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Respondents.

CASE NOS.: CE-13-385
CU-13-140

DECISION NO. 432

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On February 4, 1998, KEITH J. KOHL (KOHL), pro se,¹ filed a prohibited practice complaint against the above-named Respondents² with the Hawaii Labor Relations Board (Board).

¹KOHL filed the complaints pro se. On May 26, 2000, the Board issued Order No. 1872, to continue hearing Respondents' motions to dismiss in order to allow Eric T. Krening, Esq., sufficient time to review the case file and represent KOHL. Subsequent to the Board's disposition of the motions to dismiss, KOHL has proceeded pro se.

²JAMES TAKUSHI (TAKUSHI), Director, Department of Human Resources Development, State of Hawaii is no longer a party to this dispute. In Case No. CE-13-385, KOHL alleged that Respondent TAKUSHI failed and/or refused to process seven grievances in wilful violation of HRS §§ 89-13(a)(1), (3), (4), (5), (6), (7), and (8). On September 29, 1999, TAKUSHI filed Respondent James Takushi's Motion to Dismiss Prohibited Practice Complaint and/or for Summary Judgment. TAKUSHI alleged that dismissal is required because under Board Order No. 1778, the instant complaint fails to state a claim upon which relief can be granted. On September 1, 2000, in Order No. 1916, the Board found the parties stipulated to dismiss Respondent TAKUSHI from the complaint with regard to the four 1995 grievances. In addition, the Board dismissed the complaint with respect to TAKUSHI as to the three 1997 grievances because KOHL had clearly and unmistakably waived his rights at Step 3 under the grievance process.

In Case No. CU-13-140, KOHL alleged that Respondent RUSSELL OKATA (OKATA), Executive Director, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA or Union) breached its duty to fairly represent KOHL in seven grievances – four filed in 1995 and three filed in 1997 – in wilful violation of Hawaii Revised Statutes (HRS) §§ 89-13(b)(1), (2), (3), (4), and (5).³

On April 3, 1998, the HGEA moved to dismiss the complaint as time-barred. On September 21, 1999, in Order No. 1778, the Board granted in part, and denied in part, HGEA's motion to dismiss. Specifically, the Board dismissed allegations against the HGEA regarding three grievances filed in September and October of 1997, when KOHL knew or should have known the HGEA would not represent him. Since KOHL's complaint was filed more than 90 days after October 1997, the Board dismissed KOHL's allegations regarding the 1997 grievances.

The Board, however, denied the dismissal of allegations regarding four grievances filed in 1995. The HGEA agreed to hold in abeyance these grievances due to KOHL's medical condition and to preserve their timeliness until KOHL notified the HGEA that he was ready to proceed. The record contained no subsequent information regarding the status of the grievances to indicate whether any action by HGEA was taken or any notice was given to the HGEA from KOHL.

On September 4, 2001, prior to the scheduled hearing KOHL filed an application with the Board to subpoena Wayne Tanaka, KOHL, Colleen Miyasato, Keith Kaneshiro, Gayle Lindo, Robyn Yanaga, Roy Yamamoto, Mike Fujioka, OKATA, Randy Perreira (Perreira), TAKUSHI, Waylen Toma (Toma), Arvid Hara, and Clayton Frank.

³ HRS § 89-13 provides in part:

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

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
- (2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;
- (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.

On September 10, 2001, the HGEA filed Respondent Russell Okata's Motion to Revoke Subpoenas because the application for the issuance of subpoenas revealed no basis or grounds to subpoena OKATA, Perreira and Toma.

On September 13, 2001, the Board held a hearing on the motion to revoke subpoenas. At the hearing, KOHL refused to respond to the HGEA's request for relevancy, even after the Board informed KOHL that his failure to adequately respond may result in the revocation of the subpoenas. Because KOHL refused to "describe with sufficient particularity the evidence sought" and respond to the Board's questions regarding the relevance of the 14 subpoenaed witnesses, the Board revoked all of the subpoenas issued.⁴

After several continuances,⁵ this matter was scheduled for hearing on September 18, 2001. The parties were afforded full opportunity to present evidence and make arguments.

After a thorough review of the record and considering the evidence and the arguments presented by the parties, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. KOHL, at all times relevant, was a Recreational Specialist III at the Waiawa Correctional Facility employed by the Department of Public Safety, State of Hawaii; a public employee within the meaning of HRS § 89-2; and a member of Bargaining Unit (BU)13.

⁴Because HGEA's motion to revoke was limited to the subpoenas of OKATA, Perreira and Toma, the Board called a post-hearing status conference on November 7, 2001, for the purpose of allowing KOHL an opportunity to re-subpoena the 11 witnesses not included in HGEA's motion to revoke subpoenas and to re-open the record for hearing. The Board set a deadline of November 21, 2001 to allow KOHL time to inform the Board whether he intended to reopen the record with additional witnesses. On November 20, 2001, Kohl submitted a statement and memorandum objecting to the matters discussed at the November 7, 2001 status conference, except to make clear that "the case was already heard on Sept. 18th, 2001 and final post hearing briefs had been turned in Oct. 25, 2001 by all parties. Therefore, without waiver of any of his rights, Kohl awaits the Board decision in this case."

⁵By Order No. 2028, issued on August 21, 2001, the Board granted a final 28-day continuance of the hearing in order to give KOHL further time to retain counsel. On February 26, 2001, by Order No. 1987, the Board granted KOHL's first request to continue the hearing scheduled on February 27, 2001, due to the withdrawal of his attorney, Eric T. Krening, Esq., and to permit him time to seek new legal counsel.

2. The HGEA is an employee organization and the exclusive bargaining representative within the meaning of HRS § 89-2, for Recreational Specialists included in BU 13.
3. Respondent OKATA, at all times relevant, was the Executive Director, HGEA. Perreira, at all times relevant, was HGEA's Field Services Officer. Toma, at all times relevant, was KOHL's HGEA Union Agent.
4. In 1995, KOHL on his own and without the assistance of his Union filed four grievances with his employer, John Smythe (Smythe), Warden, Department of Public Safety at Step 1. Grievance 1: complains about a written threat issued by Smythe on July 5, 1995. The grievance alleges violations of Articles 1, 3, 4, 8, 9, 17, and 30 of the BU 13 contract, and is signed by KOHL and dated July 31, 1995. Grievance 2: complains that security personnel failed to render assistance during an inmate fight on the basketball court on July 12, 1995. The grievance alleges violations of Articles 1, 3 and 19 of the BU 13 contract and was signed by KOHL and dated August 3, 1995. Grievance 3: complains that the employer failed to provide safe working conditions resulting in an injury to KOHL. The grievance alleges violations of Articles 1, 3 and 19 of the BU 13 contract and was signed by KOHL and dated August 3, 1995. Grievance 4: complains that KOHL was required to perform security duties and functions inconsistent with his job description, and was not provided security personnel to ensure his safety while performing his job. The grievance alleges violations of Articles 1, 3, 4 and 19 of the BU 13 contract and was signed by KOHL and dated August 10, 1995.
5. On August 28, 1995, in a written memorandum to HGEA Union agent Toma, KOHL forwarded copies of the four grievances. Because the time period for the employer to respond at Step 1 had passed, KOHL asked Toma to "prepare Step II drafts of these four grievances which I can review before they are submitted to the Department of Public Safety. The Union should sign these on my behalf as my representative, or inform me of any reason the HGEA is not representing me with respect to any of the four grievances. The Employer may interpret my filing these grievances at Step I without the Union signatures as an indication that the HGEA Union does not support me in these matters."

6. On September 18, 1995, in a written memorandum to HGEA Field Services Officer Perreira, KOHL forwarded the four grievances and requested help.⁶ Union Exhibit (Ex.) 6.
7. On October 3, 1995, Perreira responded to KOHL's request for help by stating:

...we are committed to represent your interests. Due to our intervention, the department has rescinded any changes to your work schedule, a major issue you raised with us. The main antagonist in these grievances you have filed, John Smythe, has retired and can no longer be accused of harassing you. We are presently investigating the issues you raised about your safety, and the claim that you are required to perform your duties without security staff present. We have been informed by the department that they will contact us shortly to meet and discuss these matters (they are presently wrapping up the bumping and placement processes for Deputy Sheriffs affected by the RIF).

Perreira also sought additional information from KOHL in an effort to further assist KOHL in pursuing the grievances that was reasonable under the circumstances.⁷ Union Ex. 1.

⁶Kohl wrote in part:

I am currently on Leave Without Pay due to the stress caused me by the threats and intimidation from management at Waiawa Correctional Facility and especially the unsafe working conditions. I have requested the Union's help in addressing these problems at my workplace.

I am requesting your immediate attention and action by the HGEA with respect to filing the four Grievances at Step II with the Public Safety Department. I also request supportive action on my behalf by my Union with respect to all related issues of the problems I have encountered at (sic) while working at Waiawa Correctional Facility.

Union Ex. 6.

⁷Perreira further wrote to KOHL as follows:

At this time, I am unsure about exactly what you want us to do on your behalf. For one, I must expect that you are under a physician's care because of your stress condition. Assuming this to

8. By letter dated November 16, 1995, Toma reported to KOHL that he had spoken with his employer:

... about the possibilities of your return to work. However, because we do not have any further information from you, I was not able to talk about specifics with him. I did raise your concern about security support and we felt that the numbers of inmates that you had to supervise at one time were ridiculous. .

We are awaiting any information which you may have about your ability to return to work and under what conditions you would be able to do this.

Union Ex. 2.

9. By letter dated November 28, 1995, KOHL responded to TOMA with a letter from Dr. Shepard Ginandes enclosed. Union Ex. 4. Dr. Ginandes' handwritten medical note states:

Keith is severely stressed by his job conditions. He will not be returning in the near future, and he must not be involved in stress-ful communications regarding his job conditions at this time. I will report when he becomes able to deal with these matters.

10. By letter dated December 1, 1995, Toma informed KOHL that the grievances would be held in abeyance until such time that his physician clears him "to

be the case, we must have an idea of what your physician feels is necessary in terms of working condition changes to allow you to return to work. In addition, the absence of Mr. Smythe leads us to wonder what other party(ies) are responsible for creating a hostile work environment for you. As a result, we must request that you inform us of any specific action that you wish for us to take on your behalf. Given this information, we will be able to pursue whatever course is necessary or appropriate on your grievances. In addition, we must be informed if you are able to return to work, or if your physician has restricted you from returning to your position. In the meantime, we will continue to investigate your claims, and await the opportunity to meet with PSD to resolve these matters.

Union Ex. 1.

deal with these matters.” Toma asked KOHL to notify his Union when his medical condition improves and he is able to return to work. Based on the report of November 28, 1995 by Dr. Ginandes, we find the HGEA’s decision to hold his grievances in abeyance reasonable.

11. On February 4, 1998, KOHL filed this prohibited practice complaint against his union and employer, alleging, inter alia, that the HGEA breached its duty of fair representation to KOHL by holding in abeyance the four grievances filed in 1995 “without any representation to date of this filing.”
12. On March 31, 1998, Dr. Ginandes reported:

To Whom It May Concern:

Keith Kohl has been my patient since 1995 for a severe stress disorder. He is currently totally disabled by this condition.

13. On October 26, 2000, Dr. Ginandes reported as follows:

Keith Kohl remains in my care. His stress has been so severe that I have counseled him that he should not represent himself in any hearings on legal proceedings. He needs time to find a suitable attorney to represent him. I am monitoring his condition closely.

DISCUSSION

The issue before the Board is whether the HGEA’s action to hold in abeyance the processing of KOHL’s four 1995 grievances based on his medical condition as reported by his treating physician constitutes a breach of the duty of fair representation in wilful violation of HRS §§ 89-13(b)(4) and (5).

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 regard to employee organization membership.”

The burden of proof is on KOHL to show by a preponderance of evidence that HGEA’s decision to hold his four 1994 grievances in abeyance based on the report from his treating physician was arbitrary, discriminatory or in bad faith. Sheldon S. Varney, 5 HLRB

The burden of proof is on KOHL to show by a preponderance of evidence that HGEA's decision to hold his four 1994 grievances in abeyance based on the report from his treating physician was arbitrary, discriminatory or in bad faith. Sheldon S. Varney, 5 HLRB 508 (1995). See also, Vaca v. Sipes, 386 U.S. 171, 190-91, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) "[A] union'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).

The Supreme Court in Airline Pilots Ass'n., Intern. v. O'Neill, 499 U.S. 65, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991) (O'Neill) 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 67. 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 78. In carrying out its duty of fair representation, an unwise or even an unconsidered decision by the union is not necessarily an irrational decision.

KOHL contends the HGEA's failure to proceed on his grievances, in and of itself, was intentional and demonstrated bad faith and that relying on the concerns raised by his treating physician was a "poor excuse" because his Union knew or should have known what to do in moving his grievances forward." We disagree.

The medical note by KOHL's treating physician is clear and unequivocal. He is "severely stressed by his job conditions. He will not be returning in the near future. And he must not be involved in stressful communications regarding his job conditions at this time. I will report when he becomes able to deal with these matters." See Union Ex. 3.

The HGEA had assured KOHL that it was committed to represent his interests. Before receiving the medical report from KOHL's treating physician the HGEA had already intervened by contacting the employer to rescind any proposed changes to KOHL's work schedule. Perreira reported to KOHL that: "The main antagonist in these grievances you have filed, John Smythe, has retired and can no longer be accused of harassing you. We are presently investigating the issues you raised about your safety, and the claim that you are required to perform your duties without security staff present."

The HGEA contends that KOHL has 1) failed to state a claim and KOHL has failed to meet his burden of proving any set of facts to support any violation of HRS §§ 89-13(b)(1) to (5); 2) failed to establish that the HGEA's action or inaction was wilful; and 3) failed to show that the HGEA's conduct was arbitrary, discriminatory or in bad faith. We agree.

Under the circumstances, we find the HGEA's conduct in representing KOHL both before and after it was notified that KOHL was "severely stressed by his job conditions,

burden of demonstrating that the HGEA breached its duty of representation to KOHL to support a prohibited practice under HRS §§ 89-8(a) and 89-13(b)(4).

Violations of HRS §§ 89-13(b)(1), (2), (3) and (5)

In his complaint, KOHL alleges that the HGEA violated, *inter alia*, HRS §§ 89-13(b)(1), (2), (3), and (5) by failing to meet contract requirements and the duty of fair representation in handling his grievances. KOHL alleges that the Union ignored his grievances and denied his contract rights, including removal of the applicable grievance procedure and a forum to file his grievances regarding other contract rights.

HRS § 89-13(b)(1), *supra*, provides that it is a prohibited practice for an employee organization or its designated agent wilfully to interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter. Here, KOHL failed to specify what right under Chapter 89 was interfered with by the Union and further failed to provide any evidence to support his allegations.

HRS § 89-13(b)(2), *supra*, provides that it is a prohibited practice for an employee organization or its designated agent wilfully to refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in HRS § 89-9. HRS § 89-9 refers to the scope of collective bargaining negotiations and defines the scope of negotiable subjects. As KOHL is not a public employer, he lacks standing to charge the HGEA with a breach of the duty to bargain in good faith. Moreover, KOHL failed to present any evidence or argument to support a refusal to bargain charge.

HRS § 89-13(b)(3), *supra*, provides that it is a prohibited practice for an employee organization to refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in HRS § 89-11. HRS § 89-11 refers to mediation, fact-finding and arbitration procedures in the resolution of impasses in collective bargaining negotiations. KOHL's claims against the Union arise from its handling of his contract grievances rather than the resolution of disputes through the impasse procedure. Accordingly, KOHL failed to state a claim that the Union violated the mediation, fact-finding and arbitration procedures.

HRS § 89-13(b)(5), *supra*, provides that it is a prohibited practice for an employee organization to violate the terms of a collective bargaining agreement. KOHL failed to present any evidence or arguments on whether the HGEA violated the terms of the applicable collective bargaining agreement.

Accordingly, we conclude that KOHL has failed to present any evidence to support his claims that the HGEA committed any prohibited practice in wilful violation of HRS §§ 89-13(b)(1), (2), (3) and (5).

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.
2. 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.
3. The Complainant has the burden to prove by a preponderance of evidence that the HGEA breached its duty of fair representation to KOHL in the handling of his four 1995 grievances.
4. We conclude that the actions taken by the HGEA relating to KOHL's four grievances filed in 1995, based on the medical report of Complainant's treating physician for stress related to his job conditions were not so far outside the wide range of reasonableness as to be irrational.
5. Based on the record, the Board concludes that KOHL failed to prove by a preponderance of evidence that the HGEA's conduct and actions in handling his four 1995 grievances, and then holding the matter in abeyance pending receipt of a medical report his treating physician, was arbitrary, discriminatory or in bad faith.
6. Based on the record, the Board concludes that KOHL failed to prove by a preponderance of evidence that the HGEA committed prohibited practices by violating HRS §§ 89-13(b)(1), (2), (3), and (5).

ORDER

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

DATED: Honolulu, Hawaii, March 8, 2002

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member

KEITH J. KOHL v. JAMES TAKUSHI, et al.
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