STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of KENDERSON CASPILLO, Complainant(s), and DEPARTMENT OF TRANSPORTATION, State of Hawai‘i; and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Respondent(s).	CASE NO(S). 17-CE-01-899 17-CU-01-355 DECISION NO. 509 FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

1. Introduction and Statement of the Case

This prohibited practice case arises from the termination of Complainant KENDERSON CASPILLO (Caspillo) from his position by Respondent DEPARTMENT OF TRANSPORTATION, State of Hawai‘i (DOT). After his termination, Caspillo requested that Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW and, collectively with DOT, Respondents)) file a grievance on his behalf. UPW did so, and, after Caspillo declined to sign a last chance agreement (LCA) that would have reinstated him, UPW decided not to take Caspillo's grievance to arbitration.

Caspillo argues, among other things, that DOT wilfully violated the terms of the applicable collective bargaining agreement, thus committing a prohibited practice under Hawai‘i Revised Statutes (HRS) § 89-13(a)(8); that UPW violated its duty of fair representation; and that UPW violated the terms of the applicable collective bargaining agreement (CBA), thus committing a prohibited practice under HRS § 89-13(b)(5).

1.1. Issues

Based on the charging document, the issues in this case are:

1. Whether UPW violated the terms of a collective bargaining agreement, committing a prohibited practice under HRS § 89-13(b)(5);

2. Whether UPW arbitrarily, discriminatorily, and/or in bad faith violated its duty of fair representation owed to Caspillo, committing a prohibited practice when it failed to take Caspillo's grievance to arbitration; and

3. Whether DOT violated the terms of a collective bargaining agreement, committing a prohibited practice under HRS § 89-13(a)(8), when it terminated Caspillo.

1.2. Statement of the Case

The Board held hearings on the merits (HOMs) on January 14-17, 2020, January 21 and 23, 2020, and March 10, 2020. The parties then submitted post-hearing briefs on November 30, 2020.

After a full and complete review of the record, the Board issued a minute order that Caspillo failed to prove that UPW violated the CBA and breached its duty of fair representation owed to Caspillo. Accordingly, the Board's minute order further dismisses the HRS § 89-13(a)(8) claim against DOT. Based on the hybrid case, Caspillo, having failed to prove a breach of the duty of fair representation, cannot succeed on the HRS § 89-13(a)(8) claim. *See* Poe v. Haw. Labor Rels. Bd., 105 Hawai'i 97, 101-02, 94 P.3d 652, 656-57 (2004) (Poe II) (citations omitted).

The minute order further directed UPW to submit proposed findings of fact and conclusions of law and provided that:

> Caspillo and DOT may submit objections to UPW's proposed findings of fact and conclusions of law, based on this Minute Order, within ten days of service of UPW's proposed findings of fact and conclusions of law.

DOT submitted objections to certain language in a particular finding of fact. However, Caspillo did not submit objections.

The Board, having considered the proposed findings of fact and conclusions of law, as well as DOT's objections, issues this final order. Any finding of fact or conclusion of law submitted by UPW or DOT but not adopted in this decision is rejected. Any conclusion of law improperly designated as a finding of fact is deemed or construed as a conclusion of law; any finding of fact improperly designated as a conclusion of law is deemed or construed as a finding of fact.

2. Background and Findings of Fact

During the relevant times, Caspillo was an employee[i] of DOT[ii] and worked as a truck driver for a cone truck, a position that is included in bargaining unit 1[iii] (BU 1). UPW is the exclusive representative[iv] for BU 1. UPW and the relevant employer group for BU 1 are parties to a CBA for BU 1.

2.1. Contraflow Setup

During the relevant period, DOT employees set up contraflow from mile marker 2.6 to mile marker 6.6 Wailua Bypass Road, also known as the Kapa‘a Bypass. The contraflow is primarily set up and monitored by two crews: a cone truck crew and a sign truck crew. Each crew consists of a driver and two ride-along crew members, assigned to a particular truck.

The cone truck crew is responsible for setting up and taking down the cones, and the sign truck crew is responsible for setting up and taking down the signs used during contraflow. The sign truck crew is also responsible for placing cones on a forked part of the route.

To setup the contraflow, both trucks travel on the road together, one about 30 to 40 feet behind the other.

Both crews are responsible for monitoring and standing up any cones that may have been knocked down. The trucks follow the contraflow route to monitor for knocked down cones and typically stagger their loops on the highway. The trucks typically cross paths on opposite sides of the road during the loops.

The contraflow crew utilizes a staging area at the end of the contraflow, located at the beginning of the Kapa‘a Bypass. The crews park at this staging area as they prepare to drive the route to pick up cones.

2.2. Subject Incident; Investigation and Discipline

An incident on October 26, 2015 led to another DOT employee, Leong Lim (Lim) filing a workplace violence complaint against Caspillo. Lim spoke to the maintenance engineer, Willy Ortal (Ortal), who instructed Keith Ana (Ana), the contraflow supervisor, to take a statement from Caspillo that day. Ortal requested a written statement from Caspillo as well, which Caspillo provided.

After consulting with Tom Jackson (Jackson), the DOT Human Resource Specialist, Ortal called the police, pursuant to a request from Lim. Ortal further called Caspillo to inform him that he was being placed on leave without pay for thirty days, pending investigation, beginning on October 27, 2015. Caspillo also received written notice of this leave without pay.

On April 13, 2016, Larry Dill (Dill), the district engineer, who is responsible for making recommendations as to discipline, held a meeting with Caspillo and Leilani Mindoro (Mindoro), the UPW Division Director for Kauaʻi, as well as a DOT Human Resources Officer. At this meeting, Dill gave Caspillo a notice of termination of employment, effective April 29, 2016, and Caspillo signed that he received the notice.

On April 27, 2016, a meeting characterized as a pre-termination hearing was held in Dill's office, with Caspillo, Mindoro, Dill, and Jackson. Mindoro argued on Caspillo's behalf, and Caspillo told his side of the story. The meeting did not change DOT's decision to terminate Caspillo.

2.3. UPW Investigation and Grievance Process

UPW first became aware of the incident when Mindoro received a copy of the written notice of leave without pay. On October 27, 2015, Mindoro met with Ortal, Ana, and Caspillo at the UPW hall about the issue. Mindoro also discussed several issues with Caspillo, including the leave with/without pay process during investigation, the grievance process, and the allegations about the incident.

The grievance process, as laid out in the CBA, consists of a three-step process.

Mindoro went on to interview witnesses to the October 26, 2015 incident. She attended an interview with Caspillo and the Department of the Attorney General's Special Agent assigned to investigate the incident, and she represented Caspillo at the April 27, 2016 meeting, making arguments on his behalf.

After Caspillo's discharge, on May 5, 2016, Mindoro filed a grievance on Caspillo's behalf, along with a request for information. Mindoro amended the grievance on May 9, 2016 to correct the remedies section to reflect that Caspillo had been discharged. DOT responded to UPW's request for information on May 13, 2016.

The parties held a Step 1 meeting on July 6, 2016, where Mindoro represented Caspillo. DOT denied the Step 1 Grievance on July 20, 2016, and UPW submitted a Step 2 Grievance on July 22, 2016. The parties held the Step 2 meeting on August 16, 2016.

After the Step 2 meeting, UPW's Kauaʻi Division was short staffed. Therefore, Mindoro requested assistance from Chip Uwaine (Uwaine), the Special Assistant to the State Director of UPW, to ensure that Caspillo's grievance did not "fall between the cracks."

Uwaine sought to settle the grievance, and, during those settlement negotiations, on February 27, 2017, UPW submitted a notice of intent to arbitrate the grievance.

Although not all DOT employees agreed, DOT proposed a Last Chance Agreement (LCA) that would restore Caspillo's employment as a truck driver for DOT, effective April 29, 2016, and signed the LCA on March 28, 2017. The conditions of the LCA include a 30-day suspension from April 29 to May 29, 2016 and leave without pay from May 30, 2016 through January 2, 2017. The LCA provides that, among other things, for a two-year period, certain types of misconduct on Caspillo's part, if substantiated by a formal administrative investigation with Caspillo represented by UPW, constitute an immediate end to employment, and that such an end would be considered a resignation. The LCA further provides that this type of resignation would mean that Caspillo and UPW would not be able to challenge this resignation through the grievance process. DOT, UPW, and Caspillo are all named parties to the LCA.

After receiving and reviewing the LCA, Mindoro and Uwaine met with Caspillo, and Uwaine reviewed the LCA with Caspillo. Uwaine explained that, in his opinion, going to arbitration was "like flipping a coin," whereas the LCA would guarantee that Caspillo's employment would be restored. Uwaine further pointed out that Caspillo's seniority would be preserved through the LCA.

Caspillo consulted with Gary Rodrigues (Rodrigues), a former State Director of UPW, about the LCA. After consideration, Caspillo rejected the LCA because, among other things, he did not want to give up his grievance rights, and he believed that UPW would not represent him if he got into trouble again.

Uwaine informed DOT that Caspillo rejected the LCA, and DOT withdrew the offer.

On April 27, 2017, DOT denied the Step 2 grievance.

After Caspillo rejected the LCA, UPW conducted an evaluation of whether Caspillo's grievance had merit. Uwaine drafted an extensive inter-office memorandum (Uwaine Memorandum) and submitted it to Dayton Nakanelua (Nakanelua), the State Director for UPW. The Uwaine Memorandum lays out the facts and investigations in the case, as well as what happened during the grievance procedure, and, among other things, recommends that UPW not pursue Caspillo's grievance to arbitration because of Caspillo's rejection of the LCA.

Nakanelua reviewed the Uwaine Memorandum and UPW's file on Caspillo's grievance and determined that he concurred with Uwaine's recommendation. Therefore, by letter dated May 2, 2017, UPW informed Caspillo that it did not intend to pursue the grievance to arbitration.

3. Analysis and Conclusions of Law

3.1. Dispositive Motions

DOT filed a Motion to Dismiss, arguing, among other things, that the Complaint is untimely because it was filed more than 90-days after his termination notice (that then went

through the grievance process); that Caspillo did not exhaust his administrative remedies because he did not request that UPW utilize arbitration; and that Caspillo was required to prove that UPW breached its duty of fair representation prior to filing an HRS § 89-13(a)(8) claim.

UPW filed a Motion to Dismiss and/or for Summary Judgment, arguing, among other things, that UPW did not breach its duty of fair representation; that Caspillo lacks standing to pursue an HRS § 89-13(a)(8) claim because UPW did not breach its duty of fair representation; and that Caspillo failed to exhaust his administrative remedies because he did not request that UPW take his grievance to arbitration.

Caspillo opposed both dispositive motions.

3.1.1. Motion for Summary Judgment

The Board has adopted the standards for motions for summary judgment set forth by the Hawai'i Supreme Court (HSC) in Thomas v. Kidani, 126 Hawai'i 125, 267 P.3d 1230 (2011), and French v. Haw. Pizza Hut, Inc., 105 Hawai'i 462, 99 P.3d 1046 (2004). *See, e.g.,* Haw. Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Kawakami, Board Case Nos. 20-CE-03-946a; 20-CE-04-946b; 20-CE-13-946c, Decision No. 506 at *22 (June 23, 2021) (https://labor.hawaii.gov/hlrb/files/2021/06/Decision-No-506.pdf) (Kawakami); *see also* Tupola v. Univ. of Haw. Prof'l Assembly, Board Case Nos. CU-07-330; CE-07-847, Order No. 3054, at *18 (February 25, 2015) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3054.pdf) (Tupola).

Summary judgment is appropriate only when the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law; the Board must review the evidence in the light most favorable to the party opposing the motion for summary judgment; and the Board must resolve any doubt about whether or not such a motion should be granted in favor of the non-moving party. Kawakami, Decision No. 506, at *22.

At the time UPW filed its Motion to Dismiss and/or for Summary Judgment, the Board considered the facts on the record and determined that genuine disputes regarding material facts existed, including but not limited to issues about the motives of the parties.

Accordingly, the Board did not grant summary judgment.

3.1.2. Motions to Dismiss

The contents of the complaint serve as the basis for motions to dismiss for lack of subject matter jurisdiction, and, accordingly, when considering a motion to dismiss, the Board must accept the allegations of the complaint as true and view those allegations in the light most favorable to the complainant. *See* Jones v. Lee, Board Case No. 21-CE-06-960, Order No. 3781, at *2 (July 16, 2021) (https://labor.hawaii.gov/hlrb/files/2021/07/Order-No-3781.pdf) (Jones).

The Board is not required to accept conclusory allegations on the legal effect of the events alleged in the complaint. Tupola, Order No. 3054, at *17. However, the Board may dismiss a claim if it appears beyond a doubt that the complainant can prove no set of facts that would support the claim and entitle the complainant to relief. Haw. State Teachers Ass'n v. Abercrombie, 126 Hawai'i 13, 19, 265 P.3d 482, 488 (App. 2011).

The party seeking to invoke the Board's jurisdiction has the burden of establishing that jurisdiction exists. Jones, Order No. 3781, at *2. The Board may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction while considering a motion to dismiss for lack of subject matter jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawai'i 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Comm. v. City Council, City and County of Honolulu, 117 Hawai'i 1, 7, 175 P.3d 111, 117 (App. 2007).

3.1.3. Timeliness

The Board may only hear cases within its jurisdiction, and the Board's jurisdiction has been defined by both statute and the courts. *See*, HRS §§ 89-14, 377-9; Aio v. Hamada, 66 Haw. 401, 404 n. 3, 664 P.2d 727, 729 n. 3 (1983) (Aio).

HRS § 377-9 sets forth a requirement that the Board can only hear complaints filed within ninety days of the action that the alleged prohibited practice is based on. HRS § 377-9(l); Id. at 505 n. 3, 664 P.2d at 729 n. 3. The administrative rules governing the Board proceedings further include this ninety-day limitation. Hawai'i Administrative Rules (HAR) § 12-42-42(a).

The Board has construed the limitations period strictly and will not waive a defect of even a single day. Fitzgerald v. Ariyoshi, Board Case Nos. CE-10-175; CU-10-43, Decision No. 175, at *21-22 (July 29, 1983) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-175.pdf). The ninety-day limit is jurisdictional and provided by statute; therefore, neither the Board nor the parties may waive this requirement. Hikalea v. Dep't of Env. Serv., City and County of Honolulu, Board Case No. CE-01-808, Order No. 3023 at *6 (October 3, 2014) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3023.pdf). Further, the ninety-day period begins when the complainant knew or should have known that his rights were being violated. United Pub. Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443A, at *4 (June 30, 2006) (https://labor.hawaii.gov/hlrb/files/2018/12/Decision-No-443.pdf).

The Board rejects DOT's argument that the Complaint was untimely as fundamentally flawed and a clear misstatement of law.

As DOT is aware, under the principle of exhaustion, Caspillo could not file a valid prohibited practice complaint with the Board alleging that DOT violated the CBA until after the parties completed the grievance process. *See*, *e.g.*, Hsiao v. Haw. Gov't Emps. Ass'n, Board

Case No. 20-CU-08-383, Decision No. 498, at *12 (October 14, 2020) (https://labor.hawaii.gov/hlrb/files/2020/10/Decision-No.-498.pdf); *see also* Poe II, 105 Hawai'i at 101-02, 94 P.3d at 656-57 (2004).

UPW did not issue its notice to Caspillo of its refusal to take his grievance to arbitration until May 2, 2017. Because of the principle of exhaustion, this date on which Caspillo exhausted his administrative remedies serves as the date when Caspillo knew or should have known that his rights were being violated.

The Complaint was filed on July 28, 2017. Therefore, the Complaint was clearly filed within the relevant 90-day period, and the Board rejects DOT's argument that it was untimely.

3.1.4. Exhaustion

As briefly mentioned in the section above, when considering an allegation that an employer has committed a prohibited practice by violating the relevant collective bargaining agreement, the Board has consistently held that a complainant must first exhaust contractual remedies unless attempting to exhaust would be futile, based on the Court's reasoning in Poe v. Haw. Lab. Rels. Bd., 97 Hawai'i 528, 531, 40 P.3d 930, 933 (2002) (Poe) and Poe II, 105 Hawai'i at 101, 94 P.3d at 656. *See, e.g.*, Univ. of Haw. Prof'l Assembly v. Bd. of Regents, Board Case No. CE-07-804, Order No. 2939 (August 22, 2013) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-2939.pdf).

DOT argues that "there is no indication from the Complaint that a request was made by the Complainant to utilize arbitration or that such request would be futile." Similarly, UPW claims that "Caspillo failed to exhaust his contractual remedies under Section 15.16 by his failure to make a request to the union to arbitrate….after he was provided a step 2 decision made by the employer on April 27, 2017…he took no action after April 28, 2017 before filing this complaint with this Board on July 28, 2017."[v]

The Complaint states, in relevant part, "On or about May 2, 2017, UPW provided a boiler plate letter denying arbitration…"

The HSC has found that:

> …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 undertake, would be futile.

Poe, 97 Hawai'i at 531, 40 P.3d at 933.

No one disputes that Caspillo's grievance regarding his termination went through Step 1 and Step 2 of the grievance process or that UPW informed Caspillo that it would not take the grievance to arbitration on May 2, 2017.

A review of the record provides clear evidence that Caspillo effectively exhausted his administrative remedies.

Exhaustion occurs when an employee reaches the point in the grievance process where they can no longer progress. Poe, 97 Hawai'i at 538, 40 P.3d at 940. Only UPW can choose to advance to the third and final grievance step of arbitration, and they have a 30-day window in which to make such a choice. Five days after DOT's Step 2 Decision, UPW informed Caspillo that it would not take his grievance to arbitration, pre-empting any request from Caspillo to request arbitration.

When UPW informed Caspillo that it would not take his grievance to arbitration, he could not progress any further in the grievance process. Therefore, under the relevant case law, he exhausted his administrative remedies.

To the extent that it can be said that Caspillo did not exhaust his remedies because he did not actually ask UPW to take his grievance to arbitration, such a request would clearly have been futile after May 2, 2017. If exhaustion of administrative remedies is futile, it is not required. Poe, 97 Hawai'i at 536, 40 P.3d at 938; *see also* Poe II, 105 Hawai'i at 102, 94 P.3d at 657. For Caspillo to request that UPW take a grievance to arbitration after UPW unequivocally stated its intention to refuse to take it to arbitration is futile.

Accordingly, the Board rejects these arguments and finds that Caspillo did exhaust his administrative remedies.

3.1.5. Order of the Filings of Claims

DOT has argued that Caspillo was required to prove that UPW committed a breach of the duty of fair representation before filing a prohibited practice complaint against DOT. Therefore, DOT asserts without citing any legal authority that the Complaint was prematurely filed. This argument is further flawed for several reasons.

First, from a simple logic standpoint, DOT's arguments in its Motion to Dismiss would lead to a situation where an employee could almost never file a prohibited practice complaint against their employer. According to DOT, prior to filing a complaint against an employer, an employee is required to exhaust their contractual remedies and then file and succeed in a complaint against the union for a breach of the duty of fair representation. At the same time, DOT argues that an employee must file their complaint against the employer within 90 days of the employer's action.

As DOT knows, the BU 1 grievance process provides:

1. Grievances must be filed within eighteen calendar days of the occurrence of the alleged violation;
2. The employer must submit its Step 1 Decision within thirteen calendar days after receipt of the grievance;
3. The grievant, and/or UPW, may appeal the Step 1 Decision at Step 2 within nine calendar days after receipt of the Step 1 Decision;
4. The employer must submit its Step 2 Decision within nine calendar days after receipt of the Step 2 appeal; and
5. If the grievance is not resolved at Step 2, UPW has 30 calendar days to notify the employer of their intention to arbitrate the grievance.

Therefore, the grievance process can take up to 79 days (not including transmittal time) under the strict language of the CBA, and the parties can increase the relevant deadlines by mutual agreement.

Following DOT's arguments, if the grievance process took 79 days, an employee would have only ***eleven*** days to file a prohibited practice complaint against the union, have the complaint heard by the Board, and have the Board decide the complaint in the employee's favor. Given that HRS § 377-9 requires that the Board hold a hearing "**not less than ten** nor more than forty days after the filing of the complaint," (emphasis added), the likelihood that the Board would be able to hear and decide a complaint within eleven days is extremely low.

Therefore, from a purely logical standpoint, DOT's arguments are untenable and would effectively lead to employees being unable to pursue any claims against their employers for breaches of the collective bargaining agreement.

Setting pure logic aside, DOT's arguments are not supported by law. The HSC has stated that, in a "hybrid case" of an alleged breach of the duty of fair representation by the union and an alleged breach of the CBA by the employer, both claims are "inextricably interdependent," so both must be proven in the proceedings. Poe II, 105 Hawai'i at 102, 94 P.3d at 657. Even if an employee brings a claim against only one party, the employee must prove both sides of the "hybrid case." Id. ("The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.")

DOT's argument that an employee must succeed in proving a union's breach of the duty of fair representation before bringing a case against the employer ignores the requirements of the hybrid case set forth in Poe II—namely, that both claims must be prosecuted and proven in one proceeding. Therefore, the Board rejects this argument and denies DOT's Motion to Dismiss.

UPW argues in its Motion to Dismiss and/or for Summary Judgment that UPW did not breach its duty of fair representation; accordingly, failing to prove such a breach, Caspillo cannot succeed on a claim against the employer. The Board agrees with UPW to the extent that Poe II requires that the employee succeed on both claims to succeed on either, as discussed above. However, at the time the Board considered these dispositive motions, the Board could not decide certain key issues, including questions of material fact regarding the motives behind certain actions. Accordingly, the Board denies UPW's Motion to Dismiss and/or for Summary Judgment.

3.2. HRS § 89-13(b)(5) Claim

The Complaint alleges that UPW violated the terms of the CBA, committing a prohibited practice under HRS § 89-13(b)(5) by refusing to pursue a meritorious grievance. However, the remainder of the record does not further this argument.

The CBA does not require UPW to take every grievance to arbitration. Consideration of UPW's decision not to take Caspillo's grievance to arbitration falls under an alleged breach of UPW's duty of fair representation—not an alleged CBA violation.

In his arguments, whenever Caspillo brings up an argument tied to the CBA, he illustrates how the employer allegedly breached the CBA—not UPW.

To the extent that Caspillo argued that UPW colluded with DOT against him, the Board notes that this argument is not a question of whether UPW violated a particular provision of the CBA. Rather, this is also a question of whether UPW's duty of fair representation was owed to Caspillo and breached. Accordingly, the Board will discuss this question when considering the hybrid case below.

Therefore, the Board dismisses the HRS § 89-13(b)(5) claim against UPW.

3.3. Hybrid Case

The remaining issues in this case comprise the "hybrid case". As discussed above, the HSC has found that a complainant must prove both parts to succeed in a hybrid case because these claims are "inextricably interdependent." Poe II, 105 Hawai'i at 102, 94 P.3d at 657; *see also* Tupola, Order No. 3054 at *39.

3.3.1. Breach of the Duty of Fair Representation

The Board can find a breach of the duty of fair representation only if UPW's conduct towards Caspillo was arbitrary, discriminatory, or in bad faith. Poe II, 105 Hawai'i at 104, 94 P.3d at 659. To determine which of these three elements apply, the Board has adopted a two-step analysis, first looking at whether the alleged union misconduct involved the union's

judgment or whether it was 'procedural or ministerial.' Mamuad v. Nakanelua, Board Case No. CU-10-331, Order No. 3337F, at *31 (May 7, 2018) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3337F.pdf) (Mamuad).

3.3.1.1. Procedural or Ministerial Acts – Arbitrariness

The "arbitrary" prong of a breach of the duty of fair representation is controlling only when the challenged union conduct is procedural or ministerial. Asato v. Haw. Gov't Emp. Ass'n and Dep't. of Ed., Board Case Nos. 19-CU-03-375; 19-CE-03-934, Decision No. 504, at *5-6 (May 5, 2021) (https://labor.hawaii.gov/hlrb/files/2021/05/Decision-No.-504.pdf) (Asato). For alleged misconduct to be arbitrary, the act in question must not require the exercise of judgment; there must be no rational or proper basis for the union's conduct; the act must have been in reckless disregard of the employee's rights; and it must prejudice a strong interest of the employee. Id. at *6. Mere negligence does not rise to the level of arbitrariness that constitutes a breach of the duty of fair representation. Id.

Caspillo alleges that UPW processed his grievance in a perfunctory fashion, including a boilerplate rejection of arbitration.

The Board has found that, if the union ignores or processes a meritorious grievance in a perfunctory manner, such actions are ministerial and can be considered as potential breaches of the duty of fair representation. Mamuad, Order No. 3337F, at *31-32. However, the union does not act perfunctorily unless it treats the union member's claim so lightly as to suggest an "egregious disregard" of their rights. Id., at *32. Further, an employee has no absolute right to have a grievance taken to arbitration, and the fact that an underlying grievance was meritorious is not sufficient to establish a breach of the duty of fair representation. Id., at 31.

A union does not perfunctorily process a grievance as long as the union undertakes some "minimal investigation" of the grievance. Emura v. Haw. Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO, Board Case No. CU-03-328, Order No. 3028, at *13 (October 27, 2014) (https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3028.pdf) (Emura). The required thoroughness of the investigation depends on the particular facts of the case. Id.

After consideration, the Board holds that UPW did not act in a perfunctory manner and conducted sufficient investigation before deciding not to proceed to arbitration.

Mindoro discussed the grievance with Caspillo, Ortal, and Ana on October 27, 2015, explaining the grievance process and speaking with them about the Subject Incident. She went on to interview members of the contraflow crew who witnessed the incident between Lim and Caspillo and filed a request for information from DOT. This investigation reflects diligence and objectivity in seeking to identify the facts of the grievance.

UPW represented Caspillo in the investigation and at the pre-termination hearing. During the consideration of the grievance, Uwaine negotiated an LCA for Caspillo and counseled him as to what the LCA would entail.

Uwaine conducted a thorough analysis of DOT's asserted "just cause" to terminate Caspillo and, through an extensive and detailed memorandum, recommended to Nakanelua that UPW not pursue the grievance to arbitration.

The primary reason behind Uwaine's recommendation was Caspillo's non-acceptance of the LCA because "The [LCA] is a sure thing and the arbitration is a flip of a coin as earlier described", due, in part, to Caspillo's actions including "testing" Lim with a decoy cone and confronting Lim without supervisory authority.

Nakanelua then considered Uwaine's recommendation, as well as the grievance file, before deciding to accept Uwaine's recommendation not to pursue the grievance to arbitration.

Caspillo argues, among other things, that the letter informing him that UPW would not pursue his grievance to arbitration was "boilerplate". The Board acknowledges that the letter does not contain specifics to Caspillo's case. However, nothing in the law requires UPW to inform Caspillo of its reasoning as to why it made its decision or even to inform Caspillo of all of the steps that it took to make this decision—only that UPW sufficiently investigates the matter and does not act with an "egregious disregard" for Caspillo's rights. Therefore, such a "boilerplate" letter is not sufficient proof of perfunctory processing of the grievance.

The Board notes that the grievance process in this case did take many months to complete. Mindoro testified that this extended length of processing time was due, in part, to UPW being short-staffed. However, Mindoro did process the grievance and requested additional assistance to process it in as timely a manner as possible. The Board finds Mindoro's actions evidence that UPW did not perfunctorily process the grievance, as she took steps to ensure that the grievance would not "fall between the cracks."

Based on the foregoing, the Board finds that UPW conducted a sufficient investigation into Caspillo's case and did not process Caspillo's grievance in a perfunctory manner. Accordingly, the Board finds that UPW did not breach the duty of fair representation in an arbitrary manner.

3.3.1.2. Acts of Judgment – Discrimination and/or Bad Faith

Decisions as to how to pursue a particular grievance, including how to present a grievance at the arbitration stage, are matters of judgment for the union, and unions are not liable for good faith, non-discriminatory errors of judgment in making those decisions. Tupola, Order No. 3054, at *28; *see also* Mamuad, Order No. 3337F, at *31.

Caspillo alleges that UPW failed to take a meritorious grievance to arbitration, despite taking other similarly-situated employees' grievances to arbitration; "turned a blind eye" to various issues during the grievance process; shared its work product with DOT, thus "betray[ing] its fiduciary duty to [Caspillo] in bad faith"; and acted in bad faith by being "not forthcoming in cooperating by providing…information."

The union must retain the discretion to act in what it perceives to be their members' best interest. Therefore, especially when it comes to questions of judgment, the duty of fair representation must be narrowly construed. Asato, Decision No. 504, at *5. Thus, the Board must be deferential in its substantive examination of UPW's performance. Tupola, Order No. 3054, at *27. Accordingly, the Board is not considering whether the union made the right decision; rather, the Board is only required to ask whether the union made its decision rationally and in good faith. Emura, Order No. 3028, at *15-16.

3.3.2. Discrimination

The Board has not adopted a strict standard for discrimination in the context of a breach of the duty of fair representation. The Board has further noted that the element of discrimination is not restricted by impermissible or immutable classifications like race or other constitutionally protected categories. Tupola, Order No. 3054, at *33. In addition to those constitutionally protected categories, a union cannot discriminate against an employee based on union membership or if discrimination comes from prejudice or animus. Id.

To prove discriminatory conduct, the complainant must show substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. Mamuad, Order No. 3337F, at *37.

Caspillo did not raise the issue of discrimination by UPW in his Complaint. To the extent that Caspillo has alleged that UPW treated his grievance differently than other similarly situated employees, Caspillo has not provided any evidence as to any discriminatory intent on behalf of UPW. Accordingly, the Board concludes that Caspillo did not prove that UPW breached the duty of fair representation in a discriminatory manner.

3.3.3. Bad Faith

The bad faith element requires that the Board make a subjective inquiry to determine if the union acted (or failed to act) due to an improper motive. Tupola, Order No. 3054, at *34. Assertions of the state of mind required for this claim must be corroborated by subsidiary facts and must show substantial evidence of fraud, deceit, or dishonest conduct. Id. If a complainant fails to present subjective evidence of an improper motive and merely suggests that an improper motive is the only "reasonable explanation" for the conduct, the complainant fails to prove their case. Emura, Order No. 3028, at *15.

Preliminarily, the Board addresses Caspillo's arguments that UPW and DOT colluded against him, primarily due to the LCA. The Board finds this argument without merit. The HSC has found that the grievance and arbitration procedures in the CBA contemplate that the employer and the union "each will endeavor in good faith to settle grievances short of arbitration." Poe II, 105 Hawai'i at 101, 94 P.3d at 656. Negotiating the LCA was a good faith attempt to settle this grievance, not collusion between UPW and DOT.

Only UPW and DOT are parties to the CBA. HRS § 89-10 provides, among other things, that agreements effective during the term of a collective bargaining agreement do not need to be ratified by the affected employees. However, in this case, UPW and DOT included Caspillo as a party to the LCA, meaning that the LCA could not be adopted without Caspillo's consent. Therefore, by the plain language of the LCA, it could not be unilaterally imposed on Caspillo. Caspillo was free to decline the LCA, which he did.

Next, Caspillo claims that UPW shared the Uwaine Memorandum with DOT; UPW denies this allegation. The Board finds that, even if UPW shared the document with DOT, Caspillo has failed to show how sharing the document would be a detriment to his case. Caspillo alleges that UPW sent the Uwaine Memorandum to DOT when UPW withdrew the request to arbitrate. That means that DOT would have received the document after the end of the grievance process, with no further proceedings pending. Therefore, even if UPW shared the Uwaine Memorandum with DOT, it would not constitute a breach of the duty of fair representation in bad faith.

Caspillo further argues that UPW ignored various issues in the grievance process; however, Caspillo has provided no evidence of fraud, deceit, or dishonest conduct by UPW. Caspillo disagrees with UPW's decision not to take his grievance to arbitration; however, as discussed above, the Board is not concerned with whether UPW made the right or wrong decision, and simply making the "wrong" decision about a meritorious grievance is not a breach of the duty of fair representation.

Accordingly, the Board finds that UPW did not breach the duty of fair representation in bad faith, and Caspillo has failed to prove a breach of the duty of fair representation.

3.3.4. HRS § 89-13(a)(8) Claim

As noted above, the hybrid claim requires that the complainant succeed on both issues; if the complainant fails to prove one, the other cannot succeed. Given that the Board finds no breach of the duty of fair representation, the Board cannot find that DOT committed a prohibited practice under HRS § 89-13(a)(8) by violating the CBA.

Therefore, the Board dismisses the HRS § 89-13(a)(8) claim for lack of standing and makes no other findings as to this claim.

4. Order

For the reasons discussed above, the Board dismisses the Complaint. The Board further orders that no remedies will be awarded under HRS § 377-9(d). This case is closed.

DATED: Honolulu, Hawai'i, November 19, 2021.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

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[i] HRS § 89-2 defines employee or public employee as:

> "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)].

[ii] In this capacity, DOT is an Employer within the meaning of HRS § 89-2, which defines "employer" or "public employer" as:

> "Employer" or "public employer" means the governor in the case of the State…and any individual who represents one of these employers or acts in their interest in dealing with public employees…

[iii] HRS § 89-6(a)(1) defines BU 1 as "Nonsupervisory employees in blue collar positions".

[iv] HRS § 89-2 defines exclusive representative as:

"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.

[v] Section 15.16 of the CBA states:

> **15.16 STEP 3 ARBITRATION**
>
> In the event the grievance is not resolved in Step 2, and the Union desires to submit the grievance to arbitration, the Union shall notify the Employer within thirty (30) calendar days after receipt of the Step 2 decision.