

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-08-158
)	
HAWAII GOVERNMENT EMPLOYEES)	DECISION NO. 340
ASSOCIATION, AFSCME LOCAL 152,)	
AFL-CIO,)	FINDINGS OF FACT, CONCLU-
)	SIONS OF LAW AND ORDER
Complainant,)	
)	
and)	
)	
BOARD OF REGENTS, University)	
of Hawaii and DONALD N. B.)	
HALL, Director, Institute for)	
Astronomy, University of)	
Hawaii,)	
)	
Respondents.)	
)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On May 22, 1991, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO (HGEA or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondents BOARD OF REGENTS, University of Hawaii and DONALD N. B. HALL, Director, Institute for Astronomy, University of Hawaii (Employer). Complainant alleges that the Employer violated Sections 89-13(a)(1), 89-3, 89-6, 89-9(a) and (c), 89-10(d) and 89-11(a), Hawaii Revised Statutes (HRS).

Complainant alleges, inter alia, that Respondents engaged in the following prohibited practices:

1. Interfered with, restrained and coerced the employees at the University of Hawaii (UH) Institute for Astronomy (IFA),

specifically Harvey K. Miyaji, in their rights guaranteed under Chapter 89, HRS.

2. Failed to consult with HGEA prior to changes in a major policy relating to the working conditions of the bargaining unit 8 members and changes in funding source and employment (hiring) status of the Unit 8 positions.

3. Discriminated against and coerced Miyaji by terminating him and hiring non-bargaining unit employees in violation of the Unit 8 Collective Bargaining Agreement (Agreement). Union and Employer Joint Exhibit.

4. Obstructed the grievance process by refusing to provide Complainant with relevant information regarding the grievance filed on Miyaji's behalf.

On December 5, 1991, Respondents filed a Motion to Dismiss on the grounds that the action was untimely filed and that the Board lacked jurisdiction over the subject matter because the Complainant failed to exhaust its contractual remedies. A hearing on the motion was held on December 19, 1991, and after arguments, the Board dismissed all of the allegations against the Respondents, but reserved the question as to whether the Respondents interfered with the grievance procedure by failing to provide certain information to HGEA on a timely basis.

A hearing on this remaining issue was held on January 14, 1992. Post-hearing briefs were submitted on February 10 and 11, 1992, by Respondents' and HGEA's counsel, respectively.

Upon a thorough review of all exhibits, testimony presented at the hearing, and arguments made orally and in writing,

the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Complainant HGEA is the exclusive representative as defined in Section 89-2, HRS, of bargaining unit 8 (Personnel of the UH and community college system, other than faculty).

Respondent BOR is the public employer as defined in Section 89-2, HRS, of members of bargaining unit 8.

Respondent DONALD N. B. HALL is the Director of the Institute for Astronomy, UH and Harvey K. Miyaji's department head.

Harvey K. Miyaji was at all times relevant a member of bargaining unit 8 as it is defined in Subsection 89-6(a), HRS.

Miyaji was hired by the IFA as an Observatory Technician II on September 18, 1989. He was hired as an Administrative, Professional and Technical (APT) employee on probationary status, subject to federal funding. Transcript 1/14/92 (Tr.), p. 9.

On February 28, 1991, HALL sent a letter to Miyaji terminating him effective April 5, 1991. Union Exhibit A-1.

At the hearing on this case, Ralph Boyea, HGEA agent, testified that he received a telephone call from Miyaji on March 1, 1991. They discussed Miyaji's termination letter. Immediately thereafter, Boyea called Ron Koehler, Miyaji's supervisor, to find out why Miyaji was being terminated. Koehler referred Boyea to Larry Sakima, Assistant Director of the IFA. Tr. p. 14.

On March 6 and 7, 1991, Boyea telephoned Sakima requesting an informal grievance meeting and the following nine items which is documented by his letter to Sakima, dated March 7, 1991:

In addition to this meeting we hereby request the following information:

1. A copy of the official organizational chart for the IRTF on Mauna Kea;
2. Complete listing of all IRTF employees including their names, classification, position number, date of hire, and, funding source;
3. Justification submitted for the creation of position #81448;
4. Justification submitted for the creation and filing of the RCUH Observatory Technician position at the IRTF;
5. Recruitment announcement for position #81448 and for the RCUH Observatory Technician position;
6. Period of appointment and renewal periods for the incumbent employees in position #81448 and RCUH Observatory Technician position;
7. Any official documents that would link these incumbents or their positions with position #81286 and/or #81287;
8. Any official documents that will substantiate your contention that this position is being deleted due to lack of funds; and,
9. Any other information relevant to the termination of Mr. Miyaji and continued employment of the RCUH Observatory Technician.

In accordance with Article 16 - GRIEVANCE PROCEDURE of the Unit 08 Agreement, we hereby request that the above referenced information be provided to us within seven (7) working days.

On March 21, 1991, Sakima and Boyea met in Hilo. Sakima testified that during this meeting he and Boyea discussed all of the issues that were raised in Boyea's March 7th letter. All of the items listed in the letter were provided to Boyea--except items 3, 4, and 8. Sakima told Boyea that items 3 and 4 were not in his possession because they were somewhere in the University personnel system's storage files and he could not get them before the March 21st meeting. Tr. pp. 65-66.

Approximately three months after the March 21st meeting in a letter dated June 19, 1991, Wayne Lu of IFA provided Gary Yoshiyama, HGEA's Hawaii Division Chief, information relative to Boyea's items 3 and 4 request which established Miyaji's position. Lu's letter also indicated the reduction of funds for the period February 1, 1991 to January 31, 1992. Employer Exhibit 3.

As to item 8, Sakima testified that he could not provide any official documents relating to the reduction of funds because IFA was still negotiating the contract. The new contract was subsequently provided to HGEA on July 30, 1991. Tr. p. 68; Employer Exhibit 4.

In a letter dated March 27, 1991, Boyea wrote to HALL stating that the Union was filing a Step 1 grievance on behalf of Harvey Miyaji. In this letter, Boyea referred to his previous letter of March 7, 1991 to Sakima and specifically stated that items 3, 4, and 8 identified in that letter had not been provided. This letter did not mention that items 1, 2, 5, 6 and 7 had not been provided. HALL received Boyea's letter on April 2, 1991. Employer Exhibit 1.

In a letter dated April 8, 1991, Boyea amended Miyaji's Step 1 grievance and requested information contained in the University Administrative Procedures Manual. He also notified HALL that the information which was previously requested had not been provided. Boyea stated this fact in the following manner:

Please note that information, previously requested, has not been provided in a timely manner. Article 16 - GRIEVANCE PROCEDURE of the Unit 08 collective bargaining Agreement clearly states:

"Any relevant information specifically identified by the ...Union in the possession of the Employer needed by the ... Union to investigate or process a grievance, shall be provided to them upon request within seven (7) working days" and

"D. Step 1. ... A meeting shall be held between the grievant and a Union representative with the division head or the designee within seven (7) working days after the written grievance is received."

The nature of this complaint and the IFA's continued reluctance to process this grievance is forcing the Union to consider other options such as filing a Prohibited Practice Complaint with the Hawaii Public Employment Relations Board. We would prefer to resolve this matter "in house" through the confidential grievance procedure.

According to Employer Exhibit 2, this letter from Boyea to Hall was received on April 9, 1991. As to the information relating to the Administrative Procedures Manual, Boyea had access to these documents on or about April 11, 1991. Tr. p. 72.

On May 22, 1991, HGEA filed the instant prohibited practice complaint with the Board. Board Exhibit 1.

On June 20, 1991, the Step 2 grievance hearing was held. The Step 3 grievance hearing was held on July 26, 1991. In a letter dated August 20, 1991, HGEA requested to proceed to arbitration. Tr. p. 30; Union Exhibit D.

DISCUSSION

The sole issue before us in this case is whether Respondents (Employer) committed prohibited practices in violation of Sections 89-13(a)(1) and (8), HRS¹, by interfering and obstructing the grievance process by failing to provide information to Complainant HGEA on a timely basis.

Sections 89-13(a)(1) and (8), HRS, provides as follows:

(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;. . .

* * *

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

The posture in which this prohibited practice complaint was presented before the Board was stipulated to and agreed upon by the respective counsel for the Employer and Union. Transcript 12/19/91, pp. 15, 22; Tr. pp. 4-5.

¹Although HGEA's counsel did not specifically designate a Section 89-13(a)(8), HRS, violation in the Complaint, the Board notes that counsel did allege that Respondents' refusal to provide information to process a grievance is in violation of Article 16 of the Agreement, thereby violating said Section 89-13(a)(8), HRS. See, p. 4 of HGEA's Prohibited Practice Complaint and Complainant's Pre-Hearing Statement dated July 1, 1991, at pp. 1 and 4.

Respondents take the position that the subject matter of this case is not grievable. Miyaji was hired on a probationary status, subject to federal funding. He was terminated during his probationary period and therefore, pursuant to Article 8 of the Agreement, the Employer does not have to give a statement of reasons for the termination.

Article 8, Employment Security, in pertinent part states:

A. All Employees shall serve a probationary period until obtaining employment security as indicated below. Employees with employment security shall not be suspended, demoted or discharged without proper cause provided, however, that the foregoing is not intended to interfere with the right of the Employer to relieve Employees from duties because of lack of work or other legitimate reasons.

B. Employees shall serve a probationary period of three (3) years of continuous service. These Employees may be terminated without a statement of reasons at any time during the probationary period by the Employer upon thirty (30) calendar days' notice or by non-renewal of their appointment. Employees so terminated have no reemployment rights as defined under Article 9, Employment rights. An Employee who satisfactorily completes the probationary period shall be given employment security.

HGEA, on the other hand, maintains that Miyaji's termination is a grievable matter subject to the grievance procedure in Article 16 of the Agreement.

Article 16 - Grievance Procedure in pertinent part reads:

A. Any complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure. Any relevant information specifically identified by the grievant or the Union in the possession of the Employer needed by the grievant or the Union to investigate or process a grievance, shall be provided to them upon request within seven

(7) working days. The grievance shall be presented to the appropriate supervisor within twenty (20) working days after the occurrence of the alledged (sic) violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) working days after the alleged violation first became known or should have become known to the Employee involved, except that in the case of an alleged payroll computational error, such allegation shall be presented to the President or the designee in writing within twenty (20) working days after the alleged error is discovered by the Employee, or the grievance may not be considered.

The Board holds that Miyaji, a bargaining unit 8 employee on probationary status before his termination, had all the rights and benefits provided in the applicable statutes and the Unit 8 Agreement. Although the question of whether the termination was subject to the grievance procedure was not resolved, the Union requested relevant information concerning Miyaji's termination pursuant to Article 16 of the Agreement. This request was brought to the attention of Ron Koehler, Miyaji's immediate supervisor, on March 1, 1991. Tr. p. 14.

Thus, under Article 16, the Employer was obligated to provide, upon request, any relevant information specifically identified by the Union and in its possession needed by the Union to investigate or process a grievance within seven (7) working days.

Addressing the merits of the case, we base our holding on several factors that establish that the Employer's conduct in submitting the information requested by the Union had a reasonable tendency in the totality of the circumstances to interfere with the grievance procedure in violation of the Agreement.

One factor we rely upon concerns the Employer's attitude that they would not answer any questions concerning Miyaji's termination. Boyea testified that in his March 1, 1991 telephone conversation with Ron Koehler, Koehler refused to meet or discuss the matter. Instead Koehler referred him to Larry Sakima. Boyea also testified that time was of the essence because Miyaji was going to be terminated on April 5, 1991 and the Union wanted to prevent it. Boyea stated, "A termination, of course, is the industrial death penalty, and if the employee actually was terminated, he'd be out without any income. So we wanted to get into his office as quickly as possible, identify whether--if there was a problem and, if so, stop it from happening". Tr. pp. 14-15.

On March 5 and 6, 1991, Boyea called Sakima who was not available. On March 6, Boyea called Koehler to request an informal grievance meeting in accordance with Article 16 of the Agreement. Koehler again refused to meet. Tr. p. 15.

On March 6, 1991, Sakima finally called Boyea and explained that the Employer did not have to provide any information because Miyaji was terminated under Article 8 of the Agreement. Boyea testified that the Union wanted an informal grievance meeting. According to Boyea, Sakima replied that they could not process the grievance because this matter was not grievable. Tr. p. 16.

As noted previously, on March 7, 1991, Boyea wrote to Sakima requesting an informal grievance meeting at the earliest possible date. He also requested nine (9) specific documents. Union Exhibit A-9. On March 20, 1991, Sakima responded that

Miyaji's employment was terminated under Article 8 which requires no statement of reasons. However, for what it was worth, Sakima also stated that the "scheduled return of Mr. Sammie Pung from extended leave of absence on April 1, 1991 and budgetary limitations and restrictions as set forth by NASA, the Federal sponsoring agency of the IRTF, do not permit the Institute to continue Mr. Miyaji's employment." Union Exhibit A-11.

At the March 21, 1991 meeting in Hilo between Boyea and Sakima, Boyea wanted to treat the meeting as the Step 1 informal grievance meeting. However, Sakima took the position that the information provided at this meeting was offered outside the contract and not within the scope of the grievance procedure. Tr. pp. 55, 74-75.

Sakima testified that during the meeting of March 21, 1991, item 1 of Boyea's March 7, 1991 letter, the official organization chart, was given to Boyea. Item 2, the list of names, position numbers and titles, was also provided to Boyea. Boyea admitted receiving item 5, the recruitment announcement for Position No. 81448, at this meeting. As to items 6 and 7, Sakima testified that there were no specific documents concerning these items but verbal information was offered to Boyea. Boyea admitted he received this information at the March 21 meeting. Tr. pp. 23, 36-37, 65-67.

At this juncture, the Board notes that the Employer between the period beginning from March 1, 1991 to March 21, 1991 was shielding itself, on the one hand, under Article 8 of the Agreement by refusing to acknowledge the Union's grievance and

contending that whatever information or documents which were subsequently provided was offered outside the Agreement. On the other hand, after HGEA filed a prohibited practice complaint with the Board on May 22, 1991, the Employer proceeded under Article 16 of the Agreement when it held a Step 2 grievance hearing before Dr. Moheb Ghali on June 20, 1991. Tr. p. 57. On July 26, 1991, the Step 3 grievance hearing was conducted before James Takushi, Director of Personnel, UH, who recognized the grievance. This was evidenced by letter dated July 30, 1991 from Mr. Takushi to Ralph Boyea. Union Exhibit D.

Therefore, instead of holding firm to the position that Miyaji's termination was not grievable under Article 8 of the Agreement, the Employer changed course and by June 20, 1991 proceeded under Article 16, Grievance Procedure, of the Agreement.

To arrive at a decision in this case, we are guided by the grievance process as agreed upon by the Union and the Employer as evidenced in the Unit 8 Agreement. Therefore, the question of timeliness shall be measured according to the specific time periods prescribed by Article 16. According to the Agreement, any relevant information specifically identified by the Union and in the possession of the Employer which is needed by the grievant or Union to investigate or process a grievance shall be provided to them upon request within seven (7) working days.

Based upon the foregoing time frame, the Employer should have provided the Union with whatever information they had in their possession as requested in the letter dated March 7, 1991, from Boyea to Sakima at least by March 19, 1991. The evidence indicates

that the Employer did not provide the requested information on March 19, but by letter dated March 20, 1991, Sakima stated that the information requested by Boyea's March 7th letter interferes with the rights of the Employer as provided under the Agreement. Union Exhibit A-11. Therefore, the Board concludes that as of March 20, 1991, the Employer interfered with the grievance process by failing to provide the subject information to the Union within 7 working days as prescribed by Article 16.

Given this conclusion, the Board is compelled to hold that whatever information provided by the Employer at the March 21 meeting between Boyea and Sakima was untimely and constituted a violation of Article 16. Assuming, arguendo, that the information relating to items 1, 2, 5, 6 and 7 were provided to Boyea at the March 21 Hilo meeting in a timely manner, we are still faced with the question of timeliness as to items 3, 4 and 8. In Boyea's letter dated March 27, 1991, he stated that those three items were not yet provided.

The Board notes that understandably as to item 8, the information could not be provided within the 7 working-day prescribed period because the Employer was still negotiating the contract relating to the reduction of federal funds. However, as to items 3 and 4, although Sakima did not have possession of these items before the March 21st meeting, the record reflects that it took approximately three months from March 27, 1991, to provide some information relative to Miyaji's position and the reduction of funds for the period February 1, 1991 to January 31, 1992. This is evidenced by letter dated June 19, 1991 from Wayne Lu of IFA to

Gary Yoshiyama of HGEA. The letter emphasized that the information was provided outside the Unit 8 Agreement. Employer Exhibit 3.

The Board holds that the information requested under items 3 and 4 were not provided on a timely basis. There was no evidence presented to justify why it took about three months to gather this information. The record does not indicate that the Employer requested an extension of time to submit this information.

We recognize the argument submitted by Respondents' counsel that the issue of providing the Union's requested information is moot because all of the requested information has now been provided. See, Respondents' Closing Memorandum, pp. 5-6. The Board is still constrained to render a decision based upon the posture in which both Employer and Union presented this case as stipulated by the respective parties--that is, whether the Respondents provided relevant information to Complainant HGEA on a timely basis.

The Board notes that Ralph Boyea's testimony covered a trail of frustration which started on March 1, 1991 when he called Ron Koehler concerning Miyaji's termination. Koehler refused to discuss the matter or even meet with Boyea. Boyea was referred to Larry Sakima who was not available by telephone on several occasions. After numerous calls to Koehler, Sakima on March 6, 1991 finally called Boyea. Sakima maintained that the Employer was not obligated to provide any information and explained there was nothing to grieve. During this period between March 1 and March 21, 1991, the Union requested documents in its investigation which would possibly explain what led to the termination of Mr. Miyaji.

Throughout this period, the Employer as noted stood on their Article 8 rights, but offered certain information on the condition that the information was not being provided pursuant to the Agreement. On several occasions, Boyea was surprised that certain information was transmitted to the Union's attorney or, for an example, to Gary Yoshiyama, HGEA's Hawaii Division Chief. Boyea testified that after the Step 2 grievance hearing on June 20, 1991, Yoshiyama told Boyea that he had an off-the-record discussion with Hall and Lu in an attempt to settle Miyaji's grievance. Boyea was notified of the letter dated June 19, 1991 from Lu to Yoshiyama. When Boyea questioned Yoshiyama as to whether he could use it in the grievance process, he was told that this information could not be used in the grievance process because the letter clearly states that this was being provided outside the Agreement. The same information was received by Boyea after the Step 3 grievance on July 26, 1991. Tr. pp. 50-51. This information was untimely provided after the Steps 2 and 3 grievance hearing. Even if this information may be available at the Step 4 arbitration hearing, the Board holds that the information was not provided on a timely basis as evidenced at the Steps 2 and 3 hearings.

In Respondents' Closing Memorandum, counsel argues that Complainant has the burden of proving by a preponderance of the evidence that Respondents had a conscious, knowing, and deliberate intent to violate the provisions of Chapter 89, HRS. Respondents contend that Complainant presented no evidence that Employer wilfully violated said Chapter 89.

The Board held in Decision No. 194, United Public Workers, AFSCME Local 646, 3 HPERB 507 (1984), at p. 514:

"Wilful" has been interpreted by the Board to mean "conscious, knowing, and deliberate intent to violate the provisions of Chapter 89, HRS." Aio, et al. and HSTA, 2 HPERB 458, 491 (1980) . . . However, while adhering to a literal interpretation of the term, the Board in Aio made it clear that wilfulness could be inferred from circumstances depending on whether obligations under the law which are allegedly broken are clearly delineated in settled doctrines. 2 HPERB at 481. The Board has also ruled that wilfulness can be presumed where a violation occurs as a natural consequences of a party's actions. State of Hawaii Organization of Police Officers (SHOPO), et al. and Frank F. Fasi, 3 HPERB 12, 23 (1982); Burns and State of Hawaii Organization of Police Officers (SHOPO) and Eileen R. Anderson, 3 HPERB 114, 123 (1982).

In the instant case, the Respondents initially chose to rely on Article 8 of the Agreement and refused to recognize Miyaji's grievance. In making that choice, they knew or should have known that the natural consequence of that decision would conflict with Article 16 of the Agreement. The Board concludes by a preponderance of the evidence that Respondents violated Article 16 of the Agreement by failing to provide certain information on a timely basis. By violating the Agreement, Respondents violated Section 89-13(a)(8), HRS, which makes it a prohibited practice to wilfully violate the terms of the collective bargaining agreement.

Accordingly, the Board holds that Respondents' actions constituted violations of Sections 89-13(a)(1) and (8), HRS.

CONCLUSIONS OF LAW

The Board has jurisdiction over this complaint pursuant to Section 89-13, HRS.

The Board concludes that the Respondents committed prohibited practices in violation of Sections 89-13(a)(1) and (8), HRS, by interfering and obstructing the grievance process and by violating the terms of Article 16 of the Unit 8 Agreement when it failed to provide relevant information to Complainant HGEA on a timely basis.

The Board concludes that the question of timeliness shall be measured according to the specific time period prescribed by the Article 16 provisions of the Unit 8 Agreement. Any relevant information specifically identified by the Union and in the possession of the Employer which is needed by the grievant or Union to investigate or process a grievance shall be provided to them upon request within seven (7) working days.

Based upon the foregoing time frame, the Employer should have provided the Union with whatever information they had in their possession as requested in the letter dated March 7, 1991, from Boyea to Sakima at least by March 19, 1991. The evidence instead shows that the Employer did not provide the requested information on March 19, but by letter dated March 20, 1991, Sakima stated that the information requested by Boyea's March 7th letter interferes with the rights of the Employer as provided under the Unit 8 Agreement. Union Exhibit A-11. Therefore, the Board concludes that as of March 20, 1991, the Employer interfered with the grievance process by failing to provide the subject information to the Union within seven (7) working days as prescribed by Article 16 of the Agreement, thereby violating Section 89-13(a)(8), HRS.

ORDER

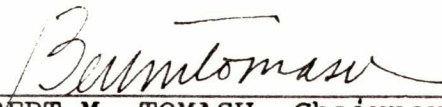
In accordance with the foregoing, the Board hereby orders and directs the following:

Respondents are directed to cease and desist from these prohibited practices.

Respondents shall immediately post copies of this decision on every bulletin board or designated space provided by the Employer for union material and leave said decision posted for a period of 60 consecutive days.

DATED: Honolulu, Hawaii, June 30, 1993.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


GERALD K. MACHIDA, Board Member


RUSSELL T. HIGA, Board Member

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