

STATE OF HAWAI'I  
HAWAI'I LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS,  
AFSCME, LOCAL 646, AFL-CIO,

Complainant,

and

MARIE LADERTA, Director,  
Department of Human Resources  
Development, State of Hawai'i; and  
VALERIE PACHECO, Personnel  
Program Administrator, Department  
of Human Resources Development,  
State of Hawai'i,

Respondents.

CASE NO(S).           CE-01-605a  
                                  CE-10-605b

DECISION NO.        495

FINAL DECISION ADOPTING  
PROPOSED DECISION AND ORDER  
ADOPTING RESPONDENT'S PROPOSED  
FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND PROPOSED DECISION AND  
ORDER

**FINAL DECISION ADOPTING PROPOSED DECISION AND  
ORDER ADOPTING RESPONDENT'S PROPOSED FINDINGS OF  
FACT, CONCLUSIONS OF LAW, AND PROPOSED DECISION AND ORDER**

On April 22, 2019, the Hawai'i Labor Relations Board (Board) issued Proposed Decision and Order Adopting Respondent's Proposed Findings of Fact, Conclusions of Law, and Proposed Decision and Order (Proposed D & O) in this case, which, among other things provided the following:

**FILING OF EXCEPTIONS**

Any person adversely affected by the Proposed Order and Decision may file exceptions with the Board, pursuant to HRS § 91-11<sup>1</sup>, 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 should any party file exceptions, and the parties will be notified thereof.

On April 25, 2019, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) filed Complainant's Motion to Continue Deadline to File Exceptions to Proposed Decision and Order Adopting Respondents' Proposed Findings of Fact, Conclusions of Law, and Proposed Decision and Order (Motion to Continue), requesting that the deadline for the filing of exceptions to the Proposed D & O scheduled for on or about May 2, 2019 be extended to June 4, 2019 due to conflicts in the union counsel's calendar.

On April 25, 2019, the Board issued Order No. 3491, Granting Complainant's Motion to Continue Deadline to File Exceptions to Proposed Decision and Order Adopting Respondents' Proposed Findings of Fact, Conclusions of Law, and Proposed Decision and Order, extending the deadline for the filing of exceptions to June 4, 2019.

On May 23, 2019, UPW filed Complainant's Motion to Continue Deadline to File Exceptions to Proposed Decision and Order Adopting Respondents' Proposed Findings of Fact, Conclusions of Law, and Proposed Decision and Order (2<sup>nd</sup> Motion to Continue), requesting that the deadline for filing of exceptions to the Proposed D & O currently scheduled for June 4, 2019 be extended to July 22, 2019 due to conflicts in union counsel's calendar.

On May 31, 2019, the Board issued Order No. 3510, Granting Complainant's Motion to Continue Deadline to File Exceptions to Proposed Decision and Order Adopting Respondents' Proposed Findings of Fact, Conclusions of Law, and Proposed Decision and Order; Notice of Hearing on Exceptions, extending the deadline for the filing of exceptions to July 22, 2019 and noticing a hearing on the exceptions filed for August 28, 2019.

On July 22, 2019, the UPW filed UPW's Exceptions to Proposed Findings of Fact, Conclusions of Law, and Decision and Order Filed April 22, 2019 and Errata to UPW's Exceptions to Proposed Findings of Fact, Conclusions of Law, and Decision and Order Filed April 22, 2019 Filed on July 22, 2019 (collectively, UPW Exceptions).

On August 28, 2019, the Board held the noticed hearing on the UPW Exceptions. At the conclusion of the hearing, the Board took the matter under advisement to render a final decision regarding the Proposed Findings of Fact, Conclusions of Law, and Proposed Decision and Order.


Upon hearing of the oral arguments presented on the UPW's Exceptions and a thorough review of the record in this matter, including all files, transcripts, exhibits, and briefs, the Board finds such Exceptions to be without merit. The Board adopts the Proposed Findings of Fact, Conclusions of Law, and Proposed Decision and Order attached hereto, as the Final Decision in this matter.

This case is closed.

DATED: Honolulu, Hawai'i, September 16, 2019.

HAWAI'I LABOR RELATIONS BOARD



  
\_\_\_\_\_  
MARCUS R. OSHIRO, Chair

  
\_\_\_\_\_  
SESNITA A.D. MOEPONO, Member

  
\_\_\_\_\_  
J.N. MUSTO, Member

Copies to:

Herbert R. Takahashi, Esq.

Jeffrey A. Keating, Deputy Attorney General

<sup>i</sup> HRS § 91-11 states:

**§91-11 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 such portions thereof as may be cited by the parties.

STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS,  
AFSCME, LOCAL 646, AFL-CIO,

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MARIE LADERTA, Director,  
Department of Human Resources  
Development, State of Hawai'i; and  
VALERIE PACHECO, Personnel  
Program Administrator, Department  
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State of Hawai'i,

Respondents.

CASE NO(S). CE-01-605a  
CE-10-605b

PROPOSED DECISION AND ORDER  
ADOPTING RESPONDENT'S PROPOSED  
FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND PROPOSED DECISION AND  
ORDER

PROPOSED DECISION AND ORDER ADOPTING  
RESPONDENTS' PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND PROPOSED ORDER AND DECISION

Hawai'i Labor Relations Board (Board) Members Marcus R. Oshiro, Sesnita A.D. Moepono, and J N. Musto did not participate in the hearings but have thoroughly reviewed the record in this matter, including the files, transcripts, and exhibits. Accordingly, pursuant to Hawai'i Revised Statutes (HRS) § 91-11,<sup>i</sup> the Board issues this Proposed Findings of Fact, Conclusions of Law and Proposed Decision and Order Adopting Respondents' Proposed Findings of Fact, Conclusions of Law, and Proposed Order and Decision, which is attached hereto.

On April 11, 2017, the Board held a status conference in the above-referenced matter.

Following the status conference, on that same date, the Board issued Order No. 3245 Stipulation of Undisputed Facts; Proposed Findings of Fact, Conclusions of Law, and Proposed Order and Decision; Deadlines for Submission. The Order stated, in relevant part:

1. The parties shall submit a Notice to the Board offering a Stipulation of Undisputed Facts by **4:30 p.m. on Monday, June 26, 2017**. If the Parties are unable to reach an agreement over such a Stipulation, they shall so notify the Board no later than the time and date set forth above.
2. The Parties shall each submit to the Board a statement of Proposed Findings of Facts, Conclusions of Law, and a Proposed Order and Decision in the matter of the above referenced cases by **4:30 p.m. on Monday, September 1, 2017**.

(Underlining and bold in original)

On June 26, 2017, the parties filed the Stipulation of Undisputed Facts.

On August 28, 2017, Respondents filed Respondent's Proposed Findings of Facts, Conclusions of Law, and Proposed Order and Decision.

On August 29, 2017, UPW filed First Stipulation and Order on Filing Proposed Findings of Fact [sic] and Proposed Order and Decision in which the parties agreed to extend the deadline for the submission of Proposed Findings of Fact, Conclusions of Law, and Proposed Order and Decision in this case from September 1, 2017 to September 18, 2017 (First Stipulation). The Board approved the First Stipulation by Order No. 3290, issued on August 29, 2017.

On September 15, 2017, UPW filed Second Stipulation and Order on Filing Proposed Findings of Fact [sic] and Proposed Order and Decision in which the parties agreed to extend the deadline for submission of the Proposed Findings of Fact, Conclusions of Law, and Proposed Order and Decision from September 15, 2017 to October 16, 2017 (Second Stipulation). The Board approved the Second Stipulation by Order No. 3292, issued on September 15, 2017.

On September 15, 2017, UPW filed UPW's Proposed Findings of Fact and Conclusions of Law and Proposed Order and Decision.

Based on a review of the full record herein, the Board hereby adopts Respondents' Proposed Findings of Fact, Conclusions of Law and Proposed Order and Decision, attached hereto, as its Proposed Decision and Order.

FILING OF EXCEPTIONS

Any person adversely affected by the Proposed Order and Decision 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 should any party file exceptions, and the parties will be notified thereof.

DATED: Honolulu, Hawai'i, April 22, 2019.

HAWAI'I LABOR RELATIONS BOARD



\_\_\_\_\_  
MARCUS R. OSHIRO, Chair

*Sesnita A. D. Moepono*  
\_\_\_\_\_  
SESNITA A.D. MOEPONO, Member

*J. N. Musto*  
\_\_\_\_\_  
J. N. MUSTO, Member

Copies to:

Rebecca Covert, Esq.  
Jeffrey A. Keating, Deputy Attorney General

<sup>i</sup> HRS § 91-11 states:

**§91-11 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 such portions thereof as may be cited by the parties.

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STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS, AFSCME,  
LOCAL 646, AFL-CIO,

Complainant,

and

MARIE LADERTA, Director, Department of  
Human Resources Development, State of  
Hawaii and VALERIE PACHECO, Personnel  
Program Administrator, Department of  
Human Resources Development, State of  
Hawaii,

Respondents.

CASE NOS. CE-01-605a  
CE-10-605b

RESPONDENTS' PROPOSED  
FINDINGS OF FACTS, CONCLUSIONS  
OF LAW, AND PROPOSED ORDER  
AND DECISION; CERTIFICATE OF  
SERVICE

RESPONDENTS' PROPOSED FINDINGS OF FACTS, CONCLUSIONS OF LAW,  
AND PROPOSED ORDER AND DECISION

Respondents' MARIE LADERTA, Director, Department of Human Resources  
Development, State of Hawaii and VALERIE PACHECO, Personnel Program Administrator,

Department of Human Resources Development, State of Hawaii ("Respondents"), by and

through their attorneys, Douglas S. Chin, Attorney General, State of Hawaii, and Deputy Attorneys General James E. Halvorson and Jeffrey A. Keating, hereby submit the Respondents' Proposed Findings of Facts, Conclusions of Law, and Proposed Decision and Order with the Hawaii Labor Relations Board ("Board").

### **FINDINGS OF FACT**

1. On September 2, 2005, the Complainant ("UPW") filed a Prohibited Practice Complaint ("PPC") with the Board.
2. On September 14, 2005, the Respondents ("DHRD") filed an Answer to the PPC.
3. On February 8, 2006, the Respondents filed a Motion to Dismiss Complaint.
4. On February 14, 2006, the UPW filed a Memorandum in Opposition to the Motion to Dismiss Complaint.
5. On March 9, 2006, the UPW filed a First Amended Prohibited Practice Complaint.
6. On March 13, 2006, the Respondents filed an Answer to the First Amended Prohibited Practice Complaint.
7. A hearing on the complaint was held before the Board on the following dates: March 6, 2006; March 9, 2006; March 10, 2006; March 14, 2006; and June 22, 2006.
8. At the hearing on the complaint the following witnesses testified: Roy Yamamoto; Valerie Pacheco; David Mikonczyk; Steve Miyasaka; and Dayton Nakanelua.
9. On August 14, 2006, the Respondents submitted a Post-Hearing Brief.
10. On August 14, 2006, the UPW submitted a Memorandum of Fact and Law.
11. The Respondents set forth the issues to the Board as follows:



Whether the Respondents, by entering into global workers' compensation settlement agreements, willfully committed or engaged in any prohibited practice(s) as alleged in the Prohibited Practice Complaint in violation of Sections 89-13(a)(1), (5), and (7), Hawaii Revised Statutes ("HRS").

Whether the Board has jurisdiction to decide a dispute concerning the Baruz, Basham, and Salangsang workers' compensation settlement agreements when the Director of Labor has original jurisdiction over such agreements pursuant to Hawaii Revised Statutes Chapter 386 Workers' Compensation Law.

12. The UPW alleged that the State of Hawaii, Department of Human Resources Development ("DHRD"), Employee Claims Division ("ECD"), had engaged in direct dealing with bargaining unit employees who entered into global workers' compensation settlement agreements.

13. The Union specifically challenged the Elizabeth Baruz, Michael Basham, and Wayne Salangsang workers' compensation settlement agreements.

14. Ms. Baruz, Mr. Basham, and Mr. Salangsang were all represented by attorneys in their workers' compensation settlement agreements.

15. The Baruz, Basham, and Salangsang workers' compensation settlement agreements were signed off on by the employees and their attorneys, by a representative of the State and the State's attorney, and were approved by the members of the Labor Appeals Board and by the Director of the Department of Labor.

16. The DHRD and the ECD is responsible for managing the Workers' Compensation cases for Department of Public Safety employees.

17. DHRD is authorized to enter into global settlement agreements on behalf of the Department of Public Safety ("PSD").

18. Steve Miyasaka, Deputy Attorney General, represented PSD in both the workers' compensation cases and the arbitration cases.

19. The UPW requested that the Board invalidate the Baruz, Basham, and Salangsang workers' compensation settlement agreements for three (3) reasons: No. 1, the Union alleges that the settlement agreements are contrary to Chapter 89, Hawaii Revised Statutes ("HRS"); No. 2, that the Baruz, Basham, and Salangsang settlement agreements were settled for inadequate consideration; and No. 3, that the settlement agreements are contrary to public policy because both DHRD and PSD knew of the substantial cost in giving out the reinstatement right, i.e., waiving the right to reemployment.

20. Section 386-73, HRS, Original Jurisdiction Over Controversies, states:

Unless otherwise provided, the director of labor and industrial relations shall have original jurisdiction over all controversies and disputes arising under this chapter. The decisions of the director shall be enforceable by the circuit court as provided in section 386-91. There shall be a right of appeal from the decisions of the director to the appellate board and thence to the intermediate appellate court, subject to chapter 602, as provided in sections 386-87 and 386-88, but in no case shall an appeal operate as a supersedeas or stay unless the appellate board or the appellate court so orders. (emphasis added).

21. The UPW alleged that the Baruz, Basham, and Salangsang workers' compensation settlement agreements impermissibly infringed upon the Union's rights under Chapter 89, HRS, by the State engaging in direct dealing with bargaining unit employees.

22. The UPW also alleged that the settlement agreements violated Chapter 386, HRS, Workers' Compensation Law, specifically Section 386-142, HRS.

23. Section 89-3, HRS, Rights of employees, states:

Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, including retiree health benefit contributions, and to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all such activities, except for having a payroll deduction equivalent to regular dues

remitted to an exclusive representative as provided in section 89-4. (emphasis added).

24. Employees have a right not to participate in Union activities including grievance and arbitration proceedings.

25. The UPW alleged that the Baruz, Basham, and Salangsang workers' compensation settlement agreements eliminated the Union's right to grieve.

26. The settlement agreements stated that the employee agreed to withdraw from participation in the notice of arbitration filed on the employee's behalf by the Union.

27. The UPW can proceed with the grievance and arbitration hearing without the employee's participation.

28. Employees have the "free will" to decide whether the employee wants to participate in the grievance arbitration process, resign from employment, or to settle the employee's workers' compensation case.

29. If an employee wants to settle a employee's workers' compensation claim, it is solely up to the employee on how he/she wants to settle the claim.

30. The Baruz, Basham, and Salangsang workers' compensation settlement agreements were global settlement agreements. As part of the global settlement the employee agreed to a wash of all claims and agreed to withdraw from participation in the grievance. As part of the global settlement and wash of all claims the employee was paid a sum of money and agreed to not seek re-employment with the State.

31. Steve Miyasaka, Deputy Attorney General, represented the Department of Public Safety and the Department of Human Resources Development in the Baruz, Basham, and Salangsang workers' compensation settlement agreements.

32. Mr. Miyasaka stated that in workers' compensation settlement agreements where there is also a pending grievance he would insert language in the settlement agreement regarding non-participation in that particular grievance as part of the waiver of reemployment rights. The waiver of grievance and arbitration participation is a rational corollary to the waiver of reemployment.

33. The Baruz, Basham, and Salangasang workers' compensation settlement agreements all contain provisions relating to a waiver of reemployment with the State.

34. Mr. Miyasaka noted that the purpose of the settlement agreements was that the employees no longer be employed by the State and not seek reemployment with the State in the future.

35. No one forced the employees to sign the settlement agreements, the employees were paid a sum of money pursuant to the settlement agreements, and the employees were all represented by attorneys in negotiating the settlement agreements.

36. Although Ms. Pacheco could not specifically recall any workers' compensation settlements that involved the waiver of participation in a grievance, DHRD often settles workers' compensation claims which include a waiver of reemployment rights under Section 386-142, HRS, of the workers' compensation statute. The waiver of participation in the grievance arbitration proceeding is merely an extension of the waiver of reemployment with the State.

37. The UPW alleged that the State engaged in direct dealing with bargaining unit employees however offered no evidence to support such an allegation, i.e., that the State dealt directly with the employees.

38. The evidence presented at the hearing showed that Mr. Miyasaka dealt exclusively with the attorneys representing Ms. Baruz, Mr. Basham, and Mr. Salangasang.

39. Ms. Baruz, Mr. Basham, and Mr. Salangsang were all provided with a sum of money in exchange for their waiver of reemployment with the State.

40. The UPW acknowledged at the hearing that employees have the right to settle their own workers' compensation cases and to waive reemployment with the State.

41. In the Baruz, Basham, and Salangsang workers' compensation settlement agreements, the State never settled the grievances with the individual employees. The employees merely agreed to withdraw from participation in the arbitration proceedings and the UPW can and did proceed with the grievance/arbitration hearing.

42. The UPW acknowledged at the hearing that Ms. Baruz, Mr. Basham, and Mr. Salangsang had every right to settle their workers' compensation cases and every right not to participate in the grievance arbitration process. The UPW can proceed with the grievance/arbitration hearing without the participation of the employee.

43. The UPW proceeded with the grievance/arbitration in UPW Case Nos. CU-04-19 to CU-04-45 before Arbitrator Paul S. Aoki.

44. On September 22, 2006, Arbitrator Aoki issued the Decision and Award and dismissed the grievances of Mr. Basham and Ms. Baruz because Mr. Basham and Ms. Baruz had entered into settle agreements with the State which specifically addressed claims pursuant to Chapter 378, HRS, and the settlements were reviewed by the Director of the Department of Labor and Industrial Relations. The terms of the settlement agreements precluded remedies arising out of the arbitration.

## **CONCLUSIONS OF LAW**

1. The Respondents, by entering into global Workers' Compensation settlement agreements, did not willfully commit or engage in any prohibited practice(s) and did not violate Sections 89-13(a)(1), (5), and (7), HRS.

2. The proper forum to decide a dispute concerning the Baruz, Basham, and Salangsang Workers' Compensation settlement agreements is with the Director of the Department Labor who has original jurisdiction over such agreements pursuant to HRS, Chapter 386 Workers' Compensation Law.

3. The Employer did not engage in direct dealing with UPW bargaining unit 01 or 10 members because the Employer communicated with the attorneys representing the employees in their Workers' Compensation cases.

4. Pursuant to Section 386-73, HRS, the Director of the Department of Labor has original jurisdiction over a dispute concerning the Baruz, Basham, and Salangsang Workers' Compensation settlement agreements.

5. Pursuant to Section 386-73, HRS, Original Jurisdiction Over Controversies,

Unless otherwise provided, the director of labor and industrial relations shall have original jurisdiction over all controversies and disputes arising under this chapter. The decisions of the director shall be enforceable by the circuit court as provided in section 386-91. There shall be a right of appeal from the decisions of the director to the appellate board and thence to the intermediate appellate court, subject to chapter 602, as provided in sections 386-87 and 386-88, but in no case shall an appeal operate as a supersedeas or stay unless the appellate board or the appellate court so orders. (emphasis added).

6. The Union has previously unsuccessfully argued in the arbitration forum that an arbitrator has jurisdiction over claims related to HRS Chapter 386 Workers' Compensation Law and HRS Chapter 368 Civil Rights Commission.

7. In the Matter of the Arbitration Between United Public Workers, AFSCME, Local 646, AFL-CIO and State of Hawaii, Department of Public Safety, Arbitrator James H. Hershey, dated March 10, 2006 (Grievance of Jock Aipoalani), Arbitrator Hershey noted that an Arbitrator is without authority or subject matter jurisdiction to revisit or in any manner amend or alter a Workers' Compensation award.

8. The same analysis would apply to a Workers' Compensation settlement agreement approved by the Labor Appeals Board and the Director of the Department of Labor.

9. When statutes such as HRS Chapter 386 provide a specific administrative scheme for prosecuting claims and the issuance of awards then those specific statutory mandates must be respected.

10. In the Matter of the Arbitration Between United Public Workers, Local 646, AFSME, AFL-CIO and State of Hawaii, Department of Public Safety, Arbitrator Mario R. Ramil, dated March 27, 2006 (Grievance of Debbie Passmore), Arbitrator Ramil concurred with Arbitrator Hershey's analysis as set forth above.

11. Arbitrator Ramil noted that for a discrimination complaint the uniform procedure to pursue such a complaint is set forth in HRS Chapter 368, Civil Rights Commission, and that the grievance procedure is not the appropriate forum to resolve such a dispute.

12. Pursuant to Section 89-3, HRS, public employees have "free will" including the right to not participate in grievance arbitration hearings, to settle their own Workers' Compensation cases, and to waive the right to reemployment with the State.

13. Pursuant to Section 89-3, HRS, Rights of employees,

Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, including retiree health benefit

contributions, and to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4. (emphasis added).

14. The Union acknowledged that employees have a right not to participate in Union activities including grievance and arbitration proceedings.

15. The Union erroneously alleged that the Baruz, Basham, and Salangsang Workers' Compensation settlement agreements eliminated the Union's right to grieve.

16. The settlement agreements merely stated that the employee agrees to withdraw from participation in the notice of arbitration filed on the employee's behalf by the Union and nothing precludes the Union from proceeding with the arbitration without the employee's participation.

17. Employees have the "free will" to decide whether the employee wants to participate in the grievance arbitration process, resign from employment, or to settle the employee's Workers' Compensation case.

18. If an employee wants to settle the employee's Workers' Compensation claim, it is solely up to the employee on how he/she wants to settle the claim.

19. The Baruz, Basham, and Salangsang Workers' Compensation settlement agreements were global settlement agreements where the employee agreed to a "wash" of all claims, agreed to withdraw from participation in the grievance, agreed to not seek reemployment with the State, and was paid a sum of money for agreeing to these conditions.

20. The waiver of participation in the grievance is a rational corollary to the waiver of reemployment especially where the Union is requesting as a remedy that the employee be reinstated.



21. No one forced the employees to sign the settlement agreements, the employees were paid a sum of money pursuant to the settlement agreements, and the employees were all represented by attorneys in negotiating the settlement agreements.

22. The evidence at the hearing showed that Mr. Miyasaka, the attorney representing the State in the Workers' Compensation settlement agreements, dealt exclusively with the attorneys representing Baruz, Basham, and Salangsang.

23. In the case of Sue Sun Won Wittig v. Allianz, A.G., et al., No. 26227, dated June 26, 2006, the Intermediate Court of Appeals for the State of Hawaii addressed the issue of whether a Workers' Compensation settlement agreement conditioned on a claimant's resignation from employment violates public policy.

24. The Intermediate Court of Appeals ruled that there is nothing wrong with a voluntary settlement that includes the employee's resignation as a condition particularly where the employee is offered additional compensation for resigning. A settlement on such terms may be attractive to the employee and serve the employee's interests.

25. The same analysis would apply not only to employees who resign from employment but also to employees who agree to a waiver of reemployment with the State. Baruz, Basham, and Salangsang were all provided with a sum of money in exchange for their resignations and waiver of reemployment with the State.

26. The Union acknowledged that employees have the right to settle their own Workers' Compensation cases and to waive reemployment with the State.

27. In the Baruz, Basham, and Salangsang Workers' Compensation settlement agreements, the State never settled the grievances with the individual employees. The

employees merely agreed to withdraw from participation in the grievance arbitration proceedings and the Union can and did proceed with the grievance arbitration proceedings.

28. The Union acknowledged that Baruz, Basham, and Salangsang had every right to settle their Workers' Compensation cases, every right not to participate in the grievance arbitration process, and that the Union can and did proceed with the arbitration.

29. The Union candidly admitted that the Union would not want an employee to withdraw from participation in a grievance arbitration proceeding because the Union's case would likely be stronger if the employee participated.

30. Even assuming that the Union's case would be stronger if the employee participated in the arbitration hearing the employee has the right of "free will" to not participate if the employee so chooses.

### **ORDER AND DECISION**

For the reasons stated above, the Union's prohibited practice complaint is dismissed in its entirety.

DATED: Honolulu, Hawaii, August 28, 2017.

/s/ Jeffrey A. Keating  
JEFFREY A. KEATING  
Deputy Attorney General  
Attorney for Respondents

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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Program Administrator, Department of  
Human Resources Development, State of  
Hawaii,

Respondents.

CASE NOS. CE-01-605a  
CE-10-605b

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing document was served via United States  
mail, postage pre-paid, to the following address:

Rebecca L. Covert, Esq.  
345 Queen Street, Suite 506  
Honolulu, Hawaii 96813

Attorney for Complainant

DATED: Honolulu, Hawaii, August 28, 2017.

/s/ Jeffrey A. Keating  
JEFFREY A. KEATING  
Deputy Attorney General

Attorney for Respondents

DOUGLAS S. CHIN 6465  
Attorney General of Hawaii

JAMES E. HALVORSON 5457  
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Attorneys for Respondents

STATE OF HAWAII

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RESPONDENTS' PROPOSED  
FINDINGS OF FACTS, CONCLUSIONS  
OF LAW, AND PROPOSED ORDER  
AND DECISION; CERTIFICATE OF  
SERVICE

RESPONDENTS' PROPOSED FINDINGS OF FACTS, CONCLUSIONS OF LAW,  
AND PROPOSED ORDER AND DECISION

Respondents' MARIE LADERTA, Director, Department of Human Resources  
Development, State of Hawaii and VALERIE PACHECO, Personnel Program Administrator,

Department of Human Resources Development, State of Hawaii ("Respondents"), by and

through their attorneys, Douglas S. Chin, Attorney General, State of Hawaii, and Deputy Attorneys General James E. Halvorson and Jeffrey A. Keating, hereby submit the Respondents' Proposed Findings of Facts, Conclusions of Law, and Proposed Decision and Order with the Hawaii Labor Relations Board ("Board").

### **FINDINGS OF FACT**

1. On September 2, 2005, the Complainant ("UPW") filed a Prohibited Practice Complaint ("PPC") with the Board.
2. On September 14, 2005, the Respondents ("DHRD") filed an Answer to the PPC.
3. On February 8, 2006, the Respondents filed a Motion to Dismiss Complaint.
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7. A hearing on the complaint was held before the Board on the following dates: March 6, 2006; March 9, 2006; March 10, 2006; March 14, 2006; and June 22, 2006.
8. At the hearing on the complaint the following witnesses testified: Roy Yamamoto; Valerie Pacheco; David Mikonczyk; Steve Miyasaka; and Dayton Nakanelua.
9. On August 14, 2006, the Respondents submitted a Post-Hearing Brief.
10. On August 14, 2006, the UPW submitted a Memorandum of Fact and Law.
11. The Respondents set forth the issues to the Board as follows:

Whether the Respondents, by entering into global workers' compensation settlement agreements, willfully committed or engaged in any prohibited practice(s) as alleged in the Prohibited Practice Complaint in violation of Sections 89-13(a)(1), (5), and (7), Hawaii Revised Statutes ("HRS").

Whether the Board has jurisdiction to decide a dispute concerning the Baruz, Basham, and Salangsang workers' compensation settlement agreements when the Director of Labor has original jurisdiction over such agreements pursuant to Hawaii Revised Statutes Chapter 386 Workers' Compensation Law.

12. The UPW alleged that the State of Hawaii, Department of Human Resources Development ("DHRD"), Employee Claims Division ("ECD"), had engaged in direct dealing with bargaining unit employees who entered into global workers' compensation settlement agreements.

13. The Union specifically challenged the Elizabeth Baruz, Michael Basham, and Wayne Salangsang workers' compensation settlement agreements.

14. Ms. Baruz, Mr. Basham, and Mr. Salangsang were all represented by attorneys in their workers' compensation settlement agreements.

15. The Baruz, Basham, and Salangsang workers' compensation settlement agreements were signed off on by the employees and their attorneys, by a representative of the State and the State's attorney, and were approved by the members of the Labor Appeals Board and by the Director of the Department of Labor.

16. The DHRD and the ECD is responsible for managing the Workers' Compensation cases for Department of Public Safety employees.

17. DHRD is authorized to enter into global settlement agreements on behalf of the Department of Public Safety ("PSD").

18. Steve Miyasaka, Deputy Attorney General, represented PSD in both the workers' compensation cases and the arbitration cases.

19. The UPW requested that the Board invalidate the Baruz, Basham, and Salangsang workers' compensation settlement agreements for three (3) reasons: No. 1, the Union alleges that the settlement agreements are contrary to Chapter 89, Hawaii Revised Statutes ("HRS"); No. 2, that the Baruz, Basham, and Salangsang settlement agreements were settled for inadequate consideration; and No. 3, that the settlement agreements are contrary to public policy because both DHRD and PSD knew of the substantial cost in giving out the reinstatement right, i.e., waiving the right to reemployment.

20. Section 386-73, HRS, Original Jurisdiction Over Controversies, states:

Unless otherwise provided, the director of labor and industrial relations shall have original jurisdiction over all controversies and disputes arising under this chapter. The decisions of the director shall be enforceable by the circuit court as provided in section 386-91. There shall be a right of appeal from the decisions of the director to the appellate board and thence to the intermediate appellate court, subject to chapter 602, as provided in sections 386-87 and 386-88, but in no case shall an appeal operate as a supersedeas or stay unless the appellate board or the appellate court so orders. (emphasis added).

21. The UPW alleged that the Baruz, Basham, and Salangsang workers' compensation settlement agreements impermissibly infringed upon the Union's rights under Chapter 89, HRS, by the State engaging in direct dealing with bargaining unit employees.

22. The UPW also alleged that the settlement agreements violated Chapter 386, HRS, Workers' Compensation Law, specifically Section 386-142, HRS.

23. Section 89-3, HRS, Rights of employees, states:

Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, including retiree health benefit contributions, and to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all such activities, except for having a payroll deduction equivalent to regular dues

remitted to an exclusive representative as provided in section 89-4. (emphasis added).

24. Employees have a right not to participate in Union activities including grievance and arbitration proceedings.

25. The UPW alleged that the Baruz, Basham, and Salangsang workers' compensation settlement agreements eliminated the Union's right to grieve.

26. The settlement agreements stated that the employee agreed to withdraw from participation in the notice of arbitration filed on the employee's behalf by the Union.

27. The UPW can proceed with the grievance and arbitration hearing without the employee's participation.

28. Employees have the "free will" to decide whether the employee wants to participate in the grievance arbitration process, resign from employment, or to settle the employee's workers' compensation case.

29. If an employee wants to settle a employee's workers' compensation claim, it is solely up to the employee on how he/she wants to settle the claim.

30. The Baruz, Basham, and Salangsang workers' compensation settlement agreements were global settlement agreements. As part of the global settlement the employee agreed to a wash of all claims and agreed to withdraw from participation in the grievance. As part of the global settlement and wash of all claims the employee was paid a sum of money and agreed to not seek re-employment with the State.

31. Steve Miyasaka, Deputy Attorney General, represented the Department of Public Safety and the Department of Human Resources Development in the Baruz, Basham, and Salangsang workers' compensation settlement agreements.



32. Mr. Miyasaka stated that in workers' compensation settlement agreements where there is also a pending grievance he would insert language in the settlement agreement regarding non-participation in that particular grievance as part of the waiver of reemployment rights. The waiver of grievance and arbitration participation is a rational corollary to the waiver of reemployment.

33. The Baruz, Basham, and Salangang workers' compensation settlement agreements all contain provisions relating to a waiver of reemployment with the State.

34. Mr. Miyasaka noted that the purpose of the settlement agreements was that the employees no longer be employed by the State and not seek reemployment with the State in the future.

35. No one forced the employees to sign the settlement agreements, the employees were paid a sum of money pursuant to the settlement agreements, and the employees were all represented by attorneys in negotiating the settlement agreements.

36. Although Ms. Pacheco could not specifically recall any workers' compensation settlements that involved the waiver of participation in a grievance, DHRD often settles workers' compensation claims which include a waiver of reemployment rights under Section 386-142, HRS, of the workers' compensation statute. The waiver of participation in the grievance arbitration proceeding is merely an extension of the waiver of reemployment with the State.

37. The UPW alleged that the State engaged in direct dealing with bargaining unit employees however offered no evidence to support such an allegation, i.e., that the State dealt directly with the employees.

38. The evidence presented at the hearing showed that Mr. Miyasaka dealt exclusively with the attorneys representing Ms. Baruz, Mr. Basham, and Mr. Salangang.

39. Ms. Baruz, Mr. Basham, and Mr. Salangsang were all provided with a sum of money in exchange for their waiver of reemployment with the State.

40. The UPW acknowledged at the hearing that employees have the right to settle their own workers' compensation cases and to waive reemployment with the State.

41. In the Baruz, Basham, and Salangsang workers' compensation settlement agreements, the State never settled the grievances with the individual employees. The employees merely agreed to withdraw from participation in the arbitration proceedings and the UPW can and did proceed with the grievance/arbitration hearing.

42. The UPW acknowledged at the hearing that Ms. Baruz, Mr. Basham, and Mr. Salangsang had every right to settle their workers' compensation cases and every right not to participate in the grievance arbitration process. The UPW can proceed with the grievance/arbitration hearing without the participation of the employee.

43. The UPW proceeded with the grievance/arbitration in UPW Case Nos. CU-04-19 to CU-04-45 before Arbitrator Paul S. Aoki.

44. On September 22, 2006, Arbitrator Aoki issued the Decision and Award and dismissed the grievances of Mr. Basham and Ms. Baruz because Mr. Basham and Ms. Baruz had entered into settle agreements with the State which specifically addressed claims pursuant to Chapter 378, HRS, and the settlements were reviewed by the Director of the Department of Labor and Industrial Relations. The terms of the settlement agreements precluded remedies arising out of the arbitration.

## **CONCLUSIONS OF LAW**

1. The Respondents, by entering into global Workers' Compensation settlement agreements, did not willfully commit or engage in any prohibited practice(s) and did not violate Sections 89-13(a)(1), (5), and (7), HRS.

2. The proper forum to decide a dispute concerning the Baruz, Basham, and Salangsang Workers' Compensation settlement agreements is with the Director of the Department Labor who has original jurisdiction over such agreements pursuant to HRS, Chapter 386 Workers' Compensation Law.

3. The Employer did not engage in direct dealing with UPW bargaining unit 01 or 10 members because the Employer communicated with the attorneys representing the employees in their Workers' Compensation cases.

4. Pursuant to Section 386-73, HRS, the Director of the Department of Labor has original jurisdiction over a dispute concerning the Baruz, Basham, and Salangsang Workers' Compensation settlement agreements.

5. Pursuant to Section 386-73, HRS, Original Jurisdiction Over Controversies,

Unless otherwise provided, the director of labor and industrial relations shall have original jurisdiction over all controversies and disputes arising under this chapter. The decisions of the director shall be enforceable by the circuit court as provided in section 386-91. There shall be a right of appeal from the decisions of the director to the appellate board and thence to the intermediate appellate court, subject to chapter 602, as provided in sections 386-87 and 386-88, but in no case shall an appeal operate as a supersedeas or stay unless the appellate board or the appellate court so orders. (emphasis added).

6. The Union has previously unsuccessfully argued in the arbitration forum that an arbitrator has jurisdiction over claims related to HRS Chapter 386 Workers' Compensation Law and HRS Chapter 368 Civil Rights Commission.

7. In the Matter of the Arbitration Between United Public Workers, AFSCME, Local 646, AFL-CIO and State of Hawaii, Department of Public Safety, Arbitrator James H. Hershey, dated March 10, 2006 (Grievance of Jock Aipoalani), Arbitrator Hershey noted that an Arbitrator is without authority or subject matter jurisdiction to revisit or in any manner amend or alter a Workers' Compensation award.

8. The same analysis would apply to a Workers' Compensation settlement agreement approved by the Labor Appeals Board and the Director of the Department of Labor.

9. When statutes such as HRS Chapter 386 provide a specific administrative scheme for prosecuting claims and the issuance of awards then those specific statutory mandates must be respected.

10. In the Matter of the Arbitration Between United Public Workers, Local 646, AFSME, AFL-CIO and State of Hawaii, Department of Public Safety, Arbitrator Mario R. Ramil, dated March 27, 2006 (Grievance of Debbie Passmore), Arbitrator Ramil concurred with Arbitrator Hershey's analysis as set forth above.

11. Arbitrator Ramil noted that for a discrimination complaint the uniform procedure to pursue such a complaint is set forth in HRS Chapter 368, Civil Rights Commission, and that the grievance procedure is not the appropriate forum to resolve such a dispute.

12. Pursuant to Section 89-3, HRS, public employees have "free will" including the right to not participate in grievance arbitration hearings, to settle their own Workers' Compensation cases, and to waive the right to reemployment with the State.

13. Pursuant to Section 89-3, HRS, Rights of employees,

Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, including retiree health benefit

contributions, and to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4. (emphasis added).

14. The Union acknowledged that employees have a right not to participate in Union activities including grievance and arbitration proceedings.

15. The Union erroneously alleged that the Baruz, Basham, and Salangsang Workers' Compensation settlement agreements eliminated the Union's right to grieve.

16. The settlement agreements merely stated that the employee agrees to withdraw from participation in the notice of arbitration filed on the employee's behalf by the Union and nothing precludes the Union from proceeding with the arbitration without the employee's participation.

17. Employees have the "free will" to decide whether the employee wants to participate in the grievance arbitration process, resign from employment, or to settle the employee's Workers' Compensation case.

18. If an employee wants to settle the employee's Workers' Compensation claim, it is solely up to the employee on how he/she wants to settle the claim.

19. The Baruz, Basham, and Salangsang Workers' Compensation settlement agreements were global settlement agreements where the employee agreed to a "wash" of all claims, agreed to withdraw from participation in the grievance, agreed to not seek reemployment with the State, and was paid a sum of money for agreeing to these conditions.

20. The waiver of participation in the grievance is a rational corollary to the waiver of reemployment especially where the Union is requesting as a remedy that the employee be reinstated.

21. No one forced the employees to sign the settlement agreements, the employees were paid a sum of money pursuant to the settlement agreements, and the employees were all represented by attorneys in negotiating the settlement agreements.

22. The evidence at the hearing showed that Mr. Miyasaka, the attorney representing the State in the Workers' Compensation settlement agreements, dealt exclusively with the attorneys representing Baruz, Basham, and Salangsang.

23. In the case of Sue Sun Won Wittig v. Allianz, A.G., et al., No. 26227, dated June 26, 2006, the Intermediate Court of Appeals for the State of Hawaii addressed the issue of whether a Workers' Compensation settlement agreement conditioned on a claimant's resignation from employment violates public policy.

24. The Intermediate Court of Appeals ruled that there is nothing wrong with a voluntary settlement that includes the employee's resignation as a condition particularly where the employee is offered additional compensation for resigning. A settlement on such terms may be attractive to the employee and serve the employee's interests.

25. The same analysis would apply not only to employees who resign from employment but also to employees who agree to a waiver of reemployment with the State. Baruz, Basham, and Salangsang were all provided with a sum of money in exchange for their resignations and waiver of reemployment with the State.

26. The Union acknowledged that employees have the right to settle their own Workers' Compensation cases and to waive reemployment with the State.

27. In the Baruz, Basham, and Salangsang Workers' Compensation settlement agreements, the State never settled the grievances with the individual employees. The

employees merely agreed to withdraw from participation in the grievance arbitration proceedings and the Union can and did proceed with the grievance arbitration proceedings.

28. The Union acknowledged that Baruz, Basham, and Salangsang had every right to settle their Workers' Compensation cases, every right not to participate in the grievance arbitration process, and that the Union can and did proceed with the arbitration.

29. The Union candidly admitted that the Union would not want an employee to withdraw from participation in a grievance arbitration proceeding because the Union's case would likely be stronger if the employee participated.

30. Even assuming that the Union's case would be stronger if the employee participated in the arbitration hearing the employee has the right of "free will" to not participate if the employee so chooses.

### **ORDER AND DECISION**

For the reasons stated above, the Union's prohibited practice complaint is dismissed in its entirety.

DATED: Honolulu, Hawaii, August 28, 2017.

/s/ Jeffrey A. Keating  
JEFFREY A. KEATING  
Deputy Attorney General  
Attorney for Respondents

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS, AFSCME,  
LOCAL 646, AFL-CIO,

Complainant,

and

MARIE LADERTA, Director, Department of  
Human Resources Development, State of  
Hawaii and VALERIE PACHECO, Personnel  
Program Administrator, Department of  
Human Resources Development, State of  
Hawaii,

Respondents.

CASE NOS. CE-01-605a  
CE-10-605b

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing document was served via United States  
mail, postage pre-paid, to the following address:

Rebecca L. Covert, Esq.  
345 Queen Street, Suite 506  
Honolulu, Hawaii 96813

Attorney for Complainant

DATED: Honolulu, Hawaii, August 28, 2017.

/s/ Jeffrey A. Keating  
JEFFREY A. KEATING  
Deputy Attorney General

Attorney for Respondents