

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-03-211
)	
LEWIS W. POE,)	DECISION NO. 441
)	
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 November 1, 2002, LEWIS POE (Complainant or Poe), pro se, filed this prohibited practice complaint against the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) alleging that the Union violated Hawaii Revised Statutes (HRS) §§ 89-13(b)(4) and (5) by entering into and subsequently failing to notify him of the existence of a Supplemental Agreement amending Article 11 of the applicable bargaining agreement (Supplemental Agreement).

A first prehearing conference was conducted on November 26, 2002 at which a January 13, 2003 deadline was set for the filing of any dispositive motions. On January 7, 2003, the Union's counsel filed a motion to continue the evidentiary hearing scheduled for January 15, 2003 to obtain a substitution of counsel. The motion was granted subject to Complainant's insistence of the deadline for the filing of dispositive motions, and a second prehearing conference on the case was scheduled for February 25, 2003. Counsel was substituted, the second prehearing conference was held, and the evidentiary hearing was conducted on March 18, 2003.

At hearing, the parties had the opportunity to present witnesses and argument. Based upon a review of the record in this case, 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 nonsupervisory 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 (State or Employer) have been parties to a BU 03 Collective Bargaining Agreement (Contract). The current agreement is in effect from July 1, 1999 to June 30, 2003.
4. Article 11 of both the Supplemental Agreement and previous Contracts set forth the "Grievance Procedure."
5. The substance of Article 11 has been a matter of continuing contest by the Complainant.¹

¹The Board takes notice that on September 30, 1994, Poe filed a declaratory ruling petition in Case No. DR-03-55, contending that the then applicable language of Steps 1 and 3 of Article 11 failed to comport with the right of an employee to present and pursue a grievance without the intervention of the Union as contained in HRS § 89-8(b). Complainant also filed Case No. DR-03-56 on October 20, 1994 requesting the Board to declare certain provisions of Article 11 violative of HRS § 89-8(b). In order to address his concerns, on August 2, 1995, the Union and the Employer entered into a Memorandum of Agreement (MOA) amending the then applicable Article 11. Complainant then argued that the MOA was invalid for want of ratification. The Board consolidated the proceedings on the petitions and found that the MOA clarified employee rights and had no adverse effect on such rights and dismissed the petitions for declaratory ruling in Decision No. 371, Lewis W. Poe, 5 HLRB 546 (1996).

In Case No. DR-03-59 filed on September 1, 1995, Poe alleged that he had the right to file a class grievance and the provisions of Article 11 interfered with his right. Poe also argued that the amendments made by the MOA were questionable because it did not fully comply with the provisions of HRS § 89-10(a). The Board held in Decision No. 388, Lewis W. Poe, 5 HLRB 712 (1997), that provisions of Article 11 which reserve the right of the exclusive representative to file a class grievance does not conflict with HRS § 89-8 which preserves the right of an individual to file a grievance without intervention of the union.

In Case No. DR-03-60 filed on October 9, 1995, Poe requested a Board declaration that the Employer failed to comply with HRS § 89-10(a) because it recognized an MOA which was not ratified. In Order No. 1746, dated August 12, 1999, the Board dismissed the petition because Decision No. 371 was dispositive of the ratification issue and the question posed was purely hypothetical. In addition, the Board found that Poe was not prejudiced by the application of the MOA in extending any grievance deadlines and therefore lacked standing.

In Case No. CU-03-112 filed on October 16, 1995, Poe alleged that the HGEA permitted individual grievants to stipulate to extend the time limits in the grievance procedure contrary to the terms of the Unit 03 collective bargaining agreement. Poe contended that the HGEA

failed to follow Article 11 and argued that the HGEA violated HRS § 89-10(a) by declaring the validity of an MOA which was not ratified. The Board dismissed the complaint relying upon Decision No. 371, where it found that the MOA did not need to be ratified in order to be valid and Poe was not prejudiced by the amendments to the contract. The Board also cited Order No. 1472, Order Granting Respondent's Motion to Dismiss Prohibited Practice Complaint, dated May 29, 1997, in Case No. CE-03-270 where Poe alleged, inter alia, that the Employer violated HRS § 89-10(a) by recognizing an MOA which had not been ratified.

In Case No. DR-03-61 filed on October 16, 1995, Poe contended that the HGEA refused or failed to comply with HRS § 89-10 by recognizing as valid an MOA amending Article 11 which had not been ratified. Poe thus requested an interpretation of HRS § 89-10(a). In Order No. 1474, dated May 30, 1997, the Board dismissed the petition because Decision No. 371 was dispositive on the issue of ratification.

In Case No. CE-03-284 filed on November 28, 1995, Poe alleged that his Employer violated Article 11 by failing to respond to a Step 2 class grievance. In Decision No. 390 dated October 10, 1997, Lewis W. Poe, 5 HLRB 732 (1997), the Board dismissed the complaint because under the terms of the Contract, only the exclusive representative may file a class grievance. Thus, Poe failed to prove that the Employer violated the contractual grievance procedure by failing to schedule a meeting on a class grievance filed by an employee.

In Case No. CE-03-286 filed on December 11, 1995, Poe filed a complaint alleging the Employer violated Article 11 of the Contract by refusing to provide him with information needed to investigate and process a class grievance. Based upon Decision No. 388, supra, the Board found that Poe was not entitled to the information requested because he did not have the right to file a class grievance and that the Employer did not commit a prohibited practice when it failed to provide the information requested by Poe. The Board thereupon dismissed the complaint in Decision No. 391, Lewis W. Poe, 5 HLRB 736 (1997).

In Case No. DR-03-64 filed on June 5, 1997, Poe contended that Article 11 was partially invalid and in violation of statutory provisions because it provided that only the union can arbitrate a grievance. The Board relied on Decision No. 89, Bruce J. Ching, 2 HPERB 23 (1978) where the Board found that a nearly identical clause in the Unit 12 contract did not violate HRS § 89-8(b) and in Order No. 1728, dated June 4, 1999, held that Article 11 clearly and unambiguously provides that only the Union can request arbitration of a grievance and such provision does not violate HRS § 89-8(b).

In Case No. CU-03-166 filed on June 8, 2000, Poe filed a complaint against the HGEA contending, inter alia, that the Article 11 printed in the 1997-99 contract did not conform to the 1995 MOA. In Order No. 1907, dated August 3, 2000, the Board approved the parties' Stipulation for Dismissal Without Prejudice.

On September 10, 2002, Complainant filed a prohibited practice complaint against the Union in Case No. CU-03-208 regarding, inter alia, the published version of Article 11 distributed to the members. Complainant asserted that the Union committed a violation by

6. On or about September 26, 2003, Complainant "by accident" discovered that the Union had entered into the Supplemental Agreement amending Article 11 effective August 19, 2002 through June 30, 2003. Poe was not notified by the Union of the existence or content of this Supplemental Agreement.
7. On or about October 7, 2002, Poe directed a contractually protected request for information to Brian Minaai (Minaai), then-Director of the Department of Transportation, State of Hawaii. Upon not receiving a response, he delivered a Step 1 grievance to Glenn Okimoto (Okimoto), Harbors Administrator and his immediate supervisor, on October 23, 2002.
8. On October 30, 2002, Poe received a reply from Okimoto that Complainant's grievance had been forwarded to Minaai so as to comport with the Supplemental Agreement.
9. Poe did not receive further communication from his Employer regarding his grievance, and did not pursue the matter further because he believes that the Supplemental Agreement requires the intervention of the Union.
10. The Supplemental Agreement at issue provides as follows:

SUPPLEMENTAL AGREEMENT (BU 03)

PERTAINING TO ARTICLE 11, GRIEVANCE PROCEDURE

SINGLE LEVEL GRIEVANCE PROCEDURE
(Pilot Project)

This SUPPLEMENTAL AGREEMENT is entered into this 30th day of July, 2002, by and between the Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, hereinafter called the Union and the State of Hawaii, hereinafter called the Employer, on behalf of Employees in bargaining unit 03.

Pursuant to Article 4 of the Unit 03 Agreement in effect from July 1, 1999, to June 30, 2003, the parties have negotiated this Supplemental Agreement that provides a single level

negotiating a provision that he claimed was invalid. The Board dismissed the complaint in Order No. 2144 dated January 3, 2003.

grievance procedure with mediation subject to mutual agreement. This modified procedure shall be utilized in lieu of ARTICLE 11 in the Unit 03 Agreement and shall be implemented on a pilot basis only, for the period August 19, 2002, to June 30, 2003, unless the parties mutually agree otherwise.

ARTICLE 11 - GRIEVANCE PROCEDURE

A. Any complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure. Any relevant information specifically identified by the grievant or the Union in the possession of the Employer needed by the grievant or the Union to investigate and process a grievance, shall be provided to them upon request within seven (7) working days. The grievance shall be presented to the immediate supervisor or department head, as appropriate, within twenty (20) working days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) working days after the alleged violation first became known or should have become known to the Employee involved, except that in the case of an alleged payroll computational error, such allegation shall be presented to the department head or the department head's designee in writing within twenty (20) working days after the alleged error is discovered by the Employee, or the grievance may not be considered.

B. An Employee may present an individual grievance at the informal and formal steps, excluding arbitration, and have the Employee's grievance heard without intervention of the Union, provided the Union has been afforded an opportunity to be present at the conference(s) on the grievance, and provided further the Employee and the Employer may extend any applicable time limits by mutual consent. Any adjustment made shall not be inconsistent with the terms of this Agreement. By mutual consent of the Union and the Employer, any time limits in this Article may be extended.

C. Informal Step. A grievance shall, whenever possible, be discussed informally between the Employee and the Employee's immediate supervisor within the twenty (20)

working day limitation provided for in paragraph "A" above. The grievant may be assisted by the grievant's Union representative. The immediate supervisor shall reply within seven (7) working days. In the event the Employer does not respond within the time limits prescribed herein, the Employee or the Union may pursue a formal grievance.

D. Formal Step. If the grievant is not satisfied with the result of the informal conference, the grievant or the Union may submit a written statement of the grievance within seven (7) working days after receiving the answers to the informal complaint to the department head or the department head's designee; or if the immediate supervisor does not reply to the informal complaint within seven (7) working days, the Employee or the Union may submit a written statement of the grievance to the department head or the department head's designee within fourteen (14) working days from the initial submission of the informal complaint; or if the grievance was not discussed informally between the Employee and the Employee's immediate supervisor, the Employee or the Union may submit a written statement of the grievance to the department head or the department head's designee within the twenty (20) working day limitation provided for in paragraph "A" above.

A meeting shall be held between the grievant and a Union representative with the department head or the department head's designee within seven (7) working days after the written grievance. Either side may present witnesses. The department head or the department head's designee shall submit a written answer to the grievant or the Union within ten (10) working days after the meeting.

E. If the Union has a class grievance involving Employees within a department, it may submit the grievance in writing to the department head or department head's designee. Time limits and the procedures for appeal from unsatisfactory answers shall be the same as in individual formal grievances.

If the Union has a class grievance involving Employees from more than one (1) department, it may submit the grievance in writing to the Governor or the Governor's designee. Time

limits and the procedures for appeal from unsatisfactory answers shall be the same as in individual formal grievances.

F. Arbitration. If the grievance is not satisfactorily resolved at the formal step and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or the Employer's designated representative of its desire to arbitrate within ten (10) working days after receipt of the Employer's decision. Representatives of the parties shall attempt to select an Arbitrator immediately thereafter.

If agreement on an Arbitrator is not reached within ten (10) working days after the notice for arbitration is submitted, either party may request the Hawaii Labor Relations Board to submit a list of five (5) Arbitrators. Selection of an Arbitrator shall be made by each party alternately deleting one (1) name at a time from the list. The first party to delete a name shall be determined by lot. The person whose name remains on the list shall be designated the Arbitrator. No grievance may be arbitrated unless it involves an alleged violation of a specific term or provision of the Agreement.

If the Employer disputes the arbitrability of any grievance, the Arbitrator shall first determine whether the Arbitrator has jurisdiction to act; and if the Arbitrator finds that the Arbitrator has no such power, the grievance shall be referred back to the parties without decision or recommendation on its merits.

The Arbitrator shall render an award in writing no later than thirty (30) calendar days after the conclusion of the hearings or if oral hearings are waived then thirty (30) calendar days from the date statements and proofs were submitted to the Arbitrator. The decision of the Arbitrator shall be final and binding upon the Union, its members, the Employees involved in the grievance, and the Employer. There shall be no appeal from the Arbitrator's decision by either party, if such decision is within the scope of the Arbitrator's authority as described below:

1. The Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the terms of this Agreement.

2. The Arbitrator's power shall be limited to deciding whether the Employer has violated any of the terms of the Agreement.
3. The Arbitrator shall not consider any alleged violations or charges other than those presented in the formal grievance.
4. In any case of suspension or discharge where the Arbitrator finds such suspension or discharge was improper, the Arbitrator may set aside, reduce or modify the action taken by the Employer. If the penalty is set aside, reduced or otherwise changed, the Arbitrator may award back pay to compensate the Employee, wholly or partially, for any wages lost because of the penalty.

The fees of the Arbitrator, the cost of transcription, and other necessary general costs, shall be shared equally by the Employer and the Union. Each party will pay the cost of presenting its own case and the cost of any transcript that it requests.

G. Mediation. At any time after a formal grievance has been filed, mediation services may be requested as provided below or as otherwise mutually agreed to by the parties:

The parties shall execute a written agreement provided by the Federal Mediation and Conciliation Service (FMCS) that sets forth ground rules.

Grievance timelines shall be held in abeyance from the date of execution of the FMCS agreement and extending through seven (7) calendar days after the last FMCS meeting.

Any settlement agreement resulting from mediation is tentative and shall be reduced to writing and subject to final review by the parties with seven (7) calendar days following the last FMCS meeting.

Each party is responsible for its costs.

11. The Supplemental Agreement supercedes the provisions of Article 11 published in the contract distributed to the Union's members. In the originally published version, grievances proceeded through three formal steps prior to arbitration. If an informal disposition of the grievance was unsatisfactory, the union or an employee acting on his or her own behalf may file a Step 1 written grievance with the employee's division head or designee. In the absence of a satisfactory resolution following a mandatory meeting, a Step 2 grievance may then be filed with the employee's department head or designee. In the absence of a satisfactory resolution following a mandatory meeting, the employee or the Union may then file a Step 3 appeal to the employer. Again, a meeting and disposition are mandatory. At Step 4, the Union can proceed to arbitration.
12. The Supplemental Agreement eliminates Steps 1 and 3 of the Grievance Procedure. Thus the only remaining formal grievance step prior to arbitration is filing, meeting and disposition by the employee's department head or designee. The language of the Supplemental Agreement appears to make notification and the presence of the Union required at the meeting.² The mandatory participation of the Union appears to deviate from the requirements of the preceding agreement.³ Another change is that the Supplemental Agreement contains a provision for mediation upon mutual agreement by the parties.⁴

²Subsection D of the Supplemental Agreement provides, in part:

A meeting shall be held between the grievant and a Union representative with the department head or the department head's designee within seven (7) working days after the written grievance. Either side may present witnesses.

³Subsection G of the 1999-2003 Unit 03 Contract provided, in part:

A meeting to discuss the grievance shall be held within seven (7) working days after receipt of the appeal.

⁴Subsection G of the Supplemental Agreement provides, in part:

Mediation. At any time after a formal grievance has been filed, mediation services may be requested as provided below or as otherwise mutually agreed to by the parties:

The parties shall execute a written agreement provided by the Federal Mediation and Conciliation Service (FMCS) that sets forth ground rules.

13. Complainant interprets the provisions regarding Union participation in the formal meeting contained in paragraph D, and mediation in paragraph G as interposing the Union as a party to any grievance procedure.
14. Randy Perreira (Perreira), HGEA Deputy Executive Director, participated in the negotiation of the Supplemental Agreement on behalf of the Union.
15. Perreira testified that the Supplemental Agreement was negotiated because both the State of Hawaii's chief negotiator and the Union shared a desire to expedite the grievance procedure so as to be more responsive to grievants. A second goal of the Employer was to make department heads more attentive and responsible for the disposition of grievances rather than defer them for disposition by the State's Department of Human Resources Development, the Employer's designee at Step 3.
16. The Supplemental Agreement at issue applies only to employees in the State's executive departments where the State of Hawaii is the statutory employer. Other agreements would have to be negotiated with other statutory employers, including the counties, State Judiciary and Hawaii Health Systems Corporation.
17. Perreira testified that the Supplemental Agreement was formulated with the intent to preserve the rights of employees to present grievances without the intervention of the Union. This intent is reflected in paragraph B which, over the objection of the Employer, specifically preserves the right of an employee to file and pursue a grievance without the intervention of the Union prior to arbitration.⁵

Grievance timeliness shall be held in abeyance from the date of execution of the FMCS agreement and extending through seven (7) calendar days after the last FMCS meeting.

Any settlement agreement resulting from mediation is tentative and shall be reduced to writing and subject to final review by the parties with seven (7) calendar days following the last FMCS meeting.

Each party is responsible for its costs.

⁵Subsection B of the Supplemental Agreement provides:

B. An Employee may present an individual grievance at the informal and formal steps, excluding arbitration, and have the Employee's grievance heard without intervention of the Union,

18. Perreira testified that paragraph B was included because “we anticipated this day would come.” This claimed anticipation was a result of knowledge of Complainant’s continuing concerns about preserving the right to pursue grievances without the intervention of the Union. Notwithstanding that paragraph B of the Supplemental Agreement was included in anticipation of the Complainant’s concerns the Union never advised the Complainant personally of the negotiation, execution or content of the Supplemental Agreement.
19. Perreira testified that the requirement to include the Union at the meeting in paragraph D was intended only to permit notice to the Union and the opportunity to attend to ensure that any grievance resolution conformed to the provisions of the Contract.
20. Perreira further testified that the Union’s attendance was not intended to, and in practice does not, make the Union a party to any grievance initiated by an employee without the intervention of the Union. He claimed that even though the literal language of the agreement appears to make the Union’s participation mandatory, in both intent and in practice, the Union’s role is limited to ensuring contractual conformity, and the requirements of Union participation in the formal meeting are limited to notice.
21. Perreira further testified that it was not intended that the Union be a party to a mediation as provided in the Supplemental Agreement when an individual employee initiates and pursues a grievance.
22. The Supplemental Agreement was executed on July 30, 2002 and provided that the new procedures are to be in effect from July 19, 2002 until the expiration of the Contract on June 30, 2003.
23. Following the execution of the Supplemental Agreement, the HGEA began negotiations with the counties, Judiciary, and Hawaii Health Systems Corporation (HHSC) to determine if these employers wished to enter into similar agreements. Separate agreements amending the applicable grievance process were subsequently entered into between the Union and the Judiciary

Employee’s grievance heard without intervention of the Union, provided the Union has been afforded an opportunity to be present at the conference(s) on the grievance, and provided further the Employee and the Employer may extend any applicable time limits by mutual consent. Any adjustment made shall not be inconsistent with the terms of this Agreement. By mutual consent of the Union and the Employer, any time limits in this Article may be extended.

and HHSC, respectively. The other statutory employers declined to amend the grievance process.

24. After execution of the Supplemental Agreement, Perreira testified that he briefed the Union's stewards about the revised grievance procedures so that they could implement them and advise the Union's members of the changes.
25. On or about October 8, 2002, the Union mailed postcards to its approximately 27,000 members and service fee paying nonmembers. The postcards advised the recipients of scheduled Stop Work Informational Meetings (SWIM), contractually guaranteed work-time opportunities for the Union to meet with its members. The nine Oahu meetings were scheduled for October 16 through November 1, 2002 at various sites around Oahu secured by the Union. The only representation of the meeting's content were, "Update on Union matters," and "Brief Presentation on other HGEA sponsored benefits."
26. On or about October 10, 2002, information substantively identical to the SWIM postcards was posted on the Union website.
27. Perreira testified that at the SWIM meetings attendees were advised of the changes in the grievance procedure resulting from the Supplemental Agreement. They were also presented with a written "Summary of the Single Level Grievance Procedure" resulting from the Supplemental Agreement. The document summarized the content of the Agreement and offered an opportunity to view the Supplemental Agreement on the Union's web site.
28. Perreira provided three reasons for the lapse in time between the execution and effective date of the Supplemental Agreement and the notification of members via the SWIM meetings. These reasons were: 1) continuing negotiations with the Judiciary, HHSC and the counties about entering into similar agreements; 2) SWIM meetings scheduled during the summer are traditionally ill-attended so the meetings were scheduled for the fall to ensure better attendance; and 3) the logistical burden of securing meeting sites (a number of which were used for the first time) and ensuring that contractual notification requirements would be met.

DISCUSSION

Poe claims that the HGEA breached its duty of fair representation by negotiating the Supplemental Agreement. He predicates this claim upon his reading of the Supplemental Agreement which makes the Union a party to grievances initiated by an employee without intervention by the Union. Poe further claims that the Union breached its

duty of fair representation by failing to notify him and other affected members of the execution, implementation and content of the Supplemental Agreement.

The HGEA denies any violation of its duty of fair representation in that the Supplemental Agreement was not intended to, and in no way interferes with any right of an employee to pursue a grievance without the intervention of the Union. Further the Union argues that its communication of the content of the Supplemental Agreement to its membership was reasonable, comprehensive and effective.

In order for Complainant to prevail against his Union, he must establish by a preponderance of evidence that the Union's conduct was arbitrary, discriminatory or in bad faith. Sheldon S. Varney, 5 HLRB 508 (1995). Proof of Union error due to negligence, inefficiency, inexperience, or even a misguided interpretation of contract provisions will not suffice. Bruce J. Ching, 2 HLRB 23 (1978).

Negotiation of the Supplemental Agreement

The duty of fair representation extends to the union's collective bargaining with the employer. Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Thus, the Union can breach its duty of fair representation in the course of bargaining the Supplemental Agreement if its bargaining was conducted in an arbitrary, capricious or discriminatory manner.

Poe predicates his claim upon the Union's allegedly plain and knowing violation of his and other employees' rights to initiate and have a grievance heard, without intervention by the Union until the arbitration stage. This right is statutorily defined in HRS § 89-8(b):

(b) An individual employee may present a grievance at any time to the employee's employer and have the grievance heard without intervention of an employee organization;....

Poe alleges that a plain reading of paragraphs B and G incorporates the Union as a party to all grievances, including those presented by employees only, thus violating employees' rights in such circumstances. Indeed, the plain language of paragraph D that "[a] meeting shall be held between the grievant and a Union representative with the department head or the department head's designee within seven (7) working days after the written grievance" (emphasis added), appears to require the presence and participation of the Union at any formal meeting. And if such required presence and participation interfered with the HRS § 89-8(b) right to proceed with a grievance without the intervention of an employee organization a violation may lie.

But HRS § 89-8(b) does not conclude with the articulation of the employee's right. It proceeds further to carve out a specific role for the Union:

(b) ... ; provided that the exclusive representative is afforded the opportunity to be present at such conferences and that any adjustment made shall not be inconsistent with the terms of an agreement then in effect between the employer and the exclusive representative.

Thus, the law requires that the Union be provided the opportunity to be present at conferences such as those provided for in paragraph D. The Board interprets the purpose of such opportunity to be to ensure conformity with the remainder of the law's mandate that any settlement be consistent with the applicable collective bargaining agreement.

This proviso, while clearly validating the Union's presence in the meeting, does not resolve Poe's concerns regarding the role of the Union. The language of paragraph D appears to make Union participation mandatory and is silent on its role or function. This ambiguity makes the language potentially open to Poe's proffered reading—that the Union could assume the role of an indispensable party. The Union contests Poe's interpretation.

In interpreting ambiguous contract language, extrinsic evidence of intent and application may be considered. Sansla, Inc., 323 NLRB 107, 109 (1997). The Union provided such evidence in the form of Perreira's testimony that the Union was included in the meeting provision to ensure that any settlement reached or offered conformed to the terms of the collective bargaining agreement. He further testified that in practice the role of the Union in any grievance initiated and pursued by an employee is so limited.⁶ Perreira thus testified that in both intent and in application the language of paragraph D conforms to HRS § 89-8(b).

Moreover, paragraph B of the Supplemental Agreement clearly provides that an employee may present an individual grievance at the informal and formal steps, excluding arbitration, and have the grievance heard without intervention of the Union, provided the Union is afforded an opportunity to be present at the conference on the grievance. A fair reading of paragraph B with paragraph D, supports Perreira's interpretation.

⁶Perreira testified that it is management's practice to secure the Union's approval of any settlement agreement with an individual grievant which might implicate the contract. While he conceded that this practice, and the apparent mandatory participation of the Union, might conceivably give the Union a de facto veto over any resolutions, he testified that neither that power or consequence was ever intended and the Union's participation has been, and would be, limited to ensuring contractual conformity.

Poe neither provided any evidence supporting his reading of the language nor rebutting the Union's, and therefore did not carry his burden in this regard. The Board is thus compelled to adopt the Union's reading for the purpose of this proceeding⁷ and concludes that paragraph D does not violate the right of an employee to initiate and pursue a grievance without the intervention of the Union. There being no violation of the Complainant's rights in the negotiation or application of this portion of the Supplemental Agreement, there is no basis to conclude that the Union was arbitrary, capricious or discriminatory in the negotiation of the agreement.

Poe also argues that Paragraph G of the Supplemental Agreement, giving the "parties" to a grievance the right to jointly submit the case to mediation, violates his right to pursue a grievance without intervention of the Union. He bases his allegation upon his interpretation of the language that includes the Union as a "party" for the purposes of Paragraph G. But the Union is not so identified in Paragraph G or anywhere else in the Supplemental Agreement. So that raises at least an ambiguity in the contract language regarding the right of the Union to participate in a request for mediation in a grievance initiated by an employee without intervention of the Union.

Again, Poe presented no extrinsic evidence of intent or application to support his interpretation. And again, Perreira testified that the Union neither intended nor has acted as a "party" for the purposes of Paragraph G for any grievance initiated by an employee without intervention of the Union. The Board thus concludes that Poe again failed to carry his burden and his interpretation of the language cannot be adopted as there is no basis for finding either violation of statutory rights or a breach of the duty of fair representation.

Poe's complaint regarding the language or negotiation of the Supplemental Agreement must therefore be dismissed.

Notice

Complainant also alleges that the HGEA violated its duty of fair representation because it allegedly failed to timely notify him or other members of the Supplemental Agreement.

In Decision No. 438, Lewis W. Poe, 6 HLRB ____ (2002), the Board discussed the applicability of duty of fair representation standards to alleged unresponsiveness or failures to communicate:

⁷If subsequently in practice the Union purports to assume, or assumes, the status of a party in an employee initiated grievance, or even if the Union participates in a manner other than to ensure conformity with contract, an original action for the violation of an employee's right to proceed without the intervention would lie. But as Poe did not pursue the instant grievances to the formal meeting stage, there is no evidence of such a violation.

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 (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.

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 (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 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 in arbitration, violated the union’s duty of fair representation.

In Decision No. 438, supra, the Board found that the Union’s totally unexplained lapse of two years to respond to Complainant’s request for information regarding the status of his requests to arbitrate his grievances violated this standard. The decision was based, inter alia, on the absence of any evidence upon which to base a conclusion of reasonable conduct by the Union.

In contrast, the instant record is rife with uncontested evidence of reasonableness. Perreira briefed the Union’s stewards in order to provide knowledge and application among the members. The Union attempted to directly advise all affected members of the Supplemental Agreement at the SWIM meetings where a synopsis of the Supplemental Agreement and the opportunity to review the document in total was provided. The delay between the execution of the Agreement and the SWIM meetings was justified by continued bargaining, logistical concerns and the desire to maximize attendance.

On the evidence presented, the Board concludes that the Union’s conduct in making its members aware of the Supplemental Agreement was reasonable, proper and

nondiscriminatory and thus did not violate its duty of fair representation. In addition, Poe was not prejudiced by the Union's conduct since Poe had actual knowledge of the Supplemental Agreement when he filed his grievance on October 23, 2002 with his supervisor rather than his department head. Poe's grievance was nevertheless forwarded to his department head for consideration in accordance with the Supplemental Agreement but was not pursued further since Poe interpreted the Supplemental Agreement in a manner which he believed interfered with his right to pursue his grievance on his own.

The complaint is therefore dismissed.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.
2. A union violates HRS § 89-13(a)(4) when it breaches its duty of fair representation to its members as provided in HRS § 89-8(a).
3. Complainant has the burden to show by a preponderance of evidence that the Union's conduct in negotiating the Supplemental Agreement which allegedly did not comport with HRS Chapter 89 and failing to notify the employees concerned was arbitrary, discriminatory, or in bad faith.
4. There is an ambiguity in Paragraph D of the Supplemental Agreement which appears to require a Union representative to be present at the grievance meeting but does not address the Union's role or function.
5. In interpreting ambiguous contract language, extrinsic evidence of intent and application may be considered.
6. According to the Union's negotiator, the Union was included in the meeting provision to ensure that any settlement reached or offered conformed to the terms of the collective bargaining agreement. As applied, the role of the Union is limited in any grievance initiated and pursued by the employee. Thus, in both intent and application, paragraph D conforms to HRS § 89-8(b).
7. Complainant failed to provide any evidence supporting his reading of the contractual provision or rebutting the Union's, and therefore did not carry his burden of proof that the Union acted arbitrarily, discriminatorily, or in bad faith. The Board concludes that Paragraph D did not violate the right of an employee to present a grievance and have the grievance heard without the intervention of the Union as the Union has a corresponding statutory right to

be present at the conferences under HRS § 89-8(b) to ensure that any adjustment made is not inconsistent with the terms of the Contract.

8. Poe failed to carry his burden in showing that Paragraph G of the Supplemental Agreement giving the "parties" to a grievance the right to jointly submit the case to mediation violates his right to pursue a grievance without intervention of the Union. There is at least an ambiguity in the contract language of Paragraph G as to the Union's role because there is no reference to the Union as a named party in mediation. And Perreira testified that the Union neither intended nor has acted as a "party" under Paragraph G for any grievance initiated by an employee without intervention of the Union.
9. The uncontested evidence in this case is that Perreira briefed the Union stewards to provide knowledge of applicability to the membership and presented the Supplemental Agreement during SWIM meetings. The delay in presenting the Supplemental Agreement is justified by continued bargaining, logistical concerns, and the desire to maximize attendance.
10. The Board concludes that the Union's conduct in making members aware of the Supplemental Agreement was reasonable, proper and nondiscriminatory and did not violate its duty of fair representation.

ORDER

The Board hereby dismisses the instant complaint.

DATED: Honolulu, Hawaii, May 1, 2003.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member


KATHLEEN R. CUYA-MARKRICH, Member

LEWIS W. POE v. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME,
LOCAL 152, AFL-CIO
CASE NO. CU-03-211
DECISION NO. 441
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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