STATE OF HAWAII

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of RONALD CALDEIRA, Complainant, and EDUARDO E. MALAPIT, Mayor of the County of Kauai, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO, Respondents.	CASE NOS.: CE-03-80 CU-03-45 DECISION NO. 196 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 21, 1982, RONALD CALDEIRA [hereinafter referred to as Complainant] filed a prohibited practice complaint with the Hawaii Public Employment Relations Board [hereinafter referred to as Board].

The Complainant alleges that EDUARDO E. MALAPIT, then-Mayor of the County of Kauai [hereinafter referred to as MALAPIT, County or Employer], violated Subsection 89-13(a)(8), Hawaii Revised Statutes [hereinafter referred to as HRS], by subjecting him to allegedly improper discipline and refusing to process his resulting grievance. Complainant further alleges that the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION [hereinafter referred to as HGEA or Union] violated Subsection 89-13(b)(5), HRS, by allegedly failing to provide him with adequate representation in the aforementioned grievance. Bd. Ex. 1. Complainant's charges

were further detailed in a Particularization of Complaint filed on August 30, 1982. Bd. Ex. 7.

On August 30, 1982, Complainant filed a Motion for Restraining Order Against Respondent Malapit, in which he sought an order restraining MALAPIT from imposing a disciplinary suspension on him from September 12 through 15, 1982, until the Board rendered its final determination. Bd. Ex. 8. A hearing on the motion was held on September 10, 1982, with all parties being represented by counsel. The Board, having determined that it is vested with the authority, under Section 89-14 and Subsection 377-9(d), HRS, to issue the interlocutory order requested, entertained arguments on the merits of the motion. In Order No. 455, issued September 15, 1982, the Board, stating that Complainant had failed to demonstrate that he would suffer irreparable harm due to the imposition of the pending disciplinary suspension, denied the motion. Bd. Ex. 13.

Hearings on the case-in-chief were held in Kauai on April 28 and June 21, 1983. All parties were represented by counsel and permitted to present argument and submit evidence. Written briefs were submitted by all parties.

Based on a full consideration of the record herein, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Complainant is an employee of the County of Kauai and a member of Unit 3, as defined in Subsection 89-6(a), HRS. At all

times relevant, Complainant was employed as a Recreation Assistant assigned to the Kapaa swimming pool.

Respondent MALAPIT was, at all times relevant, the Mayor of the County of Kauai and the public employer of the County of Kauai, as defined in Section 89-2(9), HRS.

Respondent HGEA is the exclusive representative, as defined in Section 89-2(10), HRS, of Unit 3 employees.

In a letter dated January 13, 1982 from Henry Morita, Kauai County Engineer, Complainant was advised of a disciplinary suspension which was being imposed on him. The letter in full reads as follows:

> Dear Mr. Caldeira:
>
> On November 11 [Veteran's Day], 1981 an incident at the Kapaa Pool required investigation. Investigation was started by a report of a near drowning. The details of the incident are:
>
> 1. There were five children swimming and three adults in the bleachers. You were the Recreation Assistant on duty.
>
> 2. A woman had to enter the pool, without proper attire, to assist her son from drowning. The woman was the nearest adult and you could not reach the child before her.
>
> 3. The woman stayed in the pool for fifteen (15) minutes fully clothed, without contact from the Recreation Assistant.
>
> 4. Nothing is mentioned in your daily log of the incident.
>
> Considering the small amount of pool users and that the incident occurred (as well as the adult remaining in the pool) without your knowledge shows that your monitoring of the pool activities is unacceptable. We cannot wait until a major incident happens before taking action.

You were re-trained on pool operations and given a Swimming Pools Operation Manual on 10/6/81, which includes a section on reporting procedures. It is required, and stated in the operational manual, that all events and conditions are noted carefully in the daily log and that information is recorded accurately. In a meeting with Gordon Shibao (Supt. of Parks and Recreation), Clarence Takashima (HGEA Division Chief), and yourself, on 12/29/81 you stated that the incident was reported in your daily log which is not the case.

On June 5, 1981 you were suspended for insubordination, negligence and dereliction of duty. You were advised that further insubordination and dereliction of duty would result in dismissal. But the orders were modified through the grievance procedure resulting with reduction of the suspension and deferral of the major portion of the remaining suspension.

The previous actions have not resulted in permanent changes in your regard to duties and responsibilities -- you were also suspended on 7/7/80 and 7/8/80 for insubordination. For your negligence and dereliction to duty you are hereby suspended, without pay, for twenty (20) working days, effective February 1, 1982 to March 1, 1982, inclusive, and return to service on March 2, 1982.

Further insubordination or dereliction of duty, which is intolerable and unbecoming of a government employee, will result in dismissal for the good and efficiency of our service.

Very truly yours,

/s/ Henry Morita

HENRY MORITA
County Engineer

Joint Ex. 1.

Complainant testified as to the incident on November 11, 1981 as follows:

At about 2:30 p.m., Complainant was testing the chemical balance of the pool water. His test, done at poolside, and taking between 2 to 5 minutes, indicated he did not have to add any chemicals. His daily log sheet (C's Ex. 21) indicates no chemicals were added at 2:30 p.m. Complainant testified, however, that he had to reduce the chlorine level. To do this, he had to leave the poolside and go to the pump room, adjacent to the pool proper, where the chlorine tank is situated. Chlorine levels are not noted on the log sheet, Complainant stated, as they vary with the amount of sun. Transcript of April 28, 1983 hearing [hereinafter referred to as Ap. Tr.] pp. 19-20. It took Complainant between 45 and 65 seconds to go from poolside to the pump room and back. Ap. Tr. pp. 17-20, 64, 68, 69 and 72.

Upon returning from the pump room, Complainant noticed a woman in the shallow end of the pool in civilian clothes. The wearing of such clothes in the pool is prohibited by pool rules. Transcript of June 21, 1983 hearing [hereinafter referred to as June Tr.] p. 58. He testified she was not in the pool when he went to the pump room. Ap. Tr. p. 66. He approached her and told her she could not wear such clothes in the pool. The woman said nothing but her child with whom she was playing said, "My mother saved me." Complainant filled out an accident report, using a blank log sheet since he was out of accident report sheets, writing down "what the child told" him, i.e., that the "child lost grip and the mother had to go in for it." The report also allegedly included the name of the child, his address, his

telephone number, the approximate time of the incident (2:30-2:35 p.m.), the name of witness (the mother), and Complainant's signature. He also had the mother sign the report. Ap. Tr. pp. 20-21 and 47-49.

The account of the incident as related by the mother of the child, Sharon Paik, differed greatly from that of Complainant. She said she took her then four-year-old son, Ryan, to a Tiny Tots swim class on November 11, 1981 at about 11:30 a.m. Ap. Tr. p. 11. After the class at about noon, Ryan, a non-swimmer, wanted to stay in the water. June Tr. pp. 12-13. She did not inform Complainant that her son would be in the water. June Tr. pp. 18-19. About six other children and one adult were in the shallow end of the pool at this time. June Tr. pp. 13 and 38. She sat on the deck about five feet from where Ryan, who did not know how to swim, practiced going across a corner of the pool, from gutter to gutter. June Tr. pp. 13-14. At one point, Ryan lost his grip, was not able to touch bottom, and so "struggled" to stay above water, "bobbing up and down in the water." His head went below the surface of the water. June Tr. pp. 15, 26 and 40. She looked for the lifeguard, who was in the crow's nest facing the deep end of the pool, across from the side on which she was sitting, "looking straight ahead." June Tr. p. 23; Bd. Ex. 26. Feeling he was too far away to help her, she jumped into the pool herself to help her son. June Tr. pp. 14-15 and 27. At no time did she call out to Complainant. June Tr. pp. 20 and 27.

Once in the water, Paik stayed there about 15 minutes with her son to reassure and calm him, even though she was in street clothes. June Tr. pp. 21, 24 and 26. She was never told to get out of the pool for being improperly attired. June Tr. p. 27.

After the incident, Paik testified, she and her son left for home. June Tr. p. 21. Paik returned that afternoon about 4:00 p.m. to the pool for her daughter's swim class. June Tr. p. 24. She then told Ryan to go up to the lifeguard to tell him that he had "almost drowned" that day. June Tr. p. 25. After Ryan talked to Complainant, Paik testified, Complainant approached her and said, "Your son told me that he almost drowned today." She replied "Yes. I had to go in the water after him." He did not reply. Neither did he ask her to sign an accident report or any other paper. June Tr. p. 22. She, in fact, never lodged a formal complaint with the County. June Tr. p. 45. She testified that a friend told Gordon Shibao, Superintendent of Parks and Recreation, about the incident (June Tr. pp. 21 and 23), whereupon a phone conversation between Shibao and Paik ensued. June Tr. p. 44. At some point, she also talked to Wilson Miyashiro, Director of Recreation in the Parks and Recreation Division. June Tr. p. 45.

Dennis Baretto, the adult present in the pool at the time of the incident, confirmed in substance Paik's account. He stated he was sitting on the pool deck watching his two children swimming in the shallow end of the pool along with four or five other children. When he turned his head, he saw Paik jump into

the water. He then saw her child going under water, "swallowing water." Ap. Tr. pp. 48, 51 and 53. He jumped in to aid Paik. He asked her how her child was but she did not answer. About a minute later, he asked again and she said, "I think he's all right." Ap. Tr. p. 49. Baretto stayed in the water 12 to 15 minutes. During that whole time Complainant, Baretto testified, was "sitting in the tower." Ap. Tr. p. 49.

Isaac Hookano, Complainant's immediate supervisor, interviewed Baretto and Complainant regarding the incident. Ap. Tr. p. 117. He did not interview Paik because she had already been interviewed by his immediate supervisor. Ap. Tr. pp. 120, 129-30 and 141. As reported in Hookano's written summation of his interviews with Complainant, Complainant acknowledged that Paik jumped in the pool to secure her son, and stated that the incident would not have occurred had not Orlando Anaya, the child's swimming instructor, instilled excessive confidence in the child. Bd. Ex. 29. Hookano testified that he did not himself arrive at the conclusion that the incident amounted to a "near-drowning," as the incident is referred to in Morita's letter to Complainant. Ap. Tr. pp. 124-25.

Hookano, in his testimony, mentioned a rule that required Complainant to order the pool to be emptied of people if he was to be away from the poolside for an extended period of time. Ap. Tr. pp. 124-25 and 134-36.

Miyashiro confirmed this, saying that under the rules of the Standard Operating Procedure book, the pool is to be

emptied of people when absences of the guard due to the performing of tests are more than four minutes. June Tr. pp. 57-58.

Miyashiro testified that he verbally reprimanded Hookano for not interviewing Paik, and interviewed her himself. June Tr. pp. 71 and 76.

Miyashiro further testified that, based on Hookano's reports, he came to the conclusion that a "near-drowning" occurred. Ap. Tr. pp. 144, 147 and 160. There was a "near-drowning," Miyashiro reasoned, in the sense that the mother was prompted to jump into the pool to secure her son's safety, regardless of whether the child actually took in water or was unable to remain on the surface. Ap. Tr. p. 148; June Tr. pp. 80-81. However, Miyashiro, upon reexamination, stated that the incident could also have been reported to him as a "near-drowning" by Shibao. June Tr. p. 61. Complainant's apparent obliviousness and inaction, Miyashiro averred, amounted to dereliction of duty. He had a responsibility to watch all swimmers in the pool, and also to impress upon parents the necessity of supervising their non-swimming children. June Tr. pp. 61A-62. This conclusion was not altered by the fact that Paik was not interviewed by Hookano, by the possibility that Hookano might be biased against Complainant, or by Paik's failure to initiate a complaint. The investigation as conducted supported the conclusion that Complainant was guilty of dereliction of duty. June Tr. pp. 71-72.

Miyashiro testified that Complainant also violated the Standard Operating Procedure rule that guards should be attentive to all users of the pool. He did this when he allegedly failed to keep his attention on the shallow-end where the users were congregated, and allegedly failed to notice two adults in the pool with street clothes on for 15 minutes. June Tr. pp. 77-78.

Miyashiro stated the parent rather than the guard has primary responsibility for the child's safety. June Tr. pp. 65-66. There are no signs or established rules prohibiting non-swimming children from using the pool, according to Miyashiro. June Tr. pp. 58 and 64. According to Complainant, on the date of the incident, a sign stating all non-swimmers should be accompanied by parents was posted on the front gate, but was later blown down and lost due to Hurricane Iwa. June Tr. p. 86.

Complainant's monthly activity report for November 1981 (C's Ex. 20) shows no rescues or first-aid administrations. Complainant explained that when he filled out the monthly activity report, the accident report was not in the spot on the pump room shelf where he stored them. With the accident report missing, Complainant forgot about the incident and so did not include it in the monthly report. Ap. Tr. p. 56.

Under "Remarks, Recommendations, etc." on the November 1981 monthly activity report is the notation "missing 11-21, 11-22, 11-23, 11-24, 11-25 - five log sheet." No mention is made, however, of missing accident reports. Ap. Tr. pp. 22-23, 49 and 56. Complainant did not know why the log sheets were missing, though he apparently implied that since other people,

including Hookano, had access to the pump room, one of them may have removed them. Ap. Tr. pp. 23-24.

Complainant was summoned to Shibao's office to discuss the incident of November 11, 1981. C's Ex. 26. The meeting took place on December 29, 1981 with Shibao, Complainant, and HGEA Kauai Division Chief, Clarence "Gadget" Takashima, present. Complainant was questioned about the incident but he could not remember the specific questions. He did remember, however, that just before entering the office Takashima told him he was "on his own" and that he "could not help" him. Ap. Tr. pp. 26-27, 72 and 85.

Takashima denied making such a statement. He testified that before entering the meeting, he did not know what was to be discussed and thus could not have made such a statement. Ap. Tr. p. 78. He also testified that Complainant's account of his actions at the time of the November 11, 1981 incident as related at the Board hearing differed from the account given at the meeting. Takashima stated that at the meeting Complainant claimed he in fact had to alter the chemical balance and was away from the poolside for that purpose. Ap. Tr. pp. 78-79.

Subsequent to the meeting in Shibao's office, the letter from Morita, dated January 13, 1982, cited supra, was sent to Complainant. Complainant noted at the top of his copy, "Received 1-17-82 at" [sic]. As stated in the letter, Complainant was subjected to a 20-day suspension, from February 1, 1982 to March 1, 1982 for "negligence and dereliction to duty" growing out of the incident on November 11, 1981. The letter further

states that "further insubordination or dereliction of duty" would result in dismissal.

Pursuant to Article 11, Section C[1] of the contract, Takashima called for an informal meeting with the County Engineer, Henry Morita, to determine whether the discipline was for just cause. C's Ex. 3. The meeting took place on January 18, 1982. Present were Complainant, Takashima, Morita, Shibao and Ray Emura, HGEA union agent. Complainant testified that Morita made known his resolve to suspend him. Complainant also apparently explained what happened from his point of view. Ap. Tr. p. 46. Pursuant to requests of HGEA, the County produced documents from their investigation of the incident, the daily log sheet for November 11, and the November 1981 Monthly Activity Report. Ap. Tr. pp. 79-80. Because Complainant insisted he had submitted an accident report, Takashima requested that the County search its files again for it, and requested a recess. The next day the County reported that their additional search had not turned up the report. Ap. Tr. p. 80.

On January 19, 1983, Takashima and Emura, after reviewing the case documentation, went to see Complainant at the pool.

---

[1]Article 11, Section C - Grievance Procedure, reads:

> C. Informal Step. A grievance shall, whenever possible, be discussed informally between the Employee and his immediate supervisor within the twenty (20) working day limitation provided for in paragraph "A" above. The grievant may be assisted by his Union representative. If the immediate supervisor does not reply by seven (7) working days, the Employee or the Union may pursue the grievance to the next step.

They recommended that Complainant not contest the discipline, accept a demotion, or allow HGEA to attempt to negotiate a reduction in the suspension. Ap. Tr. p. 81. Their recommendation was based on two main points: (1) the daily log sheet for November 11, 1981 (C's Ex. 21) indicates no chemicals were used between noon and 3:30 p.m., whereas at both the December 29 meeting and the informal meeting on January 18, Complainant claimed that at about 2:00 p.m. he was away from poolside adding chemicals and (2) no accident report could be located despite the claim that one was prepared. Ap. Tr. pp. 81 and 90; C's Ex. 3. Of consideration also were (1) investigative reports shown to Takashima containing Hookano's interviews with witnesses giving versions of the incident contrary to that of Complainant, along with accounts of Miyashiro (Ap. Tr. p. 82; C's Exs. 22, 23, 24 and 25) and (2) the fact that Complainant in mid-1980 had been subject to a ten-day disciplinary suspension with nine days held in abeyance pending review of his work performance by the Mayor on June 30, 1982. Ap. Tr. pp. 102-05. Complainant was eventually assessed four of the nine pending days following negotiations between the County and HGEA. Ap. Tr. p. 106.

Takashima was aware that the November Monthly Activity Report (C's Ex. 20) states that the daily log sheets for November 21 to 25 were missing, but discounted the possibility that the absence of those sheets could buttress Complainant's claim of a missing accident report since the accident report related to a different part of November than that regarding the missing daily log sheets, i.e., November 11. Ap. Tr. p. 86.

Takashima did not personally interview any witnesses. Ap. Tr. p. 87.

Complainant alleged that after the informal meeting, he told Takashima that he wanted to grieve the suspension but that Takashima said he would not help him pursue a grievance and that he would have to take it on his own. Ap. Tr. pp. 30 and 73.

Complainant wrote a letter to Morita, dated January 19, 1982, in which he objected to the discipline being imposed and denied the charge of negligence and dereliction of duty in the November 11, 1981 incident. This document was received by the office of the County Engineer on January 22, 1982. June Tr. pp. 5-6. The letter, after objecting to the discipline, counters with a list of alleged incidents of personal and job-related harassment and unfair treatment against Complainant on the part of his supervisor, Hookano, Miyashiro, and Morita. The letter reads as follows (unedited):

January 19, 1982

To: Henry Morita, County Engineer
From: Ronald Caldeira

This is in reguard to you letter dated Jan. 13, 1982, reguarding the incident at Kapaa Pool on Nov. 11, 1981.

In paragraph (1) page (2) of you letter you stated in part " for your negligence and dereliction to duty". I see no negligence and dereliction to duty. All you say (Mr. Morita) that a woman was in the water without proper attire, what better way was there to cool off.

You also say in paragraph (2) page (1) " wecannot wait until a major incident happens before taken action". I feel you should have taken action in 1978 when Isaac Hookane first started with that letter attached here and admitted personally signing the names and staff. I belive that is called

forgery. He latter threaten me with boidly harm again the proof is in the police station and was reported to you and later Wilson Miyashiro entered the picture to defame me. You have used every trick available to you. Even when you (Mr. Morita) came down to the pool and saw all my trash that had not been pickedup for over six months, my trash is almost all food wasted that attracts rats,cats,dogs and etc. and you did nothing to have that trash picked up. You also made me take care of the lawn,lawnmowering and weeding when everybody knows the Kapaa Beautification Gang has always done that job. Also on Dec. 19, 1981 Isaac Hookano called a meeting of all lifeguards, at which time he informed Orlando (Poipu lifeguard) that he was never to do the yard at Poipu beach Park. I feel a lifeguards body is to be compared to a doctor, we both cannot do our work if our bodies have cutsorsores on them.

You (Mr. Morita) also showed that Isaac Hookano needed closer supervision and could not handle responsibilities when you gave him only two pools instead of the three that the County has to Supervise, as you said for Personel Reasons and yet gave him the same pay. I feel this action shows favoritism or as the law states job discrimination.

I also feel that when Wilson Miyashiro a lifeguard Supervisor for many years and Isaac Hookano a lifeguard for many years and a lifeguard supervisor for at least (3) or more years could not change the filter bags. They tryed several times and each time the bags broke,and it only shows they cannot follow directions. If that's not bad enough to show they cannot follow directions they also ordered the wrong size filter bags, which cause the pool to be close for a long period of time and alos caused the County a very large expense.

These charges and 20 days suspension are only to defame me more just as Wilson Miyashiro tried to get me suspended for not working on a legal hoilday (Memorial Day). When he was the one that worked by himself on Memorial Day (I still cannot figure out how he work in the office and not notice he was the only one there, not only in the office but the whole building).

That reminds me of last week Monday Jan. 11, 1982 when Jackie Rodrigues,Police Commissioner, came down to the pool to ask me

about Wilson Miyashiro drunk driving (I did not know Wilson Miyashiro ALCOHOLIC) . I knew nothing about it. Jackie went on to say that Wilson Miyashiro filed a complaint with the Police Commission that he was stopped or picked up for drunk driving by seven (7) police and one officer swore at him. I then asked him for the officer's names that pulled him over or picked him up for DRUNK DRIVEING he would not give those names. I also asked for the name of the officer that Wilson Miyashiro claims swore at him, but Jackie would not give the name also. If gambling was legal I would bet my life that the officer that Wilson claims swore at him or one of the other six (6) officers was the officer that investigated my case when Isaac Hookano threatened my life.

Is Wilson Miyashiro willing to give me the names of the seven (7) police officers and the name of the one police officer that swore at him????

/s/ Ronald Caldeira
Kapaa Pool Lifeguard

cc Mr. Morita
Mayor
DPS
HGEA
Mr. Shiabo
Mr. Miyashiro
Mr. Hookano

Ap. Tr. pp. 31-32; C's Ex. 2. Complainant delivered a copy of this letter to the HGEA on Friday, January 22. Ap. Tr. pp. 32 and 90.

In a letter dated January 28, 1982, and received by Complainant on February 2, 1982 (Ap. Tr. p. 33), Takashima informed Complainant that the Union was electing not to assist Complainant in his objection to the 20-day suspension since he refused the HGEA's recommendation that he accept a reduction in days of the suspension or a demotion as negotiated by HGEA. The letter reads as follows:

January 28, 1982

TO: RONALD CALDEIRA

FROM: CLARENCE M. TAKASHIMA, KAUAI DIVISION CHIEF

SUBJECT: SUSPENSION

On January 18, 1982, the HGEA on your behalf called for an informal meeting with the County Engineer to discuss whether you were disciplined (20 working days suspension) for proper cause. The charges were for negligence and dereliction of duty. Others present besides you and me were the County Engineer, Mr. Henry Morita, Superintendent of Parks and Recreation, Mr. Gordon Shibao and Union Agent, Ray Emura. Upon request, the HGEA was provided with copies of all investigation communications of the near drowning incident that occurred on November 11, 1981, including copies of the daily station log (November 11, 1981) and monthly activity report (November 1981). We were extended adequate time by the County Engineer to review the relevant information by ourselves in the Public Works Conference Room. Upon your insistence that you did prepare and submit a rescue report to your supervisor and Mr. Shibao's insistence that no report could be found, the HGEA requested Mr. Shibao to search for said report again.

On Tuesday, January 19, 1982, the HGEA, after examining all relevant information, recommended that the disciplinary action be accepted and allow the HGEA to negotiate reducing the 20 working days suspension or accept a disciplinary demotion. The recommendation was based on the following reasons:

1. Daily Station Log

You stated that the incident was reported in the daily station log. We reviewed the daily station log prepared by you, dated November 11, 1981, and found nothing was reported.

You also stated at the meeting that the incident occurred around 2:00 P.M.

about the time you were returning from adding the chemicals in the pump room and recording the chemicals used. We reviewed the information contained in the daily station log and it is reported that no chemicals were added between 12:30 p.m. to 3:30 p.m.

2. Monthly Activity Report

You insisted that a rescue report was prepared and attached to the daily station log. We reviewed the monthly activity report for the month of November and it is reported none.

You were asked before we left to review the HGEA's recommendation and be prepared on Monday, January 25, 1o82 [sic] to give us your decision on the recommendation.

On Friday, January 22, 1982, the HGEA received from you personally a copy of your letter to the County Engineer, dated January 19, 1982, disputing the disciplinary action taken by the County Engineer. Your letter confirms that you have not accepted the recommendation of the HGEA.

In view of the foregoing, we're unable to assist you in the case of your suspension.

If you have any questions, please call me.

Thank you.

cc: Moses Keale, Unit 03 Chair
Chester Kunitake, HGEA Contracts Administrator

Upon receipt of this letter, Complainant traveled to Honolulu to consult with Counsel Samuel P. King, Jr., on February 4 or 5. Ap. Tr. pp. 33-34. On Saturday, February 6, Counsel

told Complainant over the phone that under Article 11, Section D[2] of the contract, he had 14 working days from the initial submission of the informal complaint, i.e., the day of the informal meeting called by HGEA, in which to submit a grievance. Since the meeting took place on January 18, the time for filing a grievance had already expired the day before, Friday, February 5. Ap. Tr. p. 34.

This interpretation departed from the position taken by Takashima in discussions with Counsel on the timeliness issue;

---

[2]Article 11, Section D, reads:

> D. Step 1. If the grievant is not satisfied with the result of the informal conference, he or the Union may submit a written statement of the grievance within seven (7) working days after receiving the answers to the informal complaint to the division head or his designee; or if the immediate supervisor does not reply to the informal complaint within seven (7) working days, the Employee of [sic] the Union may submit a written statement of the grievance to the division head or his designee within fourteen (14) working days from the initial submission of the informal complaint; or if the grievance was not discussed informally between the Employee and his immediate supervisor, the Employee or the Union may submit a written statement of the grievance to the division head or his designee within the twenty (20) working day limitation provided for in paragraph "A" above.
>
> A meeting shall be held between the grievant and a Union representative with the division head or his designee within seven (7) working days after the written grievance is received. Either side may present witnesses. The division head or his designee shall submit a written answer to the grievant or the Union within seven (7) working days after the meeting.

i.e., that the initial submission should be considered to have occurred on January 22, the date of the County's receipt of Complainant's letter of January 19, 1982. The 14 working days in which to file the grievance would then run until February 11, 1982. Ap. Tr. p. 96.

Takashima testified that he explained to Complainant that the informal meeting was held as the initial step in the grievance procedure and that in any case Complainant "understood" the circumstances because the Union had taken Complainant's previous grievances up through Step II on other occasions. Ap. Tr. pp. 73-74. Takashima testified that Complainant's previous grievances and the necessity to make decisions as to actions to be taken on them necessitated that he had some familiarity with applicable time limits under the contract. Ap. Tr. pp. 74-75.

Takashima stated that under Article 11, Section D, the date of the "initial submission" would be January 18, 1982, the date of the informal meeting. Ap. Tr. p. 75. If the informal meeting extends beyond one day, the initial submission is deemed complete on the last day of the informal meeting. Ap. Tr. pp. 76 and 83-85.

Although Takashima stated that the "initial submission" of the informal complaint occurred on the date of the informal meeting (Ap. Tr. p. 75), he added that because Complainant undertook the act of declaring his own position on the matter through this letter, the initial submission could, and should be measured from the day of receipt by the County of his letter, i.e., January 22, 1982. Ap. Tr. pp. 95-97.

Takashima testified that he did not inform Complainant in the letter of relevant cut-off dates for filing his grievance because the Union had "gone through this so many times before in terms of filing grievances." Ap. Tr. pp. 91-92. Further, Complainant's writing of the letter of January 19, 1982, disputing all charges, "confirmed to [Takashima] that he wanted to take it up himself." Ap. Tr. p. 91. Because Complainant wrote this letter, Takashima never himself informed the County of HGEA's decision to remove itself from the case. Ap. Tr., pp. 98-99. At any rate, Takashima stated, by Complainant's letter of February 28, asking for an extension of time to file his grievance, the County knew Complainant was representing himself. Ap. Tr. p. 102.

On the advice of Counsel, Complainant, by letter dated February 8, 1983, requested an extension of time to file a grievance as provided by Article 11, Section B[3] of the contract. Ap. Tr. p. 35; C's Ex. 4 .

In a letter dated February 10, 1982, from Morita to Complainant, the request for an extension was denied. C's Ex. 5.

---

[3]Article 11, Section B, reads:

> B. An individual Employee may present a grievance to his immediate supervisor and have his grievance heard without intervention of the Union, provided the Union has been afforded an opportunity to be present at the conference(s) on the grievance. Any adjustment made shall not be inconsistent with the terms of this Agreement. By mutual consent of the Union and the Employer, any time limits within each step may be extended.

On the advice of Counsel, and in accordance with Article 11, Section E[4] of the contract, Complainant requested a Step II hearing. C's Ex. 6. This request was denied by Morita on the basis of Complainant's failure to file a grievance in a timely manner, the denial of the extension previously requested, and the failure to address the request to the Department head as required by Article 11, Section E. Ap. Tr. pp. 36-37; C's Ex. 7.

In a letter dated March 11, 1982, Complainant, under Article 11, Section G,[5] requested a Step III hearing. C's Ex. 8.

---

[4]Article 11, Section E, reads:

> E. Step 2. If the grievance is not satisfactorily resolved at Step 1, the grievant or the Union may appeal the grievance in writing to the department head or his designee within seven (7) working days after receiving the written answer. The department head or his designee need not consider any grievance in Step 2 which encompasses different alleged violations or charges than those presented in Step 1. A meeting to discuss the grievance shall be held within seven (7) working days after receipt of the appeal. The department head or his designee shall reply in writing to the grievant or the Union within seven (7) working days after the meeting.

[5]Article 11, Section G, reads:

> G. Step 3. If the grievance is not satisfactorily resolved at Step 2, the grievant or the Union may appeal the grievance in writing to the Employer or his designee within seven (7) working days after receipt of the answer at Step 2. Within seven (7) working days after the receipt of the appeal, the Employer and the Union shall meet in an attempt to resolve the grievance. The Employer or his designee need not consider any grievance in Step 3 which encompasses a different

This request was denied, in a letter dated March 15, 1982, by then-Mayor MALAPIT. C's Ex. 9.

In a letter jointly addressed to MALAPIT and Takashima, dated March 16, 1982, Counsel protested the denial of Complainant's request for relief through the grievance procedure, and requested that the case be taken to arbitration by the Union. C's Ex. 10.

HGEA, in a letter from Davis Yogi, Contracts Specialist, to Counsel, dated April 21, 1982, revealed its decision not to pursue the case to arbitration. C's Ex. 15. After several days of negotiations between the parties on whether Complainant would be allowed to have his grievance heard, during which period Complainant was granted extensions of time within which to request arbitration (C's Exs. 12, 13 and 14), the County finally reiterated its refusal to grant Complainant a Step III hearing in a letter from Michael Abe, then-Second Deputy Kauai County Attorney, to King, dated May 11, 1982. C's Ex. 17.

CONCLUSIONS OF LAW

I. SUBSECTIONS 89-13(b)(4) AND (5), HRS, VIOLATIONS

A. FAILURE TO ASSIST IN CONTESTING DISCIPLINE AND FAILURE TO NOTIFY OF TIME LIMITS

Complainant alleges that HGEA failed to provide him with adequate representation in his opposition to the discipline

---

Footnote 5 continued

> alleged violation or charge than those presented in Step 2. The Employer or his designee shall reply in writing to the Union within seven (7) working days after the meeting.

imposed by the County. More particularly, Complainant alleges that HGEA failed to (1) properly represent him at the informal meeting on January 18, 1982 and (2) failed to advise him, upon its decision to deny him service in pursuit of his grievance, of the contractual time limit for filing a formal grievance. HGEA allegedly failed to advise Complainant of the manner in which he could have pursued a grievance on his own under Article 7, Section 4, of the contract. HGEA further allegedly violated its duty under Article 11 and Article 16, Section J,[6] to effectively represent Complainant in his grievance. Complaint, Bd. Ex. 1; Particularization, Bd. Ex. 7 and Hearing Memorandum, Bd. Ex. 22, p. 1.

HGEA allegedly violated the contract, in violation of Subsections 89-13(b)(4) and (5).[7] Complaint, Bd. Ex. 1 and Hearing Memorandum, Bd. Ex. 22, p. 4.

Complainant charges that the duties violated, even if not specifically stated in the contract, are implied by HGEA's

---

[6]Article 16, paragraph J, was not entered into evidence.

[7][89-13] Prohibited practices; evidence of bad faith.

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

* * *

(4) Refuse or fail to comply with any provision of this chapter; or

(5) Violate the terms of a collective bargaining agreement.

fiduciary and legal responsibility to represent its members effectively as their exclusive bargaining agent. Particularization, Bd. Ex. 7.

The HGEA raises in its defense the arguments that (1) Complainant failed to file his prohibited practice complaint within 90 days of the violation alleged in the complaint and is thus precluded from seeking relief; (2) Complainant has not shown that HGEA acted arbitrarily, discriminatorily, or in bad faith when it decided not to pursue his grievance; and (3) the fact that HGEA did not inform Complainant of the due date for filing a grievance on his own has not been demonstrated to have been intentional or otherwise arbitrary. Post-Hearing Memorandum of HGEA, p. 24.

A breach of the duty of fair representation occurs when the exclusive representative's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842, 857, 64 LRRM 2369, 2376 (1967). "Arbitrary" is defined as "perfunctory." Id. at 191. This standard was discussed by the Fourth Circuit in Griffin v. International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW, 469 F.2d 181, 183, 81 LRRM 2485, 2486 (4th Cir. 1972):

> . . . Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation. A union may refuse to process a grievance or handle the grievance in a particular manner for a multitude of reasons, but it may not do so without

> reason, merely at the whim of someone exercising union authority. [Emphasis added.] (cited in Yamaguchi, 2 HPERB 656 at 675.)

Complainant's charges of a failure to assist in contesting the discipline and a failure to notify of the filing time limit will be measured against this standard of union conduct.

(1) Failure to Assist in the Contesting of the Discipline

The record presents a fairly well-developed picture of HGEA's actions at all steps of the present case. Once Complainant received the January 13, 1982 letter informing him of the impending 20-day suspension, HGEA took certain limited action on behalf of Complainant.

Takashima accompanied Complainant to the meeting with Shibao on December 29, 1981, where Shibao initially questioned Complainant about the pool incident. The evidence is inconclusive as to whether Takashima made a merely perfunctory appearance as Complainant charged. Complainant alleged Takashima told him before entering the office that HGEA would not help him; Takashima denied it, saying that, without knowing what the meeting was to be about, he could not have made such a statement.

Upon Complainant's receipt of the letter of January 13, 1982 notifying him of the imposition of the 20-day suspension, Takashima called for an informal meeting under Article 11, Section C of the contract to determine whether just cause for the discipline existed. Takashima and Union Agent Ray Emura attended the meeting for HGEA in Morita's office. At the meeting, Takashima requested and received documents compiled by the County in its investigation, i.e., the Daily Log Sheets for

November 11, 1981 and the November 1981 Monthly Activity Report. Takashima also requested a recess so that the County could search its file for an accident report that Complainant claimed he had submitted. The next day, the County reported that it could not find the accident report.

Takashima and Emura then recommended that Complainant not contest the discipline and permit HGEA to attempt to negotiate a reduction in the suspension or to accept a demotion. The basis for this recommendation was (1) the discrepancy between the Daily Log Sheet notation for November 11, 1981 which indicated no chemicals were added between noon and 3:30 p.m., and Complainant's claim at meetings on December 29, 1981 and January 18, 1982 that he was away from poolside at 2:00 p.m. (the then-assumed time of the incident) adding chemicals; (2) the fact that no accident report was on file despite Complainant's claim that he had prepared one; (3) the accounts of Baretto and Paik, as prepared by Hookano, describing Complain- ant's alleged lack of attention and action regarding the pool incident, and the accounts of Miyashiro; and (4) the fact that Complainant was already in a disadvantageous bargaining position due to a pending suspension, the number of days of which was yet to be determined for a previous imposition of discipline, which was only one of many previous disciplinary embroilments involving Complainant.

Takashima did not personally interview, or apparently even attempt to contact, Baretto or the Paik family.

HGEA's recommendation was thus given without Takashima making an independent investigation of witnesses' accounts of the incident on which the discipline was based. This shortcoming in

the investigation casts serious doubts on whether the investigation in fact adequately served Complainant's interests and whether Complainant received adequate representation.

The fact that the discipline of 20 working days was serious suggests all the more the conclusion that the failure to interview any witnesses was a serious defect in the investigation. In the letter notifying Complainant of the impending discipline, the charge of "negligence and dereliction to duty" is based on an incident termed a "near-drowning." In neglecting to talk to eyewitnesses, HGEA never attempted to substantiate the serious characterization of the charge, but yet recommended that Complainant essentially acquiesce to the discipline. The testimony as to the actual incident and its subsequent administrative handling indicates that terming the incident as a "near-drowning" was in fact open to reasonable doubt. It was never determined how close one has to come to passing out to be said to have "nearly drowned," how close Ryan Paik actually came to passing out in the water, or whether Ryan was said to have "nearly drowned" only in the sense that he could have drowned had he had not been removed from the water by someone else. An interview of Mrs. Paik would have revealed that she did not immediately complain to the guard on duty of any lack of attention and that she made no formal complaint of her own to the County regarding the incident. These facts would have cast doubt on the "near-drowning" characterization.

While the Board is not now entertaining the merits of the grievance, these questions are relevant as the severity

of the discipline was predicated on a "near-drowning" having occurred, and they thus bear on the question of the adequacy of the representation given Complainant. HGEA did not attempt to verify the accuracy of the term "near-drowning." As it was, the evidence appears to indicate that Miyashiro first used the term to characterize the incident to which he was not a witness, and then only as a term of convenience for reference in discussion and documents.

In HGEA's January 28, 1982 letter to Complainant (C's Ex. 3), the discrepancy between (1) Complainant's claim that he did not see the incident because he was away from poolside adjusting the chemical balance, and the records indicating that no chemicals were used at the relevant time and (2) the discrepancy between Complainant's claim that an accident report was filed and the County's inability to find it on file, is noted. These discrepancies are stated to be the basis for the decision not to represent Complainant. Insofar as they seriously compromise the validity of Complainant's defense against the charges, HGEA acted reasonably in refusing to represent Complainant. However, the charges in response to which Complainant raised these claims, as discussed supra, merited an independent assessment as critical as that given Complainant's defenses. This the HGEA neglected to pursue. The Board finds the HGEA's failure to make any sort of objective determination that the alleged "negligence" and "dereliction of duty" of Complainant resulted in a "near-drowning" was so unreasonable and arbitrary as to amount to a lack of adequate representation of Complainant.

Takashima's inability to offer any valid rationale or colorable excuse for not interviewing Baretto or the Paik family indicates an arbitrary decision to deprive Complainant of union representation. That reports of Hookano's and Miyashiro's interviews were made available to Takashima does not stand to mitigate the arbitrary and discriminatory conduct. Takashima relied on the reports of the party bringing charges against his client. Such reliance indicated a lack of commitment to provide Complainant with adequate representation so basic as to amount to fundamentally unfair conduct.

The Union, failing to fully consider and properly investigate the charges, cannot claim that it had decided that Complainant's case was not pursued on the basis that it lacked merit. Cf., Lewis v. Magna American Corp., 472 F.2d 560, 561, 82 LRRM 2559, 2560 (6th Cir. 1972). Neither can the Union, again because of its failure to investigate, claim that it did not pursue the case because of a low likelihood of success. Hershman v. Sierra Pacific Power Company, 434 F.Supp. 46, 49, 95 LRRM 3294, 3296 (D.C. Nev. 1977). Finally, because Baretto and Paik were not only material witnesses, but the only identified witnesses to the incident, the Union's failure to interview them amounted to a failure to even attempt to confirm the basic facts of the incident.

In Miller v. Gateway Transportation Co., Inc., 616 F.2d 272 (7th Cir. 1980), summary judgment for the union was reversed and a trial ordered on the issue of the adequacy of union's representation of plaintiff in his contesting of a suspension.

Plaintiff's suspension resulted from his refusal to drive a truck he alleged exceeded the maximum height allowance. The Seventh Circuit found that there was a genuine issue as to fair representation where the union, inter alia, made no investigation into the incident involving the height of the truck that gave rise to the suspension and made no attempt to find witnesses to that incident or to obtain relevant records relating thereto. Id. at 277. The other bases for the ruling were that the union's representation at a joint union-management hearing consisted only of a "perfunctory" reading of plaintiff's pro se written grievance; and that no effort was made to urge the absence of the pre-suspension warning letter from employer to employee required by contract. Id. at 277. Cf., Hughes v. International Brotherhood of Teamsters, Local 683, 554 F.2d 365, 95 LRRM 2652 (9th Cir. 1977), where it is held a dispute as to the union's thoroughness in investigating the grounds for terminating an employee does not constitute a basis supporting a claim of a lack of fair representation, Id. at 367, note 1. The Board does not consider the dictum in Hughes persuasive. It is clear in this case that HGEA's reliance on the Employer's reports of the incident resulted in the HGEA in effect foregoing the making of an independent judgment. Such misplaced reliance so compromised the investigation as to render it a next to meaningless exercise, so lacking in good faith commitment as to place the issue of its thoroughness out of question. The failure to investigate the basic facts passes the threshold of mere negligence or the exercise of poor judgment. There was no testimony that Baretto and the Paiks were not interviewed due to inadvertence.

Takashima stated that he relied on the County's hearsay reports rather than an in-person discussion with the witnesses. This amounted to a decision to render Complainant cursory service.

A union acts in a perfunctory manner when it acts without concern or solicitude or when it gives a claim only cursory attention. Curtis v. United Transportation Union, 700 F.2d 457, 458, 112 LRRM 2864, 2865 (8th Cir. 1983). Here, the Union acted perfunctorily in neglecting to interview witnesses and conducting what amounted to a superficial investigation.

The situation at hand also departs from Raynor v. Amalgamated Transit Union, AFL-CIO, CLC Division 1493, _____ F.Supp. _____, _____ LRRM _____ (1981),[8] cited by HGEA at page 17 of its brief. In Raynor, as digested in the HGEA brief, the union failed to interview two "material witnesses" who, in signed statements, gave to the employer's agent eyewitness accounts of the events on which the employer based its claim of insubordination. The Court held that this failure did not prove that the union breached its duty of fair representation. It said that there was no evidence that the witnesses were anything other than truthful in their statements or that they could have been persuaded to change their stories in any respect. One of the two witnesses testified in the trial of the case. His testimony was essentially identical to the statement he had given to the employer.

---

[8]Because we are unable to locate the Raynor case according to the citation provided by HGEA, our discussion is confined to the facts of that case presented in HGEA's brief.

In contrast, the HGEA's failure to interview Paik and Baretto, especially Paik, was crucial to the case. At issue was not so much the "truthfulness" of the County's account of the controversy as much as its accuracy, thoroughness, and its unspoken assumptions. An interview of Paik could have probed deeply into the question of whether or not Ryan was in fact near to drowning or not. Mrs. Paik in testimony before the Board did not confirm the "near-drowning" conclusion, but averred that she jumped in more as a reflex or instinct to protect her child. Out of such an interview, HGEA would have had more of a basis on which to decide whether the discipline was warranted and whether Complainant deserved representation.

The Board remains mindful of the inconsistencies in Complai ant's version of events and how those inconsistencies figured in HGEA's decision that Complainant's case was without merit. The Board, however, now holds that the HGEA, in critically analyzing Complainant's alibis but not the County's original charges, in effect abandoned Complainant and breached its duty to fairly represent Complainant.

(2) Failure to Notify Complainant of the Time Limit to File Grievance

Once in receipt of HGEA's letter of January 28, 1982, informing him of its decision not to represent him, Complainant took steps to preserve his rights to file a formal grievance against the impending discipline. These attempts of Complainant were rebuffed by the County on the basis that he missed the contract deadline to file a grievance.

Under Article 11, Section D of the contract, Complainant had 14 working days from the "initial submission" of his informal complaint to submit a "written statement of his grievance." Testimony of Takashima indicated that the "initial submission" occurs on the date of the informal meeting under Article 11, Section C of the contract. This meeting occurred on January 18, 1982. A recess was called on that day so that the County could search for the accident report Complainant claimed he prepared. The County reported to Takashima the next day that the report could not be found. Takashima testified that where the informal step extends for more than one day, the last day could mark the date of the initial submission. Thus Complainant had 14 working days from January 19, 1982, i.e., until Monday, February 8, 1982, within which to file his written grievance. Measuring the period from the date of the actual meeting, i.e., January 18, Complainant had until Friday, February 5, to file.

Takashima also offered in testimony another interpretation of events regarding the initial submission of the informal complaint. He noted that since Complainant, on January 19, 1982, the day after the actual meeting at the informal step, wrote a letter to Morita protesting the charge and resulting discipline, Complainant in effect took the further step, independent of the Union, of declaring his own position on the matter. The initial submission thus could, and should, be measured from the day of receipt by the County of this letter, i.e., January 22, 1982. Presumably, Complainant's writing of the letter constituted an extension of the informal step in the case. Under this scheme,

Complainant would have had until February 11, 1982 in which to file a complaint.

Complainant, however, never filed a formal complaint. He received Takashima's letter of January 28, informing him of the decision not to represent him, on February 2, 1982. The letter did not inform him of the impending deadline for filing a complaint. Complainant thus flew to Honolulu to consult with counsel on February 4 or 5. In a letter dated February 8, 1983, Complainant requested of Shibao an extension of the time in which to file a grievance. This request was denied. The letter of denial, written by Morita, stated that the informal discussion occurred on January 18, and that Complainant had had "more than enough time to pursue this matter." C's Ex. 5. Presumably, Morita construed the 14 working days as running from January 18 and lapsing after February 5.

As just discussed, the 14 working-day period to file a grievance ended on either (a) February 5, i.e., 14 working days from the date of the informal meeting itself; (b) February 8, i.e., 14 working days from the report from the County that an accident report could not be found; or (c) February 11, i.e., 14 days from the date of receipt by the County of Complainant's letter of protest regarding the charges and discipline.

Complainant was not informed of the existence of a deadline, much less of any of these possible deadlines. As a result, the County, adopting an arguable interpretation that the deadline lapsed on Friday, February 5, one working day before

Complainant's request for an extension dated Monday, February 8, denied the request.

The failure of HGEA to inform Complainant of the applicable deadlines was a breach of its duty as Complainant's collective bargaining representative. Informing Complainant of applicable deadlines would be expected of HGEA, as it was versed in the contract provisions to an extent Complainant was not, even granted the possibility that Complainant had experience with the relevant provisions from previous cases. Informing Complainant would have been a simple matter for the HGEA. At the same time, the information was crucial to Complainant's case, as his access to the grievance procedure depended on meeting the deadline.

The HGEA's failure to so inform Complainant was so arbitrary and discriminatory as to deny Complainant adequate representation under Vaca v. Sipes, supra, and its line of cases. HGEA was not merely negligent or careless in failing to inform Complainant of the deadline. HGEA quite clearly was lacking in a desire to furnish Complainant the support he was entitled to. The Board infers this indifference less from any statements made by Takashima in testimony or in written documents than from the inaction and the perfunctory attention given Complainant and his case. HGEA owed Complainant the duty of assuring that he knew of his contractual obligations to preserve his right to a grievance, instead of leaving to chance the possibility that he would remember from previous cases or discover for himself those obligations.

The Union's neglect in failing to inform Complainant of the impending cut-off date displayed such an indifference to Complainant's rights as to clearly amount to a "perfunctory" handling of his case under Vaca v. Sipes, supra.

The evidence does not suggest that Takashima and HGEA were hostile to Complainant or harbored ill-will toward him. It does, however, suggest indifference to his interests. Under the "arbitrary" standard of Vaca, no bad faith or intent to hostilely discriminate need be proven to prove lack of fair representation. "Arbitrary" conduct is not limited to intentional conduct. Robesky v. Qantas Airways, 573 F.2d 1082, 1086, 1089 (9th Cir. 1978). In Robesky, the union was found to have breached its duty of fair representation when it failed to tell its member that it would not pursue her arbitration claim. Not knowing this, she rejected an offer of settlement. In a statement applicable to the case at hand, the Ninth Circuit stated, "Acts of omission by union officials not intended to harm members may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary." Id. at 1090. The Union in its brief at page 23 attempts to distinguish this case by noting that the union in Robesky intentionally withheld the information about the employer's settlement offer. The Court, however, made no finding of intentional conduct, and stated that unintentional acts or omissions by union officials may be arbitrary if they reflect reckless disregard for the rights of the individual employee

which severely prejudice the employee, and the policies underlying the duty of fair representation would not be served by shielding the union from liability in the circumstances of the particular case. Id. at 1090.

Finally, the Board notes that the HGEA's letter of abandonment, besides being deficient in failing to inform Complainant of the grievance deadline, was also lacking in its failure to inform the County of the decision not to represent Complainant. This further instance of cursory conduct also amounts to a breach of HGEA's duty of fair representation. Had the HGEA given such notice, the County could have been prepared to deal with communications from Complainant on a more formal level. With notice from HGEA, the County may have been more receptive or sensitive to the possibility of considering Complainant's January 19 letter as a written statement of his grievance or extension in the "initial submission" date and more receptive to Complainant's request for an extension written on February 8.

B. THE STATUTE OF LIMITATIONS

Besides contesting charges of arbitrary, discriminatory, and bad faith conduct, the HGEA also claims that Complainant's action should be dismissed for failure to file his prohibited practice complaint within the time allotted by statute and Board rules.

Sections 89-14 and 377-9(1), HRS, set forth the 90-day limitations period:

> §89-14 Prevention of prohibited practices. 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; provided that the board shall have exclusive original jurisdiction over such a controversy except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section 89-12(e) or (2) the judicial review of decisions or orders of the board in prohibited practice controversies in accordance with section 377-9 and chapter 91. All references in section 377-9 to "board" shall include the Hawaii public employment relations board and "labor organization" shall include employee organization.
>
> §377-9(1) No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.

Administrative Rules Subsection 12-42-42(a) reflects this requirement:

> §12-42-42 Complaint. (a) A complaint that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation.

HGEA notes that the alleged violation occurred when Takashima wrote the letter dated January 28, 1982, to Complainant, informing him of its decision not to file a grievance on his behalf. This letter was received by Complainant on February 2, 1982. The prohibited practice complaint was filed on July 21, 1982, 169 days from receipt of the letter. Thus, HGEA argues the complaint should thus be dismissed for failure to meet the limitations requirement.

In response, Complainant contends that the 90 days should be measured from May 11, 1982, the date of the letter from

Deputy County Attorney Abe to Complainant's counsel in which the final denial of a Step III hearing is made. C's Ex. 17. Complainant argues that once he received notice of "abandonment" from the Union, he had the option of either filing a complaint against the Union with the Board, or pursuing the contractual grievance without union assistance. If he had filed a complaint before proceeding through the grievance procedure, the 90 days would have been measured from the date of receipt of the "abandonment letter." But here Complainant chose to pursue the grievance. In this case, Complainant argues, the 90 days should be measured from the last day of this process, i.e., the date of the receipt by Complainant of the County's final denial of a Step III hearing issued in a letter dated May 11, 1982. In pursuing the complaint, Complainant was following the doctrine of the exhaustion of remedies. Furthermore, Complainant argues, the Unit 3 agreement requires the Union to be involved at Step III, even if it has not been involved at Steps I and II. The Complainant must thus wait to see if the Union will properly fulfill its duty at Step III before initiating a prohibited practice complaint. Post-hearing Memorandum of Complainant, pp. 5-7.

This argument is invalid since it rests on the misconceptions that (1) Complainant must exhaust the contractual grievance procedure before pursuing a claim against the Union and (2) that the Union has an absolute duty to prosecute Complainant's case at Step III.

The doctrine of the exhaustion of remedies refers to the need of the employee to utilize the grievance procedure

before maintaining an action against the employer. Santos v. State of Hawaii Department of Transportation, Kauai Division, 64 Haw. 648, 655, 646 P.2d 962, 967 (1982). By logical implication, it does not apply to actions against the union for a case charging a breach of the duty of fair representation. Winslow v. State, 2 Haw.App. 50 (1981) at 56.

Neither does the Union have an absolute duty to become involved at Step III. No provision to this effect is contained in Article 11. The provision in Article 11, Section G that "the Employer and the union shall meet in an attempt to resolve the grievance" of course presupposes that the union has decided to act for the grievant. Implicit in the ruling of Vaca v. Sipes, supra, and its line of cases is the presumption that the union does not have to be involved at any step of the procedure if it opts out for reasons other than those arrived at in a manner that is arbitrary, discriminatory, or in bad faith.

Clearly, the administrative cause of action accrued upon notice that the Union declined to represent Complainant. This is the case even though Takashima took certain steps to help Complainant on the timeliness issue subsequent to the formal notice of the decision to not pursue his case. At that point, it was clear that the Union was not formally a party to the case and that Takashima was offering more of a personal favor to Complainant. A distinction must be made here between Takashima's personal offer of help to Complainant as opposed to the Union's formal representation of Complainant.

As Complainant received notice on February 2, 1982, his complaint as filed on July 21, 1982 was well beyond the 90-day limitation. Thus, the Board is compelled to dismiss the prohibited practice charges against the HGEA.

II. SUBSECTION 89-13(a)(8), HRS, VIOLATION

Complainant alleges that the County of Kauai acted unreasonably in refusing to process his grievance growing out of the discipline imposed on him in the January 13, 1982 letter for "negligence and dereliction to duty." Complaint, Bd. Ex. 1. Complainant alleges that the County violated an "implied duty to act in good faith in the grievance procedure as set out in Article 11" of the contract. Furthermore, the County "arbitrarily and unreasonably refused to grant Complainant an extension of time to file his grievance in violation of the contract and the United States and Hawaii constitutions' due process clauses. Particularization, Bd. Ex. 7, pp. 3-4. These alleged violations of the contract violate Subsection 89-13(a)(8), HRS,[9] Complainant argues. Complaint, Bd. Ex. 1.

The County in its defense states that under the time limitations contained in Article 11 of the contract, Complainant was untimely in filing his grievance and that his request for an

---

[9] [89-13] Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

* * *

(8) Violate the terms of a collective bargaining agreement.

extension of time, made after the time limit had run, was properly denied. Post-Hearing Brief of Respondents, at p. 3.

Complainant alleges that Kauai County violated Article 11 when it refused to process his grievance protesting the 20-day suspension and refused to grant his request for an extension of the time limit for filing a grievance.

As discussed above, Complainant had, under Article 11, Section D, 14 working days from the "initial submission" of his complaint in which to submit a "written statement" of his grievance. Fourteen days from the initial submission lapsed, also as discussed above, on one of three dates: (1) February 5, i.e., 14 working days from the date of the informal meeting; (2) February 8, i.e., 14 working days from the report of the County on the accident report allegedly filed by Complainant; or (3) February 11, i.e., 14 working days from the date of receipt by the County on January 22 of Complainant's letter of January 19, protesting the charges and discipline.

Complainant received Takashima's letter informing him of HGEA's decision not to represent him on February 2. In a letter dated February 8, 1982, Complainant requested of Shibao an extension of the time in which to file a grievance. This request was denied in a letter dated February 10, 1982 and signed by Morita.

The Board deems the date by which Complainant had to submit his grievance to be February 8. This is 14 working days from the conclusion of exchanges between the parties initiated on January 18, at the informal meeting, and concluded January 19

with the County's reply to the Union that it could not find the accident report--the question of the existence of which was raised by the HGEA the previous day.

The date of the initial submission did not extend until January 22, the date of the County's receipt of Complainant's letter of protest. The writing of that letter is most accurately seen as a response to Morita's letter of January 13, notifying Complainant of the charges and impending discipline. Complainant's letter in fact starts out by stating: "This is in reguard [sic] to [your] letter dated June 13, 1982, reguarding [sic] the incident at Kapaa Pool on November 11, 1981." C's Ex. 2. As such a response, it was an action taken independently of the "initial submission" process.

From a strictly technical viewpoint, the County acted within its contractual prerogatives in denying Complainant the opportunity to grieve. He failed to submit a formal written grievance in a timely manner. However, it is established that the failure to comply strictly with the technical requirements of the grievance procedure does not automatically deny access to the grievance process. In Columbus Show Case Co., 44 LA 507 (1965), the employer's argument that a grievance was not arbitrable for the employee's failure to properly follow the procedural steps for the "presentation" of the grievance to the proper parties at steps one and two was rejected by the arbitrator. The arbitrator invoked the doctrine of substantial compliance in deciding whether the grievance was procedurally valid, using the following terms:

> Grievance procedures under labor-management contracts should not, in my opinion, be construed or applied under strict legalistic or technical rules of construction. . . . It is my view . . . that if substantial compliance with the procedural requirements of the contractual grievance procedure has occurred and if the party complaining of the technical noncompliance has not been prejudiced thereby, the arbitration proceedings ordinarily should not be dismissed upon technical noncompliance grounds, in the absence of the clearest language expressly calling for a different consequence.
>
> Also, in cases of doubt as to the meaning of or alleged noncompliance with the contractual procedural requirements, such doubt should when reasonably possible be resolved against dismissal of the arbitration upon procedural grounds. Id. at 510-511. [Emphasis added.]

This case is applicable to the case at hand. Complainant, by writing the letter of protest, in effect substantially complied with the written grievance requirement. The County would not have been prejudiced by its considering the letter a grievance. The letter arrived well before the contract deadline and fully apprised the recipient of Complainant's objection to the discipline. Finally, any doubt as to the sufficiency of Complainant's written grievance should be resolved in favor of entertainment of the controversy on its merits. See also, Metal Hose and Tubing Co., 41 LA 182, 183 (1963), also citing substantial compliance doctrine.

Complainant's letter of protest is clearly an objection to the charges and impending discipline. Although it fails to conform to the formal structure of a written grievance, it is in effect a written statement of grievance. By Complainant's

writing and posting of that letter the County knew, or should have known, that Complainant took strong and absolute exception to the disciplinary action, and, by logical implication, meant to grieve the severe penalty of an enforced one-month absence from work. It is clear that Complainant objected to the charges and discipline. By so registering his objections, Complainant did the minimal amount necessary to continue the grievance machinery in motion. The County should have considered Complainant's letter of protest sufficient to initiate the Step I grievance process as the date for a Step I grievance submittal approached and passed with no further formal communication from Union representatives or Complainant. Complainant in the letter expressly denies the charge of "negligence and dereliction to duty," upon which the suspension was based, stating "I see no negligence and dereliction to duty." He further indicates his objection by stating, "These charges and 20 days suspension are only to defame me more just as Wilson Miyashiro tried to [get] me suspended for not working on a legal holiday (Memorial Day)." C's Ex. 2, p. 2.

Had HGEA informed the County in a timely manner, i.e., well before the 14 working day period was to elapse, that it would not be representing Complainant, the Employer would have been better prepared to deal with Complainant's communications as formal communications under the contractual grievance process. In so stating, the Board is not placing the burden on the County of having to accept the consequences of HGEA's conduct in not informing the County of its withdrawal, which resulted in the

County's lack of formal notice that Complainant was acting as his own counsel. In the present situation, it is merely more equitable for the Union and County to absorb the consequences of their own misconduct in taking a dismissive approach to Complainant's case.

The Board has previously enunciated a policy that questions concerning the applicability of contractual time limits in the processing of a grievance should be resolved against forfeiture of the grievance rights. SHOPO and Damas and Fasi, 3 HPERB 12, 23 (1982). The Board reiterates the policy favoring a reasonable construction of contract rights against forfeiture of grievances, as applied more particularly here to the question of the technical sufficiency of the grievance itself.

Respondent MALAPIT is deemed to have violated Article 11, Section D of the contract by virtue of his decision denying Complainant's request for a grievance hearing at Step I. By violating the contract, Respondent MALAPIT violated Subsection 89-13(a)(8), HRS, which makes it a prohibited practice to wilfully violate the terms of the collective bargaining contract.

The Board deems the violation to have been wilful. Complainant's letter opposing the discipline made it apparent that he intended to grieve the discipline and suspension. It is clear that the County should have broadly construed Complainant's contractual right to gain access to the grievance procedure and thus allow the airing of his grievance. Had the County not taken a stance deliberately unreceptive to Complainant's resort to his contractual rights, Complainant would not have been denied a

Step I hearing for failure to comply with the technical requirements for a grievance. The Board is mindful that whether Complainant's actions were adequate to register a grievance is a close question. Yet it is clear that viewed in a light solely of contractual rights and obligations and cited law, apart from subjective responses and personal reactions, Complainant's letter should have been considered a grievance when the time came to decide whether Complainant could proceed to Step I.

ORDER

The case is dismissed against Respondent HGEA for failure to file the prohibited practice charge within the 90-day limit applicable to the case.

Respondent MALAPIT is deemed to have violated Article 11, Section D by virtue of his decision denying Complainant's request for a grievance hearing at Step I. By violating the contract, Respondent MALAPIT wilfully violated Subsection 89-13(a)(8), HRS. The County of Kauai is ordered to afford Complainant access to the grievance procedure at Step I.

Should the case remain unresolved through Step III, and should Complainant request HGEA to take the case to arbitration, the Board directs HGEA to give such a request a full and fair appraisal untainted by past dealings between the parties. HGEA should take into full consideration the findings and conclusions in this decision in considering this request.

The Board retains jurisdiction over the instant matter, pending resolution through the grievance procedure, and shall

entertain any request to reopen the case at the Board level, should any party feel that any actions contrary to the holdings of this decision have been taken.

Complainant's charges regarding HGEA's violation of its alleged fiduciary duty to Complainant and charges of alleged Hawaii and United States constitutional violations by Respondent MALAPIT are dismissed for failure to establish a prima facie case. State of Hawaii Organization of Police Officers and DeMorales and Fasi, 3 HPERB 47, 65 (1982).

Complainant's request for attorney's fees is denied.

DATED: Honolulu, Hawaii, August 17, 1984.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

MACK H. HAMADA, Chairperson

JAMES K. CLARK, Board Member

JAMES R. CARRAS, Board Member

Copies sent to:

Samuel P. King, Esq.
Warren Perry, Esq.
Yukio Naito, Esq.
Publications Distribution Center
State Archives
University of Hawaii Library
Robert Hasegawa, CLEAR
Joyce Najita, IRC