

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CU-03-203
	)	
LEWIS W. POE,	)	DECISION NO. 438
	)	
Complainant,	)	FINDINGS OF FACT, CONCLUSIONS
	)	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 July 9, 2002, Complainant LEWIS W. POE (Complainant or POE), proceeding pro se, filed a prohibited practice complaint against Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (Respondent, HGEA or Union), charging a violation of Hawaii Revised Statutes (HRS) §§ 89-13(b)(1), (4), and (5) and a breach of duty of fair representation by failing to respond to POE when he asked for the current status of four arbitrations by letters dated January 5, 2001 and June 7, 2002. In addition, Complainant alleged that the HGEA breached its duty of fair representation with respect to his requests to file grievances at Step 1 for the violation of Article 11 and/or 3 and at Step 2 regarding the underpayment of night differential, respectively.

On July 18, 2002, the Board issued Order No. 2100, Granting, in Part, and Denying, in Part, Respondent's Motion for Particularization, directing Complainant to specify when and how Respondent had violated HRS §§ 89-13(b)(1), (4) and (5) and/or the duty of fair representation.

On August 1, 2002, the Board held a prehearing conference to clarify the issues. Pursuant to the Prehearing Conference, the Board issued Order No. 2103, denying Respondent's Motion for Discovery, Production of Documents and Things; continuing the hearing on the complaint to September 12, 2002; and noticing oral arguments on Respondent's Motion to Dismiss filed August 5, 2002 on the grounds the instant complaint was untimely for August 20, 2002.

On September 3, 2002, the Board issued Order No. 2111, Granting in Part, and Denying, in Part, Respondent's Motion to Dismiss concluding that Complainant's alleged violations based on the Union's non-responsiveness to Complainant's letters of January 5, 2001 and June 7, 2002, were not time-barred. The Board also dismissed as untimely Complainant's allegations based on the Union's failure to pursue a grievance at Step 2 and initiate another grievance at Step 1, as requested by Complainant by letter dated February 11, 2001.

On September 12, 2002, the Board held an evidentiary hearing at which time counsel for Respondent appeared and Complainant, appearing pro se, were given full opportunity to introduce evidence, examine and cross-examine witnesses and make argument.

After considering the entire record, the Board makes the following findings of fact, conclusions of law, and order.

#### **FINDINGS OF FACT**

1. Complainant is a public employee within the meaning of HRS § 89-2 and a member of Bargaining Unit (BU) 03.
2. Respondent HGEA is an employee organization and the exclusive representative, within the meaning of HRS § 89-2, for non-supervisory employees in white-collar positions in BU 03.
3. At all times relevant the HGEA and Complainant's employer, the State of Hawaii, Department of Transportation have been parties to a BU 03 Collective Bargaining Agreement (Contract).
4. On January 5, 2001, Complainant wrote to HGEA Deputy Executive Director Randy Perreira (Perreira) seeking a timely written response about the "current status and/or processing of my four requests" to initiate Step 4 arbitration proceedings in grievances which he had pursued without the assistance of the Union.
5. By letter dated January 10, 2001, Complainant wrote to Perreira transmitting "[a]dditional information/documents pertaining to" Complainant's October 10, 2000 request asking HGEA to arbitrate the employer's Step 3 denial of POE's grievance, dated October 6, 2000, by Acting Human Resources Development Director Davis Yogi and received on October 10, 2000.



6. On February 6, 2001, Perreira acknowledged receipt of Complainant's January 10, 2001 letter, and informed Complainant that:

We have contacted the Department of Human Resources Development and have mutually agreed to extend the deadline to arbitrate this matter. The extension will allow us time to investigate your grievance and determine whether there is sufficient merit to your allegations to proceed to arbitration.

We will contact you should we require additional information pertaining to your case.

7. As of June 7, 2002, Complainant received no acknowledgement or information from Perreira or "applicable HGEA agents" regarding three of the four grievances, which Complainant asked the current status of on January 5, 2001. As a result, on June 7, 2002, Complainant wrote to Perreira requesting "information on the current stage and status of each and every one of Poe's ('Step 4') grievances which the HGEA ('Union') is/was controlling and/or processing under the provisions of Article 11, Grievance Procedure, of the BU 03 Collective Bargaining Agreement ('CBA')."

Complainant's letter stated:

1. Time is of the essence. A timely written response by the HGEA is expected by me (Poe), a dues-paying member of BU 03.
  2. If I do not receive on or prior to June 25, 2002 an accurate, valid current status report on each of my four "Step 4 grievances" (see my Jan. 5, 2001 and Oct. 10, 2000 letters to Mr. Randy Perreira), I shall take appropriate action (as I see fit under the circumstances).
  3. I feel that the HGEA may not be timely and/or properly processing said grievances. I hope that my feeling is "wrong." [Emphasis in original.]
8. A copy of Complainant's letter was originally intended for Union agent Royden Kotake, but Complainant amended his letter and wrote instead to Patrick Silva, after he learned from the HGEA receptionist when he hand-delivered his letter that Royden Kotake was no longer employed at HGEA, and was given the name of Patrick Silva.

9. Respondent admits that it did not respond to Complainant's June 7, 2002 letter by June 25, 2002 and offers no explanation for the failure to respond.

### **DISCUSSION**

The relevant facts of the instant proceeding are undisputed. On October 11, 2000, Complainant delivered to the HGEA a request that the Union proceed to arbitration on management's denial of his Step 3 grievance received October 10, 2000. The Union did not respond to Complainant's request and on January 6, 2001, Complainant wrote to the HGEA requesting that the Union advise him in writing of the status of the October 10, 2000 request and three other requests for arbitration (1998, 1999 performance evaluations, and June 16, 2000 Step 3 denial) the status of which he had never been apprised. By letter dated February 6, 2001, Randy Perreira, HGEA's Deputy Executive Director, wrote Complainant to advise that the Union and management had "mutually agreed to extend the deadline to arbitrate this [October 10, 2000] matter. This extension will allow us time to investigate your grievance and determine whether there is sufficient merit to your allegations to proceed to arbitration." No further information was received from the Union and on June 7, 2002, Complainant wrote another letter to the HGEA requesting a timely written response to his requests for arbitration. Complainant further promised to "take appropriate action" if a response were not received by June 25, 2002. No response was received and the instant complaint was filed on August 5, 2002. At the evidentiary hearing in this case, the HGEA offered no reason for its failures to reply to Complainant's request for information.

The issue is whether the Union breached the duty of fair representation by failing to respond at all or by June 25, 2002, to Complainant's requests for the current status on four grievances ripe for the Union to take to arbitration.

"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 (9<sup>th</sup> 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.

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.

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 (4<sup>th</sup> 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 has found a violation of the union’s duty of fair representation. In Bernadine L. Brown, 5 HLRB 16 (1991), 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.” Similarly in Richard Hunt, 6 HLRB 222 (2001) the Board held that a nine-month delay in advising grievant, despite his repeated requests, whether his grievance would be pursued to arbitration, violated the union’s duty of fair representation.

In the instant proceeding, almost 18 months elapsed between the Union’s advising Complainant that a deadline extension had been agreed to and the filing of the instant complaint. For this period, the record is totally devoid of any investigations or efforts made, or of any attempt made to contact the Complainant regarding status. As far as the Complainant could reasonably determine, his requests had been abandoned. This hardly rises to the level of care due from an exclusive representative which had, by contract, reserved to itself the irrevocable authority to decide to pursue a grievance to arbitration.

The HGEA presented no factual defense. Thus, the Board cannot examine whether the conduct of the Union in failing to advise Complainant for more than 18 months

might somehow rise to the level of reasonableness. Instead, the Union argues that unreasonableness cannot be found since the Complainant only renewed his request for information on June 7, 2002, three months before filing the complaint, and in doing so attempted to establish a 15-day deadline for the Union's response. It argues that neither the two-month nor 15-day lapses were unreasonable.

The Board tends to agree that neither a Complainant's unilateral deadline nor a two-month lapse in responding will necessarily rise to the level of indifference to employees' rights necessary to find a breach of duty. But this is not a case where the only evidence of indifference was a relatively brief delay. Almost two years had passed between the Complainant's request for arbitration and the evidentiary hearing on this matter. During this time almost no information was provided or offered. This is the evidence of indifference which is compelling. Even though Complainant waited only two months after his letter to file his complaint, and had given the Union only 15 days to respond, the Union had more than 18 months to prepare information that was due to the Complainant. And it is this lapse, in its entirety, that evidences indifference to its member's rights.<sup>1</sup>

Accordingly, the HGEA is found to have violated its duty of fair representation and HRS § 89-13(b)(4), and is ordered to provide Complainant within 30 days with the information sought in his letter of June 7, 2002, including, but not limited to any investigation that was conducted in connection with his request, the status and disposition of his requests for arbitration, and the reasons, if any, for the Union's decision and conduct.

In view of the Board's ruling, the Board finds it unnecessary to address the allegations of HRS §§ 89-13(b)(1) and (5).

### **CONCLUSIONS OF LAW**

1. The Board has jurisdiction over this complaint pursuant to HRS §§ 89-5(b) and 89-14.

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<sup>1</sup>The HGEA, and the Board's dissenting opinion, also have argued that a violation cannot be found because the requisite 90-day filing period had elapsed and the Complainant knew or should have known within the applicable time that the information he requested would not be forthcoming. This argument was disposed of in the denial of the Union's Motion to Dismiss, see, Order No. 2111. Additionally, the Board majority further concludes that the failure to provide information is in the nature of a continuing violation. Cf., Local Lodge No. 1424 v. NLRB, 462 U.S. 411, 422 (1960) ("It may be conceded that the continued enforcement, as well as the execution of a collective bargaining agreement constitutes an unfair labor practice, and that these two are logically separate violations, independent in the sense that they can be described in discrete terms.") To find otherwise would simply permit the HGEA to escape the neglect of its members simply by extending that neglect. Such a conclusion cannot be found to be in conformance with Chapter 89.



2. A union 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. The HGEA acted in an unreasonable and arbitrary manner, thereby breaching its duty of fair representation when the Union failed to respond to his requests for information on the current status of his grievances for over two years.

### ORDER

In accordance with the above, the Board sustains POE's prohibited practice complaint and orders that:

1. The HGEA shall cease and desist from failing to provide fair representation to POE in the processing of any future grievances.
2. The HGEA shall inform Complainant as to the status of his grievances within 30 days from the date of this decision.
3. The HGEA 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 office statewide where employees of bargaining unit 03 assemble and leave such copies posted for a period of 60 days from the initial date of posting.
4. The HGEA shall notify the Board within 30 days of the receipt of this decision of the steps taken to comply herewith.

DATED: Honolulu, Hawaii, October 24, 2002.

HAWAII LABOR RELATIONS BOARD

  
BRIAN K. NAKAMURA, Chair

  
KATHLEEN RACUYA-MARKRICH, Member

### DISSENTING OPINION

I agree with my fellow Board members that a union must be responsive to its members and I would join them in their conclusions if I found the underlying matters in the instant requests for information to be timely. In this case, however, I find the following chronology very disturbing leading to my dissent in this case:

1. By letter dated April 14, 2000, POE requested arbitration in cases 1 and 2.
2. By letter dated June 16, 2000, POE requested arbitration in case 3.
3. By letter dated October 10, 2000, POE requested arbitration in case 4.
4. By letter dated January 6, 2001, POE requested "...valid, current, reasonable and specific reports and/or decisions on the current status and/or processing of my four requests. . . ."
5. By letter dated January 10, 2001, POE wrote to PERREIRA providing additional information on the October 10, 2000 request for arbitration.
6. By letter dated February 6, 2001, PERREIRA responded to POE on his request of October 10, 2000.
7. By letter dated June 7, 2002, POE wrote to PERREIRA regarding the status of his grievances.
8. On July 9, 2002, POE filed the subject prohibited practice complaint.

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

Therefore, while the prohibited practice charge was filed within 90 days of POE's June 7, 2002 letter, the letter addresses matters first raised in the year 2000 and February 2001. I would therefore find that the underlying matters identified in POE's letter of June 7, 2002 are clearly untimely and similarly, the instant prohibited practice complaint to be untimely.

  
CHESTER C. KUNITAKE, Member