

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NOS.: CE-03-131
)	CU-03-64
TERRY TOMINAGA,)	
)	
Complainant,)	DECISION NO. 310
)	
and)	FINDINGS OF FACT, CONCLU-
)	SIONS OF LAW AND ORDER
)	
BOARD OF EDUCATION, State of)	
Hawaii and HAWAII GOVERNMENT)	
EMPLOYEES ASSOCIATION, AFSCME,)	
LOCAL 152, AFL-CIO,)	
)	
Respondents.)	
)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On January 18, 1990, Complainant TERRY TOMINAGA filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) alleging that Respondent BOARD OF EDUCATION (BOE or State), State of Hawaii violated Subsection 89-13(a)(8), Hawaii Revised Statutes (HRS), when it allegedly suspended Complainant without just cause, and that Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) violated Subsections 89-13(b)(1) and (4) and Section 89-3, HRS, when it allegedly acted in an arbitrary manner by failing to process a grievance concerning Complainant's suspension.

A hearing was held on the instant matter on April 10, 1990.

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 TERRY TOMINAGA is a Library Assistant II (LA II) at the McCully-Moiliili public library. He has been in this position since 1980. Transcript (Tr.) at 18. TOMINAGA is and was, at all times relevant, a member of bargaining unit 3 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 3.

Respondent HGEA is the exclusive representative, as defined in Section 89-2, HRS, of bargaining unit 3.

On or about September 13, 1989, Linda Delima, Complainant's immediate supervisor, was told by the children's librarian that a class of students was expected the next day. Tr. at 46. The children's librarian granted the teacher's request to extend the loan period from three to four weeks. The class was scheduled to come in at 12:45 p.m. when Complainant would be at the circulation desk. No other class was scheduled to come in to the library at that time. Only Delima and Complainant were scheduled to work on September 15. Tr. at 38, 46-47, 76. Delima testified that before going to lunch, she left the manual check-out sheet with Complainant and told

him that she had reset the date stamper for the four-week period. Tr. at 19, 48. Because the computers were down that day, a Portapak was being used for the normal three-week check-out period and a manual check-out for the extended four-week period. Respondent's Ex. 12. Delima also testified that she had told Complainant to give the extended loan period to this particular class prior to the opening of the library at about 9:00 a.m. or 9:30 a.m. (Tr. at 46, 57) and again just before she went to lunch. Tr. at 48. Upon her return, Delima found that Complainant was not giving the class the extended loan period. Tr. at 49. Instead of using the manual check-out sheet, Complainant was using the Portapak with the three-week period. Tr. at 49.

Upon being asked by Delima why he was not giving the extended loan period, TOMINAGA, according to Delima, replied that he was waiting for the teacher to tell him. Tr. at 50, 17, 21. Delima reported the incident to Ruta Maeda, McCully-Moiliili head librarian. Tr. at 50, 73.

Maeda asked Complainant why he did not give the class the extended loan period and TOMINAGA again replied that he was waiting for the teacher to tell him that they needed the extended loan period. Tr. at 21, 75. Complainant also stated that he did not know if that was the class to receive the extended period. Tr. at 21, 76. However, both Delima and Maeda testified that there was only one class scheduled to

come in during that time period. Tr. at 47; Respondent's Ex. 12. Complainant also testified that he knew that there was only one class scheduled to come in that day. Tr. at 38.

Complainant submitted into evidence the letter of suspension he received from State Librarian Bart Kane. In the letter, dated September 22, 1989, Kane informed TOMINAGA of the imposition of a three-day suspension on September 25, 26, and 27, 1989. The reason given for the suspension is "continuing insubordination in response to instructions given" by his supervisor. The letter relates that Complainant was told to give the extended loan period three times by Delima prior to the arrival of the class. The letter further relates that Complainant replied that he did not give the extended loan period because he was waiting for the teacher to ask for it. The letter further states that Complainant also told Maeda that he was waiting for the teacher to request the extended period and also that he was not sure that it was the correct class.

The letter terms the failure to give the extended loan period an "act of refusal" which is "intolerable and cannot be condoned." The letter notes previous discipline imposed on Complainant, i.e., a two-day suspension on January 30 and 31, 1989 due to tardiness and insubordination, and a charge of 30 minutes of unauthorized leave for failing to report to work on time on April 18, 1988. Also noted is the issuance on August 10, 1987 of a letter of reprimand due to a refusal to perform assigned work as well as for continuing tardiness. The

letter informs Complainant that if he believes the actions taken are not for just cause he has the right to appeal under the Unit 3 contract. The letter closes with notice that future instances of insubordination or tardiness may be cause for further disciplinary action, including dismissal. Complainant Ex. 1.

In regard to his case against the Union, Complainant testified that on October 4, 1989 he went to see Sanford Chun at HGEA to file a grievance regarding the suspension. Complainant testified that they talked for about an hour or an hour and a half. Complainant testified that Chun informed him that he probably would not prevail on a grievance so Complainant stated that he wouldn't file a grievance if the employer corrected certain parts of the letter. Specifically, he maintained that Delima told him once, not three times, to extend the due date. Also, he maintained that the reference in the letter of suspension to a meeting on June 24, 1989 to discuss tardiness was inaccurate. Complainant maintains that either the date of the meeting is incorrect, or if correct, the subject matter discussed on that date is incorrect. Complainant testified that if these two corrections had been promptly made, he would not have pursued a grievance. Tr. at 7-8.

Complainant further testified that Chun called him on October 16, 1989 and told him that he would look into the matter. Tr. at 8.

Complainant testified that, not having heard from Chun, he called Chun on October 20 and requested that Chun file a grievance on Complainant's behalf. Complainant testified that Chun informed him it was too late to file a grievance. Complainant asked if an extension of time could be made and Chun allegedly answered in the negative. Tr. at 9. Complainant further testified that Chun told him that if he did not bring up the subject of filing a grievance again, Chun would look into the matter of getting Complainant a transfer to another library. Tr. at 10. On Monday, October 23, Chun allegedly called Complainant and informed him that he had spoken to Delima who said that she had told Complainant to extend the library due date three times, and he also told Complainant that it was too late to file a grievance. Chun suggested that Complainant compile a list of problems he had with Delima and that he would investigate it. Complainant testified that he felt that since Chun did not do anything for him in the past there was no use in compiling the list. Tr. at 10. This was his last contact with Chun. Tr. at 10-11.

Complainant testified that at the time that he initially discussed the disciplinary matters with Chun, he would have been satisfied to let the matter rest with the correction of the letter of suspension. He now seeks redress from HGEA, suggesting in his testimony that he is upset with HGEA's lack of supportive action. Tr. at 12-13.

Chun testified that he met with TOMINAGA on October 4 to gather information regarding the suspension. The meeting took about an hour and a half. They discussed the letter of suspension, and Chun testified that Complainant agreed that he failed to give the class the extended loan period. Chun testified that Complainant stated that he understood the instructions that were given to him and that he believed that the class that came in was the class which was to receive the extended loan period, but that he felt he needed a reminder to give them the extension. He stated that he needed the reminder since "he was a very shy person and didn't ask many questions." Tr. at 106-108.

Since Complainant said that he understood the instructions but failed to carry them out, and based on Complainant's reasons for that failure, Chun mentioned to Complainant that he felt the employer was reasonable in expecting that Complainant would carry out his duties. Chun further counseled Complainant about "the type of worker he should strive to be" and that he should ask questions and be more assertive in his actions. Chun testified that at the conclusion of their conference, Complainant agreed not to file a grievance. Tr. at 109.

Chun mentioned to Complainant that he could call the department to ask if they would consider reducing the penalty. Chun testified that he spoke to Delima to verify the letter and the incident; and that he also spoke to Maeda about the

incident and the severity of the discipline imposed. Tr. at 110. In speaking to Delima, Chun sought to verify how many times Delima had given the instructions on the extended due date. However, he told Complainant at their initial conference that whether Delima told him once or three times was not material. Tr. at 111.

Prior to speaking to Complainant on October 16, Chun testified that he spoke with Beverly Look, another HGEA business agent, who normally services the libraries division. She confirmed that Complainant had previous problems with tardiness and insubordination and that there were attempts made to have him transferred. Tr. at 112.

Chun testified that he talked with Complainant by phone on October 16 to let Complainant know about his conversations with Delima which verified the incident and to explain the rationale behind the severity of the discipline imposed, i.e., progressive discipline and his history of problems. Tr. at 111-112. Chun testified that Complainant again agreed that he was wrong and that he would not file a grievance. Tr. at 112-113.

Chun testified that he was surprised to receive a call on October 20 from Complainant, given that they had gone over the incident and that Complainant had agreed that he was wrong. Chun testified that they again reviewed the incident and Complainant's alleged admission that he failed to carry out clear instructions, and that Complainant again at the end of

the conversation acknowledged that he failed to carry out his duties and that he would not file a grievance. Chun testified that Complainant stated that he was unhappy with his supervisor and Chun replied that he could apply for a transfer to another library. Tr. at 113-114. Chun also suggested that Complainant write down concerns he had regarding his supervisor and which Chun could then look into. Tr. at 114. Chun testified that Complainant never got back to him. Tr. at 114.

Upon cross-examination by Complainant, Chun denied that he told Complainant that if he didn't bring up the grievance again he would see what he could do about getting Complainant transferred. Tr. at 119.

In testimony, Delima, Complainant's supervisor, and Maeda, the head librarian, both confirmed that Chun had called to discuss the three-day suspension. Tr. at 56, 81-82. Chun was informed that TOMINAGA's three-day suspension was imposed pursuant to the library's progressive discipline practice. Tr. at 110.

Delima also testified that prior to September 15, 1989, she had observed Complainant performing the extended loan procedure. Tr. at 49. Complainant admitted that he was familiar with and had previous experience with the extended loan procedure. Tr. at 22, 36.

Complainant, in testimony, protested that discipline was meted out to him in a disparate fashion as compared to discipline imposed on other employees. He claimed that another

employee, Marcia Linville, was tardy more often than he was, yet he was suspended sooner. Tr. at 88. To this contention, Maeda testified that the cases of Complainant and Linville could not be compared. Tr. at 91. Maeda testified that Linville called in sick almost daily and that she had other problems besides tardiness and was finally terminated in October 1988. Tr. at 89-90. Complainant further argued that in November 1989 two other employees forgot to give an extended loan period and they were never disciplined. Tr. at 14-15. Delima and Maeda testified to not being aware of such incidents. Tr. at 54, 79.

Delima testified that she has had prior problems with Complainant's tardiness and insubordination. Tr. at 50-54; BOE Exhibits (Exs.) 10-11. Letters of reprimand regarding tardiness were submitted into evidence by Respondent BOE. BOE Exs. 5, 6, 7 and 8. These incidents of tardiness culminated in a written reprimand. BOE Ex. 4.

Look testified that in counseling sessions, Complainant said that he is "a night person" and cannot get up early. Tr. at 97. Other incidents of alleged misconduct by Complainant were raised by Respondent BOE at the hearing, i.e., an incident where Complainant waited for the library back door to be unlocked before entering for work (BOE Ex. 9), Tr. at 34-35; an incident where Complainant allegedly placed books on the floor, contravening directives of his immediate supervisor (BOE Ex. 10), Tr. at 51, 69; and an incident where Complainant

allegedly used vulgar language in responding to his immediate supervisor, Delima (BOE Ex. 11), Tr. at 52.

Complainant was suspended on January 30 and 31, 1989 for continuing tardiness and for an incident occurring on December 29, 1988 when Complainant, allegedly upset over the turning off of a fan, threatened to and in fact, called in sick the following day (BOE Ex. 1). Tr. at 25.

Maeda testified that the series of progressive discipline begins with counseling. If the misconduct continues, then the employee is orally reprimanded. Further misconduct results in a written reprimand, followed by a suspension, and then termination. Tr. at 77, 85.

CONCLUSIONS OF LAW

At the close of Complainant's presentation, counsel for the BOE entered an oral motion for directed verdict, contending that Complainant had not carried his burden of proof in showing that the employer unjustly suspended him. Counsel further argued that Complainant admitted that he did not carry out duties that were prescribed to him, that progressive discipline was properly administered, and that Complainant had failed to put forth evidence that his suspension was unjustified. Tr. at 42.

The Board denies the motion. Considering only Complainant's presentation, significant issues remain for

resolution, including Complainant's charges of disparate discipline and harassment by superiors. Tr. at 43.

On June 5, 1990, Respondent HGEA filed Respondent Hawaii Government Employees Association's Motion to Strike Complainant's Closing Memorandum, accompanied by affidavit of counsel. HGEA argues that Complainant's closing arguments contain prejudicial new evidence for the Board's consideration thereby denying HGEA a fair hearing. The Board hereby grants said motion to the extent that in its deliberations on the instant matter, the Board will not consider evidence contained in Complainant's closing memorandum which was not properly submitted at the hearing.

With regard to the merits of this case, Complainant charges that Respondent BOE violated Subsection 89-13(a)(8), HRS, by suspending him without just cause. Subsection 89-13(a)(8), HRS, reads:

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's charge against the employer alleges a statutory violation arising from a violation of the collective bargaining agreement concerning the validity of his suspension for "continuing insubordination". Complainant's Ex. 1. The collective bargaining agreement was not entered into evidence

and therefore the Board cannot properly entertain Complainant's allegation of a contractual violation. Ryan and SHOPO, 3 HPERB 81 (1982), at 98.

However, even assuming arguendo that the agreement was in evidence, the Board nevertheless concludes that Complainant failed to carry the burden of proving that a prohibited practice occurred when Complainant was disciplined for his failure to carry out his duty by issuing the extended due date. Complainant contends that disparate treatment occurred in the application of the discipline. He argues that two other employees were not disciplined for failing to extend the due date. This was rebutted by Complainant's immediate supervisor and the head librarian who testified to having been unaware of such incidents.

Complainant also argued that prior discipline for tardiness was also administered in a biased manner. Complainant testified that a former employee was not disciplined for tardiness as early as he was. This contention was rebutted by head librarian Maeda who testified that the cases of Complainant and Marcia Linville are not comparable as Linville's case involved the possible abuse of sick leave. In any event, the other employee has since been terminated.

Taking in balance the opposing contentions of Complainant and Respondent State, the Board concludes that Complainant failed to carry the burden of proving by a preponderance of the evidence that the suspension imposed was applied

in a discriminatory or otherwise invalid or irregular manner. This conclusion is buttressed by the testimony of HGEA business agent Chun, who testified that Complainant acknowledged the propriety of the directive to extend the due date, his failure to do so, and his relenting in his intention to file a grievance. Complainant, in testimony, rebutted Chun's contentions, but not so convincingly as to prompt the Board to conclude that he had established that his version of events more probably occurred.

Further evidence introduced by Respondent State of prior work site conflicts with fellow employees and supervisors support Respondent's arguments. Complainant counters with allegations of harassment by his immediate supervisor for a period of years but again, the Board concludes that such charges by Complainant are insufficient to tip the balance of the evidence in his favor.

Complainant alleges that Respondent HGEA violated Subsections 89-13(b)(1) and (4) and Section 89-3, HRS, when it acted in an arbitrary manner in failing to take any steps to process his grievance. 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; . . .

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.

Regarding the case against the HGEA, the Board concludes that Complainant failed to establish by a preponderance of the evidence that the HGEA failed to adequately represent Complainant in addressing his concerns over the three-day suspension for insubordination.

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 842, 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.) Caldeira and Malapit, 3 HLRB 523 (1989) at 539.

An examination of the evidence, leads the Board to conclude that the decision by Chun to refrain from filing a grievance was not so unreasonable or arbitrary as to constitute a violation of the Union's duty of fair representation. In the initial conference between Chun and Complainant on October 4, 1989, Complainant apparently was concerned only with alleged inaccuracies in the letter of suspension and agreed that no grievance would be filed to challenge the suspension. Complainant apparently agreed with Chun that the directive to extend the due date was valid and that he failed to carry out the instructions. Chun agreed to and in fact investigated the facts surrounding the incident and attempted to establish the number of times Delima gave the directive to Complainant. Both Delima and Maeda confirmed that Chun had called to discuss the three-day suspension. He was informed that the three-day suspension was imposed pursuant to the department's progressive

discipline policy. Chun concluded that the directive was valid, that Complainant failed to carry it out and that the discipline imposed apparently was proper. Chun also conferred with Look upon her return. Look in turn informed Chun of previous conflicts Complainant had and of counseling sessions with Complainant. Chun then talked to Complainant on October 16 to inform him of his findings and established with Complainant that no grievance would be filed.

Complainant apparently called Chun on October 20 and, according to Chun, the two repeated previous discussions and again arrived at the understanding that no grievance would be filed.

Complainant contested Chun's recounting of these events. He agreed that his initial concern upon being suspended was with the alleged misrepresentations of fact contained in the letter of suspension. Complainant's stance apparently changed after October 4, 1989, when he testified, Chun did not communicate with him. Thus, in speaking to Chun on October 20, he decided that he wanted to file a grievance because he had not heard from Chun. Tr. at 9. Complainant also testified that he had a final conversation with Chun on October 23.

The evidence indicates a direct conflict in testimony between Chun and Complainant as to the circumstances surrounding the non-filing of a grievance. In this circumstance, it cannot be concluded that Complainant has established a failure

to provide adequate representation. Chun's testimony as to factual circumstances surrounding his contacts with Complainant, and his execution of his professional responsibilities was credible. While Complainant contested the accuracy of Chun's testimony, it was not established that Complainant's version of events was more probable than not.

Even if the Board were to conclude that the HGEA failed to file a grievance as demanded by Complainant, the Board would yet conclude that a failure to adequately represent Complainant had not occurred. Chun's recounting of his conversations with Complainant, his review of the incident, and his testimony as to deliberations in deciding that a grievance was not to be filed indicated that he acted in a reasonable and fair manner. Even given Complainant's conflicting version of events, the Board concludes that the evidence does not indicate that the Union acted in an arbitrary or capricious manner in refraining from filing a grievance.

For the above stated reasons, the complaint against the Union is dismissed with prejudice.


ORDER

The complaints against Respondent State and Respondent HGEA are hereby dismissed with prejudice.

TERRY TOMINAGA v. BOARD OF EDUCATION, State of Hawaii and HAWAII
GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO;
CASE NOS.: CE-03-131, CU-03-64
DECISION NO. 310
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATED: Honolulu, Hawaii, October 4, 1990.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


GERALD K. MACHIDA, Board Member


RUSSELL T. HIGA, Board Member

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