

STATE OF HAWAII
HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	CASE NOS.: CE-13-65
)	CU-13-39
EDGAR H. W. LUM,)	
)	DECISION NO. 203
Complainant,)	
)	FINDINGS OF FACT, CONCLU-
and)	SIONS OF LAW AND ORDER
)	
EILEEN R. ANDERSON, Mayor)	
of the City and County of)	
Honolulu,)	
)	
and)	
)	
HAWAII GOVERNMENT EMPLOYEES)	
ASSOCIATION, AFSCME LOCAL)	
152, AFL-CIO,)	
)	
Respondents.)	

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

On August 4, 1980, Complainant EDGAR H. W. LUM filed a prohibited practice complaint with the Hawaii Public Employment Relations Board [hereinafter referred to as Board]. Complainant alleged that Respondent Frank F. Fasi [hereinafter referred to as Employer] violated Subsection 89-13(a)(8), Hawaii Revised Statutes [hereinafter referred to as HRS], by suspending him from employment for ten days and dismissing him immediately thereafter.

Additionally, Complainant alleged Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION [hereinafter referred to as HGEA or Union] violated Subsection 89-13(b)(1), HRS, by its refusal to take his discharge grievance to arbitration. Complainant submits

this refusal was wilful, arbitrary, discriminatory, and in bad faith, thus breaching its duty of fair representation.

A prehearing conference was held on August 28, 1980.

After several motions for continuance of hearing, counsel for Complainant made a motion to withdraw as counsel on February 20, 1981. Complainant was then granted ample time to secure substitute counsel. Therefore, on October 27, 1981, the Board issued a notice rescheduling a prehearing conference and hearing.

After numerous motions for continuance of hearing by all parties, a hearing on this matter was conducted on May 10, 11, 12, 13, 16, July 25, October 4, 5, 6, 7, 13 and 20, 1983.

Briefs by all parties were submitted on March 9, 1984. On March 28, 1984, Complainant filed a Motion to Amend Prohibited Practice Complaint. Respondents HGEA and EILEEN R. ANDERSON submitted Memorandum in Opposition to said motion. The Board denied the motion on June 29, 1984.

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

FINDINGS OF FACT

Complainant EDGAR H. W. LUM was for all times relevant, employed at the Department of Finance, City and County of Honolulu, as an Internal Control Analyst II and a member of Unit 13 as defined in Subsection 89-6(a), HRS.

Respondent Frank F. Fasi is and was, for all times relevant, a public employer as defined in Subsection 89-2(9),

HRS, and the appointing authority at the time of Complainant's dismissal. Thereafter, EILEEN R. ANDERSON succeeded Fasi as Mayor and has been substituted as the public employer.

Respondent HGEA is and was, for all times relevant, an employee organization and the certified exclusive representative of employees in bargaining unit 13 (Professional and scientific employees, other than registered professional nurses) as defined in Subsection 89-2(12), HRS.

By letter dated July 18, 1979, Complainant was notified that he would be suspended from his job for ten working days upon receipt of the notice. Further, upon termination of the suspension, he would be dismissed from employment with the Department of Finance, City and County of Honolulu.

The letter reads:

Dear Mr. Lum:

For the good and efficiency of the Department of Finance, you are hereby suspended without pay from your employment as an Internal Control Analyst II with the City and County of Honolulu for a period of ten (10) working days effective upon your receipt of this notice. At the termination of the 10-day suspension, you are dismissed from employment with the Department of Finance, City and County of Honolulu, for the following reasons:

1. Excessive use of sick leave. The employer has the right to expect his employees to be able bodied, healthy and fully capable of doing work assigned him adequately. Your sick leave record leaves little doubt that you are not a responsible employee, and we see no expectation that the situation will improve overall.

2. Inability to perform assignments. On numerous occasions you have complained of mental stress, dizziness and headaches which prevent you from doing your assigned work.
3. Nonproduction of assigned work. Your work record is abundant with examples of lack of work production, loafing and a lackadaisical, uncaring attitude toward your work.
4. Attitude toward your job. You have exhibited the attitude of a disgruntled employee toward your employer, your work and your fellow employees which transmits the image of an unhappy, dissatisfied, uncooperative and unproductive employee.

I realize that dismissing an employee is an extremely severe act, however, I also know that you have been counseled by numerous people in and outside the City in an effort to improve your work performance. Chief among these persons are Messrs. Arlie Carson, Ernest Hara and Alex Oka of the Department of Finance, and the counseling covered the area of work production and misuse of sick leave. The Department has referred you to Mr. Andy Lyons, Civil Service Troubled Employee Program; Dr. Thomas Chang, City & County of Honolulu Physician; and Dr. H. G. Hamadani, Psychiatrist, Hawaii State Hospital, for observation and assistance to your general well being, all without any visible improvement either in work habits or health.

The Department has warned you repeatedly about your lack of work production, both orally and in writing, including a written reprimand and a 10-day suspension without any results or improvement in work production on your part.

Thus, we are left with no alternative but to dismiss you from your position in the Department of Finance.

We are fully aware of the possible repercussions that this action may have due to the discrimination charge that you have

filed with the Federal Equal Employment Opportunity Commission. We are cognizant of the fact that this action may have the appearance of being a retaliating measure resulting from your filing of the charge. However, the events leading to this dismissal action was set in motion long before the charge was filed. Furthermore, your recent failure to perform tasks assigned by your supervisor subsequent to the filing of your discrimination charge, also forms a basis for this action. We feel strongly that we can substantiate the fact that this action of suspension and dismissal is not of a retaliatory nature and that you have never been discriminated against by this Department.

Sincerely,

/s/ Samuel T. Hata

Samuel T. Hata
Director of Finance

Complainant [hereinafter referred to as Comp.] Ex. 29.

Complainant testified that he was first employed by the City and County of Honolulu in 1967 as an Auditor II. For the 12 years he was in City employ, he remained in the same position. Complainant felt he did not receive a promotion during that time because his supervisors did not like him. Vol. I, pp. 14-22.

Lum testified that during the initial years of his employment, the relationship between his supervisors, fellow co-workers and himself was "average to good." However, he stated that about one year later, his supervisors (Alexander Oka, Ernest Hara) began to "harass" him. He believes this was the result of his not buying political tickets and that they did not like his "lifestyle." Id. at 22-23.

Lum further testified that in the organizational chart, there were two Auditor I positions occupied by Randy Young and

Hideo Kubo. On certain projects, he gave them assignments and directly supervised them. In later years, when applying for promotions, he experienced disagreements with his supervisors whether or not the Auditor I's were under his supervision. Id. at 24-26.

Complainant related that approximately four years after he commenced employment with the City, the organizational structure changed in that the two Auditor I's were promoted above him. They were then on an equivalent rank as Lum's immediate supervisor. Id. at 28-29.

Lum believed that he was harassed by administrators because he refused to buy campaign fund tickets for political events. He also felt that that was a reason he was not being promoted although he had applied approximately 20 times for promotions. He was also aware that other employees were asked to buy or sell political campaign tickets. Lum also testified he understood the State law as saying that people cannot be disciplined or otherwise treated differently because they do not buy political campaign tickets. Additionally, he received this impression from HGEA informational meetings. Moreover, he complained about this matter to the HGEA, but to his knowledge, the Union did not support his complaint. Id. at 42-43, 53-54, 66.

Lum further believed that his immediate supervisor, Ernest Hara, disliked him because of his lifestyle, inter alia, the shoes he wore, the clothes he wore, where he ate lunch, the kind of cola he drank, and the car he drove. He got this

impression from the comments made to him by Hara and other co-workers. Lum felt that others were jealous of him because aside from Alexander Oka, he was earning the highest salary due to his seniority and his previous work for the State. Because of his seniority, he was earning more than Hara and, owing to this fact, Hara was complaining that Lum should do more of the complex assignments. Id. at 60-61.

Lum testified that during his years of service for the City, Oka asked him to resign and/or to take a demotion. Moreover, Hara asked that he be transferred out of the department. Id. at 64-65.

At one point in time, Lum was offered a position at the Liquor Commission. However, he refused to accept it because he felt the position was temporary and it meant he would be downgraded in title although his salary would remain the same. Vol. II, pp. 176-78.

With respect to his requests for promotion, Lum wrote to then-Mayor Fasi informing him that he had not been selected for promotions over the years. (Comp. Ex. 9) The Mayor responded to the effect that he had confidence in his Finance Director's selection of employees for the various positions. Lum also solicited the help of his Union in filing an Equal Employment Opportunity Commission complaint. (Comp. Ex. 10) Additionally, he filed grievances with the Union regarding his promotion denials. In one instance, the Union took the grievance to the level short of arbitration and then did not pursue it further.

In a letter dated July 13, 1976, from Oka to James Sakai, Finance Director, Oka recommended that Lum be dismissed from the department. (Comp. Ex. 12) Oka had informed all auditors of a preliminary meeting regarding a Kukui Plaza project audit. However, Lum arrived at the meeting ten minutes late. He testified that he had asked his supervisor, Hara, for permission to go to the bank to cash a check before payment could be stopped on it, while promising to return in time for the meeting. Based upon his late arrival, Oka recommended his dismissal. In fact, Lum was not dismissed. Vol. I, pp. 71-72.

For the 1972-1973 job evaluation period, Lum received an unsatisfactory performance rating. He filed a grievance with the HGEA. By letter dated September 8, 1976 from James Sakai to Melvin Higa of HGEA, the subject performance evaluation report was removed from Lum's personnel file. (Comp. Ex. 13)

Lum expressed confusion regarding his responsibilities toward specific assignments. Most of the disagreements he had with his supervisors arose because he felt his supervisors "expanded" the assignment after he had completed it. His confusion was also compounded by receiving job assignments directly from Oka. Lum felt he should have received the assignments from Hara, his immediate supervisor. This multiple supervision, he believed, created much confusion. Additionally, the multiple supervision confusion was expanded with regard to preparing time sheets. Lum testified that Arlie Carson, then-Executive Assistant to the Director of Finance, would communicate directly with

him expressing dissatisfaction with Lum's time sheets. Id. at 75-83.

To Lum's knowledge, there was no standard method in which employees were to keep their time sheets. He once asked Oka about the purpose of keeping time sheets and was told that Oka wanted to know each employee's current assignments. Lum understood this to mean the time sheets were not kept for job performance evaluation purposes. However, he said, Carson would object to the way Lum's time sheets were recorded. One example involved the holiday season. On his time sheet, Lum allocated one-half day for an office party, and was criticized by Carson. Lum also looked at other employees' time sheets and saw that others had allocated the same to working time. Id. at 84-86.

Lum filed a grievance with the HGEA regarding his time sheet record-keeping. As the memoranda from Carson were not disciplinary in nature and were not part of Lum's personnel records, the matter was not further pursued. Id. at 99.

During his tenure at the Department of Finance, Lum was criticized several times for taking excessive sick leave. On two separate occasions, management required Lum to provide doctor certification for each sick leave. Lum filed a grievance which resulted in the Union requesting the directive be rescinded and that the department comply with Article 35 of the collective bargaining agreement. Article 35 requires a doctor's certificate for sick leave absences of five or more consecutive work days. Id. at 105; Comp. Ex. 22.

On July 18, 1979, Lum received a letter from Sam Hata, Director of Finance, informing him of a ten-day suspension, immediately followed by dismissal from the department. Lum immediately grieved the matter and the Union wrote a letter to Hata contending the department did not have proper cause to suspend Lum and did not provide him with proper notice of dismissal.

(Comp. Ex. 24) The Union took the matter to Step 3 of the grievance process and maintained the same position with respect to the Civil Service Director, Harry Boranian. (Comp. Ex. 25) Following this step, the Union did not take the matter to arbitration. Although two Union agents recommended arbitration of the matter, the recommendation was rejected by other Union officials. Lum discussed the matter with Chester Kunitake, Contracts Officer for HGEA, and was told the Employer was justified in dismissing him. Lum then received a letter from David Trask, Executive Director of HGEA, informing him that the Union would not take the matter to arbitration. Lum asked both Trask and Russell Okata, then-Deputy Director of HGEA, to reconsider the decision of not taking the case to arbitration. Vol. II, p. 203.

Throughout his employment with the City, Lum testified he filed approximately six written grievances against his employer. In all of those grievances, he was assisted by HGEA. Id. at 192.

Ernest Hara, then-General Control Analyst and immediate supervisor of Lum, testified he felt Lum was a disgruntled, unhappy employee. Thus, he was difficult to supervise because of his attitude toward work, his fellow employees, and his employer.

Moreover, he needed frequent prodding to get started on a job and close supervision to complete the job: Id. at 274-75.

Hara testified that he gave work assignments to Lum and to his recollection, Oka did not give direct assignments to Lum unless it was a special assignment. Many of the assignments given to Lum were routine concession audits which Lum accepted readily. In late 1978, Lum indicated he wanted an opportunity to handle a more difficult project. Thereafter, he was assigned a compliance audit for St. Francis Hospital. Id. at 276-78.

Hara felt that not only was Lum a slow starter, but he spent excessive time unproductively, i.e., reading magazines, inner-office circulars, daydreaming, and attending to personal matters. Id. at 280.

On the first job performance evaluation that Hara completed as Lum's supervisor (1972-73 JPR), he rated Lum as "unsatisfactory" in all categories. Lum filed a grievance. Hara testified the grievance procedure was lengthy and the result was disappointing as the rating was overturned or rescinded by his superiors. Thereafter, in subsequent evaluations, he rated Lum as "meeting minimum requirements" to avoid the time-consuming, lengthy and costly grievance process although he believed this "satisfactory" rating was inaccurate. To show that he did not find Complainant's performance satisfactory, Hara wrote comments on the JPR indicating Lum needed to improve his work habits and attitude, and to be more productive. Generally, Lum would disagree with these comments and indicated such on the JPR. Id. at 294-303; Employer Ex. 13.

Arlie Carson, then-Executive Assistant to the Director of Finance, testified that during all times relevant to this case, he handled all personnel matters on behalf of the department. His duties included approving all transactions regarding labor relations, dealing with the union and civil service, recommending promotions and handling disciplinary actions. Vol. IV, p. 464.

During his 12 years at the Department of Finance, he estimates having met with Complainant approximately 300 times. These meetings revolved around Complainant's opinion that he was being treated unfairly by his supervisors, and that he was under mental stress. Id. at 466.

Sometime in the early 1970's, owing to Lum's claim of mental stress, Carson referred him to the City doctor for an examination to see if he had a medical problem. The doctor could not find anything wrong. Carson also referred Lum to the State psychiatrist for an examination. Carson recommended these examinations because Complainant took "an awful lot of sick leave and his supervisor and co-workers were unhappy with him, his attitude, and he was not doing the job, the assignments that he was given." Id. at 471-72.

Another attempt Carson made to remedy the problem was recommending Lum to the City's Troubled Employees Program. Lum went for a first visit on work time. Carson testified that subsequent participation in the program is generally conducted on the employee's time. It was recommended that Lum return for further visits. Lum told Carson that he would not return to

the program if he had to use his own time. Thereafter, Carson authorized Lum to participate in the program on City time because he felt that if the situation was resolved, it would be worth it. However, Carson believed the situation did not improve. Id. at 472-73.

Carson attempted to effect a transfer for Complainant to other departments including the Honolulu Police Department, Department of Transportation and the Liquor Commission. He testified that the agreement with respect to the latter position as a fiscal officer was if Lum could do the job, he would suffer no change in status. If not, the position would be downgraded but "red circled" meaning there would be no loss in pay initially. However, Lum declined the offer because he felt he had more influence and power in the position he occupied. Carson testified the Union was also working with management to resolve the matter. At one point in time, he testified, the Union asked him to have a third party judge Complainant's work. However, Carson was unable to fund the suggestion. Instead, he compiled work completed by Complainant and three other analysts in the division, removed their names from the assignments, gave it to a Certified Public Accountant and asked her for her opinion. This was done on a gratis basis. Based on a discussion with this Certified Public Accountant, Carson concluded Lum's work was sloppy and incomplete although the result was accurate. Id. at 482-83; 487-90.

In May or June 1979, Oka called Carson to discuss Lum's refusal to perform a fiscal inventory of the Parks and Recreation

storeroom. Carson told Oka to document the insubordination complaint and forward it together with recommendations to correct the situation. Carson then conducted an investigation of the incident. He testified he did not have a need to review Lum's disciplinary record because he knew it by heart. In April 1973, Lum was given a reprimand for excessive use of sick leave. In 1975, upon Carson's recommendation, Lum was to be dismissed for not doing his assignments. However, David Trask, HGEA Executive Director, intervened and asked James Sakai, then-Director of Finance, to give Lum another chance. The request was granted. Carson felt there was no appreciable improvement in Lum's demeanor. Id. at 492-96.

In 1976 and 1977, Complainant used a large amount of sick leave. In November 1978, Complainant was suspended for ten days for excessive use of sick leave, excessive use of working time to accomplish personal business, and malingering. (Employer Ex. 24) The Union grieved the matter but the City was sustained at Step 3. However, the issue did not proceed to arbitration. Id. at 495-98.

On July 18, 1979, Lum was notified by letter from Sam Hata that he was suspended for ten days followed by dismissal from employment. (Comp. Ex. 29) Carson drafted the notice and recommended dismissal based on excessive use of sick leave, inability to perform assignments, nonproduction of assigned work, and attitude towards the job. As Lum had been suspended once before, Carson felt dismissal was warranted. Id. at 516-17.

Davis Yogi, Contracts Specialist with HGEA, testified that he worked directly with Complainant regarding his discharge grievance. Step 1 of the grievance process was waived. At Step 2, the Union maintained there was no cause for discipline. As the grievance was denied at this point, the Union proceeded to Step 3, an appeal to the Civil Service Commission. The Union focused on the sick leave issue using a double jeopardy defense. Yogi believed that if that argument prevailed, the remaining charges could be dropped. However, the grievance was similarly denied at Step 3.

Yogi recommended proceeding to arbitration because the Union still did not know the totality of the Employer's case and he believed Complainant would sue the Union for breach of the duty of fair representation otherwise. Yogi also theorized the Union could advance a double jeopardy defense for the excessive sick leave charge. In the long run, Yogi felt it was more economical to take the case to arbitration. Vol. XI, pp. 1018-33.

Chester Kunitake, Contracts Officer for HGEA, testified that he was familiar with Complainant's discharge grievance. After Yogi submitted his recommendation on the matter, Kunitake "did whatever investigation" he "felt was necessary," then prepared his own recommendation for the executive director (Trask). Kunitake recommended denial of arbitration in this matter. Vol. XII, pp. 1111-13; 1116.

Kunitake stated that from 1975-1979, the Union handled 16 cases for Lum, either informally or through the formal grievance procedure. The grievances included job performance evaluation grievances, promotion grievances, classification grievances, reorganization grievances, sick leave grievances and discipline grievances. Of these 16 cases, the Union withdrew eight cases because it felt the cases were weak on merit. Of the remaining eight cases, the Union prevailed in six cases. With respect to the grievances, the Union was successful in those cases involving "strong technical ground." For those cases that were weak "on merits," the Union withdrew from those grievances. However, Kunitake was not personally involved in these cases. Id. at 1128-29, 1187.

Kunitake consulted this past grievance file in deciding whether or not HGEA would pursue arbitration in the instant matter. Id. at 1129.

During March-June 1980, Lum made four requests to HGEA personnel to reconsider their decisions not to take the case to arbitration. Id. at 1140. Each request was denied. Id. at 1119, 1134-35; HGEA Exs. 8, 9, 10.

Kunitake had known of Complainant since 1972 when Complainant had a problem with his job performance rating. He was personally involved only in that grievance although as classification officer, Kunitake was often consulted regarding questions on rules and regulations with respect to Complainant's various grievances. Id. at 1142.

CONCLUSIONS OF LAW

Complainant alleges that Respondent Employer violated Subsection 89-13(a)(8), HRS, by suspending and subsequently dismissing him from employment without proper cause.

Additionally, Complainant alleges Respondent HGEA violated Subsection 89-13(b)(1), HRS, by refusing to take his discharge grievance to arbitration. Complainant alleges this refusal was wilful, arbitrary, and in bad faith and thus the Union breached its duty of fair representation to him.

I. SUBSECTION 89-13(b)(1), HRS, VIOLATION

We first consider Complainant's charge that the Union breached its duty of fair representation to him.

Subsection 89-13(b)(1), HRS, reads as follows:

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

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

* * *

Complainant poses that during the ten months following his discharge, he attempted to exhaust his grievance/arbitration remedies contained in the collective bargaining agreement. And the Union, during grievance Steps 1-3 maintained his discharge was without proper cause. However, when the grievance reached Step 4, the arbitration level, the Union changed its position for the first time and refused to take the case to arbitration.

In its defense, HGEA maintains that it acted in good faith and in a non-arbitrary and non-discriminatory manner when it refused to take the case to arbitration.

A breach of the duty of fair representation occurs when the exclusive representative's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 824, 857, 64 LRRM 2369, 2376 (1967). "Arbitrary" is defined as "perfunctory." Id. at 191. 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 the 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. [Emphasis added.] (cited in Yamaguchi, 2 HPERB 656 at 675.)

Complainant's charge that the Union breached its duty of fair representation to him will be measured against this standard.

The record documents HGEA's actions following Lum's notice of discharge. Upon receipt of Lum's discharge grievance, Yogi investigated the charges and recommended the Union take the case to arbitration. His recommendation was based upon: (1) a double jeopardy theory; (2) the fact that the Employer had not presented documentary evidence to support its charges; and (3)

the belief that Lum would sue the Union if it did not pursue the matter. HGEA Ex. 4.

Thereafter, his supervisor, Keith Ahue, concurred with the recommendation based upon: (1) the severity of the discipline; (2) a possible suit against the Union by Lum if the case was not arbitrated; and (3) the failure of the Employer to present an "iron-clad" case for termination. Vol. XI, p. 1038; HGEA Ex. 4.

The recommendation was then forwarded to Chester Kunitake. After conducting his own investigation, Kunitake disagreed with the field agent's conclusion and instead, recommended to the Union's Executive Director that the grievance not be arbitrated.

Upon notice of the Union's intent not to take the grievance to arbitration, Lum asked for reconsideration. In fact, he requested reconsideration on four separate occasions, each of which resulted in a negative answer. The Union maintained that on the merits of the charges, it would not have a strong case to present to an arbitrator.

Based on this sequence of events, the Union believes its decision was made in good faith and thus not arbitrary or discriminatory.

Our review of the record, however, compels us to reach a different conclusion.

In his 12 years of employment with the City, Lum filed at least 16 grievances. These grievances encompassed performance evaluation, promotions, classification, reorganization, sick

leave and discipline. Testimony indicated that eight grievances were withdrawn. In at least six of the remaining grievances, the Union was successful in obtaining relief for Complainant. Based on this evidence, it is difficult to understand why the Union did not pursue the discharge grievance to arbitration, especially in light of the fact that discharge is the most severe action that could be taken against an employee and because the Union had pursued, oftentimes successfully, grievances of lesser importance.

In reviewing the charges for termination, we again question the Union's judgment. The evidence shows on July 9, 1979, A. J. Oka sent a letter to Sam Hata recommending Lum's dismissal for refusing to perform duties relating to the Parks Department storeroom audit. Thereafter, on July 18, 1979, Sam Hata informed Lum via letter that he was suspended then dismissed for: (1) Excessive use of sick leave, (2) inability to perform assignments; (3) nonproduction of assigned work; and (4) poor attitude. These charges were couched in very general terms, and the Parks Department storeroom audit was never mentioned.

Upon initial examination of the dismissal charges, Yogi proposed the Employer was punishing Complainant a second time for matters in which he had been previously disciplined. Yogi was also concerned that the Employer would not narrow the general charges to specific incidents or reasons. It was not until a hearing on Unemployment Compensation benefits was held (based upon the subject suspension and dismissal) that the Employer presented a specific case. And, Kunitake made his recommendation of

not taking the case to arbitration after he received the results of the Unemployment Compensation hearing. Kunitake admitted that he did not conduct an independent investigation of Yogi's double jeopardy theory because he felt it was a "technical ground." Instead, he felt this case was weak on its merits.

Based on the evidence presented before the Board, it appears that the first reason for discharge, excessive use of sick leave, was not substantiated. Further, this employee's personnel file contained satisfactory annual job performance evaluations, contrary to the remaining allegations contained in his letter of discharge. Although Hara's testimony indicated these evaluations did not accurately reflect Complainant's actual performance, it is the Board's opinion that this employee had a defensible record according to his personnel file. Moreover, the Union knows that termination is a final disciplinary action. In light of the severity of discipline meted out in this case, the Union knew or should have known that arbitrary handling of this grievance would deprive Complainant of the opportunity to clear his name and to be reinstated through the arbitration process. Thus, the Board finds that the Union's handling of this grievance was contrary to its duty of fair representation guaranteed by Chapter 89.

It has been the Board's position that a prohibited practice under Section 89-13(b), HRS, is committed when a conscious, knowing and deliberate intent to violate the provisions of Chapter 89, HRS, is proven. Aio v. HSTA, 2 HPERB 458 (1980). However, in recent decisions, the Board has found the requisite wilfulness when a violation of the act was a natural consequence

of Respondent's actions. See, Yamaguchi v. Malapit, 2 HPERB 656 (1981).

As the Court stated in Griffin, supra:

A union must especially avoid capricious and arbitrary behavior in the handling of a grievance based on a discharge--the industrial equivalent of capital punishment.

469 F.2d at 183.

In light of the evidence in this case, we conclude the Union acted in an arbitrary and discriminatory manner with respect to this discharge grievance and thus with respect to Complainant. We, therefore, find that the Union committed a prohibited practice thereby violating Subsection 89-13(a)(8), HRS, by not taking the matter to arbitration.

II. SUBSECTION 89-13(a)(8), HRS, VIOLATION

Subsection 89-13(a)(8), HRS, provides:

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

* * *

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

As we have determined that this case should have been taken to arbitration, we decline to entertain the merits of Complainant's allegation against the Employer. In reviewing this prohibited practice charge, we are of the opinion that the issues raised herein should be properly decided by an arbitrator. Therefore, the prohibited practice charge alleging the Employer violated Subsection 89-13(a)(8), HRS, is dismissed.

ORDER

In accordance with the foregoing, the Board hereby orders the following with respect to Respondent HGEA:

- (1) Cease and desist from refusing Complainant access to arbitration;
- (2) Submit this case to arbitration forthwith; and
- (3) Immediately post a copy of this decision on every bulletin board or designated space provided by Employer for union material and leave said decision posted for a period of 60 consecutive days.

The prohibited practice charge against Respondent Employer is dismissed.

DATED: Honolulu, Hawaii, January 18, 1985.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


MACK H. HAMADA, Chairperson


JAMES K. CLARK, Board Member


JAMES R. CARRAS, Board Member

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