

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-03-175
)	
KATHLEEN M. LANGTAD,)	DECISION NO. 423
)	
Complainant,)	FINDINGS OF FACT, CONCLUSIONS
)	OF LAW, AND ORDER
and)	
)	
HAWAII GOVERNMENT EMPLOYEES)	
ASSOCIATION, AFSCME, LOCAL 152,)	
AFL-CIO,)	
)	
Respondent.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On November 13, 2000, Complainant KATHLEEN M. LANGTAD (Complainant or LANGTAD) filed a prohibited practice complaint against Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (Respondent, HGEA or Union), charging a violation of Hawaii Revised Statutes (HRS) § 89-13(b)(4). LANGTAD contends the HGEA breached its duty of fair representation by refusing to file a grievance as provided by a circuit court order issued on April 5, 2000 waiving any time limits for filing such a grievance against her employer.

The Hawaii Labor Relations Board (Board) held a formal hearing on the matter on February 9, 2001 at which time both parties appeared. Complainant was represented by June C. Ikemoto, Esq. and the HGEA was represented by Peter Liholiho Trask, Esq. and HGEA Union Agent Dale Shimomura (Shimomura). Both parties were given full opportunity to introduce evidence, examine and cross examine witnesses and make argument. Post-hearing briefs were filed and received by the Board on March 19, 2001.

Based upon the entire record before us, we make the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. LANGTAD is a Radio Dispatcher II employed by the Kauai Police Department, County of Kauai, and a public employee within the meaning of HRS § 89-2.

2. The HGEA is an employee organization and at all relevant times has been the exclusive representative within the meaning of HRS § 89-2 for Kauai Police Department's radio dispatchers, including LANGTAD, who are included in bargaining unit 03.
3. Shimomura is HGEA's business agent and at all relevant times has been the Union representative for radio dispatchers in LANGTAD's bargaining unit in Kauai.
4. On April 12, 1998, LANGTAD was selected to fill the Supervising Radio Dispatcher position. LANGTAD was one of two radio dispatchers who applied for a promotion to the position in December 1997.
5. Following LANGTAD's promotion, HGEA's agent Shimomura represented the non-selectee Miriam Klattenhoff (Klattenhoff) and filed a grievance on her behalf based on seniority citing a violation of Article 13, Promotions, paragraph B(4) as provided for in the Unit 03 collective bargaining agreement.
6. On August 3, 1998, after a Step III meeting on the grievance, Allan Tanigawa (Tanigawa), Director of Personnel Services for Kauai County, sustained the grievance, reversed the selection of LANGTAD and promoted Klattenhoff based on her seniority and the less than five percent difference in test scores between LANGTAD and Klattenhoff.
7. On August 8, 1998, LANGTAD was personally informed by Mayor Maryanne Kusaka that Klattenhoff won her grievance. The Mayor approved the Department of Personnel Services' August 3, 1998 decision at Step III to promote Klattenhoff resulting in LANGTAD's return to her former radio dispatcher position.
8. Shimomura attempted to visit LANGTAD at her worksite about Klattenhoff's prevailing on the grievance. After learning from co-workers about Shimomura's visit, LANGTAD called him to find out what he could do to help her since she had been satisfactorily performing the work of the Supervising Radio Dispatcher for approximately four months. By phone, Shimomura explained that in promotions, when all things are "relatively" equal, seniority prevails. Hence, LANGTAD was led to understand that nothing could be done to help her because she could not file "a grievance on a grievance." Therefore, she chose not to follow up by meeting with Shimomura at that time because he was so adamant that she had no recourse.

9. Shimomura did not discuss with LANGTAD any rights or options that she could pursue such as filing a grievance on her own, or exploring whether the employer could create an additional Supervising Radio Dispatcher position.
10. LANGTAD knew in 1998 after she retained her attorney that even without the assistance of her Union she had the right to proceed on her own to file a grievance at Steps 1, 2 and 3 of the contract.
11. On August 31, 1998, LANGTAD turned to the Kauai Civil Service Commission (Commission) for relief over the rescission of her promotion to Supervising Radio Dispatcher and return to her former Radio Dispatcher II position. The Commission dismissed LANGTAD's complaint with prejudice and she appealed the Commission's decision to the Circuit Court of the Fifth Circuit (Circuit Court).
12. On April 5, 2000, the Circuit Court issued its Decision and Order of Katheleen (sic) LANGTAD's Appeal Filed June 4, 1999, affirming the Kauai Civil Service Commission's decision dated May 21, 1999 as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Civil Service Commission's decision dated May 21, 1999 is affirmed, with leave granted to Appellant Kathleen Langtad to file a grievance and pursue her contractual remedies under the collective bargaining agreement and any time periods for filing of a grievance shall be waived.

13. LANGTAD knows she can file a grievance on her own and has had the assistance of an attorney since 1998. Nevertheless, she testified that it is imperative that HGEA file her grievance and represent her, in order to proceed to arbitration at step 4, pursue an appeal of the arbitration award, and have a chance at prevailing in Circuit Court.
14. HGEA's reasons for refusing to pursue a grievance for LANGTAD is that it has no merit. As the Union agent representing Klattenhoff, Shimomura was privy to the employer's action rescinding the selection of LANGTAD in order to grant Klattenhoff's grievance. It was reasonable for Shimomura to believe that the personnel action by Personnel Director Tanigawa that resulted in LANGTAD's return to her former position was proper. Shimomura did not believe LANGTAD had any legitimate grounds for filing a grievance in as much as he saw no violation, misapplication, or misinterpretation of the Unit 03 collective bargaining agreement.

15. After Shimomura received a copy of the Circuit Court order, he called LANGTAD "to find out what the [contract] violation was and what she wanted [the union] to assist her with."
16. On August 15, 2000, in response to LANGTAD's request to file a grievance pursuant to the Circuit Court's order, Shimomura notified LANGTAD that HGEA would not file a grievance on her behalf. Shimomura's response explained that:

The action to return you to your former position was a direct result of the grievance filed on behalf of Ms. Klattenhoff, who was the aggrieved on the initial promotion. The Department corrected the violation by administratively returning you to your position as Radio Dispatcher II. Given the aforementioned we will not be pursuing a grievance on your behalf.
17. On November 13, 2000, LANGTAD filed this prohibited practice complaint over HGEA's refusal to pursue her grievance regarding the rescission of her promotion to Supervising Radio Dispatcher and return to her Radio Dispatcher II position and compensation rate.
18. Shimomura did not breach his duty of fair representation by refusing to file a grievance on behalf of LANGTAD after the Circuit Court had waived the time period for filing a grievance under the contract.

DISCUSSION

The issue before the Board is whether the HGEA's August 15, 2000 refusal to file a grievance and represent LANGTAD against the County of Kauai Police Department and Department of Personnel Services for having rescinded her selection as Supervising Radio Dispatcher and returning her to the Radio Dispatcher II position constitutes a breach of its duty of fair representation in wilful violation of HRS §§ 89-8(a) and 89-13(b)(4).

Statute of Limitations

HRS § 377-9 which is made applicable to the Board by HRS § 89-14, provides that no complaints of any specific unfair labor practice shall be considered unless filed within 90 days of its occurrence. Similarly, under the Board's rules of practice and procedure, a prohibited practice complaint may be filed within 90 days of the alleged violation. Hawaii Administrative Rules (HAR) § 12-42-42.

The HGEA contends LANGTAD's complaint is untimely because it should have been brought within 90 days of August 1998 when HGEA first denied LANGTAD's request to file a grievance over her employer's decision to rescind her selection and return her to the Radio Dispatcher II position. The HGEA further argues that neither LANGTAD's appeal to the Kauai Civil Service Commission, nor the Circuit Court's order of April 5, 2000 creates a new claim for relief. Absent any legal authority to support this proposition, the Board is not persuaded to dismiss the complaint as untimely.

LANGTAD's complaint was filed with the Board on November 13, 2000. The basis for her complaint is the letter of August 15, 2000 from Shimomura denying her request to file a grievance and represent her. There is no dispute that this request to file a grievance was triggered by the Circuit Court's order of April 5, 2000 granting LANGTAD leave to file a grievance and pursue her contractual remedies under the collective bargaining agreement and waiving any time periods for filing such a grievance.

The Board finds the date of the alleged violation to be Shimomura's August 15, 2000 letter to LANGTAD denying her request to file a grievance. As such, LANGTAD's complaint was timely filed within the 90-day period as required by HAR §12-42-42.

Accordingly, the Board limits the complaint to HGEA's conduct and reasons for refusing on August 15, 2000 to pursue a grievance after the request by LANGTAD triggered by the Circuit Court's order of April 5, 2000. The Board will not consider any allegations of violations prior to this period.

Duty of Fair Representation

The duty of fair representation embodied in HRS § 89-8(a) is twofold. First, the exclusive representative is mandated "to act for and negotiate agreements covering all employees in the unit." Second, the exclusive representative must "be responsible for representing the interests of all such employees without discrimination and without regarding to employee organization membership."

The burden of proof is on LANGTAD to show by a preponderance of evidence that HGEA's refusal on August 15, 2000 to file her grievance was arbitrary, discriminatory or in bad faith. Sheldon H. Varney, 5 HLRB 369 (1995). See also, Vaca v. Sipes, 386 U.S. 171, 190-191, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). "A unions's conduct is 'arbitrary' if it is 'without rational basis,'... or is 'egregious, unfair and unrelated to legitimate union interests,'" Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir. 1985).

Proof of union error due to negligence, inefficiency, inexperience, or even a misguided interpretation of contract provisions will not suffice. Bruce J. Ching, 2 HLRB 23 (1978). 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 reasonable,' 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, this Board found that a 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 its union member initially selected for the promotion. The Board applied the O'Neill test, to find that the union acted within the range of reasonableness where the promotions were awarded to other employees.

Similarly, 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 pursued by the union for another member that resulted in an arbitration award favoring the grievant. In that case the union failed to provide the employee with notice of, or opportunity to be heard at any stage. The union's pursuit of the promotion grievance was found to be reasonable, despite the union's indifference to the employee who was ultimately demoted. The court reasoned that the union had the right and obligation to advance collective interests even though it must choose between opposing interests. "Specifically, the union's duty of fair representation did not require it to do more than articulate and pursue a non-arbitrary interpretation of the Agreement although the successful pursuit of its interpretation would detrimentally affect one of its members." Id. at 2145.

LANGTAD contends that HGEA's refusal to grieve the employer's action rescinding her promotion and returning her to the Radio Dispatcher II position after serving four months as the Supervising Radio Dispatcher was arbitrary, capricious and in bad faith. LANGTAD claims that after the Circuit Court's order was issued, HGEA failed to: conduct a minimum investigation, inform her of any options available, and inform her of her right to pursue a grievance on her own.

The HGEA counters that LANGTAD's request to pursue a grievance after the Circuit Court's order waiving the time periods to file a grievance had no merit. Because LANGTAD's return to the Radio Dispatcher II position was the result of an administration action to correct the promotion grievance filed by LANGTAD's co-worker, Shimomura did

not believe LANGTAD had any legitimate grounds for filing a grievance inasmuch as he saw no violation, misapplication, or misinterpretation of the Unit 03 collective bargaining agreement.

There is no dispute that LANGTAD's return to her former position was the result of the employment action by Kauai's Director of Personnel Services Tanigawa, approved by Mayor Kusaka, in order to sustain Klattenhoff's promotion grievance. As Klattenhoff's Union agent, Shimomura was cognizant of the employer's reasons to rescind LANGTAD's selection. When Shimomura received a copy of the Circuit Court order he initiated a call to LANGTAD to find out what assistance she wanted from the Union. His August 15, 2000 letter explains the reasons why. The Board finds Shimomura's reasons and explanation for refusing to file a grievance on LANGTAD's behalf are not "so far outside the wide range of reasonable, as to be irrational."

After receiving a copy of the Circuit Court order, there was no need for Shimomura to do even a minimum investigation other than initiate a call to LANGTAD to find out specifically what assistance she was seeking. Shimomura testified that LANGTAD deferred to her attorney. LANGTAD knew she could file a grievance on her own and was being represented by an attorney. It probably would have been helpful for LANGTAD had Shimomura been more attentive to LANGTAD in helping her understand her rights and options¹ and even sharing more information about the employer's written decision for the action taken in the Klattenhoff grievance. But his failure in doing so, does not constitute arbitrary or bad faith behavior in refusing to file a grievance at this juncture.

Unfortunately Shimomura's failure to pay more attention to LANGTAD, by meeting with her and her attorney to discuss fully her rights and options under the contract when he received a copy of the Circuit Court order, are more attributable to a lackadaisical attitude and inefficiency in his role as LANGTAD's Union agent. This does not suffice in proving a violation of HRS § 89-13(b)(4). Bruce J. Ching, supra. Under the circumstances, this Board cannot find that Shimomura's conduct in refusing to file a grievance was arbitrary, discriminatory or in bad faith. Sheldon H. Varney, supra.

¹There is no question that LANGTAD does not have a clear understanding of her rights and options under the contract. This is evidenced by the fact that her complaint is premised on the mistaken belief that HGEA's failure to represent her ultimately affects her ability to compel arbitration as provided in Step IV of the grievance procedure. LANGTAD believes, rightly or wrongly, that if she is not represented by the HGEA on her grievance, then arbitration is foreclosed to her as an option. LANGTAD believes that without an arbitration, all hope of an appeal to the Circuit Court and ultimately prevailing is dashed.

CONCLUSIONS OF LAW

1. The union's breach of its duty of fair representation is a prohibited practice in violation of HRS § 89-13(b)(4) and HRS § 89-8(a), when the union's conduct is arbitrary, discriminatory or in bad faith.
2. In the instant case, the Complainant has the burden to prove by a preponderance of evidence that Respondent's conduct in refusing to pursue a grievance was arbitrary, discriminatory or in bad faith.
3. Based on the record, the Board concludes that HGEA's refusal to file LANGTAD'S grievance because it believes the administrative action returning her to the position of Radio Dispatcher II was properly done to correct a promotion grievance for a co-worker, was not so far outside the wide range of unreasonable, as to be irrational.
4. Based on the record, the Board concludes that LANGTAD has failed to prove by a preponderance of evidence that Shimomura's reasons and conduct resulting in a denial of LANGTAD's request to prosecute a grievance over her return to her position as a Radio Dispatcher II was arbitrary, discriminatory or in bad faith.

ORDER

For the reasons given above, the Board hereby orders the instant prohibited practice complaint be dismissed.

DATED: Honolulu, Hawaii, April 16, 2001.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member


KATHLEEN RACUYA-MARKRICH, Member

KATHLEEN M. LANGTAD and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION,
AFSCME, LOCAL 152, AFL-CIO
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