

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-03-208
LEWIS W. POE,)	ORDER NO. 2144
)	
Complainant,)	ORDER GRANTING SUMMARY JUDG-
)	MENT IN RESPONDENT'S FAVOR
and)	AND DISMISSING COMPLAINT
)	
HAWAII GOVERNMENT EMPLOYEES)	
ASSOCIATION, AFSCME, LOCAL 152,)	
AFL-CIO,)	
)	
Respondent.)	

ORDER GRANTING SUMMARY JUDGMENT
IN RESPONDENT'S FAVOR AND DISMISSING COMPLAINT

On September 10, 2002, Complainant Lewis W. Poe (Complainant) filed the instant Prohibited Practice Complaint alleging that the Hawaii Government Employees Association (HGEA or Union) violated Hawaii Revised Statutes (HRS) §§ 89-13(b)(4) and (5) by its failure to include a time of execution on its published version of the Bargaining Unit 03 contract, and its publication of what Complainant alleges is an invalid version of Article XI, the grievance procedure.

On October 15, 2002, Respondent filed a Motion to Dismiss Prohibited Practice Complaint asserting a failure to state a claim for which relief could be granted. Complainant filed a timely opposition and on October 30, 2002 the Board conducted a hearing on the Motion.¹

After full and fair consideration of the arguments presented, the Board hereby dismisses Poe's complaint.

¹At the conclusion of the hearing, the Board orally indicated that it was inclined to grant the motion to dismiss with regard to the Article 3 allegations but inclined to deny the motion with regard to the Article 11 allegations. However, upon further review of the record, including the relevant contract provisions which were not provided the Board as part of the submitted record, the Board, in its final written decision on the matter, see, Hawaii Administrative Rules § 12-42-50 ("The board shall prepare a decision setting forth... (its) order dismissing or sustaining the complaint, in whole or in part."), hereby dismisses the complaint in total.

Undisputed Facts

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, have been parties to a BU 03 Collective Bargaining Agreement (Contract).
4. Article 3 of the Contract currently in effect provides as follows:

Except as modified herein, Employees shall retain all rights and benefits pertaining to their conditions of employment as contained in the departmental and Civil Service rules and regulations and Hawaii Revised Statutes at the time of execution of this Agreement, but excluding matters which are not negotiable under Chapter 89, HRS.
5. The Contract does not identify a date of execution. Article 56 of the Contract does, however, identify a duration effective "as of July 1, 1999, and shall remain in effect to and including June 30, 2003."
6. Article 11 of the Contract contains the grievance procedure currently in effect.
7. In September 1994, Complainant filed Case No. DR-03-55 with the Board contesting the grievance procedure contained in the Contract in effect from July 1, 1993 to June 30, 1997. In that case, Complainant asserted that the grievance procedure of the Contract violated the right of employees to grieve without intervention of the Union as provided by HRS § 89-8(b).
8. During the consideration of Complainant's filing, the HGEA addressed the substance of Complainant's concerns by entering into a memorandum of agreement (1995 MOU) with the Employer on August 2, 1995 which amended the then applicable Article 11 as follows:

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. By mutual consent of the Employee or the Union and the Employer, any time limits within each step may be extended. Any relevant information specifically identified by the [grievant] Employee or the Union in the possession of the Employer needed by the [grievant] Employee 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 appropriate supervisor 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 designee in writing within twenty (20) working days after the alleged error is discovered by the [e]Employee, or the grievance may not be considered.

B. An individual Employee may present a grievance [to the Employee's immediate supervisor, and have the grievance heard] without intervention of the Union, up to and including Step 3, provided the Union has been afforded an opportunity to be present at the [conference(s)] meeting(s) on the grievance. 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 within each step may be extended.]

C. Informal Step. A grievance shall, whenever possible, be discussed informally between the Employee and the immediate supervisor within the twenty (20) working day limitation provided for in paragraph "A" above. The [grievant] Employee may be assisted by a Union representative. If the immediate supervisor does not reply by seven (7) working days, the Employee or the Union may pursue the grievance to the next step.

D. Step 1. If the [grievant is not satisfied with the result of the informal conference] grievance is not satisfactorily resolved at the informal step, the [grievant] Employee or the Union may submit a written statement of the grievance within seven (7) working days after [receiving the answers] receipt of the reply to the informal complaint to the division head or 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 division head or 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 immediate supervisor, the Employee or the Union may submit a written statement of the grievance to the division head or designee within the twenty (20) working day limitation provided for in paragraph "A" above.

A meeting to discuss the grievance shall be held [between the grievant and a Union representative with the division head or designee] within seven (7) working days after receipt of the written grievance [is received]. Either side may present witnesses. The division head or designee shall [submit a written answer to the grievant or] reply in writing to the Employee and the Union within (7) working days after the meeting.

E. Step 2. If the grievance is not satisfactorily resolved at Step 1, the [grievant] Employee or the Union may appeal the grievance in writing to the department head or designee within seven (7) working days after [receiving the written answer] receipt of the reply at Step 1. The department head or designee need not consider any grievance in Step 2 which encompasses different alleged violations or charges than those presented in Step 1.

A meeting to discuss the grievance shall be held within seven (7) working days after receipt of the appeal. The department head or designee shall reply in writing to the [grievant or] Employee and the Union within seven (7) working days after the meeting.

F. If the Union has a class grievance involving Employees within a department, it may submit the grievance in writing to the department head or designee. Time limits shall be

the same as in individual grievances, as prescribed in Paragraph "A", and the procedures for appeal [from unsatisfactory answer] shall be the same as in Step 3.

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 and/or the respective Mayors, or their designees, as the case may be. Time limits shall be the same as in individual grievances, as prescribed in Paragraph "A", and the procedures for appeal [from unsatisfactory answers] shall be the same as in Step [3] 4.

G. Step 3. If the grievance is not satisfactorily resolved at Step 2, the [grievant] Employee or the Union may appeal the grievance in writing to the Employer or designee within seven (7) working days after receipt of the [answer] reply at Step 2. [Within seven (7) working days after the receipt of the appeal, the Employer and the Union shall meet in an attempt to resolve the grievance.] The Employer or designee need not consider any grievance in Step 3 which encompasses [a] different alleged [violation or charge] violations or charges than those presented in Step 2.

A meeting to discuss the grievance shall be held within seven (7) working days after receipt of the appeal. The Employer or designee shall reply in writing to the [grievant or] Employee and the Union within seven (7) working days after the meeting.

H. Step 4. Arbitration. If the grievance is not satisfactorily resolved at Step 3 and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or designated representative of its desire to arbitrate within (10) working days after receipt of the [Employer's decision] reply at Step 3. 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 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 findings show 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 this Agreement.

3. The Arbitrator shall not consider any alleged violations or charges other than those presented in Step 3.

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.

9. Article 11 of the collective bargaining agreement currently in effect is identical to the 1995 MOU except for the inclusion of the sentence, "By mutual consent of the Union and Employer, any time limits within each step may be extended" at the conclusion of paragraph B.
10. The 1995 MOU had deleted the included sentence and had instead included a sentence in paragraph A, "By mutual consent of the Employee or the Union and the Employer, any time limits within each step may be extended." The latter provision remains a part of the currently applicable agreement.

DISCUSSION

Complainant alleges that the HGEA has committed a prohibited practice in violation of HRS §§ 89-13(b)(4) and (5)² by virtue of the Union's failure to identify the date and time of execution, and the inclusion of the existing language regarding the grievance process (Article 11), in the collective bargaining agreement.

Respondent, in its motion to dismiss, argues that these allegations, even if true do not state a claim upon which relief can be granted, see, Hawaii Rules of Civil Procedure (HRCP) Rule 12(b)(6), so that dismissal is required. Such a dismissal is generally disfavored but warranted "if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts entitling a plaintiff to relief." Bertelmann v. Taas Associates, 69 Haw. 95, 99, 735 P.2d 930 (1987).

Complainant alleges in his complaint that the Union violated, *inter alia*, HRS § 89-13(b)(5) by violating the terms of the collective bargaining agreement but does not

²HRS § 89-13(b) provides in part:

§ 89-13 Prohibited practices; evidence of bad faith.

* * *

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

* * *

- (4) Refuse or fail to comply with any provision of this chapter; or
- (5) Violate the terms of a collective bargaining agreement.

identify any term that may have been violated or adverse effects that might have flowed from any violation. Instead he argues simply that the incomplete nature of one provision and inclusion of another constitute a prohibited practice. The Board cannot identify, and Complainant does not allege, any way in which such errors might constitute a wilful contract violation. If anything, any error occurred in the course of bargaining rather than execution. Accordingly, the Board must dismiss the HRS § 89-13(b)(5) claim.

Complainant does, however, raise a more colorable claim in his HRS § 89-13(b)(4) allegation. The provision, which requires compliance with Chapter 89, incorporates the union's duty of fair representation to its members. Kathleen M. Langtad, 6 HLRB 423 (2001) This duty 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, if the Union breached its duty in the course of bargaining through the allegedly wrongful exclusion of an effective date and inclusion of Article 11, a claim of a violation of HRS § 89-13(b)(4) may exist.

This does not, however, end consideration of the instant motion. For while both parties referred to both Articles 3 and 11 of the collective bargaining agreement, neither party provided the Board with the content of the Articles in either their pleadings or briefs. In order to fully consider the instant motion, the Board has taken notice³ of the language of both Articles. This consideration of matters outside the pleadings requires the motion to be treated as one for summary judgment. See, HRCP Rule 12(b)(6); Hall v. State, 7 Haw.App. 274, 756 P.2d 1048 (1988) (When matters outside the pleadings are considered order of dismissal reviewed as one granting summary judgment.) Accordingly, the controlling inquiry is whether there is no genuine issue of material fact and the case can be decided solely as a matter of law. Kajiya v. Dept. of Water Supply, 2 Haw.App. 221, 629 P.2d 635 (1981).

We have concluded above that the Complainant has implicitly stated a claim that the Union failed its duty of fair representation by negotiating the allegedly defective Articles. 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).

The Board concludes, that there are no material facts which would carry Complainant's burden. This is because we further conclude that the alleged errors on the part of the Union are, if anything, *de minimus*.

³HAR § 12-42-8(g)(8)(F) provides, "The board may take notice of judicially recognizable facts."

Complainant argues that the exclusion of a date/time of execution represents a prohibited practice. Article 3, "Maintenance of Rights and Benefits," indeed purports to preserve employees' rights and benefits that are extrinsic to the contract "at the time of execution of this agreement," and the contract does not identify the time of its execution. Complainant argues that this omission deprives employees of adequate notice of the actual content of the preserved rights. He does not, however, even suggest, and the Board cannot identify, any right or benefit which may be ambiguous or threatened.

The Board finds that the language of Article 3 expressly and unequivocally expresses and manifests the intent of the parties to the contract. The omission of the time of execution is, if anything, a minor ambiguity which can be relatively easily resolved through a simple factual inquiry or, if necessary, the grievance process. Its omission in no way prejudices members and therefore could not rise to the level of a prohibited practice.

Complainant further alleges that differences between Article 11 and the 1995 MOU constitutes a prohibited practice. Upon review of the relevant texts the Board finds that the only difference between the documents is the addition of the sentence, "By mutual consent of the Union and Employer, any time limits within each step may be extended" in Article 11.

It is apparent that the intent of the 1995 MOU was to preserve the statutory right of individual employees to pursue their own grievances without the intervention of the Union.⁴ Accordingly, contractual prerogatives in the grievance process that had been exclusively reserved to the Union were expanded to include individually grieving employees. The contested sentence in Article 11 had been removed in the 1995 MOU and replaced at a preceding location (Section A) with the same sentence amended by providing the employee and the Union with the opportunity to reach mutual consent to extend time limits. The amended relocated sentence remains part of Article 11. Thus the Article at one point gives both the employee and Union the power to negotiate extensions of time, and at another point appears to reserve it to the Union alone.

⁴HRS § 89-8(b) provides:

§ 89-8 Recognition and representation; employee participation.

(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; 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.

Again, this is at most a simple ambiguity which can almost certainly be resolved through a simple procedural inquiry. The Complainant has not suggested, and the Board cannot identify, circumstances under which this ambiguity might have resulted from arbitrary, capricious or discriminatory conduct on the part of the Union.

Accordingly, the Board hereby grants summary judgment in favor of Respondent and dismisses the instant complaint.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.
2. Dismissal for failure to state a claim for relief is warranted if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts entitling a plaintiff to relief.
3. The Board concludes that Complainant failed to state a claim for relief against the Union under HRS § 89-13(b)(5) by the failure to include the execution date in the agreement or inclusion of language in Article 11 because he failed to identify any contractual term which may have been violated and any adverse effects from any alleged contractual violation.
4. Based on the entire record, and viewing the facts in the light most favorable to the Complainant, the Board concludes there are no genuine issues of material fact in dispute to show the Union breached its duty of fair representation to Complainant in violation of HRS § 89-13(b)(4) by failing to include the date/time of execution in the contract and by including a provision which is different from the provision actually negotiated. The Board further concludes that the alleged errors on the part of the Union are, if anything, *de minimus*.

ORDER

The Board hereby dismisses the instant complaint.

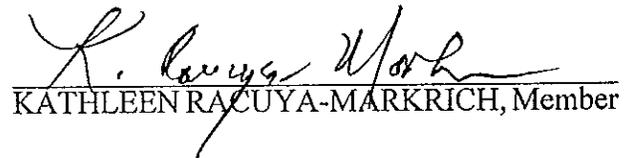
LEWIS W. POE and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME,
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DATED: Honolulu, Hawaii, January 7, 2003

HAWAII LABOR RELATIONS BOARD


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