

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of
RICHARD HUNT,

Complainant,

and

CATHERINE BRATT, Principal, Kohala High
& Intermediate School, Department of
Education, State of Hawaii; DEPARTMENT
OF EDUCATION, State of Hawaii; and MARK
NAKASHIMA, Uniserv Specialist, Hawaii
State Teachers Association,

Respondents.

CASE NOS: CE-05-460
CU-05-177

DECISION NO. 430

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On December 18, 2000, RICHARD HUNT (HUNT), proceeding pro se, filed a prohibited practice complaint against CATHERINE BRATT (BRATT), Principal of Kohala High & Intermediate School, Department of Education, State of Hawaii and the DEPARTMENT OF EDUCATION (DOE), State of Hawaii (collectively Employer) and MARK NAKASHIMA (NAKASHIMA), Uniserv Specialist, Hawaii State Teachers Association (HSTA or Union) with the Hawaii Labor Relations Board (Board). HUNT alleged that the BRATT lied to the hearings officer during a grievance hearing and the hearings officer improperly denied his grievance over his non-selection for a transfer to a math position at Kohala High & Intermediate School. HUNT also alleged that NAKASHIMA was inadequately prepared for the grievance hearings and failed to respond to his requests to arbitrate his grievance.

On March 2, 2001, NAKASHIMA, by and through his counsel, filed a motion to dismiss the prohibited practice complaint with the Board. NAKASHIMA contended that the complaint was barred by the applicable 90-day statute of limitations and that the Union had filed a demand for arbitration on August 21, 2000. Thus, the Union had not refused to arbitrate HUNT's grievance and contended that the instant complaint should be dismissed.

Thereafter, on March 23, 2001, Respondent Employer filed a motion to dismiss the instant complaint. The Employer also contended that the complaint was time-barred as well as vague and ambiguous. The Employer further contended that HUNT failed to exhaust

his available contractual remedies since the grievance was still pending arbitration and thus his complaint against the Employer should be dismissed.

The Board conducted a hearing on the motions by conference call on April 4, 2001. In Order No. 2007 issued on April 26, 2001, the Board found that although HSTA filed a demand to arbitrate HUNT's grievance in August of 2000, the Employer could not proceed to select an arbitrator because the HSTA Board of Directors had not made a final decision to arbitrate HUNT's grievance. The Board concluded that HUNT failed to exhaust his contractual remedies and dismissed the complaint against the Employer for lack of jurisdiction without prejudice. The Board also found the charges against the Union were ripe for adjudication and there was a genuine issue of fact as to whether the delay of nearly eight months by the HSTA Board of Directors in deciding to proceed to arbitration was arbitrary, discriminatory, or in bad faith. The Board also concluded that it was necessary and proper under Hawaii Revised Statutes (HRS) § 89-5(b)(4) to determine whether the delay in the HSTA's decision whether to proceed to arbitration and NAKASHIMA's alleged unresponsiveness was a breach of the Union's duty of fair representation and a prohibited practice in violation of HRS § 89-13(b)(4).

On May 29, 2001, the Board held a hearing on HUNT's complaint against Respondent NAKASHIMA in Kona, Hawaii. The parties were given full opportunity to present evidence and arguments to the Board. Complainant filed his post-hearing brief with the Board on July 17, 2001 and Respondent filed his brief on July 23, 2001.

Thereafter, on October 18, 2001, NAKASHIMA's counsel filed an affidavit stating that the arbitrator had been selected to arbitrate HUNT's grievance and the pre-arbitration conference had been scheduled on October 25, 2001 with the hearing date to be determined. Accordingly, NAKASHIMA requested that the complaint be dismissed in accordance with his arguments in his post-hearing brief.

On November 1, 2001, HUNT filed a Memo of Opposition with the Board. HUNT argued that while the HSTA contends that the "supposed" arbitration has been scheduled, it has been almost one-and-a-half years after the alleged infraction took place. HUNT argues that because of the delays involved, the probationary teacher has gained her tenure and the math position at Kohala Middle School is no longer available. Thus, HUNT requested to be transferred to an available math position at Kohala High School.

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

FINDINGS OF FACT

1. HUNT is a teacher employed by the DOE at Honokaa High School, a public employee as defined in HRS § 89-2, and a member of bargaining unit 05.
2. The HSTA is the exclusive representative, as defined in HRS § 89-2, of teachers in bargaining unit 05, including HUNT.
3. NAKASHIMA is HUNT's Uniserv Representative and a designated agent of HSTA within the meaning of HRS § 89-13(b).
4. For all relevant times, the HSTA was a party to the collective bargaining agreement covering teachers in bargaining unit 05 (Contract).
5. On May 23, 2000, the HSTA filed a grievance on HUNT's behalf challenging BRATT's denial of his application to transfer to a math teaching position at the Halaula campus of Kohala High & Intermediate School. The HSTA alleged violations of Article VII, Assignments and Transfers, of the Contract in force at all times relevant.
6. On May 23, 2000, the DOE conducted a hearing on HUNT's grievance at Step 1 of the grievance procedure. The DOE denied the grievance by decision issued on June 22, 2000. The grievance was filed at the next step, and the DOE conducted a hearing on the grievance on June 27, 2000. The DOE issued a decision on July 20, 2000 denying the grievance.
7. The Arbitration provision in Article V, Grievance Procedure, of the Contract provides as follows:

E. MEDIATION/ARBITRATION

* * *

2. **Arbitration.** If a claim by the Association or teacher that there has been a violation, misinterpretation or misapplication of this Agreement is not satisfactorily resolved at Step 2, the Association may present a request for arbitration of the grievance within ten (10) days after receipt of the answer at Step 2.
8. The HSTA's in-house guidelines require NAKASHIMA to file a Demand for Arbitration within ten days after the receipt of an unfavorable Step 2 response. Within 30 days after receipt of the Step 2 response, NAKASHIMA must file a summary of the Employer's Step 2 decision with his recommendation on

whether to proceed to arbitration to his supervisor, the HSTA Deputy Executive Director (Deputy). NAKASHIMA's summary and recommendation are forwarded to the HSTA Executive Director, who ultimately makes a recommendation to the HSTA Board of Directors whether to proceed to arbitration. The HSTA Executive Director is responsible to coordinate with the HSTA President and schedule the item for consideration and action by the Board of Directors at a meeting.

9. The DOE did not select an arbitrator for HUNT's grievance, because as a matter of practice the Demand for Arbitration is subject to final approval by the HSTA Board of Directors before proceeding to arbitrate.
10. NAKASHIMA prepared the Demand for Arbitration which was transmitted to the DOE by memorandum dated August 21, 2000 from HSTA Deputy Joan Lee Husted (HUSTED) within the ten-day time limit under the Contract. The DOE acknowledged receipt of the demand on August 23, 2000.
11. Although it was NAKASHIMA's practice to send a copy of the arbitration demand to the grievant, HUNT neither received a copy of the Demand for Arbitration, nor was told that such a demand was filed. Thus, HUNT did not know the HSTA had filed a Demand for Arbitration with the DOE until he was so informed at the Board's prehearing conference on February 7, 2001.
12. NAKASHIMA did not explain to HUNT that this was not a "real" demand for arbitration because it required approval by the HSTA Board of Directors. Typically the HSTA explains this procedure to teachers in writing. NAKASHIMA did not explain this process to HUNT "because [he] has participated in this process numerous times in the past." Transcript of hearing (Tr.) 5/29/01, p. 87.
13. By the end of August, NAKASHIMA submitted a summary of HUNT's grievance and his recommendation not to arbitrate the grievance to the HSTA's Deputy within the required 30-day period.
14. NAKASHIMA did not provide a copy of his summary and recommendation to HUNT, although he did inform HUNT initially that he was recommending not to arbitrate HUNT's grievance.
15. If NAKASHIMA had followed the "normal course of action" provided by the HSTA in-house guidelines, the HSTA Board of Directors could have considered HUNT's request to arbitrate "conceivably at the September 4th meeting." Id. p. 62.

16. On Friday afternoon, August 25, 2000, HUNT left a message on NAKASHIMA's telephone answering machine, as follows:

Hello Mark, this is Richard Hunt. I didn't get a chance to talk to you that much the other day, just briefly there at the meeting. But, ah, I want to go to arbitration, ah, against that lady. And um, if we need to, then we need to have the HSTA lawyer go there and do it. Its (sic) ridiculous for, to let her get away with her lying, and win every case and then for you to not recommend not go to arbitration would be terrible.

And so if you don't go (laughing) to arbitration, you are going to have to go back to the same kind of hearing against me that you got with Janet. It would be terrible representation to not go to arbitration against that dishonest woman. So, uh, Please get your recommendation in there on time. You recommend that we go to arbitration and we go to arbitration so we win against that gal for change. And if we need to get a lawyer or someone to help do it, fine lets (sic) do it. You and I both know that she is completely dishonest and lying about everything she does and that needs to stop somewhere so that would be, that would help anyway. Well thank you. Call me back if you need to 889-0244.

17. HUNT's statement regarding "the same kind of hearing against me that you got with Janet" refers to a prohibited practice complaint filed by Janet Weiss (Weiss) pending before the Board at the time in Case No. CU-05-164 resulting in Decision No. 420, 6 HLRB __ (2001).¹
18. Returning to work on Monday, August 28, 2000, NAKASHIMA listened to HUNT's phone message and called HUSTED.
19. Instead of following the normal course of action, HUSTED directed NAKASHIMA on or about August 25, 2000 to "hold off" and transmit the case file to legal counsel because of HUNT's phone call to NAKASHIMA, which he perceived as "threatening."

¹Weiss filed a prohibited practice complaint against the HSTA for breaching its duty of fair representation based on a transfer grievance handled by NAKASHIMA as the Uniserv Representative and involving Kohala High School principal, BRATT. At Weiss' hearing in Case No. CU-05-164, HUNT appeared as a witness for Weiss. In the instant complaint, Weiss attended the hearing to lend HUNT support.

[By Hunt] Q: Didn't you earlier in my questioning say that, because of the phone call or other things, that there was an intentional delay on my part

[By NAKASHIMA] A: Well, it was not – After receiving your phone call, we did things that were not usual, because of the perceived threat that you would take us to the Hawaii Labor Relations Board. So in a way, they were reacting. Id., pp. 80-81.

20. Following HUSTED's direction to "hold off," NAKASHIMA transferred HUNT's grievance file to HSTA legal counsel Vernon Yu within a week.
21. No information was given to HUNT about the status of his arbitration request while NAKASHIMA waited to receive "other instructions."
22. NAKASHIMA received further instructions from HSTA's Deputy to verify a statement allegedly made at the Step 2 grievance meeting, and also to obtain evaluations of the other candidates considered for the teaching position from the DOE. During September or October, 2000 while waiting for the DOE to submit the evaluation documents requested by NAKASHIMA, HSTA's legal counsel returned HUNT's case file.
23. On November 13, 2000, the HSTA filed a Notice of Impasse with the Board regarding unsuccessful negotiations toward reaching a new bargaining agreement with the State Board of Education.
24. NAKASHIMA was still waiting for the evaluation documents from the DOE when he received the instant complaint by HUNT filed on December 18, 2000. NAKASHIMA received the documents he requested of the DOE the week before the Board's hearing on this complaint. He admitted the information was not necessary for purposes of recommending arbitration of HUNT's grievance to the HSTA Board of Directors in an effort to settle the instant complaint.
25. Upon contacting the Deputy about the instant complaint, NAKASHIMA was told to leave it up to legal counsel to work on the case. At this point, NAKASHIMA took no further action on HUNT's request for arbitration.
26. On January 29, 2001, HSTA President Karen Ginoza and newly appointed Executive Director HUSTED issued a letter to all teachers in Unit 05 about a "bargaining crisis" and the unavailability of UniServ Directors to assist with grievances. The letter stated as follows:

Because of this expanded time to concentrate on the crisis, Uniserv Directors will not be available to help you with your grievances and problems as they have in the past. But your school level leaders are there to help. During this crisis period, we are asking you to contact your grievance representative or APC (Association Policy Committee) members to help you work on your problem or grievance rather than calling your UniServ Director. You will find the names of your grievance representative and APC members on the HSTA bulletin board in your school.

27. The impasse culminated in a strike by the HSTA on April 5, 2001. The strike ended on April 24, 2001.
28. The "bargaining crisis" and teachers' strike caused NAKASHIMA to be unavailable to assist HUNT for the period beginning January to April, 2001.
29. As of the date of hearing on May 29, 2001, the HSTA Executive Director intended to recommend to the Board of Directors, that "we move this case to arbitration." However, HUNT's request to arbitrate his grievance "has not ever been discussed by the board," nor was the matter set on the Board of Directors' agenda for decision-making.
30. As of May 29, 2001, the delay by HSTA in deciding whether to arbitrate HUNT's grievance totaled nine months.
31. Arbitration proceedings commenced on HUNT's grievance on or about October 25, 2001.

DISCUSSION

HUNT complains that after requesting the Union to arbitrate his grievance in September and November of 2000, he "heard NOTHING, for or against my request, to this date 12-14-00" of approximately nine months.² He filed the instant complaint four days later on December 18, 2000. HUNT contends that the Union breached its duty of fair representation by delaying its decision to proceed to arbitration as provided under Article V of the Contract and failing to keep him informed as to the processing of the grievance.

²HUNT's complaint also alleged prohibited practices by NAKASHIMA for not being adequately prepared in his questioning of BRATT at the Steps 1 and 2 grievance meetings. The Board limited the evidentiary hearing to the issue of the HSTA's delay in proceeding to arbitrate HUNT's transfer grievance and NAKASHIMA's conduct contributing to the delay.

Jurisdiction

NAKASHIMA alleges that “[i]t’s the intent of HSTA to recommend to the board of directors that we move this case to arbitration.” Id., p. 83. “Since the only effective available remedy in this case is to compel the Union to arbitrate. . . and since HSTA has already decided to take Mr. Hunt’s case to arbitration (and affirmed this on the record), this matter is moot.” Respondent NAKASHIMA’s Post Hearing Brief, p. 3. NAKASHIMA argues that the Board should dismiss the instant complaint for lack of jurisdiction. We disagree.

Under the doctrine of mootness, a tribunal will not retain jurisdiction over a case when “events . . . have so affected the relations between the parties that the two conditions for justiciability relevant on appeal – adverse interest and effective remedy – have been compromised.” Re: App’n of J.T. Thomas, 73 Haw. 223, 226, 832 P.2d 253 (1992). The Court further stated:

There is an exception to this precept, however, that occurs in cases involving a legal issue which is capable of repetition, yet evading review. The phrase, “capable of repetition, yet evading review,” means that “a court will not dismiss a case on the grounds of mootness where a challenged governmental action would evade full review because the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit. (Citations omitted.)

Id.

The Board finds that the instant case falls within this exception to the mootness doctrine. The record is clear that only the HSTA Board of Directors has the authority to approve the arbitration of a grievance. At the hearing in this matter, NAKASHIMA testified that HSTA would “recommend” arbitration to the HSTA Board of Directors but also admitted that to his knowledge, HUNT’s request to arbitrate “has not ever been discussed by the board of directors.” Tr. p. 61. After the close of the hearing, HSTA’s counsel submitted an affidavit to the Board stating that the parties had selected an arbitrator and the matter would be set for hearing. However, if the Union’s recent decision to arbitrate HUNT’s grievance during the pendency of these prohibited practice proceeding mooted the issues before the Board, the Union’s alleged unresponsiveness and delay in deciding whether to arbitrate would never be reviewed. Thus, the Board finds that the issues presented in this case are capable of repetition yet evading review and the Board concludes that the complaint is not moot.

Duty of Fair Representation

HUNT contends that the HSTA breached the duty of fair representation³ by failing to respond to his requests to arbitrate and delaying a decision of whether or not to proceed to arbitration by the HSTA Board of Directors for approximately eight to nine months. The burden of proof is on HUNT to show by a preponderance of evidence that his exclusive representative's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed. 842, 857, 64 LRRM 2369, 2376 (1967). See also, Sheldon S. Varney, 5 HLRB 508 (1995).

"A union's course of conduct may be so unreasonable and arbitrary toward an employee as to constitute a violation of its duty of fair representation, even without any hostile motive of discrimination and when conducted in complete good faith. Arbitrary conduct that might breach a union's duty of fair representation is not limited to intentional conduct by union officials. It may also include acts of omission which, while not calculated to harm union members, be so egregious, so far short of minimum standards of fairness to the employee, and unrelated to legitimate union interest as to constitute arbitrary conduct." 48 Am.Jur.2d 853 § 1529; see also, Price v. Southern Pacific Transp. Co., 586 F.2d 750 (9th Cir. 1978).

In determining arbitrariness, the Ninth Circuit Court of Appeals has required a finding that the act in question not involve the exercise of judgment, and that the union had no rational reason for its conduct. Moore v. Bechtel Power Corp., 840 F.2d 634, 636, 127 LRRM 3023 (9th Cir. 1988) (Moore). In Moore, the Court of Appeals stated:

Moreover, mere negligence is not arbitrariness. The union must have acted in "reckless disregard" of the employee's rights. Citations omitted. More particularly, we have said: In all cases in which we found a breach of the duty of fair representation based on a union's arbitrary conduct, it is clear that the union failed to perform a procedural or ministerial act, that the act in question did not require the exercise of judgment and that there was no rational and proper basis for the union's conduct.

³The 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." By alleging a breach of the duty of fair representation, HUNT's prohibited practice complaint claims a wilful violation of HRS § 89-13(b)(4).

Finally, a union's actions are "arbitrary" when "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." Air Line Pilots v. O'Neill, 499 U.S. 65, 111 S.Ct. 1127, 113 L.Ed.2d 51, 136 LRRM 272 (1991). See also, Decision No. 420, Janet Weiss, 6 HLRB __ (2001), where the Board applied a totality of the circumstances analysis for breach of duty of fair representation claims against the HSTA.

Respondent contends HUNT failed to allege and prove that HSTA treated his grievance in a discriminatory manner, and there is nothing in the record to indicate that the Union acted with deliberate bad faith, nor is there any evidence of ill will or malice of any kind on the record. NAKASHIMA admits that the Union "may have exercised poor judgment in not acting sooner," but contends that nonetheless "this case does not rise to the level of arbitrariness required to find a failure of the duty of fair representation." Respondent Mark Nakashima's Post Hearing Brief, p. 8. The HSTA defends the delay and unresponsiveness experienced by HUNT as follows:

Also, the delay in determining whether to arbitrate Mr. Hunt's case was not, in light of the factual and legal landscape at the time of the union's action, so far outside a "wide range of reasonableness" as to be irrational. As discussed, the Union had valid reasons for the delay which occurred in Mr. Hunt's case, including: (1) the referral to legal counsel caused by Mr. Hunt's own threatening telephone call, (2) the requirements of further investigation of Mr. Hunt's grievance, which was not completed until a week before the hearing (Tr. p. 90), and (3) the extraordinary situation of a strike build-up and resulting strike in the midst of Mr. Hunt's grievance process. These are significant intervening factors which demonstrate that, while the union may have exercised poor judgement in not acting sooner, this case does not rise to the level of arbitrariness required to find a failure of the duty of fair representation.

Respondent Mark Nakashima's Post Hearing Brief, dated July 23, 2001, p. 8.

The Moore, supra, standard of whether the Union acted in "reckless disregard of the employees rights" imposes an affirmative duty that is in fact enforceable and meaningful. "Reckless" is defined to include "inattentive, indifferent to consequences." Black's Law Dictionary, p. 1435 (4th Ed. 1968). As used in the context of Moore, the standard at least requires that a union's conduct not be a product of indifference to the grievant or his rights and interests. Thus in cases where it is demonstrated that a union's malfeasance or nonfeasance was a product of its indifference to the grievant or his or her rights, the Board will find a violation of the union's duty of fair representation. Cf., Bernadine L. Brown, 5 HLRB 16 (1991), where the Board held that the union breached its

duty of fair representation because of its "all but absolute unresponsiveness to Complainant's requests for information regarding her grievance, regardless of the validity of claims raised."

In the instant proceeding, the Board majority finds the Union's failure to submit an arbitration recommendation to its Board of Directors was not a consequence of indifference to HUNT's rights. The Union attributes the delay in part, to obtain further records from the DOE and refer the matter to legal counsel for review after receiving HUNT's telephone call. The Board majority finds this delay was a product of an overabundance of caution in attempting to ensure that the Union did not violate the grievant's rights in its review of HUNT's grievance. In addition, the unique circumstance of a strike during the pendency of HUNT's arbitration request also contributed to the delay and does not reflect an indifference to HUNT's rights. In the first instance, the Union preserved HUNT's right to appeal by routinely filing its Demand for Arbitration of his grievance. The HSTA further represented that HUNT's grievance will be arbitrated notwithstanding NAKASHIMA's initial recommendation against arbitration.

The Board majority does not find that the HSTA acted unreasonably or irrationally in delaying its decision to arbitrate HUNT's grievance and we do not find that the Union acted out of indifference to HUNT's rights in this regard.

However, the same cannot be said of NAKASHIMA's eight-month failure to apprise him of the status of his grievance. HUNT testified that until the prehearing conference on the instant complaint, he was not apprised of the Union's submission of the Demand for Arbitration, was never advised of the need to submit the arbitration recommendation to the Union's Board of Directors, was never advised of the probable recommendation of the Executive Director to the Union's Board, and, despite repeated requests, never advised of the status of his grievance. NAKASHIMA testified that he routinely sends a copy of the Demand for Arbitration to each grievant and assumed that he had done so in this instance. He further claimed to have been in regular contact with HUNT subsequent to the referral of his file to counsel. He provided, however, no documentary evidence, specific instances, or corroborative testimony to substantiate his testimony. In the absence of any such evidence, specific instances or corroborative testimony, the Board finds HUNT's testimony to be more credible and finds that the HSTA failed to apprise HUNT of the status of his grievance without justification.

The Board finds NAKASHIMA's failure to apprise HUNT of the status of his grievance violated the Union's duty of fair representation. Absent some material justification, the failure of the Union to routinely apprise a grievant of the status of a grievance upon his requests for information violates the duty of fair representation. Bernadine L. Brown, supra. Because the HSTA elected to contest rather than justify its silence, the record is bare of any reason for its failure. Under this circumstance, the Board concludes that the Union's conduct was unreasonable and made with reckless disregard for the rights of the grievant and accordingly arbitrary.

With respect to wilfulness, the Board has ruled that “wilfulness can presumed where a violation occurs as a natural consequence of a party’s actions.” United Public Workers, AFSCME, Local 646, AFL-CIO, 3 HLRB 507, 514 (1984). In the instant case, we conclude that the Union wrongfully failed to inform the grievant as to the status of his grievance despite repeated requests. NAKASHIMA had numerous opportunities to inform and advise HUNT on the status of his grievance but refused to provide him with information. The Board concludes on this record that NAKASHIMA’s violation of HUNT’s rights was a natural consequence of his actions and wilfulness is presumed.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint as provided by HRS §§ 89-5 and 89-13.
2. The Union commits a prohibited practice and violates HRS § 89-13(b)(4) when it breaches the duty of fair representation to its member as provided in HRS § 89-8(a).
3. HUNT failed to prove by a preponderance of evidence that the Union breached its duty of fair representation by delaying the pursuit of his grievance to arbitration.
4. NAKASHIMA, as an agent of the Union, breached the Union’s duty of fair representation by failing to inform HUNT as to the status of his grievance after repeated requests.

ORDER

In accordance with the above, the Board sustains HUNT’s prohibited practice complaint, in part, and orders that:

The HSTA shall cease and desist from committing prohibited practices by failing to provide information to HUNT as to the processing of his grievance which is in arbitration.⁴

⁴In his November 1, 2001 Memo of Opposition filed with the Board, HUNT requested that he be transferred to an available math position at Kohala High School because the position he sought is no longer available. The Board denies HUNT’s request because the HSTA has no authority to implement such a transfer and the Employer has been dismissed from this complaint.

The HSTA shall within 30 days of the receipt of this decision, post copies of this decision on its website and in conspicuous places on the bulletin boards located in every public school statewide where employees of bargaining unit 05 assemble and leave such copies posted for a period of 60 days from the initial date of posting.

The HSTA shall notify the Board within 30 days of the receipt of this decision of the steps taken to comply herewith.

DATED: Honolulu, Hawaii, December 14, 2001

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member

OPINION, CONCURRING IN PART, AND DISSENTING, IN PART

While I concur with the Board majority's decision and analysis in concluding that HSTA breached its duty of fair representation to HUNT for failing to keep him informed about the status of his grievance, I find the Union's eight-month delay in deciding whether or not to proceed to arbitration more egregious than an "exercise in poor judgment."

No doubt, the teachers' strike and preparation legitimately consumed the attention of the HSTA Board of Directors throughout the first half of 2001. But I find inexcusable, NAKASHIMA and HUSTED's failure to follow the "normal course of action" provided by the HSTA in-house guidelines and failure to obtain either final approval or disapproval on HUNT's demand for arbitration during the fall of 2000.

According to the record before us, the reason NAKASHIMA and HSTA did not follow the "usual course of action" was because of HUNT's "threatening phone call." HUNT's reference to the "same kind of hearing as Janet," essentially meant bringing this prohibited practice complaint.⁵ The Union is well aware of its duty of fair representation embodied in HRS § 89-8(a). Accordingly, HUNT's right to bring a prohibited practice complaint against his Union is embodied in Chapter 89, HRS. Rather than acknowledge such

⁵Not only does the instant complaint involve the same parties and principal, but also, HUNT's grievance charges the employer with a violation of the same Article VII – Assignments and Transfers, considered in Decision No. 420, Janet Weiss, 6 HLRB __ (2001).

a right, however, the Union chose to refer the case for review by counsel instead of letting the HSTA Board of Directors either approve or disapprove the Demand for Arbitration.

Typically, prohibited practice complaints brought before this Board allege a breach of duty when a Union decides not to take a grievance to arbitration. In this case, because NAKASHIMA perceived HUNT's phone call as a threat, the HSTA Board of Directors was never given the opportunity to approve or disapprove the Demand for Arbitration, and NAKASHIMA remained unresponsive to HUNT's repeated requests to arbitrate his grievance.

By the end of August 2000, NAKASHIMA submitted a summary of HUNT's grievance and his recommendation not to arbitrate to HUSTED within the required 30-day period. All HUNT knew, when he made his phone call on August 25, 2000, was that NAKASHIMA intended not to recommend arbitration. HUNT obviously wanted his Union to arbitrate his grievance. This triggered his phone call to NAKASHIMA.

There was no reason why NAKASHIMA and HUSTED should perceive HUNT's phone call as threatening especially because the final decision on whether to arbitrate a grievance rests solely with the HSTA Board of Directors. Even when viewed from the perspective of the Union and its leadership, NAKASHIMA and HUSTED's perception of a threat by HUNT resulting in the delay in bringing this matter for a final decision before the HSTA Board of Directors was unreasonable. Thus, even if the Demand for Arbitration was filed with the Employer, HUNT would have a right to bring a prohibited practice complaint against his Union under HRS § 89-13(b) based on the HSTA's denial to arbitrate his grievance.

There is no dispute that the automatic filing of HUNT's Demand for Arbitration was subject to final approval by the Board of Directors. If NAKASHIMA had followed the "normal course of action" provided by the HSTA in-house guidelines, the HSTA Board of Directors could have acted on HUNT's request to arbitrate conceivably at the September 4th meeting. Tr. p. 62. This could have been accomplished while simultaneously checking with legal counsel. In any event, by the time HUNT filed this complaint on December 18, 2000, no final approval by the HSTA Board of Directors had been made, and no information about his request to arbitrate was forthcoming.


KATHLEEN RACUYA-MARKRICH, Member

RICHARD HUNT v. CATHERINE BRATT, et al.
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