

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CU-03-220
	)	
LEWIS W. POE,	)	DECISION NO. 442
	)	
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 May 1, 2003, LEWIS POE (Complainant or Poe), pro se, filed a prohibited practice complaint against the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) alleging that the Union failed to timely or appropriately represent his interests regarding a grievance involving a \$2.20 night differential underpayment. POE contends that the HGEA breached its duty of fair representation provided in Hawaii Revised Statutes (HRS) § 89-8(a) and violated HRS § 89-13(b)(4).

The Board conducted a prehearing conference on June 2, 2003. Thereafter on June 5, 2003, the HGEA filed a Motion to Dismiss with the Board contending that POE's underlying claim is moot. On June 6, 2003, the HGEA filed a Statement and Notice of Its Waiver of Right to Appear at and/or Present Oral Argument for Any Hearing on Respondent's Motion to Dismiss Filed on June 5, 2003, Trial Submission, and Statement and Notice of Its Waiver of Right to Appear at Trial and/or Cross-Examine Witnesses indicating that its motion, supplemented by the Trial Submission also filed on June 6, 2003 were sufficient to defend the HGEA's interests.

At the scheduled hearing on June 10, 2003, POE appeared pro se, and the HGEA did not appear. POE requested a continuance to submit a written response to the HGEA's Motion to Dismiss. The Board granted POE's request and continued the hearing on HGEA's motion to dismiss and the hearing on the merits, if appropriate, to June 18, 2003. POE filed a Memorandum-in-Opposition to HGEA's Motion to Dismiss with the Board on June 12, 2003.

At the rescheduled hearing held on June 18, 2003, POE appeared pro se, and the HGEA did not appear. POE presented argument against the HGEA's motion to dismiss. After conferring, the Board indicated its inclination to deny the HGEA's motion to dismiss the complaint. POE then presented testimony on his complaint and argument. POE also objected to the Board's consideration of the HGEA's Trial Submission as it was not introduced into evidence and he was not afforded the right to cross-examine the witnesses who submitted affidavits.

Based upon consideration 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. On or about January 20, 2001, POE filed a Step 2 grievance with his employer claiming he was underpaid \$2.20 in night differential from the period December 16, 2000 to December 31, 2000 because he worked the 3d watch on Christmas day which entitled him to overtime and night differential.
5. By letter dated February 11, 2001, POE requested the HGEA to represent him in his pending grievance because the employer had not conducted a meeting or responded to POE's individual grievance.
6. Pursuant to Hawaii Administrative Rules § 12-42-8(F), the Board takes administrative notice of Decision No. 438, Lewis W. Poe, 6 HLRB \_\_\_\_ (October 24, 2002) where the Board found that the HGEA breached its duty of fair representation by failing to respond to POE's requests for information on the status of his grievances for over two years. One of the grievances at issue concerned the alleged underpayment of night differential. The Board ordered the HGEA to cease and desist from failing to provide fair representation to POE in the processing of any future grievances and inform



POE as to the status of his grievances within 30 days from the date of the decision.

7. By letter dated November 22, 2002, Deputy Executive Director Randy Perreira informed POE of the status of his requests for arbitration and about the status of his request to file a Step 2 grievance for him on the underpayment of night differential, stating:

With respect to your grievance involving a \$2.20 underpayment error for night differential, the Union is looking into the matter.

8. Since November 22, 2002 POE was never contacted by the HGEA regarding the status of his night differential grievance and has no idea what happened to it.
9. During the course of the proceedings before the Board, the HGEA offered to pay \$2.20 to POE plus reasonable costs incurred in the filing of the instant complaint. After POE declined the offer, the HGEA waived its right to appear at the hearing on its motion to dismiss as well as the hearing on the merits of the instant complaint.
10. POE asked for an award of \$5.85 for costs incurred in bringing this complaint.

### DISCUSSION

The relevant facts of the instant proceeding are undisputed. POE claims he was underpaid \$2.20 in night differential during the period of December 16, 2000 through December 31, 2000. POE filed a Step 2 grievance with his employer on January 20, 2001 and not having met with the employer's representative or received a response, requested the HGEA to file an appropriate grievance or represent him in his pending grievance at Step 2 on February 11, 2001. On November 22, 2002, Perreira advised POE that the Union was looking into his claims involving a \$2.20 night differential underpayment. POE filed the instant complaint on May 1, 2003 claiming that the HGEA failed to apprise him of the status of his request for representation or the results of its investigation since November 22, 2002. The HGEA put forth no factual defense of its position.<sup>1</sup>

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<sup>1</sup>POE objected to the Board's consideration of Respondent Hawaii Government Employees Association, AFSCME, LOCAL 152, AFL-CIO's Trial Submission filed with the Board on June 6, 2003. Given the inability to cross examine the witnesses who submitted affidavits attached to the Trial Submission, the Board denied the introduction of the Trial Submission into the evidentiary record.

## **HGEA'S MOTION TO DISMISS THE COMPLAINT**

In its motion to dismiss the complaint, the HGEA contends that if the employer paid POE's claimed \$2.20, then POE would not have any standing to file the instant complaint because the case would be moot. While the HGEA acknowledged that the employer did not and has not responded to POE's grievance which has been pending since January 2001, the HGEA offered to pay POE \$2.20 plus reasonable costs to make POE whole and settle the instant claim contending that the HGEA's offer renders POE's claim moot. The HGEA also claims that, "[t]he question presented by POE's Complaint (i.e., whether HGEA breached its duty of fair representation relating to an employee's grievance for the employer's underpayment of Night Differential in the amount of \$2.20) is not a matter that is likely to repeat itself and evade judicial review."

POE argues that his underlying claim against the HGEA is not for the \$2.20 night differential owing from the employer but for the Union's breach of its duty to represent him in providing timely and appropriate action on his request for representation. Thus, POE contends that the HGEA has never offered to settle the claim against the HGEA in full by conceding that it breached its duty of fair representation and accordingly, the HGEA's motion to dismiss should be denied.

In considering the HGEA's arguments, the Union does not submit and the Board is unable to find any authority to support the proposition that a rejected settlement offer on these facts moots the case. The Board is therefore not persuaded by the HGEA's arguments and denies the HGEA's motion to dismiss the complaint finding that the case before it is not moot.

## **BREACH OF DUTY**

The issue is whether the Union breached the duty of fair representation by failing to apprise Complainant on the status of his request for representation in his night differential grievance since November 22, 2002.

In Decision No. 438, supra, the Board discussed the duty of fair representation stating:

"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 this case, the Union notified POE on November 22, 2002 that it was looking into his night differential grievance after having been found guilty of a prohibited practice for failing to inform him on the status of his grievances and requests for arbitration in Decision No. 438. Almost five and one-half months have elapsed between the Union's advising Complainant that it would look into the matter which had been pending without response from the employer since January 2001 and the filing of this complaint. As the HGEA presented no factual defense, the record is devoid of any competent evidence of investigations or efforts made, or of any attempt the HGEA made to contact the Complainant regarding the status of his grievance. As in Decision No. 438, given the passage of nearly six months with no communication to POE on the progress of the HGEA's investigation on the pending grievance, the Board majority finds that the HGEA's indifference to POE constitutes a prohibited practice. The Board majority finds the HGEA's inaction to be especially egregious here because it concerns the same grievance which was the subject of a prior prohibited practice charge.

Accordingly, the Board majority concludes that the HGEA violated its duty of fair representation and HRS § 89-13(b)(4), and is ordered to provide Complainant within 30 days with information including, but not limited to any investigation that was conducted in connection with his request, the status and disposition of his request for representation, and the reasons, if any, for the Union's decision and conduct. In addition, for good cause shown, the Board majority awards POE his requested costs of \$5.85.

### **CONCLUSIONS OF LAW**

1. The Board has jurisdiction over this complaint pursuant to HRS §§ 89-5(b) and 89-14.
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 inform POE as to the status of his request for representation in his night differential grievance.

### 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 his night differential grievance.
2. The HGEA shall inform Complainant in writing, whether or not the HGEA plans to pursue the subject grievance on POE's behalf; and if not, provide the reasons, and if so, provide the status of his grievance, including what efforts have been made to contact the employer to resolve the grievance, within 30 days from the date of this decision. Thereafter, if the HGEA represents POE in said grievance, the HGEA shall communicate (in writing or by telephone) its progress to him monthly.
3. The HGEA shall pay POE \$5.85 to reimburse him for his costs of filing this complaint.
4. 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.
5. 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, June 30, 2003.

HAWAII LABOR RELATIONS BOARD

  
BRIAN K. NAKAMURA, Chair

  
KATHLEEN RACUYA-MARKRICH, Member

### DISSENTING OPINION

I dissent from the majority opinion because as in Decision No. 438, I find that the underlying claim is barred by the Board's 90-day statute of limitations provided by HRS § 377-9 and made applicable by HRS § 89-14. HAR § 12-42-42. The alleged night differential underpayment occurred in December 2000. POE filed his own grievance challenging the underpayment on January 20, 2001 and requested the Union's assistance in filing a grievance on February 11, 2001. While the majority allowed POE to resurrect his claims in Case No. CU-03-203 by filing a complaint on July 9, 2002, given POE's experience in filing grievances and prohibited practice complaints, POE knew or should have known that his cause of action accrued sometime in 2001. Thus, I find that the underlying issues in this complaint to be clearly untimely and this prohibited practice charge to also be also untimely.

  
CHESTER C. KUNITAKE, Member

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Respondent.

CASE NO. CU-03-220

ERRATA FOR DECISION NO. 442

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The first sentence of Finding of Fact No. 6 on p. 2 of Decision No. 220, issued on June 30, 2003 should read:

Pursuant to Hawaii Administrative Rules § 12-42-8(g)(8)(F), the Board takes administrative notice of Decision No. 438, Lewis W. Poe, 6 HLRB \_\_\_\_ (October 24, 2002) where the Board found that the HGEA breached its duty of fair representation by failing to respond to POE's requests for information on the status of his grievances for over two years.

The reference to Hawaii Administrative Rules § 12-42-8(F) was a typographical error.

DATED: Honolulu, Hawaii, July 11, 2003.

HAWAII LABOR RELATIONS BOARD

  
BRIAN K. NAKAMURA, Chair

  
KATHLEEN RACUYA-MARKRICH, Member

LEWIS W. POE v. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME,  
LOCAL 152  
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The reference to Hawaii Administrative Rules § 12-42-8(F) was a typographical error.

DATED: Honolulu, Hawaii, July 21, 2003.

HAWAII LABOR RELATIONS BOARD

  
BRIAN K. NAKAMURA, Chair

  
CHESTER C. KUNITAKE, Member

LEWIS W. POE v. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME,  
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