

STATE OF HAWAII

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	CASE NO. PD-07-01
)	
MARTIN K. DOUDNA,)	DECISION NO. 174
)	
Petitioner,)	
)	
and)	
)	
UNIVERSITY OF HAWAII)	
PROFESSIONAL ASSEMBLY,)	
)	
Exclusive)	
Representative.)	

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

On December 29, 1981, MARTIN K. DOUDNA [hereinafter referred to as Petitioner or DOUDNA], a member of the faculty at the University of Hawaii at Hilo, filed a Petition for Review of Dues Refund with the Hawaii Public Employment Relations Board [hereinafter referred to as HPERB or the Board]. The petition presented a number of issues and charges constituting objections to the use of statutory payments to the Exclusive Representative for ideological purposes unrelated to terms and conditions of employment. The petition also alleged discriminatory treatment of non-union members by the Exclusive Representative, the UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY [hereinafter referred to as UHPA].

A prehearing conference was held in the instant matter on February 19, 1982 at which time the various charges and issues raised in the Petition were reduced to the following:

1. Whether Petitioner is entitled
(a) to be refunded, under Section 89-4,

Hawaii Revised Statutes [hereinafter referred to as HRS], as amended by Act 180 of the Eleventh Legislature, 1981, his entire pro rata share of statutory payments to the Exclusive Representative, and (b) to donate, in lieu of payment to the Exclusive Representative, an equivalent amount to a charitable organization;¹

2. Whether the Exclusive Representative violated Section 89-13(b)(4), HRS; that is, whether it refused or failed to comply with any provisions of Chapter 89, HRS, in failing to reply to a letter from Petitioner, dated August 20, 1981 (Petitioner's Complaint, attachment 9, Board Ex. 1) in which Petitioner asked for an interpretation of Article IX(K)(2)(H) of the 1981-83 Agreement (Respondent's Ex. 2), regarding tenure evaluation procedures; and

3. Whether Exclusive Representative violated subsection 89-13(b)(4), HRS, in addressing a cover letter transmitted with copies of the 1981-83 agreement for Unit 7 members to "Members of UHPA" rather than "Members of Unit 7" or "Faculty Members" and thereby discriminated against non-UHPA members. Board Order No. 442, dated May 12, 1982, Board Ex. 5.

A hearing on the instant petition was held in Hilo on August 13, 1982. At the hearing, Complainant read a written statement into the record for his case presentation. Dr. J. Norbert Musto appeared as a witness for UHPA and was subject to cross-examination.

Based upon a review of the record and arguments presented in the case, the Board makes the following findings of fact, conclusions of law, and order.

¹This case is brought under Section 89-4, HRS, prior to the enactment of Act 102, Eleventh Legislature, Session Laws of Hawaii, 1982. Act 102 allows employees to pay, in lieu of employee organization dues and initiation fees, an equivalent amount to a charitable fund.

FINDINGS OF FACT

Petitioner MARTIN K. DOUDNA is a member of Unit 7 as defined in Subsection 89-6(a), HRS (Faculty of the University of Hawaii and the community college system) but is not a member of Respondent UHPA.

Respondent UHPA is the Exclusive Representative, as defined in Subsection 89-2(10), HRS, of public employees in Unit 7.

In his presentation at the hearing regarding the three issues in controversy herein, Petitioner advanced the following arguments.

Petitioner asserts that, under his interpretation of the term "ideological" as used in Section 89-4, HRS, as revised by Act 180, and which is taken from the International Encyclopedia of the Social Sciences, virtually all of the activities of UHPA are ideological. Moreover, engagement in these activities is based on a particular view of society and social relationships that distorts reality. Citing examples of UHPA's ideology with which he disagrees, Petitioner referred to UHPA's alleged belief in the use of strikes as a bargaining tactic, UHPA's blaming the University administration for negative promotion and tenure decisions rather than faculty committees involved in such decisions, and UHPA's position that its views coincide with those of the entire faculty. On this basis, Petitioner argues that he is entitled to a refund of his statutory dues payments and a substitution to a charitable donation is warranted. Tr. pp. 8-11.

In his initial presentation, Petitioner did not address the remaining two issues in controversy.

UHPA offered the following in its case regarding the three issues:

1. Request for Charitable Donation in Lieu of Dues.

UHPA submitted into evidence a copy of its "Statutory Dues Rebate Procedure for Non-Members" (Respondent's Ex. 1), which provides procedures whereby objecting employees can obtain refunds of dues used for any cause, program, or activity which is political or ideological in nature, within the meaning of Chapter 89, HRS.

DOUDNA had previously been notified by letter that no rebate was forthcoming with regard to the budget for the 1981-82 fiscal year. Complaint, Attachment 2, Board Ex. 1. However, UHPA submitted into evidence a letter, dated September 20, 1982, from Dr. J. N. Musto, UHPA Executive Director, to DOUDNA, in which Dr. Musto indicated that the 1981-82 UHPA budget had been audited. The audit indicated that no dues had been expended for direct support or services to political candidates, or for contributions to any political or ideological causes unrelated to the terms and conditions of employment. It was found, however, that some staff time was used in support of the UHPA Political Actions Committee. Petitioner's pro rata share of dues spent on paying for such staff time was calculated to be \$1.32. The letter indicated that a check for that amount was enclosed. Respondent's Ex. 4.

Also submitted into evidence were the UHPA Financial Statements for fiscal years 1981 and 1982. Respondent's Ex. 3.

2. Request for Contract Interpretation.

In a letter to UHPA President, Professor Robert Fox, dated August 20, 1981, Petitioner requested an interpretation of contract provisions regarding procedures for tenure and promotion evaluation. (Complaint, Attachment 9, Board Ex. 1). The letter cited contract Article IX(K)(2)(H), regarding tenure evaluation which provides:

When an administrative official disagrees with the recommendation of the TPRC [Tenure and Promotion Review Committee], she/he shall discuss the case with the TPRC before making her/his recommendation. Respondent's Ex. 2, p. 24.

DOUDNA asked, by his letter, whether this provision also applies to promotion procedures.

The letter also cited Article XI(B)(2), regarding promotion, which states:

Procedures and provisions described in Article IX, K.2, paragraphs f through n, shall apply for promotion as well as tenure, except as otherwise provided in this Article. Respondent's Ex. 2, p. 29.

As DOUDNA deemed applicability of Article IX(K)(2)(H) to promotions to be unclear, he requested an interpretation from Professor Fox.

At the hearing, Dr. Musto indicated that the explicit contract language provides that consultation applies to both tenure and promotion procedures. The answer to Petitioner's question, Dr. Musto thus asserted, is in the contract. Tr. p. 33. Dr. Musto further alleged that Dr. Fox had discussed the matter with Petitioner. Petitioner in reply stated that Dr. Musto's recollection in this regard was incorrect. Tr. pp. 33, 41.

3. Contract Cover Letter.

Dr. Musto further stated that upon issuance of the UHPA 1981-83 contract with the cover letter beginning "Members of UHPA," no one else within the bargaining unit objected to the form of the salutation. Tr. p. 34.

CONCLUSIONS OF LAW

1. Pro Rata Share of Statutory Payments.

a. Entitlement to Refund.

Petitioner requests full refund of his pro rata share of annual dues to the union on the basis that virtually all of UHPA's activities are ideological. Subsection 89-4(a), HRS, provides:

[§89-4] Payroll deductions. (a) Upon receiving from an exclusive representative a written statement specifying the amount of regular dues required of its members in the appropriate bargaining unit, the employer shall deduct this amount from the payroll of every member employee in the appropriate bargaining unit and remit the amount to the exclusive representative; provided that the employer shall make the deduction only upon written authorization from a member employee, such authorization being executed any time after his joining an employee organization. Additionally, the employer shall deduct an amount equivalent to the regular dues from the payroll of every nonmember employee in the appropriate bargaining unit, and shall remit the amount to the exclusive representative; provided that the deduction from the payroll of every nonmember employee shall be made only for an exclusive representative which provides for a procedure for determining the amount of a refund to any employee who demands the return of any part of the deduction which represents the employees' pro rata share of expenditures made by the exclusive representative for activities of a political and ideological nature unrelated to terms and conditions of employment. If a nonmember employee objects to the amount to be refunded, he may petition the

board for review thereof within fifteen days after notice of the refund has been received. If an employee organization is no longer the exclusive representative of the appropriate bargaining unit, the deduction from the payroll of non-members shall terminate. [Emphasis added].

The Board finds Petitioner's request to be without merit as he has failed to establish that his pro rata share went towards the support of "activities of a political and ideological nature unrelated to terms and conditions of employment," as that phrase is used in Subsection 89-4(a). The Board is not persuaded by Petitioner's argument regarding the "ideological" nature of UHPA's activities as outlined in the findings of fact, supra. Moreover, while Petitioner relies upon a broad definition of "ideology," he fails to demonstrate that these allegedly proscribed activities are unrelated to terms and conditions of employment. Further, Petitioner failed to argue with any sufficient degree of particularity which and how UHPA expenditures were unconnected to terms and conditions of employment. Hence, we are of the opinion that Petitioner has failed to demonstrate that he is entitled to a refund of his statutory payments.

b. Donation to Charity.

Assuming arguendo, Petitioner was entitled to a full refund, he further requests that he be allowed to contribute his annual statutory dues to a charity mutually agreed upon by UHPA and himself. Complaint, Attachment 5, Board Ex. 1. He relies upon Equal Employment Opportunity Commission Guidelines on Discrimination Because of Religion, which in pertinent part provide:

(2) Payment of Dues to a Labor Organization.

Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices to [sic] not permit compliance with such a provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization. Complaint, attachment 5, attachment, p. 72613, Board Ex. 1.

The guidelines define "religious practices" as including "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." Complaint, Attachment 5, Attachment, p. 72612, Board Ex. 1.

The Board concludes, however, that under the applicable provisions of Section 89-4, HRS, Petitioner cannot legally make a charitable donation in lieu of statutory dues payments. All rights and privileges regarding the use and payment of statutory dues are set forth in Section 89-4, HRS. As the applicable statute did not provide for the disposition of statutory dues that Petitioner seeks, the Board is unable to grant such relief.² Moreover, contrary federal guidelines are not controlling here as they are permissive in wording. Guidelines of the Equal Employment Opportunity Commission do not have the force of law. Bartmess v. Drewys U.S.A., Inc., 444 F.2d 1186, 1190, (7th Cir. 1971), cert. den., 404 U.S. 939, 92 S.Ct. 274, 30 L.Ed.2d 252 (1971).

²Act 102 of the Eleventh Legislature, 1982, as noted supra in note 1, allows employees to pay, in lieu of employee organization dues and initiation fees, an equivalent amount to a charitable fund. Act 102 reads:

2. Request for Contract Interpretation.

Petitioner alleges that UIPA refused or failed to comply with provisions of Chapter 89, HRS, by failing to reply to his letter requesting contract interpretation.

(Footnote 2 continued)

[§89-3.5] Religious exemption from support of employee organization. Notwithstanding any other provision of law to the contrary, any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body or sect which has historically held conscientious objections to joining or financially supporting employee organizations shall not be required to join or financially support any employee organization as a condition of employment; except that an employee may be required in a contract between an employees' employer and employee organization in lieu of periodic dues and initiation fees, to pay sums equal to the dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of title 26 of the Internal Revenue Code, chosen by the employee from a list of at least three funds, designated in the contract or if the contract fails to designate any funds, then to any fund chosen by the employee. If an employee who holds conscientious objections pursuant to this section requests the employee organization to use the grievance-arbitration procedure on the employee's behalf, the employee organization is authorized to charge the employee for the reasonable cost of using the procedure. [L 1982, c 102, §1] [Emphasis added].

While Petitioner's claim did not arise under the above provision, he would not prevail even if it did so. Petitioner does not claim, and has not proven in accordance with the statutory requirements, that he is a member of a "bona fide religion, body or sect which has historically held conscientious objections to joining or financially supporting employee organizations." As such, he is not entitled to the requested relief under the present statutory provision.

Petitioner requested an interpretation of provisions regarding procedures for tenure and promotion evaluation (Complaint, Attachment 9, Board Ex. 1). DOUDNA asked whether the consultation provisions of Article IX(K)(2)(H), cited supra, apply to promotion procedures.

At the hearing, Dr. Musto indicated that the contract language, Article XI(B)(2), explicitly provides that consultation applies to both tenure and promotion procedures. The answer to Petitioner's question, Dr. Musto thus asserted, is clearly in the contract. Tr. p. 33. Dr. Musto further stated that Dr. Fox had discussed the matter with Petitioner. Petitioner in reply stated that Dr. Musto's recollection in this regard was incorrect. Tr. pp. 33, 41.

The Board concludes that Petitioner failed to prove by a preponderance of evidence that UHPA's failure to reply in writing to his request for contract interpretation amounted to discrimination in violation of Sections 89-3 and 89-13(b)(4), HRS. The evidence is inconclusive as to whether Petitioner received a verbal reply to his written inquiry. Musto testified that DOUDNA received a verbal answer from Fox while Petitioner denied it. Findings of Fact (2). The Board thus concludes that no prohibited practice resulted from UHPA's failure to answer Petitioner's letter as Petitioner did not sufficiently rebut Musto's statement that a verbal reply was furnished and because the answer to his question was apparent from the face of the contract. As the charging party, Petitioner has the burden of proving his allegations by a preponderance of the evidence. Administrative Rules, Section 12-42-8(g)(16). Petitioner failed to prove that the lack of written response

was more than a lack of formality in communication on UHPA's part, and that any alleged denial of Chapter 89 rights was wilful. Aio, 2 HPERB 458, 491 (1980).

3. Contract Cover Letter Salutation.

Finally, Petitioner charges that UHPA violated Subsection 89-13(b)(4), HRS, by addressing the cover letter appearing in copies of the 1981-83 Unit 7 agreement to "Members of UHPA," rather than "Members of Unit 7" or "Faculty Members" and thereby discriminated against non-UHPA members. Board Order No. 442, dated May 12, 1982, Board Ex. 5.

Viewing the matter strictly, UHPA was incorrect in addressing the contract cover letter to "Members of UHPA," as opposed to "Faculty Members" or "Unit Members," as the contract covers all Unit 7 members and not just those who are UHPA members.

The Board concludes, however, that the salutation does not amount to legally recognizable discrimination against non-UHPA members such as would violate Sections 89-3 and 89-13(b)(4), HRS. Although the cover letter was addressed to UHPA members, there was no proof presented that non-UHPA members were in fact discriminatorily denied UHPA's services or that their coverage under the contract was disputed. Moreover, as stated previously, no wilfulness was shown in this case.

ORDER


The Petition and complaints are dismissed.

DATED: Honolulu, Hawaii, July 15, 1983.

MARTIN DOUDNA, Petitioner; and UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY; Exclusive Representative; CASE NO.
PD-07-01
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


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