

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

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| In the Matter of |) | CASE NO. CU-03-183 |
| |) | |
| LEWIS W. POE, |) | DECISION NO. 437 |
| |) | |
| 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 July 6, 2001, LEWIS W. POE (POE or Complainant) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board). POE alleges that the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) committed a prohibited practice when it denied POE access to three Memorandums of Agreements (MOAs) scheduled for a ratification vote. In so doing, POE contends the HGEA violated the provisions of Hawaii Revised Statutes (HRS) §§ 89-13(b)(1) and (4) and 89-10(a).

On July 31, 2001, the Board held a hearing on the alleged charges. The parties were afforded full opportunity to present evidence and argue their positions. After a thorough review of the record and arguments the Board makes the following findings of facts, conclusions of law, and order.

FINDINGS OF FACT

1. Complainant is a public employee as defined in HRS § 89-2, and is included in bargaining unit 03.
2. The HGEA is an employee organization as defined in HRS § 89-2, and is the exclusive representative of the employees in bargaining unit 03.
3. On Friday July 6, 2001 after several attempts to contact Union staff, Complainant spoke to HGEA Union agent Harlow Urabe (Urabe).

Complainant requested copies of the MOAs. After being denied by Urabe, Complainant requested to review copies of the MOAs at the HGEA office. The request was again denied by Urabe. While Urabe states that he suggested Complainant speak to his supervisor Guy Tajiri (Tajiri), Tajiri was not available until Monday and the complaint was filed on Friday, July 6, 2001.

4. Beginning on Monday, July 9, 2001 through Thursday, July 12, 2001, the HGEA held approximately 38 ratification meetings at various times and locations on the island of Oahu. The purpose of the meetings was to ratify proposed amendments to the collective bargaining contract for Unit 03 covered by three MOAs.
5. Complainant attended the meeting on July 9, 2001 at 1:00-2:30 p.m. at the State Capitol Auditorium. He received the materials and ballot distributed at the meeting. POE asked a question on what percentage it would take to carry the ratification but did not ask the person conducting the meeting any questions regarding the MOAs nor did he speak to any of the Union staff present at the meeting. POE did not cast his ballot.
6. The HGEA has a policy whereby information on any contract or changes to be ratified is given out only at the ratification meeting. Information is not given out before the meeting. At the above cited ratification meetings information given out included a summary of the changes covered by the three MOAs and a ballot for voting on the changes. In addition, a member of the negotiating team of the HGEA explained the changes and answered questions posed by the members in attendance. At the end of the meeting members in attendance can speak to the negotiating team members or Union staff available at the meeting. Also, several sets of the MOAs were available if members wanted to see them. No announcement was made that copies of the MOAs were available for inspection, and no one at the meeting attended by Complainant made any request to see the MOAs.
7. The reasons provided by the Union for not giving out information prior to a ratification meeting are to avoid confusion as well as to encourage attendance at the ratification meeting.
8. The summary distributed at ratification meetings read in its entirety as follows:

UNIT 03 TENTATIVE AGREEMENT
Summary of Memorandum of Agreements for
Vacation Leave, Sick Leave and Drug and Alcohol Testing

A. Article 35 - Vacation Leave

1. Vacation Leave Earning Rate for Employees
Hired on or After 7/2/01

| <u>Years of Service</u> | <u>Workdays Earned Per Month</u> |
|-------------------------|----------------------------------|
|-------------------------|----------------------------------|

| | |
|---------------------|-------|
| Less than 5 | 1 |
| 5 but less 10 | 1 1/2 |
| 10 but less than 20 | 1 3/4 |
| 20 or more | 2 |

2. Protective Features for Employees Employed
Prior to 7/2/01

- a. An Employee who is in another bargaining unit prior to 7/2/01 and who becomes a Unit 3 Employee on or after 7/2/01 without a break in service of one workday shall continue to earn vacation leave at the rate of 1 & 3/4 working days per month of service.
- b. An exempt Employee (entitled to earn vacation leave) or a limited term Employee employed prior to 7/2/01 who receives, without a break in service of one workday, an exempt appointment, a limited term appointment, an initial probationary appointment, or a permanent appointment on or after 7/2/01 shall continue to earn vacation leave at the rate of 1 & 3/4 working days per month of service.
- c. Although a provisional Employee is not allowed to use vacation leave, such a provisional Employee employed prior to 7/2/01 who receives without a break in service one workday a probationary, limited term or permanent appointment in the same position shall be allowed to earn vacation leave at the rate of 1 & 3/4 working days per month of service, including the period of the provisional

appointment, and be allowed to use such vacation leave earned.

- d. A non-regular Employee whose Temporary Appointment Outside the List (TAOL) begins prior to 7/2/01 and subsequently receives, without a break in service of one workday, an exempt appointment, a limited term appointment, an initial probationary appointment or a permanent appointment on or after 7/2/01 shall earn vacation leave at the rate of 1 & 3/4 working days per month of service and be allowed to use such vacation leave accrued. Any vacation leave accrued by the Employee during the TAOL shall be forfeited when the TAOL is ended.

3. An Employee serving an initial probationary period on or after July 2, 2001 shall earn and accumulate vacation leave but shall not be entitled to use the vacation leave. An Employee may apply for vacation leave in the event of an emergency; however, the granting of the leave shall be at the discretion of the appointing authority.

4. The word "allowance" has been replaced with "leave."

B. Article 36 - Sick Leave

1. Sick Leave Earning Rate for Employees Hired on or After 7/2/01

| <u>Years of Service</u> | <u>Workdays Earned Per Month</u> |
|-------------------------|----------------------------------|
| Less than 10 | 1 1/4 |
| 10 or more | 1 3/4 |

2. Protective Features for Employees Employed Prior to 7/2/01

- a. An Employee who is in another bargaining unit prior to 7/2/01 and who becomes a

Unit 3 Employee on or after 7/2/01 without a break in service of one workday shall continue to earn sick leave at the rate of 1 & 3/4 working days per month of service.

- b. An Employee who is serving in an exempt or temporary appointment prior to 7/2/01 and subsequently receives, without a break in service of one workday, an exempt appointment, a temporary appointment, an initial probationary appointment or a permanent appointment on or after 7/2/01 shall continue to earn sick leave at the rate of 1 & 3/4 working days per month of service and be allowed to use such sick leave.
- 3. An Employee serving an initial probationary period that begins on or after July 2, 2001 shall earn and accumulate sick leave but shall not be entitled to use the sick leave. The Employee shall be entitled to temporary disability benefits (TDI) as provided by State Statute.
- 4. The word "allowance" has been replaced with "leave."

C. Article (New) - Drug and Alcohol Testing

The new Article titled "Drug and Alcohol Testing" shall be modified to reflect a "two strikes and you're out" alcohol and substance abuse testing procedures.

- 9. There are approximately 12,800 members in bargaining unit 03.
- 10. The MOAs were ratified by 60% of members voting in the ratification meetings.

DISCUSSION

Complainant alleges that by failing to provide him with prior access to the MOAs that were the subjects of the ratification meeting, the HGEA effectively denied his right to vote at the ratification thereby violating HRS §§ 89-13(b)(1) and (4).¹

The HGEA concedes that it denied Complainant access to the MOAs prior to the ratification meeting but argues that the denial was based upon sound policy that is within its discretion to establish. The Union further argues that since the Complainant filed this complaint before the date of the ratification vote, the complaint was not timely in that no denial of the right to vote could have yet taken place.

Timeliness

It may be that a complaint filed solely in anticipation of a prohibited practice would not be timely.² But in this case the Complainant does not argue that the allegedly wrongful occurrence took place during the ratification meeting. Instead, he argues that the denial of access to the language of the documents prior to the date of the vote in itself interfered with his right to cast an informed vote. Since this complaint was filed after denial, it is timely. And since any "right to an informed vote" did not accrue until the time of ratification, the claimed wrong is justiciable.

Complainant does not specifically allege that any claim arises from the HGEA's actual conducting of the ratification meetings. Rather, the Union argues that the nature and quality of the meetings was such that any "right to an informed vote" was fully satisfied by the proceedings. Accordingly, the legal sufficiency of the meetings, with regard

¹HRS § 89-13(b) provides in part:

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;
* * *
- (4) Refuse or fail to comply with any provision of this chapter; . . .

²See, Hawaii Administrative Rules (HAR) § 12-42-42(a). A complaint...may be filed...within ninety days of the alleged violation." But see, National Licorice Co. v. N.L.R.B., 309 U.S. 350, 369, 60 S.Ct. 569, 84 L.Ed. 799 (1940) ("we can find no warrant in the language or purposes of the [National Labor Relations Act] for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.")

to Complainant's voting rights, must be evaluated in order to determine whether the Complainant was deprived of any right.

Ratification

In Decision No. 170, Jerrold G. Brown, 3 HLRB 137 (1983) (Brown), reversed and remanded on other grounds, Ariyoshi v. HPERB, 5 Haw.App. 553 (1985), the Board established that ratification is a right guaranteed under Chapter 89. The Board stated:

The first question to be addressed is whether ratification is a right guaranteed under this chapter. Rights of employees are enumerated in Section 89-3, HRS:

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....* [Emphasis added.]

Subsection 89-10(a), HRS, specifies, in relevant part:

Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned. The agreement shall be reduced to writing and executed by both parties....

By reading these two sections in conjunction with each other, it is clear that ratification is a right guaranteed by statute. It is a "concerted activity for the purpose of collective bargaining or other mutual aid." See, Section 89-3, HRS. However, the statute itself and the legislative history is devoid of any procedures or standards applicable to ratification proceedings. Although the Legislature has specified the manner in which representation elections are to be conducted in Section 89-7, HRS, but has not done the same for ratification proceedings, we do not view this silence to infer that the Legislature intended ratification proceeding to be conducted in

a flagrant or rank manner. Regardless of whether the matter is strictly an internal union function, the fact that ratification is an established statutory right as it was included in Section 89-10, HRS, is sufficient basis to believe the Legislature intended, at the very least, that ratification proceedings be conducted in a fair and reasonable manner. Any other interpretation would equate the statutory right to a meaningless exercise. We conclude ratification of the contract is a critical step in the ongoing collective bargaining process which requires that the desires of bargaining unit members are accurately reflected.

Participation in ratification having been established as a right under Chapter 89 and accordingly within our jurisdiction, the next step is to identify the standard by which the Union's conducting of the ratification election is to be evaluated.³ In Gilliam v. Independent Steelworkers Union, 572 F.Supp. 168, 171, 116 LRRM 2547 (N.D.W.Va. 1983), a federal district court addressed an analogous case of whether the failure of a union to distribute copies of a proposed agreement prior to ratification violated a right to ratification included in the union's constitution. Gilliam's legal analysis and resultant test are persuasive and we therefore adopt it for the purposes of this proceeding:

Ratification of a collective bargaining agreement is an internal union affair. Courts should not interfere in internal union affairs at the behest of certain members when the judgment of the union's leadership appears to be fair and reasonable. See Blanchard v. Johnson, 532 F.2d 1074, 1078 (6th Cir.1976), cert. denied, 429 U.S. 869, 97 S.Ct. 180, 50 L.Ed.2d 149 (1976). Kahn v. Hotel & Rest. Emp., etc., 469 F.Supp. 14, 19 (N.D.Calif.1977), aff'd, 597 F.2d 1317 (9th Cir.1979). Plaintiffs' state their cause of action is based on 29 U.S.C. § 411 (union members bill of rights) and the right to a "meaningful and informed" vote found by some courts to be inherent therein. See, e.g., Daniels v. Nat. Post Office Mail Handlers, 454 F.Supp. 336, 339 (E.D.Va.1978). Counsel agree that there is no authority for the proposition that union members must have access to the exact wording of a proposed labor agreement prior

³In Brown, supra, at 134, the Board did not specifically identify the legal standard against which the union's conduct was to be measured. It nonetheless concluded that complainant-members' right to vote had been violated based on the union's admissions that in the course of the election 1) service fee members had been discriminated against, 2) material misinformation had been disseminated by the union, 3) the absentee ballot system was 'hopelessly inadequate,' and 3) union behavior created a hostile and coercive atmosphere.

to a ratification vote. Judicial statements in dicta indicate that leaflets, letters, or other summary-type documents are satisfactory to inform union members on the issues in collective bargaining agreement ratification votes. See Ford v. Metropolitan District Council of Philadelphia, 323 F.Supp. 1136 (E.D.Pa.1970). Indeed, it would appear that some ratification votes are set after quick membership meetings are utilized to present an oral explanation of new contract provisions. See Baker v. Newspaper & Graphic Communications, 461 F.Supp. 109, 112 (D.D.C.1978). The strongest authority offered by Plaintiff is found in Christopher v. Safeway Stores, Inc., 476 F.Supp. 950 (E.D.Tex.1979), *aff'd*, 644 F.2d 467 (5th Cir.1981), where the district court suggested that the right to a meaningful vote on significant changes proposed for a labor agreement includes the obligation of union leadership to supply written information on the “pros and cons” of the proposal. Such requirement would seem to be satisfied by the summary publications produced by Defendants.

The Court is of the opinion that an appropriate test when a union’s denial of a “meaningful and informed” vote is suggested would be: (1) Whether the members were given proper and adequate notice of the vote as to date, time, and scope or subject matter of the vote; (2) whether the information releases of the union, together with any meetings conducted, were adequate to inform the membership of the issues to be decided; (3) whether there was enough time given for adequate reflection on the merits by the members; and (4) whether there was enough time and opportunity to mount effective support or opposition to the leadership’s position.

This test will be applied to the facts of this case.

1) Whether the members were given proper and adequate notice of the vote as to date, time, and scope or subject matter of the vote: Complainant was notified of the ratification schedule by mailed receipt of the schedule and proposed subjects of ratification. The flyer was received six days before the commencement of ratification meetings. Thirty-eight separate 90-minute meetings were to be available for attendance at between two and four different sites between 8:30 a.m. and 3:00 p.m. on July 9, 2001 through July 12, 2001. This certainly provided adequate notice as to date and time. With regard to scope and subject matter, the flyer described them as follows:

These meetings are being held to go over proposed Memorandums of Agreement affecting sick leave and vacation leave for prospective employees who are hired after July 1, 2001, as well as drug testing. You will also be provided with information pertinent to the Unit 3 pay increases.

While, somewhat sparse we conclude that such notice was adequate to inform the member of the subjects and function of the meetings.

(2) Whether the information releases of the union, together with any meetings conducted, were adequate to inform the membership of the issues to be decided: At each ratification meeting, the Union distributed a "Summary of Memorandum of Agreement for Vacation Leave, Sick Leave and Alcohol Testing." The one-page (front and back) summary identified the changes to the then existing contract which were contained in the MOAs. In addition to the summary, Union staff and bargaining unit team members made oral presentations summarizing the content of the MOAs and opened the floor to questions following the presentations. Finally, copies of the MOAs were available for review.

Complainant does not challenge the adequacy or accuracy of the information made available at the ratification meetings. Upon review of the summary provided, the Board concludes that they were neither misleading nor insufficient, the presentation and entertaining of questions provided an adequate opportunity for education and exchange, and the availability of the documents themselves ensured comprehensiveness.

(3) Whether there was enough time given for adequate reflection on the merits by the members; and

(4) Whether there was enough time and opportunity to mount effective support or opposition to the leadership's position: The need for more information and time would vary with the complexity and quantity of issues to be decided: The policy of the HGEA, as applied to the instant case, prohibits members from accessing the subject documents prior to ratification meetings.⁴ Had this policy been otherwise, it would be clear that adequate time had been provided for reflection and the mounting of effective opposition

⁴In his testimony, Tajiri stated that it was the policy of the HGEA not to provide copies of tentative agreements prior to ratification meetings. Because the policy is not in writing, he was uncertain as to whether or not he would have permitted Complainant to come in just to read and review the document. Because, however, Tajiri was never advised of Complainant's request, he did not have the opportunity to make that determination or consult with his superiors as to whether it would have been permissible under the unwritten policy.

or support. However, in the absence of such opportunities, the sufficiency of the time provided for the ratification meetings must be assessed.⁵

In conducting this assessment, we note that the Gilliam court cautioned that “[t]he need for more information and time would vary with the complexity and quantity of issues to be decided.” If the ratification involved documents or issues of significant controversy or complexity, we doubt that the 90-minute meetings would have been found to suffice. However, under the circumstances of this case, the Board concludes that sufficient time was provided. At issue were three MOAs totaling 15 pages that were effectively summarized on a single page. The issues were neither complex nor documents voluminous. The question and answer portion of the meeting could have been utilized to raise concerns and voice opposition. A forum for opposition was thus provided. And, the first meeting, attended by Complainant, was followed by 37 such meetings over a five-day period. Time, far in excess of the 90 minutes of the first meeting, was available for the mounting of opposition or support. Under these circumstances Complainant’s right to vote was not violated by the admittedly limited time available for review and ratification.

The Board thus concludes that the Union’s ratification process, having satisfied the elements of the test articulated in Gilliam, adequately preserved Complainant’s right to vote in the ratification process and accordingly dismisses the complaint.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint pursuant to HRS §§ 89-5 and 89-14.
2. An employee organization commits a prohibited practice in violation of HRS § 89-13(b)(1) by interfering with the rights of any employees guaranteed under Chapter 89.
3. An employee organization commits a prohibited practice in violation of HRS § 89-13(b)(4) by refusing to comply with any provision of Chapter 89.
4. HRS § 89-10(a) provided in part, at all relevant times:

⁵While the Board questions the soundness of HGEA’s policy not to disclose the contents of the negotiated items prior to ratification, the issue before the Board is whether the HGEA’s failure/refusal to provide him access to the MOAs interfered with and/or denied his right to participate in the ratification process.

Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned. The agreement may contain a grievance procedure and an impasse procedure culminating in final and binding arbitration, and shall be valid and enforceable when entered into in accordance with provisions of this chapter.

5. Complainant failed to prove that the Union interfered with or denied his right to ratify the MOAs when it denied him copies of the MOAs prior to the vote. The record shows that the information provided was adequate and accurate to inform Complainant of the matters presented for the voting.

ORDER

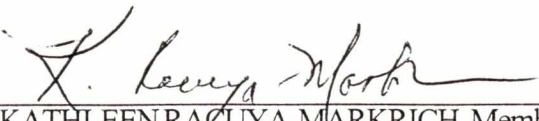
The instant complaint is dismissed.

DATED: Honolulu, Hawaii, September 13, 2002.

HAWAII LABOR RELATIONS BOARD


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CHESTER C. KUNITAKE, Member


KATHLEEN RACUYA-MARKRICH, Member

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