

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII GOVERNMENT
EMPLOYEES ASSOCIATION,
AFSCME, Local 152, AFL-CIO,

Complainant,

and

DAVID Y. IGE, Governor, State of
Hawaii; DONALD G. HORNER,
Board of Education; HAWAII STATE
BOARD OF EDUCATION;
KATHRYN S. MATAYOSHI,
Superintendent, Department of
Education; NEIL DIETZ, Acting
Administrator, Labor Relations
Section, Department of Education; and
DEPARTMENT OF EDUCATION,

Respondents.

CASE NO. CE-06-859

DECISION NO. 483

DISSENTING AND
CONCURRING OPINION OF
BOARD MEMBER SESNITA
A.D. MOEPONO

DISSENTING AND CONCURRING OPINION
OF BOARD MEMBER SESNITA A.D. MOEPONO

I concur with the Board Majority that the appropriate standard to be applied in determining whether Dietz's conduct in rejecting and returning the March 16, 2015 submission was a "wilfull" violation of HRS chapter 89 is whether this conduct demonstrates a "conscious, knowing, and deliberate intent." However, I dissent from their conclusions that "wilfullness" can be presumed and that based on the record in this case that Dietz's rejection of the March 16, 2015 submission was a "wilfull" violation of HRS Chapter 89; and from their failure to address and resolve the allegation regarding whether Dietz's failure to provide the information requested was a "wilfull" violation of HRS § 89-13(a)(7) and (8) for the following reasons.

I. Application of the “Wilfulness” Standard

The Board Majority has determined that “Dietz acted wilfully, i.e., ‘with the ‘conscious, knowing, and deliberate intent to violate the provisions’ [sic] of HRS chapter 89’ when he rejected the Union Grievance Letter.” In so finding, the Board Majority concludes that “This is a case where ‘wilfulness can be presumed where a violation occurs as a natural consequence of a party’s action.’” I concur with the Board Majority that the applicable standard for a determination regarding whether Dietz’s conduct was “wilfull,” is whether his actions demonstrated a “conscious, knowing, and deliberate intent to violate” the provisions of HRS chapter 89. However, based on the Hawaii Supreme Court’s (Court) decision in Hawai’i Gov’t Emp. Ass’n v. Caspupang, 116 Hawaii 73, 170 P.3d 324 (2007) (HGEA) and subsequent Board decisions, I do not concur with the Board Majority’s reasoning that under this standard that the “wilfulness” can be presumed. In HGEA, the Court confirmed that the appropriate criteria for “‘wilfully’ means a showing that there was a ‘conscious, knowing, and deliberate intent to violate the provisions of HRS chapter 89.’” In affirming the Board’s order of dismissal in that case, the Court clarified that in assessing a violation of HRS § 89-13, the Board is required “to determine whether Respondents acted with the ‘conscious, knowing, and deliberate intent to violate the provisions’ of HRS chapter 89[.]” Subsequently, the Board relied on HGEA in “look[ing] to the Hawaii Supreme Court’s evolving guidance in interpreting provisions of HRS chapter 89,” and concluded that the assessment of an alleged prohibited practice under HRS § 89-13 requires the Board to render a specific determination regarding whether the respondent acted with “conscious, knowing, and deliberate intent” to violate the provisions of HRS Chapter 89. *Id.* at 99, 170 P.3d at 350. Hawaii State Teachers Ass’n v. Board of Education, Board Case No. CE-05-672, Order No. 2541, at *11 (August 6, 2008) (HSTA); United Public Workers, AFSCME Local 646, AFL-CIO v. Char, Board Case No. CE-10-744, Order No. 2697, at *12-13 (April 12, 2010). Applying these principles articulated in HGEA and HSTA, I conclude that a finding of “wilfulness” in this requires a specific finding that Dietz acted with a “conscious, knowing, and deliberate intent” to violate the provisions of HRS Chapter 89 in rejecting and returning the March 16, 2015 submission. Based on the evidence in this case, I am unable to so.

To establish the “wilfulness” requirement, the Union argues that Dietz’s action shows a “calculated and intentional refusal to address the BU 06 Class Grievance based on ‘a plethora of individuals at his disposal” and “a wealth of prior private sector labor experience, and some public sector experience, and familiar with the BU 06 Agreement and the BU 06 Grievance Procedure.” The Board Majority concurs with the HGEA that Dietz was “a person experienced in labor relations,” “who knew or should have known that he could not unilaterally amend the CBA;” and that this violation of the CBA and HRS Chapter 89 “was a conscious, knowing, and deliberate interference with the Union’s right to have its disputes with DOE resolved through the bargained for class grievance.” In addition, the Board Majority definitively finds that the relevant CBA does not incorporate or provide for the formal pleading requirements for a class grievance that are required for an individual grievance; and that based on Dietz’s labor relations background and participation in DOE class grievances that Dietz should have recognized this difference. Based on the record in this case, I disagree with the Board Majority’s findings on this issue. More importantly, I am unable to find that the evidence in this case demonstrates that

Dietz's actions constitute a "conscious, knowing, and deliberate intent" to violate the HRS Chapter 89 provisions for the following reasons.

First, while there is no dispute that Dietz had experience in labor relations based on his current position and previous jobs with the Office of Collective Bargaining and the Seafarers International Union, the significant showing, in my opinion, is the amount of experience that Dietz had handling grievances under this particular BU 06 CBA. While his contract administration with the Seafarers International involved application of various agreements that the union had with the employers, the contracts were not public sector collective bargaining agreements subject to HRS Chapter 89 but rather private sector collective bargaining agreements. The fact that the Seafarers International Union's contractual language and grievance process and statutory provisions involved were different from BU 06 was not disputed. The record shows that Dietz's only experience specifically handling BU 06 CBA grievances was based on the one year that he had spent serving as acting DOE labor administrator. During that one year, Dietz administered and provided staff support for the disciplinary process within the DOE and reviewed and assigned Step 2 grievances to DOE staff, and that experience included other HGEA cases, in which grievances were returned for insufficiency.

Moreover, CBA Article 15. states in relevant part:

C. The grievance must be filed with the appropriate superior within twenty (20) working days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) working days after the alleged violation first became known or should have become known to the educational officer involved, or the grievance may not be considered.

E. Step 1. If the matter is not settled on an informal basis in a manner satisfactory to the educational involved, then the educational officer or the Union may file a formal grievance by setting forth in writing on a form provided by the Board, the nature of the complaint, the specific provision(s) of the Agreement allegedly violated, the date of the alleged violation, and the remedy sought within the twenty (20) working days specified in paragraph C above in accordance with the following procedure:

G. If the Union has a class grievance, it shall submit the grievance in writing as follows:

3. To the Superintendent in the case of all other class grievances.

4. Time limits shall be the same as in individual grievances, and the procedures for appeal from unsatisfactory answers of District Superintendents and Assistant Superintendents shall be the same as in Step 2.

(Emphasis added)

The March 25, 2016 letter sent by Dietz in response to the HGEA's March 16, 2015 submission states in relevant part:

The Department of Education (Department) has received your submission dated March 16, 2015 indicating Hawaii Government Employees Association's (Union) belief that the Department has violated Articles 1, 3, 4, 8, 11 and 12 of the current Bargaining Unit (BU) 06 collective bargaining agreement.

I have thoroughly reviewed your document as well as Article 15 of the BU 06 collective bargaining agreement.

In your submission you do not indicate dates for any of the "violations" mentioned in the 'BACKGROUND' segment. The Department must question the timeliness of your March 16, 2015 letter.

You state, "The Union contends that the Employer is arbitrary and capricious in their continuous efforts to unilaterally implement changes despite the 2014 arbitration decision." However, that claim is not supported by any actions you allege the Employer has taken. Nor does the Union provide any support for the other allegations of your claim that would indicate the Employer has improperly interpreted or applied a specific provision of the current collective bargaining agreement.

The Union provides no support for the Union's contention that the Department violated Articles 1, 3, 4, 8, 11 and 12. It is the Union's initial burden to provide evidence of a contractual violation in this case.

It is clear from the department's review of your submission as well as Article 15 of the current collective bargaining agreement that your letter of March 16, 2015 is not a Step 2 grievance. Accordingly, as the Superintendent's designated representative in this matter, I am required to return that submission to you.

(Emphasis added)

Additional evidence in the record further clarifies and illuminates Dietz's state of mind regarding the above-stated response and his reasoning. Dietz relied on Article 15.C¹ and G² in

questioning the timeliness of the grievance. He further confirmed that Article 15 E.³ not only required HGEA to put dates of the alleged violations on the grievances, including class grievances, but that the basic pleading requirements contained in this provision were equally applicable to any grievance, including class grievances. Finally, Dietz relied on Article 15. C for the Employer's ability to return the grievance. In short, Dietz reasoned that the lack of specificity in the March 16, 2015 letter did not meet the contractual requirements of a grievance requiring him to return and not consider the submission.

The Board Majority in Conclusion 10, states that "...the CBA has no formalistic pleading requirements for a class grievance. Unlike an individual, when filing a class grievance, the Union need not (a) use a form provided by DOE, and (b) specifically state what provisions of the CBA are being violated, and (c) provide a date(s) upon which the alleged violation(s) occurred." I am of the opinion that the Board Majority's Conclusion 10, which is based solely on the lack of definitive language in the CBA incorporating the technical pleading requirements set forth in Article 15. E. into the class grievance procedure, is an overly broad interpretation. While the Board Majority points out that lack of specific incorporation of the technical pleading requirements for individual grievances into Article 15. G. similar to the specific incorporation of the 20-day time requirement indicates that these pleading requirements do not apply to class grievances, neither the HGEA, which has the burden of proving the violations of HRS § 89-13(a), nor the Board Majority cite any specific evidence to support this interpretation nor is there language in Article 15. G. specifically providing that the pleading requirements of Article 15. E. is not applicable. There are certain requirements, which are the same for both individual and class grievances based on the Article 15. G. 4. provision that, "[T]he time limits shall be the same as in individual grievances and the procedures for appeal from unsatisfactory answers of District Superintendents and Assistant Superintendents shall be the same as in Step 2." At best, based on the record and the language of Article 15, it is unclear regarding whether the technical pleading requirements for individual grievances apply to class grievances.

Accordingly, I am compelled to find that Dietz's reasoning that the pleading requirements of Article 15. E. were also applicable to class grievances and not met in this case cannot be deemed completely unwarranted or unreasonable.

The evidence set forth above demonstrates that Dietz interpreted CBA Article 15 to require that class grievance submissions meet the technical requirements for an individual grievance; and that this provision permitted him to return the submission for a failure to meet these requirements. There is no dispute that the HGEA did not include a date of the alleged occurrence, which would allow the DOE to determine whether the 20 working day requirement for timeliness was met nor identify any individuals in the March 16, 2015 grievance. Even Ms. Puuohau confirmed that this grievance was "unusual" because of the failure to identify the individuals involved. While there is no dispute that the procedural and substantive issues are for the arbitrator to resolve, Dietz's raising of these issues during the grievance process was not inappropriate, and as noted below, Dietz's actions did not preclude the matter from proceeding to the arbitration step, from which it was finally withdrawn. Even if Dietz's interpretation of CBA Article 15 and actions taken in raising these issues were in error, there is simply no evidence to

substantiate that he intended or was aware that his actions in rejecting the March 16, 2015 grievance for potential untimeliness and/or lack of specific facts violated HRS § 89-13(a) and could subject him and the DOE to prohibited practice violations. TWA v. Thurston, 469 U.S. 111, 128-30 (1995) (TWA) (Although in a slightly different context of determining liquidated damages, the Court held that the airline's violation of the ADEA was not "willful" because the airline did not know that its conduct violated the ADEA and its action was not taken in reckless disregard of the Act's requirements.) In short, the HGEA failed to show that Dietz's action in returning the matter to the HGEA was done with a "conscious, knowing, and deliberate intent" to violate the HRS Chapter 89.

Further, the undisputed record establishes that Dietz's actions in returning the grievance for possible untimeliness and failure to comply with the technical requirements for a grievance under the CBA was supported by his discussions and an agreement on this issue with DOE's Erin Warner, DOE investigator Jill Suzuki, and Barbara Krieg.

Finally, the fact that Dietz denies intending to forestall the grievance process in conjunction with the evidence that the matter ultimately proceeded to arbitration but was subsequently withdraw further corroborates Dietz's and the DOE position that Dietz's actions were not intended to obstruct the arbitration process or substitute his judgment for the arbitrator.

For these reasons set forth above, I dissent from the Board majority's conclusion that Dietz "wilfully" violated HRS § 89-13(a)(7) and (8) by returning the March 16, 2015 submission.

I. Information Request

I also dissent from the Board Majority's decision because the decision fails to resolve the issue of whether the failure to provide the requested information constitutes a violation of HRS § 89-13(a)(7) and (8). Regarding this issue, as well, I am unable to find the requisite "wilfulness" for this allegation to be found. In the March 25, 2015 letter, Dietz stated:

The bulk of your March 16, 2015 submission is a lengthy request for voluminous information. These requests exhibit the Union's expectation that the Department assume the initial burden of showing that the contract was violated. As such these requests are not truly requests for information but an attempt to shift the responsibility for the Union's initial burden to show the contract has been violated onto the Employer.

The uncontroverted record in this case further shows that Dietz's reason for not providing the information was because the information request was part of the March 16, 2015 letter, which the DOE determined did not meet the requirements of a grievance. In addition, Dietz relied on Warner, Krieg, and Deputy Attorney General Jim Halvorson for this response.

Dietz's reason is not without legal support and merit. "There can be no question of the

general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties.” N.L.R.B. v. Acme Indus. Co., 385 U.S.432, 435-36 (1967), *citing* Labor Board v. Truitt Mfg. Co., 351 U.S. 149. “Similarly, the duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.” *Id.* at 536, *citing* NLRB v. C & C Plywood Corp., *ante*, p. 421 and Labor Board v. F.W. Woolworth Co., 352 U.S. 938. However, “[w]ith respect to matters for which the union would have no authority to bring a grievance, however, an information request cannot be enforced because the information requested is not relevant to the union’s duties.” Parson Elec. Co. v. NLRB, 976 F.2d 1167, 1169-70, *citing* N.L.R.B. v. Western Elec., Inc., 559 F.2d 1131 (9th Cir. 1977).

Similar to the lack of a showing of “wilfulness” regarding the return of the grievance, there is no evidence to substantiate that Dietz intended or was aware that his actions in failing to respond to the information request because there was no grievance could subject him and the DOE to prohibited practice violations. *Id.* The undisputed evidence is that Dietz took no action to respond to the information request because of his position that the March 16, 2015 letter did not meet the requirements of a proper grievance.

For this reason, I am unable to find that Dietz’s failure to respond to the information request was not “wilfull” in violation of HRS § 89-13(a)(7) and (8).

II. Summary

For all of the foregoing reasons, I concur with the Board Majority’s standard for “wilfulness” “as conscious, knowing, and deliberate intent” but respectfully dissent from the Board Majority’s presumption of “wilfulness” in applying this standard and from their reasoning and conclusion that Dietz’s return and rejection of the March 16, 2015 submission constitutes a “wilfull” violation of HRS § 89-13(a)(7) and (8) and their failure to address whether Dietz’s failure to respond to the requested information constitutes a “wilfull” violation of HRS § 89-13(a)(7) and (8).

Honolulu, Hawaii, June 29, 2016.

HAWAII LABOR RELATIONS BOARD



SESNITA A.D. MOEPONO, Member

¹ BU 06 CBA Article 15 C. states:

C. The grievance must be filed with the appropriate superior within twenty (20) working days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) working days after the alleged violation first became known or should have become known to the educational officer involved, or the grievance may not be considered.

² BU 06 CBA Article 15 G states in relevant part:

G. If the Union has a class grievance, it may submit the grievance in writing as follows:

4. Time limits shall be the same as in individual grievances, and the procedures for appeal from unsatisfactory answers of District Superintendents and Assistant Superintendents shall be the same as in Step 2.

³ BU 06 Article 15 E. states in relevant part:

E. Step 1. If the matter is not settled on an informal basis in a manner satisfactory to the educational officer involved, then the education officer or the Union may file a formal grievance by setting forth in writing on a form provided by the Board, the nature of the complaint, the specific provision(s) of the Agreement allegedly violated, the date of the alleged violation, and the remedy sought within the twenty (20) working days specified in paragraph c above in accordance with the following procedures:...