

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-03-188
)	
LEWIS W. POE,)	DECISION NO. 435
)	
Complainant,)	FINDINGS OF FACT, CONCLU-
)	SIONS OF LAW, AND ORDER
and)	
)	
HAWAII GOVERNMENT EMPLOYEES)	
ASSOCIATION, AFSCME, LOCAL 152,)	
AFL-CIO,)	
)	
Respondent.)	
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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On January 3, 2002, Complainant LEWIS W. POE (Complainant or POE), proceeding pro se, filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (Respondent, Union or HGEA).

POE alleges that the Union refused to provide certain written notices and bargaining proposals referred to in the Duration clause of the Bargaining Unit 03 (BU 03) collective bargaining agreement (Contract). According to POE, the Union's refusal to provide said information allegedly interfered with his ability to exercise his rights guaranteed under Hawaii Revised Statutes (HRS) Chapter 89 in wilful violation of HRS § 89-13(b)(1).¹ POE asserts a right to the information under HRS § 89-3.

On March 5, 2002, the Board held a hearing on the merits. At the end of Complainant's case-in-chief, HGEA, by and through its counsel, moved for a directed

¹HRS § 89-13(b) states:

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;

verdict,² which the Board took under advisement. The parties were given full and fair opportunity to present witnesses and exhibits, and submit closing memoranda.

On March 25, 2002, both parties timely filed closing memoranda, followed by the filing of the Union's Supplemental Post Hearing Brief and Complainant's Response to Respondent's Post Hearing Brief on April 5, 2002.

Having considered the entire record in these proceedings, the Board makes the following findings of fact, conclusions of law and order dismissing the instant complaint.

FINDINGS OF FACT

1. POE is 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 public employees including POE in BU 03.
3. The Board takes administrative notice of Case No. CU-03-186 in which POE filed a complaint against HGEA charging the Union had committed a prohibited practice by its initial failure to respond within a time deadline set by POE to his request to inspect and obtain a copy of the collective bargaining agreement.
4. On December 13, 2001, POE sent two letters to HGEA Deputy Executive Director Randy Perreira (Perreira). The first letter states, in part:
 1. Reference Article 55 of the 1997-1999 CBA. I request copies of
 - (a) the complete written notice which was given to the Public Employer (Employer) between July 1 and August 31 of 1998.
 - (b) the materials (specific written proposals) which were included in said written notice.

The second letter states, in part:

²The HGEA moved to dismiss the complaint arguing that POE failed to prove a prima facie case of an HRS § 89-3 violation because that statute defined the rights of the employee with respect to the employer and does not apply to acts by the Union.

1. Reference Article 56 of the 1999-2003 CBA. I request copies of

- (a) the complete written notice which was given to the Public Employer (Employer) on or prior to October 15, 2001; and
- (b) the materials (specific written proposals) which were exchanged no later than November 15, 2001.

5. Article 55 is the Duration clause in the 1997-1999 BU 03 Contract, which reads:

This Agreement shall become effective as of July 1, 1997 and shall remain in effect to and including June 30, 1999. It shall be renewed thereafter with respect to the subject matter covered, in accordance with statutes unless either party gives written notice to the other party of its desire to amend, modify or terminate the Agreement, and such written notice is given between July 1, and August 31, 1998. The notice shall include in writing the specific proposals of the notifying party. When any such notice is given, negotiations for a new Agreement shall commence on or about September 1, following the giving of the notice.

6. Article 56 is the Duration clause in the 1999 - 2003 Contract, which reads:

This Agreement shall become effective as of July 1, 1999, and shall remain in effect to and including June 30, 2003. It shall be renewed thereafter with respect to the subject matter covered, in accordance with statutes unless either party gives written notice to the other party of its desire to amend, modify or terminate the Agreement, and such written notice is given no later than October 15, 2001. After such written notice is given, the parties shall exchange their specific written proposals, if any, no later than November 15, 2001. Negotiations for a new Agreement shall commence on a mutually agreeable date following the exchange of written proposals, as applicable.

7. On December 17, 2001, Perreira denied POE's request for copies of the:

notice HGEA transmitted to the employers to bargain for a successor agreement for the 1999-2003 agreement as well as the notice for 2003-2005 . . . [and] copies of the actual proposals

submitted by the union to the employers in the last round of bargaining, as well as the proposals submitted this year.

8. The reason for denying POE's request was explained by Perreira as follows:

Please be advised that the HGEA is unable to accommodate your request. The information contained in the actual bargaining proposals is proprietary, limited only to those individuals with a material interest in the bargaining process (the unit negotiators and staff). Further, per the agreed upon Ground Rules that are in place with the employers, we are bound to maintain the confidentiality of the bargaining process, and not duplicate and/or disseminate the information contained in the proposals to anyone outside the process. I have included a copy of the Ground Rules for the 1999-2003 bargaining for your reference.

See, Exhibit G.

9. POE's purpose for requesting the notices and written bargaining proposals was to find a basis for pursuing a potential grievance.³ POE is not a member of the

Union: ³In testimony before the Board, POE provided insight into his complaint against the

Mr. Nakamura: Mr. Poe, there are some facts that might assist us in resolving this case, like why did you ask for the materials and what use did you intend to make of them?

Mr. Poe: Because I wanted to pursue a grievance, possible, potential grievance. I'm engaging in activities – (Transcript of Hearing on March 5, 2002 "Tr." at 34)

* * *

Mr. Poe: Well, I mean, I've – first of all, I alleged in my Complaint that I made at least one of the letters, which is Exhibit 6 – one of the letters came about because I just received Article 56 of the four-year contract, the second contract, and Article 56, that's the first time I've ever seen it. So when it says that they had to exchange information, I wanted to see that exchange of information. I wanted to see the dates because many members don't know what's going on, and I'm just trying to be informed as to did they send and what topics were they sending about. I don't see any – I don't see why I shouldn't – as a member who pays dues to the union, I don't see why I can't get that

information. (Tr. at 35)

Mr. Nakamura: You wanted to make certain that the union's conduct comported with the provisions of Article 56?

Mr. Poe: No. Plus I wanted to know what kind of information were they going to talk about, because as you know, the Board knows, that I have cases pending about – which is in the Complaint – I have cases pending relative to Article 45, which is a continuing problem through the contracts. That's one of them.

Ms. Racuya-Markrich: Are you planning to file a grievance that the union or the employer violated a provision of the contract?

Mr. Poe: I'm not planning on anything until I see some documents so that I know what I'm – so that I know what's going on. I can't plan on filing any grievance without information. In other words, I'm looking for information where there's a potential – I'm pursuing – according to the law, the way I see the law, I am pursuing and/or correcting, if possible, a grievance – I don't know that there's a grievance yet – just asking for information mainly through a grievance, but I have a right to pursue such information that may lead to a grievance. That's all I'm doing. I just want to – just like when I wanted to see the contract, I just want to see what the contract was saying because still today I don't have that contract. (Tr. at 36-37)

* * *

Mr. Poe: . . . But you asked me the question why I'm doing it. I can't really answer the question. I can only tell you if the information shows me that they didn't comport with what the contract says, or, also, I want to know what kind of topics were they exchanging because I wanted to know what was relevant to Article 45. That was one of them. (Tr. at 37)

* * *

Ms. Racuya-Markrich: Okay, but as part of your charge you're saying that the union's denial – you're alleging that the union's denial of the information that you request on Article 55 and 56 interfered with your right to file a grievance. (Tr. at 40)

Mr. Poe: No, I'm saying to pursue and to potentially file a grievance. See, that's all connected together.

HGEA negotiating team or staff, but felt entitled to the bargaining material as a dues paying Union member. POE's explanation for seeking the bargaining notices and proposals makes very little, if any, sense since a grievance as defined by the BU 03 Contract is "[a]ny complaint by an Employee or the Union concerning the application and interpretation of this Agreement. . . ."⁴

10. On January 3, 2002, POE filed the instant complaint charging that the Union wilfully violated HRS § 89-13(b)(1) when it denied POE access to the notices and bargaining proposals made pursuant to Articles 55 and 56 of the BU 03 Contracts.

11. HRS § 89-3 provides:

Rights of employees. Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except to the extent of making such payment of amounts equivalent to regular dues to an exclusive representative as provided in section 89-4.

Ms. Racuya-Markrich: Yes, but you are also saying that you don't know whether you're going to be filing a grievance or if there is a grievance there for you to file.

Mr. Poe: How does anybody know if they're going to file a grievance if they don't have the information on which to file anything? (Tr. at 40)

* * *

Mr. Poe: Yeah, my argument basically is I'm trying to get information that may lead to a grievance. I have that lawful right. That's an activity that I don't have to refrain from. The law, it says I can engage in lawful activity for certain purposes free from interference, and the second part of that law, 89-3, says I can refrain from those activities if I want, but I'm not choosing to refrain. (Tr. at 40-41.)

⁴The Board takes administrative notice of Article 11 – Grievance Procedure, Paragraph A, of the July 1, 1997 - June 30, 1999 BU 03 Contract.

12. POE's status as a dues paying member of BU 03 provides no entitlement to the notices and bargaining proposals made pursuant to Articles 55 and 56 of the BU 03 Contracts in the possession of his exclusive representative.
13. HRS § 89-2 defines exclusive representative as "the employee organization, which as a result of certification by the board, has the right to be the collective bargaining agent of all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership."

DISCUSSION

The instant complaint alleges that the Union wilfully violated HRS § 89-13(b)(1) when it denied POE access to the notices and bargaining proposals made by the Union pursuant to Articles 55 and 56 of the BU 03 Contracts. The burden of proof is POE's to show by a preponderance of evidence that the Union's denial of written notices sent to the public employer of its desire to modify or amend the Contract, and the specific bargaining proposals, interfered with POE's exercise of lawful protected activity under HRS § 89-3. See, HRS § 91-10(5) and Hawaii Administrative Rules (HAR) § 12-42-8(g)(16).

POE contends that being an informed BU 03 member is lawful, protected activity and thus he is entitled to know when the Union plans to enter into negotiations; if the dates set in the duration clause were met; and what specific proposals the Union wants to modify or amend. POE alleges his right to pursue and correct a grievance, which has been held to constitute lawful protected activity, inevitably includes a right to bargaining notices and bargaining proposals in the hands of his exclusive representative because it may lead to a potential grievance.

According to POE, the Union's denial of said information allegedly interferes with his right to engage in protected activities under HRS § 89-3 because the information he seeks from the Union may help him pursue a grievance. Thus, POE argues he is engaging in, not refraining from, protected activities.

The threshold issue is whether POE is engaging in a protected activity within the meaning of HRS § 89-3 by seeking bargaining information which he contends may lead to a potential grievance. As POE argues:

The law, it says I can engage in lawful activity for certain purposes free from interference, and the second part of that law, 89-3, says I can refrain from those activities if I want, but I'm not choosing to refrain. Tr. at 40-41.

Respondent HGEA counters that: 1) Articles 55 and 56 of the BU 03 Contracts do not contain any obligation for Respondent to provide the information Complainant requested in his letter of December 1, 2001, enforceable under HRS § 89-3; and 2) Complainant is operating under a mistaken belief as to his rights under HRS § 89-3 which only prohibits the public employer from interfering, restraining, or coercing any employee in the exercise of an employee's rights to engage in concerted activities.

The Board agrees with Respondent that the Contract provisions – Articles 55 and 56 – do not obligate the exclusive representative to release the notices of its desire to modify the Contract and specific bargaining proposals for purposes of negotiations, to a member of the bargaining unit upon request. As the exclusive representative, the HGEA, not POE, is the collective bargaining agent for BU 03, as defined under HRS § 89-2.

Under HRS § 89-3, employees have the right to “self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Nowhere in this section can we find an implied right to information exchanged between the exclusive representative and employer group for purposes of modifying or amending the Contract that may lead to a grievance against the employer.

Indeed, POE's explanation for seeking the bargaining notices and proposals makes very little, if any, sense since a grievance as defined by the BU 03 Contract is “[a]ny complaint by an Employee or the Union concerning the application and interpretation of this Agreement . . .” If the HGEA has reason to believe that the employer is failing to meet the requirements of the duration clause to trigger negotiations, then as the collective bargaining agent, the Union, on behalf of the entire bargaining unit is in a position to file a grievance or a prohibited practice complaint before this Board based on information in its possession and control.

POE does not claim that his reason for obtaining the written bargaining notices and proposals is meant to assist HGEA for purposes of negotiating the Contract. Indeed, POE is adamant that his purpose for obtaining the information is that it may allow him to pursue a potential grievance.

To support his contention, POE relies on United Public Workers, AFSCME, Local 646, AFL-CIO, 3 HPERB 507 (1984), where the Board held that HRS § 89-3 “protects the employee's right to pursue ‘lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restrain, or coercion.’” 3 HPERB at 517. However, the Board is not persuaded that POE's right to pursue and correct a grievance means he has a right to bargaining notices and proposals exchanged

between his exclusive representative and the employer simply because it may lead to a potential grievance.

Based on the fact that POE has not established a right to the bargaining notices and proposals under HRS § 89-3 or under the Contract, there is no basis to support his charge that the Union's denial of his request for the bargaining notices and proposals constitutes an interference of his rights guaranteed under HRS Chapter 89 in wilful violation of HRS § 89-13(b)(1).⁵

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint, under HRS §§ 89-5 and 89-14.
2. Complainant has the burden of proof to show by a preponderance of evidence that the Union's denial of written notices sent to the public employer of its desire to modify or amend the Contract, and the specific bargaining proposals, interfered in POE's exercise of lawful protected activity under HRS § 89-3.
3. Based on the record, Complainant has failed to prove that the right to pursue and correct a grievance implies a right to bargaining notices and proposals exchanged between his exclusive representative and the employer as protected activity simply because it may lead to a potential grievance.
4. Based on the record, Complainant has failed to prove that the Union's denial of notices and bargaining proposals exchanged between the employer and exclusive representative made in accordance with the Duration Clause of the collective bargaining agreement interferes with Complainant's right under HRS § 89-3 to engage in protected activities because the information may possibly lead to a potential grievance.

ORDER

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

⁵Insofar as the HGEA's motion for directed verdict was limited to the argument that HRS § 89-3 prohibited interference by the employer and not the Union, the Board denies the motion but nevertheless dismisses the complaint for the reasons stated.

LEWIS W. POE v. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME,
LOCAL 152, AFL-CIO
CASE NO. CU-03-188
DECISION NO. 435
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATED: Honolulu, Hawaii, June 18, 2002

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member


KATHLEEN RACUYA-MARKRICH, Member

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