

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-07-240
)	
UNIVERSITY OF HAWAII)	DECISION NO. 378
PROFESSIONAL ASSEMBLY,)	
)	FINDINGS OF FACT, CONCLUSIONS
Complainant,)	OF LAW AND ORDER
)	
and)	
)	
BOARD OF REGENTS, University)	
of Hawaii,)	
)	
Respondent.)	
)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On November 22, 1994, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against the BOARD OF REGENTS, University of Hawaii (BOR). The complaint alleges that the BOR refused to process a grievance in violation of Sections 89-13(a)(5) and (8), Hawaii Revised Statutes (HRS).

On January 12, 1995, the parties filed stipulated facts, exhibits, issues and a briefing schedule with the Board. Subsequently, UHPA filed its opening brief on February 1, 1995 and the BOR filed its answering brief on February 24, 1995. UHPA filed its reply brief on March 3, 1995. Based upon a complete review of the record, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

The following facts were stipulated to by the parties and are hereby adopted by the Board.

The UHPA is the exclusive representative, as defined in Section 89-2, HRS, of bargaining unit 07.

The BOR is a public employer, as defined in Section 89-2, HRS.

The UHPA and the BOR are parties to a collective bargaining agreement (agreement).

UHPA filed grievance #1 on or about May 24, 1993. The grievance alleged violations of Articles XV and XXI of the agreement.

The grievance was processed through the grievance procedure, but not taken to arbitration.

UHPA filed Grievance #2 on or about August 12, 1994.

The BOR closed Grievance #2 without processing it through the grievance procedure.

UHPA filed Grievance #3 on or about October 3, 1994. The grievance alleged violations of Articles III and XV of the agreement.

The BOR returned Grievance #3 without consideration of its merits.

In addition to the foregoing, the Board finds the following additional facts based on a review of the joint exhibits (J. Ex.).

All three grievances were filed on behalf of Clifford R. O'Donnell (O'Donnell) and grieved his termination as Director of

the Center for Youth Research effective June 30, 1993 and termination of his appointment as researcher at the Center for Youth Research effective December 31, 1993.

Grievances #1 and #2 contained identical narrative statements regarding the grievance.

Grievance #3 alleges, inter alia, that information had been withheld from UHPA during the processing of Grievance #1 and had only become available on September 20, 1994, as a result of a lawsuit filed by O'Donnell. That date is stated as the date the grievant became aware of the grievance. J. Ex. 9.

On October 31, 1994, Carol M. Eastman, Senior Vice President and Executive Vice Chancellor, University of Hawaii at Manoa, responded to Grievance #3 and stated that the issues presented and remedy requested were essentially the same as those cited in Grievance #1. She, therefore, returned the grievance without consideration.

On November 22, 1994, UHPA filed the instant complaint alleging that the failure to process Grievance #3 constitutes violations of Sections 89-13(a)(5) and (8), HRS.

DISCUSSION

UHPA contends that the issue presented in this case is whether or not the BOR can unilaterally refuse to process Grievance #3 through the contractual grievance procedure. It argues that the Board should not consider any distinctions between the three grievances because to do so would tread upon the jurisdiction of the arbitrator who would ultimately decide Grievance #3.

UHPA further contends that the BOR's unilateral determination that Grievance #3 was nongrievable and refusal to consider the grievance violate the duty to bargain in good faith as required by Section 89-13(a)(5), HRS. The refusal to process Grievance #3 is also alleged to be a violation of the agreement and, therefore, a violation of Section 89-13(a)(8), HRS.

The BOR asserts that the Board should review the facts surrounding the filing of all of the grievances and the substance of each of the three grievances. According to the BOR, it fully complied with its duty to follow the grievance procedure when it processed Grievance #1 in 1993. It points out that Grievances #1 and #2 were identical and that Grievance #3 requested essentially the same remedies under a different theory of recovery. The BOR argues that all grievances arose out of the same action of the employer and UHPA should not be allowed to assert separate causes of action with different theories of recovery when an initial grievance is unsuccessful.

The BOR further argues that the filing of the complaint in the case is premature because the BOR has not refused to proceed to arbitration of Grievance #3. It merely provided an unsatisfactory response at Step 1 of the grievance procedure and UHPA is free to appeal to the succeeding steps in the grievance procedure.

Initially, the Board agrees with the BOR that in considering this case, the circumstances surrounding the filing of all of the grievances should be considered in determining whether or not prohibited practices have occurred. To do otherwise would

be to completely ignore one of the defenses interposed by the BOR, i.e., that Grievance #3 had previously been disposed of in Grievance #1 and should not be relitigated through the grievance procedure. The Board agrees with the BOR's position that parties to a collective bargaining agreement have an interest in economic use of time and expenses as well as finality of decisions.

Turning now to the circumstances surrounding the filing of the grievances, all grievances arose out of the same actions of the employer, i.e., the termination of O'Donnell as Director and researcher for the Center for Youth Research. Grievance #3 differed from Grievance #1 and #2 in that it alleged different violations of the agreement and contained an allegation that important information was withheld from UHPA during the processing of Grievance #1 and was only discovered on September 20, 1994. Therefore, that date is alleged to be the date on which O'Donnell first knew of the violations of the agreement alleged in Grievance #3.

Article XXI of the 1989-1993 agreement relating to the grievance procedure 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.

The 1993-1995 agreement contains similar language relating to the time limits for filing grievances.

Based on the foregoing allegation in Grievance #3 and the quoted language of the agreement, it is apparent that UHPA was

attempting to file a grievance different from Grievances #1 and #2, albeit arising from the termination of O'Donnell, based on improperly withheld information. The Board makes no finding on whether or not information was improperly withheld from UHPA or if the information materially affected the processing of Grievances #1 and #2. If the grievance proceeds to arbitration, those are issues for the arbitrator to decide. Decision No. 79, State of Hawaii Organization of Police Officers (SHOPO), 1 HPERB 715 (1977); Decision No. 161, State of Hawaii Organization of Police Officers (SHOPO) and Sanderson, 3 HPERB 25 (1982). However, the Board does find that Grievance #3 made a colorable claim under the grievance procedure which the BOR refused to process at its peril. Decision No. 340, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, 5 HLRB 198 (1993).

In Decision No. 340, the union filed a grievance over the termination of a probationary employee. Initially, the employer took the position that the termination was not grievable and did not provide certain information requested by the union within the time limits provided for in the collective bargaining agreement. The Board found that the grievance should have been recognized and held that not providing the requested information on a timely basis was a violation of Section 89-13(a)(8), HRS.

Moreover, the Board held that the employer, in refusing to recognize the grievance, knew or should have known that the natural consequence of that decision would be to violate the time limits for providing information and, therefore, had committed a wilful violation.

The Board has also previously held that refusing to process a grievance constitutes violations of Sections 89-13(a)(5) and (8), HRS. Decision No. 160, State of Hawaii Organization of Police Officers (SHOPO) and Damas, 3 HPERB 12 (1982).

The BOR's refusal to process a grievance in this case similarly constitutes wilful violations of Sections 89-13(a)(5) and (8).

The BOR's contention that the filing of the instant complaint is premature because UHPA could appeal the BOR's refusal to consider the grievance at Step 1 of the grievance procedure to Step 2 is without merit. There is a difference between denying a grievance and refusing to consider the grievance. The facts in this case are clear that the BOR refused to consider the grievance in violation of the agreement and its obligation to engage in good faith bargaining.

CONCLUSIONS OF LAW

The Board has jurisdiction over this complaint pursuant to Sections 89-5 and 89-13, HRS.

An Employer violates Sections 89-13(a)(5) and (8), HRS, when it refuses to process a grievance under the terms of a collective bargaining agreement. The BOR refused to process a grievance under the terms of a collective bargaining agreement.

ORDER

The BOR shall cease and desist from refusing to recognize the grievance filed by UHPA on behalf of Clifford R. O'Donnell on October 3, 1994. The BOR shall process the O'Donnell grievance


through all steps of the grievance procedure as pursued by UHPA under the terms of the agreement and is free to raise the issue of arbitrability before an arbitrator.

The BOR shall immediately post copies of this decision in conspicuous places on the bulletin boards at the work sites where employees of the bargaining unit assemble, and leave such copies posted for a period of sixty (60) consecutive days from the initial date of posting.

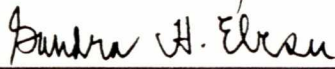
The BOR shall notify the Board within thirty (30) days of receipt of this decision of the steps taken by it to comply with the Board's order.

DATED: Honolulu, Hawaii, June 27, 1996.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member


SANDRA H. EBESU, Board Member

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