STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of SALEEM AHMED, Complainant, and EAST-WEST CENTER and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 928, AFL-CIO, Respondents.	CASE NOS.: 96-5(CE) 96-6(CU) DECISION NO. 417 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
In the Matter of AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 928, AFL-CIO, Complainant, and SALEEM AHMED, Respondent.	CASE NO. 96-7(CEE)

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

On August 26, 1996, Complainant SALEEM AHMED (AHMED) filed unfair labor practice complaints against the EAST-WEST CENTER (EWC or Employer) and the AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 928, AFL-CIO (AFSCME or Union) with the Hawaii Labor Relations Board (Board) in Case Nos. 96-5(CE) and 96-6(CU). AHMED alleged that the Employer failed to follow the

reduction-in-force (RIF) provisions of the collective bargaining agreement (contract), therefore violating Articles A-4(B) and (C) of the contract, which constitutes violations of §§ 377-6(6), (8), and 377-8, Hawaii Revised Statutes (HRS). AHMED also alleged that AFSCME breached its duty to provide him with fair representation in refusing to pursue AHMED's grievance to arbitration, thus violating §§ 377-7(3) and 377-8, HRS.

On September 13, 1996, AFSCME filed an amended counterclaim alleging that the instant complaint lacked merit and that AHMED filed the complaints to harass and intimidate the Union. AFSCME contended that AHMED violated §§ 377-7(1) and 377-8, HRS. Also on September 13, 1996, AFSCME filed a separate unfair labor practice complaint against AHMED with the Board in Case No. 96-7(CEE). AFSCME attached a copy of the amended counterclaim filed in the instant case to its complaint.

On September 25, 1996, the Union filed a motion to dismiss the complaint with the Board. The Union alleged that the complaint should be dismissed on grounds that AHMED failed to exhaust his internal administrative remedies.

On September 30, 1996, the Employer requested that the Board stay further proceedings against the EWC pending a decision on the outcome of AHMED's claim against the Union.

On August 12, 1997, the Board issued Order No. 1500 which consolidated the cases for disposition, denied motions to dismiss the complaint and further denied EWC's motion for a stay of these proceedings. The Board also denied the Union's motion to dismiss the complaint finding that AHMED exhausted his contractual remedies. The Board also found that the claims against the Union

and Employer were interrelated and to promote efficiency and clarity denied the Employer's motion to stay the proceedings against the Employer until the case against the Union was determined.

On November 12, 1997, December 15, 1997, January 7, 1998, and February 18, 1998, the Board held hearings in the instant case. All parties were allowed to present evidence and argument to the Board on the issues. After a thorough review of the case and the evidence presented the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

AHMED was an employee as defined under § 377-1, HRS.

EWC is an employer as defined under § 377-1, HRS.

AFSCME is an exclusive representative as defined under § 377-1, HRS.

The pertinent provisions of Chapter 377, HRS, provide in part as follows:

> § 377-6 Unfair labor practices of employers. It shall be an unfair labor practice for an employer individually or in concert with others:
>
> * * *
>
> (6) To violate the terms of a collective bargaining agreement;
>
> * * *
>
> (8) To discharge or otherwise discriminate against an employee because the employee has filed charges or given information or testimony under the provisions of this chapter; . . .

> § 377-7 Unfair labor practices of employees. It shall be an unfair labor practice for an employee individually or in concert with others:
>
> * * *
>
> (2) To coerce, intimidate, or induce any employer to interfere with any of the employer's employees in the enjoyment of their legal rights, including those guaranteed in section 377-4, or to engage in any practice with regard to the employer's employees which would constitute an unfair labor practice if undertaken by the employer on the employer's own initiative; . . .
>
> § 377-8 Unfair labor practice of any person. It shall be an unfair labor practice for any person to do or cause to be done, on behalf or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by sections 377-6 and 377-7.

There is no dispute that AHMED was subjected to mandatory retirement from the EWC due to a RIF. The contract between the EWC and AFSCME contains RIF provisions. AHMED filed a grievance on his own behalf, challenging the RIF. According to the contract, only the Union can initiate the arbitration of a grievance. AHMED exhausted the preliminary steps of the grievance procedure and requested that AFSCME take his grievance to arbitration. The AFSCME business agent investigated AHMED's request and determined that there was little likelihood that AHMED would prevail. AHMED presented his request for arbitration to the Union's Executive Board and the business agent recommended that the grievance not be arbitrated. After review, which included an evaluation by AFSCME's legal counsel, the Executive Board decided not to take AHMED's grievance to arbitration. AHMED thereafter filed the complaints

with the Board alleging, inter alia, that the Union breached its duty of fair representation by refusing to arbitrate his grievance and that the Employer improperly terminated his employment as part of the RIF.

Article A4 of the contract, which pertains to a RIF provides in part:

> A. A reduction-in-force for Fellows of the EWC may be declared by the Employer due to Center wide lack of funds at the EWC.
>
> B. If the Employer contemplates a reduction-in-force, the Employer shall determine the cooperative study, training, and research capabilities considered to be most critical, and the Employer shall retain the number and type of Fellows considered to be most appropriate to attain and maintain critical cooperative study, training, and research capabilities, subject to the provisions of paragraph C below.
>
> C. To this end, when the Employer determines that a reduction-in-force is necessary to meet the conditions brought about by the lack of funds, the Employer may abolish or reduce programs and/or projects and initiate a reduction-in-force of Fellows within such programs and/or projects in the following order.
>
> 1. Fellows classified as temporary Employees;
> 2. Fellows classified as limited term or probationary Employees;
> 3. Fellows who have attained job-stable (regular) status.
>
> There shall be no bumping among Fellows.

Kenji Sumida (Sumida), President of the EWC, testified that in the late summer or early Fall of 1995 official word was received that the EWC budget would be cut by approximately 50%. Sumida then asked program directors to evaluate the various projects within their programs. Taking into consideration these evaluations, Sumida made the final decision as to which projects

would survive the budget cut after considering how each program helped to accomplish the EWC's mission and priorities. Sumida's decision was reasonable and not arbitrary. After consultation with the Union, the EWC notified employees of the reduction-in-force. AHMED was one of the employees affected by the RIF.

DISCUSSION

At the conclusion of the hearing, EWC and AFSCME renewed their motions to dismiss the complaint. The Board granted the motion to dismiss in favor of the EWC. The Board finds that the contract gives the Employer wide latitude and discretion in the implementation of a RIF once budgetary constraints required such action. Sumida testified that he exercised his discretion in selecting which programs would survive the budget cut on the basis of how each program helped to accomplish the EWC's mission and priorities. The Board finds that the EWC properly applied the RIF provisions of the contract; therefore, no contractual violation occurred.

The Board also granted the motion to dismiss the instant complaint as to AFSCME. 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.

The Board finds that AHMED's grievance on the RIF was thoroughly investigated, denied and subsequently appealed to the Union's Board of Directors. Legal counsel was retained to determine whether the matter should be taken to arbitration. There is no evidence to indicate that the Union's handling of AHMED's grievance was done in an arbitrary, capricious, or discriminatory manner.

The Board also dismisses the unfair labor practice charge brought against AHMED by AFSCME. This charge alleges that AHMED filed the unfair labor practice charges to harass and intimidate the Union. The Board finds no credible evidence to support such allegations.

CONCLUSIONS OF LAW

The Board has jurisdiction over these complaints pursuant to § 377-9, HRS.

An Employer commits an unfair labor practice when it violates the terms of a collective bargaining agreement as provided for under § 377-6(6), HRS. The Board finds that no violation of the contract occurred.

An Employer commits an unfair labor practice under § 377-6(8), HRS, if an employee is discharged or otherwise discriminated against for filing charges or providing information or testimony under this chapter. While AHMED previously filed unfair labor practice charges against the Employer with the Board, he failed to present evidence to substantiate his claim of being terminated during the RIF as a result of such charges being filed. The evidence supports a finding that the basis for the RIF was the budget reduction, and the priorities deemed important by the EWC President was used to determine which programs would be eliminated.

An Employer commits an unfair labor practice when it violates the provisions of § 377-8, HRS. The Board found no violation of this statutory provision.

The Union commits an unfair labor practice when it violates the provisions of either § 377-7(3), HRS or § 377-8, HRS.

The Board finds that the Union did not violate the provisions of statutes in the instant case.

AHMED would be guilty of an unfair labor practice if he violated the provisions of § 377-7(1), HRS or § 377-8, HRS. The Union failed to prove that AHMED violated the foregoing statutes.

ORDER

The Board hereby dismisses all charges filed in the instant case.

DATED: Honolulu, Hawaii, June 29, 2000.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

CHESTER C. KUNITAKE, Board Member

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