

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. 94-6 (CU)
)	
SALEEM AHMED,)	DECISION NO. 415
)	
Complainant,)	FINDINGS OF FACT, CONCLUSIONS
)	OF LAW, AND ORDER
and)	
)	
AMERICAN FEDERATION OF STATE,)	
COUNTY AND MUNICIPAL EMPLOYEES,)	
LOCAL 928,)	
)	
Respondent.)	

In the Matter of)	CASE NO. 95-1 (CE)
)	
SALEEM AHMED,)	
)	
Complainant,)	
)	
and)	
)	
OSWALD K. STENDER, Chairman,)	
Board of Governors, East-West)	
Center and EAST-WEST CENTER,)	
)	
Respondents.)	

FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

On December 23, 1994, Complainant SALEEM AHMED (AHMED) filed an unfair labor practice in Case No. 94-6 (CU), against the AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 928 (AFSCME or Union) with the Hawaii Labor Relations Board (Board). AHMED alleged that the Union breached its duty of fair representation by failing to properly grieve unfair, harassing and discriminatory treatment imposed upon AHMED by his employer, the EAST-WEST CENTER (EWC or Employer). AHMED alleged that the Union

thereby violated §§ 377-4, 377-5(a), 377-6(6), 377-7(1), (2), (3) and (8), Hawaii Revised Statutes (HRS).

On January 30, 1995, Complainant AHMED filed an unfair labor practice complaint in Case No. 95-1(CE) against OSWALD K. STENDER, Chairman, Board of Governors, EWC and the EWC with the Board. AHMED alleged, inter alia, that the Employer took disciplinary action against him without cause. AHMED alleged that the Employer (1) gave him an unfair and unequal workload; (2) evaluated his performance in a biased manner; (3) harassed him over the specifics of his annual work plan; and (4) denied him academic freedom. In addition, AHMED alleged that on November 30, 1994, the Employer, through its agent, Dr. Terry Rambo (Rambo), gave Complainant a "less than satisfactory" performance evaluation. In addition, AHMED alleged that because he has been directed to complete a book manuscript by June 30, 1995, his unfair and unequal workload initiated by Vice President Bruce Koppel on January 24, 1994 constitutes a continuing violation. AHMED contended that the Employer thus violated Article 10 of the collective bargaining agreement between the EWC and AFSCME (Contract), thereby violating § 377-6(6), HRS.

On January 31, 1995, Respondent Union filed a motion to dismiss the complaint on grounds that the Complainant failed to exhaust his contractual remedies and that the entire complaint is barred by the statute of limitations. Alternatively, the Union argued that the Complainant failed to timely notify the Union of the alleged violations by the Employer and accordingly, the Union could not file timely grievances. Further, the Union contended

that the Board lacks jurisdiction over Complainant's claims relating to discrimination.

On February 8, 1995, Complainant filed a motion to amend his unfair labor practice complaint against the Union to include an additional allegation that on January 19, 1995, the Union failed to grieve his 1994 performance evaluation. By Order No. 1185, dated May 4, 1995, the Board granted Complainant's motion to amend his unfair labor practice complaint against the Union and consolidated both cases for hearing.

On June 23, 1995, Respondent Union filed a motion to dismiss the amended complaint. Also on June 23, 1995, Respondent Employer filed a motion to dismiss both the original and amended complaints. The Employer contended that the complaint should be dismissed because AHMED failed to exhaust his contractual remedies. The Employer also contended that Complainant's work plan claims were barred by the applicable statute of limitations. In addition, the Employer contended that the Complainant's allegations do not constitute a proper grievance under the contract. Further, the Employer argued that the instant complaint is an attempt to have his discrimination claims heard in another forum and therefore the complaint should be dismissed. Lastly, the Employer contends that Complainant's claims of unfair treatment are not cognizable claims under Hawaii law.

On July 12, 1995, the Board held a hearing on the motions to dismiss. The Board issued Order No. 1345, Order Granting, in Part, and Denying, in Part, Respondents' Motions to Dismiss on June 28, 1996.

Hearings on the remaining issues were conducted on August 14, 1996, September 16, 1996, September 26, 1996 and November 4, 1996. All parties were afforded full opportunity to present witnesses, exhibits and arguments. Based on a thorough review of the record and arguments in the case, the Board issues the following findings of fact, conclusions of law and order.

As a preliminary matter, on January 22, 1997, Respondent Union filed a motion to amend its post hearing argument. Based upon the Board's review of the motion and its technical and grammatical rather than substantive changes, for good cause shown, the Board hereby grants the Union's motion.

FINDINGS OF FACT

The Board hereby incorporates the findings of fact contained in Order No. 1345, Order Granting, In Part, and Denying, In Part, Respondents' Motions to Dismiss.

DISCUSSION

In Order No. 1345, the Board stated, as to the claim against the Employer, in relevant part:

With respect to the claims against the Employer, AHMED filed his unfair labor practice complaint on January 30, 1995. Thus the Board's jurisdictional time frame only encompasses events occurring on or after November 1, 1994. In this respect, the only claim against the Employer arising within that time frame relates to AHMED's 1994 job performance evaluation.

As to the claim against AFSCME the Board stated, in relevant part:

Based upon the foregoing, the Board finds that it has jurisdiction over the breach of duty claim against AFSCME for its refusal to

process grievances evidenced by its letter of October 17, 1994 and its refusal to process the grievance arising from the 1994 performance evaluation. With respect to the Union's refusal to file a grievance regarding the allegedly unfair treatment and working conditions, any corresponding claim against the Employer is dismissed for lack of jurisdiction. Thus, even if complainant succeeds in establishing that AFSCME wilfully breached its duty of fair representation, the Board is unable to reinstate the grievance with the Employer. Any Board remedy would be limited in nature.

Also remaining for disposition is AHMED's complaint alleging that AFSCME breached its duty of fair representation by refusing to grieve his 1994 performance evaluation. The Board will conduct a hearing limited to the issue of whether the evaluation was satisfactory or less than satisfactory. If the Board finds that the evaluation was less than satisfactory and therefore grievable, the Board will determine whether AFSCME breached its duty of fair representation when it failed to file a grievance on behalf of AHMED and whether the Employer violated the relevant contract provisions by refusing to process the grievance. Conversely, if the Board finds that the evaluation was satisfactory, the Board will not contravene the contractual provision which expressly precludes the filing of grievances on that specific subject matter.

Id.

With regard to the allegations that his 1994 performance evaluation was "less than satisfactory," AHMED has the burden of proving that the evaluation was not "satisfactory" as marked, i.e., that the statements on the evaluation that AHMED "...needs to meet the performance standards outlined under Categories 1 and 2 above. Unless he meets these standards he is at risk of receiving an overall unsatisfactory rating in his next annual evaluation," somehow changes the characterization of his evaluation to a less than satisfactory rating. A review of the record shows that AHMED

has failed to carry his burden of proof. Witnesses testified that they viewed the evaluation as being "satisfactory." Except for AHMED's argument, no evidence was provided that the evaluation was less than satisfactory. Based on the record, the Board determines that AHMED failed to prove that his evaluation was not satisfactory. Therefore, the Board dismisses the complaint as to AHMED's allegation that his performance evaluation was less than satisfactory.

With regard to the charges against the Union, AHMED has the burden of proving that the Union's refusal to file a grievance on his behalf was arbitrary and capricious. The evidence supports a finding that upon receipt of AHMED's letter of complaint, the Union conducted an investigation into the validity of the allegations raised by AHMED. AHMED was kept apprised of the status of the case and given a chance to respond to the matters uncovered by the investigation. By letter dated October 17, 1994, Ms. Elizabeth Clancey, on behalf of the Union, informed AHMED that the Union would not file a grievance on his behalf. The record does not support a finding that the Union's action in refusing to file a grievance was arbitrary and capricious. In fact the record demonstrates that the Union considered his allegations, thoroughly investigated the charges and reasonably determined that there was no legitimate basis for the grievance that AHMED wanted filed. AHMED has failed to prove by a preponderance of the evidence that the action of the Union was arbitrary and capricious. Thus the Board dismisses the complaints against the Union based on the letter dated October 17, 1994.

CONCLUSIONS OF LAW

The Board has jurisdiction over the instant unfair labor practice pursuant to the provisions of § 377-9, HRS.

It is an unfair labor practice for an Employer to violate the terms of a collective bargaining agreement. In the instant complaint, the performance evaluation of the Complainant is deemed to be "satisfactory," and thus not grievable under Article 10, paragraph I of the Contract. Therefore, by denying the grievance of the Complainant, the Employer did not violate the Contract and did not commit an unfair labor practice under the provisions of § 377-6, HRS.

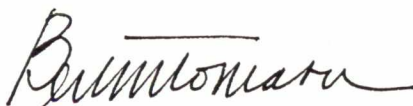
It is an unfair labor practice for the Union to act arbitrarily and capriciously when denying the filing of a grievance on behalf of a member, thus violating the exclusive representative's duty of fair representation. The Union investigated the complaints made by Complainant before determining that no legitimate basis for a grievance existed. The Union's determination was not arbitrary, capricious, or discriminatory. Therefore, the charges against the Union in violation of § 377-7, HRS, are dismissed.

ORDER

The subject unfair labor practice complaints are hereby dismissed.

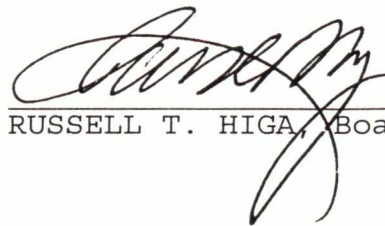
DATED: Honolulu, Hawaii, June 29, 2000.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson

SALEEM AHMED and AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, LOCAL 928 and SALEEM AHMED and
OSWALD K. STENDER, Chairman, Board of Governors, East-West
Center and EAST-WEST CENTER; CASE NOS.: 94-6(CU), 95-1(CE)
DECISION NO. 415
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER



RUSSELL T. HIGA, Board Member

Copies sent to:

Cynthia Winegar, Esq.
Saleem Ahmed
Dennis W.S. Chang, Esq.
Joyce Najita, IRC
State Archives
William Puette, CLEAR
University of Hawaii Library
Library of Congress
Richardson School of Law Library
Publications Distribution Center