STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

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| In the Matter of<br><br>STACY K. PAIO; DAYTON YOSHIDA; ERNEST SUGUITAN; SAMUEL KAEO; DONNELL ADAMS; LONNIE A. MERRITT; MITSUO NAKAMOTO; ARDEN D. COSTALES; WALLACE KAHAPEA; and EMOSI MANAIA SEVAO,<br><br>Complainants,<br><br>and<br><br>UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,<br><br>Respondent. | CASE NO. 16-CU-10-344<br><br>SECOND ERRATA TO DECISION NO. 497 FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER |
| In the Matter of<br><br>FERN KATHRYN WHEELESS,<br><br>Complainant,<br><br>and<br><br>UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,<br><br>Respondent. | CASE NO. 16-CU-10-345 |

SECOND ERRATA TO DECISION NO. 497 FINDINGS OF FACT,
CONCLUSIONS OF LAW, DECISION AND ORDER

On February 21, 2020, the Hawai‘i Labor Relations Board (Board) issued Decision No. 497 Findings of Fact, Conclusions of Law, Decision and Order (Decision No. 497).

On March 4, 2020, the Board issued Errata to Decision No. 497 Findings of Fact, Conclusions of Law, Decision and Order.

The Board further corrects Decision No. 497 as follows.

In Decision No. 497, page 34, the second to the last full paragraph, an endnote 6 was inadvertently omitted. The second to the last full paragraph on page 34 should read as follows:

> There is no dispute that the SA is a written agreement reached by PSD, a public employer, and UPW, the BU 10 exclusive representative, after good faith negotiations. Further, the SA provides for OT and TA, which obviously are issues falling within "wages, hours…and other terms and conditions of employment[.]" The Board concludes that, as a written agreement between the employer PSD and the exclusive representative extending to the entire BU 10, the SA falls within the written agreements set forth in HRS § 89-10(a) as a written agreement reached as a result of "collective bargaining".[vi]

Endnote 6 should be included on page 40 and read as follows:

> [vi] In so ruling, the Board recognizes that the SA further lacks an expiration date in compliance with HRS § 89-10(c), which provides, in relevant part:
>
> > …the public employer and the exclusive representative for each bargaining unit shall by mutual agreement include provisions in the collective bargaining agreement for that bargaining unit for an expiration date which will be on June 30th of an odd-numbered year.
>
> (Emphasis added)
>
> The Board finds that this lack of "an expiration date of June 30th of an odd-numbered year[]" in compliance with HRS § 89-10(c) is another ground for further finding that the SA is a collective bargaining agreement invalid under HRS § 89-10.

Decision No. 497, page. 35 contains an inadvertent typographical error in the fourth paragraph. Page 35, paragraph four should read as follows:

Second, the SA's lack of expiration date also means that the SA cannot be deemed a "supplemental agreement" because under HRS § 89-6(e), "any supplemental agreement reached between the employer and the exclusive representative shall not extend beyond the terms of the applicable collective bargaining agreement[.]"

In all other respects, Decision No. 497, as corrected by the Errata rendered on March 4, 2020 and this Second Errata, remains in effect and unchanged. The Board apologizes for any inconvenience caused by this error.

DATED: Honolulu, Hawai'i, March 6, 2020.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J.N. MUSTO, Member

Copies sent to:

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

STATE OF HAWAIʻI

HAWAIʻI LABOR RELATIONS BOARD

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| In the Matter of<br><br>STACY K. PAIO; DAYTON YOSHIDA; ERNEST SUGUITAN; SAMUEL KAEO; DONNELL ADAMS; LONNIE A. MERRITT; MITSUO NAKAMOTO; ARDEN D. COSTALES; WALLACE KAHAPEA; and EMOSI MANAIA SEVAO,<br><br>Complainants,<br><br>and<br><br>UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,<br><br>Respondent. | CASE NO. 16-CU-10-344<br><br>ERRATA TO DECISION NO. 497 FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER |
| In the Matter of<br><br>FERN KATHRYN WHEELESS,<br><br>Complainant,<br><br>and<br><br>UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,<br><br>Respondent | CASE NO. 16-CU-10-345 |

ERRATA TO DECISION NO. 497 FINDINGS OF FACT,
CONCLUSIONS OF LAW, DECISION AND ORDER

On February 21, 2020, the Hawai‘i Labor Relations Board (Board) issued Decision No. 497 Findings of Fact, Conclusions of Law, Decision and Order (Decision No. 497).

Decision No. 497, p. 16 contains an inadvertent typographical error in paragraph 6. of the quotation of the Settlement Agreement. Paragraph 6 should read as follows:

> 6. The UNION agrees to withdraw Class Grievances JM-11-15 and MN-13-01 from arbitration.

In addition, Decision No. 497, p. 39, paragraph 5 contains an inadvertent error erroneously ordering a posting requirement on the Department of Public Safety, State of Hawai‘i, rather than on the Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW). Accordingly, Decision No. 497, p. 39, paragraph 5 should read:

> 5. UPW shall immediately post and leave a copy of this Decision and Order in a conspicuous and usual place (such as a bulletin board or other designated space used by UPW to officially notice and communicate with BU 10 employees) at all centers and facilities where BU 10 employees are employed and on a location on the United Public Workers, AFSCME, Local 646, AFL-CIO website which is customarily accessible to BU 10 employees for UPW communications **for a period of 60 consecutive days**.

In all other respects, Decision No. 497 remains in effect and unchanged. The Board apologizes for any inconvenience caused by this error.

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 Wheeless, Representative for Complainants
Herbert R. Takahashi, Esq.

STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

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| In the Matter of<br><br>STACY K. PAIO; DAYTON YOSHIDA; ERNEST SUGUITAN; SAMUEL KAEO; DONNELL ADAMS; LONNIE A. MERRITT; MITSUO NAKAMOTO; ARDEN D. COSTALES; WALLACE KAHAPEA; and EMOSI MANAIA SEVAO,<br><br>Complainants,<br><br>and<br><br>UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,<br><br>Respondent. | CASE NO(S). 16-CU-10-344<br><br>DECISION NO. 497<br><br>FINDINGS OF FACT; CONCLUSIONS OF LAW; DECISION AND ORDER |
| In the Matter of<br><br>FERN KATHRYN WHEELESS,<br><br>Complainant,<br><br>and<br><br>UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,<br><br>Respondent. | CASE NO(S). 16-CU-10-345 |

FINDINGS OF FACT; CONCLUSIONS OF LAW; DECISION AND ORDER

## I. INTRODUCTION

This case arises from a dispute over the implementation of a June 12, 2015 settlement agreement (SA) at Hawai‘i Community Correctional Center (HCCC). In this SA, the Employer, Department of Public Safety, State of Hawai‘i (PSD or Employer), and the exclusive representative for bargaining unit 10 (institutional and correctional workers) (BU 10), Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Respondent, UPW, or Union), settled two class grievances brought on behalf of PSD BU 10 employees at Halawa Correctional Facility (HCF) and the Women's Community Correctional Center (WCCC). These two class grievances involved the filling of vacancies in adult correctional officer (ACO) IV (sergeants) and V (lieutenants) by temporary assignments (TA) and overtime (OT).

Prior to the implementation of the SA, HCCC followed an earlier agreement regarding the handling of ACO IV and V vacancies at HCCC (2007 HCCC Agreement) to address a 2007 arbitration decision regarding essential operations at HCCC. UPW and PSD entered into the 2007 HCCC Agreement prior to the enactment of the 2007-09 collective bargaining agreement. Under the 2007 HCCC Agreement, ACO IVs were receiving both TA and OT when required by work operations.

After the implementation of the SA, certain HCCC ACO IVs and Vs raised concerns to PSD and UPW regarding the SA and its effects at HCCC. Nevertheless, UPW and PSD continued with the SA implementation and application. Accordingly, some of those HCCC ACO IVs and Vs filed the instant prohibited practice complaints against the UPW with the Hawai‘i Labor Relations Board (Board).

The Board held hearings on the merits (HOMs) in these consolidated cases on November 21 and 22, 2016 and on May 22, 2017 in Hilo, Hawai‘i.

For the reasons stated below, the Board holds that the UPW committed prohibited practices under Hawai‘i Revised Statutes (HRS) § 89-13(b)(4) by implementing the SA, a written agreement reached between UPW and PSD, without ratification in violation of HRS § 89-10(a).

## II. PROCEDURAL BACKGROUND AND FINDINGS OF FACT

### A. PROCEDURAL BACKGROUND

On October 12, 17, and 19, 2016, Complainants STACY K. PAIO (Paio); DAYTON YOSHIDA (Yoshida); ERNEST SUGUITAN (Suguitan); SAMUEL KAEO (Kaeo); DONNELL ADAMS (Adams); LONNIE A. MERRITT (Merritt); MITSUO NAKAMOTO (Nakamoto); ARDEN D. COSTALES (Costales); WALLACE KAHAPEA (Kahapea); and EMOSI MANAIA

SEVAO (Sevao), self-represented litigants (SRLs), (collectively, 16-CU-10-344 Complainants) filed a Prohibited Practice Complaint in Case No. 16-CU-10-344 (16-CU-10-344 Complaint) with the Board, alleging that Respondent UPW committed prohibited practices under HRS § 89-13. On October 19, 2016, Complainant FERN KATHRYN WHEELESS, SRL, (Complainant or Wheeless and collectively with the 16-CU-10-344 Complainants, referred to as Complainants) filed a Prohibited Practice Complaint in Case No. 16-CU-10-345 against UPW based on similar allegations (16-CU-10-345 Complaint and collectively with the 16-CU-10-344 Complaint referred to as Complaints).

The Complaints allege, among other things, that UPW committed prohibited practices by entering into an agreement with the PSD that violates "…HRS 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 CBA)." As relevant facts, Complaints allege verbatim that:

> The Unit 10 contract (July 1, 2013 - June 30, 2017) subsection 26.12 specifically states "The employer shall endeavor to assign overtime work on a fair and equitable basis giving due consideration to the needs of the work operation".
>
> The UPW and the Public Safety Management entered an agreement to reduce overtime by excluding one class of workers (ACO IV Sergeants) from the overtime equation. ACO V (Lieutenants) and ACO III (correctional staff) are still allowed to work the overtime. ACO III's are to be temporarily assigned to all overtime openings for ACO IVs. This is a violation of HRS 89-9 (d) which states "the employer and the exclusive representative shall not agree to any proposal which would be inconsistent with the merit principle or the principle of equal pay for equal work persuant [sic] to Section 76-1....". Past practice was that when adequate staffing allowed TA assignment of ACO III to IV without creating overtime but allow ACO IV work when overtime would occur.
>
> Continued: This practice denies Sergeants equitable access to overtime work and thereby discriminates against them for fair and equitable pay. This practice is so bizarre that they are forcing ACO III staff to involuntary hold-backs and working them 16 hour shifts repeatedly to the point of exhaustion, even though there are ACO IV staff requesting and willing to work the shifts. This practice endangers the good operation of the facility and the safety of inmates, staff and the public.
>
> Equally important is the fact that the practice does not save money. If you TA up an ACO III to ACO IV you pay them the ACO IV pay. If doing so creates overtime work to fill the post they left vacant, you are paying an

> ACO III overtime to cover than [sic] post. So you pay overtime plus TA pay instead of simply paying overtime to an ACO IV.
>
> These are examples of the problems associated with this practice. Morale issues and security risks from frequent and extended lockdown of inmates are others.

On October 24, 2016, in Case No. 16-CU-10-344, Respondent UPW filed a Motion to Dismiss (16-CU-10-344 MTD), asserting, among other things, lack of jurisdiction due to untimely filing under HRS § 377-9(l) and Hawai‘i Administrative Rules (HAR) § 12-42-42(a)(2).

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, UPW filed a Motion to Dismiss (16-CU 10-345 MTD and collectively with 16-CU-10-344 MTD referred to as Motions to Dismiss) with the Board on similar grounds to those asserted in the 16-CU-10-344 MTD.

On November 9, 2016, the Board issued Order No. 3207 consolidating 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.

On November 14, 2016, UPW filed a Supplemental Submission by Respondent in Support of Motion[s] to Dismiss Complaint Filed October 24 & 27, 2016 (Supplemental Submission) and Respondent's First Supplemental Memorandum in Support of Motions to Dismiss Complaints. In the Supplemental Submission, UPW states that the declarations attached to the Submission are relevant to establish failure to exhaust contractual remedies.

On November 17, 2016, Complainants filed Opposition to [Respondent's] Motion(s) to Dismiss the Complaint Filed October 24 and 27, 2016.

On November 18, 2016, UPW filed Respondent's Reply Brief in Support of Motion[s] to Dismiss Complaints.

On November 21 and 22, 2016 and on May 22, 2017, the Board held the HOM in the consolidated cases. At the November 21, 2016 HOM, the Board heard and held in abeyance the Motions to Dismiss.

On November 22, 2016, the Union filed UPW's Motion for Judgment on Partial Findings and for Other Appropriate Relief (Motion for Judgment). At the November 22, 2016 HOM, the Board adjourned pending consideration of the Motion for Judgment.

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 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, UPW filed a Motion for Board Ruling Granting Respondent's October 24, 2016 Motion to Dismiss Complaint.

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, which 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.

On March 15, 2019, the Board issued Order No. 3471 Minute Order Denying United Public Workers, AFSCME, Local 626, AFL-CIO's Motion for Board Ruling and Motions to Dismiss Complaint and Directing Parties to Submit Post-Hearing Briefs. Order No. 3471 denied the Motion for Board Ruling and the Motions to Dismiss and directed the parties to file simultaneous post-hearing briefs by April 26, 2019.

On April 1, 2019, the UPW filed Respondent's Motion to Extend Deadline for the Submission of Post Hearing Briefs from April 26, 2019 to May 24, 2019.

On April 11, 2019, the Board issued Order No. 3480 Granting Respondent's Motion to Extend Deadline for Submission of Post Hearing Briefs and ordering the parties to file simultaneous post-hearing briefs by May 24, 2019.

On May 21, 2019, Complainants filed their Post Hearing Summary.

On May 24, 2019, the UPW filed its Post Hearing Brief.

Based on the full record in this case, the Board issues the following findings of fact, conclusions of law, decision, and order. Any conclusion of law improperly designated as a finding of fact shall be deemed or construed as a conclusion of law; and any finding of fact improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

B. FINDINGS OF FACT

1. Parties

Complainants Paio, Yoshida, Suguitan, Kaeo, Adams, Merritt, Nakamoto, Costales, Kahapea, Sevao, and Wheeless were, for all relevant times, members of BU 10, as defined in HRS § 89-6[i].

UPW is, and was, for all relevant times, the exclusive representative, as defined in HRS § 89-2[ii], for BU 10.

BU 10 includes all ACOs from ACO Vs (lieutenants) on down.

2. The Employer, PSD

PSD is, and was, for all relevant times, the public employer within the meaning of HRS § 89-2, for the Complainants and all other BU 10 members at State PSD facilities.

The PSD Corrections Division operates eight jails and prisons within the State of Hawai‘i. Community correctional "centers" function as jails (except for the WCCC, which functions as a prison) housing pretrial inmates, inmates sentenced to less than one year, and the sentenced felon furlough programs. "Facilities" function as prisons housing male and female inmates sentenced to open terms of more than one year. However, operational practices vary among the PSD centers and facilities depending on their functions.

At the larger centers and facilities, such as Maui Community Correctional Center (MCCC), Oahu Community Correctional Center (OCCC), and HCF, the watch commander is an ACO VI (captain) and the watch supervisor is an ACO V (lieutenant).

PSD's position is that overcrowding and inmate population at various facilities may require the hiring of additional staff for needed services (transportation of inmates or other services not on the daily routine). Assignments in each facility posted on the work schedule under CBA § 61.04 are categorized as red (essential and must be filled), black (may be filled or reassigned on a case by case basis depending on need), and warden select posts (excluded from CBA § 61.04 under an agreement between the parties). Red and black posts are evaluated by the watch commanders.

Red posts exist at all levels. When a red post vacancy occurs, the priority is TA of the most senior person from the rank below.

3. CBAs

PSD and UPW were parties to a UNITED PUBLIC WORKERS UNIT 10 AGREEMENT, effective July 1, 2007 – June 30, 2009 (07-09 CBA), and a UNITED PUBLIC WORKERS UNIT

10 AGREEMENT, effective July 1, 2013 – June 30, 2017 (13-17 CBA), for BU 10 (collectively BU 10 CBAs).

The BU 10 CBAs are uniform regarding wages, hours, terms, and conditions of employment for all BU 10 ACOs from facility to facility, including for TA and OT.

The wardens for each facility are responsible for the appropriate and correct application of the BU 10 CBAs under the direction of higher levels of PSD.

Staffing levels are a negotiable subject determined by the parties and included in the CBA.

The CBAs contain provisions for a Grievance Procedure § 15; Seniority § 16.01, Temporary Assignment (TA) §§ 16.01 c, 16.03, 16.04; and Overtime (OT) § 26.

CBA § 15 Grievance Procedure provides in relevant part:

> **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.
>
> ***

CBA § 16.03 Temporary Assignment provides in pertinent part:

> **16.03 TEMPORARY ASSIGNMENT.**
>
> A temporary assignment is the assignment by the Employer and the assumption, without a formal change in position assignment, of all or a

major portion of the significant duties and responsibilities of another position because:

**16.03 a.** The incumbent of the position is not available to perform the duties of the position, or

**16.03 b.** The incumbent of the position is also serving on a temporary assignment and the Employer determines the need for the service is immediate, essential, and in the best interest of the public, or

**16.03 c.** Of a vacancy.

CBA § 16.04 Temporary Assignment Procedure provides in pertinent part:

Temporary assignment shall be made as follows:

**16.04 a. SAME SERIES PROCEDURE.**

The qualified Employee at work in the class immediately below the class of the temporary assignment in the same series with the greatest Work Unit or Workplace Seniority. If there is no qualified Employee at work in the next lower class in the same series, the procedure will be continued within the same series until the series has been exhausted.

**16.04 b. RELATED SERIES PROCEDURE.**

The qualified Employee at work in the class immediately below the class of the temporary assignment in the related series with the greatest Work Unit or Workplace Seniority. In the event there is no qualified Employee at work in the next lower class in the related series, the procedure will be continued in the related series until the series has been exhausted.

**16.04 c. EXCUSED.**

An Employee shall perform the temporary assignment unless excused for valid reasons.

***

**16.04 i. LISTS.**

Temporary assignment seniority lists shall be prepared on Exhibit 16.04 j. by the Employer in consultation with the Union and a copy submitted to the Union and posted in each Work Unit or Workplace as follows:

***

CBA § 26. Overtime states in relevant part:

**SECTION 26. OVERTIME.**

***

**26.11 MUTUAL AGREEMENT.**

The Union and the Employer by mutual consent may modify the limitations of Section 25 and Section 26.

**26.12 DISTRIBUTION OF OVERTIME.**

The Employer shall endeavor to assign overtime work on a fair and equitable basis giving due consideration to the needs of the work operation. An Employee shall complete Exhibit 26.12 in order to be considered for overtime work.

The BU 10 CBA grievances are resolved through a process addressed by the PSD Labor Relations Office. The process begins with a Union demand letter for information, followed by a meeting between the grievant or the representative of the class of grievants with PSD, and a PSD decision officially sent to the Union. The Union then has the right to proceed to arbitration.

4. OT Procedures and Provisions

Since 1998, the Employer has endeavored to assign OT on a fair and equitable basis, giving due consideration to the work operational needs.

The Employer typically assigns voluntary OT based on CBA § 26.12. CBA § 26.12, set forth above, provides for the responsibility and method regarding OT payments. Under this provision, OT is not a right, and the OT hourly rate of pay is time and a half.

Under the CBA § 26.12 method of voluntary OT, the Employer puts the names of employees who complete CBA Exhibit 26.12 (Employee Overtime Interest Form) on a list (OT List) to determine voluntary OT offerings. When an opportunity for OT arises for a class of employees (e.g., ACO IIIs or ACO IVs), the Employer will offer the OT to employees on the OT List in that class, in accordance with seniority. Employees on the OT List may decline a voluntary OT opportunity and may remove their names from the OT List. If an employee declines a voluntary OT opportunity, the OT opportunity is offered to the next employee on the list, and the offerings are rotated in accordance with seniority.

While the Employer typically uses this method to assign voluntary OT, compliance with this method varies from institution to institution.

Even in institutions that use this typical OT List method, if the OT List is exhausted for a shift, then employees may be given mandatory or involuntary OT, resulting in what is known as a "hold back." When a shift has vacant, essential positions that cannot be filled via voluntary OT, the Employer will hold back the most junior employee with the least experience from the prior shift. That employee, who has completed their scheduled 8-hour shift, must then complete a second 8-hour shift. If an employee refuses a hold back, the employer will write them up.

The involuntary OT hold back method is not memorialized in the CBA.

At HCCC, OT was very high due to inadequate staffing.

5. TA Procedures and Provisions

When higher class positions (e.g. ACO IVs and Vs) are vacant, PSD may TA employees in the class below to those positions (e.g., ACO IIIs may TA to ACO IV positions). As stated above, at PSD's facilities, essential posts for each shift must be filled. Because those posts must be filled, and due to position vacancies and periodic daily absences, PSD has ongoing TA needs.

CBA §§ 16.03, 16.04, set forth above, govern the rights and method for the assignment of TA and are based on workplace seniority. The procedures for assigning TA are mandatory, as set forth in CBA § 16.04. Under the relevant provisions, PSD determines the need for TA and the unavailability of the incumbent in the position.

Under CBA § 16.04, if a post needs to be filled on a shift, PSD assigns an ACO from the class of employees immediately below the rank of that vacancy to be filled. For example, if the post is at the ACO V level (lieutenant), the ACO IV (sergeant) with the highest workplace seniority has the first right to the TA, regardless of whether an ACO IV with lower workplace seniority who is leaving the prior shift is willing to take the TA.

Typically, if a position at a higher class becomes vacant (e.g., an ACO IV position becomes vacant), then an employee in the class directly below that class (e.g., an ACO III) will TA into that vacant position. This TA may create a vacant post at the lower class, due to the employee in the lower class working at the higher post.

An ACO taking TA receives certain benefits, including performance of the duties of the higher position and differential pay (the equivalent of the higher level assigned for the higher position) and experience, exposure, and knowledge, providing opportunity for promotion.

TA is an optional, employee choice. A settlement agreement addressed the method for an individual employee to decline TA and be placed on a non-TA list. An ACO can also refuse TA on a day-by-day basis.

PSD represents that the practice of offering TA to BU 10 has been in effect for over 34 years and is uniform throughout the State.

6. 1998-2007, PSD Had A Preference for TA over OT

From 1998-2007, PSD allowed ACO IIIs to be TAed into ACO IV positions and ACO IVs to be TAed into ACO V positions to fill vacancies, absences, or other needs under the CBA §§ 16.03 and 16.04.

As stated above, under CBA § 26.12, OT is discretionary, not guaranteed, and provided as the operational needs arose. Between 1998-2007, OT was assigned at all levels at HCCC by offering to the person next on a rotating list.

From 1998-2007, when an ACO TAed up to a position, the lower vacancy was filled by OT. For example, if an ACO IV TAed into an ACO V position, then that ACO IV's position would be filled by OT.

Despite PSD's preference for filling operational needs by TA because of cost, at HCCC, ACO VIs (captains), ACO Vs (lieutenants), ACO IVs (sergeants), and ACO IIIs all received OT.

7. Hawai‘i Community Correctional Center (HCCC)

HCCC is the jail for the Third Circuit, State of Hawai‘i, which houses all pretrial inmates, inmates sentenced to less than one year, the furlough program for the Island of Hawai‘i; and on a short-term basis, maximum custody jail detainees awaiting transfer to HCF.

HCCC is the most overcrowded institution in the State because of lack of adequate space to house the number of people arrested and jailed. At HCCC, additional staff are required and hired to address the overcrowding and the performance of nonroutine services, such as transportation of inmates.

HCCC differs from the other PSD centers and facilities in several respects. First, unlike the staff of the larger facilities, HCCC staff includes no majors (ACO VII) or deputy directors. HCCC is staffed with an ACO VI as the Chief of Security; ACO Vs as the watch commanders and supervisors required on each watch for experience; ACO IVs; ACO IIIs with a minimum one year of experience; and ACO IIs with less than one year of service.

Second, under the CBA, there are red posts (required to clothe, house, and feed inmates, which are deemed essential positions required to be filled, and black posts (required for certain

nonroutine services, such as transportation) deemed nonessential and subject to PSD's discretion to fill.

However, based on an arbitration decision rendered in or about 2007, HCCC red and black posts are all deemed essential positions required to be filled.

Third, HCCC has three of its five housing units in a dormitory style, which cannot be closed.

Fourth, HCCC has a safety issue on the third watch (3:00 p.m.-11:00 p.m.) because there is no warden or ACO VI present. At that time, an ACO V heads the Punahele and Hale Nani sites and controls the entire HCCC facility.

All housing units, including Hale Nani (located 15 miles away) have been supervised and staffed from 3:00 p.m. to 11:00 p.m. by a newly promoted ACO IV TAed to ACO V with an entire staff of ACO IIIs TAed to ACO IVs.

This situation results in ACO III burnout because ACO IIIs face holdbacks to TA for ACO IVs or to fill vacant ACO III positions created by the ACO III TAs. This situation creates a cycle of burnout where ACO IIIs call in sick or are afraid to come to work because of the possibility of a hold back, which results in more vacancies.

Providing OT to ACO IVs, rather than constantly TAing ACO IIIs to ACO IV positions, has alleviated the need for hold backs of ACO IIIs by making available fresh bodies willing to work.

In determining CBA requirements for OT and TA, PSD does not recognize that HCCC differs from the other PSD facilities because of the necessity of filling both red posts and black posts under the arbitration decision.

8. HCCC OT and TA After 2007 Arbitration Decision Up to the June 12, 2015 Settlement Agreement

Prior to the 07-09 CBA, ACO IV Jonathan Taum (Taum), UPW State Director Dayton Nakanelua (Nakanelua), the PSD Director Clayton Frank (Frank), and PSD's Walter Harrington (Harrington) met and entered into the 2007 HCCC Agreement, effective until the new collective bargaining agreement, addressing OT only at HCCC because of its hold back and burnout issues.

As stated above, when an employee of a lower class TAs into a higher position, the TAing employee's position at the lower class may become vacant, requiring OT from another employee in that lower class. The 2007 HCCC Agreement stated that, at HCCC, if a post needed to be filled where a TA to that post would create OT at the lower level, then the vacant post would be offered to ACOs in the same rank as the vacant post, thus, alleviating the need for OT at the lower level.

If the TA would not result in OT at the lower level, then HCCC would TA without offering the post to ACOs in the same rank as the vacant post.

The 2007 HCCC Agreement was in effect until the SA became effective on July 1, 2015, and resulted in fewer hold backs, better work attendance, and less burnout.

Accordingly, based on this 2007 HCCC Agreement, up until the SA, at HCCC, TAs were regularly assigned up to the senior person in the class immediately below the vacant position, and the ACO receiving the TA was paid the differential difference in pay.

Based on this Agreement and prior to the SA, at HCCC, all ACO levels were afforded OT when there was a vacancy on the bottom level created by someone who TAed up, called in sick, took vacation, comp time, or other leaves, or for any extra duties, including suicide watch, emergencies, or court runs.

More specifically, at HCCC, until September 2017, an ACO IV could receive OT when another ACO IV was absent due to sickness or vacation before an ACO III received TA. An ACO IV could also receive TA for an ACO V who was absent due to sickness or vacation until September 2015.

9. 2011 Class Grievances Culminating in the SA

On December 2, 2010, UPW and PSD entered into a Memorandum of Understanding (MOU).

On June 14, 2011, PSD Director Nolan Espinda (Espinda) took the position that the MOU would be followed when TA was assigned to the Watch Captain position, but the Employer retained the decision-making authority to assign TA or OT for supervisory positions. Chief Steward Mielke informed the Union that PSD had opted to hire ACO VIs, VIIs, and the Deputy Warden on an OT basis, rather than assign TA to the Watch Captain position.

On July 11, 2011, the UPW filed UPW Case No. JM-11-15 (UPW Grievance 11-15). This was a class grievance on behalf of all affected HCF PSD employees for denial of TA based on alleged violations of 07-09 CBA §§ 1, 14, 15, 16, 23, and 23A. The grievance referenced the MOU stating, "Temporary assignments of ACO V (Lieutenant) to those positions excluded from collective bargaining, e.g., ACO VI (Captains who are either Watch Commanders at larger facilities or Chiefs of Security of smaller facilities) and ACO VII (Chiefs of Security of larger facilities) shall be done in accordance with section 16.04 of the Unit 10 Agreement [TA]". The grievance asserted that the ACO V to ACO VI TA had been addressed and resolved in favor of the Union in two arbitration decisions. The grievance requested make whole remedies, rescission and cease and desist, attorney's fees, declaratory, injunctive, and other appropriate relief. Arbitrator Mario Ramil was selected as the arbitrator on or about May 23, 2013.

On January 30, 2013, the Union filed another grievance UPW Case No. MN-13-01 (UPW Grievance 13-01 and collectively with UPW Grievance 11-15, ACO Grievances) on behalf of all PSD BU 10 employees at the WCCC for violations of CBA §§ 1, 14, 15, and 16 based on the handling of TA for ACOs, seeking relief similar to that in UPW Grievance 11-15.

On August 15, 2013, the First Circuit Court, State of Hawaii granted UPW's motion to consolidate arbitration proceedings in the ACO Grievances.

10. Settlement Agreement (SA)

a. The SA Purpose, Execution, and Terms

On June 12, 2015, the Union and PSD entered into the SA, which was intended to settle the ACO Grievances consistently with the Master BU 10 CBA.

The SA provides in relevant part:

> THIS SETTLEMENT AGREEMENT ("AGREEMENT") made and entered into on this 12th day of June, 2015 by and between the State of Hawaii, Department of Public Safety (hereinafter "EMPLOYER") and the United Public Workers, Local 646, AFSCME AFL-CIO (hereinafter "UNION"), collectively referred to as "PARTIES" sets forth the agreement of the PARTIES.
>
> WHEREAS, the UNION filed Class Grievance JM-11-15 on July 11, 2011. This grievance addressed temporary assignments to the ACO VI and ACO VII positions at the Halawa Correctional Facility. This grievance was moved to arbitration on March 12, 2013.
>
> WHEREAS, the UNION filed Class Grievance MN-13-01 on January 30, 2013. This grievance addressed temporary assignments to the ACO IV and ACO V positions at the Womens Community Correctional Center. This grievance was moved to arbitration on June 21, 2013.
>
> WHEREAS, not withstanding the PARTIES' respective positions, the EMPLOYER and UNION by entering into this AGREEMENT do not admit any wrongdoing in this matter or weakness in their positions, but by entering into this Agreement wish to avoid the uncertainty, inconvenience, burden, and expense of further litigation.
>
> WHEREAS, the PARTIES desire to effect a full and final compromise and settlement of any and all matters, claims, and causes of

action arising out of the subject grievances/arbitrations and have fashioned a mutually acceptable remedy to resolve the issue of Temporary Assignment.

NOW THEREFORE, IT IS HEREBY AGREED the following shall be applied when filling ACO IV and ACO V vacancies:

1. Definition of "Vacancy": For purposes of this Settlement Agreement, any post that is caused to be vacant due to a leave of absence of an employee (separation from employment to be included), and, the post was included in the final posted schedule.

2. **ACO IV Vacancies**: Temporary Assignment shall be utilized to fill ACO IV vacancies, on all shifts, at all facilities. Overtime may be assigned if the ACO IV vacancy cannot be filled by Temporary Assignment.

3. **ACO V Vacancies**:

a. Temporary Assignment shall be utilized to fill ACO V vacancies, on all shifts, at the following facilities: Halawa Correctional Facility (HCF), Oahu Community Correctional Center (OCCC), and Maui Community Correctional Center (MCCC). Overtime may be assigned if the ACO V vacancy cannot be filled utilizing Temporary Assignment.

b. Temporary Assignment shall be utilized to fill ACO V vacancies, but shall be limited to, the Second (2nd) and Third (3rd) Watches, Monday through Friday, at Waiawa Correctional Facility (WCF), Kulani Correctional Facility (KCF), Hawaii Community Correctional Center (HCCC), Kauai Community Correctional Center (KCCC) and Womens Community Correctional Center (WCCC). Overtime may be assigned if the ACO V vacancy cannot be filled by utilizing Temporary Assignment.

   All First (1st) Watch ACO V vacancies at WCF/KCF/HCCC/KCCC/WCCC may be filled utilizing Overtime within the same class. Temporary Assignment may be assigned if the ACO V vacancy cannot be filled utilizing Overtime.

   All Second (2nd) and Third (3rd) Watch ACO V vacancies on Saturday/Sunday/Holiday Off at WCF, KCF, HCCC, KCCC, and WCCC may be filled utilizing Overtime within the same class.

Temporary Assignment may be assigned if the ACO V vacancy cannot be filled utilizing Overtime.

4. Warden Select posts are excluded from the Temporary Assignment provision. However, individuals occupying Warden select posts are eligible for Temporary Assignment[.]

5. In the event of any emergency situations (inmate death, riot/disturbance, fire, major equipment breakdowns, mass movements, etc.), the Temporary Assignment provision may not apply.

6. The UNION agrees to withdraw Glass Grievances JM-1I-15 and MN-13-01 from arbitration.

NOTHING contained herein shall be construed as an admission by any party of violations of their duties or responsibilities under the Unit 10 Agreement.

IT IS hereby expressly understood and agreed that this Agreement is entered into as a complete resolution and compromise of all disputed claims including any potential claims between the settling Parties and constitutes a complete compromise of the Grievances and Arbitrations.

IT IS HEREBY EXPRESSLY UNDERSTOOD AND AGREED THAT THIS Agreement is entered into as complete resolution and compromise of all disputed claims including any potential claims between the settlement Parties and constitutes a complete compromise of the Grievance and Arbitrations.

IN WITNESS WHEREOF, the parties hereto through their duly authorized representatives have executed this Agreement on the 12th day of June, 2015.

Espinda, in his capacity as PSD Director and Nakanelua, in his capacity as UPW State Director executed the SA. While the last paragraph of the SA has June 12, 2015 as the execution date, there is no effective date or period of the SA specified.

Under the SA, PSD is required to exhaust the list of available TAs for a vacant post before OT is offered to an ACO at the same rank as the vacant post. This results in TA being offered for a vacancy instead of filling that vacancy in a way that would result in OT at the same rank as the vacancy. Therefore, an ACO IV only receives OT if the position is unable to be filled by TA by an ACO III. Prior to the SA, a "fresh" ACO IV, who had not worked for several days in a row, could have gotten OT.

Despite HCCC not being involved in these grievances (class grievances regarding TA from HCF of ACO VI to ACO VII and WCCC of ACO IV and ACO V), having no issues similar to those involved in these grievances, and having facility differences from the other PSD facilities, the SA was made applicable to the entire bargaining unit. PSD's position is that although a grievance arises on a class basis at only some of the facilities, the Union and the Employer have the right to settle for all facilities under a class grievance framework to avoid an adverse effect on uniform contract administration.

PSD's stated reason for entering into the SA was that TA cost was lower than OT cost. PSD did not consider HCCC's overcrowding and ACOs voluntarily refusing promotions because of the lack of OT.

b. PSD's Implementation of the SA

On June 17, 2015, Espinda sent a memorandum to Wardens/Chiefs of Security regarding the SA (Espinda SA Memo) transmitting and providing notice of the agreement "to resolve outstanding filed grievances and past complaints on the application of Temporary Assignment (as opposed to assignment of overtime) to ACO Supervisory positions." The Espinda SA Memo further informed the Wardens and Chief of Security "Do not change your current SOPs for this BEFORE FRIDAY, JUNE 19, 2015[]" and that, "We will be subject to penalty for not being fully compliant with this Settlement Agreement effective July 1, 2015."

Espinda delegated the SA implementation to the wardens at each facility, including HCCC Warden Peter Cabreros (Cabreros).

After receipt of the Espinda SA Memo, Cabreros attempted to notify and inform the affected individuals of the SA implementation. He informed HCCC's acting chief of security of the chief's responsibility for enforcing SA compliance. He sent a copy of the SA to the watch commanders requesting that the watch commanders schedule a meeting with all the supervisors (ACO IVs and Vs) to make sure that the supervisors understood the SA.

More specifically, on June 22, 2015, Cabreros sent an e-mail to Randal W. Waltjen notifying the watch commanders of "an urgent meeting" and sending an agenda for a meeting scheduled for June 25, 2015 regarding the SA "requiring us to be fully compliant effective July 1, 2015." The e-mail further requested that all ACO IVs be alerted and notified that an agenda was being placed in their cubbies. All the Complainants in this case were listed on a form for the Supervisory SGTS/LTS Meeting June 25, 2015.

Notwithstanding Cabreros's notification of the watch commanders before the SA implementation, the ACO IVs did not attend the Supervisory SGTS/LTS Meeting on June 25, 2015 to discuss the SA or any other meeting with Cabreros discussing the SA with the watch commanders.

c. UPW's Actions Regarding Implementation of the SA

Union Business Agent Jonathan Sloan (Sloan) provided a copy of the SA to HCCC Union Stewards ACO III Bryan Watanabe (Watanabe) and Dennis Kauka for posting on the bulletin board.

On July 1, 2015, with Cabreros's approval, Watanabe posted a copy of the SA on the main HCCC bulletin board (where notices of TA lists, meetings, and other Union announcements are posted), where it remained until November 10, 2016.

Sloan also checked with Cabreros regarding his efforts to notify the ACOs, such as by meetings.

Sloan made other efforts to provide notice of the SA, including obtaining copies of the notice of the meetings held with the ACO IVs and Vs, checking the posting of the SA on the bulletin boards, and contacting Watanabe and PSD Labor Relations Unit Supervisor Renee Laulusa regarding the necessity of compliance with the SA.

On December 10, 2015, Sloan met with Cabreros, who assured him that the SA was being enforced and complied with.

In December 2015, Sloan met with Kahapea regarding concerns about fair and equitable OT under CBA § 26.12 and the ramifications of Kahapea disregarding the SA because OT could result for an ACO III when an ACO III TAs into an ACO IV position.

d. Taum Memorandum

In a Memorandum to Espinda, dated July 14, 2015 (Taum Memorandum) and copied to others, Taum expressed his concerns regarding the SA.

In the Taum Memorandum, Taum informed Espinda of the 2007 HCCC Agreement and the circumstances surrounding that Agreement, which included the following details. Taum informed him of the meeting with Frank, Harrington, and Nakanelua during the CBA 07-09 negotiations. At that meeting, PSD was informed that: OT was already high due to HCCC'S unique layout and post assignments; OT was needed to cover vacancies; TA was also required to fill the ACO IV and V vacancies; and this TA created additional vacant positions on top of vacancies due to sick or other leaves. These vacancies caused a chain reaction in which, daily, officers were being held back and burnt out causing call ins for sick leave to rest. PSD was further informed that this cycle was getting worse because of holdbacks and burnout, despite officers being available to cover the post by rank for rank OT.

The Taum Memorandum also raised safety concerns because if every ACO IV position was filled through TA, this could result in the highest-ranking supervisor for a shift being a newly

promoted ACO IV with an entire facility of ACO IIIs, with no ACOs of higher rank and experience. PSD and UPW reached the 2007 HCCC Agreement, which provides that if a TA created a vacancy in an ACO IV or V position, the vacancy could be filled using OT within the same class. However, if no vacancy was created due to staff availability to fill a vacant ACO IV or V position, the vacancy would be filled using TA. The 2007 HCCC Agreement greatly reduced the concerns and problems until the SA was placed into effect on July 1,2015.

The Taum Memorandum proceeded to inform Espinda of current safety concerns and problems created by the SA at HCCC. The Taum Memorandum informed Espinda that the SA inequities and decrease in OT for ACO IVs and Vs, concerns over liability, and personal issues had caused some ACO IVs to waive TA and contemplate demotions. Since the SA, more officers were being held back to fill vacancies created by leave and TA, and there is an increase in burnout and ACO III vacancies. In addition, at that time, HCCC had 40 new recruits (making up 40% of the ACO III staff). With no senior officers to shadow, recruits were training recruits, and ACO III recruits with less than three months experience being placed through TA into supervising entire housing units.

Taum wrote the Memorandum to inform Espinda that the HCCC issues had been resolved during the negotiations for the CBA 07-09 and the SA was bringing back those same issues. He emphasized the uniqueness of HCCC based on the essential posts including both red and black posts, which the arbitration decision had deemed necessary to fill, and was offering an agreement that was a solution to the problem. Finally, the Taum Memorandum requested that the previous 2007 HCCC Agreement be permitted to continue.

e. HCCC Noncompliance with the SA

Following the SA, at HCCC, the OT procedure remained the same. However, the SA, Paragraph 2 changed the way in which TA was given for vacant supervisory positions and the method used to offer OT to ACO IVs and Vs. Under this SA provision, TAs of ACO IIIs had to be exhausted before ACO IVs could be assigned OT.

Similarly, SA, paragraph 3b changed the filling of the ACO V vacancies. Before July 1, 2015, if OT was created at the ACO V level, the next ACO IV available for TA would be bypassed and an ACO V would be given OT. After July 1, 2015, if OT was created, the ACO IV would not be bypassed and would be TAed to the ACO V position.

Watanabe reported incidents of noncompliance with the SA during the period July 1, 2015 to September 7, 2015, in which employees were bypassed initially and then had to receive payment consistent with the SA.

In December 2015, Watanabe, Cabreros, Larry Enriquez, and Sloan met regarding SA compliance. At the meeting, Cabreros indicated that TAs were being offered to all ACO III's to

ACO IV positions and to ACO IVs to ACO V positions, as required by the SA paragraphs 3, 4, and 5.

Despite direct orders issued regarding discipline for noncompliance, some HCCC watch commanders continued to resist SA enforcement by giving OT to an ACO IV rather than promoting an ACO III to an ACO IV vacancy. Until September 2016, the HCCC OT for ACO IVs was not reduced or cutoff because the ACO Vs continued to provide OT to the ACO IVs.

In May 2016, Kahapea discussed his request to hire ACO IVs with the chief of security and filed a report regarding his noncompliance with the SA by hiring ACO IVs to work an additional eight hours under CBA § 26-02 between July 1, 2015 up through September 2016.

f. SA Effects on OT and TA, Hold backs, Refusal of Promotion, Burnout, Calling in Sick

After the SA went into effect, ACO III OT and TA to ACO IVs remained unaffected. ACO IIIs were receiving benefits of both TA to ACO IV positions with differential pay and OT. However, ACO IVs were not afforded any OT unless there were no ACOs available to TA.

After the SA went into effect, some ACO IIIs declined promotion to the ACO IV position because the lack of OT for ACO IVs would result in a substantial pay cut.

HCCC's level of voluntary and hold back OT was high for many years because of inadequate staffing. The SA's implementation worked to bring down the OT gross numbers. However, after the SA went into effect at HCCC, there were increases in ACO III: burnouts, OT, hold backs, number of employees quitting or refusing to TA, family leave and sick leave taken, vacancies, and areas where there were no actual ACOs to fill positions.

On October 21, 2016, Cabreros sent a Memorandum to Security Staff regarding Abuse of Leaves, in which he stated that, "There is an alarming trend going on in this facility that requires your immediate attention. The concern is the growing abuse of leaves. For the Fiscal Year 2016, use of FMLA[iii] increased by over 300%. Hours increased from 8,518 hrs. in FY 15 to 18,718 (315%) in FY 16." The Memorandum warned that FMLA abuse cases would be investigated and forwarded for pre-disciplinary hearings if there is cause, which could result in termination.

g. PREA Violations at HCCC After Implementation of the SA

Since 2013, Hawai'i has enforced the federal Prison Rape Elimination Act (PREA) in its PSD's facilities, which requires a female ACO to accompany a female inmate.

At HCCC, there have been instances in which two male ACOs attended a single female inmate, rather than assigning OT to a female ACO.

Wheeless made a complaint to PSD regarding being bypassed for OT for a PREA compliance situation and received no response.

Currently, PSD has a mandatory policy that female ACOs attend and escort female inmates. At HCCC, female ACOs may be offered OT for these PREA situations.

h. Efforts to File Grievances Regarding SA

Espinda was not aware of any grievances being filed regarding any of the concerns raised in the Complaints.

On July 29, 2015, Kahapea received and attended a meeting discussing the SA. He recognized that the SA was effective July 1, 2015, that there were penalties for noncompliance with the SA, and that these changes had a significant impact on everyone.

Before the expiration period for filing a grievance, Kahapea met with Sloan and requested that a grievance be filed for a violation of CBA § 26.12 (OT). In response to that request, Sloan did not file a grievance and told Kahapea that, "there was nothing that could be done".

While aware that the CBA authorizes him to file a grievance on his own within 14-15 days, Kahapea was not aware that he waived his rights by not timely filing. Further, he knew that people, who filed their own grievances, got "no place". He had never been able to process a grievance beyond Step 1 because the Union either settled with the Employer or told him that "there is nothing you can do[.]"

Wheeless also requested that Sloan file a grievance. She also spoke with him on several occasions regarding involuntary holdbacks resulting in burnout and creation of a dangerous situation.

Based on the foregoing findings of fact, the Board makes the following conclusions of law, decision, and orders.

## III. STANDARDS OF REVIEW

The Board's administrative rules do not specifically address the standards for dispositive motions. Accordingly, 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).

### A. MOTIONS TO DISMISS

1. Lack of Jurisdiction

The Board adheres to the legal standards set forth by the Hawai‘i appellate courts for motions to dismiss under the Hawai‘i Rules of Civil Procedure (HRCP) Rule 12(b).

A motion to dismiss for lack of subject matter jurisdiction pursuant to HRCP Rule 12(b)(1) is based on the contents of the complaint, the allegations of which must be accepted as true and construed in the light most favorable to the plaintiff. Dismissal is improper unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In considering a motion to dismiss for lack of subject matter jurisdiction, the Board is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawai‘i 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawai‘i 1, 7, 175 P.3d 111, 117 (App. 2007).

2. Failure to State a Claim

Regarding a motion to dismiss brought under HRCP Rule 12(b)(6) for failure to state a claim, "Dismissal is warranted only if the claim is clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Justice v. Fuddy, 125 Hawai‘i 104, 108, 253 P.3d 665, 669 (App. 2011) (Fuddy) (*citing* Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983)). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. We must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory." Fuddy, 125 Hawai‘i at 107-108, 253 P.3d at 668-669; Young v. Allstate Ins. Co., 119 Hawai‘i 403, 412, 198 P.3d 666, 675 (2008) (Young). The Board's consideration of a motion to dismiss for failure to state a claim is strictly limited to the allegations of the complaint, and the Board must deem those allegations to be true. However, in weighing the allegations of the complaint as against a motion to dismiss, the Board is not required to accept conclusory allegations on the legal effect of the events alleged. Paysek v. Sandvold, 127 Hawai‘i 390, 402-403, 279 P.3d 55, 67-68 (App. 2012) (*citing* Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985)); Young, 119 Hawai‘i at 406, 198 P.3d at 669.

B. MOTION FOR JUDGMENT ON PARTIAL FINDINGS

HRCP Rule 52(c) (Rule 52(c)), which Respondent relies on for the Motion for Judgment based on partial findings 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 Hawai‘i 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)

## IV. RELEVANT STATUTORY PROVISIONS

HRS § 89-6(e) states:

> (e) In addition to a collective bargaining agreement under subsection (d), each employer may negotiate, independently of one another, supplemental agreements that apply to their respective employees; provided that any supplemental agreement reached between the employer and the exclusive representative shall not extend beyond the term of the applicable collective bargaining agreement and shall not require ratification by employees in the bargaining unit.

HRS § 89-10(a) states in relevant part:

> (a) Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned, except for an agreement reached pursuant to an arbitration decision. Ratification is not required for other agreements effective during the term of the collective bargaining agreement, whether a supplemental agreement, an agreement on reopened items, or a memorandum of

> agreement, and any agreement to extend the term of the collective bargaining agreement. The agreement shall be reduced to writing and executed by both parties….

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

> (b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
>
> ***
>
> (4) Refuse or fail to comply with any provision of this chapter; or
>
> (5) Violate the terms of a collective bargaining agreement.

## V. CONCLUSIONS OF LAW, DISCUSSION, AND ANALYSIS

In accordance with Order No. 3471, the Board initially addresses the basis for the denial of the Motions to Dismiss and the Motion for Judgment.

### A. MOTIONS TO DISMISS AND MOTION FOR BOARD RULING THEREON

In support of the Motions to Dismiss, the UPW asserted that the Complaints should be dismissed for lack of jurisdiction for untimely filing under HRS § 377-9(l) and HAR § 12-42-42(a)(2); failure to state a hybrid claim for relief for breach of the duty of fair representation by the union and wilfull breach of the collective bargaining agreement by the employer; and (3) lack of standing to represent the interest of the employer under the management rights clause of HRS § 89-9(d) because the Complainants are not employers. In a November 10, 2016 Supplemental Submission, the UPW impliedly raised a fourth ground of failure to exhaust contractual remedies.

#### 1. The Complaints Were Not Untimely Filed

HRS §377-9(l) states, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." This 90-day requirement is made applicable to Chapter 89 prohibited practice complaints by HRS §89-14. In addition, HAR § 12-42-42(a) states:

> A complaint that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee...within ninety days of the alleged violation.

The Board has long held that this ninety (90) day statute of limitations is a jurisdictional requirement which the Board has no authority to waive. Accordingly, the failure to file a complaint within 90 days of its occurrence divests the Board of jurisdiction to hear the complaint. Nakamoto v. Department of Defense, Board Case No. CE-0l-802, Order No. 2[9]10, at *15 (May 1, 2013) (Nakamoto Order). The Board has construed the 90-day limitation period strictly and will not waive a defect of even a single day. Fitzgerald v. Ariyoshi, Board Case No. CE-10-75, Decision No. 175, 3 HPERB 186, 199 (1983) (*citing* Thurston v. Bishop, 7 Haw. 421 (1888) and Wong Min v. City and County of Honolulu, 33 Haw. 373, *reh. den*. [] 33 Haw. 409 (1935)); Nakamoto Order, at *15.

Moreover, the beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Rather, the applicable period begins to run when "an aggrieved party knew or should have known that his statutory rights were violated." United Public Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443, 6 HLRB 319, 330 (2003) (*citing* Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978)).

UPW maintains in its Motion to Dismiss and in its Post-Hearing Brief that the Complaints, filed on October 12, 16, and 19, 2016 were untimely filed because the alleged violation or occurrence complained of happened on June 12, 2015 when the Union entered into the SA with PSD; HCCC employees knew of the SA from a Notice provided on or about June 17, 2015 via the Espinda Memorandum; copies of the SA were provided and posted; on June 25, 2015, an urgent meeting was held to discuss the settlement terms to achieve compliance by July 1, 2015; all HCCC supervisory staff were notified of the SA provisions and requirements prior to July 1, 2015; the Union enforced compliance with the SA; and, according to Cabreros, all Complainants were aware of the SA and its impact on OT by December 10, 2015.

While acknowledging that the SA was entered into on June 12, 2015, Complainants maintain that there was "some confusion" because the OT for ACO IVs did not drop remarkably and shifted to weekends; Taum filed the Taum Memorandum setting forth his concerns regarding the SA; Sloan told the ACO IVs that they would receive any involuntary OT which occurred; Cabreros told them that ACO IVs could be utilized if the OT List was exhausted; and, while OT began to drop off in July 2016, OT continued to be received by the ACO IVs until September 15, 2016.

The Board finds that there is no dispute that the SA was entered into on June 12, 2015 and that the Complainants were aware of the SA and its potential effects from its inception or shortly thereafter. However, because the SA was not immediately fully implemented at HCCC, Complainants had a reasonable expectation that the SA may not be implemented in its entirety at HCCC. While Cabreros took the position that the Complainants knew or should have known of the SA implementation and enforcement by December 10, 2015, Complainants were led to believe by both Sloan and Cabreros that they would receive any involuntary OT, which occurred even through most of 2016.

There is also no dispute that HCCC was not complying with the SA, and the ACO IVs continued to receive OT until September 15, 2016. Based on the lack of full implementation and compliance with the SA, Complainants were not aware of the effects of the SA at HCCC or that their statutory rights were being violated until September 15, 2016. Accordingly, applying the relevant principles and based on the evidence, the Board finds and holds that the filing of the Complaints in October 2016 was timely.

2. The Complaints Were Sufficiently Pled

In support of its position, UPW asserts that the Complaints in this case fail to state a claim for wilfull breach of the Unit 10 CBA by the employer because TA is a right of employees under § 16.04 and OT is not mandatory under § 26.12. Further, that the Complainants have failed to allege and are unable to prove a breach of the duty of fair representation by the Union because the Complaints do not allege arbitrary or bad faith conduct by the UPW.

The Board adheres to the pleading standards established by the Hawai'i appellate courts. Condon v. Ota, Board Case No. CU-10-263, Order No. 2511, at *2 n. 2 (6/2/08). "Hawai'i's rules of notice pleading require only that a complaint set forth a short and plain statement of the claim that provides [respondent] with fair notice of what the [complainant's] claim is and the grounds upon which the claim rests, and that pleadings be construed liberally. Suzuki v. State of Hawai'i, 119 Hawai'i 288, 296, 196 P.3d 290, 298 (Haw. Ct. App. 2008) (*citing* Laeroc Waikiki Parkside, LLC v. K.S.K (Oahu) Ltd. P'ship, 115 Hawai'i 201, 216 n.17, 166 P.3d 961, 976 n.17 (2007)). This is a fundamental tenet of Hawai'i law, particularly regarding to pleadings prepared by self-represented litigants. "The underpinnings of this tenet rest on the promotion of equal access to justice—a *pro se* litigant should not be prevented from proceeding on a pleading or letter to an agency if a reasonable, liberal construction of the document would permit him or her to do so." Waltrip v. TS Enterprises, Inc., 140 Hawai'i 226, 239, 398 P.3d 815, 828 (2016).

In applying the requirements of HRCP Rules 8 and 12(b)(6) regarding sufficiency of a pleading, the Court in Bank of America, N.A. v. Reyes-Toledo, 143 Hawai'i 249, 257-63, 428 P.3d 761, 769-75 (2018) (Bank of America), specifically rejected the "plausibility" pleadings standard established in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (previously clarified in Ashcroft v. Iqbal, 556 U.S. 662, 677-80 (2009) and adopted by the Hawai'i Intermediate Court of Appeals in Pavsek v. Sandvold, 127 Hawai'i 390, 279 P.3d 55 (App. 2012)). In so ruling, the Court reaffirmed that the "notice" pleading requirement applies and set forth the applicable principles:

> We first interpreted HRCP Rule 8(a) in Hall v. Kim, 53 Haw. 215, 491 P.2d 541 (1971), where we explained the principles underlying the rule and motions to dismiss:

> H.R.C.P., Rule 8(a)(1) provides that a pleading for claim of relief shall contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' It is also to be noted that Rule 8(f) reads: 'All pleadings shall be so construed as to do substantial justice.'
>
> ....
>
> We believe that the mandate of H.R.C.P. Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice' epitomizes the general principle underlying all rules of H.R.C.P. governing pleadings, and by the adoption of H.R.C.P. we have rejected 'the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome' and in turn accepted 'the principle that the purpose of pleading is to facilitate a proper decision on the merits.'
>
> Accordingly, under Rule 8(a)(1) 'a complaint is sufficient if it sets forth 'a short and plain statement of the claim showing that the pleader is entitled to relief.'…The rule is satisfied if the statement gives the defendant fair notice of the claim and the ground upon which it rests.…It is not necessary to plead under what particular law the recovery is sought.'…
>
> ….
>
> 'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'…Though it may be improbable for the plaintiffs to prove their claims, they are entitled to an opportunity to make that attempt. It is not for a court to circumvent a determination of an action upon the merits of the case by accepting an assertion that the claim asserted in the complaint is groundless.

(Emphasis added)

The Complaints in this case provide, in relevant part:

> UPW committed prohibited practices by entering into an agreement with the Department of Public Safety (PSD or Employer) that violates "...[Hawai'i Revised Statutes (HRS)] 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 CBA)."

The Complaints further allege, in relevant part, that:

> The Unit 10 contract (July 1, 2013 - June 30, 2017) subsection 26.12 specifically states "The employer shall endeavor to assign overtime work on a fair and equitable basis giving due consideration to the needs of the work operation".
>
> The UPW and the Public Safety Management entered an agreement to reduce overtime by excluding one class of workers (ACO IV Sergeants) from the overtime equation. ACO V (Lieutenants) and ACO III (correctional staff) are still allowed to work the overtime. ACO III's are to be temporarily assigned to all overtime openings for ACO IVs. This is a violation of HRS 89-9 (d) which states "the employer and the exclusive representative shall not agree to any proposal which would be inconsistent with the merit principle or the principle of equal pay for equal work persuant [sic] to Section 76-1....". Past practice was that when adequate staffing allowed TA assignment of ACO III to IV without creating overtime, but allow ACO IV work when overtime would occur.
>
> Continued: This practice denies Sergeants equitable access to overtime work and thereby discriminates against them for fair and equitable pay. This practice is so bizarre that they are forcing ACO III staff to involuntary hold-backs and working them 16 hour shifts repeatedly to the point of exhaustion, even though there are ACO IV staff requesting and willing to work the shifts. This practice endangers the good operation of the facility and the safety of inmates, staff and the public.
>
> Equally important is the fact that the practice does not save money. If you TA up an ACO III to ACO IV you pay them the ACO IV pay. If doing so creates overtime work to fill the post they left vacant, you are paying an ACO III overtime to cover tha[t] 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.

A review of the portions of the Complaints set forth above shows that Complainants are obviously alleging a prohibited practice under HRS § 89-13(b) arising out of the SA and the effects

on HCCC ACOs. Viewing the Complaints in the light most favorable to Complainants, the Board will not dismiss the Complaints for failure to state a claim because UPW has not established beyond doubt that the Complainants can prove no set of facts in support of their claims that would entitle them to relief.

3. While Complainants Lack Standing to Allege a Violation of "Management Rights" Under HRS § 89-9(d), This Does Not Warrant Dismissal of the Complaints.

Based on the Complaint allegation "This is a violation of HRS 89-9 (d) which states 'the employer and the exclusive representative shall not agree to any proposal which would be inconsistent with the merit principle or the principle of equal pay for equal work persuant [sic] to Section 76-1....'", UPW maintains that Complainants lack standing to allege a violation of "management rights" under HRS § 89-9(d). In support of this position, UPW relies on the Board's decision in LePere v. United Public Workers, AFSCME, Local 626, AFL-CIO, 5 HLRB 263, 272 (1994), holding that an employee lacks standing to assert the right of an employer against the Union.

UPW's argument misconstrues this allegation. The Complaints are not alleging a violation of the "management rights" provision in HRS § 89-9(d). Rather, Complainants are alleging that the parties violated the HRS § 89-9(d) provision regarding the merit principle or the principle of equal pay for equal work provision by agreeing to the SA, which excludes the entire class of ACO IVs "from participating in fair and equitable offerings of available overtime".

Regardless of UPW's misinterpretation, the Board is compelled to dismiss this allegation based on a finding that there is no showing that the SA was inconsistent with and violated the merit principle and the principle of equal pay for equal work set forth in HRS § 89-9(d). The Board holds that while the dismissal is limited to this particular allegation, the remaining allegations in the Complaints remain.

4. The Complaints Should Not Be Dismissed for Failure to Exhaust Contractual Remedies.

In the Motions to Dismiss, UPW did not assert the ground of failure to exhaust contractual remedies. However, in the November 10, 2016 Supplemental Submission, UPW argues that the attached declarations are relevant to establish the failure to exhaust contractual remedies by Complainants. In its Post-Hearing Brief, the UPW contends that Hawai'i appellate decisions have adopted and applied the federal private sector law on exhaustion of contractual remedies for an alleged violation of the collective bargaining for public sector collective bargaining purposes. In support of the failure to exhaust argument, UPW offered its business agent Sloan's testimony that

Complainants never requested that UPW file a grievance on their behalf nor did they file a grievance themselves regarding claims alleged in the Complaint.

The Board agrees with UPW that based on Poe v. Hawai'i Labor Rels. Bd., 97 Hawai'i 528, 536-37, 40 P.3d 930, 938-39 (2002) (Poe), it is well-established that an employee is required to exhaust contractual remedies before bringing an action for breach of a collective bargaining agreement under HRS Chapter 89. The Poe Court stated,

> In labor relations law, the general rule is that an employee is required to exhaust contractual remedies before bringing suit. Thus, "individuals who sue their employers for breach of a collective bargaining agreement must first attempt exhaustion of remedies under that agreement."
>
> However, exceptions to this doctrine exist, such as when pursuing the contractual remedy would be futile.

(Citations omitted)

Regardless, the Board holds that the exhaustion doctrine does not apply to the Complaints in this case because the Complaints are based on the SA. As discussed more fully below, the SA, while a "collective bargaining agreement" under HRS § 89-10(a), is on its face not a collective bargaining agreement that contains a grievance procedure requiring exhaustion. Accordingly, the SA is not subject to the UPW and PSD grievance procedure requiring exhaustion.

Further, the BU 10 CBA contains a grievance procedure set forth in CBA § 15. This provision, by its terms, limits the scope of the grievance procedure to those disputes involving "this Agreement [BU 10 CBA], its attachments, exhibits, and appendices." BU 10 CBA § 15.01 states "[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." (Emphasis added)

BU 10 CBA § 15.02 further defines the term grievance to "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." (Emphasis added)

Finally, as referenced below, at the HOM and in its post-hearing brief, UPW takes the position that the SA did not change any of the provisions in the BU 10 CBA. Therefore, the SA was a separate collective bargaining agreement, not subject to the BU 10 CBA grievance procedure nor by its own terms, was the SA subject to any other grievance procedure. In short, by limiting the scope of the grievance procedure under BU 10 CBA § 15 to disputes essentially involving the BU 10 CBA and entering into a separate SA not subject to any other grievance procedure, UPW

and PSD have precluded Complainants from the ability to grieve the SA. If the SA is not subject to a grievance procedure, then the exhaustion doctrine cannot apply.

However, even if these Complaint allegations are subject to the exhaustion requirement, the Board finds that these claims fall within the "futility" exception. In support of its position, UPW relies on its business agent Sloan's testimony that the Complainants never asked UPW to file a grievance on their behalf and that of Cabreros and Espinda that PSD did not receive a grievance from the Complainants regarding the SA. However, Complainants Kahapea and Wheeless testified to the contrary that they approached Sloan and requested that a grievance be filed regarding the effects of the SA. In response to Kahapea's request, Sloan responded that "there was nothing that could be done."

Resolution of this issue requires the Board to render a determination involving witness credibility. The Board finds Kahapea and Wheeless more credible than Sloan for three reasons. First, Sloan's testimony on the issue of whether the Complainants requested that grievances be filed was a perfunctory and prompted denial in response to a question from UPW's counsel. In contrast, Kahapea and Wheeless both provided specific details regarding not only the request made but the circumstances surrounding that request. Second, the statements from Kahapea and Wheeless regarding their requests for filing of a grievance are corroborative. Finally, the Board finds their testimonies more credible based on their demeanor.

In Kellberg v. Yuen, 131 Hawai'i 513, 531, 319 P.3d 432, 450 (2014), the Court stated regarding the exhaustion doctrine:

> However, the "doctrine of exhaustion is not absolute." Williams v. Aona, 121 Hawai'i 1, 11, 210 P.3d 501, 511 (2009). See generally 2 Am. Jur. 2d Administrative Law § 478 ("Failure to exhaust remedies is not an absolute bar to judicial consideration and must be applied in each case with an understanding of its purposes and of the particular administrative scheme involved.").
>
> This court has held that "'[a]n aggrieved party need not exhaust administrative remedies where no effective remedies exist." Williams, 121 Hawai'i at 11, 210 P.3d at 511 (quoting Hokama v. Univ. of Haw., 92 Hawai'i 268, 273, 990 P.2d 1150, 1155 (1999)). Likewise, "[whenever exhaustion of administrative remedies will be futile it is not required." Poe v. Haw. Labor Relations Bd., 97 Hawai'i 528, 536, 40 P.3d 930, 938 (2002) (quoting 4 Davis, Administrative Law Treatise § 26:11 (2d ed. 1983)) (quotation marks and brackets omitted).
>
> "Ordinarily, futility refers to the inability of an administrative process to provide the appropriate relief." In re Doe Children, 96 Hawai'i 272, 287

> n.20, 30 P.3d 878, 893 n.20 (2001). See e.g., Poe, 97 Hawai'i at 536-37, 40 P.3d at 938-39 (individuals who sue employers for breach of a collective bargaining agreement need not exhaust remedies under that agreement "when pursuing the contractual remedy would be futile"); Haw. Insurers Council v. Lingle, 120 Hawai'i 51, 72, 201 P.3d 564, 585 (2008) (in suit challenging constitutionality of statute requiring payment of fees to insurance commissioner, commissioner would have been powerless to declare the fees imposed to be unconstitutional or to provide a refund on that basis).

(Footnotes omitted)

In this case, Complainants were told by the UPW that nothing that could be done by the filing of a grievance. In fact, because the dispute arises under the SA and not the CBA, the Union was correct that the filing of a grievance would not have provided the Complainants with appropriate relief. Consequently, Complainants were not required to exhaust the grievance procedure in the CBA because the SA is not a CBA; and even if it were subject to the grievance procedure, filing a grievance would have been futile.

B. THE UPW VIOLATED HRS § 89-13(b)(4) BECAUSE UPW FAILED TO RATIFY AND IMPLEMENTED THE SA, WHICH DID NOT COMPLY WITH THE REQUIREMENTS OF HRS § 89-10(a).

Preliminarily, the Board notes that the Complaints allege violations of both general and specific subsections of HRS § 89-13, "The United Public Workers and the Department of Public Safety management have entered into an agreement which is in violation of Section 89-13 Prohibited Practices; evidence of bad faith by (8) and (b)(5)."

Although the sufficiency of the Complaints in this consolidated proceeding under HRCP Rule 12(b)(6) has been resolved above, the Board, in construing the Complaints in this consolidated case, reiterates the guiding principles set forth by the Court in Bank of America and its predecessor decisions. Specifically, that "all pleadings shall be so construed so as to do substantial justice." Further, "[t]he rule [HRCP Rule 8(a)(1)] is satisfied if the statement gives the [respondent] fair notice of the claim and the ground upon which it rests…It is not necessary to plead under what particular law the recovery is sought."

Complainants have argued that UPW committed prohibited practices based on the adoption and implementation of the SA. The Board agrees for the following reasons.

The crux of these prohibited practice complaints is the SA. The SA was an agreement negotiated in settlement of class grievances filed on behalf of affected employees at HCF and WCCC for denial of TA. Despite the class grievances being limited to affected employees at HCF

and WCCC, the SA, by its terms, was applied more broadly to BU 10 employees at all PSD facilities, including HCCC. As a written agreement between PSD and UPW, the issues are whether the SA was a written agreement subject to HRS § 89-10(a); and if so, whether the SA met the requirements of HRS § 89-10(a).

HRS § 89-10(a)[iv] provides in relevant part:

> **§89-10 Written agreements; enforceability; cost items.** (a) Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned, except for an agreement reached pursuant to an arbitration decision. Ratification is not required for other agreements effective during the term of the collective bargaining agreement, whether a supplemental agreement, an agreement on reopened items, or a memorandum of agreement, and any agreement to extend the term of the collective bargaining agreement. The agreement shall be reduced to writing and executed by both parties. Except for cost items and any non-cost items that are tied to or bargained against cost items, all provisions in the agreement that are in conformance with this chapter, including a grievance procedure and an impasse procedure culminating in an arbitration decision, shall be valid and enforceable and shall be effective as specified in the agreement, regardless of the requirements to submit cost items under this section and section 89-11.

(Emphasis added)

In interpreting HRS 89-10(a), the Board relies on the principles established by the Hawai'i appellate courts regarding statutory interpretation:

> The plain language of a statute is "the fundamental starting point of statutory interpretation." "Courts are bound, if rational and practicable, to give effect to all parts of a statute and no clause, sentence or word shall be construed as superfluous, void or insignificant if construction can be legitimately found which will give force to and preserve all words of the statute." Additionally, "this court must presume that the legislature meant what it said and is further barred from rejecting otherwise unambiguous statutory language."
>
> > [W]here there is no ambiguity in the language of a statute, and the literal application of the language would not produce an absurd or unjust result, clearly inconsistent with the purposes and policies of the statute, there is no room for

> judicial construction and interpretation, and the statute must be given effect according to its plain and obvious meaning.

State v, Demello, 136 Hawai'i 193, 195, 361 P.3d 420, 422 (2015) (Citations omitted). In a more recent decision County of Kaua'i v. Hanalei River Holdings Ltd., 139 Hawai'i 511, 526, 394 P.3d 741, 756 (2017), the Court further stated:

> The plain language of a statute is the fundamental starting point for statutory interpretation. State v. Wheeler, 121 Hawai'i 383, 390, 219 P.3d 1170, 1177 (2009). "It is a cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all the words of the statute." Camara v. Agsalud, 67 Haw. 212, 215-16, 685 P.2d 794, 797 (1984). This court must presume that the legislature meant what it said, and is barred from rejecting otherwise unambiguous statutory language. Sato v. Tawata, 79 Hawai'i 14, 23, 897 P.2d 941, 950 (1995).

Based on the plain language of HRS § 89-10(a)[v], ratification by the employees concerned is required for "[a]ny collective bargaining agreement reached between the employer and the exclusive representative".

While HRS Chapter 89 contains no definition of "collective bargaining agreement", HRS § 89-2 defines "[c]ollective bargaining" as "the performance of mutual obligations of the public employer and an exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund, and other terms and conditions of employment…."

There is no dispute that the SA is a written agreement reached by PSD, a public employer, and UPW, the BU 10 exclusive representative, after good faith negotiations. Further, the SA provides for OT and TA, which obviously are issues falling within "wages, hours…and other terms and conditions of employment[.]" The Board concludes that, as a written agreement between the employer PSD and the exclusive representative extending to the entire BU 10, the SA falls within the written agreements set forth in HRS § 89-10(a) as a written agreement reached as a result of "collective bargaining".

HRS § 89-10(a) further requires that "any collective bargaining agreement…shall be subject to ratification by the employees concerned". There is no evidence in the record that the employees concerned or BU 10 ratified the SA.

Even if the SA is not determined to be a collective bargaining agreement under HRS Chapter 89, ratification is nevertheless required under HRS § 89-10(a) unless the agreement falls under one of the exceptions specifically contained in HRS § 89-10(a) for certain agreements. Namely, the agreement must be "effective during the term of the collective bargaining agreement" and be a supplemental agreement, an agreement on reopened items, or a memorandum of agreement.

The SA does not fall within any of the types of agreements not subject to the ratification requirement for several reasons.

First, from the face of the SA, while there is an execution date of June 12, 2015, the SA does not contain an effective period for this agreement, such as a beginning and end date. As the SA has no expiration date coinciding with the expiration of the 13-17 CBA, the SA is not an agreement "effective during the term of the collective bargaining agreement."

Second, the SA's lack of expiration date also means that the SA cannot be deemed a "supplemental agreement" because under HRS § 89-6(e)(e), "any supplemental agreement reached between the employer and the exclusive representative shall not extend beyond the terms of the applicable collective bargaining agreement[.]"

Third, at the HOM, in an exchange with the presiding Board member, UPW's counsel, in fact, distinguished the SA from an MOA or supplemental agreement:

> MR. TAKAHASHI: In this case, I don't recall having referred to the settlement agreement as either an MOA or a supplemental agreement. It is an agreement resolving a grievance, withdrawing the grievance in exchange for set terms.
>
> MR. MUSTO: I gather that the term….MOU or MOA ever used in another other context? I know it's not used in this.
>
> MR. TAKAHASHI: I am not in a position to know whether the Union enters into MOAs or supplemental agreements consistently, and makes a distinction between those terms.
>
> MR. MUSTO: But again, this was a settlement agreement, and you say it did not change the provisions in the collective bargaining agreement?
>
> MR. TAKAHASHI: That's correct. It establishes certainty with respect to how the agreement is to be administered consistent with the terms of 16-03 and 16-04 and 26-12.

Transcript of Proceedings In the Matter of Fern Kathryn Wheeless, et. al. and UPW, Case Number: 16 CU-10-344 & 345 (November 21, 2016), at 64. (Emphasis added)

In this exchange, UPW's counsel unequivocally clarifies that UPW is not representing that the SA is an MOA or a supplemental agreement, and that the SA did not alter the collective bargaining agreement at that time.

Moreover, it does not appear, and no one argues, that the SA is an agreement on reopened items because this SA did not arise out of a negotiation for a previously existing CBA.

Finally, there is nothing from the face or plain language of the SA that identifies or indicates that the SA is an MOA, MOU, or a supplemental agreement. What is evident from the face and plain language of the SA and is undisputed by the parties is that the SA was a negotiated agreement between the parties and applied to all BU 10 members.

For these reasons, the Board concludes that the SA is a collective bargaining agreement subject to and required to be ratified under HRS § 89-10(a). Based on the lack of ratification, the SA fails to comply with the requirements of HRS § 89-10(a) and is invalid.

Despite the failure of the SA to comply with HRS§ 89-10(a), the record unequivocally shows that UPW did not just acquiesce but actively cooperated with PSD in the implementation of the SA at HCCC.

The record shows that the UPW business agent Sloan participated in notifying the ACOs regarding the SA, including providing a copy of the SA to the Union shop steward for posting on the HCCC main bulletin board, checking with Cabreros regarding efforts to notify the ACOs of the SA, and obtaining copies of the notice of meetings with the ACO IVs and Vs. Sloan was also actively involved in the enforcement of and compliance with the SA through meetings with Cabreros and with Kahapea, with whom he addressed the ramifications of Kahapea's disregard for the SA.

Based on the Union's implementation of the SA without ratification, the Board concludes that UPW violated HRS § 89-10(a) by executing and implementing an agreement that failed to meet the statutory requirements of HRS§ 89-10(a) and was, therefore, invalid.

HRS § 89-13(b)(4) makes it a prohibited practice for "an employee organization…willfully to…refuse or fail to comply with this chapter[.]"

The "wilfullness" of the UPW's conduct in violation of HRS § 89-10(a) is amply shown in the record.

The record evidences that since at least 2007, the parties were well-aware of the HCCC OT and TA, hold back, and burnout issues. Prior to the 07-09 CBA, the parties negotiated the 2007

HCCC Agreement addressing those issues, which implicated OT and TA. This 2007 HCCC Agreement remained in effect until the SA became effective and was implemented.

Espinda confirmed the parties' position that they have the right to settle class grievances arising out of only some PSD facilities, such as in this case, to all facilities, to avoid an adverse effect on uniform contract administration.

Less than two months after the SA went into effect, Taum sent the Taum Memorandum to both Espinda and Nakanelua providing an extensive historical background into the TA, OT, and staff problems at HCCC, the 07-09 CBA negotiations, and the 2007 HCCC Agreement reached on these issues. The Taum Memorandum further fully informed Espinda and Nakanelua regarding the positive effects of the 2007 HCCC Agreement and the regressive effect of the SA on these HCCC concerns. Finally, Taum specifically requested that the 2007 HCCC Agreement be permitted to continue. Despite such knowledge, UPW continued to cooperate and actively participate with PSD in implementing the SA.

The wilfullness of the UPW's violation of HRS § 89-13(b)(4) is also evidenced by Sloan's refusal to file a grievance regarding the SA, as requested by Kahapea and Wheeless and by meeting with Kahapea to address Kahapea's disregard of the SA. The Board notes that Sloan's testimony perfunctorily denied and directly contradicted the testimonies of Wheeless that any Complainant requested him to file a grievance. However, as previously discussed above, the Board finds more compelling and credible the testimonies of Wheeless and Kahapea, based on the specificity of and details provided in their recollections regarding the circumstances in which the requests were made.

During the HOMs, in his questioning of Espinda, UPW's counsel specifically addressed the issue of the parties' right under a class grievance to settle for all facilities, including those not involved in the class grievance. The UPW's attorney's questioning of Espinda and his subsequent answers only confirmed that the parties maintain the position that it is within their discretion to settle for all facilities for a class grievance arising at only one or some of the facilities. Espinda further justified their position by stating that it "would not be prudent to enter into a settlement applicable to one facility only that would create exceptions and inconsistency where you have a uniform term for the master agreement."

It is apparent from these questions and responses is that the parties find union contract administration as a legitimate reason to ignore the HRS § 89-10(a) requirement of ratification of written collective bargaining agreements by affected bargaining unit members.

For these reasons, the Board rules that the UPW willfully HRS§ 89-10(a) thereby willfully committing a prohibited practice under HRS§ 89-13(b)(4).

In rendering this ruling, the Board acknowledges UPW's desire to expeditiously settle disputes and negotiate and enter into agreements uniformly applicable to every member of the

bargaining unit. The Board further recognizes the view that uniform application may facilitate efficient and expeditious administration of the CBA and encourage fair treatment of bargaining unit members.

Nevertheless, the HRS § 89-10(a) technical requirements, including ratification of collective bargaining agreements by affected employees, cannot be simply ignored by the parties in the interests of uniformity and expeditious administration. The HRS § 89-10(a) requirements are statutory mandates for the creation of valid agreements under HRS Chapter 89.

Further, the Board notes that the parties could have chosen to frame a settlement agreement limited to apply to the specific ACO positions that were the subjects of the underlying grievances. Instead, the parties chose to extend the SA to all BU 10 employees, including those employed at other State correctional facilities not involved in the underlying grievances. This choice invokes and compels the application of the HRS§ 89-10(a) requirements.

While the approach taken by the parties may guarantee uniform and expeditious contract administration, this approach appears to be particularly inappropriate in a situation where there is no dispute that HCCC is a unique facility in numerous respects. Those differences include that HCCC has: the most serious overcrowding problem among the Corrections Division facilities; three of five housing units in a dormitory style; one of the housing units Hale Nani, which is located 15 miles away; and no ACO VIIs on staff. This lack of ACO VIIs results in an ACO VI (Captain) serving as Chief of Security and ACO Vs (lieutenants) serving as watch commanders; and the third watch has ACO IVs being TAed to ACO Vs as supervisors. In addition, in 2007, there was an arbitration decision regarding HCCC essential operations, and subsequent negotiations between the UPW and PSD culminated in an agreement specifically addressing OT at HCCC when the SA became effective.

Based on the negotiations prior to the 07-09 CBA, the negative effects of imposing the SA on the HCCC ACOs were significant and known to the parties, including increases in OT, hold backs, burnout, vacancies from resignations and leaves, abuse of leaves, as well as PREA violations. Yet, the parties disregarded these known effects and applied the SA to HCCC.

Finally, the Board recognizes that even with proper ratification under HRS § 89-10(a), the SA may nevertheless have become applicable to the HCCC ACOs. However, the ratification procedure would have ensured that the parties entered into a valid agreement under this provision and that the HCCC and other BU 10 bargaining unit members would have been given the opportunity to exercise their rights under this provision and under HRS Chapter 89. By failing to comply with this statutorily imposed process, the UPW denied their BU 10 members an opportunity to exercise their legally protected rights. Therefore, in ruling, the Board emphasizes that adhering to the HRS § 89-10(a) requirements is not simply a minor ministerial task by the Union prior to implementation of a written agreement but one preserving statutorily protected rights of bargaining unit members.

## VI. DECISION AND ORDER

For the reasons set forth above, the Board holds as follows:

1. The UPW's Motions to Dismiss are denied;

2. The UPW willfully committed prohibited practices in violation of HRS § 89-13(b)(4) by its violation of HRS § 89-10(a) by failing to ratify the SA and then participating in and allowing the implementation of an invalid agreement under HRS § 89-10(a);

3. The SA is ruled invalid in violation of HRS§ 89-10(a), and UPW shall cease and desist from cooperating in the implementation of the SA without valid ratification in compliance with HRS § 89-10(a) and from violating HRS § 89-13(b)(4); and

4. Under HRS § 377-9(d), the Complainants are entitled to "orders in favor of employees making them whole, including back pay with interest, costs[.]" Accordingly, any Complainant who seeks make whole remedies is required to submit a request for within 45 days from issuance of this Decision and Order, including but not limited to back pay with interest and costs, supported by an attached declaration setting forth the specific remedy sought (including dollar amounts) with appropriate justification.

5. PSD shall immediately post and leave a copy of this Decision and Order in a conspicuous and usual place (such as a bulletin board or other designated space used by PSD to communicate with BU 10 employees) at all centers and facilities where BU 10 employees are employed and on a location on the departmental website which is customarily accessible to BU 10 employees for PSD communications **for a period of 60 consecutive days**.

DATED: Honolulu, Hawai'i, February 21, 2020.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copies sent to:

Fern Kathryn Wheeless, SRL Representative
Herbert R. Takahashi, Esq.

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[i] HRS § 89-6 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:
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> (10) Institutional, health, and correctional workers[.]

[ii] HRS § 89-2 provides in relevant part:

> "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.

[iii] FMLA is the abbreviation for "Family and Medical Leave Act of 1993".

[iv] HRS § 89-10(a) was amended to include the underscored language in 2000. 2000 Haw. Sess. Laws Act 253, § 99 at 896.

[v] The Board is cognizant that statutory interpretation may involve both the plain language and the legislative history of the statutory provision. However, the Board does not rely on the legislative history of HRS§ 89-10(a) for its interpretation for two reasons. First, the Hawai'i appellate courts have ruled that ""[w]here there is no ambiguity in the language of the statute, and the literal application of the language does not produce an absurd or unjust result, clearly inconsistent with the purposes and policies of the statute, there is no room for judicial construction and interpretation, and the status must be given effect according to its plain and obvious meaning. Demello, 136 Hawai'i at 195, 361 P. 3d at 422. Second, the legislative history of HRS § 89-10(a) provides very little guidance of the legislative intent regarding this provision. The underscored portion of HRS § 89-10(a) was added by Act 253 during the 2000 Regular Session. 2000 Haw. Sess. Laws Act 253, § 99 at 396. Conf. Comm. Rep. No. 116 in https://capitol.hawaii.gov/session2000/commreports/SB2859_SCCR115_.htm states:

> (20) Clarifies that collective bargaining agreements reached under binding arbitration, agreements effective during the term of an agreement, such as a supplemental agreement, an agreement on reopened items, or a memorandum of agreement, are not subject to ratification by the employees, and that once approved, the general provisions of the agreement shall be in effect, regardless of the requirements for the submission of cost items[.]