape' at the time the union acted, its decision to abandon his grievances was 'so far outside a wide range of reasonableness, as to be irrational.'" *Id.* at 892-93 (*citing* Air Line Pilot, 499 U.S. at 67).

In Johnson, 756 F.2d at 1465-66, following the presentation of the plaintiff's case, the district court granted the defendants' FRCP Rule 41(b)[xii] motions for dismissal based on: its finding that the decision maker Peer made a rational judgment not to arbitrate based on his own expertise; Johnson's criminal conviction following a guilty plea; an awareness of arbitrators' rulings in similar cases; other documentary evidence in the file; and its finding that the decision makers in the grievance process bore no discriminatory animus toward Johnson. On appeal, although finding the union's investigation minimal, the Ninth Circuit determined that further investigation "would not have resulted in the development of further evidentiary matters that would have caused the union to make a determination other than the one which was made." In concluding that there was no breach of duty of fair representation, the appeals court found that the union did not depart from its established procedures, withdraw from the arbitration hastily, or in reckless disregard for the employee's rights. While noting the district court's concern that the union's legal counsel never communicated with the employee, who was his client, and criticism regarding a grievance procedure allowing decision making by persons not hearing the evidence, the appeals court found that "these derelictions do not constitute arbitrary, discriminatory or bad faith conduct on the union's part." Regarding the merits of the grievance, the court determined that the Postal Service was properly concerned about public confidence in the mail delivery system, and that the employee's trustworthiness was undermined by his admission of guilt to the criminal theft.

In Taylor v. Rohr Indus., 1989 U.S. App. LEXIS 26344, at *1-2 (9th Cir.), the Ninth Circuit held that the union did not violate the duty of fair representation by its investigation or its refusal to arbitrate their grievances where the union attended investigatory and other meetings in which each employee was given an opportunity to confront and respond to incriminating information, and the shop steward met with each employee to discuss individual grievances and assisted with the grievance filing attendant to the termination action against these employees for violating the employee standards of conduct.

The record substantiates that Saito's conduct in processing Mamuad's grievance met the Taylor standards for the union's duty of fair representation by its investigation. Saito was involved in the investigation process, attended all interviews, hearings, and meetings in which Complainant was confronted and given the opportunity to respond to incriminating information.

Saito met with Mamuad on at least three occasions: prior to his March 1, 2013 interview by Medeiros regarding his knowledge of the allegations; a second time after receiving a copy of the Investigation Report; and a third time to prepare him for the October 17, 2013 pre-disciplinary hearing. At the pre-disciplinary hearing, she was present and raised the issue of the failure to interview ACO Crowell (which resulted in the interview being taken post-hearing) and the timing of B.M. reporting the Incident during that hearing conducted by videoconference. Following Mamuad's receipt of the Termination Letter on or after March 5, 2014, although not obligated to do so, Saito timely filed and pursued a Step 1 grievance regarding the discharge and further requested grievance information under the CBA to investigate, process, and review the grievance and received a response from PSD producing information, including the Investigation Report, the video and audio evidence, photographs, and the disciplinary documents. When PSD denied the grievance, Saito pursued the grievance through all the required steps up to arbitration and forwarded the paperwork to Aiwohi. Saito and Aiwohi spoke with Mamuad after informing him that Aiwohi was not in favor of proceeding to arbitration based on the UPW's lack of success in the Molokai arbitration. Nonetheless, Mamuad requested that his grievance proceed to arbitration because of the lack of criminal prosecution in his case and his clean disciplinary record.

Nor is the Board able to conclude that Complainant proved that Nakanelua's review constituted an inadequate investigation breaching the duty of fair representation. Unlike the union in Tenorio and like the union in Johnson, Nakanelua adhered to his usual practice of reviewing grievances. Like the unions in Johnson and Truhlar, Nakanelua, as the sole and ultimate decision maker regarding the decision not to proceed to arbitration, not only reviewed the information provided by PSD during the grievance process, particularly the Investigation Report, including but not limited to the interview transcripts, statements taken, and photographs; disciplinary related information; the grievance file; but also Complainant's personnel file; the grievance file, the Termination Letter, and the pre-discharge letter. Ultimately, Nakanelua relied on the Investigation Report as controlling of his decision not to arbitrate and noted as compelling Mamuad's admissions that he: entered the cell without another ACO, which was contrary to his training regarding the handling of a female inmate; failed to call another ACO to accompany him; and was out of sight of the recording camera. In addition, Nakanelua had questions regarding Mamuad's credibility based on his stated reasons for being in this cell, his intent for directly contacting B.M. and his presence in the holding area; and concerns regarding the retaliation against inmates while under the direct control and custody of the ACO. Like the Johnson union, UPW took the grievance up to and withdrew from arbitration based, in part, on the documentary evidence in Mamuad's file.

Mamuad does not appear to argue that a more thorough investigation would have elicited any additional significant information. Rather, like the district court's concern in Johnson, his issue with Nakanelua's investigation rests in his failure, as the decision maker, to investigate the

case personally (reviewing the videotape or conducting his own interviews). However, based on the standards in Truhlar and Johnson, these "derelictions" do not constitute arbitrary, discriminatory, or bad faith conduct. As noted by the Ninth Circuit in Johnson, Complainant has not made any significant showing that further investigation "would not have resulted in the development of further evidentiary matters that would have caused the union to make a determination other than the one which was made." 756 F.2d at 1466. The Board finds that the Union's investigation by Saito and Nakanelua simply does not demonstrate an exercise of its duties perfunctorily reflecting "an egregious disregard" of Mamuad's rights or omissions that are "egregious, unfair and unrelated to legitimate union interests" constituting arbitrary conduct in violation the duty of fair representation.

Mamuad further attacks the UPW's decision as an act of judgment. First, Mamuad contends that Nakanelua failed to consider that his case (expungement) was distinguishable from Molokai case (conviction). Second, Mamuad was discharged not for being in the cell alone with a female inmate or investigating inmate's visitors, who were previously approved, but for sexually assaulting B.M. without any admissions or video evidence establishing that Mamuad acted in a sexually inappropriate manner. Third, Mamuad explained that he was in the holding area because of an upcoming MMA (Mixed-Martial Arts) match. Fourth, UPW ignored the upholding of his unemployment insurance benefits indicating that there was no wilfull misconduct. Fifth, that the Union failed to challenge the just cause for the discharge even though the discharge was largely based upon unscientific, inadmissible evidence (CVSA). The Board finds no merit regarding any of these grounds.

In Cross v. UAW, Local 762, 450 F.3d 844 (8th Cir. 2006) (Cross), the employee Cross was arrested pending an investigation into a fight with a coworker. The employee brought a hybrid action, suing his union for breach of the duty of fair representation for, among other things, acting arbitrarily in initially delaying arbitration and then withdrawing the grievances two days before charges against him were dismissed. The union asserted its good faith belief that further arbitration was not warranted based on its loss of a previous workplace violence arbitration. The Eighth Circuit held that the employee failed to meet his burden of producing evidence in response to the summary judgment motion on the hybrid claim. In so ruling, the appeals court determined, among other things, that because UAW had previously lost a similar arbitration involving workplace violence, its belief that further arbitration was not warranted was in good faith. Moreover, the court further concluded that UAW's delay and eventual withdrawal analysis of Cross's grievances were not an arbitrary breach of its duty of fair representation. *Id.* at 847.

Nakanelua disputes that the Molokai case played any part in his decision not to proceed to arbitration in this case. However, assuming for the purposes of this discussion that the Molokai award was a factor in the Union's decision not to proceed to arbitration, the Board holds

that, as reasoned in Cross, the Union's conduct was not arbitrary based on its good faith belief that further arbitration was not warranted. In addition, as more fully discussed below regarding the just cause for the discharge, it is not necessary for a corrections officer to be convicted of a crime with which he was charged to be dismissed. *See*, Commonwealth, Dep't of Justice, Bureau of Corrections v. Grant, 22 Pa. Commw. 582, 586, 350 A. 2d 878, 880 (1976) (Grant). Further, there is more than sufficient evidence in the record to support other more compelling reasons for the Union's decision not to proceed to arbitration on this grievance and as more fully discussed below to support the just cause for Mamuad's discharge in this case.

The Board further finds Mamuad's contention that video or his own admissions were required to establish that the sexual contact occurred is simply flawed. This position ignores Nakanelua's reliance on other substantial evidence that the PSD investigation elicited. Such evidence included Mamuad's admissions that he entered the cell where B.M. was being held out of the line of sight of the recording camera in violation of his training, Mamuad's failure to call another ACO to accompany him despite other ACOs being present in the area, Mamuad's lack of credibility based on his unconvincing explanations regarding his reason for being in the cell (the visitation list), directly contacting B.M., and being in the holding area (the MMA fight), and B.M.'s consistent and strong statements during the interview process regarding the allegations and the specific times when Mamuad entered the cell. Nakanelua's reliance was corroborated by other evidence gathered during the PSD investigation, such as the video evidence establishing Mamuad's going in and coming out of the cell where B.M. was being held on several occasions.

Regarding the value of the unemployment insurance determination, the Board finds Mamuad's assertion that the upholding of his unemployment benefits proves that there was no wilfull misconduct on his part is irrelevant to this case. Complainant fails to demonstrate the probative value of the unemployment determination on the issues regarding whether there was just cause for his termination and whether his grievance has merit. The Board agrees with the UPW's position that unemployment insurance benefits determination has no probative value for the issues in this hybrid case. *See* Boudreaux v. Vulcan Materials Co., 485 F. Supp. 347, 350 (D. Wis. 1980).

By asserting that the Union failed to challenge the termination, which was largely based on unscientific and inadmissible evidence, Complainant appears to be attacking the reliability of the CVSA. As fully discussed above, while Nakanelua admitted awareness of the CVSA results, his decision was also based on other substantial evidence and for other reasons, including PSD's complete, thorough, objective, and impartial investigation of the complaint.

For the reasons set forth above, the Board is unable to find that Complainant has shown that considering the factual and legal landscape at the time, the UPW's decision to not pursue arbitration was "so far outside a wide range of reasonableness, as to be irrational." As the court

in Patterson and Stevens reasoned even if the Union made an error in evaluating the merits of a grievance, this conduct may not be deemed arbitrary and is insufficient to meet the breach of the duty of fair representation. In this case, the Board holds for the reasons set forth above that the UPW's decision not to proceed to arbitration in this case was an act of judgment within its broad discretion. Accordingly, under the holding in Stevens, if the union's refusal to pursue the member's grievance was an act of judgment, the member must provide some evidence of the union's bad faith or discrimination to prevail.

2. The Discriminatory Standard

Unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances. Discriminatory conduct may be established by "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge, 403 U.S. 274, 301 (1971) (Lockridge). Whereas the arbitrariness analysis looks to the objective adequacy of UHPA's conduct, the discrimination and bad faith analyses look to the subjective motivation of UHPA officials. Simo, 322 F.3d at 618.

Complainant implies but does not directly argue that the UPW's refusal to take his case to arbitration after taking the Molokai case to arbitration was discriminatory. The Board finds that even if the distinction in the UPW's handling of the Molokai case (arbitration) and Mamuad's case (withdrew arbitration) is a basis for a discrimination, there is no substantial evidence that this "discrimination" is intentional, severe, and unrelated to legitimate union objectives. Complainant fails to prove facts or make arguments sufficient to support an allegation of "discriminatory" conduct by the UPW; and accordingly, the Board grants the UPW's Motion regarding this showing.

3. The Bad Faith Standard

"Whether or not a union's actions are…in bad faith calls for a subjective inquiry and requires proof that the union acted (or failed to act) due to an improper motive. Bare assertions of the state of mind required for the claim—here 'bad faith' –must be supported with subsidiary facts." Yeftich, 722 F.3d at 916. (Citations omitted); Emura v. Hawai'i Gov't Emp. Ass'n, AFSCME, Local 152, Board Case No. CU-03-328, Order No. 3028, at *15 (10/27/14) (Emura Order). For a bad faith claim to be established, there must be "substantial evidence of fraud, deceitful action, or dishonest conduct." Humphrey v. Moore, 375 U.S. 335, 348 (1964); Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. v. Lockridge, 403 U.S 274, 299 (1971).

Moreover, the structure of the duty is that bad faith is required to show a breach; it is not simply that good faith is a defense to liability. The burden is on the worker to produce evidence

of bad faith. Simo, 322 F.3d at 618. As this Board has noted based on Truhlar, our [court's] role is not "to decide with the benefit of hindsight whether [the union representative] made the right calls- we ask only whether his decisions were made rationally and in good faith." Emura Order No. 3028, at *15-16 (c*iting* Truhlar, 600 F.3d at 893.).

Complainant has made absolutely no argument nor provided any proof of UPW's bad faith. In Lardear v. Super Fresh Food Mkts., Inc., 2013 U.S. Dist. LEXIS 98909, at *13 (D. Del. 2013) (Lardear) granted summary judgment in a hybrid action brought by an employee in favor of both the union for breach of duty of fair representation for failing to take a grievance to arbitration and the employer for breach of the collective bargaining agreement for its decision to terminate the employee for failing to follow policy after being trained on procedures. In finding that the employee failed to show that the union acted in bad faith for declining to arbitrate the grievance, the court found undisputed evidence that the employee admitted to being trained, to violating company policy, and to understanding that such violations could result in termination and further, the employee submitted no evidence that the union's reliance on his admissions and that the remainder of the union's investigation was in bad faith. In this case, there is similar evidence that Complainant has admitted being trained in the SOC policies, having violated SOC policies by being alone with the female inmate, and knowing that such violations of SOC policies could result in termination and presented no evidence that the union's reliance on his admissions and that the other facts elicited in the Union's investigation regarding the sexual contact and the corroborating evidence was in bad faith. Similar to the court in Lardear, this Board concludes that Complainant has failed to show that UPW acted in bad faith for failing to pursue his discharge to arbitration.

For this reason and for the others set forth above regarding arbitrariness and discrimination, the Board is compelled to conclude and hold that the Mamuad failed to carry his burden of showing by a preponderance of the evidence that the UPW wilfully breached its duty of fair representation to Mamuad, thereby breaching HRS § 89-13(b)(1), (4), and (5). While under Poe, this conclusion alone would suffice for the Board to dismiss this case against the Union, the Board will nonetheless complete the analysis by addressing the other part of the hybrid case, whether PSD violated the applicable CBA.

C. PSD AND BREACH OF THE CBA

Mamuad asserts that he showed that PSD violated CBA §§ 11, 14, and 58 because there was no just and proper cause for the discipline under CBA § 11. In support of the showing of lack of just cause, Complainant argued that there was no compelling evidence Mamuad sexually assaulted an inmate, that the Union pursued a grievance for a Molokai employee convicted of sexual assault while wilfully refusing to pursue a grievance for Mamuad whose arrest was expunged, the surveillance video did not capture an inappropriate sexual contact or apprehension

between Mamuad and the inmate, and he denied the inappropriate sexual assault and won his unemployment appeal.

Preliminarily, the Board determines that the assertions regarding the Union's pursuit of a grievance for a Molokai employee is solely a basis for a breach of the duty of fair representation by the Union and are irrelevant regarding the issue of whether PSD violated the "just cause" requirement of the CBA. Moreover, as fully discussed above, the Board has already concluded that the unemployment appeal decision is irrelevant to this proceeding.

The Board articulates the relevant inquiry in determining whether PSD violated the CBA in rendering the discharge determination as follows. First, whether PSD procedurally complied with the CBA disciplinary procedure; and second, whether the CBA standards for "just cause" for the discharge imposed were met in this case.

1. CBA § 11

a. PSD's Compliance with the Disciplinary Procedure Set Forth in the CBA § 11.

CBA § 11 sets forth the relevant procedural requirements for determining appropriate discipline of employees. § 11.01a. requires that an employee be subject to discipline "for just and proper cause[]"; § 11.01b. requires that a disciplined employee and his union be furnished with written notice of the specific reason(s) for the discipline on or before the effective date of the discipline; § 11.01d. requires that for immediate discipline other than an oral warning or reprimand, the employee and union be furnished with a written reason within forty-eight (48) hours after the disciplinary action is taken; § 11.01e requires that the written notice include the effective date of the penalties to be imposed and the details; § 11.01f requires that a discharged employee be given an opportunity to respond to the charges prior to the effective date of the discharge; and § 11.02 requires that for a meeting on a job related incident, which the employee reasonably feels may result in disciplinary action, the employee may request a union representative or steward to be present.

Complainant fails to prove or even argue that the CBA § 11 procedural requirements were not met in this case, and the Board's review of the record shows that the requirements were unquestionably satisfied.

The record shows that PSD complied with the notice requirements of CBA § 11.01 b., d. and e. In accordance with § 11.01b., the February 5, 2013 Hirano letter received by Mamuad on February 6, 2013 and copied to the Union, notified him of his placement on leave without pay from MCCC, effective that day, with the stated reason of "sexually assault[ing] an inmate". The requirements of § 11.01d. and 11.01e. were fulfilled by the September 27, 2013 Notice of the

Pre-Disciplinary Hearing sent by Nadamoto and received by Mamuad on October 4, 2013. This Notice informed Complainant not only of the investigation into whether there was just cause for the discipline but the SOC violations and factual basis for consideration of the discipline. The January 30, 2014 Pre-Discharge letter sent by Sakai and received by Mamuad on February 5, 2014 with a copy to the Union notified him of his discharge, effective February 21, 2014 for violations of the SOC and confirmed the facts and basis for the disciplinary determination. In accordance with § 11.01f., prior to his February 21, 2014 discharge, Complainant was given the opportunity to respond to the charges at the October 17, 2013 pre-disciplinary hearing and at the February 21, 2014 pre-discharge hearing with the attendance of his UPW Business Agent. Saito was also permitted to be present at his March 1, 2013, investigation interview in compliance with § 11.02b.

Based on the record, the Board finds and concludes that Complainant failed to carry his burden of showing that PSD did not comply with the procedural requirements for imposing discipline in this case set forth in CBA § 11.

b. <u>"Just Cause" for the Complainant's Discharge</u>

The remaining § 11.01a. requirement is that there be "just and proper cause" for the discharge imposed but there are no specific criteria for what constitutes "just and proper cause". Mamuad also provides no standard or criteria to evaluate discipline for "just and proper cause" However, the Union suggests a two-prong "just cause" standard requiring the arbitrator to determine:

> (1) whether the employer proved that the employee is guilty of misconduct; and
>
> (2) assuming guilt, whether the discipline imposed was a reasonable or just penalty under the circumstances of the case.

The Union then offers the traditional seven-part test to guide the arbitrator in deciding the justness of the discipline or penalty:

> 1. Did the company give to the employee forewarning or foreknowledge of the possible or probabl[e] disciplinary consequence of the employee's conduct?
>
> 2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Was the company's investigation conducted fairly and objectively?

5. At the investigation did the "judge" obtain substantial evidence of proof that the employee was guilty as charged.

6. Has the company applied its rules, orders and penalties even-handedly and without discrimination to all employees?

7. Was the degree of discipline in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

The Board's focus for its determination regarding whether there was just cause for Mamuad's discharge rests in whether there is substantial, credible evidence in the record to support that the discipline imposed was warranted. Based on a review of the evidence in this case, the Board concludes that UPW, by demonstrating that PSD met the seven-part criteria set forth above regarding Complainant's termination, has in fact shown that there was substantial, credible evidence to warrant Mamuad's discharge. The Board further determines that Complainant, on the other hand, has not carried his burden of showing the lack of just cause for his discharge.

In asserting PSD's lack of "just cause" for his discharge, Complainant contends that the fifth element regarding whether there was substantial evidence of proof that the employee was guilty as charged and to some extent, the seventh element regarding whether the degree of discipline was reasonably related to the seriousness of the proven offense and the record of the employee in service with the employer were not met. Based on UPW's contentions that the other five elements were met, Mamuad's failure to dispute these elements, and a review of the record, the Board finds and concludes that all the other parts of the seven-part test were satisfied in this case and focuses on the fifth and seventh elements.

Regarding the fifth element, Complainant points to the absence of a surveillance video showing that there was an inappropriate sexual contact or even apprehension between him and B.M., and further relies on his denial that the sexual assault occurred and that his presence in the cell was to discuss her visitation list.

Courts have sustained just cause determinations for a discharge despite similar contentions regarding the evidence in other cases. For example, in Fire Comm'r of Boston v. Joseph, 23 Mass. App. Ct. 76, 82, 498 N.E.2d 1368, 1373 (1986) (Joseph), the Massachusetts Court of Appeals reversed the civil service commission's decision to reinstate the discharged firefighter and affirmed a fire commissioner's determination that there was just cause for the discharge. The court upheld the fire commissioner's decision even though it was based on the uncorroborated testimony of two witnesses that the firefighter had made incriminating statements and the firefighter denied involvement and was acquitted on charges of involvement with a fire that destroyed a building.

In Brown v. Commonwealth, Dep't of Transportation, 34 Pa. Commw. 462, 468, 383 A.2d 978, 981 (1977) (Brown), the Commonwealth Court of Pennsylvania affirmed a civil service commission decision of just cause for the discharge of an airport security officer based on charges of burglary and conspiracy (without a conviction) in connection with a theft because the just cause was supported by substantial evidence. In so holding, the court rejected the officer's contention that for a conclusion of just cause, the testimony had to be corroborated by an independent investigation by the appointing authority.

In Commonwealth, Dep't of Justice, Bureau of Corrections v. Grant, 22 Pa. Commw. 582, 350 A.2d 878 (1975) (Grant), the Commonwealth Court of Pennsylvania affirmed a civil service commission dismissal of a corrections officer charged with improper use of a firearm and arrested on suspicion of robbery despite his denial that he knew nothing of the robbery. In so ruling, the court rejected his claim that the evidence was not substantial to show his involvement in the criminal activity. The court reasoned:

> The appellant in the case at bar was employed to guard prisoners in a state correctional facility; this is a highly sensitive position which requires those who would hold it to avoid even the appearance of impropriety. For appellant to be dismissed, it was not necessary for him to be convicted of the crimes with which he was charged. As we stated in *Hughes v. State Civil Service Commission*, 17 Pa. Commonwealth Ct. 344, 347, 331 A.2d 590, 592 (1975):
>
> > "Obviously, the public employer was not required to justify its suspension or removal of the appellant by proof beyond a reasonable doubt that the appellant had committed crimes….

Id. at 586, 350 A.2d at 880. (Citations omitted).

Based on the Joseph and Grant decisions above, Complainant's reliance on his own denials and assertion that B.M.'s credible testimony was uncorroborated is insufficient for the Board to determine that there was no substantial evidence of just cause in this case.

Even acknowledging that Complainant is correct, the Board finds that this lack of evidence is insufficient to carry his burden of showing that PSD violated the CBA "just cause" standard by his discharge considering the following undisputed evidence gathered during the investigation. The Board finds that Complainant's statements and explanations of his actions during the Incident in his HOM testimony and the investigation were not only inconsistent with and unsupported by the other evidence in the record but were illogical raising credibility issues. First, Mamuad received training in his recruit class regarding the SOC and more recently, regarding the PREA requirements. Despite this training and knowing that he was violating the SOC and PREA, Mamuad entered and was in the cell alone with a female inmate B.M. on two occasions and in the cell alone with two female inmates B.M. and G.B. on two other occasions although other ACOs were available in the area. Second, Mamuad conceded and knew that there was no reason for him to be in the intake area, he had no authorization to be in the intake area, and that ACOs in the intake area were unable to see and monitor cell 1 from their post. Third, there was no basis for his excuse of checking on B.M.'s visitation list at the time of the Incident because there had been no changes to B.M.'s visitation list that had already been approved. In contrast, B.M. fully cooperated with the investigation and gave consistent statements during the investigation and at the HOM in this case regarding the Incident, the sexual contact, and the inappropriate comments. The Board had the opportunity to independently receive and weigh B.M.'s testimony regarding the Incident and found her testimony credible and consistent with her statements made during the PSD investigation. Apart from his denials and assertion of lack of video surveillance, Complainant presents no cogent argument raising any flaws, weaknesses, or doubts regarding B.M.'s statement or testimony or in the other corroborating evidence to refute the fifth element and maintains that discharge is too severe a penalty for being alone with a female inmate in violation of the SOC in addressing the seventh element. The Board determines and concludes that this showing is inadequate to satisfy his burden of establishing that the investigation did not obtain substantial evidence that Complainant was not guilty of being in a cell alone with B.M., having sexual contact with her as alleged, made inappropriate comments to her, and then lied about the Incident in violation of the SOC.

For these reasons, the Board concludes that the fifth element of the just cause test has been met as well, and Mamuad has failed to carry his burden of demonstrating a violation of CBA § 11.01.

Regarding the seventh element of whether the degree of discipline was reasonably related to the seriousness of the employee's proven offense and the record of the employee in service with PSD, the Board acknowledges that Complainant had no prior record of discipline.

However, SOC ARTICLE III CONDUCT, GUIDE FOR DISCIPLINARY ACTION A. provides that "Disciplinary action for violations contained in Article II of this Article shall be determined by the Director of Department of Correction and/or the Administrators. B. provides that "Disciplinary action for violations contained in Section III of this Article shall be subject to progressive discipline, except where the severity of a single violation may warrant immediate discharge." The September 27, 2013 Notice and the January 30, 3014 Pre-Discharge Letter set forth several violations of Section II, for which the Director could conclude that the disciplinary action under A. and the violations of Section III for which the severity of a single violation may warrant immediate discharge, including mistreatment of an inmate and sexual contact. Based on the Board's finding that Complainant failed to carry his burden of demonstrating that PSD lacked substantial evidence that Mamuad was alone in the cell with a female inmate, committed an inappropriate sexual contact, made inappropriate comments to a female inmate, and then was untruthful about the Incident, the Complainant is unable to carry his burden of establishing that the discharge penalty was unwarranted. The Board follows the reasoning and holding in Grant that Mamuad was employed in a highly sensitive position to guard inmates in a state correctional facility requiring him "to avoid even the appearance of impropriety" and to be discharged, it was not necessary for him to be convicted of sexual contact. The fact that Complainant violated PSD policies (SOC) for which a single violation may warrant immediate discharge justifies the discharge consequence imposed. Therefore, the Board concludes and rules that the seventh element was met for just cause.

Based on the reasons set forth about, the Board determines and holds that Complainant has failed to carry his burden of showing that there was no just cause for his discharge.

2. CBA § 58

CBA § 58 provides for an employee's due process rights during an investigation of a complaint, including notice of the complaint and the seriousness; an opportunity to respond and refute the complaint; weight given to mitigating circumstances, including the difficulties of working with some inmates; a requirement for the employer to review all available evidence, data, and factors supporting the employee regardless of whether or not the employee provides the factors in defense of the complaint. Again, other than the broad assertion that that his due process rights were violated during the investigation into the sexual contact allegations, which resulted in his discharge, Mamuad presents no other proof. To the contrary, the Board finds that Mamuad received notice of the investigation on February 5, 2013 by Hirano. On March 1, 2013, Complainant was interviewed and given an opportunity to provide his version of the events resulting in his discipline. On September 27, 2013, Mamuad was sent a notice of the pre-disciplinary hearing to be held on October 17, 2013. At the pre-disciplinary hearing, Mamuad attended with his UPW representative Saito and was given the opportunity to respond and

dispute the allegations against him. Saito raised the issue of ACO Crowell not being interviewed, which was subsequently done by PSD, and the timing of B.M.'s report of the incident.

Accordingly, there is no merit to and Complainant has not carried the burden of establishing that his due process rights were violated during an investigation of the Complaint in violation of CBA § 58

3. CBA § 14

CBA § 14 is the prior rights, benefits, and perquisites provision, which precludes the agreement from being construed as abridging, amending, or waiving any rights, benefits or perquisites presently covered by constitutions, statutes, or rules and regulations that the employee has previously enjoyed. Complainant raises no specific arguments regarding additional rights, benefits, or perquisites that were abridged or waived or violated apart from those provided by CBA §§ 11 and 58. Therefore because the Board holds that Mamuad has failed to prove any violation of CBA § 14.

Based on the foregoing, the Board finds and concludes that Complainant has failed to carry his burden of demonstrating that PSD violated the CBA regarding his discharge.

IV. PROPOSED ORDER

Based on the above-stated Proposed Findings of Fact and Proposed Conclusions of Law, the Board grants the UPW's Motion for D & O on partial findings and dismisses the case.

FILING OF EXCEPTIONS

Any person adversely affected by the PROPOSED ORDER GRANTING RESPONDENT'S MOTION FOR DECISION AND ORDER BASED ON PARTIAL FINDINGS AGAINST THE COMPLAINANT FOR FAILING TO MEET HIS BURDEN OF PROOF BY CONCLUSION OF HIS CASE IN CHIEF may file exceptions with the Board, pursuant to HRS § 91-11, within ten days after service of a certified copy of this document. The exceptions shall specify which findings or conclusions are being excepted to with citations to the factual and legal authorities therefor. A hearing for the presentation of oral arguments will be scheduled upon the filing of such exceptions, and the parties will be notified thereof.

DATED: Honolulu, Hawaii, April 5, 2018.

HAWAII LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A. D. MOEPONO, Member

J.N. MUSTO, Member

Copies to: Sean A. Luiz, Esq.
Herbert R. Takahashi, Esq.

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[i] HRS § 91-11 states:

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

[ii] In Order No. 3070 rendered in this case, the Board ruled that because a breach of duty of fair representation claim lies only against the UPW as an entity that Nakanelua is being named in his "official capacity" as the State Director and designated agent of the UPW. Hence, any breach of duty of fair representation allegations against Nakanelua for his conduct were taken not personally but in that capacity and are, therefore, against the UPW itself.

[iii] The Complaint was filed electronically and had the word "department" partially cutoff. The Board is unable to determine whether there was a period after the word "department."

[iv] HRS § 89-2 defines "employee" or "public employee" as follows:

"Employee" or "public employee" means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section [89-6(f)].

[v] HRS § 89-6(a) provides in relevant part:

> §89-6 Appropriate bargaining units. (a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:
>
> ***
>
> (10) Institutional, health, and correctional workers[.]

[vi] HRS § 89-2 defines "exclusive representative" as follows:

> "Exclusive representative" means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

[vii] For purposes of protecting the privacy rights of the inmate, the inmate shall be referred to as "B.M.".

[viii] For purposes of protecting the privacy rights of the inmate, the inmate shall be referred to as "N.F." and "C.K.".

[ix] To protect the confidentiality of this inmate, this inmate shall be referred to as "G.B".

[x] To protect the confidentiality of this inmate, this inmate shall be referred to as "inmate B".

[xi] The Hawaii Supreme Court has noted that federal precedent is applicable to guide its interpretation of state public employment law. Poe v. Hawaii Lab. Rels. Bd., 105 Hawai'i 97, 101, 94 P.3d 652, 656 (2004).

[xii] At the time that the Johnson decision was issued, Rule 41(b) stated:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in *Rule 52(a)*.

The Notes of Advisory Committee on 1991 amendment states:

> **Notes of Advisory Committee on 1991 amendment.** Language is deleted that authorized the use of this rule as a means of terminating a non-jury action on the merits when the plaintiff has failed to carry a burden of proof in presenting the plaintiff's case. The device is replaced by the new provisions of Rule 52(c), which authorize entry of judgment against the defendant as well as the plaintiff, and earlier than the close of the case of the party against whom judgment is rendered. A

motion to dismiss under Rule 41 on the ground that a plaintiff's evidence is legally insufficient should now be treated as a motion for judgment on partial findings as provided in Rule 52(c).

Based on the Notes, Rule 41(b) was essentially replaced by Rule 52(c).