

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NOS.: CE-03-422
)	CU-03-154
LENORA K. ISHIHARA and LORI A.)	
KANESHIRO,)	DECISION NO. 414
)	
Complainants,)	FINDINGS OF FACT, CONCLU-
)	SIONS OF LAW, AND ORDER
and)	
)	
DEPARTMENT OF HUMAN RESOURCES,)	
City and County of Honolulu;)	
HONOLULU POLICE DEPARTMENT,)	
City and County of Honolulu; and)	
HAWAII GOVERNMENT EMPLOYEES)	
ASSOCIATION, AFSCME, LOCAL 152,)	
AFL-CIO,)	
)	
Respondents.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On February 1, 1999, Complainants LENORA ISHIHARA (ISHIHARA) and LORI A. KANESHIRO (KANESHIRO) filed a prohibited practice complaint against the DEPARTMENT OF HUMAN RESOURCES (DHR), City and County of Honolulu; the HONOLULU POLICE DEPARTMENT (HPD), City and County of Honolulu (collectively Employer); and the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) with the Hawaii Labor Relations Board (Board). Complainants allege that the Employer failed to timely notify them of their demotions, failed to follow civil service and personnel regulations, and refused to allow them to review the evidence upon which their demotions were based. Thus, Complainants contend that Respondent Employer wilfully violated §§ 89-9(d), 89-10(d), 89-13(a)(7), 89-13(a)(8), 76-46, and 76-75, Hawaii Revised Statutes

(HRS). Complainants further allege that the HGEA breached its duty to fairly represent them when it failed to timely investigate their selection and pursued a grievance settlement which resulted in the vacating of their promotions. Complainants also contend that Respondent HGEA wilfully violated §§ 89-8(a), 89-9, 89-10(d), 89-13(b)(3), (4), and (5), 76-46, 76-75, and 389-51, HRS.

On March 11, 1999, Respondent HGEA filed a motion to dismiss and/or for summary judgment with the Board. The HGEA contended that the complaint should be dismissed because it is untimely, the Board lacks jurisdiction over the complaint, and the complaint fails to state a claim upon which relief can be granted as to Respondent HGEA.

On March 12, 1999, the Board conducted a hearing on the instant complaint. As a preliminary matter, the Board heard argument on HGEA's motion to dismiss and/or for summary judgment. Respondents DHR and HPD, by and through their counsel, joined the motion to dismiss with respect to the timeliness of the complaint. After hearing arguments on the motion, the Board denied the motion to dismiss. The Board proceeded to a hearing on the merits of the case on March 12, 1999 which continued on March 18, 1999. The parties had full opportunity to present evidence and argument to the Board. The parties filed written briefs with the Board on April 23, 1999.

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

FINDINGS OF FACT

KANESHIRO is employed by the HPD, City and County of Honolulu and is an employee within the meaning of § 89-2, HRS. KANESHIRO is a member of bargaining unit 03.

ISHIHARA is employed by the HPD, City and County of Honolulu and is an employee within the meaning of § 89-2, HRS. ISHIHARA is a member of bargaining unit 03.

The DHR, City and County of Honolulu, is representative of the public employer within the meaning of § 89-2, HRS.

The HPD, City and County of Honolulu, is representative of the public employer within the meaning of § 89-2, HRS.

The HGEA is an employee organization and the exclusive representative within the meaning of § 89-2, HRS, of employees included in bargaining unit 03.

The City and County of Honolulu and the HGEA are parties to a collective bargaining agreement covering the employees included in Unit 03.

In September 1996, the HPD conducted a selection process to fill two Fingerprint Classifier I positions and the HPD promoted Complainants to the positions effective October 1, 1996. After an investigation, on or about October 2, 1996, Respondent HGEA filed a Step 2 class grievance with the employer on behalf of the more senior non-selected employees, Christine Demello, Carolyn Kalani, and Virginia Phillips. The HGEA alleged that the selection process utilized by the HPD in selecting the applicants was flawed and that the HPD violated Articles 3, 4, 8, 13, 15, and 17 of the applicable Unit 03 collective bargaining agreement. The grievance requested that the selection process be redone. Complainants heard rumors at

the time that three of the non-selectees for the positions filed a grievance with the HPD.

On March 31, 1997, Complainants completed their probationary periods and were granted permanent status as Fingerprint Classifier I's effective April 1, 1997.

On April 30, 1997, the HPD conducted a Step 2 meeting with the grievants and their HGEA representative.

On May 9, 1997, Complainants received a written questionnaire as part of the investigation of the grievance conducted by Acting Lieutenant John Payne of the Human Resources Division of the HPD which was the first formal indication to Complainants that a grievance had been filed.

On May 9, 1997, KANESHIRO telephoned HGEA Union Agent Kevin Nakata (Nakata) to inquire about the grievance. Nakata responded that he could not speak to her because he represented the grieving parties. KANESHIRO asked Nakata if he could give her advice as to what Complainants could do to file a grievance and if HGEA could represent Complainants in the matter. Nakata told KANESHIRO that they could not do anything until the outcome of the investigation.

In July 1997, the HPD's Administrative Review Board found that the allegations of the grievance were unfounded and Chief Michael Nakamura denied the grievance at Step 2.

On or about August 22, 1997, the HGEA filed a Step 3 grievance with the DHR challenging the selection process.

Lissa Lau (Lau), Labor Relations Specialist, indicated to Nakata that the Union had raised some valid concerns and that the department would perform an investigation/internal review of the

selection process and would contact him following the completion of the investigation. The DHR Examinations Branch reviewed the entire selection process. Lau concluded from the review that the traits sought in the selection process were not defined to coincide with the actual qualities that the HPD was trying to evaluate, i.e., use of the written examination to test reasoning and work experience. In addition, since the positions were technical in nature, the process should have utilized more objective testing rather than testing for interpersonal/communication skills. Also, Lau had concerns because of the inconsistency in the scoring of the applicants. After the investigation, Lau found flaws in the testing process and recommended settling the grievance.

On October 1, 1997, Complainants had each completed one year as a Fingerprint Classifier I and were reallocated to Fingerprint Classifier II's.

On March 31, 1998, Complainants completed their six-month probationary period as Fingerprint Classifier II's but were not made permanent because of the pending grievance.

On or about October 1, 1998, the DHR, HPD, and the HGEA executed a Settlement Agreement to resolve the class grievance. The Employer agreed to set aside the selection of Complainants for the two Fingerprint Classifier I positions effective October 1, 1996 but for pay purposes, Complainants would be considered as having served limited-term appointments as Fingerprint Classifier I's from October 1, 1996 through September 30, 1997 and as Fingerprint Classifier II's from October 1, 1997 through November 9, 1998. The parties also agreed that (1) the Employer would redo the selection process for the two vacant positions with

the process limited to the candidates who originally interviewed for the positions and (2) the Employer would utilize some panel members from outside of the Records and Identification Division of HPD and would consult personnel specialists from the DHR Examinations Branch for assistance in developing the interview and selection process for the positions.

On or about November 9, 1998, Complainants received a copy of the Settlement Agreement notifying them that they would be returned to their previous positions.

After receiving the Settlement Agreement, ISHIHARA contacted Nakata and during this conversation, ISHIHARA asked for specific details of the Complainants' demotions and requested the information in writing.

On November 12, 1998, Complainants met with Nakata who provided them with a letter informing them that the Union conducted an investigation of concerns raised by the three applicants who were not selected for the positions. Through the Union's investigation, it was determined that the selection process was flawed and that the HPD violated Articles 3, 4, 8, 13, 15, and 17 of the contract. The Union filed a grievance arguing that the HPD failed to consider seniority in the filling of the vacant positions; the factors of the examination were inappropriately weighted; and the questions and scoring of the questions were inconsistent. At Step 3, the Employer agreed with the Union to redo the selection and it was mutually agreed that the Complainants would not have to repay any amounts due to the improper selection process and that the Complainants would be credited with Limited Term Appointments in the positions which would be considered in

future promotions. In addition, the parties agreed to other matters concerning the makeup of the selection panel and the development of a new interview process.

On November 16, 1998, ISHIHARA spoke with Keith Ahue (Ahue), HGEA Deputy Director, who advised the Complainants that they could seek their own counsel.

On November 17, 1998, Complainants received a Notification of Personnel Action which changed their permanent status as Fingerprint Classifiers to Limited Term Appointments.

By letter dated November 18, 1998, Ahue notified ISHIHARA that the Settlement Agreement was the result of allegations made by the HGEA on behalf of several grievants that the filling of two vacant Fingerprint Classifier I positions was procedurally flawed. As a result, the Employer agreed to redo the selection process and the HGEA concurred. Ahue notified ISHIHARA that the HGEA would not file a grievance on the Complainants' behalf to negate the Settlement Agreement because the Union could not condone a faulty selection process.

The selection process for the Fingerprint Classifier I positions was redone and on March 3, 1999, Complainants were again selected and received promotions to Fingerprint Classifier I's. On March 31, 1999, Complainants were reallocated to Fingerprint Classifier II's effective March 16, 1999.

DISCUSSION

Complainants contend that the Employer committed prohibited practices by failing to timely notify the Complainants of their demotions, failing to follow civil service and personnel

regulations, and refusing to allow the Complainants to review the evidence upon which their demotions was based. Complainants contend that the Respondent Employer violated, inter alia, §§ 89-13(a)(7) and (8), HRS.

As against the HGEA, the Complainants contend that the Union breached its duty to fairly represent them when it failed to fully investigate the selection process by giving ISHIHARA and KANESHIRO an opportunity to present their case to the Union or otherwise be heard prior to filing a grievance. The HGEA thereafter settled the grievance resulting in the vacating of Complainants' promotions. Complainants contend that the HGEA violated, inter alia, §§ 89-13(b)(3), (4), and (5), HRS.

Section 89-13, HRS, provides for the prevention of prohibited practices and states in part:

§89-13 Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

* * *

- (7) Refuse or fail to comply with any provision of this chapter;
- (8) Violate the terms of a collective bargaining agreement; . . .

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

* * *

- (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.

Complainants contend that the HGEA violated § 89-13(b)(3), HRS. However, as that section pertains to mediation, fact-finding, and arbitration procedures for interest arbitration disputes rather than the instant contractual grievance procedure and is inapplicable to the instant case, the Board hereby dismisses that claim.

In addition, the Complainants contend that the Union breached its duty to fairly represent the Complainants by failing to fully investigate the grievance by including them in the process; by filing an unmeritorious grievance on behalf of the non-selectees; and entering into a Settlement Agreement which resulted in their demotions.

Section 89-8(a), HRS, sets forth the Union's duty of fair representation which provides in part as follows:

The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.

A union breaches its duty of fair representation when the exclusive representative's conduct towards its member is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). "Arbitrary" means "perfunctory." This standard was discussed by the Fourth Circuit:

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. Griffin v. International Union, 469 F.2d 181, 183 (4th Cir. 1972).

Simple negligence or mere errors in judgment will not suffice to make out a claim for breach of duty of fair representation. Farmer v. ARA Servs. Inc., 660 F.2d 1096, 108 LRRM 2145 (6th Cir. 1981); Whitten v. Anchor Motor Freight, Inc., 521 F.2d 1335, 1341, 90 LRRM 2161 (6th Cir. 1975).

The Supreme Court in Airline Pilots Ass'n, Intern. v. O'Neill, 499 U.S. 65, 111 S.Ct. 1127, 136 LRRM 2721 (1991), held that "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational." Id. at 1130. The Court's holding in O'Neill reflects that a deferential standard is employed as to a union's actions. They may be challenged only if "wholly irrational." Id. at 1136. In carrying out its duty of fair representation, an unwise or even an unconsidered decision by the union is not necessarily an irrational decision. Id. at 1136.

In Order No. 1071, dated May 23, 1994, Case Nos.: CE-10-179, CU-10-87, Linda E. Moga Rivera, the Board dismissed prohibited practice claims against the union and employer by an employee who had been demoted pursuant to a settlement agreement resolving a grievance. The union refused to represent her in a subsequent grievance to overturn the effects of a Settlement Agreement. In that case, the union and employer agreed

to select the employees for promotion rather than redo the selection process as the selection process had been previously challenged. The Board found that the complaint arose from a similar set of facts and circumstances as in Kaiser v. UPW, et al., Case No. CU-10-89, Order No. 1025, April 4, 1994, which stated:

The Board finds that the UPW, in its efforts, balanced the interests of the affected employees with the collective interests of the bargaining unit. In reaching this conclusion, the Board is persuaded by evidence that indicates that the majority of the ACO's selected for promotion pursuant to the settlement agreement were also selected in the two previous rounds. In addition, the Board finds persuasive the fact that the promotions based on seniority and temporary assignments were consistent with prior arbitration awards and in accordance with Section 16 of the Bargaining Unit 10 (BU-10) agreement.

Although KAISER notes that the BU-10 Agreement provides for promotions based on seniority only when "other factors [are] relatively equal" and contemplates the situation where senior employees may not receive promotions, the evidence indicates that the minimum qualifications for ACOs at levels III and IV are basically the same. Moreover, the evidence indicates that this case involves a non-competitive selection procedure in which examinations are not required. Therefore, the Board accords deference to the UPW and Employer's decision to select the employees for promotion rather than redo the selection process.

While the Board expresses reservations concerning the decision to disregard test scores, the Board finds that the actions of the UPW in this regard were not so far outside the wide range of reasonableness as to be irrational. Therefore, the Board finds that the UPW's actions in this case were within the "wide range of reasonableness" contemplated by the Supreme Court in O'Neill. Accordingly, the Board hereby grants UPW's motion to dismiss for failure to state a claim.

With respect to the Employer's motion to dismiss for failure to state a claim, the Board finds that the Employer did not conspire with the UPW to deprive KAISER of a promotion

and deny him of his rights under Chapter 89, HRS. The Board reaches this conclusion based on its finding that the UPW did not breach its duty of fair representation. In addition, the Board finds that the Employer entered into a valid settlement agreement with the UPW and that KAISER failed to present sufficient evidence to support a contrary conclusion. Therefore the Board hereby grants the Employer's motion to dismiss for failure to state a claim.

Thus, the Board found in Rivera, supra, that the union did not breach its duty of fair representation when it refused to overturn a settlement agreement entered into to resolve a class grievance which resulted in the demotion of the complainant. The Board found that the union acted within the range of reasonableness where the promotions were awarded to other employees.

Based upon a review of the record the Board finds that Nakata investigated the complaints made by the non-selected senior grievants and determined that the selection process was flawed and unfair. Although he did not notify or interview Complainants during his investigation or the grievance process, the Settlement Agreement evidences consideration for the Complainants' rights as the Agreement provides for the Complainants' retention of payments received and credit for their service in the positions for future promotions. Complainants offered no evidence proving that the Union acted in bad faith or with a discriminatory motive and while Complainants argue that the HGEA "overcharged" the violations on the grievance, by including allegations of Articles 4, 8, and 17 violations which were not established, the Employer, nevertheless, after its own independent investigation agreed with the Union that the selection process was flawed and that the grievance had merit. Unlike Dennis Yamaguchi, 2 HPERB 656 (1981), there is no evidence

that the Complainants' rights were treated cavalierly by the HGEA or the Employer and there is also no evidence of collusion between the Employer and the Union. The Union contends that it was representing the interests of the majority of the bargaining unit by not condoning a faulty selection process. Thus, any errors in judgment on the part of the Union in alleging violations of certain provisions are insufficient to establish a breach of duty of fair representation.

Based on the evidence in the record, the grievants approached the Union and after an investigation, the Union agent believed that the selection process was flawed and that a grievance should be filed to redo the process. The agent's conduct in this regard does not appear to be irrational or unreasonable. Thereafter, when the Complainants approached the Union to file a grievance against their demotions, Ahue explained that the Union was obligated to ensure that the selection process was fair and therefore refused to repudiate the Settlement Agreement. As in the Rivera case, supra, the Board finds that the Union acted reasonably in refusing to repudiate the resolution of their grievance.

Complainants also allege that the Union breached its duty of fair representation by failing to notify them of the pending grievance and involving them in the determination to file a grievance citing the Board's decision in Dennis Yamaguchi, supra. In that case the Board considered that in choosing between its members, the Union must choose its position in a nonarbitrary manner giving each employee notice and a fair opportunity to be heard at the earliest state of the grievance. The Board stated at pp. 675-76:

If a union is faced with a grievance involving a conflict between its members, the union must choose its position in a non-arbitrary manner by affording each employee notice and a fair opportunity to be heard at the earliest stage of the grievance. Only after this can the union make a good faith judgment. In a Rhode Island Supreme Court case, Belanger v. Matteson, 115 R.I. 332, 346 A.2d 124, 91 LRRM 2003 (1975), cert. denied, 424 U.S. 968 (1976), the Warwick Teachers Union, Local 915, filed a grievance on behalf of the senior employee, Matteson, who lost to Belanger in a promotional bid. Matteson's grievance went to arbitration and resulted in a rescinding of Belanger's promotion and a promotion for Matteson. When Belanger requested the union's assistance to file a grievance on his behalf, the union refused reasoning that his grievance would require a remedy that amounted to a reversal of Matteson's binding arbitration award. Belanger then took his case to the Superior Court which ruled that the union breached its duty of fair representation. The Supreme Court in upholding the Superior court ruling noted:

It is true, in a very simplistic sense, that Matteson, being the only member of the bargaining unit with "a grievance," is therefore the only individual in need of Union support. But one would require blinders to accept this view. It should have been apparent to the Union that Matteson's grievance, although theoretically against the School Committee, was in reality against Belanger. Any action the Union took on Matteson's behalf threatened Belanger's job.

* * *

. . . the Union never offered Belanger an opportunity to present his case to them. It never recognized its duty to independently determine whether Matteson or Belanger was entitled to the job. It seems to us that the only fair procedure in this type of a conflict is for the Union, at the earliest stages of the grievance procedure,

to investigate the case for both sides, to give both contestants an opportunity to be heard.

In Benson v. Communications Workers, 150 LRRM 2143 (E.D. Va. 1994), the Court held that the union did not breach its duty of fair representation to an employee who was demoted as a result of a promotion grievance that union pursued and resulting in an arbitration award favoring a co-worker as the best qualified applicant. The union failed to provide the employee with notice of, or opportunity to be heard at any stage of the grievance. The union's pursuit of the grievance was found to be reasonable and the union had the right and obligation to advance collective interests even though it must choose between opposing interests. The Court found that there was no per se rule that the union had to provide the employee with notice and opportunity to participate in the arbitration hearing.

In the instant case, the Board finds that the Union acted within the wide range of reasonableness in its investigation of the grievance and pursuit of the Settlement Agreement. The Union sought a redo of the selection process and not the displacement of the Complainants by the grievants as in the Belanger and Yamaguchi case. More importantly, there is no evidence that Complainants were treated cavalierly by the Union. Their interests were addressed and protected in the Settlement Agreement in the face of the new selection process. Thus, the Board concludes that the Union did not breach its duty of fair representation in the handling of the instant grievance and Settlement Agreement. To the extent that this holding is inconsistent with the Yamaguchi case, the Board hereby overrules Yamaguchi.

As against the Respondents DHR and HPD, the Complainants contend that the Respondents violated § 89-9(d), HRS, which prohibits the employer and the exclusive representative from agreeing to any proposal which is inconsistent with the merit principles or the principle of equal pay for equal work pursuant to §§ 76-1, 76-2, 77-31, and 77-33, HRS. Complainants further contend that § 76-1(2), HRS, was violated because the HPD conducted a competitive test which was fair, objective and practical and the Settlement Agreement set aside the results of the test.

Complainants contend that DHR's action in overriding the HPD's promotion was a violation of management's rights to determine qualifications for and the methods, means and personnel by which the employer's operations are to be conducted. In this respect, Complainants fail to appreciate that the DHR is the representative of the employer at the higher step in the grievance process and that the DHR represents the public employer and management's perspective in the same manner as the HPD.

According to the DHR representative, the reason for the redo was that there were flaws in the testing process and therefore to ensure fairness, the selection process was agreed to be redone. The Board finds no compelling evidence presented by Complainants that the Employer's actions in agreeing to resolve the grievance and to redo the selection to violate the merit principles. The return of Complainants to their previously held positions was not intended as a demotion as it was to return the parties to the status quo ante to ensure that the applicants were on an equal footing and not affected by the initial selection.

The Board after reviewing the record finds that the Respondents HPD and DHR did not commit the prohibited practices as alleged by Complainants.

CONCLUSIONS OF LAW

A union breaches its duty of fair representation in violation of §§ 89-8(a) and 89-13(b)(4), HRS, when its conduct towards its member is arbitrary, discriminatory, or in bad faith.

Complainants failed to establish that the Union's conduct breached its duty to fairly represent them. The Union proceeded to represent the interests of its senior grievants in a non-arbitrary manner and its conduct was within the wide range of reasonableness permitted.

An employer violates § 89-13(a)(7), HRS, when it violates the provisions of Chapter 89, HRS.

Complainants failed to prove by a preponderance of evidence that the Employer violated the provisions of Chapter 89, HRS.

An employer violates § 89-13(a)(8), HRS, when it violates the provisions of the applicable collective bargaining agreement.

Complainants failed to prove that the Employer violated the applicable contract by entering into a settlement agreement with the Union to resolve a grievance.

ORDER

The Board hereby dismisses the instant complaint.

LENORA ISHIHARA and LORI A. KANESHIRO and DEPARTMENT OF HUMAN
RESOURCES, City and County of Honolulu; et al.
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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATED: Honolulu, Hawaii, June 28, 2000.

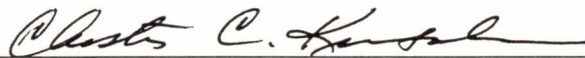
HAWAII LABOR RELATIONS BOARD



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