

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

STACY K. PAIO; DAYTON YOSHIDA;
ERNEST SUGUITAN; SAMUEL KAE0;
DONNELL ADAMS; LONNIE A.
MERRITT; MITSUO NAKAMOTO; ARDEN
D. COSTALES; WALLACE KAHAPEA; and
EMOSI MANAIA SEVAO,

Complainants,

and

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

Respondent.

CASE NO. 16-CU-10-344

ORDER NO. 3471

MINUTE ORDER DENYING UNITED
PUBLIC WORKERS, AFSCME, LOCAL
646, AFL-CIO'S MOTION FOR BOARD
RULING AND MOTIONS TO DISMISS
COMPLAINT AND DIRECTING PARTIES
TO SUBMIT POST-HEARING BRIEFS

In the Matter of

FERN KATHRYN WHEELLESS,

Complainant,

and

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

Respondent.

CASE NO. 16-CU-10-345

**MINUTE ORDER DENYING UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO'S MOTION FOR BOARD RULING AND MOTIONS
TO DISMISS AND DIRECTING THE PARTIES TO FILE POST-HEARING BRIEFS**

On October 12, 2016, and October 16, 2016, Complainants STACY K. PAIO; DAYTON YOSHIDA; ERNEST SUGUITAN; SAMUEL KAE0; DONNELL ADAMS; LONNIE A. MERRITT; MITSUO NAKAMOTO; ARDEN D. COSTALES; WALLACE KAHAPEA; and EMOSI MANAIA SEVAO, self-represented litigants (SRLs) (collectively, Complainants) filed Prohibited Practice Complaints in Case No. 16 CU-10-344 against Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Respondent, UPW, or Union) (16-CU-10-344 Complaints).

On October 19, 2016, FERN KATHRYN WHEELLESS, SRL, (Complainant or Wheelless and Complainants collectively with the 16 CU-10-344 Complainants) filed a Prohibited Practice Complaint in Case No. 16-CU-10-345, against UPW (16-CU-10-345 Complaint and collectively with 16-CU-10-344 Complaints referred to as "Complaints").

In both Case Nos. 16-CU-10-344 and 16-CU-10-345, Complainants allege, among other things, that the UPW committed Prohibited Practices by entering into an agreement with the Department of Public Safety (PSD or Employer) that violates "...Section 89-13 Prohibited Practices; evidence of bad faith by [(a)](8) and (b)(5) violating the terms of a collective bargaining unit (Unit 10 contract)." As relevant facts, Complainants allege:

The Unit 10 contract (July 1, 2013 - June 30, 2017) subsection 26.12 specifically states "The employer shall endeavor to assign overtime work on a fair and equitable basis giving due consideration to the needs of the work operation".

The UPW and the Public Safety Management entered an agreement to reduce overtime by excluding one class of workers [adult correctional officers] (ACO IV Sergeants) from the overtime equation. ACO V (Lieutenants) and ACO III (correctional staff) are still allowed to work the overtime. ACO III's are to be temporarily assigned to all overtime openings for ACO IVs. This is a violation of HRS 89-9(d) which states "the employer and the exclusive representative shall not agree to any proposal which would be inconsistent with the merit principle or the principle of equal pay for equal work [pursuant] to Section 76-1....". Past practice was that when adequate staffing allowed [temporary assignment] TA assignment of ACO III to IV without creating overtime, but allow ACO IV work when overtime would occur.

Continued: This practice denies Sergeants equitable access to overtime work and thereby discriminates against them for fair and equitable pay. This practice is so

bizarre that they are forcing ACO III staff to involuntary hold-backs and working them 16 hour shifts repeatedly to the point of exhaustion, even though there are ACO IV staff requesting and willing to work the shifts. This practice endangers the good operation of the facility and the safety of inmates, staff and the public.

Equally important is the fact that the practice does not save money. If you TA up an ACO III to ACO IV you pay them the ACO IV pay. If doing so creates overtime work to fill the post they left vacant, you are paying an ACO III overtime to cover than post. So you pay overtime plus TA pay instead of simply paying overtime to an ACO IV.

These are examples of the problems associated with this practice. Morale issues and security risks from frequent and extended lockdown of inmates are others.

On October 24, 2016, in Case No. 16 CU-10-344, Respondent UPW filed MOTION TO DISMISS (16-CU-10-344 Motion to Dismiss) with the Board, which among other things, asserted lack of jurisdiction due to untimely filing under Hawaii Revised Statutes (HRS) § 377-9(l) and Hawaii Administrative Rules (HAR) § 12-42-42(a)(2), failure to state a hybrid claim for wilfull breaches of the duty of fair representation by the arbitrary or bad faith conduct of the union and of the collective bargaining agreement by the employer, and lack of standing to represent the interest of the employer under the management rights clause HRS § 89-9(d).

On October 26, 2016, UPW filed a Supplemental Submission in Support of Motion to Dismiss Complaint Filed on October 24, 2016.

On October 28, 2016, in Case No. 16 CU-10-345, the Respondent filed with the Board a MOTION TO DISMISS (16-CU-10-345 Motion to Dismiss and collectively with 16-CU-10-344 Motion to Dismiss referred to as “Motions to Dismiss”) based on similar grounds to the 16-CU-10-344 Motion to Dismiss.

On November 9, 2016, the Board issued Order No. 3207, which consolidated Case Nos. 16 CU-10-344 and 16 CU-10-345.

On November 10, 2016, the Union filed Supplemental Submissions by Respondent in Support of Motions to Dismiss Complaint Filed October 24, & 27, 2016, which included declarations that the UPW asserted provided relevant facts regarding untimeliness of the Complaints, lack of Board jurisdiction, and failure to exhaust.

On November 14, 2016, UPW filed a Supplemental Submission by Respondent in Support of Motion to Dismiss Complaint Filed October 24 & 27, 2016 and Respondent’s First Supplemental Memorandum in Support of Motions to Dismiss Complaints.

On November 17, 2016, Complainants filed Opposition to [Respondent's] Motion(s) to Dismiss the Complaint Filed October 24 and 27, 2016. In opposing the Motions to Dismiss, Complainants set forth, among other things, the following facts: on June 12, 2015 a Settlement Agreement entitled SETTLEMENT AGREEMENT (JUNE 12, 2015) ON TEMPORARY ASSIGNMENT TO ACO SUPERVISING POSITIONS (SA) was entered into by the Department of Safety, State of Hawai'i (PSD) and UPW; a grievance was filed on July 14, 2015 regarding the SA by Sgt. Jonathan Taum (Taum); there was no response to the July 14, 2015 grievance; although the overtime (OT) for sergeants at Hawai'i Community Correction Center (HCCC) shifted to the weekends, it did not drop remarkably; there seemed to be confusion involving UPW representative John Sloan and Warden Cabreros regarding the OT for sergeants; OT began to drop off in July 2016 with limited OT until September 16, 2016; and Sergeants filed the Complaint on October [12, 17, and 19]. Regarding the Taum grievance, Complainants assert that the grievance stands without response. Complainants further contend that the SA resulted from grievances specific to Halawa Correctional Facility and Women's Community Correctional Center, which should not have been forced on all the units because there are substantial differences between HCCC and those facilities. Accordingly, Complainants argue that HCCC should be allowed to continue to function as it had been.

More specifically, regarding the timeliness issue, Complainants argue that the Complaints were filed in a timely manner. Regarding the "culpability" issue, Complainants contend that the Union went along with a scheme that violates the contract or denies one class of employees from contractual rights or benefits expressed by the contract. Further, Complainants take the position that the Board has jurisdiction over these Complaints because the Union has declined and refused to file grievances and indicated that the union members should know that there are other means to file such grievances. Finally, that Complainants assert that the parties violated HRS § 89-9 by agreeing to a proposal inconsistent with merit principles or equal pay for equal work pursuant to HTS § 76-1 thereby discriminating against the ACO IVs, which impacted ACO Vs (difficulty in effectively filling the watch) and ACO IIIs (involuntary holdbacks, exhaustion, and danger to staff, inmates, and the public).

On November 18, 2016, UPW filed Respondent's Reply Brief in Support of Motion to Dismiss Complaints (Reply). In the Reply, UPW took the position, among other things, that the claims against UPW and PSD accrued on July 14, 2015, the date on which Taum submitted his grievance on behalf of all the Complainants regarding the SA. Further, UPW argues that a union does not breach the duty of fair representation by negotiating terms and conditions more favorable for certain employees in the bargaining unit over others, and the labor board is not authorized "to substitute its own view of the proper bargain for that reached by the union." Finally, Complainants assert that the criteria and procedures governing TA do not violate the HRS § 89-9(d) merit principles because the legislature granted further latitude to negotiate over the criteria and procedures governing "assignments" and a wide range of personnel actions.

The Board held hearings on the merits (HOM) on November 21 and 22, 2016 and on May 22, 2017 in the consolidated cases.

At the November 21, 2017 HOM, the Board heard oral argument on the Motions to Dismiss.

On November 22, 2016, the Union filed UPW's Motion for Judgment on Partial Findings and for Other Appropriate Relief.

On December 15, 2016, UPW filed a Memorandum in Support of UPW's Motion for Judgment on Partial Findings and for Other Appropriate Relief.

On December 23, 2016, Complainants filed an Opposition to UPW's Motion for [Judgment] on Partial Findings and for Other Appropriate Relief.

On April 25, 2017, the Board issued Order No. 3247 Order Denying UPW's Motion for Judgment on Partial Findings and for Other Appropriate Relief and Setting the Case for Further Hearing on the Merits.

On May 24, 2017, the UPW filed a Motion for Board Ruling Granting Respondent's October 24, 2016 Motion to Dismiss Complaint (Motion for Board Ruling). This Motion for Board Ruling requested that the Board grant the 16-CU-10-344 Motion to Dismiss for lack of jurisdiction due to untimely filing and failure to exhaust contractual remedies. In support, UPW contends that the testimony presented at the HOM established that Complainants failed to meet their burden of proving that the Board has jurisdiction of the Complaints, as required by HAR § 12-48-8(g)(16), based on the timeliness of the Complaints and Complainants' exhaustion of their contractual remedies.

On June 6, 2017, the Union filed a Motion to Extend the Deadline for Filing of Post Hearing Briefs Until After A Ruling on Respondent's May 24, 2017 Motion. The Motion to Extend was granted by the Board on June 23, 2017 by Order No. 3270.

On July 31, 2017, the UPW filed Respondent's Supplemental Submission and Memorandum in Support of Motion for Board Ruling Granting Respondent's October 24, 2016 Motion to Dismiss Complaint.

Based on the pleadings and record in this case, and the arguments made by the parties, the Board denies the UPW's Motion for Board Ruling and the underlying Motions to Dismiss. The reasons for the denials of the Motion for Board Ruling and the Motions to Dismiss will be fully addressed and incorporated in the final Decision and Order rendered in this case.

Pursuant to HAR § 12-42-8(g)(17)(C) of the Board's rules, the “[B]oard may direct ...the **filing of briefs**...when it deems the submission of briefs...is warranted by the nature of the proceeding or the particular issues therein.” (Emphasis added) Accordingly, the Board directs Complainants and UPW to file and serve on the opposing party simultaneous post-hearing briefs, **no later than April 26, 2019 at 4:30 p.m.**

DATED: Honolulu, Hawai‘i, _____.

HAWAI‘I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copies sent to:

Fern Kathryn Wheelless, Representative for Complainants
Herbert R. Takahashi, Esq.

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

STACY K. PAIO; DAYTON YOSHIDA;
ERNEST SUGUITAN; SAMUEL KAE0;
DONNELL ADAMS; LONNIE A.
MERRITT; MITSUO NAKAMOTO;
ARDEN D. COSTALES; WALLACE
KAHAPEA; and EMOSI MANAIA
SEVAO,

Complainants,

and

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

Respondent.

CASE NO. 16-CU-10-344

ERRATA TO ORDER NO. 3471

MINUTE ORDER DENYING UNITED
PUBLIC WORKERS, AFSCME, LOCAL
646, AFL-CIO'S MOTION FOR BOARD
RULING AND MOTIONS TO DISMISS
COMPLAINT AND DIRECTING
PARTIES TO SUBMIT POST-
HEARING BRIEFS

In the Matter of

FERN KATHRYN WHEELESS,

Complainant,

and

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

Respondent

CASE NO. 16-C-10-345

ERRATA TO ORDER NO. 3471 MINUTE ORDER DENYING
UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO'S
MOTION FOR BOARD RULING AND MOTIONS TO DISMISS
COMPLAINT AND DIRECTING PARTIES TO SUBMIT POST-HEARING BRIEFS

There is an inadvertent typographical error on page five (5) of Order No. 3471 Minute Order Denying United Public Workers, AFSCME, Local 646, AFL-CIO's Motion for Board Ruling and Motions to Dismiss Complaint and Directing Parties to Submit Post-Hearing Briefs. On page five (5) of this Order, the line reads:

At the November 21, 2017 HOM, the Board heard oral argument on the Motions to Dismiss.

The line on page five (5) should read:

At the November 21, 2016 HOM, the Board heard oral argument on the Motions to Dismiss.

(Correction emphasized.)

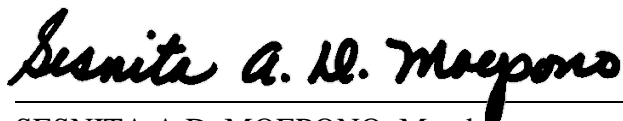
The Board apologizes for any inconvenience caused by this error.

DATED: Honolulu, Hawai'i, April 12, 2019.

HAWAII LABOR RELATIONS BOARD



MARCUS R. OSHIRO, Chair



SESNITA A.D. MOEPONO, Member



J N. MUSTO, Member



Copies sent to:

Fern Kathryn Wheelless, Representative for complainants
Herbert R. Takahashi, Esq.