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STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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| In the Matter of |) | CASE NOS.: | CU-10-58 |
| |) | | CE-10-110 |
| BERNADINE L. BROWN, |) | | |
| |) | ORDER NO. | 875 |
| Complainant, |) | ORDER CLARIFYING BOARD | |
| |) | DECISION NO. | 315 ON REMAND |
| and |) | | |
| |) | | |
| UNITED PUBLIC WORKERS, AFSCME, |) | | |
| LOCAL 646, AFL-CIO and ALFRED |) | | |
| LARDIZABAL, Director, Depart- |) | | |
| ment of Personnel Services, |) | | |
| State of Hawaii, |) | | |
| |) | | |
| Respondents. |) | | |

ORDER CLARIFYING BOARD DECISION NO. 315 ON REMAND

On January 30, 1992, the Honorable Robert G. Klein remanded this matter to the Hawaii Labor Relations Board with the following instruction:

The Hawaii Labor Relations Board (HLRB) failed to address the jurisdictional issue raised by Appellant and Appellee State. If the HLRB finds no jurisdiction, the order shall be vacated except for such finding.

If the Board finds that it had jurisdiction, it shall set forth the facts supporting its conclusion as well as facts and law which support a conclusion that the union violated its duty of fair representation in the handling of Brown's grievance.

Pursuant to the Court's order of remand, the Board hereby issues this order to clarify Decision No. 315, Bernadine L. Brown, regarding the issue of its jurisdiction with respect to the "First charge against the Employer" and set forth the bases for its conclusion that the union violated its duty of fair representation

in the handling of Brown's grievance. The following replaces pp. 9-16 of the Board's CONCLUSIONS OF LAW regarding the first charge against the Employer in the decision issued on April 17, 1991.

CONCLUSIONS OF LAW

Complainant's first charge against the Employer alleges a violation of Subsection 89-13(a), HRS. Subsection 89-13(a), HRS, reads:

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

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

(2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;

(3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage membership in any employee organization;

(4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

(6) Refuse to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in section 89-11;

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

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

This charge begins with an allegation of a Subsection 89-13(a)(1), HRS, violation. The allegation apparently is that Bikle singled out Complainant by "name and sex" in the posting thereby violating her rights under Chapter 89, HRS. Numerous sections of the Unit 10 collective bargaining agreement are cited as having been violated, although the collective bargaining agreement was not placed into evidence by any party to the proceedings.

Subsection 89-13(a)(2), HRS, is alleged to have been violated by the Employer's refusal to meet with Complainant on the grievance filed disputing the allegations of Bikle. Complainant alleges that the Employer, through Harrington, colluded with the UPW to dominate and interfere in the proper administration of the UPW by circumventing the collective bargaining agreement.

Complainant alleges that Subsection 89-13(a)(3), HRS, was violated by "publicly discriminating against grievant by singling her out in groundless and unfounded allegations by Unit Team Manager Bruce Bikle according to her sex and by deliberately humiliating her in associating her with a known homosexual inmate . . . the other male Adult Corrections Officers accused by Unit Team Manager Bruce Bile [sic] were not publicly named or identified."

Subsection 89-13(a)(4), HRS, was allegedly violated when "the Employer . . . 'retaliated' against me because I exercised my union right to file a grievance complaint against Unit Team Manager Bruce Bikle (a drug felon) to prove my innocence against his false allegations (unresolved)."

Subsection 89-13(a)(5), HRS, is alleged to have been violated because Complainant did not receive a fair hearing as both Employer and the Union refused to process her grievance.

Subsection 89-13(a)(7), HRS, was allegedly violated by the commission of prohibited practices.

Finally, Subsection 89-13(a)(8), HRS, was allegedly violated in a manner unspecified.

In response, the Employer argues that it was recommended that Complainant attempt to resolve the dispute with her supervisor and that her supervisor initiate an investigation into the matter. Respondents' Ex. 1. No further action, Employer argues, was taken by any party. The Employer further argues that about a month after filing her grievance, Complainant asked the Union steward about it and he informed her that it had been submitted to the Employer. Some months later, she inquired of Edwin Shimoda, then OCCC Director, about her grievance and was told by him that he did not know she had a pending grievance. After that, Employer alleges Complainant did nothing to pursue her grievance. On these facts, Employer argues that these allegations of the complaint are barred by the 90-day statute of limitations. Employer finally argues that there are no facts supporting any prohibited practice by the Employer. Employer's Closing Brief, pp. 3-4.

With regard to the Complainant's allegations against the Employer surrounding her first grievance, the Board finds that the record reflects only Complainant's uncontroverted claims of demands directed toward the Union for responses regarding its actions taken

to process this grievance. The record reflects no response from Complainant to the Employer's "recommendation" in its Step I decision that she discuss with Bikle her objections to the in-house investigation. The evidence suggests Complainant directed her attention toward, and relied on, the Union in pursuing this grievance. The record as it stands suggests that Complainant's own inaction played a hand in impeding a full airing of the Bikle investigation. Though this does not absolve the Employer of apparent unresponsiveness, it does prompt the view that the burden of proving a wilful violation by Employer has not been carried. In addition, the applicable collective bargaining contract was not entered into evidence; proof of a contractual violation therefore cannot be established. Eldon P. Kaopua, 2 HPERB 551 (1980); Terry Tominaga, 4 HLRB 753 (1990). It appears therefore, that the Complainant failed to carry her burden of proving a wilful contractual violation by the Employer.

As against the UPW, in regard to her grievance against Unit Team Manager Bikle, the complaint states that the UPW violated the standard making it a prohibited practice to "interfere, restrain or coerce any employee in the exercise of any right guaranteed under this chapter." This is the language contained in Subsection 89-13(b)(1), HRS. The complaint states that her grievance filed on August 24, 1984 "was restrained by Business Agent Walter Harrington and not processed in accordance with Section 15 of the collective bargaining agreement. Because of his admitted personal friendship with Unit Team Manager Bruce Bikle, a

convicted drug felon, Union Representative Harrington 'froze' Brown's grievance complaint at STEP 1. Both Union Boss Gary Rodrigues and Steward Robert Rivera were fully aware of the unfair labor practice." The complaint cites numerous collective bargaining agreement sections without setting forth the specific provisions.

The complaint cites a violation of the provision making it a prohibited practice to "refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in Section 89-9." This is the language of Subsection 89-13(b)(2), HRS. Complainant states that because of personal reasons involved between the parties [presumably the State, the UPW and Walter Harrington], her grievance was treated arbitrarily and "locked in" at Step 1 since August 27, 1984. All workers, Complainant argues, covered by a collective bargaining agreement have a right to be fairly represented by the Union.

Complainant invokes the phrase, "refuse to participate in good faith in the mediation, factfinding and arbitration procedures set forth in Section 89-11." This is the language of Subsection 89-13(b)(3). Complainant argues that by denying her rights to process her grievance that the Union denied her fair representation or the right to participate in mediation, factfinding and arbitration. The complaint finally also alleges without substantiation violations of Subsections 89-13(b)(4) and (5). Collective Bargaining Agreement Sections 1, 2, 3, 11, 14, 15, 56 and 61 are referred to without expansion.

In reply, the Union notes that the Collective Bargaining Agreement has not been placed into evidence and requests dismissal on this basis. Union's Brief, p. 2. The Union argues further that the charge set forth in the grievance form does not claim that Complainant was in any way discharged or disciplined such as would make out a violation under the collective bargaining agreement. The Union notes that Respondent Ex. 1 shows the Employer replied that it understood no attempts were made to resolve her concerns directly with Bikle. Nothing further was done until she filed her complaint with the Board on August 13, 1987, three years later and substantially beyond the 90-day period of limitations for filing complaints.

The Union argues that the complaint was filed clearly beyond the time limitations and that the grievance was not a proper one under the collective bargaining agreement. What was claimed as a contract violation was merely a complaint against "malicious and slanderous allegations" which, if continued, could lead to a suit under the Civil Rights Act. Union's Brief, pp. 3-4.

Both Respondents argue that the Board lacks jurisdiction over these complaints since the complaint was filed well beyond the ninety-day statute of limitations contained in Section 377-9(1), HRS, and Administrative Rules Section 12-42-42. Section 377-9(1), HRS, which is incorporated by Section 89-14, HRS, states:

No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.

Administrative Rules Section 12-42-42, also provides that:

A complaint that any public employer, public employee or employee organization has engaged in any prohibited act 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.

The preliminary issue with respect to Brown's charges filed with this Board is whether these charges are timely filed. The Board finds that Brown's complaint was timely filed and the Board has jurisdiction over the matter.

Section 378-51, HRS, relates to actions against labor organizations charging violations of the duty of fair representation and provides as follows:

Any complaint, whether founded upon any contract obligation or for the recovery of damage or injury to persons or property, by an employee against a labor organization for its alleged failure to fairly represent the employee in an action against an employer shall be filed within ninety days after the cause of action accrues, and not thereafter.

Where the alleged failure to fairly represent an employee arises from a grievance, the cause of action shall be deemed to accrue when an employee receives actual notice that a labor organization either refuses or has ceased to represent an employee in a grievance against an employer. Where the alleged failure is related to negotiations or collective bargaining, the cause of action shall be deemed to accrue when the applicable collective bargaining agreement or amendment thereto is executed.

Although the foregoing provision arguably deals with civil lawsuits filed directly in the courts, we find the statute to be instructive since it prescribes a limitations period for actions based upon allegations of the breach of a union's duty of fair representation and more importantly, the statute specifically

provides when the cause of action accrues. Where the alleged failure to fairly represent the employee arises from a grievance, the statute provides that the cause of action accrues when an employee receives actual notice that a labor organization either refuses or ceases to represent an employee in a grievance.

Complainant testified that Unit Team Manager Bikle posted a memo, dated August 24, 1984, to Sergeant Fereti Manumaleuna, on the bulletin board charging certain ACOs with derelictions of duty and which mentioned BROWN by name. The contents of the document were announced on all three watches. Tr., 11/28/89, p. 34. Union steward Rivera met Complainant in front of the facility indicating that Bikle had posted the allegations against her on the day watch. Id. at 48. Rivera prepared the grievance while Complainant was on the watch. Id. at 42. Complainant signed the original and gave it back to Rivera to make copies. Id. at 37. Rivera filed the Step 1 grievance on Complainant's behalf seeking to have the derogatory statements stricken from her record and the matter investigated. One copy was sent to the Union and one to the Employer. Id. at 43. Rivera advised Brown to follow up on the grievance and indicated that he would also try to follow up on it. Id. at 45. Several days after Rivera filed the grievance, then Union agent Walter Harrington came to the facility to discuss the allegations of the grievance with Complainant. Complainant explained what had transpired. Id. at 47-49. Complainant testified that Rivera went out on leave and she kept contacting the Union to find out the status of her grievance. Id. at 45. No one from the Union ever responded to her. Complainant testified that the Union kept saying

they were going to get back to her and they never did. Tr., 3/21/90, p. 32. Complainant stated that months later, she asked Shimoda what was happening to her grievance and he stated that he did not even know that she had a pending grievance. Id. at 36. Complainant filed her complaint with the Board on August 13, 1987.

In this case, Complainant was never notified by the Union that it would not pursue the grievance. The record reflects only Complainant's uncontroverted claims of demands directed towards the Union for responses regarding its actions taken to process the grievance. Neither Respondent presented any evidence to effectively refute Complainant's testimony. Based on the record before us, we find that the applicable limitations period did not begin to run until Complainant filed her complaint since the Union never gave actual notice to her that it would not represent her regarding the grievance and, in fact, led her to believe that the grievance would be processed in due course.

Regarding the issue of the Union's duty of fair representation, the Board relies on the United States Supreme Court's decision in Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842, 857, 64 LRRM 2369, 2376 (1967). There, the Court cited the Fourth Circuit's discussion of the arbitrary conduct which would constitute a breach of the union's duty. The Court stated:

"Arbitrary" is defined as "perfunctory." (cite omitted.) 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 a 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.

In Decision No. 196, Ronald Caldeira, 3 HPERB 196 (1984), the Board discussed the duty of fair representation with respect to the grievance procedure and stated:

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.

Id. at 548.

In Caldeira, supra, the employee charged the union with failure to assist him in contesting a disciplinary action and failure to notify him of the grievance filing deadlines. The union agent was unable to offer any valid rationale or colorable excuse for failing to interview the only witnesses to the incident precipitating the discipline. The Board there held that the union, which critically analyzed the employee's alibis but not the employer's original charges, in effect abandoned him and breached its duty to fairly represent the employee. The Board considered that a union acts in a perfunctory manner when it acts without concern or solicitude or when it gives a claim only cursory attention. The Board held that the union acted perfunctorily in

neglecting to interview witnesses and conducting what amounted to a superficial investigation. The Board found that the failure of the union to inform Caldeira of the contract deadline for filing a grievance was motivated by indifference, was arbitrary and discriminatory, and amounted to perfunctory behavior.

In this case, the Board finds that the Union breached its duty of fair representation to Brown because of its absolute unresponsiveness to her requests for information regarding her grievance, regardless of the validity of the claims raised. The uncontroverted lack of response to this unit member can only be inferred to have occurred wilfully. The Union here offered no evidence of any consideration which it gave to the merits of Complainant Brown's case. The Union's neglect in failing to inform Brown of the status of her grievance demonstrated an indifferent attitude towards her rights, and constitutes a "perfunctory" handling of her case under Vaca v. Sipes, supra. As stated in Caldeira, supra, "arbitrary" conduct is not limited to intentional conduct. The Board there relied on Robesky v. Qantas Airways, 573 F.2d 1082, 1086, 1089 (9th Cir. 1978), where 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. Thereafter, the employee rejected an offer of settlement based upon that act of omission. 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 Court 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. In the case before us, the Union presented no evidence that it investigated the merits of the charges or informed Brown as to its evaluation of her allegations. When asked about the status of the case, it appeared that the Union would proceed with the matter and then became indifferent or disinterested. The Board finds that the uncontroverted evidence indicates that the Union's actions in handling Brown's request for information about the status of her grievance falls outside the standard of permissible conduct. We find the Union's actions in this case to be arbitrary and perfunctory.

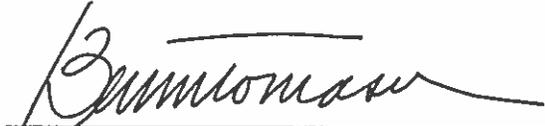
At the same time, however, the Board finds that Complainant has failed to state a claim for which a Board remedy exists. A review of the grievance indicates that it contains allegations only of malice and slander and the possibility of a civil rights action. Thus, although a breach of the duty of fair representation did occur because of the Union's handling of her complaints, Complainant suffered no detriment which can be remedied by the Board. Therefore, her allegations surrounding her first grievance are dismissed.

The Board, however, views critically the Union's lack of responsiveness in attending to Complainant's inquiries on the

grievance, and notes the fact that, but for the nature of the violations alleged in the grievance, i.e., allegations of noncontractual violations, the Union's slipshod handling of the grievance would warrant remedies to correct the breach of the duty of fair representation.

DATED: Honolulu, Hawaii, May 14, 1992.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



GERALD K. MACHIDA, Board Member



RUSSELL T. HIGA, Board Member

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