

STATE OF HAWAII
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)
JEFFERY SILVA,) Case No. CE-01-53
Complainant,)
and)
HERBERT T. MATAYOSHI, Mayor)
of the County of Hawaii,)
Respondent.)

In the Matter of)
JEFFERY SILVA,) Case No. CU-01-36
Complainant,)
and) Decision No. 125
UNITED PUBLIC WORKERS,)
LOCAL 646, AFSCME, AFL-CIO,)
Respondent.)

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

On August 8, 1979, Complainant Jeffery Silva filed with the Board these prohibited practice complaints against Respondents Herbert T. Matayoshi, Mayor of the County of Hawaii (hereafter Employer), and United Public Workers, Local 646 (hereafter UPW or the Union).

Against Employer, Complainant alleged statutory and contract violations when it denied him a noncompetitive promotion.

Against UPW, Complainant alleged that under the bargaining contract he was entitled to a noncompetitive promotion, and when that was denied by Employer, UPW breached

its duty to him as a union member when it failed to arbitrate his grievance against Employer.

After due notice to the parties, a hearing was held on January 21, 1980 in the Hawaii County Council Conference Room in Hilo, Hawaii. The two cases were consolidated at the commencement of the hearing. All parties were present, except Complainant who did not appear due to illness; he was represented by his mother, Mrs. Janet Silva. All parties were afforded full opportunity to call and cross-examine witnesses, submit exhibits and present briefs and oral arguments.

Employer filed its memorandum on January 21, 1980, shortly before the hearing commenced. At the close of the hearing, Chairman Hamada set January 28, 1980 as the final date for the parties to submit additional written materials. Mrs. Janet Silva sent two letters to the Board, dated January 23 and January 24, 1980, respectively. The Union filed its memorandum on January 28, 1980.

Upon a full review of all exhibits, testimony presented at the hearing, and arguments made orally and in writing, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Complainant Silva is a public employee as defined in Section 89-2(7), Hawaii Revised Statutes (hereafter HRS), and is included in Unit 1 (nonsupervisory employees in blue collar positions).

Respondent Mayor Matayoshi is a public employer as defined in Section 89-2(9), HRS.

Respondent UPW is the exclusive representative as defined in Section 89-2(10), HRS, of employees in Unit 1.

UPW and Employer are parties to the Unit 1 collective bargaining agreement. An agreement, executed June 7, 1977, was in effect for the period July 1, 1977 to June 30, 1979.

Complainant is, and was at all times relevant, employed by the County of Hawaii Department of Public Works as a lubrication worker in the motor pool.

Complainant had been temporarily assigned as an Automotive Mechanic I since either March 1, 1978 (Bd. Ex. 1 in CU case, letter dated November 30, 1978, from Complainant to Edward Harada, and letter of August 1, 1979 attached to Complainant's petition) or May 13, 1978 (also Bd. Ex. 1 in CU case, letter dated May 23, 1979, from Complainant to Henry Epstein, et al.).

On December 19, 1978, Complainant took a written examination for an Automotive Mechanic I position.

On December 27, 1978, Complainant received notification from the Department of Personnel Services, County of Hawaii, that he had not made the requisite score to be placed on the eligible list.

Pursuant to Complainant's request, Edward L. Silva, Director of Personnel Services, County of Hawaii, informed him by letter of December 28, 1978, that on the examination in question, Automotive Mechanic I, Exam No. 60-78 Intra, there were a total of 145 questions. One hundred and one questions answered correctly equaled 70 percent. Complainant answered 97 questions correctly.

In a letter dated November 30, 1978 to Edward Harada, Chief Engineer, County of Hawaii, Complainant cites the County of Hawaii's Civil Service Rules and Regulations, Rule 4.13, "Promotions Without Examinations," and sets forth his reasons as to why he qualifies under each condition of Sec. 4.13 to be promoted without examination. Complainant concludes his letter with: "I here-by [sic] respectfully request that I be promoted without examination to the position."

A note of clarification is necessary here. Bd. Ex. 1, in the CU case, consists of numerous letters which Complainant attached to his letter of July 5, 1979 to this Board. In orally listing the contents of said exhibit at the hearing (Tr. 6-7), Chairman Hamada inadvertently omitted a letter dated January 2, 1979, from Mr. Harada to Complainant. Mrs. Janet Silva and counsel for Respondents Employer and Union were duly notified by telephone of this omission. There were no objections.

Said letter of January 2, 1979 states in full:

In reply to your letter dated December 29, 1978¹ asking consideration for promotion to the vacant Automotive Mechanic I position without examination, I am denying your request for the following reasons:

¹There appears to be a discrepancy in the date of Complainant's letter of November 30, 1978 to Mr. Harada. In the xeroxed copy of said letter in Bd. Ex. 1 in the CU case, two lines are drawn through the November 3. . . of "November 30, 1978." Presumably the letter of December 29, 1978 which Mr. Harada responded to was similar, if not identical, to the above-cited letter of November 30, 1978. The December 29 date is more probable, however, since Complainant did not take the exam until December 19, 1978, and he did not receive notification of the results until December 28, 1978. Furthermore, in a subsequent letter of May 23, 1979, to the Union, also part of this Bd. Ex. 1, Complainant refers to a letter of December 29, 1978 to Mr. Harada requesting noncompetitive promotion.

1. The examination process would offer equal opportunity to all interested applicants.
2. This is in conformity with our departmental as well as County-wide policy.

Your understanding of our position in this matter will be appreciated.

On December 27, 1978, Complainant filed a grievance with Ann Delos Santos of the Hilo UPW.

By letter dated December 29, 1978 to Edward Silva, Complainant lodged a complaint that "[t]here were approximately 15 or more questions not in relation to the test," and requested an opportunity to be heard.

On January 15, 1979, Complainant wrote to Mr. Silva a letter identical to the previously cited letter of November 30 or December 29, 1978, with an additional citation of Section 16.06(a), requesting promotion without examination.

By letter dated January 18, 1979, Mr. Silva answered Complainant's two letters, in brief: (1) the 15 problems on diesel engines were job related; there were one or two debatable problems, but even if they were deleted, Complainant would still not achieve a passing score; (2) citing Section 76-23, HRS, he sustained Mr. Harada's denial of promotion without examination. Mr. Silva also advised Complainant of his right to appeal to the Civil Service Commission.

By letter to Mr. Harada dated January 25, 1979, referencing the Step 2 level of grievance, UPW Hawaii Division Director Jack Konno asked for reconsideration of the Union's request for a noncompetitive promotion for Complainant.

By letter dated February 14, 1979 to Mr. Konno, Mr. Harada referred to the Step 2 meeting held in his office on February 9, 1979, attended by Mr. Konno, Complainant and

himself, to discuss the grievance in accordance with Section 15.15 of the Blue-Collar Nonsupervisory Bargaining Unit Agreement. Mr. Harada made the following conclusions: (1) under Section 16.07 of the contract, the Department of Personnel Services determined the appropriateness of the examination in question; (2) under Section 16.06, which gives Employer the option to make promotions competitive, Employer exercised this right "in conformity with [its] policy of requiring examination for promotions to positions requiring technical skills."

By letter dated February 20, 1979 to Jack Keppeler, Managing Director, County of Hawaii, Mr. Konno appealed the Step 2 decision rendered by Mr. Harada.

By letter dated May 17, 1979 to Mr. Konno, Mr. Keppeler sustained Mr. Harada's decision.

On May 21, 1979, Mr. Konno sent Mr. Keppeler's decision to Complainant and advised him that his grievance was being submitted for review and consideration to the Union's Arbitration Committee.

On May 23, 1979, Complainant wrote a chronology of his case in a letter addressed to Messrs. Henry Epstein, Don Dumont, Kiyoshi Nagata, Jimmy Brown and Jimmy Toledo, members of the Arbitration Committee, and requested that his grievance proceed to arbitration.

Henry Epstein, State Director of UPW, testified that the Arbitration Committee's vote was five to zero not to take the case to arbitration (Tr. 14).

On June 22, 1979, Edward Silva, pursuant to Complainant's inquiry, sent him the results of a second test Complainant took for Automotive Mechanic I, Exam No. 14-79

Intra. There were a total of 130 questions. Seventy-nine questions answered correctly equaled 70 percent. Complainant answered 76 questions correctly.

CONCLUSIONS OF LAW

In Case No. CE-01-53 against Employer, the issue before the Board is whether Employer is required to grant Complainant a noncompetitive promotion. The Board concludes that Employer is not so required. In Case No. CU-01-36 against UPW, the issue is whether the Union breached its duty of fair representation to Complainant when it refused to proceed to arbitration with his grievance against Employer. The Board concludes that UPW did not breach this duty.

The charges in both cases arise from Employer's refusal to grant Complainant a noncompetitive promotion.

Complainant contends that he is entitled to a non-competitive promotion under Section 16.06(a) of the bargaining contract which states as follows:

When making promotions, one of the following options shall be utilized:

1. Noncompetitive promotion
2. Intra-departmental competitive promotion
3. Inter-departmental competitive promotion

Complainant's belief that the inclusion of "noncompetitive promotion" in the foregoing list gives him the right to such promotion is erroneous. Section 16.06(a) gives the employer three options when making promotions. "Option" is defined as the right, power, or liberty of choosing, or the exercise of such right; discretion; liberty to elect between alternatives. *Norwood v. Adams*, Tex. Civ. App. 51 S.W.2d 625, 626. Thus, the employer may promote by one of the following methods:

(1) noncompetitive promotion, (2) intra-departmental competitive promotion, or (3) inter-departmental competitive promotion. While he must utilize one of the three methods, as ". . . one of the following options shall be utilized:" (emphasis added), the option, or choice, of which means to use lies with the employer. Employer in this case chose to use competitive examination "in conformity with our departmental as well as County-wide policy." (Bd. Ex. 1 in CU case, letter from Edward Harada to Complainant, dated January 2, 1979.) Even the Union conceded Employer this right: "We are not disputing the right of the appointive authority to determine the method through which a promotion will be made." (Bd. Ex. 1 in CU case, letter from Jack Konno to Edward Harada, dated January 25, 1979.)

Complainant also cited portions of Section 76-23, HRS, which read:

All vacant civil service positions shall be filled in the manner prescribed in this part. . . .

An appointing authority may fill a vacant position in his department by promoting any regular employee in the department without examination. . . . (Emphasis Complainant's)

Here also, contrary to Complainant's position, promotion without examination is optional with the employer or appointing authority. Complainant has overlooked the discretionary "may" in: "An appointing authority may fill a vacant position in his department by promoting any regular employee in the department without examination. . . ." (Emphasis added) Well-recognized rules of statutory construction establish that while the word "shall" connotes mandatory action, the word "may" indicates permissiveness (Court's emphasis) Cannizzo v. Guarantee Ins. Co., 53 Cal. Rptr. 657, 658-59 (1966).

"may" is permissive when used in a statute, especially where "shall" appears in close juxtaposition in other parts of the same statute. Scanlon v. City of Menasha, 114 N.W.2d 791, 795 (1962).

Rule 4.13 of the Rules and Regulations on Civil Service and Compensation of the County of Hawaii provides:

4.13 Promotions Without Examinations.

- a. A promotion without examination may be made under the following conditions:
 - (1) The employee to be promoted is a regular employee of the County.
 - (2) The promotion is to a higher class in the same or a related series.
 - (3) The employee meets the minimum qualification requirements of the higher class.
 - (4) When there is no material difference in the qualifications of the employees who are interested, the employee with the longest service in the County merit system shall receive first consideration.
 - (5) The employee has not received a promotion without an examination during the preceding year.

In his letter of November 30, 1978 or December 29, 1978 (Bd. Ex. 1 in CU case), Complainant set forth what he believed to be his qualifying status under each of the five conditions of Rule 4.13, which, in his view, would require Employer to promote him without examination. But again, he overlooked the discretionary "may" in: "a. A promotion without examination may be made under the following conditions. . . ." (Emphasis added) Therefore, he errs in his belief that under Rule 4.13 he has a right to a promotion without examination.

A promotion without examination does not exempt an employee from examination altogether. Rule 4.3-c of the

County of Hawaii Rules and Regulations on Civil Service and Compensation provides:

A non-competitive examination is one given to determine the fitness of an applicant for a particular position. The Director (of the Department of Personnel Services, County of Hawaii) may authorize a non-competitive examination in any of the following cases:

- (1) Where the examination is to test an employee who seeks to transfer to a position in a class of the same pay range as his present position but which requires a skill not required in his present position.
- (2) Where the examination is to test an employee whose position has been reclassified to a class which requires a new skill.
- (3) The class for which an examination is to be given calls for special qualifications and training which do not admit of competition.
- (4) For promotion pursuant to Rule 4.13.

Thus, while Rule 4.13 permits promotions without examination, the Director of Personnel Services may still, under Rule 4.3-c, require the employee to take a noncompetitive examination to insure that he possesses the skills necessary for the new position.

Complainant also errs in his belief that he satisfies that condition, under both Section 76-23, HRS, and the County's Rule 4.13, which requires that a promotion without examination be to a position which is in the same or related series as the position held by the employee. Complainant is a lubrication worker. The Automotive Mechanic I class specification states:

1. "Makes mechanical repairs on all types of gasoline and diesel driven automotive equipment. . ."
2. ". . .removes, repairs, overhauls and installs gasoline and diesel engines. . ."

3. "Locate, adjust and repair gasoline and diesel driven automotive equipment. . ."

4. ". . .operate motorized equipment."

(Bd. Ex. 1 in CU case, letter from Edward Silva to Complainant, dated January 18, 1979.)

No evidence was presented that lubrication work is in the same or related series as the above-cited duties of an automotive mechanic encompassing mechanical repairs and related skills.

In view of the foregoing, the Board concludes that it was within Employer's discretion to require a written examination under the circumstances of this case and that this discretion was properly exercised. Therefore, the Board holds for Employer, and the charges in Case No. CE-01-36 are dismissed.

The Board, however, wishes to append a note of criticism to Employer here. Complainant asserted, and Employer did not deny, that he has been temporarily assigned to the mechanic's position at the motor pool since March or May of 1978. The Board feels that in temporarily assigning and keeping Complainant in the position he sought to be promoted to without examination, Employer has acted imprudently.

In Case No. CU-01-36 against UPW, Complainant charged the Union with breaching its duty of fair representation when it failed to arbitrate his grievance against Employer in the above case. The Union's position is that its Arbitration Committee's decision not to go to arbitration was arrived at after due consideration of the facts of the grievance itself and the fact that the Union's past efforts to provide for promotion without examination in the

contract had failed. Therefore, it firmly believed that arbitration would not be successful.

In Decision No. 89, this Board addressed the issue of a union's duty of fair representation to a union member. It cited the case of Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed.2d 842 (1967), wherein the Supreme Court held:

. . . A breach of the statutory duty of fair representation occurs only when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. (Emphasis added) 386 U.S. at 190.

With specific reference to the question of discretionary arbitration, the Vaca court continued:

Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the collective bargaining agreement. . . 386 U.S. at 191.

In its application of Vaca to the case in Decision 89, this Board elaborated:

Under the principles set forth in Vaca, it is clear that SHOPO, as the exclusive representative of employees in bargaining Unit 12, is required by Chapter 89, HRS, to serve the interests of all of its members without discrimination, to act in good faith and to avoid arbitrary conduct. While it is not required under the Unit 12 contract or under Chapter 89, HRS, to take every grievance to arbitration, its processing of each grievance must be done in a fair and impartial manner. Moreover, any of its decisions not to proceed to arbitration must be based on objective, rational criteria.

Vaca emphasized that a union's mere refusal to take a grievance to arbitration does not, in itself, constitute a breach of the duty of fair representation. Similarly, in this case, we believe that the fact that SHOPO ultimately refused to take Complainant's grievance to arbitration is not, without more, a breach of the duty of fair representation.

The issue here is whether or not SHOPO's processing of Complainant's grievance, and withdrawal of its request for arbitration, was arbitrary, discriminatory or in bad faith.

Decision 89 at 17.

Section 15.22 of the collective bargaining agreement in the instant case provides, in pertinent part:

Step 4. Arbitration. If the matter is not satisfactorily settled at Step 3, and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or his representative of its desire to arbitrate within fifteen (15) calendar days or [sic] receipt of the decision of the Employer or his designated representative. (Emphasis added)

It is clear that, under the contract, the decision to proceed with arbitration lies with the Union. Pursuant to this grant of discretion, was the Union's decision against arbitration arbitrary, discriminatory or in bad faith?

UPW State Director Henry Epstein testified that the Arbitration Committee's decision not to pursue Complainant's grievance was based on its belief that arbitration would not be successful. He stated at the hearing:

Well, as I remember the discussion in the Arbitration Committee, I think the committee was sympathetic, and we do believe that people should be promoted without examination once they have proven themselves with an entrance job. But, we have not been able to convince management of it. And, we had to look at the law in the Management Rights Section and we had to look at our contract. And, we discussed the fact that in our negotiations we were trying to improve the contract.

We had proposals about letting the employee decide what kind of examination to have. But, we had proposals about, nobody can come in from outside if a Unit 1 person wants the job. And, we were trying to get those into the contract, but so far we have been unsuccessful.

But, these are the kinds of things we were discussing, and the issue was, did we think we could successfully pursue an arbitration. And, the committee decided no after the discussion. (Tr. 18)

Thus, the Union had made definite attempts in the past to provide for promotion without examination in the contract and had failed. In the Board's opinion, the Union's consequent decision against proceeding to arbitration was neither arbitrary, discriminatory nor in bad faith.

The charges in Case No. CU-01-36 accordingly are dismissed.

ORDER

Case No. CE-01-53, against the Employer, and Case No. CU-01-36, against the Union, are hereby dismissed.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


James K. Clark, Board Member


John E. Milligan, Board Member

Dated: April 2, 1980

Honolulu, Hawaii