

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NOS.: CE-02-91a
)	CE-03-91b
HAWAII GOVERNMENT EMPLOYEES)	CE-04-91c
ASSOCIATION, AFSCME LOCAL 152,)	CE-13-91d
AFL-CIO,)	
)	DECISION NO. 211
Complainant,)	
)	FINDINGS OF FACT, CONCLU-
and)	SIONS OF LAW AND ORDER
)	
DANTE CARPENTER, Mayor of the)	
County of Hawaii,)	
)	
Respondent.)	
)	

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

On January 4, 1985, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO [hereinafter referred to as HGEA], filed a prohibited practice complaint with the Hawaii Public Employment Relations Board [hereinafter referred to as HPERB or the Board] in which it charged that Respondent DANTE CARPENTER, Mayor of Hawaii County [hereinafter referred to as Respondent or Employer], committed a prohibited practice within the meaning of Section 89-13, Hawaii Revised Statutes [hereinafter referred to as HRS]. The HGEA charges that Employer committed a prohibited practice when Harry Boranian, Hawaii County Director of Civil Service [hereinafter referred to

as Boranian], the Employer's alleged agent, wrote and had published an article critical of the HGEA's pursuit of a comparable worth lawsuit in the "Hawaii County Employee News."¹

Respondent denies the HGEA's allegations on the basis that (1) Boranian's article cannot be attributed to the Employer, and (2) that the statements contained in the article in question do not constitute prohibited practices under Chapter 89, HRS.

FINDINGS OF FACT

The HGEA charges that Employer committed a prohibited practice when Boranian wrote and had published an article criticizing the HGEA's pursuit of a comparable worth lawsuit in the "Hawaii County Employee News." The article in its entirety reads:

Straight from the Horse's Mouth
by Harry Boranian, Director of
Civil Service

HGEA'S COMPARABLE WORTH SUIT
A Phoney Issue - A Waste of Dues Money
That Could Be Put to Better Use

The HGEA's comparable worth law suit against the State of Hawaii is a phoney issue with little or no basis in fact. The HGEA must prove that the State of Hawaii deliberately set out to discriminate against women employees by paying workers in traditionally female jobs less money than it paid to men in traditionally male jobs which they claim are of equal worth to the employer.

¹HGEA's allegation of a refusal to bargain in good faith as required by Subsection 89-13(a)(5), HRS, was withdrawn by the HGEA at the prehearing conference.

AFSCME, the mother union of the HGEA and the UPW, is pushing the comparable worth issue on a national basis, and Mel Higa and Russell Okata as dutiful vassals of the great white father of AFSCME in Washington, D. C., are pushing the issue in Hawaii.

The last session of the legislature passed an HGEA supported resolution to create a commission to find out whether such discrimination does exist in Hawaii and to report its findings to the legislature who will then decide if action is needed. This commission, of which I am a member, is chaired by legislative auditor Clinton Tanimura and staffed by highly competent researchers and analysts.

Mel Higa of the HGEA is also a member of this commission. Two meetings have been held at which considerable progress has been made, but Mel Higa is impatient. Why he is so anxious to "gig" the State of Hawaii, which is one of the best public employers in the country from a labor relations standpoint, is not known, but it is obvious to me why AFSCME is pushing the comparable worth issue so hard.

AFSCME is in the middle of one of the greatest organizing drives that the country has ever seen. State, County and Municipal employees are by no means 100% organized. A great proportion of the people AFSCME is trying to organize are women employees, and by pushing the comparable worth issue the union hopes to appeal to this vast number of unorganized women public employees to engage in collective bargaining under the AFSCME banner.

This is a perfectly legitimate organizing technique being used by a well respected public employees organization which has helped thousands of public workers, including those in Hawaii, to improve their wages, hours and other conditions of employment.

Hawaii traditionally has been in the forefront in public employee labor relations. For many years before the public employee collective bargaining law was enacted,

Chapters 76-77 of the Hawaii Revised Statutes, spelled out our civil service laws. In addition to that, Act 188 called for equal pay for equal work and the civil service rules and regulations enacted by the various jurisdictions took a strong stand against discrimination of any kind. Class for class men and women have been paid the same in Hawaii for many, many years.

Do we have discrimination in employment in Hawaii? Yes; but it is not between employees in traditionally male/female occupations. There is rampant discrimination in each of the white collar classes subject to the compensation plan in Chapter 77 because of the law that prevents employees from getting their 5% annual increments in any year that they receive any negotiated pay increase.

There are employees who have been at the "B" step for 6 years. This is discriminatory because every time a general increase is negotiated, they get farther and farther behind, dollarwise, from their fellow employees, who are classified the same, but by a stroke of luck happened to be in longevity when this discriminatory law was passed by the State Legislature.

This is where the HGEA should be spending its time and money; to correct this terrible inequity in pay. In actual dollars received, both men and women working under the same classification suffer a wide discrepancy in actual dollars paid for the same work. Wake up HGEA members. Tell your leaders to concentrate on the doughnut and not upon the hole. Tell them to stop pursuing the "willow-the-wisp" of comparable worth and concentrate on the most important issue facing the majority of HGEA members today--pay inequity within each class. [Emphasis added.]

Through this article, HGEA alleges the Employer interfered with its internal processes in violation of Subsection 89-13(a)(1), HRS.

At the prehearing conference held on February 11, 1985, the HGEA and the Employer made the following stipulations as to fact:

1. The newspaper in question was distributed to employees within the meaning of Section 89-2(7), HRS, by the Employer; and
2. The newspaper article appended to the complaint filed in the instant case is an authentic copy of the article that appeared in the newspaper in question.

At the prehearing, the Board also took official notice that Megumi Kon was the mayor of Hawaii County during November and December, 1984 and that his immediate successor was DANTE CARPENTER.

At the March 13, 1985 hearing, the HGEA and the Employer stipulated that the newspaper in question was distributed by the Employer to its employees during the week of November 26, 1984. Also, the Board took official notice that the HGEA is the exclusive representative of the employees in bargaining units 2, 3, 4, 6, 8, 9, and 13.

Boranian, called as a witness by the HGEA, established that he acts as the mayor's representative for labor relations. Transcript [hereinafter referred to as Tr.], p. 7. He further stated that he administers the training of employees of Hawaii County and administers the County civil service examinations. Tr., p. 7.

Boranian further established that he wrote the article in question, reviewed the final version and caused it to be distributed to the employees of the Hawaii County. Tr., pp. 13-14.

Boranian characterized the statements made in the article as his "opinion" on issues addressed therein. He thus described the article as an editorial. Tr., pp. 13-14. Boranian stated that the HGEA should, instead of pursuing the comparable worth suit, seek to amend the discriminatory clause in Chapter 77, HRS, which prevents annual increments in years where a salary increase is negotiated. Tr., p. 18. Boranian acknowledged that he stated in the article that employees should "tell your leaders to concentrate on the doughnut and not upon the hole" in reference to the HGEA pursuit of the comparable worth lawsuit as opposed to directing attention to the wage structure of government employees. Although this statement was framed in the nature of a directive to the employees to communicate with HGEA leadership, he did not in actuality expect the employees to take specific action to communicate with the HGEA leadership. Boranian stated his primary intent was to inform employees on matters pertinent to their positions as county employees. Tr., pp. 15-16. Boranian thus characterized the statement that the employees should contact their leaders to stop pursuing the "willow-the-wisp" of comparable worth as a rhetorical directive which he could not enforce. Tr., p. 17.

While Boranian framed the statements in the form of directives to the employees to contact the HGEA leadership, he testified that he expected most public employees to read the

article and "forget it." He did not expect HGEA members to descend upon the leadership and pursue the issues contained in his article. Tr., p. 18. He characterized such an expectation as "naive." Tr., pp. 18, 22-23. In writing the article, Boranian denied having the intent of fostering dissatisfaction in employees represented by HGEA due to the HGEA's pursuit of the comparable worth suit. Tr., p. 23. Boranian asserted that there was no coercion or intimidation inherent in the writing of the article and that there was no way he could enforce any statements made therein. Tr., p. 24. Boranian stated that in calling Mel Higa a "dutiful vassal of the great white father of AFSCME in Washington, D. C.," he was speaking editorially and stating an opinion. Tr., pp. 24-25. Boranian denied making these statements to undermine the standing of Russell Okata and Mel Higa in the HGEA. Tr., p. 25-26. Boranian also denied having any intent to inject a racial issue into the article in his use of the term "great white father." He referred to that term as an "old Indian term" first used by American Indians in reference to Caucasians but asserted that there was nothing racial in the use of the term. He stated that the term could have been substituted with any other terms such as "the big cheese," etc. Tr., pp. 26-27. Boranian denied that his statement that Mel Higa was misusing his position on the State Commission investigating the comparable worth issue was intended to cause dissention in the bargaining unit members regarding HGEA leadership. Boranian testified that this statement concerning the use of the term "'gig' the state" was made merely to inform readers that Mel Higa sat as a member

of that Commission which decided the methods to be used in determining whether there was a comparable worth problem. And also, to inform readers that after the Commission's second meeting, Mel Higa and the HGEA decided to file a suit against all public employers in the State on the comparable worth issue. Boranian felt that the Commission apparently was being undercut and he wanted to inform employees of this state of affairs. Tr., pp. 28-32.

Borianian testified that the Hawaii County employees' newsletter was established slightly over two years ago. The purpose of the newsletter is to inform employees of facts and information connected with employment. Such information includes issues regarding jobs, civil service rules and regulations, deferred compensation, policies, etc. Tr., pp. 35-36. The column written by Boranian is not approved by anyone else. The topic of the article in question was not suggested to him by anyone else nor was it reviewed, censored or edited by the mayor prior to publication. Tr., pp. 36-37. Following publication of the column, Boranian had no personal contact with any Hawaii County employees regarding the topic of the column. Neither did he hold any meetings to further discuss the column. Tr., p. 37.

CONCLUSIONS OF LAW

The HGEA charges that the article in question amounts to an "interference with the internal processes" of the HGEA, in violation of Subsection 89-13(a)(1), HRS, which reads:

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

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

HGEA argues that Subsection 89-13(a)(1), HRS, was violated through a violation of Section 89-3, HRS, which reads:

Rights of employees. Employees shall have the right of self-organization and the right to form, join or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except to the extent of making such payment of service fees to an exclusive representative as provided in section 89-4.

HGEA contends the illegal solicitation occurred when the Employer, through Boranian's article, encouraged employees who are HGEA members to tell the leadership of the HGEA to abandon the "comparable worth" lawsuit. This solicitation amounted to an illegal interference with the internal affairs of the HGEA. Moreover, the HGEA asserts that Boranian's statements cannot be characterized as mere free speech, because his alleged solicitations exceed the mere expression of views on the topic and actually solicit or direct employees to tell the HGEA leadership to abandon the "comparable worth" lawsuit, in which the Employer is a defendant. Post Hearing Brief, pp. 19-20.

The HGEA argues that the Respondent, as Boranian's principal, is liable for the acts engaged in by Boranian as the mayor's agent. The HGEA notes that Subsection 89-2(9), HRS, defines an employer or public employer, in relevant part, as "the respective mayors in the case of the City and County of Honolulu and the counties of Hawaii, Maui and Kauai . . . and any individual who represents one of these employers or acts in their interest in dealing with public employees." The HGEA notes that Boranian testified that he is a representative for labor relations for the mayor of Hawaii County and that he represents the mayor or acts in the mayor's interests in the areas of employee training and employee testing. The HGEA thus asserts that these duties indicate that Boranian is an agent of the Employer, under Subsection 89-2(9), HRS.

The HGEA further argues that its decision to pursue the comparable worth lawsuit is an internal management decision regarding how the HGEA's financial resources are to be spent. HGEA contends the Employer's interference in that internal management decision violates Subsection 89-13(a)(1), HRS. Moreover, the HGEA argues that the statements in question are not mere expressions of opinion protected by the right to free speech but rather amount to solicitations of employees to express dissatisfaction to their leaders. Post Hearing Brief, at p. 13. While the form of the statements is that of an editorial expression of opinion, the HGEA argues, the true substance of the statements constitutes solicitations rather than the expression of free speech. Post Hearing Brief, at p. 15. The HGEA argues

that Boranian's statements, in going further than merely expressing opinions and in fact soliciting employees to support the abandonment of the comparable worth lawsuit, make disparaging slurs with racial overtones against Mel Higa and Russell Okata.

The HGEA also contests the veracity of Boranian's testimony. The HGEA thus notes that since the County of Hawaii is a defendant in the comparable worth lawsuit, it is "obvious" that Boranian is biased against the HGEA. Thus it is in his interest to testify in a manner that would disparage the HGEA. Post Hearing Brief, p. 16.

The HGEA further argues, using parallels to federal law, that even if Boranian's statements do not rise to the level of "solicitations," they still violate Subsection 89-13(a) (1), HRS, since they are not protected as statements containing no "threat of reprisal or force or promise of benefit," under Section 8 of the National Labor Relations Act (NLRA). Post Hearing Brief, p. 17. The HGEA notes that Boranian, as the Director of Civil Service, had great authority and discretion to enforce his directives. There was thus implied, HGEA argues, a threat of reprisal if employees did not follow the directive to tell the HGEA leadership to abandon the comparable worth lawsuit and an implied promise of benefit if employees followed this directive. The HGEA further notes that Boranian, as Director of Civil Service, controlled the training of employees, the testing, and the records of all Hawaii County employees, and that he could clearly make working for the county very difficult for employees if he so desired. Post Hearing Brief, pp. 17-18. Thus, the

HGEA argues, by making such statements, Subsection 89-13(a)(1), HRS, was violated because of the implied threats or promises therein. Post Hearing Brief, p. 18.

The Respondent asserts that the column is an editorial or statement of opinion by Boranian, who chose the topic and wrote the column himself without screening by anyone else in the County. The statements complained of are critical of the comparable worth lawsuit calling it a "phoney issue with little or no basis in fact." Boranian merely contrasts the comparable worth issue with that of pay inequity in each class. Thus, Boranian expresses the opinion that HGEA should attempt to correct this latter situation. He urges union members to bring this matter to the attention of the union leaders and "tell them to stop pursuing the 'willow-the-wisp' of comparable worth and concentrate on the most important issue facing the majority of HGEA members today--pay inequity within each class."

The Respondent argues that in making these statements Boranian's sole purpose was to provide information to county employees which he felt they would not otherwise get and that he had no intent to violate Subsection 89-13(a) or any other provision in Chapter 89, HRS. Post Hearing Brief of the County at p. 4. There was thus no "wilful" intent to violate any provisions of Chapter 89 such as is required in Subsection 89-13(a), HRS. Neither do Boranian's statements amount to a wilful violation of Subsection 89-13(a)(1), HRS, in the sense of being a "natural consequence" of the actions complained of, as that term

was discussed in the case of In the Matter of Jerrold E. Brown and Those Similarly Situated and SHOPO, 3 HPERB 125, pp. 111-70.

The Respondent notes that the natural consequences of reading Boranian's statements would be just to encourage participation in the collective bargaining process. In telling readers of his column to go to the Union leaders and tell them to "concentrate on the doughnut and not the hole" or to quit following the "willow-the-wisp" he was merely encouraging participation in the collective bargaining process. Moreover, the Respondent notes that Boranian was probably accurate in his belief that most readers would probably do nothing. Post Hearing Brief at p. 4. Boranian was merely expressing a sincere belief that the pay inequity within classes is a problem which should be addressed by the HGEA. Post Hearing Brief, pp. 4-5.

The Respondent further argues that Boranian's statements only criticize a particular stance of the Union and do not amount to an attempt to get any members to reject the Union. Post Hearing Brief, p. 5.

The Respondent further notes that under Section 8(c) NLRA, which is referred to in the Board case of Hawaii Federation of College Teachers, 1 HPERB 464 [Decision No. 50], Boranian's statements contain no threat of reprisal or force or promise of benefit. Boranian has no hiring or firing powers over any employees except those in his own department and he had no way to force employees to go to HGEA and tell them anything. In addition, there was no follow-up to the column in any manner.

Boranian made no contact with employees and held no meetings to further discuss his views. Post Hearing Brief, pp. 6-7. Boranian's statements, however colorful, are not threatening, argues the Respondent. No actions were taken to enforce the statements. As such, the opinions are protected free speech and do not constitute employer interference. Post Hearing Brief, p. 7.

The Respondent also disputes the HGEA's characterization of Boranian acting as the agent of the mayor. The Respondent notes that the column and the statements contained therein were the sole creation and responsibility of Boranian. There was no evidence that the statements represent the views of the Employer. Post Hearing Brief, p. 9.

The Board concludes that Boranian's statements in his article do not violate Subsection 89-13(a)(1), HRS. Clearly, Boranian's statements are critical of the comparable worth lawsuit. This view is expressed in somewhat antagonistic language, calling it "a phoney issue" without factual basis. However, Boranian keeps the discussion within factual bounds as his concerns regarding the suit are clearly related to his own viewpoint that the issue of pay inequity in each class is a more pressing concern than the comparable worth issue. Boranian's directive to bring the matter to the attention of the leaders and to "tell them to stop pursuing the willow-the-wisp of comparable worth and concentrate on the most important issue facing the majority of HGEA members today--pay inequity within each class"

is conveyed in language veering to the antagonistic and inflammatory when he characterizes Union leaders Russell Okata and Mel Higa as vassals or dutiful slaves to the great white father heading the national union, AFSCME. Because of the antagonistic tone of these phrases, the application of the free speech protection to them is indeed cast into question. However, the Board, in finding no violations of Subsection 89-13(a)(1), HRS, notes that the context within which the statements are made is clearly a forum for personal opinion, i.e., a newsletter editorial. There was no attempt by Boranian to suggest that the views expressed were anything other than his personally or that the editorial positions reflected County policy. Absent evidence to the contrary, the Board assumes that readers are clearly aware of the editorial nature of the comments and have not been unduly swayed by a resort to emotionalism and factionalism of whatever sort.

The Board concludes that the aforesaid statements are primarily rhetorical in nature. As the testimony indicated, the characterization of the statements as implied threats of reprisal or force or promise of benefit were not substantiated. Testimony indicated that Boranian went no further than the writing of the editorial in promoting his views. No meetings were called nor were employees contacted in order to enforce the views expressed in the article. This is in clear contrast with Cooper-Jarrett, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 109 LRRM 1265, 260 NLRB 1123 (1982). Therein, interference with employee rights was

found where the chairman of the board made threatening remarks regarding a union steward. The chairman of the board directly told three employees that the steward was a "son-of-a-bitch," that they should get a new leader, that the steward was "no good," and that they should "get rid of that f_____ McDonald. He's no good for the company. He's breaking me. Vote him out." Id., at 1266, 260 NLRB at 1123. Similar statements to the steward himself such as that he wished he could fire him were also found to interfere with the right to engage in self-organization. Id., at 1266, 260 NLRB 1123-24.

In the instant case, Boranian made no statements of a comparable nature and took no positive action to effect any statements made. Neither is the instant case comparable to Roman Catholic Diocese, 91 LRRM 1419, 222 NLRB 1052 (1976), also cited by the HGEA, wherein the employer solicited employees to sign a petition critical of the union. Again, Boranian took no such positive actions to implement positions taken in the editorial.

Because the editorial nature of the comments are clear, neither can they be attributed to the Mayor as Boranian's principal or superior.

The Board thus concludes that the article remains sufficiently within the realm of the expression of personal views on a clearly defined set of factual circumstances to constitute protected speech. The Board finds no intent on Boranian's part to cloak threats in the form of an editorial opinion. The evidence indicates no link between the views expressed in a clearly marked

editorial and any curtailment of employee rights or union activity. Cf., NLRB v. Gissel Packing, 395 U.S. 575, 23 L.Ed.2d 547, 89 S.Ct. 1918 (1969), cited at p. 14 of the Post Hearing Brief. This is also in contrast to the case of General Athletics Products Company and Cleveland Joint Board, 95 LRRM 1130, 227 NLRB 1565 (1977). Therein, the NLRB found the employer refused to bargain in good faith where, in a strike situation, it sent letters to employees ostensibly to inform them of the status of negotiations. The employer was found to be engaging in a campaign to disparage the union by casting doubt on efforts of union representatives in advancing interests of the employees, thus driving a wedge between representatives and employees. Intimidation and coercion were found in suggestions in the letters that the plant would be closed if the agreement as drawn up by the employer was not ratified. The obvious contrast to the instant situation is that in the General Athletics case, employees received personally addressed letters from the employer containing remarks directly disparaging of the union. Furthermore, the shop in question contained only one hundred employees. This fact combined with the fact that personal letters were involved distinguishes that case from the instant one where no comparable economic threats were made and where employees are not addressed in personal letters. What critical language the article did contain directed to the union and its leadership did not rise to the level of interference with internal union processes, implied threats of reprisal or force, or promise of benefit.

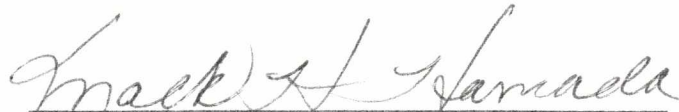
For these reasons, the Board concludes that Boranian's article does not violate Subsection 89-13(a)(1), HRS.

ORDER

The subject complaint is hereby dismissed.

DATED: Honolulu, Hawaii, February 7, 1986.

HAWAII LABOR RELATIONS BOARD


MACK H. HAMADA, Chairperson


JAMES K. CLARK, Board Member


JAMES R. CARRAS, Board Member

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