

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-07-106
)	
SHELDON S. VARNEY,)	DECISION NO. 369
)	
Complainant,)	FINDINGS OF FACT, CONCLU-
)	SIONS OF LAW AND ORDER
and)	
)	
UNIVERSITY OF HAWAII)	
PROFESSIONAL ASSEMBLY,)	
)	
Respondent.)	
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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 29, 1994, Complainant SHELDON S. VARNEY (VARNEY) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board). According to his complaint, VARNEY agreed to transfer from the College of Education, University of Hawaii (UH), to the School of Public Health (SPH) in 1988 provided that he be given an 11-month contract. In 1993, Complainant alleged that the Dean of the SPH told him that all persons on 11-month contracts in the SPH were being placed on nine-month contracts due to a shortage in funds. Thereafter, in April 1994, Complainant learned that a similarly situated professor in the SPH had been restored to 11-month status. Complainant sought the assistance of his union, the UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA or Union) but was dissatisfied with its representation.

Complainant contends that UHPA breached its duty of fair representation by, inter alia, violating the terms of the

bargaining unit 07 collective bargaining agreement (contract) by refusing to provide him with pertinent information and refusing to file a class grievance on his behalf. Complainant also alleges that the Union failed to participate in good faith fact-finding through the grievance process and failed to give good and clear reasons for not allowing his case to proceed to arbitration, and therefore interfered and restrained him in his right to bring a grievance. Thus, Complainant alleges that UHPA violated, inter alia, Sections 89-13(a)(1), (a)(6), (b)(3), and (b)(5), Hawaii Revised Statutes (HRS).

At the prehearing conference held in this matter on December 27, 1994, the Board indicated that VARNEY's allegations of Section 89-13(a), HRS, violations would be dismissed because those statutory provisions refer to prohibited practices committed by the public employer or employer representative and were inappropriately brought against the Union. The Board also indicated that it would allow VARNEY to amend his complaint to conform to the evidence adduced. At the time, VARNEY stated that his complaint against the Union was for the breach of its duty of fair representation, i.e., a violation of Section 89-13(b)(4), HRS, and against the Union for interference with his right to file a grievance, i.e., a violation of Section 89-13(b)(1), HRS. In addition, VARNEY indicated that he felt the Union violated provisions of the Unit 07 contract.

Thereafter, the Board held a hearing in this matter on January 5, 1995. All parties had full opportunity to present evidence and argument to the Board. The parties subsequently filed post-hearing briefs with the Board.

On March 3, 1995, UHPA filed a motion to strike Complainant's Post-Hearing Brief with the Board. UHPA contended that Complainant's Brief contains prejudicial new evidence for the Board's consideration in his Remedy section which thereby denied Respondent a fair hearing. UHPA claimed that the Complainant's calculation of compensatory damages contains numerous facts which were not admitted into evidence. Specifically, UHPA contended that there is no evidence in the record to support VARNEY's actual salary for the years 1990-91 and 1991-92, VARNEY's calculation of retirement loss, reference to an IRS Table on life expectancy, VARNEY's retirement system formula and the calculation of his loss of benefits of Union dues and miscellaneous expenses. Thus, UHPA requested that the Board strike Complainant's Brief.

On March 6, 1995, VARNEY submitted an Answering Affidavit to the Board. VARNEY claimed that UHPA set forth in its Prehearing Statement that the change from an 11-month contract to a nine-month contract amounted to a \$955 per month reduction in pay. In addition, VARNEY referred to several parts of the transcript of the hearing which he believes establishes his damages and where the Union failed to further cross-examine VARNEY on his claimed loss of salary and retirement benefits. Moreover, Complainant submitted that the Board is not bound by the technical rules of evidence and thus UHPA's motion should be denied because it is unreasonable.

In Decision No. 310, Terry Tominaga, 4 HLRB 753 (1990), the Board granted respondent's motion to strike the complainant's closing memorandum to the extent that in its deliberations, the Board would not consider evidence contained in a closing memorandum

which was not properly submitted at the hearing. Likewise, the Board in this case is constrained to disregard arguments in Complainant's Post-Hearing Brief based upon evidence which was not properly introduced into the record during the hearing. Thus, the Board grants Respondent's motion to strike Complainant's Brief to the extent that the argument is based upon facts not in evidence. However, with respect to Complainant's calculation of loss in salary and retirement benefits, the Board finds that there is evidence in the record which supports these contentions. VARNEY testified on these issues and was subject to cross-examination by counsel for Respondent. Thus, as to those matters, the Board denies Respondent's motion.

Based upon a complete review of the record, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

SHELDON S. VARNEY is a professor at the SPH, UH (Employer) and a member of bargaining unit 07, composed of faculty of the UH and the community college system.

UHPA is the exclusive representative of the employees included in Unit 07.

UHPA and the UH are parties to a collective bargaining agreement covering the employees of Unit 07. Respondent's (R's) Exhibit (Ex.) 1.

VARNEY was employed by the UH in 1970 in the College of Education in the Department of Education Administration. Complainant's (C's) Ex. 3. In 1989, VARNEY transferred to the Department of Community Health Development's Health Administration

and Planning Unit at the SPH. C's Ex. 4. He also served a school-wide function as the Director of SPH's annual Summer Institute which required an 11-month appointment. Id. VARNEY performed the duties of a regular full-time professor, including instruction and research, advising students, and sitting on committees. Transcript of hearing held on January 5, 1995 (Tr.) p. 116. In addition, as Director of the Summer Institute, VARNEY performed administrative duties, including organizing, scheduling, hiring the teachers, arranging supplies, etc., for the SPH's summer program. Id. at 116-17.

In the spring of 1993, SPH Dean Barbara Siegel met with faculty members and informed them that due to budget cutbacks, 11-month appointments would be restricted to Department Chairs and the PhD/DrPH Chair for the 1993-94 academic year. Affidavit of Barbara Z. Siegel. VARNEY understood Siegel as saying that all persons within SPH were being taken off 11-month contracts. C's Ex. 1. VARNEY was told that his position would be changed from an 11-month to a nine-month appointment. Tr. p. 106. VARNEY did not grieve because he understood that all 11-month professors would be treated equally. C's Ex. 1.

Thereafter, Dean Siegel and two Assistant Deans, met with VARNEY to persuade him to continue to perform the Summer Institute Director's duties without compensation for the 1993-94 academic year. Tr. p. 118. VARNEY refused to perform the duties without pay. Id.

In June 1993, VARNEY received a Form 5B, Notification of Personnel Action, which indicated that he had an 11-month

appointment for the 1993-94 year with an annual base pay of \$78,924.00. Id. at 107; C's Ex. 4. VARNEY thought the Dean had reconsidered her decision to discontinue his 11-month appointment. Tr. p. 107. However, in July 1993, VARNEY received another Form 5B that indicated a change from an 11-month appointment to a nine-month appointment with an annual base pay of \$67,464.00. Id.

On November 8, 1993, VARNEY attended an SPH Policy Council meeting where, inter alia, the Council approved the policy which the Dean had announced to the faculty during the prior semester that 11-month appointments were restricted to Departmental Chairs and the PhD/DrPH Chair. Id. at 108; C's Ex. 5.

On April 11, 1994, VARNEY learned that Professor Jerome Grossman (Grossman) was reinstated by the administration to an 11-month appointment for the 1993-94 year during a staff meeting. C's Ex. 1. VARNEY also discovered that another faculty member had been given an 11-month appointment. Tr. p. 119; C's Ex. 3. VARNEY contacted UHPA about filing a possible grievance.

Subsequently, VARNEY spoke with James Kardash, UHPA Assistant Executive Director, on April 18, 1994. Board Ex. 6. Kardash indicated that he had no information about the Grossman case and that VARNEY would have to talk to J.N. Musto, Executive Director of UHPA. Id. Sometime during the week of April 18, 1994, VARNEY spoke to Musto. Tr. p. 64. VARNEY wanted information about Professor Grossman's grievance and Musto told him that the cases were different and that the confidentiality of grievances prevented UHPA from discussing the Grossman case. Id. at 34. Musto told VARNEY that he was not making a judgment about his case since it

would be inappropriate. Id. at 64. Musto told VARNEY that if he felt aggrieved, he should file a grievance. Id. Musto asked VARNEY for a written request for information. Board Ex. 6.

By letter dated April 26, 1994, VARNEY requested UHPA to assist him to achieve his 5th and 14th Constitutional Amendment right to "equal protection" by a governmental body and to reinstate him to the same status as that of Professor Grossman "so that a decision as to one grievant shall be decisive as to all members of the class." C's Ex. 1.

The Addendum attached to the letter to Musto indicates that it was submitted at Kardash's suggestion on April 26, 1994 that he make specific requests to UHPA for assistance and that he relate the requests to the contract. Id. VARNEY indicated that he contacted UHPA on April 11, 1994 to request assistance and he spoke to John Radcliffe. Id. VARNEY told him that he had been told that Professor Grossman had been provided relief from being changed from 11 to nine-month status by the SPH. Id. VARNEY informed Radcliffe that the rumor was that the SPH refused to reverse their position but that the Academic Vice President's Office had settled the case in favor of Professor Grossman and provided relief. Id. Since the information was a staff discussion, VARNEY acknowledged that the information could be inaccurate. Id. VARNEY specifically requested UHPA to assist him in getting information pertinent to any possible grievance he could have relating to equal treatment by the UH. Id. If the facts verified the rumor that the case was settled in favor of the faculty member, VARNEY requested assistance so that a decision as to one grievant, Grossman, would be decisive

to all members of the class. Id. Further, if the facts were found to be true, VARNEY wanted to know why the UNION did not notify him as a class member to be included or excluded. Id.

Musto responded to VARNEY by letter dated April 29, 1994, stating that if he felt aggrieved that he should sign a grievance form and if requested, UHPA would assist him in the processing of the grievance. C's Ex. 2. Musto's letter indicated that the grievance procedure specifies that a written grievance must be filed within twenty days from the date the alleged grievance occurred. Although Musto indicated that he had no real notion whether VARNEY's situation was similar to Grossman's, he felt it "unlikely" that the particular circumstances were identical. Id.

VARNEY met with Kardash to discuss his case. VARNEY sought proof of Grossman's grievance settlement. VARNEY believed that there was a written settlement in the Grossman case and that proof of the settlement was the key to his reinstatement to an 11-month contract. Board Ex. 1. Kardash replied that the grievances were confidential and that UHPA could not show VARNEY the file. Tr. p. 184. VARNEY wanted UHPA to file a class grievance for him on the matter. C's Ex. 1. Kardash informed VARNEY that there was no precedential value to grievances and that his wasn't a class grievance. Tr. p. 151. Kardash reviewed the class grievance language of the contract with VARNEY but VARNEY refused to accept UHPA's interpretation of the clause. Id. Kardash asked VARNEY to identify a class but VARNEY was unable to do so. Id. at 152.

Kardash felt VARNEY's complaints were untimely since he did not grieve at the time he was changed from 11-month to nine-month status and did not grieve after the November 1993 meeting. Id. at 148. Kardash asked VARNEY why he didn't contact UHPA when the change in status was made. Id. at 182. VARNEY responded that he wasn't the kind of person who filed grievances. Id. Kardash testified that VARNEY was upset when told that any grievance was untimely and that UHPA would not represent him in a grievance on this matter. Id. at 150. Kardash testified that he informed VARNEY that without UHPA's assistance he had a right to file a grievance on his own behalf. Id. at 149-50. Kardash never informed VARNEY in writing that UHPA would not represent VARNEY in his grievance. Id. at 157-58.

During this discussion, Kardash believed that VARNEY concluded that there was no breach of the contract but that his claims concerned constitutional issues. Id. at 147, 183. VARNEY stated that he was entitled to equal protection under the Constitution to be reinstated to an 11-month appointment like Grossman. He felt that it was UHPA's duty to press his constitutional claims of "equal protection" against the UH to be reinstated to an 11-month appointment like Grossman. Id. at 148. VARNEY would not accept Kardash's explanation that it was not UHPA's policy to bring a lawsuit against the UH for constitutional violations. Id. VARNEY was told that UHPA would not press his constitutional claims because they were not within the scope of obligations as seen by the UHPA Board of Directors. Id. at 149.

Kardash offered suggestions concerning various alternative strategies to resolve VARNEY's concerns about equal treatment. Id. at 148-49. Kardash asked VARNEY whether he had discussed the matter with persons in the administration. Id. at 149. Since VARNEY had already talked to the Dean, Kardash suggested that VARNEY talk with the Vice President for Administration. Id. VARNEY followed the suggestion and met with Madeleine Goodman, Assistant to the Vice President for Academic Affairs. Id. at 150.

Goodman suggested that VARNEY file a grievance in order to get information on Grossman's grievance settlement. Id. at 152. VARNEY met with Kardash for assistance in preparing a grievance. Id. Kardash believed that the purpose of the grievance was to conduct "fact-finding" in Grossman's case. Id. at 181-82. UHPA decided to assist VARNEY in preparing and filing the grievance. Id. at 180.

VARNEY prepared the Step 1 grievance according to his theories of the case. As one of the points leading to the grievance, Varney noted that he had learned that two other professors at the SPH were granted one additional year of 11-month status, indicating that he was not being treated equally. Id. at 16. He asked Kardash to review the form and Kardash made some suggestions. Kardash identified possible sections of the contract that could be grieved and drafted the remedy statement. Id. at 16, 164-65.

VARNEY signed the grievance form and also checked the box requesting UHPA assistance. C's Ex. 3. Kardash testified that if

UHPA had filed the grievance, Kardash would have signed the grievance form with the grievant. Tr. p. 178-79. Nevertheless, VARNEY submitted the form to UHPA and Union staff apparently faxed the form to the UH on May 27, 1994 for filing with the administration. Id. at 180.

The Step 1 hearing was held on June 20, 1994. C's Ex. 5. At the Step 1 hearing, Kardash testified that he appeared as an observer, pursuant to the contract.¹ Tr. p. 152. Kardash testified that with the permission of the Administration he assisted VARNEY in an advocate's role by providing counsel and advice to VARNEY. Id. at 159, 181. Kardash advised VARNEY against delaying the hearing for a month while the administration gathered more facts. Id. at 172. VARNEY presented a summary of the issues and the documentation to argue his case. Id. at 153. Kardash's impression of the Step 1 hearing was that Goodman and Pang were able to restate the issues clearly and accurately and that they understood what the grievance was about. Id.

The Employer, by Goodman, issued the Step 1 decision on June 22, 1994. C's Ex. 5. The grievance was denied and in

¹Article XXI, Grievance Procedure, of the applicable contract provides as follows:

The Faculty Member may request the assistance and representation of the Union in the grievance procedure. Alternatively, the Faculty Member may file a grievance and have the grievance heard without intervention of the Union provided the Union is afforded an opportunity to be present at the conference(s) with the grievant, in which case a copy of the grievance shall be furnished to the Union. Any adjustment made shall not be inconsistent with the terms of the Agreement.

addressing the equal treatment argument made by VARNEY, Goodman explained the differences between VARNEY's case and the cases of a Professor Lenzer and Grossman as follows:

Dr. Lenzer received an 11-month contract for FY 1993-94 because his return to the School of Public Health from the Center on Aging was made in December 1993/January 1994, in the middle of the fiscal year. The transfer was also made under very short notice. As such, our office felt responsible for the unusual mid-year transfer and was willing to fund Dr. Lenzer's additional one month salary, from May 15, 1994 until his retirement on June 15, 1994.

[I]t was determined that Dr. Grossman was not given adequate notice of the change in his appointment status prior to its effective date. Dr. Grossman was in Asia at the time the decision was made on his position, and it was not until after the effective date and his return that he learned officially of the change.

Id.

In Grossman's case, Dean Siegel agreed to allow Grossman to continue his administrative duties for the next year. Tr. p. 137. An agreement was reached at the end of April 1993 and memorialized in early May. Id. at 138. When Grossman returned from a trip to Asia in August 1993, he received a Form 5B which notified him of the change from an 11 to a nine-month appointment. Id. at 139. Grossman then met with Dean Siegel to discuss the change in appointment. Id. Grossman informed UHPA and after a meeting between Grossman, Musto, and Siegel, a grievance was filed. Id. During the 1993-94 academic year, Grossman performed the administrative duties. Id. at 141. Grossman's grievance was upheld at Step 2. There was no written settlement agreement executed between the parties.

Goodman acknowledged that while VARNEY had transferred to the SPH to accept an 11-month contract, the January 10, 1989 memo did not guarantee a continuing 11-month contract. Goodman also stated that VARNEY was notified of the impending change in the status of the position many months before it became effective. She specifically stated that the minutes of the November 8, 1993 meeting of the SPH Policy Council indicates that VARNEY was present when the Council approved the nine-month faculty policy where only the Department Chairs and the PhD/DrPH chair would receive 11 month appointments for the 1993-94 year. Id.

When VARNEY received the Step 1 response, VARNEY felt there were many inaccuracies to be addressed. VARNEY prepared the Step 2 grievance. Id. at 24. VARNEY presented it to Kardash for his review and Kardash suggested improvements. Among the points raised by VARNEY in the Step 2 grievance filed on July 1, 1994 were:

1. His Step 1 grievance mentioned "two other professors at the SPH" who received an additional year of 11-month contract status. He had in mind Professor Grossman and a colleague, Professor Chung, who remained on an 11-month contract for the 1993-94 academic year while VARNEY was taken off. VARNEY only became aware of Professor Lenzer's case when it was mentioned at the Step 1 meeting and his case should also be considered at Step 2.
2. The administrative duties he had been hired to perform still existed.
3. The official notification of his change in status was made on short notice.
4. His term of hire expressly required an 11 month contract. He believed he had a guaranteed 11 month contract and that he would not have moved from the College of Education if he believed otherwise.

5. Finally, VARNEY argued that the Policy Council meeting took place four months after his change in status became effective. Under the previous policy on 11-month appointments, the School would honor present commitments to 11 month appointees. Therefore, he argues that he was not treated the same as Grossman, Lenzer and Chung.

The Step 2 hearing was held on July 21, 1994. C's Ex. 7. Kardash made the presentation on VARNEY's behalf. Tr. pp. 172, 188. Kardash indicated that his presentation took 15 minutes and VARNEY testified that Kardash's presentation consisted of his introduction of VARNEY which was nearer to 30 seconds. Id.

The Employer issued its Step 2 decision on August 9, 1994, and dismissed the grievance as untimely. C's Ex. 7. The UH indicated that the grievance was filed more than twenty calendar days after the date of the alleged violation. Id. The decision stated:

The record shows that the grievant was officially notified of his change in appointment in June 1993 by copy of the Notification of Personnel Action, Form 5B. Furthermore, the change in appointment was discussed at a Policy Council Meeting on November 8, 1993 at which time the grievant was present.

VARNEY requested that the UHPA Grievance Committee, which recommends cases for arbitration to the UHPA Board of Directors, take his case to arbitration under Step 3 of the contract. Tr. p. 91. The Committee's meeting was scheduled for 9:00 a.m. on August 31, 1994. Id. at 84, 95, 154. When VARNEY informed Kardash that he could not attend the meeting, Kardash gave him the names and telephone numbers of the Committee members and suggested that he call them to discuss the merits of his case. Id. at 82-83, 95,

112, 154. VARNEY called David Miller, PhD. (Miller), Chair of the Grievance Committee, and Adrienne Valdez and discussed his grievance with them. Id.

Thereafter, the Committee meeting was rescheduled to a later time to permit VARNEY to attend and present his statement. Id. at 96. VARNEY gave a summary of the case to the Committee. Id. at 89. According to Miller, Kardash probably presented a summary of times and events. Id. at 88. The Committee members questioned VARNEY about the facts and theories of his grievance. Id. at 96. According to Miller, the presenter, Kardash, is always the advocate of the grievant, and Kardash recommended in favor of going forward to arbitration. Id. at 102. Kardash testified that during steps 1 and 2 he was an advocate but he sought to present the information to the Committee in an unbiased way. Id. at 155. Kardash testified that he worked with VARNEY to develop a strategy for his presentation so he left his personal judgment about the case out of his presentation. Id. Kardash indicated that he usually reserves his personal comment until asked by the Chair after a full discussion by the Committee. Id. at 155. VARNEY was excused from the meeting and the Committee began its deliberations. Id. at 103.

According to Miller, the issues concerned VARNEY's being changed from 11-month to a nine-month status, with an additional issue raised by the administration in the first and second levels being the time limits. Id. at 97. Miller also understood that VARNEY raised the issue that other members of his department had been treated differently but that he had no information on the

Grossman case other than what was included in Goodman's response at Step 1. Id. at 97-98. While there were no formal findings, Miller testified that the Committee felt that the UH had the right to change VARNEY's appointment from 11 months to 9 months. Id. at 98. Miller also testified that whether it had been done equitably was a question which would have to be addressed under the salary equity system. Id. at 98. Miller testified that the committee did not make decisions on specific issues in VARNEY's case but decided that it was not a case which they would win in arbitration and the issue of timeliness was a significant issue. Id. at 98, 104. Miller testified that the Committee unanimously decided not to take VARNEY's grievance to arbitration. Id. at 98.

Kardash notified VARNEY by telephone of the Committee's decision on the same day. Id. at 156, 172. Kardash reported that there was considerable discussion over VARNEY's grievance, and that the Committee evaluated the UH's handling of the situation. Id. at 173. Kardash informed VARNEY that a majority of the Committee voted not to take VARNEY's grievance to arbitration. Id.

VARNEY requested a written statement of the Committee's decision. Id. at 156. Kardash stated that he would give VARNEY a written statement that the Committee decided not to take his grievance to arbitration. Id. Kardash drafted a written confirmation of the Committee's decision to VARNEY and called Miller about VARNEY's request for a written decision. Id. at 156-57. Miller instructed Kardash not to send anything out and that he would respond personally to VARNEY. Id.; Tr. p. 100. Miller testified that he was busy preparing for his sabbatical and

a trip to the mainland and never wrote the statement to VARNEY. Id. At first, Miller testified that it was an oversight and then recanted. He stated that it may not have been an oversight because it had never been done before and the letter would have merely indicated that the committee could not take the case to arbitration. Id.

Jerome Grossman testified that at the end of April, 1993 Dean Siegel called him into her office and proposed that he be changed from an 11-month to a nine-month appointment for the next academic year. Id. at 137. Grossman expressed his concerns with the matters he was responsible for and indicated that he might not continue his work with SPH on a nine-month appointment. Id. Grossman proposed that he be given an 11-month contract for the next school year to complete his work, which included administrative duties pertaining to a school of public health in Thailand and Siegel agreed to allow Grossman to remain on an 11-month appointment for the next school year. Id. at 138. Thereafter, he sent her a memo in early May detailing their oral agreement and requesting correction if he were mistaken. Since Siegel did not respond, Grossman expected to be placed on an 11-month appointment. Id. When he returned to the UH in August, he found the Form 5B indicating that he was on a nine-month appointment. Id. at 139. Grossman called the Dean and UHPA and an informal meeting was arranged. Id. At the conclusion of the meeting, it was clear that the Dean would not change her mind. Id. Thereafter, UHPA filed a grievance on Grossman's behalf. Id. Grossman testified that his grievance was heard and resolved at

Step 2 but there was no written decision issued. Id. at 134-35. Musto informed Grossman that the matter was favorably resolved. Id. at 135.

William Thomas, Special Assistant to the Vice President for University Relations, previously Program Officer in the Office of the Senior Vice President for Academic Affairs, testified that he assisted Goodman and worked on grievances involving nine and 11-month contracts. Id. at 125-26. Thomas indicated that in the administration's review of the facts, the initial offers of employment are important to determine the duties and responsibilities to be performed versus the present conditions of employment. Id. at 126. Thomas testified that the administration reviewed how explicit the initial terms of hire were and compared those to the situation which existed at the time of the grievance. Id. at 127. If the duties and responsibilities remained the same as when the faculty member was originally hired under an 11-month contract, the administration would rule in favor of the employee. Id. at 128.

DISCUSSION

Complainant VARNEY alleges that the UHPA breached its duty of fair representation in its handling of his grievance. Complainant further alleges that UHPA violated the terms of the Unit 07 collective bargaining agreement and Sections 89-13(b)(1), (4) and (5), HRS. Those sections provide in pertinent part:

(b) It shall be a prohibited practice for a public employee or for an employee 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; or
- (5) Violate the terms of a collective bargaining agreement.

The Board has consistently relied on the United States Supreme Court's decision regarding the duty of fair representation in Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842, 857, 64 LRRM 2369, 2376 (1967). There, the Court cited the Fourth Circuit's discussion of the arbitrary conduct which would constitute a breach of the union's duty. The Court stated:

"Arbitrary" is defined as "perfunctory." (cite omitted.) 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.

To establish a breach of a union's duty of fair representation then, an employee must show that the union's conduct was arbitrary, discriminatory or in bad faith. In the grievance context, a union will breach its duty of fair representation if it ignores a meritorious grievance or processes the grievance in a

perfunctory fashion. Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1483, 118 LRRM 2717 (9th Cir. 1985). However, a union does not breach its duty of fair representation when it does not process a meritless grievance or engages in mere negligent conduct. Galindo v. Stoodly Co., 793 F.2d 1502, 123 LRRM 2705 (9th Cir. 1986).

In Decision No. 196, Caldeira, 3 HPERB 523 (1984), the Board discussed the duty of fair representation with respect to the grievance procedure and stated:

. . . Implicit in the ruling of Vaca v. Sipes, supra, and its line of cases is the presumption that the union does not have to be involved at any step of the procedure if it opts out for reasons other than those arrived at in a manner that is arbitrary, discriminatory, or in bad faith.

Id. at 548.

In this case, Complainant VARNEY filed this breach of duty of fair representation complaint against the Union but did not bring a corresponding breach of contract claim against the UH administration. For the purpose of analysis, however, the Board will consider the merits of VARNEY's grievance since the foregoing authorities imply that a union's breach of duty has no prejudicial effect if there is no underlying meritorious claim to be pursued.

Under the facts of this case, the administration and the Union considered VARNEY's grievance to be untimely because it was not filed within twenty days of the adverse action, which the Employer considers either the nine-month appointment date or the date of the SPH Council meeting. Article XXI of the applicable collective bargaining agreement provides in pertinent part:

A grievance must be filed within twenty (20) calendar days or within forty-five (45) calendar days in the case of a class grievance, of the date following the alleged violation giving rise thereto, or the date on which the Faculty Member or the Union first knew or reasonably should have known of such alleged violation, whichever date is later.

VARNEY's grievance was filed on May 27, 1994. C's Ex. 5. At Step 2, the Employer, by Evelyn H. Nowaki, Associate Director of Personnel, dismissed the grievance as untimely stating that the grievant was officially notified of his change in appointment in June 1993 by copy of Notification of Personnel Action, Form 5B.² C's Ex. 7. The decision further states that the change in appointment was discussed at a Policy Council Meeting held on November 8, 1993. Id. However, VARNEY contends that he did not know of the Grossman case until April 1994. VARNEY learned about Professor Lenzer's case from Goodman's reply at Step 1 in June 1994. C's Ex. 5. According to Goodman, Lenzer was given an 11-month appointment because of a last minute mid-year transfer and a relatively short notice period. At the time VARNEY filed his grievance, VARNEY was aware that Professor Chung was excepted from the nine-month appointment policy and alluded to the existence of a second professor who was granted an 11-month contract status for at least one additional year. C's Ex. 3. Rather than Chung's case, however, Goodman raised the issue of a third faculty member, Lenzer, who had had his appointment extended by the Employer.

²According to the Form 5B received in June or July 1993, VARNEY was notified that he would continue at the same salary rate. C's Ex. 4. Thus, VARNEY concluded that he received an 11-month appointment notwithstanding Dean Siegel's representations. VARNEY actually received the Form 5B in July or August 1993, that his appointment was changed from 11 months to nine months. Tr. p. 107.

Thus, VARNEY argues that his cause of action accrued in 1994 when he learned that the nine-month appointment policy was not uniformly applied throughout the SPH, that the Employer had granted exceptions to the policy and in fact, the nine-month policy was only applied as to him. In this regard, VARNEY's claim arises from the unequal application of SPH's appointment policy because of the number of exceptions permitted by the Employer.

In May 1993, Siegel spoke to VARNEY about the nine-month appointment and he did not complain. At the same time, however, according to Grossman, he was greatly upset and the Dean orally agreed that Grossman could remain on an 11-month contract and could perform additional duties to justify such appointment. Thereafter, in August 1993, upon his return, Grossman was notified by his Form 5B that his appointment had been changed to a nine-month contract and again complained to the Dean. UHPA filed a grievance on his behalf complaining of the change in his appointment. According to Goodman's Step 1 response to VARNEY, she dismissed Grossman's grievance because there were no additional agreed upon assignments being performed by Grossman. However, she indicated that the grievance was later settled at the next step because it was determined that Grossman did not receive adequate notice of the change in appointment status.

In this respect, Grossman and VARNEY received notice of the change in appointment status at approximately the same time because there was an apparent error in the earlier Form 5B that VARNEY received in June 1993 informing him that he continued on an 11-month contract and he received a corrected Form 5B in July or

August. The record also indicates that VARNEY first learned of the Grossman settlement in April 1994 and he contacted the Union shortly thereafter.

Goodman states in her Step 1 decision that Lenzer's extension was received after his mid-year transfer in December 1993/January 1994. However, these matters could not have been known to VARNEY in August nor in November 1993 when the administration and the Union determined that VARNEY's cause of action accrued. Thus, with respect to the timeliness issue, the Board finds that VARNEY had a colorable argument that he filed his grievance within the appropriate time frame since VARNEY very recently learned about the Employer's exceptions to the appointment policy.

With regard to the merits of VARNEY's grievance, one issue which does not appear to have been considered or raised is whether the SPH could retroactively implement the appointment policy which was approved by the Policy Council in November 1993. Prior to that time, the SPH recognized that a number of faculty had been 11-month appointees because these arrangements were apparently negotiated as conditions for hire, to provide relief for G-fund monies or because of special assignments. C's Ex. 5. Nevertheless, prior to approval by the Council, Siegel implemented the policy as to VARNEY in August 1993. While the Union appears to agree that the Employer can require that instructional-faculty be given a nine-month appointment unless additional duties are required, the policy adopted by the SPH Policy Council states that only the Department Chairs and the DrPH Chair would be given

11-month appointments. Id. Thus, the Employer's recognition of the assignment of additional duties as justification for the 11-month appointments appears as an exception to the approved SPH policy.

Further, VARNEY was approached by the SPH Dean and others who suggested that he continue to perform his summer school responsibilities without additional compensation. Thus, the record indicates that contrary to Goodman's response that the Summer Institute was discontinued after the 1991-92 year, additional summer school responsibilities remained which could have supported an 11-month appointment for VARNEY because of "additional agreed upon assignments."

VARNEY also contends that he was entitled to remain on an 11-month contract because of his initial terms of hire which were fully documented. While this argument may not be convincing to the Employer and the Union, it could have been compelling to a third party in view of the fact that the summer school duties still remained and the administration had approached him to continue these duties.

Further, the Board finds that the Employer's responses to VARNEY at Steps 1 and 2 contain many inaccuracies as contended by VARNEY. Goodman apparently failed to appreciate that the November 1993 Council meeting to approve the appointment policy was after the effective date of its implementation as to VARNEY. Therefore there is a question as to the sufficiency of notice to VARNEY. In addition, the SPH summer school responsibilities remained after the 1991-92 year. Further, Nowaki indicated that he

was officially notified in June 1993 of his nine-month appointment when actually VARNEY received a Form 5B indicating at that time that he would receive an 11-month appointment.

Based upon the foregoing, the Board finds that VARNEY's case had merit and we turn to the Union's conduct with respect thereto to determine whether the Union breached its duty to represent VARNEY.

VARNEY contends that UHPA interfered with his efforts to obtain necessary information pertinent to his grievance, interfered with and restrained him from filing his grievance in a timely manner, arbitrarily decided not to assist him in seeking relief by filing a class grievance, and improperly refused to pursue his case to arbitration.

With respect to the request for information from the UNION to process his grievance, Complainant cites Article XXI, B, 2, of the Unit 07 Contract which states:

Any information pertaining to the grievance in the possession of the Employer needed by the grievant or the Union in behalf of the grievant to investigate and process a grievance shall be provided to them on request within seven (7) working days.

According to VARNEY, the foregoing contract provision and Sections 89-13(b)(1), (4) and (5), HRS, prohibit UHPA from interfering with and restraining his attempt to obtain pertinent information regarding Grossman's grievance and compels UHPA to follow the contract. Specifically, VARNEY requested information regarding the Grossman case in a telephone call during April 18, 1993. VARNEY contends that Musto withheld such information and

refused to obtain the information from the Employer in accordance with the above contract language.

The Board finds that the foregoing contract provision does not impose a duty on the Union to disclose pertinent information to the grievant. The Board considered a similar provision in Decision No. 130, Manuel Vincent, Jr., et al. and Herbert T. Matayoshi, 2 HPERB 494 (1980), and found that under the contract and within the duty to bargain in good faith, the employer is under an obligation to provide information needed by the bargaining representative for the proper performance of its duties. If the information is relevant and reasonably necessary to the union's role as bargaining agent in the administration of the collective bargaining agreement, it is an unfair labor practice for an employer to refuse to furnish the requested data. Thus, the contract defines the obligations of the employer vis-a-vis the union and is not applicable to the situation as in this case where the information is sought from the Union. Thus, the Board concludes that the Union is not obligated under the foregoing contract provision to provide the requested information to the grievant.

Thus, if there is a duty to provide information to the employee in this case it would arise within the context of the Union's duty of fair representation in reasonably investigating and evaluating the merits of VARNEY's grievance.

Musto indicated in his letter to VARNEY that he had no notion whether his situation was similar to Grossman's. C's Ex. 2. Musto stated however, that it seemed unlikely that the

circumstances surrounding Grossman's appointment would be similar to VARNEY's case. Id. Musto testified that he was aware of the relevant dates in the Grossman case (Tr. p. 40), but did not provide the specific information to VARNEY.

VARNEY also contends that UHPA withheld information as to its knowledge of the level at which the Grossman case was settled. VARNEY contends that he was misled by Kardash who recommended that VARNEY see Goodman when actually Grossman's case was settled at the UH President's level. VARNEY contends that such misdirection was purposeful since it kept him from finding out the level at which informal discussions led to the Grossman settlement and that he would be unable to find witnesses to the alleged agreement that no cases would follow Grossman's case.

UHPA on the other hand contends that the grievance information is confidential. On cross-examination, Musto testified regarding the confidentiality of grievances.

Q. Could you explain to us why grievances are considered confidential?

A. Because many issues which can arise under a grievance by their mere disclosure may harm an individual. For instance, issues of discipline which are grieved. The fact that a person - - it becomes public knowledge that a person was disciplined, even if it was unfair and even if the grievant - - the discipline was overturned through the process, that mere exposure to the public is a form of harm.

Id. at 60-61.

Kardash confirmed that the information regarding Grossman's grievance was withheld because of the confidentiality of individual grievances. He testified in pertinent part:

Q. --that before we could discuss the case any further, we should wait until Dr. Musto got back from the mainland, which would be a waiting period of approximately a week?

A. --I think you were interested in that point in time on information about the Grossman case. And it would seem to me at this -- sitting here now recollecting as best I can that it would have been reasonable for me to say, "I can't tell you about the Grossman case. I don't have access to it. It's confidential".
--

Id. at 161-62.

Thus, VARNEY contends that pertinent information about Grossman's case and its informal settlement was withheld from him which restrained him from exercising his rights under Chapter 89, HRS. VARNEY further contends that Dr. Goodman provided the facts surrounding the Grossman and Lenzer cases. Goodman also revealed the time period of the Grossman notification, the importance of the additional agreed upon assignment as pertinent facts, and the general terms of the remedy in the Grossman case. VARNEY argues that if the revelation of such information was confidential then, under the pertinent contract provision, UHPA should have filed a grievance against the administration which it did not. Thus, VARNEY contends that the revelation of such information was not improper and protected under the confidentiality provisions of the contract as contended by UHPA.

The Board notes that Grossman's grievance did not involve disciplinary action and the information sought by VARNEY did not place Grossman in a negative light. The Board agrees with VARNEY that the Union could have investigated the matter and rather than

denying VARNEY access to the material on the basis of confidentiality, the Union could have either obtained a release of information from Grossman or in the exercise of its duty of fair representation, it could have conceivably divulged the information on the basis that it was determined to be appropriate for the good of the membership in its investigation of VARNEY's grievance.

VARNEY also contends that UHPA arbitrarily refused to file a class grievance on his behalf. The Union asserts that VARNEY could not identify a class related to the changes of status from 11-month to nine-month status. Logically, it would appear that the class would be defined as any faculty member who was changed from 11-month to nine-month status. However, based upon the record, VARNEY appears to be the only SPH faculty member who was changed from 11-month status to nine-month status. With regard to this issue, the Board finds that there is insufficient proof offered that UHPA should have filed a class action for Grossman which would have benefitted VARNEY. In fact, Grossman's grievance depended upon the specific facts of his case where the Dean agreed in May to permit Grossman to remain on an 11-month contract and then changed the term to a nine-month contract in August.

With respect to the UNION's refusal to submit the case to arbitration, VARNEY contends that the committee did not have sufficient time to review the documents in VARNEY's case. During the time in which the committee had to study the documents, Kardash made a presentation at which VARNEY was not allowed to be present nor permitted to read his statement. VARNEY was permitted to present his case to the committee. After the meeting, Kardash

informed VARNEY that the committee denied his request to submit the matter to arbitration and indicated that the vote was not unanimous. VARNEY asked for the decision in writing and Kardash said it would be forthcoming. Kardash testified that he prepared a letter to VARNEY and was told by Chair Miller that he would write the letter to VARNEY. Miller, in fact, never wrote to VARNEY. Id. at 100. Miller testified that Kardash asked him to write the statement and he agreed to write the statement. Miller testified that it was a busy time for him because it was the end of the semester and he was preparing for his sabbatical and it "slipped [his] mind" as an oversight. Miller then testified that in retrospect, it wasn't an oversight and that another reason that he didn't do it was that it's never been done before and he simply would have written to VARNEY and said that the Committee "feels that we cannot take your case to arbitration." Id. at 100. Moreover, Miller testified that the vote of the Committee was unanimous. Id. at 98.

While the Committee appears to have acted in an appropriate fashion, the record indicates that the Committee did not consider whether VARNEY could have argued that his cause of action arose when he found that he was the only person who was changed from an 11-month to a nine-month appointment. Although Kardash and Miller testified that the Committee was concerned with the timeliness issue, the Committee never considered the argument that VARNEY only recently learned that he was the only faculty member on a nine-month appointment.

In addition, the Board finds that UHPA made no attempts to informally settle the VARNEY grievance as it did in the Grossman grievance. Musto testified that he assisted Grossman in informally settling his grievance but he did not assist VARNEY. Kardash admitted that he never attempted any informal resolution of VARNEY's grievance. Id. at 160. Musto testified that he avoided involvement in the VARNEY grievance because he did not want to become a pawn in a dispute between the members of the SPH faculty. Id. at 68-69. However, there is no evidence presented that supported Musto's perception that VARNEY and Grossman were involved in any type of power struggle. If there was a possible conflict of interest in representing VARNEY, the matter could have been investigated and resolved. What occurred however, was that Musto refused to become a pawn in some perceived power struggle and turned the case over to Kardash.

VARNEY also contends that UHPA failed to respond to Goodman's step 1 response. Thus, VARNEY alleges that UHPA represented him in bad faith by remaining silent and not challenging the Dean's implementation of a policy prior to the Policy Council's adoption of the policy.

However, the Board finds significant Kardash's testimony that the Union never intended to represent VARNEY during the instant grievance procedure. Logically, since the Union was not representing Complainant in his grievance, the Union cannot be faulted for not vigorously representing Complainant's interests. The Board, however, finds that Kardash's disclaimer that he represented VARNEY came as a total surprise to VARNEY. Contrary to

Kardash's statement that he clearly indicated to VARNEY that he would not represent him in his grievance, the Board finds that the statement was never put into writing and the record does not support the fact that it was clearly communicated to VARNEY. Kardash's testimony in this regard was ambiguous and not convincing to the Board. See, Tr. pp. 155, 159.

Moreover, Musto indicated that he would not represent VARNEY and instructed VARNEY to contact Kardash who would assist him in filing a grievance. Musto testified that he told Kardash to proceed with vigor on the grievance. Id. p. 66. Thereafter, Kardash assisted VARNEY by drafting the remedy portion of the grievance and VARNEY signed the form requesting Union assistance. VARNEY submitted the form to UHPA and the evidence indicates that the UHPA staff faxed the form to the administration. Thereafter, Kardash contends that he attended the grievance step meetings as an observer and did not intend to represent VARNEY's interests unless permitted by the administration. At times, he indicates that he appeared as VARNEY's advocate. Thus, even though Kardash claims that UHPA did not represent VARNEY, he advised VARNEY and did not clearly disclaim UHPA's representation of him. Moreover, the Steps 1 and 2 decisions indicated that the Employer perceived UHPA's role as one filing the grievance. C's Exs. 5 and 7. Goodman refers to the grievance "filed by UHPA" and Nowaki refers to UHPA's failure to meet the applicable time limits. Id. UHPA's prehearing statement also indicates that Kardash represented VARNEY at Steps 1 and 2. Board Ex. 5. Thus, the Board concludes that Kardash failed to clearly define his role and VARNEY reasonably expected to

receive vigorous representation by his Union. Kardash's disclaimer before the Board colors his handling of the VARNEY matter and the Board finds that VARNEY was treated in an arbitrary and perfunctory manner by his Union.

In the first instance, UHPA refused to give VARNEY information on Grossman's case relying on the confidentiality provisions of the contract. The contract provision, however, is inapplicable and does not prevent the disclosure of information sought by the employee from the Union.

In addition, the Board finds that UHPA treated the matter in a perfunctory manner because VARNEY telephoned the Union on April 11, 1994 when he learned of the Grossman case. Thereafter, VARNEY was requested to put something in writing on April 28, 1994 for Musto's response on April 29, 1994. The 20-day grievance time frame was advancing and no immediate action was taken. Although Musto advised VARNEY to file a grievance if he felt he had a case, Musto also instructed VARNEY to contact Kardash to file the grievance. VARNEY's grievance was filed on May 27, 1994, well after the 20 days required by the contract. While the administration considered the instant grievance untimely because it was filed more than 20 days from the date which VARNEY's status was changed, VARNEY's grievance was also untimely on its face as it was filed on May 27, 1994 when, according to the grievance, the alleged adverse action occurred on April 15, 1994.

Further, the Union refused to recognize or advance the theory that the cause of action arose when VARNEY learned that he

was being treated differently from the other faculty members rather than when the actual change in appointments occurred.

Lastly, the facts in the record indicate that the Union failed to clearly indicate to VARNEY that UHPA was not representing him. VARNEY was therefore misled into relying on UHPA's assistance to advocate his grievance.

Based upon the record in this case, the Board concludes that throughout his contact with UHPA, the Union treated VARNEY's complaint in a perfunctory manner and thereby breached its duty of fair representation. The direct result of the Union's failure to assist VARNEY was the failure of his claim. With respect to a remedy in this case, the Board notes that VARNEY did not join the Employer as a party to this case, therefore, VARNEY cannot be made whole.

In Bowen v. U.S. Postal Service, 459 U.S. 212, 112 LRRM 2281 (1983), the U.S. Supreme Court held that the union that breached its duty of fair representation by wrongfully handling an apparently meritorious grievance in an arbitrary and perfunctory manner is primarily liable for that part of the employee's damages caused by the Union's breach of duty. Generally, in cases where the employer breaches the contract and the union breaches its duty of fair representation, damages are apportioned between the employer and the union. The employer is liable for any damages preceding the time an arbitrator would have reinstated the employee, had the union done its duty. Camacho v. Ritz-Carlton Water Tower, 786 F.2d 242, 245, 121 LRRM 2801 (7th Cir. 1986).

Under the circumstances of this case, the Board finds that VARNEY suffered, inter alia, the difference between the 11 months and nine months of salary due to the Union's breach of duty. The Board finds that the Union's reimbursement of two months' salary to VARNEY, the difference between the 11-month and nine-month salaries, is reasonable and appropriate in this case.

CONCLUSIONS OF LAW

The Board has jurisdiction over the instant case pursuant to Sections 89-5 and 89-13, HRS.

The Union breaches its duty of fair representation when the exclusive representative's conduct toward a member of the bargaining unit is arbitrary, discriminatory or in bad faith.

The Union breached its duty of fair representation to Complainant when it refused to provide him with information to assist him in processing his grievance, failed to pursue a viable claim, and failed to clearly indicate that it would not assist him in the presentation of his grievance thereby misleading the grievant in this case.

The Union's wilful breach of its duty of fair representation constitutes a prohibited practice under Sections 89-13(b)(1) and (4), HRS.

ORDER

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


The Union shall pay VARNEY the difference between his 11-month and nine-month salary for one year.

The Union shall, within thirty (30) days of the receipt of this decision, post copies of this decision in conspicuous places on the bulletin boards at the worksites where Unit 07 employees assemble, and leave such copies posted for a period of sixty (60) days from the initial date of posting.

The Union shall notify the Board within thirty (30) days of the receipt of this decision of the steps taken by the Union to comply herewith.

DATED: Honolulu, Hawaii, September 21, 1995 .

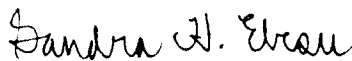
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