

Dec.

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NOS.: CU-10-58
)	CE-10-110
BERNADINE L. BROWN,)	
)	DECISION NO. 315
Complainant,)	
)	FINDINGS OF FACT, CONCLU-
and)	SIONS OF LAW AND ORDER
)	
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO and ALFRED)	
LARDIZABAL, Director, Depart-)	
ment of Personnel Services,)	
State of Hawaii,)	
)	
Respondents.)	
)	

FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

On August 17, 1987, Complainant BERNADINE L. BROWN (BROWN) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondents UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) and ALFRED LARDIZABAL, Director, Department of Personnel Services, State of Hawaii (State or Employer). Her complaint includes a 17-page attachment detailing numerous alleged violations dating back to 1984.

The Employer filed a Motion by Respondent Alfred Lardizabal to Dismiss on October 26, 1989. The UPW joined in the State's motion to dismiss. Transcript (Tr.), 11/28/89, p. 4; Board Ex. 23. A hearing on the motion was conducted on November 28, 1989, and after arguments, the Board dismissed

four of Complainant's six allegations against the Employer. Tr., 11/28/89, pp. 22-24. The two remaining allegations against the Employer are summarized as follows:

1. On August 24, 1984, Complainant's Unit Team Manager at Oahu Community Correctional Center (OCCC), Bruce Bikle (Bikle), allegedly prepared a document which accused Complainant of misconduct. A grievance filed by Union steward, Robert Rivera, was taken to Step 1 on August 27, 1984 but was not resolved to Complainant's satisfaction. The Complainant alleges that the Employer refused to meet with her to resolve her complaint against Bikle. The Complainant further states that the Employer has "continuously" denied her the right to process her grievance, and that the Employer and the Union have colluded to circumvent the collective bargaining agreement.
2. On September 9, 1986, Complainant was terminated from her employment for being on unauthorized leave, when allegedly she was unable to return to work because of work-induced stress. The complaint states that a grievance was filed on September 2, 1986 by UPW Business Agent Tony Gonzales (Gonzales), in anticipation of her termination. The complaint further states that a Step 4 meeting was requested by Gonzales on

September 10, 1986 with no response and that subsequently the UPW sent four letters to the Department of Personnel Services, State of Hawaii, requesting a hearing, again with no response.

As against the UPW, Complainant alleges that the Union refused to process the August 27, 1984 grievance past Step 1 of the grievance procedure. Complainant alleges that upon being accused of an infraction by Bikle and upon raising a grievance with the Union about it, the Union violated Chapter 89 by failing to properly pursue her grievance. Secondly, Complainant accuses the Union of violating its duty of fair representation in that upon her arrest and confinement on May 22, 1985, Union representation was withdrawn because of a personal grudge harbored by then UPW Business Agent Walter Harrington (Harrington) against her.

A hearing was held on the case-in-chief on March 21, 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 BROWN was, at all times relevant, a member of bargaining unit 10 as it is defined in Subsection 89-6(a), Hawaii Revised Statutes (HRS). BROWN was an Adult Corrections

Officer (ACO) I at OCCC until she was terminated effective September 9, 1986. Complainant's Ex. 13.

Respondent State is the representative of the public employer, which is defined in Section 89-2, HRS, designated to hear grievances at Step 4 of the contractual grievance procedure.

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

First charge against Employer

OCCC Unit Team Manager Bikle posted a memo (Complainant's Ex. 1), dated August 24, 1984, addressed to ACO IV Fereti Manumaleuna, making various charges as to derelictions of duty by various ACOs and mentioning BROWN by name. The memo ordered that reports be submitted on the allegations.

On August 27, 1984, Union steward Robert Rivera (Rivera) submitted a Step 1 grievance on Complainant's behalf seeking to have the allegedly derogatory statements stricken from her record and the matter investigated. Tr., 11/28/89, p. 19; Respondents' Ex. 1; Complainant's Ex. 2. Complainant testified that Rivera stated to her that he would "try to follow up on it," that a copy would go to the Union and to the Employer, and that she also should "try to follow up on it." Tr., 11/28/89, p. 19.

Complainant further testified that Rivera then "went out on some kind of leave" and that she "kept going back to the Union" trying to find out the status of her grievance. She testified that the Union seemed to be disinterested or

uninformed about the grievance. Tr., 11/28/89, p. 19. Complainant testified that upon the filing of the grievance, nobody from the Union responded to her and the grievance "died a natural death." Tr., 3/21/90, p. 32.

The State replied that it understood no attempts were made to resolve her concern directly with Bikle. The State contends that Bikle was only initiating an investigation as he had the right and responsibility to do; and urged her to meet with him. Respondent's Ex. 1; Tr., 3/21/90, pp. 32-36. Complainant apparently did not. About a month after the filing of the grievance, Complainant asked Rivera what was happening with her grievance and whether the grievance was submitted to the Employer. That was the last she heard of it, Complainant testified. Tr., 3/21/90, pp. 34-35. "Months later," she asked Edwin Shimoda (Shimoda) what was happening on her grievance and he stated that he did not even know that she had a pending grievance. Tr., 3/21/90, p. 36. Apparently nothing further was done by her until she filed her complaint with the Board on August 13, 1987. Tr., 3/21/90, pp. 32-36.

The written grievance charges a violation of Section 11 of the collective bargaining agreement dealing with discipline and discharge of employees. The grievance does not claim that Complainant was in any way discharged or disciplined but claims "malicious and slanderous" allegations were lodged against Complainant and that if continued, they could lead to a suit under the Civil Rights Act. Complainant's Ex. 2.

Upon the initial filing of the grievance, an informal discussion with the supervisor never occurred. Tr., 11/28/89, pp. 49-50.

Second charge against Employer

Complainant's second charge against the Employer originated out of Complainant's arrest on May 22, 1985, while she was on duty at OCCC, when guards allegedly found contraband in her purse. See Complaint, "Case History No. 4"; Tr., 3/21/90, pp. 36-37. The day of Complainant's arrest was her last day of work at OCCC. Tr., 3/21/90, p. 37.

Complainant received a letter, dated July 1, 1986, from Kenneth Saito, Captain, stating that as of July 15, 1985, she had not reported to work because of her pending workers' compensation claim. Since the Employer had denied her claim for benefits, the letter informed her to report to her Employer to update her status. The letter indicated that her failure to report her intentions within 14 days would result in her having vacated her position. Complainant's Ex. 12; Tr., 3/21/90, pp. 38-39.

Complainant did not go back to work upon the Employer's request because, she testified, she was under the care of Dr. Leigh Sakamaki, who had prescribed anti-depressants and instructed Complainant to remain under his treatment and not to return to work. Tr., 3/21/90, p. 39. Complainant thereafter filed a workers' compensation claim in July of 1985, claiming

inability to work due to work-induced stress. Tr., 3/21/90, p. 37.

On August 21, 1986, Complainant was notified that she would be terminated for vacating her position effective September 9, 1986. Complainant's Ex. 13. Administrative Rules Section 14-14-14(3) permits the Employer to terminate an employee who does not report to work 14 days after the expiration of the employee's authorized leave.

A grievance was filed by Gonzales on September 2, 1986 in anticipation of Complainant's termination. Tr., 11/28/89, p. 14; Complainant's Ex. 14. Complainant's grievance charges violations of Sections 11 and 56 of the collective bargaining agreement, i.e., Termination Without Just Cause. Complainant's Ex. 14.

Complainant believes that Gonzales requested a Step 4 hearing but she does not know if it in fact took place. She testified that the Union never stayed in touch with her regarding the grievance. Complainant alleges that she took repeated measures to reach the Union regarding her complaint, often calling the Union without substantive response. Tr., 11/28/89, pp. 14-15; Complainant's Ex. 15.

As to the status of the grievance filed regarding the termination, Complainant testified that she was told by Dayton Nakanelua from the UPW that he would look into the situation surrounding the grievance and that he would be in contact with

her by letter. Complainant testified that Nakanelua never contacted her. Complainant, in effect, does not know what happened to the pursuit of this grievance. Tr., 11/28/89, pp. 64-65.

In one exchange with the Union, Complainant testified, she told the Union that she could not go back to work and needed to see a doctor. She testified that the Union assented to this. Meanwhile, she testified, the State kept denying her workers' compensation claims for work-induced stress. Workers' compensation benefits were finally approved in 1987. Tr., 3/21/90, p. 39. Complainant testified that she received workers' compensation with the help of Harold Falk, Acting Director, and that neither the Employer nor the Union helped her. Tr., 11/28/89, pp. 16-17. After Falk helped Complainant, the Union then represented her in her workers' compensation proceedings. Tr., 11/28/89, p. 17.

Complainant was awarded total temporary disability (TTD) benefits from May 22, 1985 to August 9, 1985 pursuant to a Disability Compensation Division decision of August 25, 1987. Complainant's Ex. 17. Thereafter, Complainant was awarded weekly compensation for additional TTD benefits beginning August 10, 1985 through May 31, 1987 pursuant to Disability Compensation Division Decision of April 3, 1989. The Employer's responsibility for benefits ceased effective February 16, 1989. Complainant's Ex. 18. Complainant was permitted to retain the TTD benefits paid to her after May 31, 1987 pursuant to a Disability Compensation Division Decision of October 27, 1989.

Complainant's Ex. 19. The matter is presently before the Labor Appeals Board on appeal by the Employer.

CONCLUSIONS OF LAW

Complainant's first charge against the Employer alleges a violation of Subsection 89-13(a), HRS. Subsection 89-13(a), 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:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
- (2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;
- (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;
- (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;
- (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
- (6) Refuse to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in section 89-11;
- (7) Refuse or fail to comply with any provision of this chapter; or

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

This charge begins with an allegation of a Subsection 89-13(a)(1), HRS, violation. The allegation apparently is that Bikle singled out Complainant by "name and sex" in the posting thereby violating her rights under Chapter 89, HRS. Numerous sections of the Unit 10 collective bargaining agreement are cited as having been violated, although the collective bargaining agreement was not placed into evidence by any party to the proceedings.

Subsection 89-13(a)(2), HRS, is alleged to have been violated by the Employer's refusal to meet with Complainant on the grievance filed disputing the allegations of Bikle. Complainant alleges that the Employer, through Harrington, colluded with the UPW to dominate and interfere in the proper administration of the UPW by circumventing the collective bargaining agreement.

Complainant alleges that Subsection 89-13(a)(3), HRS, was violated by "publicly discriminating against grievant by singling her out in groundless and unfounded allegations by Unit Team Manager Bruce Bikle according to her sex and by deliberately humiliating her in associating her with a known homosexual inmate . . . the other male Adult Corrections Officers accused by Unit Team Manager Bruce Bile [sic] were not publicly named or identified."

Subsection 89-13(a)(4), HRS, was allegedly violated when "the Employer . . . 'retaliated' against me because I

exercised my union right to file a grievance complaint against Unit Team Manager Bruce Bikle (a drug felon) to prove my innocence against his false allegations (unresolved)."

Subsection 89-13(a)(5), HRS, is alleged to have been violated because Complainant did not receive a fair hearing as both Employer and the Union refused to process her grievance.

Subsection 89-13(a)(6), HRS, is allegedly violated as a result of a violation of Section 15 of the Collective Bargaining Agreement.

Subsection 89-13(a)(7), HRS, was allegedly violated by the commission of prohibited practices.

Finally, Subsection 89-13(a)(8), HRS, was allegedly violated in a manner unspecified.

In response, the Employer argues that it was recommended that Complainant attempt to resolve the dispute with her supervisor and that her supervisor initiate an investigation into the matter. Respondents' Ex. 1. No further action, Employer argues, was taken by any party. The Employer further argues that about a month after filing her grievance, Complainant asked the Union steward about it and he informed her that it had been submitted to the Employer. Some months later, she inquired of Edwin Shimoda, then OCCC Director, about her grievance and was told by him that he did not know she had a pending grievance. After that, Employer alleges Complainant did nothing to pursue her grievance.

On these facts, Employer argues that these allegations of the complaint are barred by the 90-day statute of limitations. Employer finally argues that there are no facts supporting any prohibited practice by the Employer. Employer's Closing Brief, pp. 3-4.

As against the UPW, in regard to her grievance against Unit Team Manager Bikle, the complaint states that the UPW violated the standard making it a prohibited practice to "interfere, restrain or coerce or any employee in the exercise of any right guaranteed under this chapter." This is the language contained in Subsection 89-13(b)(1), HRS. The complaint states that her grievance filed on August 24, 1984 "was restrained by Business Agent Walter Harrington and not processed in accordance with Section 15 of the collective bargaining agreement. Because of his admitted personal friendship with Unit Team Manager Bruce Bikle, a convicted drug felon, Union Representative Harrington 'froze' Brown's grievance complaint at STEP 1. Both Union Boss Gary Rodrigues and Steward Robert Rivera were fully aware of the unfair labor practice." The complaint cites numerous collective bargaining agreement sections without citing the provisions themselves.

The complaint cites a violation of the provision making it a prohibited practice to "refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in Section 89-9." This is the language of Subsection 89-13(b)(2), HRS. Complainant

states that because of personal reasons involved between the parties [presumably the State, the UPW and Walter Harrington], her grievance was treated arbitrarily and "locked in" at Step 1 since August 27, 1984. All workers, Complainant argues, covered by a collective bargaining agreement have a right to be fairly represented by the Union.

Complainant invokes the phrase, "refuse to participate in good faith in the mediation, factfinding and arbitration procedures set forth in Section 89-11." This is the language of Subsection 89-13(b)(3). Complainant argues that by denying her rights to process her grievance that the Union denied her fair representation or the right to participate in mediation, fact-finding and arbitration. The complaint finally also alleges without substantiation violations of Subsection 89-13(b)(4) and (5). Collective Bargaining Agreement Sections 1, 2, 3, 11, 14, 15, 56 and 61 are referred to without expansion.

In reply, the Union notes that the Collective Bargaining Agreement has not been placed into evidence and requests dismissal on this basis. Union's Brief, p. 2. The Union argues further that the charge set forth in the grievance form does not claim that Complainant was in any way discharged or disciplined such as would make out a violation under the collective bargaining agreement. The Union notes that Respondent Ex. 1 shows the Employer replied that it understood no attempts were made to resolve her concerns directly with Bikle. The Employer said Bikle was only initiating an investigation as he had the right

and responsibility to do and urged her to meet with him. Complainant did not. At no point did she ever seek to speak to Bikle nor pursue the grievance further after speaking to Shimoda. Nothing further was done until she filed her complaint with the Board on August 13, 1987, three years later and substantially beyond the 90-day period of limitations for filing complaints.

The Union argues that the complaint was filed clearly beyond the time limitations and that the grievance was not a proper one under the collective bargaining agreement. What was claimed as a contract violation was merely a complaint against "malicious and slanderous allegations" which, if continued, could lead to a suit under the Civil Rights Act. Union's Brief, pp. 3-4.

With regard to the Complainant's allegations against the Employer surrounding her first grievance, the Board finds that the record reflects only Complainant's uncontroverted claims of demands directed toward the Union for responses regarding its actions taken to process this grievance. The record reflects no response from Complainant to the Employer's "recommendation" in its Step I decision that she discuss with Bikle her objections to the in-house investigation. The evidence suggests Complainant directed her attention toward, and relied on, the Union in pursuing this grievance. The record as it stands suggests that Complainant's own inaction played a hand in impeding a full airing of the Bikle investigation. Though

this does not absolve the Employer of apparent nonresponsiveness, it does prompt the view that the burden of proving a wilful violation by Employer has not been carried.

In the case against the UPW, the Union, in reply, takes the position that the grievance contains no allegations of contractual violations and that, presumably, because no contractual violations are alleged, the Union cannot be held to have violated its duty of fair representation.

A breach 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 Court 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 a reason, merely at the whim of someone exercising union authority. [Emphasis added] (cited in Yamaguchi, 2 HPERB 656 at 675.

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

The Board holds that a breach of the Union's duty of fair representation did, in fact, occur because of the Union's all but absolute unresponsiveness to Complainant's requests for information regarding her grievance, regardless of the validity of claims raised. The Union's uncontroverted lack of response to a unit member can only be inferred to have occurred in wilful bad faith. However, at the same time, the Board finds that Complainant has failed to state a violation for which a Board remedy exists. The contract was not offered into evidence; proof of a contractual violation cannot therefore be established. Moreover, the grievance itself raises allegations only of malice and slander and the possibility of a civil rights suit. Thus, although a breach of the duty of fair representation did occur, Complainant suffered no detriment which can be remedied by the Board, and so is not now in a position to receive corrective action or remedy.

The Board, however, views critically the Union's lack of responsiveness in attending to Complainant's inquiries on the grievance, and notes the fact that, but for the nature of the violations alleged in the grievance, i.e., allegations of non-contractual violations, the Union's slipshod handling of the grievance would warrant remedies to correct the breach of the duty of fair representation.

In regard to her second charge against the Employer, Complainant does not cite the statutory section alleged to have

been violated. Complainant merely notes her suspension effective May 22, 1985, her instructions to return to work July 15, 1985 with reinstatement and full back pay from May 22, 1985. Thirteenth attached sheet of complaint. Complainant alleges that she has been denied full reinstatement and retroactive back pay in violation of the collective bargaining agreement. Complainant also notes Employer's instruction to return to work within 14 days from July 1, 1986. She further notes the filing of a grievance on September 2, 1986 by Gonzales, charging the Employer with violations of Sections 11 and 56 of the Unit 10 collective bargaining agreement, relating to termination without just and proper cause, and the failure to consider mitigating circumstances prior to reaching the decision to terminate. Complainant charges that a letter requesting a Step 4 meeting was sent to then Personnel Director James Takushi by Gonzales on September 10, 1986 and that there was no response of which she is aware. She further alleges that the UPW sent four letters to the Department of Personnel Services since September 10, 1986 requesting a hearing without a response.

Employer notes in response that the July 1, 1986 letter from Employer informed Complainant that since she had failed to return to work and since her claim for workers' compensation had been denied, she would have to report within 14 days to tell the Employer her intentions. Complainant's Ex. 12. The letter indicates that her failure to report her intentions would result in her having vacated her position.

Complainant, Employer alleges, did not report to her Employer as directed. On August 21, 1986, Complainant was informed that since she had failed to respond to the July letter and since attempts to contact her had proven to be unsuccessful, she was being terminated pursuant to Administrative Rules Section 14-14-14(3). Complainant's Ex. 13. This section permits the Employer to terminate an employee who does not report to work following 14 days after the expiration of the employee's authorized leave. Employer argues that Complainant's termination, pursuant to the above-cited regulation, was proper. Employer's Closing Brief, p. 5. In any event, Employer argues, even if there were a violation of the Administrative Rules, the violation would not be a prohibited practice within the meaning of Section 89-13, HRS. The Board, Employer argues, does not have jurisdiction over the issue. The Employer further argues that under the collective bargaining agreement, the Employer can grant leave for up to one year without pay for an industrial injury. The one-year leave may be extended if the employee is receiving TTD compensation under workers' compensation laws. Since Complainant was not receiving TTD at the time of her termination, the leave period did not have to be extended. Employer's Closing Brief, p. 5. Finally, the Employer argues that Complainant did not file a complaint within 90 days of the alleged prohibited practice and that Complainant has failed to exhaust remedies available to her under the collective bargaining agreement. Employer's Closing Brief, pp. 5-6.

Employer does not address Complainant's allegations of a failure to respond to her grievance.

In her complaint regarding the issue of her grievance filed pursuant to her termination, Complainant does not make any explicit allegations against the Union. The Union, however, addresses this charge in its brief. The Union states that Complainant was terminated while she was officially on disability leave under the workers' compensation law. The Union notes that the Employer argues that the real reason for her discharge was her failure to contact the Employer as to her intentions and status and thus the discharge was proper under Administrative Rules Section 14-14-14(3). The Union states that the key matter is whether the employee was excusably absent because of disability, mental, emotional and/or physical at the time of termination.

The Union thus submits that it is neither appropriate nor timely to initiate arbitration proceedings at this point when key issues that will decide the validity of the complaint here and in the workers' compensation case have not yet been determined. A reasoned evaluation of the necessity for arbitration cannot yet be made by either Brown or the Union. The final outcome of the Labor Appeals Board case should shortly decide the matter. As of the time of the filing of the complaint herein and up to now, the Union argues that it has not failed or refused to represent Brown adequately or properly with respect to any arbitration claims she may have. Accordingly,

the Union argues, the complaint should be dismissed without prejudice. Union's Brief, p. 7.

In regard to the charges surrounding Complainant's second grievance filed pursuant to her notice of termination, the Board notes that the Union's demand for arbitration is still valid and pending despite the passage of time. While there was no evidence submitted to illuminate the processing of the grievance and to answer Complainant's demands for an explanation of the status of her grievance, the Board must conclude that the grievance has been adequately addressed, given that the grievance has reached the stage of a request for arbitration. Therefore, the Board must conclude that the Union has committed no breach of the duty of fair representation and that the Employer has adequately provided Complainant access to the grievance procedure. With the disposition of issues herein, the Board need not address Complainant's enumerated allegations of statutory violations, nor the State's arguments regarding the validity of her termination.

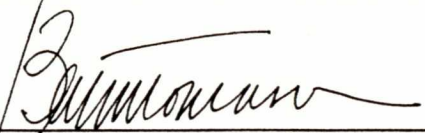
The Board is mindful that the pending decision on Complainant's workers' compensation claims is imminent and that the issuance of this decision will materially affect the decision of whether or not to go to arbitration. The Board thus recognizes that Complainant's claims herein may be reactivated before this Board after decisions in the workers' compensation context and arbitration are issued.

ORDER

Complainant's allegations surrounding her first grievance are dismissed. Complainant's allegations regarding the grievance filed in regard to her termination are dismissed without prejudice.

DATED: Honolulu, Hawaii, April 17, 1991.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


GERALD K. MACHIDA, Board Member


RUSSELL T. HIGA, Board Member

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