

In response, Complainants, by TAYLOR, filed their Response to the Order of Particularization Requested by the Hawaii Labor Relations Board on August 13, 2001.

On August 14, 2001, Respondents ESPIRITU and UPW filed a Motion to Dismiss and/or for Summary Judgment with the Board. Respondents contend that the complaint should be dismissed for lack of standing, failure to state a claim for relief, and failure to exhaust contractual remedies. Alternatively, the UPW contends there are no genuine issues of material fact in dispute and that judgment should be entered in favor of the Union as a matter of law.

On August 15, 2001, the Board noticed a hearing on Respondents ESPIRITU's and UPW's motion to dismiss and/or for summary judgment to be held on August 29, 2001.

On August 24, 2001, Respondent Murashige filed a Motion to Dismiss or in the Alternative for Summary Judgment with the Board contending that Complainants failed to exhaust their contractual remedies and that the Board lacked jurisdiction over the matter.

On August 27, 2001, Complainants requested a 60-day continuance for the hearing because they were in the process of retaining an attorney. That same day, the Union filed an opposition to the continuance contending that the motion was not in compliance with Hawaii Administrative Rules (HAR) § 12-42-9(g)(3)(C); would delay a hearing on the merits of the complaint; and that TAYLOR was already late in her response to the pending motion and there was no valid basis for a continuance.

In Order No. 2031, the Board granted Complainants' request for continuance for 30 days for good cause and rescheduled the hearing to September 28, 2001.

Thereafter on September 25, 2001, Complainants filed a Notice of Dismissal of Complaint Without Prejudice Against Respondent Albert Murashige with the Board. Also on September 25, 2001, Complainants filed an Opposition to Respondent (sic) Eddie Espiritu and United Public Workers, AFSCME, Local 646, AFL-CIO's Motion to Dismiss and/or for Summary Judgment Filed on August 14, 2001.

In addition, on September 25, 2001, Respondents ESPIRITU and UPW filed a Motion to Strike Answering Declarations and Complainants' Opposition Papers Filed on 9/25/01 with the Board contending that Complainants filed its opposing papers more than five days after the filing of their motion to dismiss and/or for summary judgment in noncompliance with HAR § 12-42-8(g)(3)(C)(iii).²

²HAR § 12-42-8(g)(3)(C)(iii) provides:

Answering affidavits, if any, shall be served on all parties and the original and five copies, with certificate of service on all parties,

On September 27, 2001, Complainants filed an Opposition to the Respondent UPW's motion to strike answering declarations arguing that good cause exists to permit Complainants an extension of time to respond to ESPIRITU and UPW's motion to dismiss and/or for summary judgment.

The Board conducted a hearing on the instant motions on September 28, 2001 and in Order No. 2056, dated January 29, 2002, the Board granted Coleen Rafferty-Stamper and Dorothy Galia's withdrawal as Complainants as well as Murashige's dismissal as a Respondent in this matter. In addition, the Board granted partial summary judgment in favor of the Union and dismissed the allegations of contract violations by the Union because the cited contract provisions did not impose a duty upon the Union. However, as Complainants' particularization of the complaint included allegations of coercion or interference with statutory rights and the Union's breach of its duty of fair representation, the Board permitted Complainants to file a First Amended Complaint within ten days.

On February 11, 2002, Complainants filed a First Amended Prohibited Practice Complaint with the Board and on February 12, 2002, Respondents filed a Motion for Particularization of the Amended Complaint contending that insofar as the Amended Complaint realleges a violation of HRS § 89-13(b)(5), the complaint is contrary to Order No. 2056 and otherwise vague requiring particularization. Respondents also moved for sanctions against Complainants' counsel for contemptuous conduct.

The Board conducted a hearing on the motions on March 7, 2002 and in Order No. 2070, dated March 15, 2002, the Board denied the Union's motion for particularization. In addition, the Board clarified that it had dismissed the allegations of HRS § 89-13(b)(5) violations in Order No. 2056 and additionally dismissed allegations of HRS §§ 89-13(b)(2) and (3) for failure to state a claim. The remaining claims before the Board allege violations of HRS §§ 89-13(b)(1) and (4), and 89-8.

On March 21, 2002, Respondents ESPIRITU and UPW filed a Motion to Dismiss First Amended Complaint and/or for Summary Judgment. The Union contends that the Amended Complaint should be dismissed for failure to state a claim for relief and alternatively, there are no genuine issues of material fact in dispute and the Union is entitled to judgment as a matter of law. The Union argues that the Complainants fail to state a claim for relief because the gravamen of the complaint is the denial of K-Pay or overtime which is not a right guaranteed under HRS Chapter 89. In addition, the Union argues that there is no breach of the duty of fair representation because the Union reasonably decided not to pursue a scheduling grievance after the employer agreed to a reselection process.

shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise.

Thereafter, on March 28, 2002, Complainants filed an opposition to the motion with the Board. Complainants contend, inter alia, that the Union interfered with their statutory rights to present a grievance to the employer and engaged in conscious and knowing indifference to violate the provisions of HRS Chapter 89.

The UPW filed a Reply Brief on April 1, 2002. The Board conducted a hearing on the motion on April 2, 2002 where the parties had full opportunity to present argument to the Board. After a thorough review of the record and the oral and written arguments of counsel, the Board makes the following findings of fact, and conclusions of law, and hereby grants the Union's Motion to Dismiss the First Amended Complaint and/or for Summary Judgment.

FINDINGS OF FACT

1. TAYLOR (TAYLOR), CANDICE SIGRAH, MARIE AHUNA, SHELLY FERNANDEZ, MELANIE MANARPAAC, and GAIL TORRES are ACOs at Maui Community Correctional Center (MCCC), Department of Public Safety (PSD), State of Hawaii and as such, are public employees within the meaning of HRS § 89-2.
2. The UPW is the certified exclusive representative, within the meaning of HRS § 89-2, of employees included in bargaining unit 10. ESPIRITU is the UPW Maui Division Director and represents the UPW; ESPIRITU has handled grievances for PSD employees in Unit 10 since 1994.
3. The UPW and the State of Hawaii are parties to a collective bargaining agreement covering Unit 10 employees and which contains a grievance procedure in Section 15 and requirements for scheduling ACOs in Section 61.
4. Section 15.10 of the applicable agreement provides:

In the event the grievance is not satisfactorily resolved on an informal basis, the grieving party and/or the Union may file a formal grievance by completing the grievance form provided by the Union.
5. Section 61.04 of the applicable agreement provides for Shift Work--Adult Correction Officers and provides in Section 61.04a.5:

The work schedule shall be presented to Employees commencing in Work Unit or Workplace seniority order for

each classification twelve (12) weeks prior to the beginning of the work scheduled.

6. Section 61.04a.6 provides:

Employees shall have three (3) weeks to exercise their choices of work days, days off, shifts and posts, however, in choosing work days, days off, shifts and posts each Employee is required to select the same work days, days off, shifts and posts for each work week of the twelve (12) week period, subject to the manpower coverage, contractual restrictions and limitations in order of Work Unit or Workplace seniority for each classification.

7. From May 21, 2001 to May 25, 2001, the ACOs made their initial selection for the proposed 12-week schedule from August 5, 2001 to October 27, 2001. The order of seniority for the affected ACOs at MCCC was as follows:

No.	Name	Seniority
1.	Laverne Morton	3/6/92
2.	Deborah Pike	3/3/94
3.	Joanne Manintin	6/20/94
4.	Candice Sigrah	6/30/97
5.	Deborah Taylor	6/30/97
6.	Colleen Rafferty	5/4/98
7.	Marie Ahuna	7/12/98
8.	Shelly Fernandez	5/9/00
9.	Dorothy Galima	5/9/00
10.	Melanie Manarpaac	5/9/00
11.	Norine Nam	5/9/00
12.	Gail Torres	5/9/00

8. On or about May 29, 2001, the work schedule was posted on the bulletin board.

9. On June 15, 2001 Chief of Security Albert Murashige (Murashige) granted a hardship transfer for ACO Debra Segich and on June 27, 2001, Murashige granted a hardship transfer for ACO Marla Bondaug. The transfers created openings in the assigned posts.

10. On June 26, 2001 Murashige reassigned ACOs Laverne Morton (Morton) and TAYLOR to the posts that were vacated.

11. On or about July 27, 2001, ESPIRITU received a call from Morton, the most senior of the ACOs on the list, complaining that because of the two hardship transfers, the employer had changed her post.
12. TAYLOR also complained to ESPIRITU on or about June 27, 2001. TAYLOR is fifth on the seniority list.
13. Based on Morton's complaint, ESPIRITU contacted the employer on or about June 28, 2001 to review the situation contending that Morton's seniority would be violated if MCCC did not respect her choice of shifts and posts.
14. On or about June 29, 2001, ESPIRITU briefed UPW State Director Gary Rodrigues (Rodrigues) on the scheduling complaint and Rodrigues informed ESPIRITU that Morton's complaint had merit because of her seniority and Section 61.04a.6 of the Unit 10 agreement had been violated. Rodrigues advised ESPIRITU that reselection was the appropriate resolution as provided in Sections 61.04a.10 and 26.02 since the employer could make appropriate modifications prior to the posting of schedules "to avoid violations" of the agreement.
15. On or about June 29, 2001 MCCC decided to have a reselection for nine affected ACOs which was completed during the period June 29-30, 2001. The process was based upon seniority and constituted the adjustment of the informal grievance presented by Morton.
16. On July 2, 2001, TAYLOR told ESPIRITU that they had to reselect posts contrary to the contract which states that the employer has two weeks to make changes in the schedule. ESPIRITU told her the fairest way to resolve the dispute was to re-do the selection and when confronted further said that they could go back to the way it was (before the reselection) and have Morton and TAYLOR work the posts and not get a "K" (overtime pay).
17. On July 5, 2001, ESPIRITU informed TAYLOR that he did not believe the employer violated the Unit 10 agreement by undertaking the reselection in accordance with seniority because MCCC made the adjustment to avoid initial violations of the agreement and that the schedule to be posted effective August 5, 2001 was consistent with seniority rights of the ACOs.
18. When ESPIRITU informed Rodrigues that the employer implemented the reselection process and certain ACOs questioned whether there had been compliance with Section 61.04a and indicated a desire to proceed with a grievance, Rodrigues advised ESPIRITU not to file a grievance because the violation of the Unit 10 agreement caused by the employer's selection of

Morton after the two employees had been transferred had been corrected by the reselection process. Rodrigues advised ESPIRITU to inform the employees who disagreed that they could file an "employee grievance" as provided in Section 15.03a within eighteen calendar days of the effective date of the schedule (August 5, 2001).

19. In late July 2001, Complainants were advised by the Maui division office of UPW that scheduling grievances could be filed by employees with MCCC and on July 24, 2001, SIGRAH gave eight grievances to ESPIRITU's office to forward to Ted Sakai. SIGRAH was told to forward the grievances herself on July 31, 2001.
20. Rodrigues learned that the employees had filed a timely grievance with Ted Sakai.
21. The Board finds that pursuant to a complaint from ACO Morton (the most senior ACO) arising from MCCC's reassignment of posts caused by the transfer of two ACOs, the employer and UPW agreed to reselect posts. The UPW believed that the MCCC's initial reassignment of posts violated the contract and sought to fairly adjust the complaint made by Morton by reselecting posts.
22. Accordingly, the Board finds the UPW did not act outside the bounds of reasonableness in refusing to pursue a grievance by Complainants as the action complained of, the reselection of posts, was the result of the grievance adjustment sought pursuant to Morton's informal grievance.
23. In addition, the UPW advised the Complainants to file a grievance with the employer, which the Complainants did.
24. The UPW has no right to grant overtime to ACO's and concomitantly, no power to deny overtime to any ACO.

DISCUSSION

Complainants contend that the UPW threatened them regarding K-Pay or overtime and in addition, interfered with and coerced them in exercising their right to present a grievance at any time to the employer guaranteed by HRS § 89-8(b). In addition, Complainants allege that the UPW breached its duty of fair representation.

In its motion to dismiss or alternatively for summary judgment, the Union argues that the complaint should be dismissed because the gravamen of the instant complaint

is the denial of K-Pay or overtime which is not a right guaranteed under HRS Chapter 89. The UPW therefore contends Complainants failed to state a claim for relief because the UPW has not interfered with or coerced them regarding a right guaranteed under Chapter 89 as prohibited by HRS § 89-13(b)(1). In addition, the Union argues that there is no breach of the duty of fair representation because the Union reasonably decided not to pursue a scheduling grievance after the employer agreed to a reselection process to adjust a complaint raised by the UPW.

Duty of Fair Representation

The Board discussed the Union's duty of fair representation in Order No. 2105, dated August 8, 2002, in Helen L. Gabriel, Case Nos. CU-01-189, CE-01-493, stating:

The duty of fair representation embodied in HRS § 89-8(a) is twofold. First, the exclusive representative is mandated "to act for and negotiate agreements covering all employees in the unit." Second, the exclusive representative must "be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership."

In the instant complaint, the burden of proof is on GABRIEL to show by a preponderance of evidence that: 1) the decision not to proceed to arbitration was arbitrary, discriminatory or in bad faith. Sheldon S. Varney, 5 HLRB 508 (1995). See also, Vaca v. Sipes, 386 U.S. 171, 190-191, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). "[A] union's conduct is 'arbitrary' if it is 'without rational basis,'...or is 'egregious, unfair and unrelated to legitimate union interests.'" Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir. 1985).

The U.S. Supreme Court in Airlines Pilots Ass'n. Intern. v. O'Neill, 499 U.S. 65, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991) (O'Neill), held that "a union's actions are arbitrary only if, 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." Id., at 67. The Court's holding in O'Neill reflects that a deferential standard is employed as to a union's actions. They may be challenged only if "wholly irrational." Id., at 78. In carrying out its duty of fair representation, an unwise or even an unconsidered decision by the union is not necessarily an irrational decision. Id.

Simple negligence or mere errors in judgment will not suffice to make out a claim for a breach of the duty of fair representation. Farmer v. ARA Services, Inc., 660 F.2d 1096, 108 LRRM 2145 (6th Cir 1981); Whitten v. Anchor Motor Freight, Inc., 521 F.2d 1335, 1341, 90 LRRM 2161 (6th Cir. 1975).

A union does not breach its duty of fair representation when it exercises its “judgment” in good faith not to pursue a grievance further, Stevens v. Moore Business Forms, Inc., 18 F.3d 1443, 1447, 145 LRRM 2668 (9th Cir. 1994) (Stevens), or by acting negligently, Patterson v. International Brotherhood of Teamsters, Local 959, 121 F.3d 1345, 1349, 156 LRRM 2008 (9th Cir. 1997). As explained in Stevens:

... A union’s decision to pursue a grievance based on its merits or lack thereof is considered an exercise of its judgment. (Citations omitted.) “We have never held that a union has acted in an arbitrary manner where the challenged conduct involved the union’s judgment as to how best to handle a grievance. To the contrary, we have held consistently that unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances.” (Citations omitted). 18 F.3d at 1447. [Emphasis added.]

And where a union’s judgment is in question, complainant “may prevail only if the union’s conduct was discriminatory or in bad faith.” Moore v. Bechtel Power Corp., 840 F.2d 634, 127 LRRM 3023 (9th Cir. 1988).

Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact in dispute and, therefore it is entitled to judgment as a matter of law. State of Hawai`i Organization of Police Officers (SHOPO) v. Society of Professional Journalists - University of Hawai`i Chapter, 83 Hawai`i 387, 389, 927 P.2d 386 (1996). A fact is material if proof of that fact would have the effect of establishing or refuting the essential elements of a cause of action or defense asserted by the parties. Konno v. County of Hawai`i, 85 Hawai`i 61, 937 P.2d 397 (1997).

In the instant case, having viewed the facts in the First Amended Complaint in a light most favorable to Complainant, the Board concludes that there are no genuine material issues of fact in dispute and the Union is entitled to summary judgment in its favor. The record establishes that the UPW investigated the complaints raised by Morton and TAYLOR caused by MCCC's unilateral reassignment of posts due to the transfer of two ACOs. Thereafter, there is no dispute that Rodrigues and ESPIRITU agreed that the contract was violated as to Morton, the senior employee, and believed that the fairest way to resolve the post assignments was to redo the post selections. There is also no dispute that MCCC agreed with the UPW and redid the selection of posts to resolve the informal grievance brought by Morton. Thereafter, Complainants complained to ESPIRITU that the reselection was not in accordance with the Unit 10 contract and sought his assistance to file a grievance. It is undisputed that ESPIRITU provided Complainants with grievance forms and advised them to file them on their own with the employer, which they did.

In a similar case where an employee challenged the resolution of a grievance pursued by the union, Kathleen M. Langtad, 6 HLRB182 (2001), the Board concluded that the union's refusal to file an employee's grievance because it believed the administrative action returning her to her position was properly done to correct a promotion grievance for a co-worker and was not so far outside the wide range of reasonableness, as to be irrational under O'Neill, *supra*. Further, in Order No. 1071, dated May 23, 1994, Case Nos.: CE-10-179, CU-10-87, Linda E. Moga Rivera, this Board found that a union did not breach its duty of fair representation when it refused to overturn a settlement agreement entered into to resolve a class grievance which resulted in the demotion of its union member initially selected for the promotion. The Board applied the O'Neill test, to find that the union acted within the range of reasonableness where the promotions were awarded to other employees.

And, in Benson v. Communications Workers, 150 LRRM 2143 (E.D. Va. 1994), the court held that the union did not breach its duty of fair representation to an employee who was demoted as a result of a promotion grievance pursued by the union for another member that resulted in an arbitration award favoring the grievant. In that case the union failed to provide the employee with notice of, or opportunity to be heard at any stage. The union's pursuit of the promotion grievance was found to be reasonable, despite the union's indifference to the employee who was ultimately demoted. The court reasoned that the union had the right and obligation to advance collective interests even though it must choose between opposing interests. "Specifically, the union's duty of fair representation did not require it to do more than articulate and pursue a non-arbitrary interpretation of the Agreement although the successful pursuit of its interpretation would detrimentally affect one of its members." *Id.* at 2145.

Thus, based on the foregoing, the Board finds that the UPW's handling of Complainants' requests to file a grievance was not arbitrary, discriminatory, or in bad faith.

Therefore, UPW did not breach its duty of fair representation to them. Moreover, as the UPW advised the employees to file their own grievances which the employees, in fact, did, the Board concludes that UPW did not interfere with the employees' right to file their own grievances with the employer in violation of HRS § 89-13(b)(1).

CONCLUSIONS OF LAW

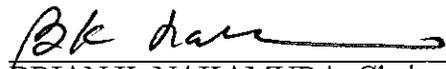
1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-14 and 89-5.
2. The UPW did not interfere with the Complainants' rights to file a grievance on their own behalf. The record is undisputed that the UPW advised Complainants to file their own grievances which they, in fact, did. Therefore, the Board concludes that the UPW did not violate HRS § 89-13(b)(1).
3. The breach of duty of fair representation is a prohibited practice in violation of HRS §§ 89-13(b)(4) and 89-8(a), when the union's conduct is arbitrary, discriminatory or in bad faith.
4. Based on the entire record, the Board concludes there are no genuine issues of material fact in dispute and Respondents are entitled to summary judgment in favor; i.e., that the UPW did not breach its duty of fair representation to Complainants by deciding that they would not pursue a grievance on their behalf and notifying them to that extent. The Board concludes that Respondents' conduct was nonarbitrary or nondiscriminatory when it refused to represent Complainants in their grievances over the reselection of posts due to the resolution of an informal grievance by the senior ACO.

ORDER

The instant First Amended Complaint is hereby dismissed.

DATED: Honolulu, Hawaii, October 21, 2002.

HAWAII LABOR RELATIONS BOARD



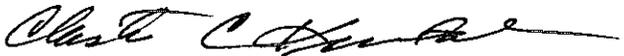
BRIAN K. NAKAMURA, Chair

DEBORAH TAYLOR; CANDICE SIGRAH; MARIE AHUNA; SHELLY FERNANDEZ;
MELAINÉ MANARPAAC; and GAIL TORRES and EDDIE ESPIRITU and UNITED PUBLIC
WORKERS, AFSCME, LOCAL 646, AFL-CIO

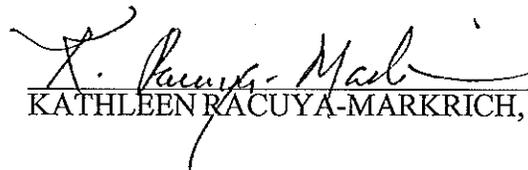
CASE NO. CU-10-184

ORDER NO. 2126

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS FIRST AMENDED
COMPLAINT AND/OR FOR SUMMARY JUDGMENT



CHESTER C. KUNITAKE, Member



KATHLEEN RACUYA-MARKRICH, Member

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