STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of RICHARD K. CONDON, Complainant, and SANFORD CHUN, Field Supervisor, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Respondents.	CASE NO. CU-03-240 ORDER NO. 2334 ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

On April 5, 2005, Complainant RICHARD K. CONDON (CONDON) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board). CONDON alleges that Respondents SANFORD CHUN (CHUN), Field Supervisor, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA) and the HGEA (collectively Union) committed a prohibited practice in violation of Hawaii Revised Statutes (HRS) §§ 89-13(b)(2), (3), (4), and (5). CONDON's complaint states:

> Complainant contends Respondent fails to take the attached grievance to arbitration.
>
> Respondent acknowledges they are processing it for arbitration, however it has been HGEA's practice to not assign it to a (sic) attorney until a prohibited practice complaint is filed.
>
> REMEDY: Assign the case to an attorney for arbitration

On April 18, 2005, the Union filed Respondent's Motion to Dismiss and/or for Summary Judgment. The Union contends that the instant complaint should be dismissed for lack of jurisdiction and the failure to state a claim upon which relief can be granted. Alternatively, the Union contends that there are no genuine issues of material fact in dispute and it is entitled to judgment as a matter of law.

On May 17, 2005, the Board held a hearing on the motions. CONDON appeared pro se and the Union was represented by counsel. The parties were allowed full opportunity to argue their respective positions before the Board. After a thorough review of the record in the case, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. CONDON is a public employee, within the meaning of HRS § 89-2, in bargaining unit 03. CONDON has filed several prohibited practice complaints with the Board and has proceeded pro se in those cases.

2. Respondent HGEA is an employee organization and the exclusive representative, within the meaning of HRS § 89-2, of the employees in bargaining unit 03. CHUN is an HGEA Field Supervisor and is deemed to represent the interests of the HGEA.

3. The HGEA and the public employer are parties to a collective bargaining contract which contains a grievance procedure, culminating in arbitration at Step 4, which only the union can invoke.

4. The HGEA filed an intent to arbitrate with the employer after the completion of Step 3. Prior to proceeding to arbitration, the exclusive representative has a business decision to make whether to have the case assigned to a staff member or an attorney to represent the union in arbitration.

DISCUSSION

CONDON alleges violation of HRS §§ 89-13(b)(2), (3), (4), and (5) and brings this complaint seeking to have the Board order the HGEA to assign an attorney to represent him at arbitration. The statutes provide in pertinent part as follows:

> (b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
>
> * * *
>
> (2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;

(3) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in section 89-11;

(4) Refuse or fail to comply with any provision of this chapter; or

(5) Violate the terms of a collective bargaining agreement.

HRS §§ 89-13(b)(2) and (3)

With regard to the violations of HRS §§ 89-13(b)(2) and (3), the Board finds that CONDON lacks standing to bring these claims. In previous rulings the Board has held that the violations referred to in these provisions of the statutes normally occur during the collective bargaining process where the employer alleges that the union is not negotiating in good faith or participating in the impasse process of the negotiation provisions of the chapter. See, Thomas Lepere, 5 HLRB 263 (1994).[1] Since, CONDON is neither an "employee organization" nor a "public employer" as defined by HRS § 89-2, he lacks standing to maintain the HRS §§ 89-13(b)(2) and (3) allegations against the Union. Thus, the Board dismisses CONDON's alleged violations of HRS §§ 89-13(b)(2)and (3).

Failure to State a Claim for Relief

"The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993). A dismissal is clearly warranted under Rule 12(b)(6), HRCP, if the claim is clearly without merit due to "an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or of disclosure of some fact which will necessarily defeat the claim." Rosa v. CWJ Contractors, Ltd., 4 Haw.App. 210, 215, 664 P.2d 745 (1983) (internal quotes and citation omitted). 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). While the allegations

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[1]HRS § 89-13(b)(2) prohibits an employee organization from refusing to bargain with the public employer as required in HRS § 89-9. A refusal to bargain charge is properly raised by a public employer who has the reciprocal duty to bargain in good faith. Similarly, HRS § 89-13(b)(3) prohibits an employee organization from refusing to participate in the mediation, fact-finding, and arbitration procedures in HRS § 89-11. These procedures in HRS § 89-11 refer to the impasse resolution mechanism for interest arbitrations involving the terms of the contract rather than the grievance procedures which involve the violation or interpretation of the collective bargaining agreements.

in the complaint are deemed true, the court is not required to accept conclusory allegations on the legal effect of the events alleged. Marsland v. Pang, 5 Haw.App. 463, 474, 701 P.2d 175 (1985).

With regard to the remaining charges in his complaint and his arguments before the Board, it is clear that CONDON is using the Board's processes to require the Union to assign an attorney to represent him in his grievance. While HRS § 89-10 permits the parties to negotiate a collective bargaining agreement which provides for a grievance procedure culminating in an arbitration decision, neither the statute nor the applicable agreement provides that the union must provide counsel to represent a grievant in arbitration. Thus on the face of the complaint, the Union's failure to provide CONDON with counsel does not violate HRS §§ 89-13(b)(4) and (5).

Duty of Fair Representation

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."

The burden of proof is on the complainant-employee 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).

"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).

The U.S. Supreme Court in Air Line 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). Proof of union error due to negligence, inefficiency, inexperience, or even a misguided interpretation of contract provisions will not suffice. Bruce J. Ching, 2 HPERB 23 (1978).

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 processing of grievances." (Citations omitted). 18 F.3d at 1447.

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).

The employee's right to have counsel provided by the Union was addressed by the court in Lettis v. U.S. Postal Service, 39 F.Supp.2d 181, 198 (E.D.N.Y. 1998), which stated:

> A grievant has no right to a private attorney, or to require a union to utilize a lawyer, at an arbitration. Henry v. Community Resource Center, Inc., No. 95 Civ. 5480, 1996 WL 251845, at 8 (S.D.N.Y. May 13, 1996) (rejecting the plaintiff's argument that she was entitled to an attorney and citing to cases in other circuits holding same); see also Baxter v. United Paperworkers Int'l Union, Local 7370, 140 F.3d 745, 747 (8th Cir. 1998).

In addition, in Patterson v. International Broth. of Teamsters, Local 959, 121 F.3d 1345 (9th Cir. 1997), the court stated:

> Patterson points to several other instances of Local 959's alleged breach of its duty of fair representation. None, however, has any merit. Local 959 was not required to assign an attorney to represent Patterson during his arbitration proceedings, see Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1483 (9th Cir.1985), and it did not have an obligation to advise Patterson of his ability to further pursue a civil action--particularly in light of the weakness of Patterson's case. Cf. Galindo v. Stoody Co., 793 F.2d 1502, 1513 (9th Cir.1986) (stating a union "need not process a meritless grievance").

Also in Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1483 (9th Cir. 1985), the court stated:

> Decisions in other circuits hold that it is for the union to decide the circumstances under which an attorney will be supplied to a grievant. Del Casal v. Eastern Airlines, Inc., 634 F.2d 295, 301 (5th Cir.), *cert. denied,* 454 U.S. 892, 102 S.Ct. 386, 70 L.Ed.2d 206 (1981). Where a union representative assists an employee at arbitration, the union's failure to provide the employee with an attorney is not a breach of the duty of fair representation. Grovner v. Georgia-Pacific Corp., 625 F.2d 1289, 1291 (5th Cir.1980); *see also,* Steed v. United Parcel Service, Inc., 512 F.Supp. 1088, 1091 (S.D.W.Va.1981) (plaintiff's argument that he was entitled to counsel during grievance process meritless).

Thus, based on the foregoing authorities, the Board concludes on this record, that CONDON failed to state a claim for which relief can be granted as the failure to appoint counsel for CONDON does not violate any statutory or contractual provision. In addition, absent a claim of discrimination, CONDON's complaint fails to state a claim for relief based on a breach of duty of fair representation. The Board therefore grants Respondents' motion to dismiss the instant complaint.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.

2. The Board concludes that Complainant lacks standing to raise claims that the Union violated HRS §§ 89-13(b)(2) and (3).

3. The Board concludes that based on the pleadings, Complainant can prove no set of facts which would entitle him to relief for violations of HRS §§ 89-13(b)(4) and (5). There is no statutory or contractual requirement for the Union to provide counsel to assist CONDON in his grievance or arbitration.

4. The Board concludes that based on the pleadings, Complainant can prove no set of facts which would entitle him to relief on his claim that the Union breached its duty of fair representation by a failure to provide him with counsel to represent him.

ORDER

The Board hereby grants the Union's motion to dismiss the instant complaint.

DATED: Honolulu, Hawaii, MAY 26, 2005.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

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