STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of DANIEL EDWARD PARKER, Complainant(s), and ~~UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO~~ and DEPARTMENT OF PUBLIC SAFETY, State of Hawai‘i, Respondent(s).	CASE NO(S). ~~18-CU-10-370~~ 19-CE-10-923 DECISION NO. 502 FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

Table of Contents

1. Introduction and Statement of the Case

Complainant Daniel Edward Parker (Complainant or Parker) filed this prohibited practice complaint to challenge his discharge from his adult correctional officer (ACO) position at Maui Community Correctional Center (MCCC), Department of Public Safety, State of Hawai‘i (PSD, Employer, Department, or Respondent). PSD's stated reason for Parker's discharge was for insubordination arising out of the Department's attempt to conduct a videotaped strip search for contraband on Parker.

When Parker arrived for his shift at MCCC, Captain Cori Ryan (Ryan) asked Parker to come to his office. In his office, two other ACOs were present, and one of them turned on a video camera. Ryan informed Parker that PSD was investigating him for contraband and needed his immediate consent for a strip search. Ryan further informed Parker that PSD had the right to conduct the strip search under the policy and handed Parker a copy of a highlighted provision for a videotaped search.

Parker requested representation from his exclusive representative United Public Workers, AFSCME, Local 646, AFL-CIO (UPW or Union), and Ryan called for the UPW Shop Steward.

However, Parker requested that the UPW Division Director and Business Agent be present, according to the established procedure when an employee could be subject to discipline. The UPW Shop Steward made a phone call to the UPW Division Director, who was neither familiar with nor had any experience with the strip search policy. Ryan interrupted Parker's attempts to consult with the UPW Division Director on the phone several times by requesting that Parker decide whether to consent to the search and talk to the UPW later.

Parker refused to comply with the strip search. PSD placed Parker on administrative leave pending investigation and then discharged him for insubordination. Parker filed the prohibited practice complaint, which he amended three times. The Third Amended Complaint, alleges, among other things, that UPW committed prohibited practices in violation of Hawai‘i Revised Statutes (HRS) § 89-8(a), constituting a violation of HRS § 89-13(b)(4), and that PSD committed prohibited practices in violation of HRS §§ 89-3 and 89-13(a)(1) and (7).

1.1. Issues

The issues in this case regarding UPW's Motion for Judgment on Partial Findings on the Second Amended Complaint were as follows:

1. Whether Complainant carried the burden of establishing that the UPW breached its duty of fair representation by refusing to take Parker's grievance regarding his discharge to arbitration in violation of HRS § 89-8(a) thereby violating HRS § 89-13(b)(4)?

2. Whether Complainant carried the burden of establishing that PSD breached the bargaining unit (BU) 10 collective bargaining agreement (CBA) by discharging Parker in violation of HRS § 89-13(a)(8)?

The remaining issues on the Third Amended Complaint are as follows:

1. Whether PSD violated HRS § 89-13(a)(1) by interfering and restraining Parker in the exercise of his HRS Chapter 89 rights by failing to consult with the UPW regarding a videotaped and consensual strip search policy and by interfering with Parker's right to consult with the UPW Division Director during the September 8, 2017 incident?

2. Whether PSD violated HRS § 89-3 by failing to consult with the UPW regarding a videotaped and consensual strip search policy and by interfering with Parker's right to consult with the UPW Division Director during the September 8, 2017 incident thereby wilfully violating HRS § 89-13(a)(7)?

1.2. Statement of the Case

On December 17, 2018, Complainant filed his original prohibited practice complaint in Case No. 18-CU-10-370 against former Respondent UPW alleging that the Union violated HRS § 89-13(b)(3) for refusing to arbitrate his grievance regarding his termination. On January 22, 2019, Parker filed his amended prohibited practice complaint to clarify that his claims are against both UPW and PSD as Respondents and the nature of the hybrid claim against the Respondents to contest his discharge, which commenced the combined Case Nos. 18-CU-10-370 and 18-CE-10-923 and a second time to correct a typographical error.

The Board held hearings on the merits (HOMs) on the Second Amended Complaint on April 1- 2, 2019 and June 17-18, 2019.

The HOMs on the Second Amended Complaint included testimony from Parker; MCCC employees Lot Kalalau (Kalalau), Isaac Gazmen (Gazmen), and Michael Diana (Diana); and UPW Division Director Melanie Saito (Saito). PSD called PSD Director Nolan Espinda (Espinda). UPW called UPW employees Rachel Gibson (Gibson) and Laurie Nadamoto (Nadamoto) and PSD Intake Service Center Division Administrator Shelley Nobriga Harrington (Nobriga).

At the HOMs on the Second Amended Complaint, some of the exhibits were admitted into evidence and others were excluded. Complainant's Exhibits 2-12 and 14 were admitted in evidence. Union Exhibits EE, FF, RR, and SS were admitted in evidence.

After Complainant rested his case, UPW filed a Motion for Judgment as a Matter of Law (UPW Motion for Judgment), and PSD filed a substantive joinder, which the Complainant opposed.

Various other motions were filed during the proceedings, which were orally ruled on and are further addressed to the extent necessary in this Decision and Order (D & O).

After hearing the UPW Motion for Judgment, the Board orally took the Motion under advisement. The Board further orally ruled, among other things, that the Board would grant the Complainant the right to file a Motion to Amend the Second Complaint to conform to the evidence.

Parker filed Complainant Daniel Edward Parker's Motion to Amend Second Amended Complaint, which was opposed by the Respondents. The Board granted, in part, the Motion to Amend the Second Amended Complaint in Order No. 3545.

Parker filed his Third Amended Complaint to conform to the evidence. In addition to the allegations against PSD and UPW set forth in the Second Amended Complaint, the Third Amended Complaint further claimed that PSD violated HRS §§ 89-3 and 89-13(a)(1) and (7) by unilaterally adopting a strip search/video recording policy without notice to UPW or the Complainant and interfering with Complainant's ability to consult with his union regarding the strip search policy during the September 8, 2017 incident.

UPW filed a motion to dismiss and/or for summary judgment on the Third Amended Complaint (UPW MTD/MSJ), and PSD filed a joinder in the UPW MTD/MSJ.

At the August 28, 2019 status conference, the Board orally granted, in part, and denied in part, for reasons to be addressed to the extent necessary in this final D & O, the UPW Motion for Judgment and PSD's joinder. The oral order dismissed the hybrid case, including the HRS § 89-13(a)(8) (violation of the CBA) against PSD and all claims against UPW, which closed Case No. 18-CU-10-370. In so ruling, the Board ruled that the Respondents showed that Complainant failed to carry his burden of proving the hybrid case.

On December 6, 2019, after hearing the PSD joinder to the UPW MTD/MSJ on the Third Amended Complaint, the Board orally denied the PSD Joinder for reasons that will be addressed to the extent necessary in this final D & O. The Board then proceeded to an HOM on the new allegations contained in Third Amended Complaint. At the HOM on the Third Amended Complaint, Parker called himself as a witness, and PSD called Juan Hedge (Hedge).

Based on the full record and for the reasons set forth below, the Board finds and holds that PSD willfully committed a prohibited practice under HRS §§ 89-13(a)(1) and (7) by violating HRS § 89-3.

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

2. Relevant Background and Findings of Fact

2.1. Background

PSD employed Parker as an ACO III from August 2013 until his discharge in April 2018. PSD[i] operates eight adult correctional facilities and jails throughout the State of Hawai‘i, including MCCC.

During his PSD employment, Parker was a member of bargaining unit 10 (BU 10),[ii] which is represented by UPW. [iii]

UPW and the Employer State of Hawai‘i (which includes PSD) were parties to a BU 10 collective bargaining agreement, effective July 1, 2017 – June 30, 2021 (BU 10 CBA) during the period of the allegations in the Second and Third Amended Complaints.

2.2. Standards of Conduct

During his basic training for his MCCC position, Parker was trained in the Standards of Conduct of the Department of Corrections, State of Hawai‘i, effective March 17, 1988 (SOC).

The SOC (Article III Conduct I.) provides that PSD Director and/or the Administrators determine disciplinary action for violations of this Article. Further, that while disciplinary actions for violations are subject to progressive discipline, the severity of a single violation may warrant immediate discharge and are taken under the CBA provisions.

The SOC (Article III Conduct II B. and C.) requires a PSD employee to be loyal to and maintain a high level of cooperation with PSD and their associates consistent with law and professional ethics. Under general responsibilities, correctional employees must act appropriately to create a feeling of security within the assigned facility (Article III, Conduct II, E.), have knowledge of laws and regulations, including the SOC and PSD policies and procedures (Article III, Conduct II, G.); perform their duties as required or directed by law, PSD rules or policies, or by an order of a supervisor (Article III, Conduct II, H.); and observe and obey all PSD policies, procedures, and the SOC (Article III, Conduct II, I.)

However, the SOC (Article III, Conduct II, K.) further requires that orders from superiors to subordinates be in clear language, civil in tone, and issued in furtherance of PSD business. In addition, a corrections officer given an order that the officer feels unjust, must obey the order to the best of their ability and then appeal. On the other hand, an employee is not required to comply with an unlawful order.

Finally, the SOC makes insubordination to superiors or supervisors a Class C violation of the SOC. The SOC violations are classified from Class A to D, with Class A as the most serious violation.

2.3. PSD Contraband Policy and Procedures

PSD has had a continual problem with the introduction of contraband into its facilities. PSD's Policies and procedures governing searches of visitors and employees are integral to its efforts to control this introduction of contraband.

Since before January 2, 1995, PSD has had Policy No. 08.02 Searches of Visitors and Staff (Policy 8.02 or Policy), effective July 1, 2010. UPW consulted and agreed to the current version of Policy No. 08.02.

Policy 8.02, Section 4.0, Paragraph 2. Staff Searches provides that all staff entering and leaving a correctional institution may be subject to search at any time. The staff search includes metal detector, ion scan, and pat searches without consent or justification. The search may progress to a strip search and a vehicle search upon a reasonable suspicion that a staff member is carrying contraband. As with other types of searches, a strip search and a vehicle search may be conducted without written or verbal consent.[iv]

In addition, Policy 8.02, Section 4.0, Paragraph 3. sets forth the procedures for conducting a staff strip search.[v] The only documentation required is a detailed report of any search more than a pat search. The report requires the name of the person searched; the date, time and place of the search; the names of the searching officers, any witnesses, and the official authorizing the search; the reasons for and extent of the search; and what, if anything, was found.

The Policy, Section 4.0, Paragraph 4. provides for a search of a staff vehicle parked on facility property with reasonable suspicion of hidden contraband. This provision specifically allows for the search to be conducted without owner permission or a search warrant and for video recording and written documentation of refusals and the search process.

The UPW never agreed to a videotaped strip search policy.

2.4. PSD Videotaping

2.4.1. Policy No. ERC 11.02

Policy No. ERC 11.02 Video Recording of Emergency Situations (04/27/98) (Policy 11.02) provides guidelines for video recording of emergency situations and the maintenance, security, and retention of videotapes.

Under Policy 11.02, the use of video cameras is not limited to emergency situations but to situations which represent a high probability of generating injuries, property damage, grievances, lawsuits, or adverse publicity for PSD. In addition, while the decision about when and where to deploy video cameras must be made with due consideration to the emergency, staff safety, and staff needs in controlling the emergency, Policy 11.02 allows the video camera operator to use his or her own judgment about what actions to record unless directed otherwise.

2.4.2. PSD Videotaping in Practice

There is no policy permitting or prohibiting the use of a video camera during a strip search, and videotaping had not been used for strip searches of inmates, staff,[vi] or visitors at MCCC.

However, the Captain, after consultation with the highest-level person available, has the discretion to authorize the use of a video camera for various situations, which may include a strip search. It is regular practice to use a video camera in a control contraband situation, for security, and documentation. There is a longstanding policy that video cameras may be used when an individual refuses to submit to a search.

Prior to September 8, 2017, videotaping at MCCC was limited to planned use of force, takedowns, and shakedowns of cells or living areas to document items recovered for the purpose of providing an accurate record of findings.

2.5. Parker's Background and Experience with Strip Searches

From August 2013 until his April 27, 2018 discharge, Parker was employed as an ACO at MCCC.[vii]

During his MCCC employment, Parker received basic training, which included inmate strip search policies and procedures. These policies and procedures permitted camcorders for recording searches but not for inmate strip searches. Parker was not aware of the procedure for ACO strip searches.

However, Parker performed strip searches on hundreds of inmates under different circumstances. None were videotaped. In such cases, the inmate was taken to a setting, which protected his privacy.

2.6. Parker's History of Conflicts with Ryan Prior to September 8, 2017

Beginning with a 2014 incident, Ryan and Parker had a history of conflicts. At the time of the incident, Ryan was the Administrative Captain responsible for handling essential post assignments. Parker made a written report regarding Ryan's handling of these assignments upon

advice from Major Deborah Taylor (Taylor). Following submission of this report, Ryan was removed as the Administrative Captain.

During the period between this incident and the September 8, 2017 incident, Ryan made numerous disparaging remarks to and about Parker, such as calling him an F-ing haole.

2.7. The September 8, 2017 Incident (Incident)

During an interview regarding gangs in facilities, an inmate disclosed to a deputy sheriff (assigned as a task officer with the FBI), his FBI supervisor, and two ACOs that Parker was likely to be handling contraband on the day of the incident.

On September 7, 2017, the task officer emailed Espinda with the information that Parker was bringing drugs into the facility on September 8, 2017.

Espinda had never authorized a strip search before. However, Espinda determined there was a reasonable suspicion of contraband based on this information and that the proper procedure was to direct and authorize MCCC Warden Hirano (Hirano) to strip search Parker.

Espinda transmitted the task force officer's email to Hirano with an order to conduct a strip search of Parker. Upon receipt of the email, Hirano ordered Parker to be strip searched. This was the first MCCC staff member strip search.

On September 8, 2017 at 2:55 p.m., Parker arrived for his 3:00 p.m. post.

At approximately 1500 hours, Ryan asked Parker to come to his office where Sergeants Pita Totau (Totau) and Hedge were present. Hedge carried a camera, which he turned on under Ryan's instructions.

Ryan informed Parker that Parker was being investigated for bringing in contraband. Ryan then informed Parker that his immediate consent was needed to conduct a strip search on him, and that under the policy, PSD had the right to conduct the strip search.

Ryan further informed Parker that if Parker wanted Union representation, MCCC Union Representative ACO Joshua Visconti (Visconti) would be brought. Parker requested Union representation and stated that he won't agree to the strip search. Ryan directed that Visconti be called.

Totau informed Parker that they were being told what to do, that this was not personal, but came from the Warden and departmental policy. Parker questioned the statement that it was not personal and stated that to strip search him "is crazy." Totau stated it was the policy and that Visconti would be brought in.

Ryan handed Complainant a copy of Policy 8.02 with the pages 5-6, Subparagraph c. highlighted and referred Parker to the bottom. The highlighted section stated, "Said refusals and the search process will be documented on a video recording and in writing[.]"

Parker had not been given a copy of Policy No. 8.02 before the incident nor an opportunity to fully review the Policy. Based on being given the Policy with the video recording section highlighted, Parker had a reasonable belief that his strip search was going to be filmed.

After Visconti arrived, Ryan told Visconti that Parker was asked to consent to the strip search and a vehicle search per the policy and that Parker could not decline. Parker responded that he was declining and would not be strip searched.

Visconti took and reviewed the copy of the Policy.

Parker then requested that the UPW Division Director, Saito, be there.

Visconti requested permission to call Saito. Ryan told Visconti to call and read the highlighted parts of the policy to the Union representatives, so they knew that the search was per the policy.

Parker then asked twice for permission to go to the restroom with someone to follow and keep an eye on him. Ryan denied the request. Parker stated that he needed to use the restroom.

Visconti called and spoke with Jolene at the Union and told her that they had a situation. Visconti asked to speak to Joy Miyagawa (Miyagawa) or Saito and requested to see the Policy. Parker told Visconti to let the Union know that he needed to use the restroom and was willing to have someone follow him there.

Visconti informed Saito that he was there with Parker, Ryan, Hedge, and Totau. Visconti then told Saito that they have Policy 8.02, searches of visitors and staff, and that Part 2.B. provides for a strip search to be conducted where there is a reasonable suspicion that a staff member is carrying contraband. Visconti informed Saito that Parker was declining the strip search and asked for her take.

Saito had never been contacted by telephone regarding a situation in which an ACO may be subject to potential discipline. The established procedure for these kinds of situations was that Saito receives advance notice of the scheduled meeting because of the bargaining unit member's right to have Saito be there in person.

Although having prior experience with Policy 8.02, Saito had never experienced an MCCC ACO being ordered to submit to a strip search. Saito went to get a copy of the Policy.

Visconti informed Parker that Saito was going to get and read the policy. Visconti told Parker that Saito said that Parker cannot refuse a direct order. Saito based that advice upon an assumption that PSD had reasonable suspicion to conduct the strip search.

Parker reiterated his request to use the restroom and asked who will follow him to the restroom. Ryan allowed him to go. Totau turned off the video and accompanied Parker to the restroom.

When Parker and Totau returned to Ryan's office, Totau turned the video on.

Visconti informed Parker that Saito stated that the directive came from the Chief, and that Parker had the right to refuse a strip search and be put on administrative leave.

Visconti called Saito so that Parker could hear it "from the horse's mouth." Parker took the phone and talked to Saito. While looking at the copy of the Policy, Parker told Saito that when he came in, he was ushered into the watch captain's office where they had a camera on him and were asking him to strip search and search his bag, belt, all his property, locker, and truck parked on the street. Parker told Saito that he had just arrived at work and didn't know what the suspicion would be.

Parker asked what the Chief was suspicious of, and Visconti handed him a paper.

Parker stated that he was on the phone. Ryan then interrupted Parker's phone call with Saito and told Parker that the bottom line was that, if he didn't consent, that was his right. Ryan repeated that if he did not consent, Ryan would read him something from the Warden. Parker asked if he could see it and told Saito that if he does not consent, they are going to read him something. Parker repeated that if he does not consent, then they have something provided.

Parker stated that he wanted to hear it. Ryan read a notice informing Parker of the following. If Parker did not consent, Parker would be placed on leave without pay (LWOP) from MCCC pending the outcome of an internal investigation, effective Friday, September 8 through Saturday, October 7 in accordance with CBA Section 11A. Parker could be called back if the investigation was completed before 30 days had elapsed. If Parker did not receive a call, Parker was directed to return to work on the first regular workday after Sunday, October 8. The action was taken as a result of preliminary information for introduction of prison contraband. It was determined that Parker's presence at the work site would be detrimental to the workplace safety and operation. Parker was directed not to contact any MCCC staff and was not allowed to be on MCCC premises during the 30-day period. If Parker felt that this action was not being taken without proper cause, Parker had the right to file a grievance under the CBA.

Parker asked to read the statement to Saito, and Ryan agreed.

During the phone call, Parker asked Saito if she heard the notice given. Saito told Parker that she did not understand the policy, was trying to find it, and had never heard of this type of situation at MCCC. She asked Parker if there was any way that he could go through it. Parker told Saito that they had a camera on him, so "there's no way" and that "literally they [were] filming it." Saito responded that he did not have to do it or consent.

Parker did not specifically communicate to Saito that his refusal to consent to the strip search was because of the videotaping. However, Parker told Saito twice about being videotaped and asked Saito whether the Policy permitted video recorded strip searches.

After reviewing the Policy, Saito reiterated that if Parker was given a direct order, he was required to comply. In giving this advice, Saito assumed that there was reasonable suspicion for the strip search, that Parker had been given a direct order to be strip searched based on the SOC, and that consent was not required under the Policy.

Saito told Parker that he had the right to ask for the reason for the strip search. Parker told Saito that he is against the strip search, and that they were videotaping it. Saito advised Parker to comply because noncompliance is insubordination.

Ryan then interrupted, told Parker that this "is just prolonging the situation," and that all Ryan wanted to know was whether Parker was consenting or not. Finally, Ryan got up from his chair, grabbed the paper from Parker, and told Parker that all he wanted to know was whether Parker was consenting or not. Parker responded that he did not feel comfortable with it. Ryan stated that he understood, but all he wanted to know was whether Parker was consenting to the search or not.

Parker told Saito that he was unable to use the restroom because he was that uncomfortable with being filmed, and that he could not imagine or fathom it, he had never heard of it before, and he had just come into work and did not know what they were searching for other than a vague statement.

Ryan interrupted Parker's phone call with Saito again and told him that he could talk to Saito later, and that all Ryan wanted to know was whether Parker was a yes or no on the consent.

Totau asked to speak to Saito. Parker handed Totau the phone. Parker told Ryan that he was not going to consent, and there was no way that he was going to "get naked in front of you guys." Ryan responded that was fine.

Totau then got on the phone and informed Saito that Parker had the option to refuse and that was his right. Parker then stated that if he refuses, he gets a 30-day suspension pending investigation. Totau stated that if Parker refused, Parker could talk to her later because they needed to move forward.

Ryan then showed Parker the paper and told him to sign, date, and provide the address where he could be reached. Ryan signed the paper.

Totau told Saito that Parker was signing the paper now and was not complying, which was Parker's choice and right. Totau patted Parker on the shoulder and told Parker that he "respects him".

The Board finds that it was reasonable for Parker to be limited in his ability to consult with Saito based on Ryan's constant interruptions, the filming of the phone call with Saito, and Ryan's statements to Parker to consent or not, sign the paper, and "enough already."

Parker signed the paper, and Ryan gave him a copy.

Totau told Parker to contact Saito immediately and that she was waiting for him.

Ryan gave Parker a copy of the paper.

After signing the paper, Parker told Ryan that Parker felt that his human rights were being violated. Ryan responded that, if you work in corrections, that is the policy. Parker told Ryan that he had never heard of it. Ryan responded that all they were doing was following the policy, and he does not know what led up to it.

Parker repeated that he has never heard of anyone getting strip searched and being filmed. Ryan answered by telling Parker to read the policy. Ryan further stated that during the strip search, they would not have made him take off his underwear, but they had to follow the policy, which dictated that they could do that.

Visconti then told Parker that it was on the back page that the strip search can be videoed.

During the investigation, Visconti confirmed that Parker seemed surprised and extremely concerned about being videotaped, repeatedly requested that the camera be turned off, and that Ryan did not tell Parker that Ryan was directly ordering him to submit to a search.

The video recording was concluded, and Hedge turned off the video.

The Board finds that Parker had a reasonable belief that Ryan was asking for his consent to a videotaped strip search.

Parker denied carrying contraband.

Hedge and Visconti escorted Complainant from the facility. As Parker was escorted off the facility grounds, Parker said that "they tried to strip search me." Visconti told him to be quiet and contact Miyagawa at the Union. Hedge told ACO III Bobby Labasan (Labasan) to log that Ryan ordered that Parker was not authorized to enter the facility.

On September 8, 2017, Parker was placed on LWOP from MCCC pending outcome of an internal investigation.

After the September 8, 2017 incident, Ryan told Gazmen that Parker tried to enter the facility with drugs taped to his back.

2.8. PSD Investigation

PSD investigatory and disciplinary processes consist of separate steps conducted by independent officers to provide a variation in perspectives, and most importantly, so no one person makes decisions.

Hirano assigned Lt. Mirkovich to start the Parker investigation (Parker investigation) with instructions to turn over all evidence to PSD Internal Affairs Offices (PSD IA).

On September 11, 2017, Espinda reassigned the investigation to PSD IA and requested MCCC to turn over all the evidence collected. Garrett Medeiros (Medeiros), a 10-year Investigator V, with experience in performing more than 80 previous investigations and familiarity with PSD rules applicable to ACOs, was assigned by his supervisor Chief Investigator David Festerling (Festerling) to the Parker investigation.

The Parker investigation was to determine whether Parker was given a direct order and violated Policy 8.02 and the SOC Code of Ethics, Article III, General Responsibilities, Knowledge of Laws and Regulations, Performance of Duty, Obedience to Laws and Regulations, Rule C-Conduct toward Superiors, Subordinates, and Associates.

In conducting the Parker investigation, Medeiros reviewed Policy 8.02 and two video recordings of the Parker incident. Medeiros sent questionnaires and Memoranda regarding Advice of Right and Waiver to Representation and Truthfulness and Cooperation to Parker, Hirano, Ryan, Totau, Visconti, Hedge, and Taylor. Medeiros reviewed statements from Ryan, Totau, Hedge, Visconti, ACO III William Gary, and Labasan, and Offendertrak database information system's information on Parker.

Medeiros's usual procedure regarding investigative reports was to submit the report to his supervisor, who transmitted the report to the PSD Director for review and necessary disciplinary action with a hearings officer recommendation. Medeiros followed his usual procedure in this case and submitted a report of the Parker investigation (Parker Report I) with all relevant information and his investigation findings to his supervisor.

In October 2017, Medeiros submitted the Parker Report I to Festerling. In November 2017, the Parker Report I was then revised and resubmitted to Festerling (Parker Report II). Initially, Festerling agreed with the Parker Report II conclusions. However, by November 28, 2017, Festerling did not concur with the Parker Report II.

During an investigation, it is standard practice for the investigator to confer with the warden or chief supervisor. However, for the first time, Medeiros was called into a meeting initiated by the PSD Hearings Officer Nobriga because of her problems with Medeiros's investigation and the Parker Report II.

In previous investigations, Nobriga had found that the conclusions did not reconcile with the facts and information. However, in those investigations, Nobriga read the cover memo as clearly indicating that the investigator would refuse to change the investigative report.

Since Medeiros's cover letter did not express a direct refusal to change his investigation, Nobriga decided to "improve" Medeiros's investigation by "educating him."

On December 21, 2017, Nobriga and Festerling met with Medeiros. At the meeting, Medeiros's position was that there was no direct order. However, Nobriga maintained that the investigation's analysis was flawed and inconsistent with ACO training because there was too much opinion. Specifically, she disagreed with Medeiros's concept of insubordination and felt that Medeiros did not understand and should be educated regarding the definition. Nobriga gave Medeiros guidelines from the American Arbitration Association and Americans for Effective Law Enforcement (AELE) regarding what is considered insubordination in a paramilitary organization.[viii] Nobriga informed Medeiros that his report failed to consider that in the paramilitary organization rules, there is no requirement that a direct order be given, and the command and rank are given that authority. Nobriga instructed Medeiros to include and focus on the fact that Parker was given the highlighted policy and was "defiant" and to revisit this finding that there was no insubordination.

Festerling further directed Medeiros to include in the investigation report the source interview upon which the reasonable suspicion was based.

After this meeting with Nobriga and Festerling, Medeiros then revised his report to reach the conclusion that Parker had been insubordinate.

Medeiros's final report on the Parker investigation, dated January 5, 2018 (Final Parker Report), included specific Findings, which were the basis for and incorporated in the Conclusions.

In the Final Parker Report, Medeiros complied with Nobriga's direction and rendered a conclusion that Parker had a "defiant attitude" and was insubordinate to Ryan, Visconti, and Saito in violation of SOC C4.

While rendering that conclusion, the Final Parker Report found and concluded, among other things, that Ryan gave Parker the option to consent to the search but never gave Parker a direct order to submit to the search; Policy 8.02 provides that a staff member may be subject to a

strip search or a pat search without consent upon reasonable suspicion that that the member is carrying contraband; Ryan did not directly order Parker to submit to a pat search before requesting Parker's consent to a strip search; Ryan never told Parker that Parker's refusal to be searched would disobey a lawful order; and Ryan made Parker sign the leave form and escorted Parker off the property without a search or collection of any evidence proving the reasonable suspicion.

The Final Parker Report further found and concluded, among other things, that Hirano ordered the search based on information from a credible law enforcement source that Parker was bringing drugs into MCCC on September 8, 2017. Hirano further instructed Ryan to give Parker a directive to undergo a strip search. If Parker refused the directive, then Ryan was to issue a 30-day LWOP letter. When Parker reported to work and called into Ryan's office, Ryan explained to Parker that Parker was suspected of smuggling contraband, and that Ryan wanted Parker to consent to a strip search and a vehicle search under Policy 8.02. Parker told Ryan that his vehicle was parked on the street.

The Final Parker Report determined regarding the question of consent that Ryan told Parker that they need his consent; Black's Law Dictionary definition of consent is a voluntary agreement by a person to make an intelligent choice to do something proposed by another person; and that while Ryan was initially correct to request consent, Parker's refusal removed a consent search as an option. The Final Parker Report further determined that the Policy does not define the steps to administer a direct order or to conduct the search, does not require written or verbal consent, and provides that based on reasonable suspicion, an authorized person could have done a pat or strip search on Parker without consent.

The Final Parker Report found and concluded that because the Policy did not define the exact steps for Ryan to provide a direct order, Ryan never gave Parker a mandate or authoritative command. The Report noted that on multiple occasions during the incident, Ryan gave Parker the option to be strip searched, and that when Parker refused, the option expired. Based on the lack of guidance in the Policy, Ryan used the wrong words and failed to communicate to Parker to directly submit to the search.

The Final Parker Report found and concluded that when the option of a consent search expired, Ryan should have elevated the situation to a mandatory order to be searched. If Parker refused that mandatory order, this refusal would constitute disobedience and violation of a lawful order from a superior. However, Ryan failed to communicate and clearly convey a direct order to Parker and never explained to Parker that a refusal of an order would be disobedience of a lawful order or the Policy with consequences.

The Final Parker Report also noted that, Totau alleged certain observations when he took Parker to the bathroom, including hearing a sound that would have given Totau greater suspicion to conduct a search; however, Totau did not conduct a pat-down search of Parker.

The Final Parker Report found and concluded that Ryan brought Visconti as Parker's Union representative. Ryan read the Policy to Parker. Although Ryan allowed Parker to read the Policy, Parker contended that he did not have adequate time to do it. When talking to Visconti, Parker was told that he has to abide by a direct order. However, at no time did Ryan explain to Parker that a refusal would be disobedience of a direct order or the Policy, which carries consequences.

The Final Parker Report found and concluded that Parker further requested a consultation with Saito. During that consultation, Parker told Saito that he was not going to submit to the search.

During the Parker investigation, Medeiros further found based on the videotape that Ryan was present when Parker raised with Saito several times the issue of videotaping. Medeiros further found that Parker raised the issue of PSD's failure to comply with Policy 8.02 based on the lack of a private setting and his opposition to a videotaped strip search.

The Final Parker Report then noted that Parker refused to consent to the strip search, was issued a 30-day LWOP pending investigation, and escorted off the MCCC premises without any evidence collected.

In closing, the Final Parker Report significantly concluded that Ryan failed to execute and did not clearly convey a direct order to Parker but rather gave him the option to be strip searched.

Notwithstanding this closing conclusion, the Final Parker Report concluded that Parker was still insubordinate and that the SOC C-4[ix] conduct could be sustained. This conclusion was based on the video indicating that Parker had a defiant attitude towards Ryan because Parker told Ryan that he was not complying with the search; towards Visconti, when Parker told Visconti that it was "BS"; and towards Saito, when Parker stated to her that there was "no way" and that "they are literally filming." The Report further concluded that the facts established reasonable cause of a violation of a PSD rule or policy, that Parker was given notice by being handed the Policy to read compelling him to submit to a search, and that when Parker signed the LWOP memorandum, he was given notice of the disciplinary action pending investigation,

The Final Parker Report culminated with a Conferral section documenting how PSD created the Final Parker Report. On October 27, 2017, the investigation facts were discussed and submitted to Festerling for review as Parker Report I. Festerling returned the investigation twice for revisions, then concurred with the investigation findings, and instructed that the case be submitted for administrative review and action. Ultimately, Festerling did not concur with the investigative report and held a meeting. After the December 21, 2017 meeting where the insubordination elements were discussed, the Parker Report II was returned for revision and returned on January 5, 2018.

Medeiros's determinations in the Final Parker Report that Parker was not given and did not violate an order of the warden to submit to or to consent to a strip search and that Parker was not told by Ryan of the consequences for refusal of a search was based on his experience, training, and findings that a direct order requires a stern communication to and understanding by the individual of the action to be taken, which Ryan failed to convey to Parker of the direct order from the Warden.

Based on her review of the video, Taylor agreed with Medeiros that Ryan never gave Parker a direct order.

Despite the Final Parker Report's finding that Hirano ordered the search based on information from a credible law enforcement source that Parker was bringing drugs into MCCC, Medeiros did not include the interview with the inmate source (Source Interview), which was the basis for the reasonable suspicion because of his inability to determine whether or how the source was properly qualified.

After receiving the Final Parker Report, Nobriga concluded that it was useless to go back to Medeiros because "somebody didn't want to change." However, she was satisfied that the Final Parker Report met the standard after the removal of "lots of opinion."

Medeiros sent Parker a copy of the Final Parker Report.

2.9. Disciplinary Proceedings

2.9.1. Pre-Disciplinary Hearings

On September 8, 2017, Hirano sent a letter informing Parker, among other things, of Parker's placement on LWOP, effective September 8, 2017 through October 7, 2017, pending the outcome of an internal investigation for introduction of prison contraband.

The disciplinary case procedure is for a hearings officer to be assigned after the first five steps of just cause are determined. The role of the hearings officer is to perform the last two steps for just cause and to verify whether the policy was properly complied with. The hearings officer holds a hearing and has unlimited authority to follow up on issues and render a recommendation. The recommendation to the PSD Director includes the file and the formal letter for the PSD Director to sign. If the Director signs, the formal letter is returned to Nobriga's office for distribution.

On January 16, 2018, Nobriga drafted and sent a Notice of Pre-Disciplinary Due Process Hearing (Notice of Pre-Disciplinary Hearing) to Parker notifying him that PSD was in the process of determining whether there was just and proper cause to take disciplinary action against him for violating PSD SOC Article III, Section II. B., C., E2., E.7, E.10, G. H., I., N. and P. and Article III, Section III, Rules C. Class C Rules, C4. based on his refusal to comply with a

strip search several times on September 8, 2017. The Notice ordered Parker to appear at a Pre-Disciplinary due process hearing on January 26, 2018 at the Maui Intake Service Center and of his right to have a union representative and/or witnesses on his behalf.

On January 26, 2018, Nobriga held an audiotaped Pre-Disciplinary hearing. At the hearing, the computer "ate" the CD.

Miyagawa, assisted by Saito, attended, took notes, and handled the Pre-Disciplinary hearings with Parker.

Nobriga conducted a second audiotaped Pre-Disciplinary hearing on February 6, 2018 in Maui. The UPW representatives attended without Parker. Visconti appeared and recounted that Saito told Parker that a direct order had to be complied with, the directive came from the Chief, and Parker was told that he had the right to not be strip searched but would be put on administrative leave.

At the Pre-Disciplinary hearings, Nobriga and the Union representatives went through the videotapes. Parker was questioned by Nobriga. He further presented his account of the incident, and his feelings of discomfort about being videotaped and of being pressured to sign the consent form.

At the Pre-Disciplinary hearings, Saito and Miyagawa first argued that during consultation, UPW did not agree to the use of the video or allow their members to be videotaped at any time. Saito objected to the videotaped strip search because Policy 8.02 does not provide for a videotaped strip search; requiring a staff member to submit to a videotaped strip is a serious issue; and there had been no consultation regarding a videotaped strip search policy. Second, UPW asserted regarding the direct order that the investigation did not document who gave the directive, and there was no direct order because the strip search was presented as an option. Third, regarding the reasonable suspicion, UPW argued that inmates are not the most credible witnesses, and there was a lack of first-hand knowledge. UPW concluded that MCCC "bungled" and "totally failed" to execute the strip search process and apply the policy because of lack of knowledge, including failing to pat search Parker. Fourth, that Parker was not defiant or disrespectful but was more emotional and concerned because he did not understand what was going on during the incident. UPW finally argued that PSD failed to clearly communicate the process in a highly sensitive situation to Parker. Parker denied having contraband and raised the question of why Totau did not do a pat down if Totau heard a sound in the bathroom.

During and regarding the Pre-Disciplinary hearings, Nobriga made some significant statements. First, regarding UPW's objections that an on-camera strip search would have caused Parker embarrassment and shame, Nobriga represented that PSD has recorded other strip searches, no one had refused in prior strip searches, and that the extent of the strip search depended on the situation. Nobriga further represented that the search under the Policy is

videotaped from beginning to end, and that the subject is not forced to take everything off but only strips down to the subject's underwear. Nobriga further predicted that based on her prior experience with another MCCC employee found with tobacco after complying with a strip search, that Parker would not have been discharged if he had complied with the directive and was found with contraband. Second, Nobriga asserted that PSD had no obligation to inform Parker that he was not going to be videotaped until he consented to the strip search, and that Parker hindered PSD from providing that notice because of his refusal to consent. Alternatively, Parker should have known that he was not going to be filmed because Totau did not film him in the bathroom. Third, despite the position statement in the September 7, 2017 Memorandum regarding the Intel on Parker that there was no reasonable suspicion based on the inmate's account, Nobriga found that reasonable suspicion based on her own review of the definition. Finally, Nobriga admitted that Ryan never said that this was a direct order but maintained that there were other variables involved.

2.9.2. Espinda's Pre-Discharge Determination

Under the SOC Article III, the PSD Director is the only authority to implement disciplinary action and is authorized to implement an immediate discharge where the severity of a single violation is warranted.

Espinda saw no conflict between Nobriga meeting with Medeiros regarding the investigation prior to the submission of the Final Parker Report being submitted, and Nobriga serving as the hearings officer for the Pre-Disciplinary Hearing.

Prior to sending the Pre-Discharge Letter to Parker on April 5, 2018, Espinda reviewed the Final Parker Report, the Pre-Disciplinary and Pre-Discharge hearings, other PSD actions leading up to the termination, and the due process given to Parker.

On April 5, 2018, Espinda sent a letter to Parker drafted by Nobriga. This letter notified Parker of his discharge from employment as an ACO III, effective April 21, 2018, for violating PSD SOC Article III, Section II. B., C., E2., G. H., I., N. and Article III, Section III, Rules C. Class C Rules, C4 (Pre-Discharge Letter). The Class C violation is a low-grade violation. The Pre-Discharge Letter summarized the factual findings that on September 8, 2017, Parker: was escorted to Ryan's office to comply with a strip search under Policy 8.02; provided with a copy of the relevant sections of the Policy; refused the strip search several times; was afforded the opportunity to converse with a Union steward and business; and was placed on leave pending investigation and escorted out of MCCC.

Espinda provided additional supporting facts and conclusions, including, among other things, that the Director and the Warden deemed that: there was reasonable suspicion that Parker would be introducing contraband into MCCC on September 8, 2017; it was determined that Parker be subject to a strip search under Policy 8.02; and the Union was consulted on Policy 8.02

providing, among other things that written or verbal consent by the employee is not required for a strip or vehicle search. The Pre-Discharge Letter's facts and conclusions regarding the September 8, 2017 incident included among other things, that: Parker was directed to Ryan's office where Ryan, Hedge (camera person) and Totau were present; Parker was provided with a highlighted copy of Policy 8.02; the process was documented by videotape substantiating his refusal and failure to comply with the Policy 8.02 search; Parker made numerous responses to Ryan's repeated directives to comply with the policy requiring him to submit to a strip and vehicle search, which included refusals to comply with a strip search; the process in a para-military organization does not require explicit words indicating a direct order where the direction is to perform a strip search covered by department policy; MCCC staff described Parker's actions as refusing to comply with Ryan's strip search order; and the Union Business Agent advised Parker that while Parker could refuse the search, refusal would be subject to insubordination.

In the Pre-Discharge Letter, Espinda noted Parker's justifications for his conduct presented during the investigation and the Presdisciplinary hearing included among other things, that the policy was not complied with; his opposition to being videotaped while stripping; that his Union raised the lack of consultation regarding the use of a videotaped strip search; Parker was provided with an option to submit to a strip search; the MCCC staff was not familiar with execution of the Policy and failed to provide a proper explanation of the process; Union did not believe that there was reasonable suspicion for the Policy to be applied; and confidentiality concerns.

Espinda rebuttal of those justifications included, among other things, that: if Parker had progressed to a strip search, the videotaping would have been limited to the verbal exchange and the search of his clothing and belongings and not include his nude body with exposed body parts; his refusal was based on an unjust (not an unlawful) order; an ACO's duties require enforcement of contraband policies, rules, and laws and compliance with the SOC; correctional facility security is compromised by employees smuggling of contraband; and the totality of the circumstances indicated that Parker failed to allow the correctional facility to fulfill its duty by his refusal of a strip search after being directed and provided with Policy 8.02.

Espinda stated that the basis for the discharge was based on a review and consideration of Parker's personnel file and the severity of his misconduct, which consisted of a complete disregard of Department policies.

Finally, Espinda notified Parker of his right to contest the discharge at a video conferenced Pre-Discharge hearing, and his rights to have union representation and/or present evidence and to file a grievance under the CBA.

2.9.3. PSD's Pre-Discharge Hearing

On April 26, 2018, Nobriga assigned PSD Pre-Disciplinary Hearings Officer Nadamoto to hold Parker's Pre-Discharge hearing.

Prior to the hearing, Nadamoto reviewed the Pre-Discharge letter, the investigation, and the video.

At the Pre-Discharge hearing, the recorder was not turned on, so the hearing was repeated for recording.

Miyagawa, assisted by Saito, attended the Pre-Discharge hearing with Parker and presented Parker's defense that Parker did not comply with a videotaped strip search because the order was unjust.

At the Pre-Discharge hearing, Parker requested his job back and raised certain arguments, including but not limited to the following. First, Parker asserted that he had never seen nor was he taught that a camera would be used during an inmate strip search. In Parker's experience, a camera was used to find contraband and not turned on until the inmate exited his cell. Nevertheless, Parker pointed out that the sergeant or higher has the authority to determine when a camera is used. Second, no one ever told Parker that the camera would be turned off when the search was started, or that he would be moved to a private room. Therefore, when given an option, Parker did not comply because he felt violated. Third, Parker contended that unjust and unlawful is subjective, and Parker believed and felt that a strip search on camera is unlawful and not in the Policy. Finally, Parker represented that if the camera was not present or if it was clarified that the camera would not be used, he would have complied. As an example, Parker pointed out that he offered to have someone accompany him into the restroom. Parker disputed PSD's position that not using the camera was not indicative of what was happening next.

As a hearings officer, Nadamoto viewed the substantive differences of the three types of order violations under the SOC as a matter of degrees. Unlawful orders include violations of statutes, administrative rules or policies, and the SOC. Unlawful orders do not require obedience.

Unjust orders, on the other hand, are not substantively defined but are those that an employee feels are unfair. The employee is required to obey an unjust order and then appeal.

Conflicting or improper orders are contrary to the SOC, a policy, or an order. With a conflicting order, the employee has the burden of raising and informing his superior of the conflict, and the superior is required to clarify or countermand the order. Conflicting orders require obedience.

Nadamoto acknowledged that the issue of whether an ACO is required to obey an improper order has never been raised. There is no policy that requires obedience of an improper policy.

Nadamoto further acknowledged that if an order to submit to a videotaped strip search was carried out, the order would be unlawful. An order violating Policy 8.02 would be unlawful, which an ACO is not required to obey under SOC Article III, Section II. M.

In rendering her decision, Nadamoto found based on the investigation and the Director's letter finding reasonable suspicion that Parker was transporting contraband that there was no unlawful, unjust, or improper order in requiring Parker to comply with the strip search and that Parker provided no justification for his failure to comply. She disregarded Parker's objection to the videotaping of the strip search based on her finding that the PSD staff involved in the strip search would not have videotaped the strip search.

2.9.4. PSD Director's Decision to Discharge Parker

On April 27, 2018, Espinda notified Parker that the discharge was sustained because the evidence presented by Parker and his representative was insufficient to overturn the sanction imposed by April 5, 2018 discharge letter (Discharge Letter). In the Discharge Letter, Espinda established the basis for the decision, including the following findings.

Espinda found that immediate discharge was authorized by SOC Article III-B for a single violation of sufficient severity because a sanction less than dismissal sent a message to all employees that refusal of any directive policy would be acceptable behavior, which is not acceptable in a paramilitary organization.

Espinda rejected Parker's objection to the videotaped strip search based on Parker's failure to object or ask any questions regarding his right to refuse based on being videotaped while naked.

Espinda maintained that Policy 8.02 does not require written or verbal consent for a strip search where there is a reasonable suspicion of carrying contraband or that property is being removed and that Parker violated the policy by not participating in a directed search. Further, that videotaping of an incident is authorized, and part of every staff search that Espinda conducted as a warden.

2.10. UPW Assistance of Parker Regarding the September 8, 2017 Incident and Disciplinary Proceedings

2.10.1. UPW Assistance During the Investigation Process

Immediately after the incident, Parker met with Miyagawa and provided his recollection of the incident. Miyagawa reviewed Policy 8.02, agreed that a videotaped strip search was not permitted, and that the Union would grieve the disciplinary action. Miyagawa further told Parker that if there were no findings to support the leave, his pay would be restored. However, the conclusions would not be quick. Miyagawa advised Parker to comply and immediately contact the Union if he is contacted for questioning and not to speak to anyone regarding the investigation.

On September 11, 2017, Parker met again with Miyagawa. Miyagawa raised that there was no policy regarding a video camera being used in a strip search. Parker was upset that the details of his removal from the facility were publicly posted on Facebook and on email by Lieutenant Fujimoto. Miyagawa advised Parker that Parker could file a complaint for harassment with PSD.

On November 3, 2017, Parker informed Miyagawa of his lack of full pay for October. Miyagawa responded to Parker's question that the leave with pay pending investigation could last a long time.

Parker went to the Union office and signed a letter extending his 30-day leave with pay. Miyagawa advised Parker that if Parker was not contacted regarding return to work, Miyagawa would try to get an update.

On November 6, 2017 Miyagawa emailed Warden Hirano and called PSD's Renee Laulusa (Laulusa) regarding whether Parker could return to work. Taylor responded that Hirano was out, and that Taylor needed to confirm that Parker should not return to work. Taylor further informed Miyagawa of a letter being drafted that would be sent to Miyagawa for signature.

On November 6, 2017, Miyagawa notified Parker not to return to work and promised to follow up with Parker's notification status.

On November 7, 2017, Hirano called Miyagawa to request that Miyagawa pick up, obtain, and return Parker's notification letter. Miyagawa called Parker to confirm the letter for him to sign.

Miyagawa assisted Parker in preparation of his investigation questionnaire. In this questionnaire, Parker raised that Policy 08.02 was not followed properly because the setting was not private, Parker's opposition to being videotaped while stripping on a camera accessible to

any staff member, and Parker's inability to recall being given a direct order to submit to a strip search because of being given an option.

2.10.2. UPW Assistance During the Disciplinary Process

Miyagawa followed up with PSD regarding Parker's disciplinary case.

On January 17, 2018, Miyagawa notified Parker of the meeting for the following week. On January 19, 2018, she notified Parker of the January 26, 2018 hearing, which was rescheduled to accommodate his representation request.

Upon receipt of the Notice, Miyagawa contacted and told Parker that given his clean record, she expected a one-day suspension as the disciplinary consequence, which the Union would fight because of the effect on Parker's seniority.

On January 24, 2018, Miyagawa prepared Parker for the Pre-Disciplinary hearing and discussed the following. Parker gave Miyagawa a letter from Gazmen. Parker further advised Miyagawa of arguments to be raised at the hearing. Miyagawa noted that while during consultation, PSD represented that the purpose of the policy was to prove and discover contraband, the policy was violated because videotaping of the conversation prior to or during the strip search was not allowed. Parker did not recall whether PSD informed him of the videotaping of the strip search. Parker thought their comments, the highlighted page about the camera, and their failure to turn off the camera or move to a private place insinuated the videotaping. Parker did not comply because the order to strip on camera was unlawful.

At an April 9, 2018 meeting, Parker asked Miyagawa if the Union would still represent him or if Parker needed to hire an attorney. Miyagawa explained that the hearing was Parker's opportunity to convince PSD that termination was too severe; it is typical for PSD to uphold the decision; the Union then proceeds to grievance with arbitration as the State Director's decision; that Parker was insubordinate by refusing to comply with the directive; and that hiring an attorney was Parker's decision.

As more fully discussed above and incorporated herein, Saito and Miyagawa appeared and represented Parker at the Pre-Disciplinary hearings, made numerous arguments in support of Parker and a complaint with documentary support of the Facebook postings and text messages from the lieutenant about the Parker incident.

2.10.3. UPW Assistance During the Grievance Process

The UPW Division Director supervises, directs, and communicates on a daily basis with the business agents regarding the handling of grievances.

The UPW's standard procedure for handling a grievance is that an employee contacts the business agent regarding an issue or action that would trigger the filing of a grievance. If the Union decides that the grievance has merit, formal files are established, which include investigative records, requests for information, information received from the employer, business agent contemporaneous notes, records kept in the normal course of business, and dated contacts with the grievant and the employer.

Under this procedure, the business agent makes the initial decision on whether a grievance should be filed. If the matter is unique, the business agent will consult with the Division Director.

The Union files a Step 1 grievance (Step 1) and receives the decision, which is provided to the grievant.

The next step is that the Union decides whether or not to arbitrate based on the recommendation. The business agent makes a recommendation to the State Director through the Division Director and Executive Assistant to the Executive Director.

UPW processed the Parker grievance in accordance with this UPW standard procedure.

Miyagawa oriented Parker regarding the grievance process and told him that the Union would go to arbitration.

Miyagawa met with Parker after every meeting, including the Step 1 and communicated frequently with him. Parker agreed that Miyagawa followed through on her promised actions.

On April 30, 2018, Miyagawa filed a Step 1 with PSD (Parker grievance) seeking, among other things, rescission of Parker's discharge, reinstatement, and restoration of his prior rights, benefits, and status, including lost wages. The Step 1 filing claimed that the employer violated the CBA by discharging Parker without just and proper cause and failing to review and consider all available evidence, data, and factors supporting Parker prior to making a final decision.

On April 30, 2018, Miyagawa transmitted a copy of the Step 1 filing to Parker.

In accordance with established procedure, Miyagawa sent a letter to PSD (Request for Information) requesting information, which typically consists of the investigative report and other documents, necessary for the processing of the Parker grievance.

On May 11, 2018, Miyagawa informed Parker of the status of his grievance and that the Union was waiting for the requested information. Parker asked to review the video. Miyagawa promised to request the video if it was not provided and to contact Parker upon receipt of the information and the scheduling of the Step 1 meeting.

On June 1, 2018, Miyagawa spoke again with Parker regarding the status of his grievance and asked Parker if he would consider resignation if the outcome was not favorable. He was unwilling, planned to get an attorney, and would only settle for a return to work. Miyagawa told Parker to call anytime, that she expected the requested information by the end of the week, and that she would schedule the Step 1 meeting and meet with him prior to the Step 1 meeting.

Miyagawa informed Parker that there was a delay in receiving the information from the State. Parker told Miyagawa of his receipt of certain documents from Medeiros. Parker also obtained other documents and information, including the DVD of the incident, from his unemployment proceeding.

On June 7, 2018, Miyagawa received a response to the Request for Information, which included the Final Parker Report.

By a June 14, 2018 letter, Miyagawa notified Parker of the June 27, 2018 Step 1 meeting.

On June 26, 2018, Miyagawa spoke with and responded to Parker regarding the grievance process steps. Miyagawa also told Parker that he could review the video if he brought a computer. Miyagawa further told Parker that after Step 1, there was arbitration at the recommendation of the State Director, which would be based only on the merits.

Laulusa conducted the Step 1 meeting, which Parker, Miyagawa, and Saito attended. At the meeting, Parker raised that the video was incomplete and denied having contraband. Parker argued that the video shows that Parker told Ryan that he had never heard of a videotaped strip search. Parker further asserted, among other things, that a filmed strip search violated the 4th amendment and the policy and that he found the video camera and the four males were intimidating. Further, despite being told or not, Parker felt that the search would be videotaped and expressed that the camera was bothering him. Finally, Parker denied having contraband on him or in his vehicle and asserted that a pat search could have been done.

At the Step 1 meeting, Miyagawa raised Parker's lack of a disciplinary record, PSD's lack of communication of the strip search policy to Parker, and that Parker was repeatedly given the option to decide whether to be strip searched. Miyagawa further argued that despite the fact that videotaping of strip searches had never been done before, the highlighted policy was provided to Parker implying that videotaping was standard and customary for strip searches. Miyagawa also argued that the Final Parker Report describing Parker as defiant and insubordinate was not supported by the video. Finally, Miyagawa asserted that the decision letter's statement that, once the search was begun, the camera would have been panned was not communicated to Parker, and UPW did not believe that this would have happened.

At the hearing, Laulusa justified the use of the video based on the need to preserve factual data and because it was done in other searches.

On July 5, 2018, Miyagawa informed Parker that Laulusa said the Step 1 decision would be sent early in the week.

On July 24, 2018, Espinda denied the Step 1 and responded to Parker's and the Union's arguments. First, Espinda acknowledged the merit in their argument that the policy only provided for video recording of vehicles. However, Espinda asserted that the policy did not prohibit the use of video record of physical searches to preserve evidence. Second, Espinda blamed Ryan's failure to offer detailed information regarding the strip search procedure on Parker. Third, while acknowledging that a pat search could have been and was not conducted, Espinda responded that the Warden has the discretion to determine the type of search. Fourth, regarding the violation of Parker's rights, Espinda responded that the courts have ruled that strip searches in correctional facilities do not invade the reasonable expectation of privacy, that Ryan did not violate the search policy, and that the search was conducted in accordance with the Warden's directive and policy. Finally, Espinda responded to Parker's contention that he did not want to be videotaped "naked" that the video shows that Parker was allowed to use the restroom without being videotaped.

On July 26, 2018, Miyagawa notified Parker that the Step 1 was denied, and the case would be submitted to the State Director, who had the sole authority to decide on the next step. Miyagawa transmitted the July 25, 2018 Step 1 decision to Parker.

Parker requested that the Union take his grievance to Step 2. Upon being told that the next step for an ACO was to go to arbitration, Parker requested arbitration.

Parker made multiple calls to Miyagawa but was unable to contact her between the denial of the Step 1 grievance and the September 22, 2018 letter from UPW State Director Dayton Nakanelua (Nakaneulua) denying arbitration.

2.11. UPW's Refusal to Take Grievance to Arbitration

The UPW State Director, not the business agent, makes the final decision regarding whether to take a grievance to arbitration.

By a Memorandum to Nakanelua (Miyagawa Memo), Miyagawa recommended to Nakanelua that UPW not pursue Parker's grievance regarding his termination to arbitration. The Miyagawa Memo documented that the Union attended the Step 1 meeting and the arguments made regarding the flaws in PSD's poorly conducted search. Miyagawa further referenced Parker's lack of prior disciplinary history and Parker's arguments made at the Step 1 meeting.

Nevertheless, Miyagawa concluded that the Parker grievance should not be pursued to arbitration because there was no disputing Parker's insubordination for failing to comply with a directive to be strip searched. Miyagawa reasoned that regardless of Parker's discomfort of

being filmed while stripping, the order should have been complied with and then grieved. Ultimately, Miyagawa determined that it was clear that the September 7, 2017 email from a Security Threat Group Coordinator provided creditable evidence to justify a search, and that the seven-part test for just cause[x] was met in Parker's case.

After looking at the policies and procedures, Saito, however, remained concerned that PSD failed to follow and bungled the process by, among other things, continually requesting that Parker consent and allowing him to go to the restroom. Therefore, Saito contacted UPW Hawai'i Division Director Loyna Kamakeeaina (Kamakeeaina) regarding the Parker strip search procedure. Kamakeeaina told her that UPW had consulted on the Policy, that videotaping was not part of the Policy, and to consider whether that was a fatal flaw.

Prior to recommending whether to arbitrate the Parker grievance, Saito reviewed the videotape of the September 8, 2017 incident.

After reviewing the video, the investigative file, the request for information, the employer's and Miyagawa's notes, and the grievance records, Saito nonetheless concurred with Miyagawa's conclusion that Parker was guilty of insubordination regarding a direct order reasonably related to the safety and security of MCCC for refusing the numerous requests to consent to the search. Therefore, Saito signed off on Miyagawa's recommendation to Nakanelua.

On September 19, 2018, Nakanelua notified Parker that the Union has decided not to pursue the grievance because there was insufficient proof that there was a violation of the CBA (Nakanelua Letter).

After receiving the Nakanelua Letter, Parker attempted to contact Miyagawa.

Parker called Miyagawa on multiple occasions, including on September 24 and 25, 2018, to discuss this matter. He left messages, which remained unanswered.

On September 25, 2018, Parker emailed Miyagawa and Saito and acknowledged receipt of the Nakanelua Letter. Parker requested, among other things, an explanation of UPW's finding of insufficient proof of a CBA violation, an opportunity to appeal the decision, his official personnel file, including derogatory information, and the PSD and UPW grievance files. Parker further informed Miyagawa and Saito that UPW failed to provide fair representation. He also reiterated his position that the PSD strip search violated his human rights, his discharge was based on an incomplete and edited videotape, Ryan's repeated request for Parker to consent was inconsistent with the allegation of a direct order, that Ryan, Totau, and Hedge mishandled the strip search in violation of the search policy and did not reassure him that the actual strip search would not be filmed, and the video recording shows his reaction of disbelief, confusion, and concern and not wilfull insubordination.

Parker received no response to this email from UPW.

Parker called the UPW headquarters in Honolulu and spoke to a woman. Parker informed the woman of his dissatisfaction with his Maui representation, his receipt of the Nakanelua letter, and his desire to appeal. Parker was told to call back. Parker called back the next day and spoke to a woman in Nakanelua's office, who told him that Nakanelua would call him back on Wednesday.

Nakanelua did not return the call. Parker called Nakanelua five more times, but the calls were never returned.

At the end of September, Saito and Miyagawa called Parker to address his concerns based on his calls to UPW O'ahu. Saito informed Parker that the decision came from O'ahu, that Parker should address his concerns to Nakanelua, and would get a call from Nakanelua's secretary. She reiterated that Gibson had told him that once the State Director issues a decision, it is no longer within their control to overturn that decision, and a written appeal would need to be submitted. Saito further told Parker to call O'ahu about his request for his case file.

On October 1, 2018, Parker called Gibson regarding the Nakanelua Letter. Upon instructions from Nakanelua's secretary, Gibson told Parker to submit any concerns or requests in writing to the State Director. Gibson emailed regarding Parker's phone call and her response.

On October 3, 2018, Saito talked to Parker on the phone and reiterated to direct his concerns or requests regarding the Nakanelua Letter to the State Director.

3. Analysis and Conclusions of Law

3.1. Burden of Proof

Under HRS § 91-10(5) and HAR § 12-42-8(g)(16), the Complainant has the burden of proving alleged violations of HRS Chapter 89 by a preponderance of the evidence.

Under HAR § 12-42-8(g)(16), any party raising any other issue has the burden of proving that issue by a preponderance of the evidence. *See also*: Hawaii Gov't Emp. Ass'n, Local 152 v. Keller, Board Case No. CE-13-597, Decision No. 456, 6 HLRB 421, 429 (2005).

The preponderance of the evidence is proof which leads the factfinder to find that the existence of the contested fact is more probable than its nonexistence. Minnich v. Admin. Dir. of the Courts, 109 Hawai'i 220, 228, 124 P.3d 965, 974 (1989) (*citing* Masaki v. Gen. Motors Corp., 71 Haw. 1, 14, 780 P.2d 535, 574 (1989).

Further, the Board has interpreted HAR § 12-42-8(g)(16) to mean that the party required to carry the burden of proof, must not only produce sufficient evidence but also support that

evidence with arguments in applying the relevant legal principles. If any party fails to present sufficient legal arguments with respect to any issue, the Board will find that the party failed to carry its burden of proof and dispose of the issue accordingly. State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982).

3.2. Witness Credibility

In assessing the credibility of the witnesses in this case, the Board relied primarily upon witness demeanor, the context and consistency of the testimony, and the quality of the witness recollection. The Board further considered the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. In rendering such assessment, the Board notes that credibility findings are not all or nothing. The Board may believe some, but not all, of a witness's testimony. Most of the credibility determinations regarding the witnesses are incorporated into the findings of facts above.

Parker called as his witnesses: himself; Kalalau; Gazmen; Diana; Medeiros; and Saito. Based on their observations at the HOM, the Board members generally found Parker's witnesses to be credible, and their testimony was credited to the extent consistent with the findings of fact.

Witness credibility mattered in this case on several issues. The most critical one was the question of whether Parker reasonably believed that Ryan was requesting Parker's consent to a videotaped strip search.

For the reasons set forth below, the Board generally finds that Parker was a credible witness, and his testimony is credited to the extent consistent with the findings of fact above. During certain points in his testimony, Parker's emotions and frustrations were apparent from his responses but were not inappropriate under the circumstances. Most significantly, the Board finds credible that Parker had a reasonable belief that Ryan was requesting that Parker submit to a consensual videotaped strip search.

Parker had a fairly clear and detailed recollection regarding the details of the September 8, 2017 incident. His testimony was largely straightforward, consistent, and plausible. Parker was honest regarding his intentions and thoughts during the incident and the subsequent processes. Parker further admitted based on his training and experience with strip searches of inmates and his knowledge of the Policy that strip searches had not been videotaped.

UPW contended that Parker was not credible and sought to impeach and discredit him in several ways. First, UPW tried to show that the reason for Parker's refusal to the strip search was because he was carrying contraband. UPW portrayed Parker as an intelligent and knowledgeable employee with notice and awareness of the SOC, the policies, and the

consequences for a reasonable suspicion of carrying contraband, who would have nothing to lose by submitting to a strip search if he was not carrying contraband.

UPW's attempts were largely unsuccessful because Parker consistently adhered to his position that that he would have lost his dignity and his privacy by submitting to a videotaped strip search. Parker further legitimized his concerns by presenting evidence of the Facebook posting of the Parker incident. Second, UPW tried to prove that Parker's alleged insubordination to Ryan was based on their past friction and lack of trust. However, Parker credibly testified that things had improved in his relationship with Ryan because the two men left each other alone. In short, the Union failed to establish the relationship between their prior conflicts and Parker's refusal to submit to the strip search. Finally, while the Union attempted to raise doubts regarding Parker's credibility by introducing testimony of rumors. However, the objection to this evidence was sustained.

Parker's recall regarding his interactions with the UPW after the incident, however, was weak. UPW challenged and probed Parker's recollection on his Union interactions, which at times, exposed Parker's lack of recall of specific details or resulted in specific denials.

Kalalau had a clear and detailed recollection with attention to detail and accuracy. His testimony was direct, consistent with the other evidence in the record, plausible, and authoritative regarding the strip search policy, procedure, and training. In response to UPW's attempts to question Kalalau's qualifications to train and testify regarding the strip search policy, Kalalau was honest regarding his educational background and able to demonstrate his knowledge of the policy and the procedure. Although called by Complainant, Kalalau's testimony was objective and beneficial to all parties.

ACO Gazmen was less credible than Kalalau because of his tendency to exaggerate. For example, Gazmen testified that he was involved with thousands of inmate strip searches. Gazmen was also prone to making broad conclusory statements, such as using terms like never ever, which lacked detail and fine distinctions. Nonetheless, his testimony generally showed a clear recollection that was consistent with the other testimony in the record. UPW sought to prove that Gazmen was biased towards Parker based because of their prior relationship. However, this effort actually supported Gazmen's credibility based on his candid admissions that he was Parker's classmate and coworker, that he met with Complainant's attorney an hour before the HOM, and that he gave Parker a written note of Ryan's statement that Parker was caught with drugs taped to his back.

Similar to Gazmen, ACO Diana exaggerated regarding the thousands of inmate searches that he had conducted. However, apart from this exaggeration, Diana was credible based on a clear recall, straightforward responses, and admissions of confusion during questioning.

Complainant's most credible and effective witness was the PSD investigator Medeiros. Medeiros had a clear and detailed recollection. His testimony was very credible, straightforward, consistent, and plausible. The most significant indication of his credibility was his straightforward admissions regarding the conflict between performing his job to investigate the September 8, 2017 and make accurate findings and conclusions based on his training and addressing Nobriga's pressure to change his findings and conclusions to support a determination that Parker violated the SOC for insubordination by disobeying a direct order.

Medeiros was candid that his initial conclusion was that Parker did not violate the SOC because no direct order was given to submit to the strip search or to consent, and that the inmate source may not have been qualified based on his review of the video, his training, and experience. Medeiros was also forthright in his position that the Parker investigation deviated from the standard procedure, in which the investigative report was submitted directly to the Director. Medeiros stated that, in this case, Nobriga interceded in the Parker investigation report procedure by calling Medeiros into a meeting, critiquing and requesting that changes be made to the Parker Report II's findings and conclusions. The Board credits Medeiros's testimony that Nobriga directed him to change the Parker Report II to include a finding that Parker was defiant and to revisit his determination that Parker was not insubordinate.

Finally, Medeiros was also honest regarding his inability to determine if the inmate witness was qualified to establish the reasonable suspicion. He further admitted that his finding of reasonable suspicion for the strip search was added to the Final Parker Report under Festerling's instruction.

Parker also called Saito, who was generally a credible witness. Saito had a detailed and clear recall of the Parker incident and the disciplinary and grievance proceedings in his case. Saito was confident regarding her specific role in those proceedings, her knowledge, and the reasons for her actions. Her testimony was believable, honest, consistent, and plausible.

Despite Saito's general credibility, there were certain flaws in her testimony. Unlike her testimony on other issues, Saito's testimony regarding the reason that Parker's email was not deemed to constitute a request for appeal from Nakanelua's decision regarding arbitration was confusing and unclear. Further, while Saito admitted based on the Parker video that Parker was not given a direct order, she maintained that an employee can be terminated for insubordination without a direct order under the SOC. This position is simply contrary to the SOC. Saito verified that UPW's practice is to give the Employer examples of the disciplinary consequences in similar cases, and the record shows that Saito raised Parker's lack of prior discipline during the disciplinary procedure. However, the record is unclear whether UPW provided such information in Parker's case.

Saito's testimony regarding her recommendation not to arbitrate Parker's discharge also contained some weaknesses. Saito admitted that she read the Final Parker Report and was aware

that Parker's disciplinary action was based on an SOC Class C violation at the lower end of seriousness. Saito clearly articulated her reason that a Class C violation of insubordination could warrant the severe consequence of discharge under the SOC. However, Saito did not adequately explain the reason that Parker's conduct warranted the most severe consequence for a Class C violation. The second weakness was Saito's testimony that she could not recall the basis for the statement in her notes that there was a fatal flaw in the compliance with Policy 8.02 was unconvincing.

Based on observations at the HOM, the Board generally found the UPW witnesses Gibson and Nadamoto credible, and their testimony was credited to the extent consistent with the findings of fact.

UPW Business Agent Gibson testified regarding a telephone call with Parker, in which she advised Parker to respond to the Nakanelua Letter in writing to the State Director's office, and her follow-up communications with Saito after this call. Gibson was credible with a detailed and clear recollection.

Nadamoto, the PSD Pre-Disciplinary hearings officer for Parker's case, was called to corroborate PSD's proper handling of the Parker disciplinary action. While Nadamoto's recollection was detailed and clear regarding the general Pre-Disciplinary hearing process, her recall regarding the specific details of Parker's hearing and the September 8. 2017 incident lacked the same level of detail and clarity. The UPW attorney's questioning of Nadamoto was often leading and suggestive.

Nadamoto also confirmed that Nobriga departed from the PSD standard procedure in disciplinary cases by initiating a meeting with Medeiros and prevailing upon him to alter the Parker Report II to find that Parker was insubordinate. Nadamoto further confirmed that hearings officers receive only the final investigative report.

However, Nadamoto then sought to diminish the negative impact of her testimony upon PSD by also stating that she could request adjustments to the investigative report for clarification. Finally, Nadamoto was unclear and unable to reconcile in her testimony a policy that gives an employee the option of a consensual strip search with a requirement that the employee comply with a direct order to submit to a strip search. Nadamoto was also vague and confusing in responding to probing questions regarding the distinction between unlawful, unjust, and improper orders.

The Board does not credit Nobriga's testimony because the testimony was self-serving, contradictory, inconsistent with other evidence in the record, and defied credibility in several respects. First, at the time of the HOM, Nobriga was and still is a top-level administrator at PSD. In that capacity, she was in charge of the PSD disciplinary hearings office, conducted training for all investigators, and reported directly to Espinda. Moreover, Nobriga was the Pre-Disciplinary

Hearings Officer tasked with hearing and recommending the disciplinary action taken by PSD against Parker in this case. In that capacity, Nobriga drafted the letters setting forth the grounds for disciplinary actions taken against employees for Espinda, including the Notice of Pre-Disciplinary Hearing and the Pre-Discharge letters sent to Parker. Given her PSD position and involvement with the Parker discharge, her interest in framing her testimony as favorably as possible to PSD's actions taken in this case is obvious. In short, Nobriga's conduct is at the heart of PSD's conduct being challenged by Parker. Hence, her testimony must, at a minimum, be viewed and characterized as self-serving.

In particular, the Board finds Nobriga's testimony regarding the disciplinary process unreliable, not credible, and inconsistent with the other testimony in the record. The most significant examples are those with respect to Nobriga's actions taken regarding the Parker investigation.

Nobriga maintained that she intervened in the Parker investigation because Medeiros's cover letter did not indicate a refusal to change his investigation like cover letters for other investigative reports. This explanation is contrived and intended to justify her intervention. More importantly, if true, this *ad hoc* approach to investigations and the investigative reports is evidence that investigations and the reports are not handled consistently under established procedures and standards. Instead, the integrity of the investigation and the report rests in the investigator's willingness to tolerate interference with the findings and conclusions by the hearings officer and the investigator's supervisor. This is an obvious compromise of the investigative process.

Further, Nobriga testified that she contacted Festerling because of her concerns that Medeiros's conclusions did not reconcile with his facts and information in the investigation, and it was apparent that Medeiros did not comprehend insubordination. Nobriga's statements that she only provided guidance and did not direct Medeiros to make any specific changes was directly contradicted by Medeiros's testimony credited by the Board. Nobriga's characterization of her actions as guidance rather than direction is self-serving, biased, and unsupported and inconsistent with the record.

Additionally, Nobriga's testimony that Medeiros failed to comprehend the concept of insubordination is also unsupported and inconsistent with the record. In the Parker Report I, Medeiros's conclusion that Parker was not insubordinate was consistent with his finding that Parker was not given a direct order. After Medeiros changed the Parker Report II under Nobriga's direction to conclude that Parker was insubordinate, the Report became internally inconsistent. This conclusion that Parker was insubordinate conflicted with the finding that Parker was not given a direct order because of the request for his consent. To attempt to resolve those inconsistencies, the Final Parker Report implausibly reasoned that Parker was defiant, and his refusal removed the option of consent. Therefore, Parker was insubordinate because he

refused to comply with the strip search and made statements to Saito and Visconti, such as this is B.S., and they literally filming me. The Board finds this reasoning nonsensical and the conclusions obviously erroneous based on the findings.

Despite Espinda's corroboration, the Board is not convinced by Nobriga's position that the PSD investigative process continues through the Discharge Hearing. The Board finds that PSD took this position to justify Nobriga's intervention in the Parker investigative process. Medeiros's testimony credited by the Board, which Nobriga, in fact, admitted that she and Festerling had never previously intervened in investigations. Finally, Nobriga's advocacy for the PSD position at the Pre-Disciplinary hearing is more consistent with an effort to justify a predetermined disciplinary consequence as opposed to a continuing impartial investigation.

Nobriga's testimony had other inconsistencies with the record. Her explanation that a direct order is not required to violate the insubordination rule in a paramilitary organization is inconsistent with the SOC. Her statement she accepted the Final Parker Report because it met the standard based on her experience was inconsistent with her later testimony that she did not return the Final Parker Report because somebody did not want to change.

Finally, the Board does not credit Nobriga's testimony because, as discussed more fully below, the testimony appeared to be an obvious and deliberate attempt to influence an investigation to salvage a bungled strip search and a predetermined disciplinary consequence.

Nobriga made some admissions regarding the grounds for the disciplinary consequence, which, as more fully discussed below, are significant to the decision in this case. Nobriga agreed that the hearings officer was responsible for verifying that the policy was properly complied with and that the only supported ground for Parker's disciplinary action was his lack of compliance with a directive based on reasonable suspicion. She further conceded that if Policy 8.02 was not properly complied with, then the order to comply was unlawful and Parker was justified in refusing to comply. On those issues, Nobriga admitted that the video does not show that Ryan stated that he was giving a direct order. She also acknowledged that Ryan failed to inform Parker that the strip search was not going to be videotaped. Nobriga's placement of blame on Parker for Ryan's failure to inform him is simply nonsensical because the obligation of notice in disciplinary situations is on PSD. Finally, Nobriga conceded that there was no reasonable suspicion for the strip search because the inmate's account could not be credited. However, after the fact, Nobriga accepted that the reasonable suspicion was already decided and then used her own analysis to support that reasonable suspicion finding. She also admitted that she failed to consider the issue raised by UPW that Parker denied bringing contraband into the facility as sufficient to contradict the reasonable suspicion.

PSD called only two witnesses: Espinda and ACO Hedge.

Respondents sought to establish the just cause for Parker's discharge through Espinda's testimony as the primary decisionmaker regarding Parker's strip search and discharge. However, the Board does not find Espinda credible based on his obvious vested interest in the outcome. UPW sought to provide more credibility to Espinda's testimony by establishing the length of his PSD work experience and purported familiarity with PSD policies and practices. However, Espinda's review and commentary regarding the video of the September 8, 2017 incident was entitled to limited weight because of his lack of direct knowledge of the incident. At best, his testimony amounted to a self-serving, secondhand narrative of the incident, which did little to refute Parker's direct testimony.

PSD's examination of Espinda was also framed to elicit very general, misleading, and devious responses, which Espinda delivered. In numerous instances, Respondents' attorneys framed Espinda's testimony to give the impression that the grounds for the insubordination and the discharge were more substantial and compelling than they actually were. For example, Espinda used the terms totality and inclusive. He further cited hypothetical conduct unsupported in the record, such as that an untruthful response to an investigation questionnaire could result in discipline, to imply that Parker's discharge may have been based on more than insubordination. His response to the critical question whether Ryan's request to Parker to consent was a direct order was longwinded and incoherent. On the other hand, his response on the issue of whether Parker consciously declined a direct order to participate in a duly authorized policy mandated strip search was conclusory. Espinda's testimony further contained internal contradictions. For example, he stated that he ordered the strip search of Parker, and then later contradicted that statement with by testifying that Hirano made the decision. Finally, the Board simply finds Espinda's conclusion that the reasonable suspicion was supported by Totau's uncorroborated statement regarding the bathroom incident which did not result in a finding of contraband is proof of the lack of substantial evidence to support PSD's reasonable suspicion determination.

At the hearing, Espinda made significant admissions undermining his findings and conclusions regarding the just cause for Parker's discharge. Those admissions included that his determination was inconsistent with the SOC requirement that orders from superiors to subordinates be in clear language and with the Final Parker Report's finding that Parker violated the SOC insubordination provision but not the SOC professional conduct and responsibilities provisions. Further, Espinda admitted that he did not know what Parker was handed during the incident or what was highlighted. Espinda also conceded that Policy 8.02 does not allow for videotaped strip searches, and there was no finding that Parker brought contraband into the facility. Espinda also admitted that Parker had no prior history of disciplinary actions. Finally, his justification that a sanction less than discharge sends a message to staff that refusal of a direct order was acceptable in a paramilitary organization was unconvincing. It was also inconsistent with the Final Parker Report's conclusion that no direct order was given, and that the insubordination was based on defiance and the statements made to the UPW officials.

Despite being a PSD employee under the supervision of Ryan, Hedge was a credible witness whose testimony benefitted all parties. The Board credits Hedge's testimony that he was told to videotape the conversation before the strip search and the vehicle search, that Parker seemed confused about the reason for the strip search, that it was the first time that he videotaped a strip search of a staff member and that a person was asked for his consent for a strip search, and that a pat down and ion machine could have been used to detect the contraband.

Regarding the PSD witnesses generally, the Board is particularly troubled that PSD failed to call critical and percipient witnesses to support their findings of reasonable suspicion and that Parker was given and disobeyed a direct order. In particular, PSD failed to call Ryan, the PSD official who implemented the search procedure and gave the alleged direct order that was allegedly disobeyed by Parker. PSD's failure to call the key witness on these issues leaves Parker's testimony largely unrebutted. The failure to call Ryan is significant given Visconti's testimony and his reference to the back page of the Policy providing for videotaping of vehicle searches corroborating the reasonableness of Parker's belief that he was being subjected to a videotaped strip search.

PSD also failed to call Totau regarding the bathroom incident and the reasonable suspicion based on his involvement with the inmate interview giving rise to the September 8, 2017 incident. Instead, Respondents relied on Espinda's secondhand testimony on these issues. Therefore, the Board was unable to consider the evidence regarding the bathroom incident and Totau's conduct regarding the incident.

Finally, PSD failed to call Festerling to establish his reasons for refusing to approve the Parker I and II Reports and for the meeting with Nobriga and to corroborate Nobriga's testimony that the reasoning underlying the conclusion that the initial draft of the investigative report was deficient requiring revision.

Based on these determinations, the Board considers the following issues.

3.3. Order No. 3545

The Board issued Order No. 3545, which documented a prior oral ruling. Order No. 3545, among other things, denied the UPW's Motion to Disqualify. The Order also granted, in part, Complainant's Motion for Leave to Amend the Second Amended Complaint to conform to the evidence to add allegations that PSD applied and unilaterally implemented policies regarding videotaping of strip searches and consensual searches without notice to the Union or the Complainant constituting an interference and restraint of the Complainant's ability to exercise his rights under HRS Chapter 89 in violation of HRS §§ 89-3 and 89-13(a)(1) and (7). Finally, the Order provided an opportunity to all the parties to reopen their case at the HOM to address the additional violations and applied the full record filed in the case to the Third Amended Complaint.

3.3.1. Motion to Amend Second Amended Complaint Under Rule 15(b)

The Board's administrative rules Hawai'i Administrative Rules (HAR) provide for a liberal construction to effectuate the purpose of HRS Chapter 91 and to secure the just and speedy determination of every proceeding. HAR § 12-42-2. HAR § 12-42-8(g)(3)(A) provides that motions made during a hearing shall be made part of the proceedings. HAR § 12-42-8(g)(3)(C) provides that written motions shall briefly state the relief sought, accompanied by affidavits or memoranda setting forth the grounds upon which they are based, must be served on all parties and filed with the Board along with the certificate of service within three days.

Regarding amendment of a prohibited practice complaint, those rules provide that without limitation any complaint filed in a proceeding may be amended in the discretion of the Board at any time prior to the issuance of a final order. HAR § 12-42-8(g)(10) and § 12-42-43. HAR § 12-42-8(g)(10)(C) allows the amended pleading to be effective as of the date of the original filing if it relates to the same proceeding.

In their written oppositions to the amendment and at the hearing on the motion to amend, Respondents based their objections to the Board's granting of the amendment of the Second Amended Complaint on Hawaii Rules of Civil Procedure (HRCP) Rule 15(b) providing for amendment of complaints to conform to the evidence and the case law interpreting this rule.

The Board's administrative rules do not specifically provide for amendment of pleadings to conform to the evidence similar to HRCP Rule 15(b), [xi] and the Board is not bound by the HRCP. However, when Board rules are silent or ambiguous on procedural matters, the Board generally looks to analogous provisions of court rules and decisions interpreting such rules for guidance in applying the Board's own rules and procedures. *See, e.g.*, 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).

Further, an administrative agency's authority to amend charges to conform to the evidence has been recognized as required to implement its responsibility of conducting a full, fair and impartial hearing. Taylor v. City of Los Angeles, 60 Cal.App.4th 611, 618 (Cal. Ct. App. 1997) (Taylor).

Accordingly, under these administrative rules and for the reasons set forth in Taylor, the Board finds their authority to permit the amendment of pleadings to conform to the evidence in this case. This rule reflects the liberal policy favoring amendments of pleadings at any time.

The Board rejects Respondents' assertions regarding the manifest prejudice of allowing the amendment of the Second Amended Complaint. There was no showing that any of the amendments granted caused undue delay or prejudice. When the Board granted the Motion to

Amend, the HOM was still proceeding. The Board accorded Respondents with a full opportunity to reopen their case to address the additional allegations regarding the HRS §§ 89-3 and 89-13(a)(1) and (7) contained in the Third Amended Complaint and for the Complainant to rebut the evidence presented in the Respondents' case.

Second, the Board agrees with Respondents that there was no express consent to the trial of the HRS §§ 89-3, 89-13(a)(1) and (7) issues, and therefore, the significant issue is whether there was implied consent to the trial of these issues. The Board finds that there was implied consent to the trial of these issues based on the record in this case for several reasons.

While there is no dispute that Respondents consulted regarding Policy 8.02, both Respondents agreed that this policy does not provide for a videotaped strip search. PSD argued that in Parker's case, the strip search was not and would not have been videotaped. Nonetheless, when the issue was raised at the Pre-Disciplinary hearing, Nobriga represented that videotaped strip searches had been conducted. Moreover, the record contained substantial evidence to support Parker's reasonable belief that the strip search was going to be videotaped as more fully discussed below and fully incorporated herein.

Based on the lack of any objections to this evidence, such as that this evidence was relevant to preexisting issues, the Board concludes that Respondents impliedly consented to the trial of these issues.

The Board further finds no merit to UPW's other arguments opposing the amendment. Regarding the lack of an affidavit or memorandum supporting the Motion to Amend, the Board finds that Complainant articulated the basis for the amendment in the motion. Regarding UPW's futility argument that the use of a video camera for a strip search is not bargainable, the Board concludes that the record showed that PSD did not even consult or provide UPW with an opportunity to determine whether there was a bargainable issue regarding a videotaped strip search. Regarding UPW's assertion that objections were made to all of Parker's exhibits and testimony, the Board finds that a blanket objection was not sustained, and that no specific objection was made to this evidence. Furthermore, Saito addressed these issues in her testimony, and UPW's exhibits corroborated the PSD's failure to consult regarding a videotaped strip search.

As to PSD's objections regarding the futility of the amendment, the Board finds that based on the evidence, the claim of PSD's unilateral implementation of a videotaped strip search policy was not hypothetical. The evidence included Nobriga's position that strip searches had been videotaped, and Ryan's failure to communicate or correct Parker's perception that videotaping was not part of the strip search procedure. There is no merit to the untimeliness of the proposed Third Amended Complaint. As more fully discussed below and incorporated here, under HAR § 12-42-8(g)(10)(C), the amended complaint would be effective as of or relate back to the date of the original filing. Finally, regarding PSD's arguments that no notice was required

to the UPW or Parker of the consensual, videotaped strip search, and that Parker lacks standing to contest a policy that did not exist, the Board finds that the lack of a written policy does not excuse the consultation or negotiation required by HRS Chapter 89 on a unilaterally implemented policy or procedure.

3.3.2. Motion to Disqualify the Board

UPW requested that the Board disqualify and recuse itself from considering the Motion to Amend based on an appearance of impropriety. UPW based its request on its argument that the Board caused Parker to file the motion and gave him specific directions and instructions regarding the specific statutory claims. In addition, UPW asserted that the proposed amendment raises new issues relating to interference with employee rights under HRS §§ 89-3 or 89-13(a)(1) and (7), which UPW did not expressly or impliedly consent to try.

The standard for disqualifying a board member for impartiality is whether the movant shows an appearance of impropriety on the part of the challenged board member. The test for an "appearance of impropriety" is an objective one, based not on the beliefs of the petitioner or adjudicator, but on the assessment of a reasonable impartial onlooker apprised of all the facts. Del Monte Fresh Produce v. Int'l Longshore & Warehouse Union, Local 142, 128 Hawai'i 289, 302, 287 P.3d 190, 203 (2012). (Citations omitted)

The Board denied the Motion to Disqualify because the objective evidence supports the propriety of such action. The Board rejects UPW's characterization that the Board caused Parker to file the motion to amend. To alleviate any prejudice to Respondents, the Board not only entertained the motion to amend but allowed Respondents to provide their position on the amendment. The Board further permitted Respondents to reopen their cases to address the additional allegations. In short, based on the circumstances, the Board properly exercised its discretion to ensure a full, fair, and impartial hearing by raising the issue of amendment of the Second Amended Complaint to conform to the evidence.

Finally, a motion for disqualification applies to individual Board members and not to the whole Board, and UPW provided no authority for disqualification of the full Board for an action.

3.4. UPW's Motion for Judgment on Partial Findings

In the Third Amended Complaint,[xii] Parker alleged, among other things, that UPW wilfully breached its duty of fair representation to Complainant by deciding not to take his grievance over his discharge for the September 8, 2017 incident to arbitration; and that PSD, among other things, breached the CBA in violation of HRS § 89-13(a)(8) by discharging him.

UPW moved for judgment as a matter of law based on HAR § 12-42-8(g)(3)(B) and (C) and HRCP Rule 52(c), which PSD joined. UPW argued that after the full HOM, Complainant

failed to carry his burden on proof under HRS § 91-10(5) to establish his pled *prima facie* hybrid case.

HRCP Rule 52(c)[xiii] provides that in a nonjury trial, where a party has been fully heard and the court finds against the party on that issue, the court may either enter judgment as a matter of law or decline to render any judgment until the close of all the evidence on a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue. The judgment is required to be supported by findings of fact and conclusions of law.

The Board is permitted to hear motions akin to a motion for a directed verdict, so long as the party opposing the motion is given a full and fair opportunity to be heard on the motion after reasonable notice, and the rules applicable to the Board are not otherwise violated. Los Banos v. Hawaii Lab. Rel. Bd., 2019 Haw. App. LEXIS 510, at *43. In this case, Complainant filed an opposition to the motion for judgment and was given a full and fair opportunity to be heard through filing a written opposition to the motion for judgment and a hearing on the motion.

Regarding the controlling law, the Board relies on Poe v. Hawaii Labor Relations Bd., 105 Hawai‘i 97, 102, 94 P.3d at 657 (2004) (Poe II) for the relevant principles and standards for a situation, like this case, in which the collective bargaining agreement requires an employee to exhaust the grievance process before bringing a Board case under the agreement and provides the union with the sole power to advance the employee's claim to the final stage of the grievance process. Tupola v. Univ. of Hawaii Pro. Assembly, Board Order No. 3054 at *23-26 (2015), Board Case No. CU-07-330 (2018) (Tupola).

Poe II established the principle that, while an individual employee has no absolute right to have his grievance taken to arbitration regardless of the applicable CBA provision, a union cannot ignore a meritorious grievance or process it in a perfunctory manner. The Court further recognized that in these cases in which the employee is prevented from exhausting his contractual remedies because the union wrongfully refused to pursue an individual grievance and the employer had committed a wrongful discharge in breach of the collective bargaining, agreement, the employee is not without recourse. Rather, exceptions to the exhaustion requirement exist, such as when pursuing the contractual remedy would be futile. Accordingly, the Court reasoned that a wrongfully discharged employee may bring an action against his employer despite a defense of the failure to exhaust contractual remedies, provided that the employee can prove that the union as bargaining agent breached its duty of fair representation in the handling of the employee's grievance.

In so ruling, the Court clarified that the two claims are inextricably interdependent and constitute a hybrid case. Therefore, to prevail against either the employer or the union, the Complainant must not only show that the discharge was contrary to the collective bargaining agreement, but also carry the burden of showing a breach of the duty of fair representation by the union. In these cases, the Complainant may choose to bring a claim against one respondent, but

the proof is the same whether the claims are against the union or the employer or both. The Court held that if an employee fails to demonstrate that the Union breached the duty of fair representation, he lacks standing to pursue his claim before the Board. *Id.* at 104, 94 P.3d at 659.

3.4.1. Respondents Failed to Show That Complainant Did Not Carry His Burden That PSD Violated HRS § 89-13(a)(8)

As the moving parties, Respondents have the burden of showing that Complainant failed to carry his burden of showing that PSD violated HRS § 89-13(a)(8).[xiv] Respondents provide numerous reasons that PSD's just cause for Parker's discharge was correct. The Board finds, however, for the reasons set forth below that Respondents failed to meet their burden. Parker proved based on the evidence at the HOM that PSD failed to establish the just cause for his discharge.

To begin with, as a BU 10 member, Parker is covered by the terms of the BU 10 CBA, which provides in § 11.01a. that a regular employee shall be subject to discipline by the employer for just and proper cause. However, neither PSD nor UPW have provided any standard for just cause in this case. Accordingly, in the absence of a standard, Respondents cannot establish that PSD had just cause.

In addition, in both Espinda's Pre-Discharge Letter and in UPW's Motion for Judgment, Respondents based just cause for Parker's discharge on PSD's factual findings and conclusions that the attempted strip search of Parker was conducted in compliance with Policy 8.02 and the SOC. This premise is faulty and unsupported by the evidence in this case.

Policy 8.02, on its face, provides that all staff members may be subject to a search at any time with or without their consent when entering the facility by metal detector, ion scan search, or pat search. Further, upon a reasonable suspicion that a staff member is carrying contraband, a strip search and a vehicle search may be conducted.

More specifically for staff strip searches, Policy 8.02 provides that the search is required to be conducted by security personnel of the same gender as the staff member, conducted in a private area ensuring the dignity and privacy of the staff member. The staff member may request that a staff member witness and two security officers of the same gender as the subject be present. The strip search subject may not be touched by the security personnel. A male subject may be required to lift his genitals, squat, spread his buttocks, and cough.

Regarding vehicle searches, however, Policy 8.02 further provides that vehicles parked on facility property may be subject to search without the owner's permission if there is a reasonable suspicion to believe contraband may be hidden within the vehicle.

Under the Policy, the documentation required for the vehicle search is different from other searches. With vehicle searches, refusals and the search process are required to be documented on a video recording and in writing. For any other searches, any search more thorough than a pat search requires documentation by a detailed report.

The Board finds that Ryan's implementation of the Parker strip search is significant to the just cause and cannot be ignored. In attempting the strip search, Ryan deviated from the procedures established in the Policy in several significant ways. Specifically, PSD failed to show the reasonable suspicion for the strip search required by the Policy, the Policy contains no provision for use of a video camera during the strip search of a staff member, and the Policy unequivocally provides that a strip search may be conducted without consent.

Regarding the required reasonable suspicion for the strip search, the Board credits Medeiros's testimony that he was unable to qualify the inmate witness. In fact, Nobriga agreed that the inmate's account could not be credited, and there was no reasonable suspicion for the search. Nonetheless, Nobriga accepted the decision of reasonable suspicion as already made, and just reviewed the definition in the policy to find the reasonable suspicion during the Pre-Disciplinary Hearing phase. The Board finds that this approach does not comply with Policy 8.02, which requires that reasonable suspicion be determined before the strip search is permitted, not after. Accordingly, Respondents failed to definitively establish the reasonable suspicion for the strip search in compliance with Policy 8.02.

However, even assuming reasonable suspicion for Parker's strip search, the Board finds that the record shows PSD's numerous missteps in its implementation of the strip search procedure under Policy 8.02. These missteps led to Parker's reasonable belief that PSD was intending to videotape his strip search, which obviously is not allowed by Policy 8.02

To provide the necessary notice, Ryan handed Parker a copy of the applicable Policy 8.02. The Board finds significant the context and manner in which Parker was handed the copy of the Policy.

When Parker arrived at work and was brought into Ryan's office, the video camera was turned on. Parker was informed that he was under investigation for bringing contraband into the facility and his immediate consent was needed to conduct a strip search. Parker was then handed the Policy open to a page with subparagraph c. highlighted. This subparagraph requires that refusals and the search process be documented on a video recording and in writing. While Subparagraph c. on its face applies to vehicle searches, Ryan failed to clarify that the video recording provision only applies to a search of any vehicle of Parker's parked on facility premises and not to the strip search. Parker had no vehicle parked on facility premises. Because the video recording provision application was not clarified and was given to him in the context of a consensual strip search, the Board finds that Parker had a reasonable belief that the videotaping requirement applied to the consensual strip search.

The reasonableness of Parker's belief is further supported by the circumstances that followed. After Visconti arrived, Ryan instructed Visconti to read the highlighted section to Saito so that she would know that the strip search was being done per the policy. Again, Ryan's request to Visconti to notify Saito of Parker's intended strip search under the highlighted section of the Policy indicated that Parker was being subjected to a videotaped strip search.

Moreover, when Parker was finally able to speak directly to Saito, Parker told Saito three times that PSD was videotaping him. Parker further told Saito that he was against the intended strip search and asked whether the Policy allows for videotaping the strip search. Despite Ryan being present and able to overhear this call, Ryan failed to clarify that the strip search would not be videotaped. Saito's response that she did not understand the policy and had never heard of this type of situation at MCCC corroborates and supports the confusion and misunderstanding of the situation created by Ryan's mishandling of the intended strip search and the deviation of the implemented procedure from the Policy.

Finally, even after Parker signed off on the notice and told Ryan that he had never heard of anyone being filmed during a strip search, Ryan never clarified that the strip search would not be videotaped. Instead, Ryan tells Parker that although the policy dictates Parker take off his underwear,[xv] they would not have made him do it. This explanation of the intended strip search procedure violates the Policy defining a strip search as the removal of all clothing and a visual inspection of all body surfaces including areas adjacent to the opening of body cavities and permits the individual to be required to lift his genitals, squat, spread his buttocks, and cough during the strip search.

While PSD denied any intention of videotaping the actual strip search and blamed Parker for PSD's inability to communicate this intention, the Board finds that Parker expressed his belief that the strip search was going to be videotaped. Further, under Policy 11.02, the video camera operator may use his judgment about what actions to record in the absence of other direction, and the Captain has the discretion to use the video camera in a strip search situation. Because Respondents have the burden of demonstrating that Parker was given adequate notice of the Policy to establish the just cause for the discharge, it was PSD's burden to show that PSD adequately communicated the Policy, including the strip search procedure and the disciplinary consequences for the refusal to comply. Based on PSD's admission that this intention was not communicated, the burden was not met.

Besides the videotaping, the record further shows that Ryan repeatedly requested Parker's consent to the strip search during the incident. This request for consent directly conflicts with Policy 8.02, Section 4.0.2.b, which specifically provides that a strip search does not require written or verbal consent.[xvi]

Further, Ryan's request for consent is inconsistent with Respondents' contention that Parker was insubordinate for refusing to comply with a direct order to submit to a strip search.

The Board credits the Final Parker Report's conclusion and Medeiros's testimony that Parker was not given a direct order to be strip searched or to consent to a strip search. Ryan's multiple requests that Parker consent to the strip search completely eviscerates PSD's finding and conclusion that Parker was given a direct order to comply with a strip search. Finally, Ryan's statements to Parker that he had the right not to consent and that it was fine when Parker stated that he was not going to consent nor get naked in front of them support the finding that Ryan never gave a direct order.

The Board rejects PSD's position that a paramilitary process does not require explicit words indicating a direct order. This position is contrary to the explicit language of Article III CONDUCT, II PROFESSIONAL CONDUCT AND RESPONSIBILITIES H. Performance of Duty K. that orders from superiors to subordinates be in clear language. The Board further agrees with Complainant that because the definition of consent is a voluntary agreement, approval, or permission, consent is inconsistent with a direct order. State v. Yong Shik Won, 137 Hawai'i 330, 337-40, 37 P.3d 1065, 1072-75 (2015). Accordingly, because Ryan's language was not clearly an order, as required by this provision, Parker was not given and did not violate a directive to comply with a strip search.

The Board also recognizes that during the incident, Saito advised Parker that he could face insubordination charges and disciplinary action. However, there was no evidence that during the incident, PSD informed Parker that the strip search was a directive warranting a finding of insubordination for refusal. In fact, Ryan informed Parker of his right to consent or to refuse. Moreover, the Board finds that Parker was informed that the disciplinary consequence for refusal was a 30-day suspension pending investigation but not discharge.

Respondents' assertion that the Union was consulted on Policy 8.02 is irrelevant because, as discussed above, the strip search procedure implemented by Ryan was not done in compliance with the consulted Policy. Therefore, the Board finds that what is critical is that PSD failed to consult with the Union on the strip search procedure implemented in this case.[xvii]

Finally, Respondents contended that Parker was given the opportunity to consult with Saito during the incident. This assertion is also not supported by the evidence. Saito's obvious confusion regarding the circumstances of the incident was evident from the phone calls during the incident caused by the multiple missteps in the process. While Parker was permitted to speak with Saito by phone, as more fully discussed below and incorporated here, the Board finds that the conversation was not a meaningful or adequate conferral.

For these reasons, the Board finds no support for the grounds set forth by Espinda in the Pre-Discharge Letter that Parker violated SOC, Article III, Section II B. C, E2, G, H, I. and N.[xviii] regarding loyalty, cooperation, creating facility security, knowledge of laws and regulations, performance of duty, obedience to laws and regulations, obedience to unjust orders and Article III, Section III, Rules C. Class C Rules regarding conduct toward superiors.[xix]

The Board finds that Espinda's factual findings supporting his conclusion that Parker violated the SOC are not consistent with the record in this case. Perhaps the most telling evidence is that Espinda's basis for the insubordination determination (that Parker was given a direct order) is inconsistent with the Final Parker Report's finding that there was no direct order given to him and that the insubordination was based on Parker's defiant attitude towards Ryan, Visconti, and Saito and the SOC. While the SOC requires that a correctional employee perform their duties as directed by an order of the supervisor,[xx] the SOC further requires that the order from superiors to subordinations be in clear language.[xxi] Further, there is no SOC provision providing that PSD is a paramilitary organization entitled to exceptions from the SOC, as asserted by Nobriga and Espinda. Espinda's basis further runs afoul of Nadamoto's admissions that orders for a videotaped strip search or which violates Policy 8.02 were unlawful and need not be obeyed. Therefore, Espinda's conclusion in the Pre-Discharge Letter that Parker was insubordinate and violated the enumerated SOC provisions are based on erroneous factual findings and cannot be sustained. Accordingly, the Board holds that Complainant could prove that there was no just cause for his discharge.

Finally, even if the record supports Espinda's determination that Parker disobeyed a direct order, the Board finds the discharge consequence is not commensurate with the finding of insubordination. Espinda's justification for the discharge was that a sanction less than dismissal would have sent a message to all employees that refusal of any directive policy would be acceptable behavior, which is not acceptable in a paramilitary organization. However, there is nothing in the SOC, which provides notice of this message.

In the SOC, insubordination is a Class C offense, which is on the lower side of the spectrum of violations based on seriousness (Class A offense is the most serious violation.). Discharge, on the other hand, is the most severe disciplinary consequence. Moreover, during the incident, PSD sought but failed to confirm its finding of reasonable suspicion that Parker was trafficking in contraband. Discharge is not an appropriate consequence for the offense where the circumstances show that Parker had no prior record, there was no evidence of his wrongdoing, the reasonable suspicion was questionable, and the consequence is not commensurate with the seriousness of the SOC offense. In short, the punishment did not fit the offense.

For the reasons set forth above, the Board holds that Respondents failed to show that Complainant could not prevail on the violation of CBA because there was no just cause for his discharge.

For PSD's conduct to constitute a prohibited practice under HRS § 89-13(a)(8), however, the violation must be wilfull. Therefore, the Board is required to determine that Respondents acted with the conscious, knowing, and deliberate intent to violate the provisions of HRS Chapter 89. Hawaii Gov't Emp. Ass'n. v. Casupang, 116 Hawai'i 73, 99, 170 P.3d 324, 350 (2007).

The Board finds the requisite wilfullness of PSD's conduct from the conduct of Ryan. The Board acknowledges that Ryan's handling of the attempted strip search of Parker may have been due, in part, to ignorance and incompetence and a Policy that lacked sufficient detail regarding the procedure for conducting a strip search of a staff member. However, Ryan's history of racist and disparaging remarks about Parker in response to Ryan's removal from his position as administrative captain and his statement to Gazmen after the September 8, 2017 incident that Parker was caught with contraband cannot be ignored and establish the wilfullness of his conduct. From the record, the Board finds that Ryan's behavior was characterized by intimidation, impatience, and frustration by Parker's refusal to consent to the strip search and a callous disregard for Parker's concerns.

More significant proof of PSD's wilfullness is the conduct of Festerling, Nobriga, and Espinda during the disciplinary process. Through all of the Parker Reports, Medeiros maintained his conclusion that Parker was not given a direct order to submit to a strip search. Medeiros submitted the Parker Reports I and II to Festerling. The Parker Report I was returned to Medeiros for revisions. After Medeiros made revisions and submitted Parker Report II, Medeiros was called into a meeting with Nobriga and Festerling. At this meeting, Nobriga instructed Medeiros to change his investigation report to include findings and conclusions that Parker was defiant to Ryan and Saito, and therefore, subject to a determination that he was insubordinate in violation of the SOC.

However, after requesting these changes, Nobriga then conducted the Pre-Disciplinary hearing. Her action in instructing Medeiros to alter his investigation report and then proceeding to conduct the hearing was, at a minimum, a conflict of interest. Further, Nobriga's actions were a conscious and deliberate effort to cover up an incompetently implemented strip search and manipulate Medeiros's findings and conclusions to support the legitimacy of PSD's conduct regarding the Parker incident and PSD's conclusions regarding Parker's insubordination and discharge.

The Board simply does not accept the explanations of Nobriga and Espinda that the Pre-Disciplinary hearings were part of the investigative process in this case. Nobriga's interference in the investigation and then hearing and rendering a pre-disciplinary conclusion for submission to Espinda undermined the integrity of both the investigative process and the disciplinary process. Espinda admitted that when he signed the Pre-Disciplinary and Pre-Discharge letters that Nobriga drafted, he knew that Nobriga interfered with the investigation and then conducted the Pre-Disciplinary hearing. Based on this knowledge and concurrence, Espinda was complicit in the cover up and interference with the investigation and disciplinary processes. For these reasons, the Board holds that this conduct of these PSD officials was conscious, knowing, and deliberate. Therefore, PSD committed a wilfull violation of HRS § 89-13(a)(8).

For these reasons, the Board holds that Respondents failed to carry their burden as the moving party of showing that Complainant did not carry his burden of showing that PSD violated HRS § 89-13(a)(8). However, based on Poe II, to prove the hybrid case, Complainant must also carry the burden of demonstrating breach of duty of fair representation by the Union.

3.4.2. Respondents Showed That Complainant Failed to Carry the Burden of Showing That UPW Breached Its Duty of Fair Representation.

Poe II requires the UPW, as the exclusive bargaining unit representative of BU 10 employees, to fairly represent all of those employees, both in collective bargaining and in enforcement of the resulting collective bargaining agreement. 105 Hawai'i at 101, 94 P.3d 656. A union breaches its duty of fair representation when its conduct towards a bargaining unit member is arbitrary, discriminatory, or in bad faith. *Id.* at 204, 94 P.3d at 204.

3.4.2.1. Arbitrary Standard

A union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness" as to be irrational. Air Line Pilots v. O'Neill, 499 U.S. 65, 78. Arbitrary conduct has been defined as unintentional conduct showing an egregious disregard for the rights of union members, or even a reckless disregard of such rights, conduct without a rational basis, and omissions that are egregious, unfair and unrelated to legitimate union interests. Johnson v. United States Postal Serv., 756 F.2d 1461, 1465 (9th Cir. 1985) (*citing* Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1089 (9th Cir. 1978)) (Johnson). 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).

More specifically, a union's decision is arbitrary only if it lacks a rational basis. A union's decision not to arbitrate a grievance that it considers to be meritless is an exercise of its judgment. Stevens v. Moore Business Forms, 18 F.3d 1443, 1447 (9th Cir. 1994) (Stevens). A union does not act arbitrarily where the challenged conduct involved the union's judgment in the handling of a grievance. A union's conduct may not be deemed arbitrary simply because of an error in evaluating the merits of a grievance. Patterson v. Int'l Bhd. of Teamsters, Local 959, 121 F.3d 1345, 1349 (9th Cir. 1997) (Patterson).

In handling a grievance, a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner. Nevertheless, the individual employee has no absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.[xxii] However, when the union wrongfully refuses to pursue an individual grievance, the employee is not left without recourse. Exceptions to the exhaustion requirement exist, such as when pursuing the contractual remedy would be futile. Poe II, 105 Hawai'i at 101-02, 94 P.3d at 656-57 (*citing* Vaca, 386 U.S. at 191).

The union's actions are given a wide degree of deference. Declining to pursue a grievance as far as a union might like has been held not a violation of the duty of fair representation in the absence of arbitrariness, discriminatory, or in bad faith. Trnka v. Local Union No. 688, United Auto., Aerospace & Agric. Implement Workers, 30 F.3d 60, 61 (7th Cir. 1994). Moreover, in handling a grievance, an individual employee lacks direct control over a union's action taken on his behalf, and the union typically has broad discretion in its decision whether and how to pursue an employee grievance against the employer. Chauffeurs, Teamsters & Helpers v. Terry, 494 U.S. 558, 567-58 (1990).

Applying these standards to the evidence in this case, the Board finds that UPW's decision not to arbitrate Parker's grievance was a valid exercise of its judgment and not arbitrary for the following reasons.

To ensure that its handling of a grievance is not arbitrary, the union is required to investigate the grievance, the thoroughness of which varies with the circumstances of each case. Tenorio v. NLRB, 680 F.2d 598, 601-02 (9th Cir. 1982).

A union does not breach the duty of fair representation by its investigation or its refusal to arbitrate a grievance where the union attends investigatory and other meetings in which the employee is given an opportunity to confront and respond to incriminating information, and the union representative meets with the employee to discuss the individual grievance and assists with filing a grievance regarding the termination against the employee for violating the employee standards of conduct. Taylor v. Rohr Indus., 1989 U.S. App. LEXIS 26344, at *1-2 (9th Cir.) (Taylor)

In this case, the UPW's conduct in processing Parker's grievance met the Taylor standard for the union's requirement to investigate a grievance. In addition to the phone advice that Saito provided to Parker during the September 8, 2017 incident, Saito and Miyagawa assisted Parker during the investigative, disciplinary, and grievance processes arising out of this incident.

More specifically, immediately following the incident, Parker went to the UPW office, met with Saito, and provided his recollection of the incident. Miyagawa then met and assisted Parker with the preparation of his questionnaire submitted during the investigation.

Prior to the Pre-Disciplinary hearing, Miyagawa met with Parker to prepare and give him the opportunity to communicate to her the issues that he wanted raised. Both Miyagawa and Saito attended the Pre-Disciplinary hearing. At the hearing, the parties went through the videotape, and Parker presented his account of the incident. The Union representatives presented arguments regarding the directive, and the lack of a direct order, reasonable suspicion, a policy permitting a videotaped strip search, and consultation on such policy.

Miyagawa and Saito also attended the Pre-Discharge hearing, presented his defense, and allowed him to provide his side of the incident. Finally, Miyagawa filed the Step 1 seeking rescission of Parker's discharge and make whole remedies and made a request for and received information, including the investigative report and other documents relevant to the grievance.

She also communicated with Parker throughout the grievance process, notifying him of the status of his grievance and of the Step 1 meeting. Prior to the meeting, Miyagawa spoke with and responded to Parker's questions regarding the grievance procedure and informed him of the UPW State Director's authority to decide whether or not to proceed to arbitration. Both she and Saito attended the Step 1 meeting with Parker where he presented his arguments regarding the incident. In addition, Miyagawa raised numerous relevant and compelling arguments against Parker's discharge.

However, after going through Step 1, Miyagawa recommended that the Parker grievance not be taken to arbitration because the test for just cause was met in the case, and Saito concurred with the recommendation.

Regardless of whether the Board disagrees with Saito's approval of Miyagawa's recommendation, reasoning, and conclusion regarding the just cause for Parker's discharge, the Board is compelled by the record to conclude that UPW fulfilled its obligation to perform a thorough investigation based on the circumstances because of their full and active participation in the investigation, disciplinary, and grievance process regarding Parker's discharge.

The Board acknowledges that the only evidence regarding the basis for Nakanelua's ultimate decision not to proceed to arbitration is the Nakanelua Letter, which provided little detail regarding the reason. However, because of the thoroughness of the investigation performed by the UPW in this case, the Board is unable to find that further investigation would have caused the Union to determine otherwise. Johnson, 756 F.2d at 1465.

Moreover, the challenged conduct in this case unquestionably involves the UPW's judgment regarding the handling of a grievance. Therefore, the Union's decision not to pursue arbitration can be found to be arbitrary only if it lacks a rational basis, which requires more than an error in evaluating the merits of the grievance. Patterson, 121 F.3d at 1349. While the Board disagrees with UPW on the merits of the grievance and acknowledges Parker's arguments in his Opposition to the Motion for Judgment, the Board must agree with UPW's arguments in support of the Motion for Judgment that this is not sufficient for a finding that the UPW's decision was arbitrary.

Regarding Parker's assertions made in his Opposition, the Board finds no contract between UPW and the Complainant upon which such implied covenant may rest. The BU 10 CBA is an agreement between UPW, as the exclusive representative for BU 10, and the

Governor and other public employers under HRS § 89-6(d)(1). Therefore, based on HRS Chapter 89 and the relevant Hawai‘i case, the UPW's duty to Parker is to fairly represent him.

The Board does not disagree with Parker that UPW's reasons on the merits of their decision not to proceed to arbitration contain certain flaws. However, the Board finds that those flaws involve UPW's judgment in the handling of Parker's grievance. Further, the Board is unable to find that there was no rational basis for the reasons underlying the recommendation and Nakanelua's decision. Accordingly, UPW's conduct may not be deemed arbitrary because of an error in evaluating the merits of the grievance in the absence of discrimination or bad faith.

While neither Parker nor UPW addressed the elements of discrimination or bad faith, the Board will in order to complete the analysis of whether UPW violated its duty of fair representation.

3.4.2.2. Discriminatory

Whereas the arbitrariness looks to the objective adequacy of the union's conduct, the discrimination and bad faith analyses look to the subjective motivation of the union officials. Unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances. Discriminatory conduct may be established by substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. Mamuad v. Nakanelua, Order No. 3337, Board Case No. CU-10-33, at *37. (2018) (Citations omitted).

Based on the lack of evidence in the record that the UPW's conduct in rendering the decision not to proceed to arbitration was discriminatory, the Board concurs with the UPW that Complainant did not show that UPW breached that duty of fair representation.

3.4.2.3. Bad Faith

Whether or not a union's actions are in bad faith calls for a subjective inquiry and requires proof that the union acted (or failed to act) due to an improper motive. Bare assertions of the state of mind required for the claim—here 'bad faith'—must be supported with subsidiary facts. For a bad faith claim to be established, there must be "substantial evidence of fraud, deceitful action, or dishonest conduct." The burden is on the worker to produce evidence of bad faith. *Id.* (Citations omitted)

In this case, the Board simply finds that Complainant produced no evidence of bad faith. Therefore, the Board finds that UPW did not act with bad faith in refusing to take Parker's grievance to arbitration.

For this reason and those set forth above regarding the elements of arbitrariness and discrimination, the Board concludes and holds that Parker failed to carry his burden of showing

by a preponderance of the evidence that UPW wilfully violated its duty of fair representation to Parker.

Although the Board concludes that PSD violated the CBA, Complainant failed to prove that the UPW breached the duty of fair representation. Based on Poe II, Parker's failure to meet both parts of the hybrid test in this case means that he lacked standing to bring his case before the Board. Therefore, the Board grants UPW's motion for judgment.

Finally, the Board rejects UPW's argument that Parker failed to exhaust his contractual remedies based on Poe v. Hawaii Labor Rels. Bd., 97 Hawai'i 528, 531, 40 P.3d 930, 933 (2002) (Poe I). In Poe I, the Court held that under HRS Chapter 89, a public employee pursuing an individual grievance exhausts his or her administrative remedies when the employee completes every step available to the employee in the grievance process and a request to the employee's exclusive bargaining representative to proceed to the last grievance step, which only the representative can take, would be futile. In this case, there is no dispute that UPW took Parker's grievance to Step 1, and that Parker requested that the Union take his case to the next step of arbitration. Consequently, Parker exhausted his contractual remedies.

3.5. PSD's Joinder in UPW's Motion for MTD/MSJ

In the Motion for MTD/MSJ, UPW asserted that: Parker failed to state a claim for relief for failure to bargain over strip search/video recording policies; Parker was not engaged in protected conduct when he refused to be strip searched as advised by the Union on September 8, 2017; and that the Board lacks jurisdiction because Parker's Complaint was untimely filed. PSD joined in the Motion.

UPW was dismissed from the case between the filing and hearing of the Motion for MTD/MSJ. Therefore, PSD now stands in the shoes of the UPW as the moving party for purposes of the Motion for MTD/MSJ.

3.5.1. Legal Standards for Motion to Dismiss

The Board's administrative rules HAR § 12-42-8(g)(3) provide for the filing of motions, including motions to dismiss. However, HAR § 12-42-8(g)(3)(B) provides only that motions to dismiss be filed at least forty-eight hours before the time of the hearing of the case and conform to the requirements of HAR § 12-42-8(g)(3)(C) discussed above.

As with motion for partial findings, the Board generally looks to the legal standards set forth by the Hawai'i appellate courts for motions to dismiss under the HRCP for guidance in applying the Board's rules of practice and procedure. Tupola, Order No. 3054, at *17.

3.5.1.1. Legal Standards for Subject Matter Jurisdiction

A motion to dismiss for lack of subject matter jurisdiction 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. *Id.* (citations omitted)

3.5.1.2. Legal Standards for Failure to State a Claim

Dismissal of a complaint for failure to state a claim is warranted only if the claim is clearly without any merit and this want of merit leads to a finding that no law supports the claim or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant can prove any set of facts in support of his claim that would entitle him to relief. Accordingly, the Board must view a complaint in a light most favorable to the complainant to determine whether the allegations in the complaint could warrant relief under any alternative theory. *Id.* (citations omitted)

When the Board considers a motion to dismiss for failure to state a claim, the Board is strictly limited to the allegations of the complaint, and the Board must deem those allegations to be true. However, the Board is not required to accept conclusory allegations on the legal effect of the events alleged. *Id.* at *17-18. (citations omitted)

In addition, the Board follows the pleading standards established by the Hawai‘i appellate courts. Paio, et al. v. UPW, Board Case Nos. 16-CU-10-344, 16-CU-10-345, Decision No. 497, at *26 (2020). Accordingly, the Board requires only that the complaint contain a short and plain statement of the claim to provide the respondent with fair notice of the complaint and the grounds that the complainant is arguing. Further, the Board must construe pleadings liberally. *Id.*

Notice pleading is a fundamental tenet of Hawai‘i law. Under notice pleading, it is not necessary to plead legal theories with precision. All that is required is to provide the respondent with fair notice of what the complainant’s claim is and the grounds upon which the claim rests. It is not necessary to plead legal theories with precision nor is the pleading of evidence, facts, or conclusions or law dispositive. *Id.* at 26-27 (*citing* Bank of America, N.A. v. Reyes-Toledo, 142 Hawai‘i 249, 252, 428 P. 3d 761, 764 (2018)).

3.5.2. Legal Standards for Motion for Summary Judgment

As with motions to dismiss, the Board generally looks to the legal standards applied for a motion for summary judgment under the HRCP for guidance. Tupola, Order No. 3054, at *18

3.5.2.1. General Standard

A party may move with or without supporting affidavits for a summary judgment in the party's favor. Summary judgment is appropriate if any pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, the Board must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion. Further, any doubt concerning the propriety of granting a motion for summary judgment should be resolved in favor of the non-moving party. *Id.* (citations omitted)

3.5.2.2. Standard Where Non-Moving Party Has Burden of Proof at Trial

For cases in which complainant is the non-moving party with the burden of proof at trial, the Board applies the burden shifting paradigm adopted by the Hawai‘i courts in ruling on a respondent's motion for summary judgment.

First, the respondent moving for summary judgment has the burden of producing support for its claim that: (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or question; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. Only when the moving party respondent satisfies its initial burden of production does the burden shift to the non-moving party complainant to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. *Id.* (citations omitted)

Second, the respondent moving for summary judgment bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the Board that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. *Id.* at *18-19. (citations and emphasis omitted).

Therefore, where the non-moving complainant bears the burden of proof at trial, the respondent may demonstrate that there is no genuine issue of material fact in two ways by either:

presenting evidence negating an element of the non-moving complainant's claim; or by demonstrating that the non-moving complainant will be unable to carry his proof at trial. *Id.* at 19. (citations omitted).

Finally, when a motion for summary judgment is made and supported as provided, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided by in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate will be entered against the adverse party. *Id*. at *19 (citations omitted)

3.5.3. Motion to Dismiss Grounds

3.5.3.1. Jurisdiction

PSD argued that the Board has no jurisdiction because the Third Amended Complaint was filed more than 90 days after the September 8, 2017 incident. Based on the well-established requirements applicable to the timeliness of a prohibited practice complaint, PSD's argument has no merit.

The Board's jurisdiction is governed by HRS Chapters 89 and 377. The HRS § 377-9(l) requirement that unfair labor practice complaints are required to be filed within ninety days of its occurrence apply to prohibited practice complaints filed under HRS Chapter 89 based on HRS § 89-14.[xxiii]

The failure to file a complaint within ninety days of its occurrence divests the Board of the jurisdiction to hear the complaint. This time requirement has been held jurisdictional and provided by statute and may not be waived by either the Board or the parties. Hikalea v. Dep't of Env't Serv., City and County of Honolulu, Board Case No. CE-01-808, Order No. 3023, at *5-6 (2014) (*citing* Thomas v. Commonwealth of Pennsylvania Lab. Rels. Bd., 483 A.2d 1016 (Pa. 1984). In construing and applying this time limit requirement, the Board's approach has been to adhere to the principles that statutes of limitations are to be strictly construed; and because the time limits are jurisdictional, the defect of missing the deadline even by one day is unable to be waived. Valeho-Novikoff v. Okabe, Board Case No. CU-05-302, Order No. 3024, at *10 (2014) (*citing* Fitzgerald v. Ariyoshi, 3 HPERB 186, 198-99 (19843). Lastly, in applying this requirement, the Board has conformed to the rule that the limitations period begins to run when an aggrieved party knew or should have known that his [or her] 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)).

HAR § 12-42-8(g)(10)(C) provides that if an amended document relates to the same proceeding, the amended document shall be effective as of the date of the original filing.

Moreover, the Board has held that an amended complaint relates back to the time of filing of the original pleading. Ballera v. Del Monte Fresh Produce, Inc., Case Nos. 00-1(CE) and 00-6(CU), Order No. 1937, at *6-7 (2000).

Applying these principles, the Board finds and holds that the Board has jurisdiction in this case because the Third Amended Complaint was timely for the following reasons.

First, under the standards for a motion to dismiss, the Board deems the allegation in the Third Amended Complaint in Paragraph 55 as true that "The Hawaii Labor Relations Board has jurisdiction over Complainant's claims against Respondents."

Second, under HAR § 12-42-8(g)(10)(C) and Ballera, if the original Complaint filed in this case on December 17, 2018 was timely filed, the Third Amended Complaint is effective as of the date of the original filing.

In prior cases, the Board has established that in a hybrid case the causes of action against the union for denial of representation of an employee and against the employer for breach of the collective bargaining agreement are "inextricably intertwined" and accrue when the complainant receives notice from the union that his remedies were exhausted. Seminavage v. Ka Waihona O Ka Na'auao, Public Charter School, Board Case No. CE-05-648, Order No. 2502, at *18 (April 16, 2008); s*ee* Poe II, 105 Hawaii at 104, 94 P.3d at 659; DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 170 (1983).

In this case, Nakanelua sent his letter notifying Parker that UPW denied his request to proceed to arbitration on September 19, 2018. Accordingly, the 90-day limitations period began to run as of September 19, 2018 and ended on December 18, 2018.[xxiv] The original Complaint filed on December 17, 2018 against UPW and PSD was, therefore, timely filed. Based on HAR § 12-42-8(g)(10)(C), Ballera, and the timely filing of the original Complaint, the Third Amended Complaint was effective as of filing date of the original complaint on December 17, 2018 and timely filed.

For these reasons, there is no merit to PSD's position that the Board has no jurisdiction regarding the Third Amended Complaint. The claims against PSD arising out of the same dispute cannot be dismissed.

3.5.3.2. Failure to State A Claim for Failure to Bargain Over Strip Search/VideoRecording Policies and for Interference Under HRS §§ 89-3 and 89-13(a)(1) and (7)

The Third Amended Complaint alleges, among other things, that PSD's actions violated HRS § 89-13(a)(1) and HRS § 89-3 constituting a violation of HRS § 89-13(a)(7). In support, the Third Amended Complaint alleges, among other things, that PSD unilaterally adopted the strip search policy, including video recording, without notice to the UPW or the Complainant, and that this unilateral adoption of the videorecorded strip search policy constituted a restraint and interference with Complainant's ability to exercise his rights under HRS Chapter 89. The Third Amended Complaint further alleges as facts, among other things, that Parker was handed a copy of Policy 8.02 with the video recorded vehicle strip search provision highlighted, he objected to the video recorded strip search to Ryan and to Saito, Saito told him that she had never heard of a union member being ordered to be strip search and was not familiar with the policy, and that Ryan told him that it was his right to decline to consent, demanded that Parker immediately consent or not, and interfered with Parker's ability to consult with his Union.

PSD asserts that the Third Amended Complaint failed to state a claim for violation of HRS § 89-13(a)(1) and (7) because PSD bargained regarding the strip search and video recording policies, and there is no evidence of non-compliance with the PSD policies. Therefore, PSD did not unilaterally adopt the strip search/video recording policies without notice to the UPW. Also, under State of Hawaii Org. of Police Officers v. Carvalho, Board Case No. CE-12-875, Decision No. 481 (2016) (Decision No. 481), the employer's use of a video camera is a management right not subject to negotiation.

Contrary to PSD's assertions and deeming the allegations of the Third Amended Complaint to be true and viewed in the light most favorable to the Complainant, the Board is unable to find that Complainant can prove no facts in support of his claim entitling him to relief. Therefore, these allegations cannot be dismissed for failure to state a claim.

An Employer commits a prohibited practice in violation of HRS §§ 89-3[xxv] and 89-13(a)(1) and (7) [xxvi] by interfering with the employee's right to participate in the collective bargaining process without Employer interference, restraint, or coercion.

The test is whether the employer engaged in conduct reasonably tending to interfere with the free exercise of employee rights. United Public Workers, AFSCME. Local 646, AFL-CIO v. Takushi, Board Case Nos. CE-01-374a and CE-10-374b, Decision No. 404, 6 HLRB 72, 74 (2000) (Decision 404). However, only interference with a lawful employee activity, or discrimination affecting the employee exercise of a protected right, may be the subject of a prohibited practice charge under the statute. Hawaii State Tchr. Ass'n v. Hawaii Pub. Emp. Rels. Bd., 60 Haw. 361, 362-64, 590 P.2d 993, 995-96 (1979).

The allegation that PSD unilaterally adopted and implemented a strip search policy, which included video recording and consent, during the September 8, 2017 incident without consulting UPW in violation of HRS §§ 89-3 and 89-13(a)(1) and (7) should not be dismissed for a failure to state a claim. The Board has refused to dismiss a similarly pled complaint alleging statutory violations, the employer's interference with an employee's rights under HRS Chapter 89, and a change in policy without consultation for failure to state a claim. Hawaii Gov't Emp. Ass'n., AFSCME, Local 152, AFL-CIO v. Bd. of Educ., State of Hawai'i, Board Case No. CE-06-424, Order No. 1796, at *3 (9/30/99).

PSD's argument that Decision No. 481 is controlling of the issues in this case has no merit. Decision No. 481 addressed the issue of whether Kaua'i Police Department's (KPD) implementation of a body camera system policy required the State of Hawaii Organization of Police Officers' (SHOPO) consent under the meet and mutual consent provisions of the collective bargaining agreement between the parties. The Board held that KPD had no obligation to bargain over the policy. In so ruling, the Board found that because the collective bargaining agreement in that case had only a consultation requirement regarding the adoption and implementation of the policy, which was met, KPD did not commit a prohibited practice.

Decision No. 481 is simply not controlling of the issue in this case because this case involves a different collective bargaining agreement, a different policy, and a different issue of the duty to bargain rather than the duty to consult. Moreover, even if Decision No. 481 is controlling, a ruling that the failure to comply with a consultation requirement under HRS Chapter 89 constitutes a prohibited practice is certainly not inconsistent with Decision No. 481.

The Board likewise refuses to dismiss the allegation that PSD interfered with Parker's ability to consult with his Union in violation of HRS §§ 89-3 and 89-13(a)(1) and (7) for a failure to state a claim. UPW argued in this case that there is no claim for interference because Parker was not engaged in protected conduct. However, in a prior case, a union has otherwise argued that the rights established under HRS §§ 89-3 and 89-13(a)(1) and (7) are not limited to union organizational activities but include situations where an employer violates an employee's right to union representation in disciplinary proceedings based on NLRB v. J. Weingarten, Inc., 420 U.S, 251 (1975) (Weingarten).[xxvii] Hawaii Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO, Board Case No. CE-09-411, Decision No. 400, 6 HLRB 47, 50 (1999).[xxviii] The Board agrees with this position.

Based on interpretations of federal law provisions[xxix] analogous to HRS §§ 89-3 and 89-13(a)(1), Hawai'i has recognized that the right to organize includes the right to have a union representative present at an employer-meeting or interview that the employee reasonably believes could result in disciplinary action. The right is not founded on the duty to bargain in good faith but in the employee's right to act in concert with others for "mutual aid and protection" under HRS § 89-3. Hawaii State Tchr. Ass'n v. Bd. of Educ., 2019 Haw. App.

LEXIS 44, at *7-8. Therefore, the allegation that Ryan interfered with Parker's right to consult with his Union representative Saito during the incident is sufficient to state a claim under HRS § 89-3 and 89-13(a)(1) and (7) and will not be dismissed.

At the MTD/MSJ hearing, both PSD and Parker made additional arguments more appropriate as closing arguments following the HOM of this case. Accordingly, the Board will address those arguments in the discussion below regarding the issues remaining before the Board on the HOM of the Third Amended Complaint.

3.6. HOM of the Third Amended Complaint

At the HOM on the Third Amended Complaint, the remaining issues were whether PSD wilfully committed a prohibited practice by interfering and restraining Parker in the exercise of his rights under HRS Chapter 89 by failing to consult with the UPW regarding a videotaped strip search policy and by interfering with Parker's right to consult with the UPW during the September 8, 2017 incident. The parties were given an opportunity to present any additional evidence specifically on these issues. Since the Third Amended Complaint had been amended to conform to evidence in the record, the parties supplemented the evidence already in the record. The only two witnesses called were Parker and Hedge. Their testimony is credited to the extent contained in the findings of fact.

Based on the full record herein, the Board resolves the remaining issues on the Third Amended Complaint as follows.

Under HRS § 89-9(c),[xxx] the right of consultation belongs to the Union and not to the employee. Based on the evidence presented at HOM in this case, there is no dispute that, while PSD and UPW consulted on Policy 8.02, PSD never consulted with UPW on a consensual, videotaped strip search procedure, which was implemented during the September 8, 2017 incident.

For the reasons fully set forth above and incorporated in this section, the strip search procedure implemented by Ryan during the September 8, 2017 incident did not comply with Policy 8.02 in several critical respects. There was the lack of reasonable suspicion. Based on the circumstances, Parker reasonably believed that a video camera was going to be used during the strip search based on the highlighted copy of Policy 8.02 handed to him and the failure to clarify the procedure to be implemented. There were also the multiple requests for his consent, inconsistent with the Policy on its face. Therefore, the strip search procedure implemented during the Parker incident differed substantially from Policy 8.02, which was the subject of consultation between PSD and UPW.

While the right of consultation belongs to the Union, the parties' lack of consultation regarding the implemented strip search procedure further resulted in an interference with

Parker's right and ability to consult or confer with his Union during the September 8, 2017 incident because of the misinformation and confusion. This interference is evident from the record. During their phone call during the incident, Saito admitted to Parker that she did not understand the policy and had not heard of or dealt with this type of situation. Saito's advice to Parker not to disobey a direct order was based on her knowledge that Policy 8.02 specifically provides that no consent to a strip search is required.

The Board acknowledges that the Policy does not specifically provide for a BU 10 member's right to a Union staff person being present during a search. However, CBA SECTION 11, Paragraph 11.02 (CBA 11.02), provides that the employee may request a Union representative or steward be present when the subject of a meeting is on a job related incident, which the employee reasonably feels that disciplinary action may result.[xxxi] In addition, there was an established practice that PSD give the Union advance notice of a planned action, which could lead to discipline of a BU 10 member and permit a Union employee (business agent or division director) to be present during the incident. Despite the fact that this was the first time that an MCCC staff member was going to undergo a strip search for contraband, PSD diverged from that past practice in this case in several important ways.

First, Saito was not given advance notice nor the ability to be present during the incident. Despite Parker's request that Saito be present, Ryan sent for the UPW Shop Steward Visconti. Ryan allowed Visconti to call Saito on the phone and instructed him to read the highlighted portion of the Policy regarding the videotaped vehicle search to Saito, so that she would know that the Policy was being complied with. Visconti called Saito and informed her that he was present with Parker, Ryan, Totau, and Hedge, that the Policy provided for a strip search upon reasonable suspicion, and that her take was needed. Saito did not have the Policy available, and more importantly, she had no experience with strip searches. Nevertheless, Saito told Visconti to tell Parker that he could not refuse a direct order. Not until later in the incident did Visconti tell Parker that Saito said that the directive came from the Chief and that Parker had the right to refuse a strip search and be placed on administrative leave.

Parker's direct phone conversation with Saito was further complicated by continual interruptions from Ryan. In addition, Saito again admitted that she did not have a copy of nor understand the Policy or the circumstances of the consensual, videotaped strip search, and had not heard of a situation like it at MCCC. Based on this inadequate understanding and lack of information, Saito advised Parker that he did not have to consent or to undergo the strip search. After reviewing the Policy and based on her understanding that Parker was given a direct order for which noncompliance would be insubordination, Saito then changed that advice and told Parker to comply with a direct order. While Saito was still on the call, Parker told Ryan that he was uncomfortable with being filmed, had not heard of it before, and that he was not going to consent and get naked in front of them. At this point, Totau got on the phone with Saito and told

her that Parker had the right to refuse and get a 30-day suspension and that Parker was not complying and signing the paper.

The Board finds that Parker was not given a meaningful opportunity to confer with UPW based on the circumstances. The deviation from CBA 11.02 and the established practice of giving the Union business agent or division director advance notice and the ability to be present at the incident, the telephone conferral continually interrupted by Ryan, Saito's inexperience and lack of knowledge of the Policy and of strip search procedures, including videotaping requirements, and her limited ability to communicate with Parker during the telephone conferral all contributed to the lack of a meaningful opportunity for Parker to consult with his Union.

As discussed above and incorporated here, an employer commits a prohibited practice in violation of HRS §§ 89-3[xxxii] and 89-13(a)(1) and (7) when it interferes with the employee's right to participate in the collective bargaining process without employer interference, restraint, or coercion. This right is not limited to union organizational activities but includes situations where an employer violates an employee's right to Union representation in disciplinary proceedings based on Weingarten.

Weingarten provides that it is the Board's province and not the courts to determine whether or not the need exists for union representation and that the use by an administrative agency of the evolutional approach is particularly fitting. 420 U.S. at 266.

The Board recognizes that Parker was allowed to have the UPW Shop Steward Visconti present, which arguably may have been sufficient under Weingarten and CBA 11.02. However, Parker requested that Saito be present.[xxxiii] The Board finds that under the specific circumstances of this case, PSD's implementation of the strip search in this case required more than merely allowing the UPW Shop Steward to be present. Not only did the procedure deviate from Policy 8.02, but this also was the first time that PSD conducted a strip search on an MCCC employee under Policy 8.02. There is no question that the intended strip search could lead to discipline. Under such circumstances, the Board finds under Weingarten, CBA 11.02, and the established practice that Parker had the need and right to have a Union staff person, who had been given advance notice and an ability to be present during the planned strip search.

The Board recognizes that these circumstances may have resulted from Ryan's unfamiliarity and lack of understanding of or his abject failure to communicate to Parker the requirements for a valid strip search procedure set forth in Policy 8.02. Regardless, PSD is responsible for these failures by its staff in its facility. Ultimately, PSD is responsible for the invalidly implemented strip search under the Policy and the lack of consultation with UPW on the issue.

Under the criteria set forth above, PSD engaged in conduct reasonably tending to interfere with Parker's right to be validly strip searched under Policy 8.02, which was properly

consulted on and implemented and to have adequate representation by the UPW during the procedure. Contrary to PSD's assertions, as fully discussed above and incorporated here, these rights are protected by HRS §§ 89-3 and 89-13(a)(1) and (7).

The Board finds that PSD committed the requisite wilfullness for the violations of HRS § 89-13(a)(1) and (7) based on the conduct of Ryan, Espinda, Nobriga, and Festerling for the reasons set forth above and fully incorporated herein.

Finally, the Board addresses the arguments made by PSD during the MTD/MSJ hearing that are better characterized as closing arguments.

While acknowledging that Policy 08.02 does not provide for videotaping an individual during a strip search, PSD justified the videotaping by the following arguments. First, Complainant was not videotaped during a strip search because of his refusal. Second, Complainant was aware from his training that, although strip searches were not videotaped, the meeting prior to the strip search could be videotaped under Policy ERC 11.02 (situations where serious crimes are involved, which could lead to grievances). Third, UPW was consulted regarding the search and general videotaping policies and aware that videotaping under particular circumstances does not violate the constitutional, collective bargaining agreement, or HRS § 89-3 rights of union members. Fourth, there is no evidence that Parker was engaged in union organizational activities. Fifth, the Complainant is charged with knowledge that the Union had no objection to videotaping a union member under the circumstances.

After reviewing the evidence in the HOM, the Board rejects each of these justifications for the videotaped strip search. The Board finds that PSD's argument that Parker's refusal stopped the invalid strip search does not excuse or render PSD any less culpable for a violation of Parker's rights under HRS § 89-13(a) for attempting to implement an invalid strip search. Second, while Parker was aware from his training that inmate strip searches were not videotaped, he had no experience with staff strip searches and as more fully discussed above and incorporated here, under Policy 11.02, the video camera operator had the discretion, and the Captain had the authority subject to certain conditions to determine what actions to record. More importantly, as fully discussed above, Ryan handed him a copy of Policy 8.02 with a highlighted provision for a videotaped search. Third, as fully discussed above, UPW consultation was regarding strip searches under Policy 8.02. The strip search to be implemented in this case was not a strip search complying with that consulted Policy. The issue of Parker being engaged in union organizational activities is addressed fully above and incorporated here. Finally, the Board finds that contrary to PSD's argument, the HOM record shows that during the Pre-Disciplinary and Pre-Discharge proceedings, UPW did object to videotaping of a union member under these circumstances.

4. Order

For the reasons set forth above, the Board finds and holds that PSD violated HRS § 89-13(a)(1) and § 89-3 thereby violating HRS § 89-13(a)(7).

The Board, therefore, orders that PSD:

1. Cease and desist from implementing a strip search in violation of Policy 8.02, including video recording or requesting consent;

2. Refrain from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them in violation of HRS §§ 89-3, 89-13 (a)(1) and (7) by interfering with a union member's right to effectively consult with his union and by failing to consult regarding the specific strip search procedure to be implemented;

3. Within 30 days of this Order, reinstate Daniel Edward Parker to his former position as an ACO III at MCCC without prejudice to his seniority or any other rights, benefits, or privileges previously enjoyed;

4. Make Daniel Edward Parker whole, including back pay with interest and other benefits suffered as a result of the misconduct taken against him;

5. Within 30 days from the date of this Order, remove from its files any reference to the unlawful discharge of Daniel Edward Parker, and within three days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way;

6. Preserve and within 14 days of a request, or such additional time as the Board may allow for good cause shown, provide at a reasonable place designated by the Board, all payroll records, social security payment records, timecards, personnel records and reports, and any other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay and other benefits to make Complainant whole due under the terms of this Order;

7. Complainant shall submit any request for recovery of attorney's fees and costs by motion filed no later than ten days after the date of this Decision and Order, which motion shall include sufficient details to enable the Board to determine the reasonableness of the items requested. Any opposition to such motion shall be filed no later than five days after the filing of the motion;

8. Post at MCCC copies of this Decision and Order for 60 consecutive days in places where notices to employees are customarily posted. In addition to physical

posting of paper notices, notices shall be distributed electronically, such as by posting on an intranet or an internet site, and/or other electronic means where PSD customarily communicates with such employees; and

9. PSD shall notify the Board of the steps taken to comply with this Order within 45 days of receipt of this Decision and Order.

DATED: Honolulu, Hawai'i, March 23, 2021.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copies sent to:

Matthew Padgett, Esq.
Dennis Ferm, Deputy Attorney General
Jonathan Spiker, Esq.

---

i PSD is and was for all relevant times a "public employer" as defined in HRS § 89-2 for BU 10 employees, as defined in HRS § 89-6(a).

HRS § 89-2 Definitions provides, in relevant part:

> "Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees…

ii HRS § 89-6(a) provides:

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

iii UPW is the "exclusive representative," as defined in HRS § 89-2 for BU 10, as defined in HRS § 89-6(a).

HRS § 89-2 Definitions provides

> "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.

iv Policy 8.02, Section 4.0, Paragraph 2.b. provides:

> b. If there is reasonable suspicion that a staff member is carrying contraband…a full frisk or strip search may be conducted. The staff member['s] vehicle may be included in this search. Written or verbal consent by the employee is not required in either case.

v 3. Procedures for conducting a strip search (visitors or staff)

> a. The strip search shall be conducted by security personnel of the same gender as the visitor or staff member being searched. The search shall be conducted in a private area, which shall ensure the dignity and privacy of the visitor or staff member. One witness (staff member) may be present in addition if requested by the individual being searched. Two security officers of the same gender as the individual being searched shall always be present during the search. (one acting as a witness, the other conducting the search)…
>
> b. Suspicion or probable cause must exist prior to strip searching staff members. Authorization must first be sought and obtained from the facility Warden or Acting Warden prior to carrying out the search.
>
> c. During the strip search of an individual, the subject shall not be touched by the security personnel as part of the search, but if the individual is a male, he may be required to lift his genitals, squat, spread his buttocks and cough…
>
> d. A detailed report shall be made following any search more thorough than a pat search. This report shall contain the name of the person searched, the date, time and place of the search, the names of the searching officers, any witnesses, the official who authorized the search, the reasons for the search, the extent of the search, and what, if anything, was found.

vi As more fully determined below, prior to September 8, 2017, there had been no attempt to conduct a strip search of a staff member at MCCC.

vii In that capacity, Parker was, for all relevant times, an "employee" or "public employee," as defined in HRS § 89-2, of BU 10.

HRS § 89-2 Definitions provides, in relevant part:

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

viii Nobriga did not check or use the Hawai'i Supreme Court (Court) definition of insubordination.

ix **SOC Article III CONDUCT III Rules C. Class C Rules** provides in relevant part:

> C4 Conduct Towards Superiors, Subordinates, and Associates - Employees shall treat superiors, subordinates, and associates with respect. They shall not be insubordinate to superiors or supervisors.

x The seven-part test set forth in the Miyagawa Memo was:

1. Did the employer give to the employee forewarning or foreknowledge of the possible or probabl[e] disciplinary consequence of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the company's investigation conducted fairly and objectively?
5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the company applied its rules, orders and penalties even-handedly and without discrimination to all employees?
7. Was the degree of discipline in a particular case reasonably related to (a) the seriousness of the employee's prove offense and (b) the record of the employee in his service with the company?

xi HRCP Rule 15 (b)(1) provides:

> FOR ISSUES TRIED BY CONSENT. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

xii Motion for Judgment was deemed applicable to the Third Amended Complaint based on Order No. 3545.

xiii A review of HAR § 12-42-8(g)(3) shows that there are no provisions analogous to Rule 52(c), which Respondents relied on for the Motion for Judgment. However, as stated above, the Board is generally guided by the analogous court rules when Board rules are silent or ambiguous on procedural matters.

HRCP Rule 52(c) states:

> (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.

xiv Under the applicable statutory and administrative rules provisions, Complainant has the burden of proving allegations of HRS Chapter 89 violations by a preponderance of the evidence. HRS § 91-10(5) and HAR § 12-42-8(g)(16).

xv At the Pre-Disciplinary hearing, Nobriga confirmed that in other strip searches, the subject is not forced to strip completely but is required only to go down to the subject's underwear.

xvi Nobriga testified that the request for consent to a strip search was a result of a 1995 consultation with the UPW in response to a federal court decision in Javar v. Saito. However, Policy 8.02 on its face states that no consent is required, and the Policy was obviously not amended to incorporate that practice.

xvii While Policy 11.02 may arguably be relied on to justify the videotaping of a strip search because this policy provides for videotaping of situations which represent a high probability of generating injuries, grievances, lawsuits, or adverse publicity for PSD at the discretion of the camera operator, there was no showing of consultation regarding the application to a strip search of a staff member.

xviii **SOC ARTICLE III CONDUCT II. PROFESSIONAL CONDUCT AND RESPONSIBILITIES** states in relevant part:

> **ARTICLE III CONDUCT II. PROFESSIONAL CONDUCT AND RESPONSIBILITIES** states in relevant part:
>
> ***
>
> **B. Loyalty** – Loyalty to the Department and to associates is an important factor in departmental morale and efficiency. Employees shall maintain loyalty to the Department and their associates as is consistent with the law and professional ethics.
>
> **C. Cooperation** – Cooperation between employees and elements of the Department is essential for effective correctional attainment. Therefore, all employees are strictly charged with establishing and maintaining a high level of cooperation.
>
> ***
>
> **E. General Responsibilities** – Correctional employees shall at all times take appropriate action to:
>
> *******
>
> 2. Create and maintain a feeling of security within the facility assigned.
>
> ***
>
> **G. Knowledge of Laws and Regulations** – Correctional employees are expected to know those Statutes of the State of Hawaii, Administrative Rules, Standards of Conduct, and Policies and Procedures of the Department which are applicable to the functions as correctional employees. In the event of improper actions of breaches of discipline, it will be presumed that the employee was familiar with the law, rule, or policy in question.

They shall seek information through superiors or fellow employees on matters in they they have questions or doubts.

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

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

***

K. Manner of Issuing Orders – Orders from superiors to subordinates shall be in clear language, civil in tone, and issued in furtherance of Department business.

***

N. Obedience to Unjust Orders – Corrections Officers and employees, who are given orders which they feel to be unjust must first obey the order to the best of their abilities and then may proceed to appeal as provided.

xix In support of the violations, Espinda noted, among other things, that: 1) there was reasonable suspicion that Parker would be introducing contraband into MCCC on the date of the incident; 2) a determination was made for a strip search; 3) the Union was consulted on Policy 8.02 providing that no consent was required for a strip or vehicle search; 4) Parker was provided with a highlighted copy of Policy 8.02; 5) a video camera documented the process showing that Parker refused to comply with Ryan's several directives for a strip search; 6) Parker refused those directives for a strip search; 7) a paramilitary process does not require explicit words indicating a direct order; and 8) the Union business agent told Parker that he could either submit or refuse to comply and be subject to insubordination.

xx Article III Conduct II. Professional Conduct and Responsibilities H.

xxi Article III Conduct II. Professional Conduct and Responsibilities K.

xxii The Court in Poe cited and relied on the reasoning set forth by the U.S. Supreme Court in Vaca v. Sipes, 386 U.S. 171, 191, stating:

> Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement…In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and

> as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement.
>
> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully.

Id. at 191-92. (footnote and citations omitted)

xxiii HRS § 89-14 provides that, "Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9…."

xxiv The Board has further generally looked for guidance to HRCP Rule 6(e), which provides that where notice is served upon a party by mail, two (2) days shall be added to the prescribed period. United Public Workers, AFSCME, Local 646, AFL-CIO, Board Case No. CE-01-685, Order No. 2588, at *16 (2009). Therefore, based on this rule if the Nakanelua Letter was mailed to Complainant, Parker the 90-day limitations period would be extended to December 20, 2017.

xxv HRS § 89-3 provides that, "Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion…"

xxvi HRS § 89-13(a)(1) and (7) provide:

> §89-13(a) Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
>
> ***
>
> (7) Refuse or fail to comply with any provision of this chapter[.]

xxvii In Weingarten, the U.S. Supreme Court upheld a National Labor Relations Board decision that § 7 (§7 guarantees the right of employees to act in concert for mutual aid and protection) of the National Labor Relations Act creates a statutory right in an employee to refuse to submit without union representation to an interview which the employee reasonably fears may result in discipline.

xxviii In Decision No. 400, the Board did not address the issue because of deferral of the issue to the pending grievance process along with the contractual claims of unjust discipline. The present case is distinguishable because the grievance process was exhausted and is not pending.

xxix 29 U.S.C. § 157(8)(a)(1).

xxx HRS § 89-9(c) provides that, "Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be

subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations."

xxxi The BU 10 CBA, Section 11.02 states:

> **11.02 MEETING.**
>
> 11.02a. In the event that an Employee is scheduled in advance by the Employer to meet to answer questions, the Employee shall be informed of the purpose of the meeting.
>
> 11.02b. When the subject of the meeting is on a job related incident and the Employee reasonably feels that disciplinary action may result from the meeting, the Employee may request that a Union representative or steward be present in the meeting.
>
> 11.02c. The Employee shall be credited with work time in the event the meeting is held on non-work hours.

xxxii *See* endnote xxv, *supra*.

xxxiii The Board clarifies that case is factually distinguishable from the Board's decision in Sapla v. Waihee, Board Case No. CE-01-148, Decision No. 325, 5 HLRB 82, 92 (1992) (Sapla), in which the Board rejected a complainant's argument that his HRS Chapter 89 rights were interfered with because he was denied adequate union representation at a disciplinary meeting. In that case, the complainant based that claim on the employer's decision to allow a union shop steward rather than a union representative of his choice. The union representative requested by the complainant was a working foreman with a close relationship with the complainant, which was part of the basis for which the disciplinary meeting was held. In rejecting the argument, the Board reasoned that the complainant failed to cite any legal authority for his position that he was entitled to choose his union representative, and that there was no showing that the union shop steward allowed was incompetent.

Unlike Sapla, Parker's request for Saito was not based on his ability to choose the union person. Parker's request was for the UPW Maui Division Director. This request was supported by his right to have a Union representative at a meeting on a job related incident which he, as an employee, felt may result in a disciplinary action under CBA § 11.02 and an established practice between PSD and UPW that the UPW Maui Director be given advance notice and the ability to be present during the implementation of a strip search procedure for the first time at MCCC.