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Case No. CE-10-737, CU-10-284

STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of CHAD ROSS; CARL L. KAHAWAI; QUINCY G. K. PACHECO; BRADFORD J. LEIALOHA; and JOLIEANN L. SALAS, Complainants, and DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, State of Hawai'i; DEPARTMENT OF CORRECTIONS AND REHABILITATION,[1] State of Hawai'i; and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Respondents.	CASE NOS. CE-10-737 CU-10-284 DECISION NO. 529 FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

I. INTRODUCTION

On November 13, 2009, Complainants CHAD ROSS[2] and CARL L. KAHAWAI, QUINCY G. K. PACHECO; BRADFORD J. LEIALOHA; AND JOLIEANN L. SALAS (collectively Complainant Group) filed a Prohibited Practice Complaint with the Hawai'i Labor Relations Board (Board) against Respondents DEPARTMENT OF HUMAN RESOURCES

[1] As of January 1, 2024, the Department of Public Safety, State of Hawai'i was renamed as the Department of Corrections and Rehabilitation, State of Hawai'i. 2002 Haw. Sess. Laws Act 278, § 20 at 780. Accordingly, the Board amends the caption for this case by updating the name of the Department of Public Safety, State of Hawai'i to the Department of Corrections and Rehabilitation, State of Hawai'i. *See* Hawai'i Administrative Rules (HAR) § 12-43-22(a); *see also* HAR § 12-43-33(c).

[2] Chad Ross is presently a self-represented litigant, but will be referred to collectively with the Complainant Group as "Complainants".

DEVELOPMENT, State of Hawai‘i, and DEPARTMENT OF CORRECTIONS AND REHABILITATION, State of Hawai‘i (collectively "State Respondents") and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW).

II. PROCEDURAL HISTORY

The Board's recitation of the procedural history in this case may be found in Order Nos. 3991 and 4006. Subsequently, pursuant to Board Order No. 4009, the parties timely submitted their post hearing briefs.[3]

On July 17, 2024, in Order No. 4051 Minute Order, the Board found in favor of the Complainants and held that between 2009 to 2013, under a prior State Director, UPW committed prohibited practices in violation of Hawai‘i Revised Statute (HRS) §§ 89-13(b)(1), (4), 89-3, 89-8(a), and 89-10(a). The Board also held that between 2009 to 2013, under a prior administration, the State Respondents violated HRS §§ 89-13(a)(1), (7), (8), 89-3, and 89-10(a).

On August 9, 2024, Complainant Group's counsel submitted Complainants' Proposed Findings of Fact, Conclusions of Law, Decision and Order as ordered by the Board in Order No. 4051. Respondents timely filed their respective objections.

III. FINDINGS OF FACT

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

[3] State Respondents elected to use their oral joinder to UPW's motion as their closing argument , and the other parties elected to file post-hearing briefs.

A. Complainants' Action

In 2009, the State of Hawai'i experienced economic hardships that resulted in the closure of the Kulani Correctional Facility (Kulani) on the island of Hawai'i as part of the State's mandatory department-wide cost reductions. All positions at Kulani were eliminated.

On October 5, 2009, each of the Complainants received a letter from the State of Hawai'i, Department of Human Resources Development that stated:

> The Department of Human Resources Development has conducted a jurisdiction-wide reduction-in-force search for an employee whose departmental search was unsuccessful. We regret to inform you that in accordance with the Reduction-in-Force/layoff process, you are being displaced from your current Adult Corrections Officer ___ Position Number ___, by an employee with a greater amount of retention points from the Department of Public Safety.
>
> In order to determine your interest and qualifications for a possible placement into another position, please complete the enclosed Reduction-in-Force (RIF) Application and Work Force Reduction Placement Questionnaire (HRD 315 RIF) and return it to your Personnel Office at 919 Ala Moana Blvd., #110, Honolulu, HI 96814 or via FAX at (808) 587-3473 by 8:00 a.m. on October 6, 2009.

Complainants were instructed to complete the forms in order to qualify for possible placement into another position and had less than a few minutes to fill out the forms.

On October 6, 2009, the Complainants and other Hawai'i Community Correctional Center (HCCC) Adult Corrections Officers (ACO) went to the UPW Office to meet with their union representative, Hawai'i Division Director, June Rabago (Rabago). Complainants requested UPW's assistance to file a grievance on their behalf. Rabago informed Complainants that the UPW already filed class grievances on the layoff.

On June 27, 2012, UPW and State Respondents entered into a Settlement Agreement to resolve grievances filed for BU 1 and 10 employees that resulted as an implementation of a Reduction-In-Force (RIF). The Settlement Agreement addressed the BU 10 employees who were subject to the layoff from Kulani to address their re-employment.

On August 28, 2013, UPW and State Respondents entered into a "Memorandum of Agreement" that was not ratified by the bargaining unit members.

B Relevant Sections of the Collective Bargaining Agreement.

UPW and State Respondents are parties to a Bargaining Unit 10 Agreement that was effective from July 1, 2007 – June 30, 2009 (CBA). Section 12 of the CBA sets forth the relevant provisions governing layoffs, or actions that are also known as RIF of BU 10 members.

> 12.06 PLACEMENT AND LAYOFF WITHIN THE EMPLOYING DEPARTMENT.
>
> 12.06a. The Employer shall exhaust all possibilities in placing the Employee in another position in the Employee's department before an Employer-wide layoff action will be effectuated.
>
> 12.06b. When there is no appropriate vacant position in which the Employee may be placed, the Employer shall follow the order provided in Section 12.06 and in accordance with the Employee's indication of availability, in determining which Employee within the Employee's department the Employee shall displace.
>
> 12.08 EMPLOYER-WIDE LAYOFF.
>
> 12.08 a. An Employer-wide layoff will be effectuated only for an Employee who has not been referred for placement or cannot be placed in an appropriate position within the Employee's department, and if the Employee is a regular Employee with the Employer with at least twenty-four (24) retention points.
>
> 12.08 b. A regular Employee with less than twenty-four (24) retention points will have retention rights only within the department in which the Employee is employed.

C. Layoff Actions

Due to Kulani's closure, all employees at Kulani were laid off and covered by RIF actions in Section 12 of the CBA. Kulani employees were placed in other DEPARTMENT OF CORRECTIONS AND REHABILITATION (DCR) facilities, including HCCC. The relocation of Kulani employees to HCCC resulted in the displacement of Complainants. To determine which HCCC employees were displaced, State Respondents looked to each HCCC bargaining

unit member's retention points pursuant to Section 12.03 of the CBA. Retention points are calculated based on length of civil service. Employees such as Complainants, who had the least retention points, were displaced to make room for Kulani employees.

State Respondents required HCCC employees fill out RIF forms, though HCCC employees were not laid off. There is no form specifically for displaced employees and there is no section in the CBA that addresses displaced employees.

D. UPW Filed Multiple Class Action Grievances That Culminated into a Memorandum of Agreement dated August 23, 2013.

On June 12, 2009, UPW filed a class action grievance DMN-09-01 against State Respondents contesting statewide furloughs that alleged violations of Sections 3, 12, 66 of the BU 10 CBA, among other things. The allegations against the State of Hawai‘i's violation of Section 12 is due to the layoffs that were implemented when UPW challenged the statewide furloughs.

On August 19, 2009, UPW filed additional class action grievances DMN-09-03 and DMN-09-04 against the State of Hawai‘i alleging the Respondents refused to negotiate and consult on the furloughs. UPW sought to enjoin the State of Hawai‘i from closing Kulani and the resulting layoff of Kulani employees.

On February 3, 2010, UPW and State Respondents signed a Proposed Resolution holding that PSD bargain with UPW over the effects of the closure of Kulani. This resolution included Complainants.

On June 27, 2012, UPW and State Respondents entered into a Settlement Agreement concerning the reinstatement of Kulani ACOs that were laid off. This Settlement Agreement did not include reinstating Complainants.

On August 28, 2013, the UPW and State Respondents entered into a Memorandum of Agreement (MOA) regarding the re-opening of Kulani. The MOA included "[a]ll former [HCCC] employees who were displaced as a direct result of the Kulani Correctional Facility, and who return or have already returned to their former position at the HCCC shall be allowed to continue their workplace seniority as through their displacement was an involuntary movement." UPW did not inform the Complainants of the settlement agreement, and did not ratify the agreement.

IV. ANALYSIS

A. Burden of Proof

HRS § 91-10(5) states:

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

The Board's rules under Hawai'i Administrative Rule (HAR) § 12-42-8(g)(16) also states that the complainant asserting a violation of an HRS Chapter 89 claim has the burden of proving the allegations by a preponderance of the evidence. See Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO and Casupang, et al., Board Case No. CE-03-579, Decision No. 453 (June 30, 2005).

Preponderance of the evidence is defined as "proof which leads the factfinder to find that the existence of the contested fact is more probable than its nonexistence." Minnich v. Admin. Dir. of the Courts, 109 Haw. 220, 228 (2005). The Board requires that the party carrying the burden of proof must produce sufficient evidence "and support that evidence with arguments in

applying the relevant legal principles." State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982).

Allegations against the union for breach of the duty of fair representation and employer for unfair labor practices is considered a hybrid action. In Poe v. Hawai'i Lab. Rels. Bd., 105 Haw. 97, 94 P.3d 653 (2004), the Hawai'i Supreme Court held that in order for an employee to prevail in a hybrid claim, the complainant must establish both 1) a breach of the collective bargaining agreement and 2) a breach of the duty of fair representation because the "two claims are inextricably interdependent. . . . The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both." Id. at 101-02, 656-57 (citations omitted).

B. UPW Breached of Its Duty of Fair Representation and Violated HRS §§ 89-13(b)(1) and (4) When It Arbitrarily Refused to Process Complainants' Request for Grievances.

A complaint alleging that a union breached its duty of fair representation alleges a colorable claim of an HRS § 89-13(b)(1) and (4) violation. Poe v. Hawaii Gov't Emp. Ass'n, Board Case No. CU-03-208, Order No. 2144, at *8 (January 7, 2003). Pursuant to HRS § 89-13(b)(1) and (4), a union, as the exclusive bargaining representative of the employees in the bargaining unit, has a duty to fairly represent all those employees in its collective bargaining and in its enforcement of the resulting CBA. Vaca v. Sipes, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Unions are afforded wide discretion to act in what they perceive to be their members' best interests. Air Line Pilots v. O'Neill, 499 U.S. 65, 67, 78 (1991). Therefore, the duty of fair representation is narrowly construed and the examination of a union's performance is highly deferential. Id. at 78.

A union does not breach its duty by acting negligently. United Steelworkers of America v. Rawson, 495 U.S. 362, 376, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990). A union breaches its

duty of fair representation when its conduct toward a collective bargaining unit member is arbitrary, discriminatory, or in bad faith.[4] A union's actions are arbitrary "only if in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." O'Neill, *supra* at 78. Courts have also held that arbitrary conduct is the "reckless disregard for an employee's rights." Johnson v. United States Postal Service, 756 F.2d 1461, 1465 (1985). The "arbitrariness analysis looks to the objective adequacy of the union's conduct." Simo v. Union of Needletrades, 322 F.3d 602, 618 (9th Cir. 2003).

The Board adopts the Ninth Circuit's two-step analysis to determine whether the union has breached the duty of fair representation. Marino v. Writers Guild of America, East, Inc., 992 F.2d 1480, 1486 (9th Cir. 1993). First, the Board must decide whether UPW's conduct involved its judgment or whether the conduct is "procedural or ministerial." Second, if the union's conduct was procedural or ministerial, then the Complainants may prevail if UPW's conduct was arbitrary, discriminatory, or in bad faith. If the conduct involved the union's judgment, then the plaintiff may only prevail if the union's conduct was discriminatory or in bad faith.

If the union ignores or processes a meritorious grievance in an arbitrary or perfunctory manner, such actions are ministerial and can be considered as potential breaches of the duty of fair representation. Beck v. UFCW, Local 99, 506 F.3d 874, 879 (9th Cir. 2007). UPW's actions will not be considered "perfunctory" unless those actions treat the Complainants' claims so lightly as to suggest an "egregious disregard" of their rights. Campos II, Decision No. 511, at *9. If the union undertakes at least some "minimal investigation" of a grievance before making

[4] Vaca, *supra* at 190; Poe, *supra* at 104, 659.

its decision as to whether to arbitrate the grievance, the union has not acted perfunctorily. Caspillo, at *12.

A union does not act in an arbitrary manner where the challenged conduct involved the union's judgment in the handling of a grievance. Decisions about how to pursue a particular grievance, including whether to arbitrate a grievance, are matters of judgment for the union, and unions are not liable for good faith, non-discriminatory errors of judgment in making those decisions. Tupola, Order No. 3054, at *28.

In this instance, Rabago's conduct was procedural or ministerial. Complainants sought assistance from Rabago concerning their displacement and requested grievances to be filed on their behalf. Rabago refused. Rabago told Complainants that the State Respondents followed Section 12 of the CBA and Complainants' displacement was part of the CBA's Layoff section and therefore, a grievance could not be filed on their behalf. Rabago also informed Complainants that grievances were filed on behalf of "employees affected by the layoff." Complainants were led to believe that filing any additional grievances individually would be futile.

Rabago did not make any "minimal investigation" to determine whether UPW could grieve the Complainants' concerns or whether Complainants had any valid claim distinct from the grievances already filed. Rather, Rabago informed the Complainants at the October 6, 2009 meeting that UPW was "challenging everything the governor has done" and "challenging everything that has to do with the furlough." This statement is misleading because the class grievances Rabago provided to Complainants did not include them. Rabago testified that Kulani ACOs, not HCCC ACOs, were included in the class grievances.

Under HRS § 89-13(b)(1), a Union commits a prohibited practice by wilfully "interfering, restraining, or coercing any employee in the exercise of any right guaranteed" under HRS Chapter 89. Hawaii Government Employees Association v. Casupang, 116 Hawai'i 73, 97, 170 P.3d 324, 348 (2007). The Hawaii Supreme Court has defined wilfully to mean "conscious, knowing, and deliberate intent to violate the provisions of HRS chapter 89." Id. at 99. Rabago's uncontroverted denial of unit members requests for representation—with no minimal research or consideration – is wilful.

Therefore, the Board finds UPW's conduct was arbitrary and violated HRS §§ 89-13(b)(1) and (4) when breached its duty of fair representation.

C. Complainants Did Not Prove That UPW Acted Discriminatorily or In Bad Faith.

Complainants assert that UPW acted discriminatorily when it placed the needs of Kulani employees over HCCC employees. Discrimination under HRS Chapter 89 is not restricted to constitutionally protected categories, but includes discrimination based on union membership and discrimination from prejudice or animus. Tupola, Order No. 3054, at *33. To prove discriminatory conduct, the Complainants must show substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. Mamuad, Order No. 3337F, at *37. Complainants did not produce the requisite evidence to satisfy a showing of discriminatory conduct.

Complainants also assert that Rabago was deceitful or dishonest during the October 6, 2009 meeting. The bad faith element requires the Board to make a subjective inquiry and requires Complainants to provide proof that UPW acted (or failed to act) due to an improper motive. Tupola, at *34. Assertions of the state of mind required for the claim must be corroborated by subsidiary facts, and must show substantial evidence of fraud, deceit, or

dishonest conduct. Id. Though Rabago clearly misrepresented information to Complainants at the October 6, 2009 meeting, the Board does not find that the record supports any claim that UPW acted in bad faith.

D. UPW Breached Its Duty of Fair Representation When It Violated HRS §§ 89-8(a).

A breach of its duty of fair representation would violate HRS § 89-8(a) and would constitute a prohibited practice under HRS § 89-13(b)(4). Lee v. United Pub. Workers, AFSCME, Local 646, AFL-CIO, 125 Hawai'i 317, 324, 260 P.3d 1135, 1142 (App. 2011)

As discussed above, the Board finds UPW breached its duty of fair representation.

E. The Union violated HRS § 89-10(a).

A hearing on Complainants' Second Amended Complaint was held on October 17, 2023. The Board subsequently issued Order No. 3991 that determined Complainants presented evidence of certain written agreements related to Kulani's closure and the placement of certain BU 10 members were not ratified, thus, violating HRS § 89-10(a). Respondents did not object to the evidence presented at the hearing. *See* Order No. 3991. Therefore, the Board permitted Complainants to file a Third Motion to Amend the Prohibited Practice Complaint.

Complainants' position on both Respondents' violation of HRS § 89-10(a) relies on the Board's decision in Paio v. UPW, Case No. 16-CU-10-344, Board No. 497 (February 21, 2020), and asserts that Paio should apply to the present case.

In Paio, the Board interpreted HRS § 89-10(a) pursuant to the plain language of the statute, as established by Hawai'i courts regarding statutory interpretation.

> In construing statutory language, [t]he fundamental objective . . . is to ascertain and give effect to the intention of the legislature. . . . The intention of the legislature is to be obtained primarily from the language contained in the statute itself." Thus, the general rule is that "where the language of the law in question is plain and

> unambiguous, construction by this court is inappropriate and our duty is only to give effect to the law according to its plain and obvious meaning.

Hawaii Public Employment Relations Board v. United Public Workers, 66 Haw. 461, 469, 667 P.2d 783 (1983) (internal citations omitted).

The Board thus follows Hawai'i courts in construing statutes pursuant to its plain and obvious meaning. Hawai'i courts determined that "[i]f an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning." Dir., DOL & Indus. Relations v. Permasteelisa Cladding Techs., Ltd., 125 Hawai'i 223, 229, 257 P.3d 236, 242 (App. 2011). Therefore, even without relying on Paio, the Board looks at the plain meaning of HRS § 89-10(a) in its analysis to this case.

HRS § 89-10(a) states

> 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.

(emphasis added).

The agreement at issue is the August 28, 2013 Memorandum of Understanding for the Re-Opening of the Kulani Correctional Facility (Agreement). The Agreement states

> This Settlement Agreement shall be limited to the facts of this case and shall not be considered as precedent in any other complaint, grievance, dispute or future proceeding, nor can this document be used as evidence in any other complaint, grievance, dispute or future proceeding.
>
> The Parties agree that this SETTLEMENT AGREEMENT shall serve as the resolution of all issues associated with the closure of the Kulani Correctional Facility between PSD and the Union.

> The Parties agree to meet to jointly resolve any unanticipated issues that may arise regarding this SETTLEMENT AGREEMENT.

While the Agreement is titled "Memorandum of Agreement" that would exempt the Agreement from the ratification requirement under HRS § 89-10(a), the content of the Agreement states that the document is a "Settlement Agreement."

The Agreement does not arise out of a negotiation for the previous CBA, nor does it alter the CBA. The Agreement thus could not be considered an "agreement on reopened items". Rather, the Agreement explicitly applies to the "closure of the Kulani Correctional Facility (KCF) on November 20, 2009." The Agreement covers Kulani and HCCC employees affected by the closing of Kulani. The terms of the Agreement state that the parties intend to settle the grievances over the closure of Kulani that resulted in a RIF to include the displacement of all HCCC employees. The Agreement requires Respondent DCR to make an "offer to all former [HCCC] employees who are still employed in the civil service system and were displaced as a direct result of the closure of the Kulani Correctional Facilities." The Agreement also covered "individuals identified in Attachment 1, who were formerly employed at the [HCCC]". Attachment 1 includes Complainants.

The Board finds that the Agreement titled "Memorandum of Agreement" is in fact a settlement agreement between UPW and State Respondents. Settlement agreements are not enumerated in HRS § 89-10(a) as exempt from ratification. Therefore, UPW should have obtained member approval pursuant to HRS § 89-10(a).

The Board holds that UPW violated HRS § 89-10(a) when it failed to ratify the Agreement.

F. UPW Representative June Rabago is not a credible witness.

In assessing witnesses' credibility, the Board primarily relies on witness demeanor, the context and consistency of testimony, and the quality of the individual witness' recollections. The Board also considers if the evidence corroborated or refuted the testimony and the weight of this evidence. Finally, the Board looks at established or admitted facts, inherent probabilities, and reasonable inferences that can be drawn from the entire record.

It is clear that Rabago possesses a long tenure as a union agent and consequential familiarity with UPW's contracts and procedures. Rabago informed the Complainants that she would not file a grievance on their behalf because DCR properly followed the CBA. Rabago also informed Complainants that the class grievances were already filed on their behalf, even though the class grievances concerned employees that were laid off due to the RIF, or more specifically, the closure of Kulani. Her misrepresentations of the class grievances do not lend to her credibility. Additionally, her perfunctory dismissal of Complainants' concerns with a wholesale insistence that Respondent DCR did not violate the CBA is particularly problematic.

The Board does not find Rabago credible.

G. The State Respondents violated HRS §§ 89-13(a)(1), (7), (8), 89-3, and 89-10(a).

Complainants allege State Respondents committed prohibited practices in violation of HRS §§ 89-3, 89-8(a), and 89-13(a)(1) and(7) by intentionally and knowingly discouraging and prohibiting Complainants from exercising their rights under HRS Chapter 89.

In order for there to be a violation of HRS § 89-13, the violation must be wilful. Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO and Cayetano, et al., Board Case No. CE-03-427, Decision No. 407 (May 3, 2000). Complainants alleging an HRS § 89-13(a) claim must plead a specification of the HRS Chapter 89 provision to provide the

employer notice of the statutory violation being charged. Here, Complainants adequately pled a violation of HRS §§ 89-13(a)(1) and (7) with specificity when it also alleged violations of HRS §§ 89-3 and 89-10, and inter alia HRS § 89-9.

HRS § 89-3 guarantees employees the right to self-organize, to form, join or assist labor organizations, to bargain collectively with representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. The Board recognizes that an employer commits a prohibited practice in violation of HRS § 89-13(a)(1) by interfering with the employee's right to participate in the collective bargaining process without employer interference, restraint, or coercion under HRS § 89-3. Parker, at *58. The right of an employee to communicate with the employee's exclusive representative is a fundamental corollary of the rights of employees identified in HRS § 89-3. Haw. Gov't Emp. Ass'n. AFSCME, Local 152, AFL-CIO v. Lingle, Board Case No. CE-03-574, Order No. 2321, at *3-4 (April 6, 2005).

The test for determining whether an employer has violated HRS § 89-13(a)(1) is whether the employer's threats or statements based on the totality of the circumstances surrounding the occurrence, tend to be coercive, not whether the employees are in fact coerced. *See* Brown & Root, Inc. v, NLRB, 333 F.3d 628, 634 (5th Cir. 2003). An employer violates HRS § 89-13(a)(1) by making statements, which considered from the employees' point of view, have a reasonable tendency to coerce. *See* DynCorp. Inc. v. NLRB, 233 Fed. Appx. 419, 426-27 (6th Cir. 2007). The inquiry should examine the atmosphere of the workplace and how specific comments fit into that atmosphere to determine whether there was a "threatening color" to specific remarks.

It is undisputed that on October 5, 2009, State Respondents gave Complainants and other ACOs at HCCC a letter informing them that were displaced from their current positions due to a RIF. The forms included in the letter were entitled "Reduction-In-Force."

The letter stated that the RIF forms were due by 8:00 a.m. on October 6, 2009. However, Complainants were provided no more than 30 minutes to fill out and return the forms to State Respondents. Complainants were informed orally by State Respondents to fill out the forms the same day. State Respondents did not provide Complainants with any explanation concerning the forms. Complainants wanted to consult with their union representative upon receipt of the letter, but were unable to reach a UPW representative on October 5, 2024. Consequently, Complainants were unable to contact their representatives prior to returning the forms. The Board finds that State Respondents' wilfully provided Complainants with the letter and RIF forms and directives to immediately fill out and return the RIF forms in a matter of minutes to be unreasonable. Respondents actions, therefore, constitute a prohibited practice in violation of § 89-13(a)(1), and consequently § 89-13(a)(7).

The immediacy that Complainants were forced to comply with the State Respondent's directive, the lack of explanation by any State Respondent representative, and the verbal due date of October 5, 2009 contradicting the written due date of October 6, 2009, supports Complainant's testimony that they felt pressured into making a life-altering decision in mere minutes. The amount of time allocated to Complainants to complete their forms deprived the Complainants time to meaningfully consult with their union representative. Complainants testified that they also needed time to discuss the forced relocation with their families because the relocation would disrupt their lives. While there may be no explicit rule that requires State Respondents to provide Complainants time to discuss relocation with their families, it is

unreasonable to direct Complainants to decide on relocation to another island for work in a matter of minutes. Furthermore, as relocation is clearly a topic required for collective bargaining, State Respondents plainly violated HRS § 89-8(a) and, inter alia, HRS § 89-9.

Upon a full evaluation of the evidence and pleadings in the record, the Board finds that State Respondents' actions on October 5, 2009 interfered with Complainants' right to participate in the collective bargaining process without employer interference, restraint, or coercion, violating HRS §§ 89-13(a)(1), (7), (8), and 89-3, 89-8, and 89-9.

H. State Respondents' violated HRS § 89-10(a).

As noted above, State Respondents violated HRS § 89-10(a) when it failed to obtain the approval from Complainants when it finalized the August 28, 2013 Memorandum of Understanding for the Re-Opening of the Kulani Correctional Facility with UPW.

V. ORDER

A. Respondents are ordered to cease and desist from committing the instant prohibited practices.

B. Respondents shall immediately post copies of this decision in conspicuous places at its work sites where employees of Unit 10 assemble and congregate for a period of 60 days from the initial date of posting. Respondents shall also immediately send this decision through electronic mailing on the Respondents' respective internet or intranet to all unit members

C. Respondents shall notify the Board of the steps taken to comply herewith within 30 days of receipt of this order.

A further hearing on the remedies shall be held on December 17, 18, and 19, 2024, to determine appropriate remedies for Complainants.

DATED: Honolulu, Hawai‘i, October 31, 2024.

HAWAI‘I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

STACY MONIZ, Member

Copies sent to:

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