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Case No. CU-01-333

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

PATRICK L. ISHIDA,

Complainant,

and

UNITED PUBLIC WORKERS,
AFSCME, LOCAL 646, AFL-CIO;
DAYTON NAKANELUA, STATE
DIRECTOR, UNITED PUBLIC
WORKERS, AFSCME, LOCAL 646,
AFL-CIO; UPW STATE EXECUTIVE
BOARD (2015-011),

Respondents.

CASE NO. CU-01-333

ORDER NO. 3146

PROPOSED ORDER GRANTING
UPW'S MOTION TO DISMISS
COMPLAINT AND/OR FOR
SUMMARY JUDGMENT

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DISMISS COMPLAINT AND/OR FOR SUMMARY JUDGMENT

The Board members thoroughly reviewed all the evidence and arguments presented,¹ and the Board issues these proposed findings of fact, conclusions of law, and decision and order pursuant to Hawaii Revised Statutes (HRS) § 91-11, which provides in relevant part:

Examination of evidence by agency. Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination

¹ While Board Chair Komatsubara did not participate in the hearing in this matter, he has reviewed the entire record, including the pleadings, transcripts and exhibits filed in this case.

of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affect to file exceptions and present argument to the officials who are to render the decision[.]

I. Background

A. Factual Background

Complainant PATRICK L. ISHIDA (Ishida) at all times relevant to this proceeding was employed by the County of Kauai and is a member of the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) Unit 1 bargaining unit.

On or about January 6, 2015, Ishida submitted (1) a request for union representation on a work injury claim and (2) a UPW injury report. Ishida's claim was pending at the Disability Compensation Division of the Department of Labor and Industrial Relations and scheduled for hearing on January 14, 2015. On January 30, 2015, UPW notified Ishida that it decided not to pursue Ishida's workers' compensation claim. UPW's decision was because Ishida was previously offered representation by counsel selected by UPW, but since Ishida was not satisfied with UPW's counsel he withdrew from UPW's program.

B. Procedural Background

On April 28, 2015, Ishida filed a prohibited practice complaint against UPW, its State Director DAYTON NAKANELUA (Nakanelua), and the UPW State Executive Board (collectively, Respondents), over the handling of Ishida's HRS Chapter 386 worker's compensation claim.

On May 8, 2015, UPW filed a Motion to Dismiss Complaint and/or for Summary Judgment (UPW Motion), together with a Memorandum in Support of Motion, the Declaration of Dayton M. Nakanelua and Exhibits 1 - 8. The UPW Motion sought to dismiss the complaint for (1) lack of subject matter jurisdiction, (2) failure to state a claim for relief under Chapter 89 for an alleged breach of UPW's duty of fair representation, and (3) lack of standing since Ishida is unable to allege any injury for which relief is available under Chapter 89. Alternatively, the UPW Motion sought summary judgment and alleged that there is no genuine issue of material fact in dispute and that UPW is entitled to judgment as a matter of law.

On May 14, 2015, Ishida filed Complainant's Memorandum in Opposition to Respondents' Motion to Dismiss Complaint and/or for Summary Judgment (Ishida's Memo in Opposition), together with Exhibits C1 - C10.

On June 12, 2015, oral arguments on the UPW Motion were held before the Hawaii Labor Relations Board (Board).

II. STANDARDS OF REVIEW

The Board adheres to the legal standards set forth by the Hawaii appellate courts for motions to dismiss under the HRCF Rule 12(b).

A. Motion to Dismiss

For HRCF Rule 12(b) motions to dismiss based on lack of subject matter jurisdictions, “a party who seeks to invoke the jurisdiction of the court has the burden of proving the actual existence of subject matter jurisdiction.” Thompson v. McCombe, 99f.3d 352, 353 (9th Cir. 1996); Trentacosta v. Frontier Pac. Aircraft Indus. Inc., 813 F.2d 1553, 1559 (9th Cir. 1987). The question of jurisdiction is a question of law which is reviewed de novo under the right/wrong standard. Lingle v. Hawai’i Gov’t Employees Ass’n, 107 Hawai’i 178, 182, 111 P.3d 587, 591 (2005).

For HRCF Rule 12(b) motions to dismiss based on a failure to state a claim, “dismissal is warranted only if the claim is clearly without any merit; and this want of merit may consist of an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.” Justice v. Fuddy, 125 Hawaii 104, 108, 253 P.3d 665, 669 (App. 2011) (Fuddy), (*citing* Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983)). “A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. We must therefore view a plaintiffs complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory.” Fuddy, 125 Hawaii at 107-08, 253 P.3d at 668-669; Young v. Allstate Ins. Co., 119 Hawaii 403, 412, 198 P.3d 666, 675 (2008). The Board's consideration of a motion to dismiss for failure to state a claim is strictly limited to the allegations of the complaint, and the Board must deem those allegations to be true. However, in weighing the allegations of the complaint as against a motion to dismiss, the Board is not required to accept conclusory allegations on the legal effect of the events alleged. Paysek v. Sandvold, 127 Hawaii 390, 402-03, 279 P.3d 55, 67-68 (App. 2012) (*citing* Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985)); Young, 119 Hawaii at 406, 198 P.3d at 669.

For HRCF Rule 12(b) motions to dismiss based on lack of standing, a complainant must demonstrate a “logical nexus” between the interest asserted and the claim sought to be adjudicated in order to have standing. Life of the Land v. Land Use Commission, 63 Hawaii 166, 623 P.2d 431 (1981).

B. Motion for Summary Judgment

Under HRCP Rule 56(b), a party "may move with or without supporting affidavits for a summary judgment in the party's favor[r]." Ralston v. Yim, 129 Haw. 46, 56, 292 P.3d 1276, 1286 (2013) (Ralston). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show, that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." *Id.* at 55-56, 292 P.3d at 1285-1286; Querubin v. Thronas, 107 Hawaii 48, 56, 109 P.3d 689, 697 (2005); Thomas v. Kidani, 126 Hawaii 125, 129, 267 P.3d 1230, 1234 (2011). Further, any doubt concerning the propriety of granting a motion for summary judgment should be resolved in favor of the non-moving party. French v. Hawaii Pizza Hut, Inc., 105 Hawaii 462, 473, 99 P.3d 1046, 1057 (2004) (French).

In addition, for cases in which the non-moving party bears the burden of proof at trial, the Hawaii Supreme Court (Court) has adopted the burden shifting paradigm: first, the movant has the burden of producing support for movant's claim that (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions, and (2) based on the undisputed facts, movant is entitled to summary judgment as a matter of law; once the movant satisfies the initial burden of production, the burden shifts to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. Second, the movant bears the ultimate burden of persuasion. This burden always remains with the movant and requires the movant to convince the court that no genuine issue of material fact exists and that the movant is entitled to summary judgment as a matter of law. French, 105 Hawaii at 470, 99 P.3d at 1054.

Thus, where the non-moving party bears the burden of proof at trial, a movant may demonstrate that there is no genuine issue of material fact by either: (1) presenting evidence negating an element of the non-moving party's claim, or (2) demonstrating that the non-moving party will be unable to carry its, his or her proof at trial. Ralston, 129 Hawaii at 56-57, 292 P.3d at 1286-1287; French, 105 Hawaii at 472, 99 P.3d at 1056.

However, "[w]hen a motion for summary judgment is made and supported as provided in [HRCP Rule 56], an adverse party may not rest upon the mere allegations or denials of his [or her] pleading, but his [or her] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he [or she] does not so

respond, summary judgment, if appropriate, shall be entered against him [or her]." Foronda v. Hawaii International Boxing Club, 96 Hawaii 51, 58, 25 P.3d, 826, 833 (2001); Tri-S Corp. v. Western World Insurance Co., 110 Hawaii 473, 494 n.9, 135 P.3d 82, 103 n. 9 (2006).

III. DISCUSSION, CONCLUSIONS OF LAW AND ORDER

If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Regarding the Motion to Dismiss brought under HRCF Rule 12(b) for lack of subject matter jurisdiction, UPW argues that the Board's jurisdiction does not include controversies and disputes arising under Chapter 386 and that Hawaii's legislature has conferred the authority to adjudicate issues regarding Hawaii's workers' compensation laws to the director of labor and industrial relations. *Citing, Travelers Ins. Co. v. Hawaii Roofing, Inc.*, 62 Hawaii 380, 641 P.2d 1333 (1982). UPW further argues that Section 386-73, Hawaii Revised Statutes (HRS), states that "the director of labor and industrial relations shall have original jurisdiction over all controversies and disputes arising under [Chapter 386]." Section 386-94, HRS, further provides that the director of labor and industrial relations has the authority to regulate services rendered by representatives, including attorneys handling work injury claims. Based on established case law and Hawaii's workers' compensation laws, UPW argues that Ishida's sole legal remedy is to file an action with the director of labor and not this Board.

Although the Board agrees with UPW's contention that the Board does not have the authority or jurisdiction to address controversies and disputes regarding Chapter 386 claims, the Board does not agree that the issue in Ishida's prohibited practice complaint requires the Board to interpret or adjudicate an issue regarding Hawaii's workers' compensation laws. The specific dispute in this case is not the interpretation or application of the workers' compensation law as it applies to Ishida's work injury claim. Instead, the dispute here is Ishida's right to representation by his union on a work injury dispute which does not involve a collective bargaining activity as defined in Section 89-2, HRS.

What is the "UPW program" that entitled Ishida to representation by UPW in pursuing his workers' compensation claim? According to UPW, it offered its union members various programs which are separate and distinct from UPW's obligations as a bargaining unit's exclusive representative in the collective bargaining process. These programs or "perquisites" of union membership are considered by UPW to be benefits offered to UPW's members, and are "internal" matters which are separate and apart from its obligations under HRS Chapter 89, and therefore, are not subject to the duty of fair representation. One of these "internal" programs,

involves UPW providing legal representation to eligible claimants who sustain work injuries which are covered by Chapter 386. UPW's decision to accept or decline representation are made on a case-by-case basis and are left to the UPW's State Director's sole discretion. UPW claims that the services provided in this program are separate and apart from UPW's activities and duties as an exclusive bargaining representative in collective bargaining under Chapter 89 and that this program was in effect prior to UPW's certification as the exclusive bargaining representative of bargaining units 1 and 10. Ishida has not submitted any evidence to the contrary and does not dispute UPW's description of this internal program or benefit.

Clearly, the Board does not have jurisdiction over matters concerning public employees unless they fall within the purview of Chapter 89. The Hawaii Intermediate Court of Appeals held in TIG Insurance Co. v. Kauhane, 101 Hawaii 311, 327, 67 P.3d 810, 826 (Haw. App. 2003), that an administrative agency can only wield powers expressly or implicitly granted to it by statute.

Not all activities undertaken by a union are part of the union's duties as the exclusive representative in dealing with labor-management issues. The United States Supreme Court recognized that some union activities are germane to collective bargaining, contract administration, and grievance adjustment, which are labor-management issues, while some activities such as charitable, social, or political events, are not. *See, e.g., Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees*, 466 U.S. 435, 104 S. Ct. 1883 (1984). Similarly, not all activities undertaken by UPW are germane to performing the duties of an exclusive representative of the employees in dealing with labor-management issues under Chapter 89. As an example, UPW's program to assist retirees pursuant to Chapter 88, HRS, are statutory claims and benefits outside the parameters of Chapter 89.

UPW argued that the representation of workers' compensation claimants by UPW is not part of either the grievance or the negotiating process covered by Chapter 89. There is no evidence to the contrary. As such, the Board concludes that the assistance provided by UPW to its members with workers' compensation claims is voluntary and is a benefit or perquisite of union membership, and not a collective bargaining activity wherein the union has a duty to represent its members in dealing with the employer on labor-management issues under Chapter 89. This Board takes notice of its prior ruling where it held that the union's duty of fair representation of its members does not encompass the pursuit of claims arising under the workers' compensation statutes. In Board Decision No. 410, Sandra Pelosi and Hawaii Government Employees Association, 6 HLRB 101, 105 (2000), the Board specifically concluded that:

[C]laims arising under the workers' compensation statutes are beyond the scope of Chapter 89, HRS

* * *

Nothing in Chapter 89, HRS, and in particular Section 89-13(b), HRS, imposes an affirmative duty upon Respondent, explicitly or implicitly, to represent Complainant in matters which exist beyond the terms of the collective bargaining agreement.

The Board does not pass judgment on Ishida's claim that UPW has a legal obligation to represent his interests in his work injury claim, because of its "internal" benefits program. It is clear that any such obligation is not pursuant to Chapter 89, but is an internal or private and voluntary benefit provided to its members. As such, the Board finds that Ishida has not met his burden of proving the actual existence of subject matter jurisdiction in this case.

B. Motion to Dismiss for Failure to State a Claim for Relief.

As pointed out by UPW, Ishida cannot establish a claim for breach of duty of fair representation here where UPW does not hold exclusive authority to prosecute his workers' compensation claim. Unlike the authority to take a grievance to arbitration, which rests solely with the union, claimants may represent themselves or hire private counsel to represent them through the workers' compensation proceedings. As the Fifth Circuit noted in Barrett v. Ebasco Constructors, 868 F.2d 170 (5th Cir. 1989):

The union did not represent Barrett at any point during his litigation in court, nor was it obligated to do so. The scope of the duty of fair representation is coextensive only with the union's statutory authority to act as the exclusive representative of all employees within the bargaining units. If a union does not serve as the exclusive agent for the members of the bargaining unit with respect to a particular matter, there is no corresponding duty of fair representation. In this case, the union did not have the exclusive right to seek judicial review of the arbitrator's award, as it did under the collective bargaining agreement to determine whether this case should be grieved and arbitrated. Indeed, Barrett exercised his own individual remedies outside the collective bargaining agreement when he filed this suit.

For these reasons, the Board is required to grant the UPW Motion for a failure to state a claim since UPW has no duty of fair representation with respect to Ishida's workers' compensation claim.²

² In essence, Ishida's workers' compensation claim is not a dispute between management and its employees over matters covered by the CBA.

C. Motion to Dismiss for Lack of Standing and Motion for Summary Judgment.

Since we find in favor of UPW in Paragraphs III. A. and B. above, the Board finds unnecessary a discussion and ruling regarding the other grounds for dismissal raised by UPW.

D. Conclusion.

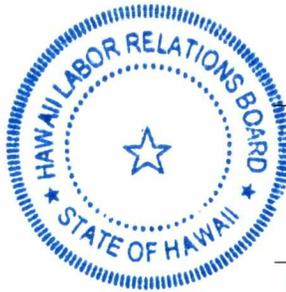
For all the reasons set forth above, the Board hereby grants the UPW Motion and dismisses this matter. This case is closed.

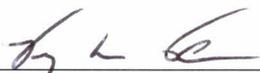
FILING OF EXCEPTIONS

Any party adversely affected by the Proposed Findings of Fact, Conclusions of Law, and Decision and Order may file exceptions with the Board within ten days after service of this document. The exceptions shall specify which proposed findings or conclusions are being excepted to, with full citations to the factual and legal authorities therefor. A hearing for the presentation of legal arguments will be scheduled should any party file exceptions, and the parties will be notified thereof.

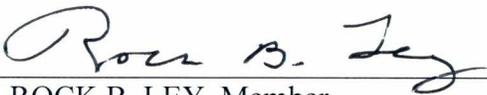
DATED: Honolulu, Hawaii, February 11, 2016.

HAWAII LABOR RELATIONS BOARD




KERRY M. KOMATSUBARA, Chair


SESNITA A.D. MOEPONO, Member


ROCK B. LEY, Member

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