

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-10-108
)	
BUDDY H. KIMURA,)	DECISION NO. 282
)	
Complainant,)	FINDINGS OF FACT, CONCLU-
)	SIONS OF LAW AND ORDER
and)	
)	
JOHN WAIHEE, Governor of the)	
State of Hawaii,)	
)	
Respondent.)	

In the Matter of)	CASE NO. CU-10-56
)	
BUDDY H. KIMURA,)	
)	
Complainant,)	
)	
and)	
)	
UNITED PUBLIC WORKERS,)	
LOCAL 646, AFSCME, AFL-CIO,)	
)	
Respondent.)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On May 12, 1987, Complainant BUDDY H. KIMURA [hereinafter referred to as KIMURA or Complainant] filed a prohibited practice complaint with the Hawaii Labor Relations Board [hereinafter referred to as Board] in Case No. CE-10-108. The complaint alleged that JOHN WAIHEE, Governor of the State of Hawaii [hereinafter referred to as STATE or Employer], violated Subsection 89-13(a)(8), Hawaii Revised Statutes [hereinafter referred to as HRS], by violating the terms of the Unit 10 collective bargaining agreement.

On May 15, 1987, KIMURA filed a prohibited practice complaint in Case No. CU-10-56 with the Board alleging that Respondent UNITED PUBLIC WORKERS, LOCAL 646, AFSCME, AFL-CIO [hereinafter referred to as UPW], the exclusive representative for bargaining unit 10, violated Sections 89-3, 89-8, 89-13(b)(1) and (4), HRS, by delaying the processing of grievances filed on his behalf and by failing to timely request arbitration of one of his grievances.

In Case No. CE-10-108, the STATE moved for particularization of the complaint on June 2, 1987 which was granted, in part, by Board Order No. 627, dated June 16, 1987. The particularization was filed by Complainant on June 25, 1987.

Thereafter, Case Nos. CE-10-108 and CU-10-56 were consolidated for disposition in Order No. 666, dated January 13, 1988.

Respondent STATE filed a motion to dismiss the instant petition on February 9, 1988. Respondent UPW filed a joinder in the STATE's motion on February 12, 1988. The motion was denied by Order No. 676, dated March 1, 1988.

A hearing was held on the consolidated cases on March 16, 1988.

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

FINDINGS OF FACT

Complainant BUDDY H. KIMURA was at all times relevant a member of bargaining unit 10 as it is defined in Subsection 89-6(a), HRS.

Respondent STATE is the public employer as defined in Section 89-2, HRS, of members of bargaining unit 10.

Respondent UPW is the exclusive representative as defined in Section 89-2, HRS, of bargaining unit 10.

Complainant is an Adult Corrections Officer [hereinafter referred to as ACO] III at Oahu Community Correctional Center [hereinafter referred to as OCCC] presently on medical leave from his position. Transcript of hearing on 3/16/88 [hereinafter referred to as Tr.], p. 55.

Complainant has filed three grievances and one previous prohibited practice complaint with the Board relating to issues regarding the STATE's practices regarding temporary assignment [hereinafter referred to as TA] policies.

In the first grievance¹, filed on September 24, 1985, Complainant sought TA pay for the period September 23, 1985 to November 30, 1985. He claimed therein that ACOs with less seniority were given TAs that he should have received.

In his first grievance, KIMURA wrote:

As of September 23, 1985, UM Guy Hall has made no attempt to offer this writer the

¹The first grievance is attached to STATE's Amended Motion by Respondent Alfred Lardizabal to Dismiss Petition as Exhibit 2.

TAS position created by ACO IV F. Watkins [sic] assignment to Waiawa. Guy Hall has given no reason in regards to the qualification of this writer, and in disregard to any individual who might have wanted the TAS position, Guy Hall did not post any notice ten days prior to the vacancy opening.

This grievance was resolved at Step IV of the grievance process when the STATE reimbursed Complainant the amount of \$106.58 as the wrongfully denied TA pay. Complainant alleges the reimbursement was made in the form of an automatic deposit into his account. Tr., p. 48.

On May 5, 1986, Complainant filed a second grievance² claiming that he was improperly denied TAs subsequent to the period for which he received reimbursement in the first grievance. In KIMURA's second grievance he sought to be reimbursed for all regular and overtime pay "until retirement."

A third grievance³ was filed by the UPW on June 19, 1986 alleging that OCCC unit team manager, Guy Hall, has "continuously denied him TA position in Module 3 at OCCC, although he is the senior most qualified individual for that position." It was alleged that the Employer violated Sections 1.05, 14 and 16.04 of the contract.

On June 19, 1986, Complainant also filed a prohibited practice complaint with the Board claiming that the UPW was mishandling his grievance.

²The second grievance is attached to Amended Motion by Respondent Alfred Lardizabal to Dismiss Petition as an unnumbered exhibit.

³The third grievance is attached to Amended Motion by Respondent Alfred Lardizabal to Dismiss Petition as Exhibit 5.

On December 16, 1986, the Board issued Decision No. 235, Buddy H. Kimura, 4 HLRB 105 (1986) dismissing KIMURA's complaint.

The Board, therein, stated:

Based upon the evidence and arguments presented, the Board concludes that the remedy received by Complainant in his first grievance is adequate insofar as he received monetary reimbursement for temporary assignments wrongfully denied. Complainant's further desire for an apology or explanation of denial of future temporary assignments are not grievable issues under the unit 10 contract. Since the remedy in the first grievance is adequate, the UPW is not deemed to have violated the duty of fair representation in the handling of Complainant's first grievance.

Further, since the second and third grievances are in the process of being considered at Step IV they cannot be the bases of a claim of the violation of the duty of fair representation before the Board at this time. Only the first grievance is the proper subject of the prohibited practice charge now under consideration. The Complainant must first exhaust his contractual remedies regarding the second and third grievances before they can be properly considered by this Board. Winslow v. State, 2 Haw.App. 50, 625 P.2d 1046 (1981). 4 HLRB at p. 108.

On October 19, 1987, a meeting was held with a representative of the STATE, Union representatives, including James King, counsel to UPW and Complainant. In the affidavit of Walter Harrington attached to the STATE's Amended Motion By Respondent Alfred Lardizabal to Dismiss Petition, which was entered into evidence (Tr., p. 61), the STATE claims that Complainant agreed to amend his remedy by seeking TA pay for the period December 1, 1985 (the day following the end of the period

for which settlement was reached in the first grievance) to March 31, 1986 (when Complainant went out on disability). Tr., p. 55.

Pursuant to the meeting on October 19, 1987 (which the Employer in the Harrington affidavit terms a Step IV meeting but which Complainant at the hearing characterized as a meeting for an unspecified reason his attendance at which was gained by deception [Tr., p. 74]), the Employer offered to settle the grievances with KIMURA and the UPW by paying him \$163.56 for the period December 1, 1985 to March 31, 1986. The reimbursement is calculated from the day immediately following the period covered by the first settlement addressed in Decision No. 235, to March 31, 1986, the day KIMURA went out on disability. Although KIMURA refused this settlement offer, the STATE has indicated its willingness to keep the offer on the table. Tr., p. 73.

Edwin Shimoda, OCCC Administrator, testified that the first settlement was offered to Complainant on the basis that the STATE did not adhere to the contract on the matter of seniority and that the settlement offer was made on the basis of module-as opposed to facility-wide seniority. Tr., p. 17.

During Shimoda's testimony the STATE offered a computer printout of OCCC personnel which indicated that on the basis of facility-wide seniority, Complainant, at the times relevant, ranked number 53 in terms of seniority. Tr., pp. 18-19. Shimoda further testified that during December 1985 through March 1986 there were five TA vacancies on the third watch to which Complainant could have been assigned. Tr., pp. 18-19. Shimoda thus

concluded that based on his ranking of 53 on the seniority list he could not have qualified for any of the vacancies.

During cross-examination of Shimoda, Complainant called into question the conclusion that he was, in terms of actual TA eligibility, number 53 in terms of seniority. He elicited from Shimoda that the personnel list included persons senior to Complainant in the annex, halfway house and on the security staff; that the list did not designate which persons were on third watch; that the list does not designate how many ACOs refused TAs; and that the list does not designate how many persons were refused TAs because of excessive sick leave and disciplinary write-ups, the ostensible reason for denial of TAs to Complainant. Tr., pp. 22, 26, 39, and 76.

CONCLUSIONS OF LAW

Complainant alleges that the STATE has failed to adequately "answer" his second grievance, dated May 5, 1986, thus breaching Sections 16.04, 16.05, 15.12, 15.18 and 15.22 of the Unit 10 bargaining agreement, thereby violating Subsection 89-13(a)(8), HRS. This Subsection provides:

89-13 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.

Complainant alleges that Respondent UPW breached its duty of fair representation to Complainant when it failed to

request arbitration of Complainant's grievance dated May 5, 1986, thus violating Sections 89-3, 89-8 and Subsections 89-13(b) (1) and (4), HRS.

Section 89-3, HRS, provides:

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 amounts equivalent to regular dues to an exclusive representative as provided in section 89-4.

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

Recognition and representation; employee participation. (a) The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership. Any other provision herein to the contrary notwithstanding, whenever two or more employee organizations which have been duly certified by the board as the exclusive representatives of employees in bargaining units merge, combine, or amalgamate or enter into an agreement for common administration or operation of their affairs, all rights and duties of such employee organizations as exclusive representatives of employees in such units shall inure to and shall be discharged by the organization resulting from such merger, combination, amalgamation, or agreement, either alone or with such employee organizations. Election

by the employees in the unit involved, and certification by the board of such resulting employee organization shall not be required.

Subsections 89-13(b)(1) and (4), HRS,
provide:

Prohibited practices; evidence of bad faith.

(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;

* * *

(4) Refuse or fail to comply with any provision of this chapter;. . .

In disposing of the instant matter, the Board first examines the charge of a violation of the duty of fair representation as lodged against the Union, then examines whether any failure in the duty of fair representation has resulted in any detriment to Complainant in his case against the Employer.

However, as a preliminary issue, the Board addresses the applicable statute of limitations. Under Board Administrative Rules Section 12-42-42, Sections 89-14 and 377-9, HRS, complaints must be filed with the Board within 90 days of the alleged violation. The prohibited practice complaints against the STATE and the UPW, herein, were filed May 12 and May 15, 1987, respectively. At issue is the awarding of TA pay from December 1, 1985 to March 31, 1986, a period ending more than a year before the complaints were filed herein.

However, the 90-day statute of limitations may be considered tolled during the period that the grievances were

being processed through the contractual grievance procedure. Ledward and Fasi, 2 HPERB 539, 546-547 (1980). Complainant's case therefore only ripened when the UPW's counsel announced his recommendation to the Union not to arbitrate the matter on February 16, 1988 at the Board hearing. Thus, the Board concludes that it may properly consider the charges herein.

The Board finds that the Union failed to give Complainant prompt representation in his grievances to either secure TA or retroactive pay for TAs wrongfully denied by the unit team manager at OCCC. However, the Board also concludes that the monetary settlement offered to Complainant by the STATE for the period December 1, 1985 to March 31, 1986 is adequate and apparently fair⁴, and that no detriment recognizable under Chapter 89, HRS, has been suffered by Complainant.

Complainant has gone through considerable effort with a considerable expenditure of time with much resulting frustration. Moreover, the wrongs inflicted upon Complainant by the Employer's denial of TA and the Union's delay in prosecuting Complainant's efforts to recoup unwarranted denials of TA are clearly established, as evidenced by the STATE's offer of a monetary settlement. The frustrations experienced by Complainant at high-handed treatment by the Employer, and delay by the UPW, moreover, are understandable and warranted. However, the Board concludes that

⁴While the record does not clearly reflect which grievance the settlement offer refers to, the Board considers that the offer encompasses both grievances. The central issue of Complainant's second and third grievances is the propriety of the TAs during the relevant time period. Hence, the settlement adequately resolves both grievances.

the monetary settlement as offered by the STATE fully makes Complainant whole. He was wrongfully denied TAs. Eventually, albeit after much delay and cajoling, full monetary compensation has been offered. Under these circumstances, Complainant cannot be said to have suffered detriment and therefore the Union is not regarded as having breached its duty of fair representation.

This conclusion rests on the finding that: 1) the pay period for which Complainant offered compensation for wrongfully denied TAs is the correct period; and 2) the amount offered and the standards for eligibility used to compute that amount are also correct.

A. PAY COMPUTATION

Since the Board, in Decision No. 235, decided that the remedies provided Complainant up to November 30, 1985 were adequate, the STATE's use of the time period from December 1, 1985, the day immediately following the end of the period covered in Decision No. 235, to March 1, 1986, the date Complainant went out on disability, as the period for which Complainant may be eligible for monetary remedy, is correct. Complainant's argument that the period for which he is owed backpay has been arbitrarily set by the STATE with the acquiescence of the UPW therefore appears to be groundless. Thus Complainant's argument that the time period upon which backpay settlement is computed should be arbitrated is also groundless. Tr., pp. 50-51.

Assuming the time period for which KIMURA is owed TA pay is correct, the Board also concludes that the amount offered is correct and based on proper standards for eligibility under

the contract. The STATE's offer, like its previous settlement of Complainant's first grievance, is based upon its determination of when Complainant should have received TAs as the senior ACO in the module. The STATE uses the module as constituting a "work unit" under the contract. Tr., p. 16. The UPW agrees that module seniority is correct under the contract. Tr., p. 70. Complainant seems to suggest that facility-wide eligibility should have been used. However, under the contract, TAs are made on the basis of work unit seniority. Section 16.01(e) of the contract reads:

e. Work unit or work place seniority shall mean an employee's continuous length of service within a work unit of a facility. Work units shall be determined in consultation with the union. The employer may enter into written mutual agreements with the union in identifying work units for each facility or institution. Such agreements shall remain in effect for the duration of the contract. [Emphasis added.]

Clearly, the "work unit" is a portion of the facility, not the whole facility, under the contract.

The evidence as presented at the hearing and in documents submitted in the instant matter furthermore indicate that even if facility-wide eligibility were employed in awarding TAs, Complainant would have less owing in monetary compensation. The STATE submitted documentary evidence indicating Complainant to be ranked number 53 in seniority facility-wide. The STATE thus argued that on a facility-wide basis Complainant may very well have been ineligible for the handful of TAs available in the time period in question. Complainant rebutted this argument to an extent by questioning the accuracy of the list in terms of work

sites included, the currentness of the list, eligibility of those with a higher rank for TAs, etc. Thus, it may very well be that Complainant's ranking was higher than 53 on the seniority list. However, taking the evidence on balance it is clear that Complainant's position on the seniority list does not put him in a strong position to claim more monetary compensation. By a preponderance of the evidence, his claim for more TAs on the basis of facility-wide seniority is without merit.

B. UPW DELAYS

Complainant apparently approached Hall and asked him why he was not given a TA which was wrongly given to ACO Cedric Roldan. Complainant said Hall told him his sick leave record was bad and allegedly told him to "grieve me." Complainant was then transferred to Module 3 and still denied TAs which were given to Pedro Scanlan. Tr., pp. 21, and 46-48. Shimoda used the same rationale for denial, i.e., excessive sick leave and two write-ups. Tr., p. 47.

The Union in its turn delayed seeking action on Complainant's grievances. Complainant and the Union filed grievances on May 5 and June 19, 1986, respectively. On October 19, 1987, the Step IV meeting with UPW representatives was finally held. At the hearing before the Board on February 16, 1988, King joined the STATE's motion to dismiss and indicated to the Board that the Union found the STATE's settlement offer acceptable and further, that King would recommend to the Union not to arbitrate Complainant's grievances.

It appears that Hall discriminated against Complainant in making TA assignments and that the Union was guilty of delay in prosecuting Complainant's case at the grievance levels. The issue is whether the settlement offer adequately remedies the alleged wrongdoing. Since this is not a promotion case, the monetary settlements for temporary assignments as offered are adequate in themselves. Mere negligence or delay in pursuing a meritorious claim is not a violation of the duty of fair representation. Cronin v. Sears Roebuck and Company, 588 F.2d 616 (8th Cir. 1979); American Postal Workers Union Hollywood Local, 1979 NLRB Advice memo; Case No. 12-CE-2137(P); General Truck Drivers, Chauffeurs and Helpers, 85 LRRM 1385, 209 NLRB 446 (1974).

In finding no violation by the UPW or the STATE of the provisions of Section 89-13, HRS, the Board does not deny or minimize a drawn out series of wrongdoings on the part of both Respondents. It started with the denial by the OCCC unit team manager and then OCCC administration, of TAs rightfully due to Complainant, and proceeded with the unresponsiveness of both the STATE and the UPW in processing Complainant's grievances. The Board is also mindful of Complainant's failure to clearly articulate his grievances against both parties, and that this failure contributed to Respondents' lack of responsiveness in addressing Complainant's grievances. The Board finds that the Employer's and the UPW's actions in the instant circumstances are characterized by a lack of responsiveness and a high-handed lack of commitment to procedure. The Employer failed under the

contract to post seniority lists. The UPW's service to Complainant was characterized by shoddiness and arrogance in its failure to timely communicate its position on Complainant's grievances to the Complainant.

While recognizing the Employer's and UPW's lack of urgency, the matter taken in total merits no finding of a prohibited practice by either Respondent. No breach of the duty of fair representation has been committed by the Union in spite of its dilatory actions in seeking redress for Complainant. Redress offered for wrongfully denied TAs fully compensates Complainant on an hourly basis for TAs denied. Other redress Complainant may seek such as apology or explanation is not grievable as such under the contract and thus not a basis for prohibited practice findings.

The STATE committed no prohibited practice, as a preponderance of the evidence indicates that the TA pay settlement offered to Complainant is adequate. The Board concludes that the evidence indicates that the method of computing the settlement, in terms of module seniority, the calendar period in question, and the seniority list used as a basis for determining Complainant's eligibility are proper, or cannot be conclusively shown to be so improper as to warrant further deliberation through arbitration.

The Board concludes that the monetary settlement offered to Complainant is sufficient to satisfactorily dispose of Complainant's second and third grievances.

ORDER

The subject complaints are dismissed. This order is based upon the State's representation that the settlement offer remains on the table.

DATED: Honolulu, Hawaii, August 17, 1988.

HAWAII LABOR RELATIONS BOARD


MACK H. HAMADA, Chairperson


JAMES R. CARRAS, Board Member


GERALD K. MACHIDA, Board Member

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