

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-03-158
)	
SANDRA PELOSI,)	DECISION NO. 410
)	
Complainant,)	FINDINGS OF FACT, CONCLU-
)	SIONS OF LAW, AND ORDER
and)	
)	
HAWAII GOVERNMENT EMPLOYEES)	
ASSOCIATION, AFSCME, LOCAL 152,)	
AFL-CIO,)	
)	
Respondent.)	
)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On October 18, 1999, Complainant SANDRA PELOSI (PELOSI) filed a prohibited practice complaint against Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) with the Hawaii Labor Relations Board (Board), alleging, inter alia, that Respondent selected an improper venue to address her termination. Complainant contends that the HGEA abandoned her by failing to assist her in finding the proper jurisdiction for her termination case in contravention of its duty to find the correct venue.

The Board conducted a prehearing conference on November 18, 1999 by conference call. Member Kunitake recused himself from these proceedings because he had prior dealings with the Complainant.

On November 29, 1999, the Board held a hearing on the instant complaint in Wailuku, Hawaii. The parties had full and fair opportunity to present evidence and arguments to the Board

in support of their respective positions. The Respondent and Complainant filed written arguments with the Board on January 10 and 11, 2000, respectively. Thereafter, on March 10, 2000, the Board issued Order No. 1841, directing the Respondent to file a proposed order with the Board. On May 9, 2000, Respondent filed its Proposed Findings of Fact, Conclusions of Law and Order with the Board. Complainant did not file objections to Respondent's proposed order with the Board. After a thorough review of the record, the Board makes the following findings of fact, conclusions of law, and order.¹

FINDINGS OF FACT

Complainant PELOSI was for all times relevant, an Income Maintenance Worker III in the Maui Branch of the Department of Human Services (DHS), Family and Adult Services Division (Employer). PELOSI initially began working for the Maui Branch of the DHS in 1983. Complainant was for all times relevant an employee within the meaning of § 89-2, Hawaii Revised Statutes (HRS), who was included in Unit 03 and a member of the HGEA.

The HGEA was for all times relevant the exclusive representative, as defined in § 89-2, HRS, of the employees included in Unit 03.

On or about September 12, 1991, Complainant sustained a stress-related injury allegedly arising from her employment.

¹After reviewing Complainant's proposed order, the Board has adopted those proposed findings of fact and conclusions of law which support its decision in this case and has modified the proposed order accordingly.

Complainant sought treatment from Elmer Ratzlaff, M.D., and Janna Fineberg, Ph.D., who initially opined that Complainant should not return to her position, then later recommended significant changes to the work environment before her return. In particular, Complainant's doctors required a work environment free from supervision, a reasonable workload, a congenial and unpressured work atmosphere, and a Caucasian or non-Japanese supervisor. Complainant's doctors recommended that her next work experience be extremely positive with a job location in the vicinity of her residence.

Complainant retained Jeffrey M. Taylor, Esq. to assist her with her workers' compensation claim. While the exact date of Taylor's retention is not clear from the record, Taylor wrote to Benjamin Y.P. Fong, Personnel Officer, DHS, on September 28, 1994, complaining about the Employer's efforts in finding a suitable position for Complainant. The reference heading in the letter contains information about the workers' compensation claim and bears the Disability Compensation Division (DCD) reference number of the claim.

By letter dated June 12, 1996, DHS Director Susan M. Chandler, informed Complainant that she would be terminated effective July 3, 1996. Chandler wrote that the termination action was due to the determination by Complainant's physicians that she was unable to return to work, as well as the Employer's inability to place her in a position which met the specifications and limitations specified by her doctors.

Through its agent Alton K. Watanabe (Watanabe), Respondent filed a Step 1 grievance on Complainant's behalf on July 10, 1996, contending that Employer had violated Articles 3, 8, and 17 of the Unit 03 collective bargaining agreement (contract) by terminating Complainant. Respondent asserted that the termination was without proper cause and Employer's action was arbitrary, capricious, and an abuse of managerial discretion. Respondent further contended that Employer violated the Civil Rights Act of 1991 and the Americans With Disabilities Act (ADA) by discriminating against Complainant and by failing to make reasonable accommodations for her continued employment. As a remedy, Respondent requested that Complainant be made whole by reinstatement to her former position without loss of compensation or benefits, and that the dismissal letter be expunged from her personnel file.

The grievance was denied by Administrator Patricia Murakami on September 23, 1996. In support of the denial, Murakami wrote that Employer had conducted a lengthy but unsuccessful job search, had complied with ADA provisions, and that the Civil Rights Act was not applicable to discrimination based on disability. Murakami also wrote that Article 8 of the Agreement did not apply to the non-disciplinary discharge of Complainant and that Article 17 was irrelevant to the matter as well.

Respondent, through Watanabe, filed a Step 2 grievance on October 1, 1996, which alleged violations of Articles 3, 8,

and 17 of the Unit 03 contract and reasserted the contentions made in the Step 1 grievance.

By letter dated October 21, 1999, David T. Tomatani, an analyst employed by the Office of the Ombudsman, advised Complainant that the Enforcement Division of the Department of Labor and Industrial Relations had referred her case to the DCD, which had jurisdiction to conduct a hearing relative to her termination pursuant to § 386-142, HRS. Tomatani also informed Complainant that DCD had contacted Jeffrey M. Taylor, Complainant's attorney, to inquire into whether Complainant was requesting a hearing. Tomatani further suggested that Complainant contact Taylor with regard to the matter. Complainant apparently did so, as she testified that Taylor had informed her that he did not handle terminations.

The Step 2 grievance was denied by Director Chandler on December 9, 1996 for the same reasons cited by Murakami in her Step 1 denial.

Respondent, through Watanabe, continued to pursue the discharge grievance on Respondent's behalf and filed a Step 3 grievance on December 19, 1996.

Employer failed to respond with a Step 3 answer as required by Article 11 of the Agreement, and Respondent, through Watanabe, filed an intent to arbitrate letter on October 31, 1997.

Respondent's intent to arbitrate letter was acknowledged by James H. Takushi, Director of the Department of Human Resources Development, on November 4, 1997.

On November 16, 1998, C.F. Damon, Jr. was selected as arbitrator by representatives for the parties and was advised of his selection. The Employer challenged the arbitrability of the grievance and the parties agreed to bifurcate the arbitration hearing to address the threshold question of the arbitrator's jurisdiction prior to addressing the merits of the termination grievance.

Through their respective counsel, and without a hearing on the matter, the parties submitted written briefs to address the jurisdiction issue on March 22, 1999.

On June 14, 1999, Arbitrator Damon issued his Decision and Award, granting Employer's Motion to Dismiss and further referred the grievance back to the parties without a decision on the merits. In his Decision and Award, Arbitrator Damon noted that Article 11, Section H.2 of the contract limited an arbitrator's power to deciding whether the Employer violated any term of the contract. Arbitrator Damon found that the contract clearly did not cover the question of Complainant's termination, as it did not contain provisions relating to disability, accommodation, job placement, and non-discrimination requirements. In addressing the contention that the Employer violated Article 3 of the contract, the Arbitrator agreed with a decision by Arbitrator Brown in In the Matter Between HGEA and State of Hawaii - Grievance of Elizabeth Ball, and ruled that since "the rights and benefits of the applicable rules and statutes are retained by the [Complainant] and not incorporated [into the contract]," he had no authority to rule on the merits.

On June 23, 1999, Respondent, through its attorney, Dennis W.S. Chang, filed a Motion to Vacate the June 14, 1999 Decision and Award of C.F. Damon, Jr. in the Circuit Court of the First Circuit, State of Hawaii. Respondent argued that Arbitrator Damon had violated § 658-9, HRS, by denying Respondent's request for a hearing to address disputed factual issues with respect to the intent of Article 3 of the contract. Respondent also argued that Arbitrator Damon had violated § 658-10, HRS, by ruling on factual disputes which were not submitted to him for a decision. Furthermore, Respondent contended that the Arbitrator had violated §§ 658-9 and 658-10, HRS, by finding that Respondent had failed to produce evidence with respect to several major disputed issues without holding a hearing. Finally, Respondent contended that the Arbitrator exceeded his power by failing to issue a final and definite award as required by § 658-9(4), HRS.

On August 9, 1999, Judge Gail G. Nakatani denied Respondent's Motion to Vacate the June 14, 1999 Decision and Award of C.F. Damon, Jr. Judge Nakatani ruled that Arbitrator Damon did not engage in misconduct by not taking evidence on the issue of his jurisdiction, nor did he improperly refuse to hold an evidentiary hearing on the intent of Article 3. The bifurcation was also found to be proper.

Complainant PELOSI thereafter filed a prohibited practice complaint against Respondent, asserting that the Union "abandoned" her, that Respondent was obligated to find the right venue for Complainant's complaint, and that Respondent should

represent her before the DCD, Department of Labor and Industrial Relations, in her workers' compensation claim to challenge her termination there.

At the hearing before this Board on November 29, 1999, Complainant, appearing pro se, asserted that Respondent had selected the wrong venue to challenge her termination and that she had detrimentally relied upon the grievance process. Complainant also stated that Employer had led both she and Respondent "down the garden path" to the wrong forum for her case, and that Respondent should have discovered the proper venue "from the beginning." Had the Arbitrator issued a decision on the merits, Complainant stated, she would have been satisfied. She also stated, however, that Respondent had a "moral obligation" to represent her at a hearing before DCD.

Union Agent Watanabe testified that the contractual grievance procedure was an "appeals process" in which a grievance progressed through various steps and culminated in arbitration. He further testified that certain matters were not covered by the contract, citing workers' compensation claims and discrimination complaints handled by the Equal Employment Opportunity Commission (EEOC) and the Hawaii Civil Rights Commission (HCRC) as examples. However, Watanabe stated that a grievance could be filed over a matter which exists outside of the contract, provided that a claim could be made in accordance with the contractual grievance procedure. This is the course which Respondent took with regard to Complainant's termination.

Watanabe testified that he recalled telling Complainant that her claim would "probably fall under Chapter 386" and that she should request assistance from her attorney to challenge the discharge. Watanabe stated he was aware that a dispute over workers' compensation matters, including terminations, are brought before the DCD.

Watanabe's supervisor at the time, Stuart McKinley, was concerned that Complainant's termination was proper under Chapter 386 and, therefore, the Union would not have a "strong case" to arbitrate. Watanabe believed that there was a "slim" chance of prevailing on the merits if the matter proceeded to arbitration and advised Complainant that there were "no guarantees."

He further testified that neither Chapter 89, HRS, nor the Unit 03 contract required the Union to represent Complainant at a hearing before DCD to challenge her termination, or to represent employees in workers' compensation cases. While the Union had done so some years before, its policy at the time of Complainant's claim was not to represent its members at workers' compensation proceedings. Watanabe further stated that the Union did not have an obligation to represent its members in matters before the Civil Service Commission or the Public Employees Compensation Appeals Board.

Complainant did not dispute Watanabe's testimony that he had advised her about a possible claim before DCD and that she should pursue the matter independently with her private attorney as the grievance proceeded to arbitration. Complainant stated

that her attorney did not handle terminations and she did not have the money to retain another.

Based upon the foregoing facts, the Board finds that Respondent pursued Complainant's termination through the contractual grievance procedure and further attempted to vacate the Arbitrator's dismissal of the grievance in circuit court. The Board also finds that Union Agent Watanabe, a representative for Respondent, advised Complainant to pursue her termination as a workers' compensation claim through her private attorney, Jeffrey M. Taylor.

DISCUSSION

Complainant, in accordance with Administrative Rules § 12-42-8(16) has the burden of proving by a preponderance of the evidence that Respondent breached its duty of fair representation in violation of § 89-13(b), HRS.

Section 89-13(b), Hawaii Revised Statutes, provides:

It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
- (2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in Section 89-11;
- (3) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in Section 89-11;
- (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 ruled that "[a] breach of the duty of fair representation occurs when the exclusive representative's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith." Ronald Caldeira and Eduardo E. Malapit, et al., 3 HPERB 523, 539 (1984), citing Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842, 857, 64 LRRM 2369, 2376 (1967). In turn, the Court defined "arbitrary" to mean "perfunctory." Vaca v. Sipes, supra, at 191. This standard was further elaborated upon by the Fourth Circuit as follows:

. . . 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. 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).

Caldeira, supra, at 539.

Complainant has failed to prove that Respondent filed her claims in an improper forum or otherwise breached its duty of fair representation in violation of § 89-13(b), HRS.

Article 11, Subsection A of the Unit 03 contract provides in relevant part, "Any complaint concerning the application and interpretation of this Agreement shall be subject to the grievance procedure." (Emphasis added). The broad wording of Article 11 clearly mandates that complaints with respect to the terms of the contract are to be processed through the contractual grievance procedure. As a signatory to the contract, Respondent was required to follow the procedure. While

Watanabe recognized that Complainant's termination was governed by the provisions of Chapter 386, he made a good faith argument that the termination also violated various provisions of the contract and filed a grievance on that basis. Respondent's actions in pursuing the matter through the contractually mandated steps and its attempt to vacate the Arbitrator's order do not constitute arbitrary or unreasonable behavior as contemplated by the Supreme Court in Vaca, supra, or the Fourth Circuit in Griffin, supra. In addition, Watanabe advised Complainant to pursue her termination claim before the DCD.

The Board has previously held that the union's duty of fair representation extends to matters dealing with collective bargaining and the rights created by the respective collective bargaining agreements and does not encompass the pursuit of claims arising under Chapters 76 and 77, HRS. Oren J. Tsunezumi, Case Nos. CU-03-128a, CU-04-128b, Order No. 1460, Order Granting Respondents' Motion to Dismiss Complaint (5/9/97). In the Tsunezumi case, the Board found that the union was not obligated to represent a union member in his complaint before the Civil Service Commission.

Here, Complainant offered no evidence or authority to support her claim that Respondent has a duty to represent her in matters relating to her workers' compensation claims and only alleged that the Union had a moral duty to do so. The Board thus concludes that claims arising under the workers' compensation statutes are beyond the scope of Chapter 89, HRS, and the duty of fair representation does not extend to representation of

Complainant's workers' compensation claims arising under Chapter 386.

Collective bargaining is defined in § 89-2, HRS, as:

[t]he performance of the mutual obligations of the public employer and the exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, amounts of contributions by the State and counties to Hawai'i public employees health fund, and other terms and conditions of employment, except that by any such obligation neither party shall be compelled to agree to a proposal, or be required to make a concession.

Nothing in Chapter 89, HRS, and in particular § 89-13(b), HRS, imposes an affirmative duty upon Respondent, explicitly or implicitly, to represent Complainant in matters which exist beyond the terms of the collective bargaining agreement.

On the other hand, Chapter 386, HRS, relates exclusively to matters relating to workers' compensation and over which the Director of the Department of Labor and Industrial Relations retains original jurisdiction. Section 386-73, HRS, provides in relevant part:

Original jurisdiction over controversies.
Unless otherwise provided, the director of labor and industrial relations shall have original jurisdiction over all controversies and disputes arising under this chapter.
(Emphasis added.)

Complainant's claim of wrongful termination appears to fall within the parameters of § 386-142, HRS, which provides in relevant part:

Employment rights of injured employees. It shall be unlawful for any employer to suspend

or discharge any employee solely because the employee suffers any work injury which is compensable under this chapter and which arises out of and in the course of employment with the employer unless it is shown to the satisfaction of the director that the employee will no longer be capable of performing the employee's work as a result of the work injury and that the employer has no other available work which the employee is capable of performing.

The language of Chapters 89 and 386 are mutually exclusive and, as applied in this case, the former imposes the duty of fair representation within the provisions of the chapter, while the latter explicitly gives the Director of Labor and Industrial Relations original jurisdiction over workers' compensation claims. In the absence of any language in Chapter 386, HRS, which would require an exclusive bargaining representative to act on behalf of its members on matters covered by the statute, and in light of the clear language of §§ 386-73 and 386-142, HRS, the Board finds that Respondent does not have an affirmative duty to represent Complainant in her workers' compensation claims and the Union's duty to fairly represent its members does not extend to cases arising under Chapter 386, HRS.

CONCLUSIONS OF LAW

The Board has jurisdiction over this complaint pursuant to §§ 89-5 and 89-14, HRS.

A union breaches its duty of fair representation when its conduct towards a member is arbitrary, discriminatory, or in bad faith.

Complainant failed to prove that the Union filed her claims in an improper forum or otherwise breached its duty of

fair representation in violation of § 89-13(b), HRS. The Union's duty of fair representation extends to matters dealing with collective bargaining and the rights created by the respective collective bargaining agreements and does not encompass the pursuit of Complainant's workers' compensation claims arising under Chapter 386, HRS.

ORDER

The prohibited practice complaint is dismissed.

DATED: Honolulu, Hawaii, June 2, 2000.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member

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