

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

NELLIE K. FEJERAN,

Complainant,

and

DAYTON NAKANELUA, State Director,
United Public Workers, AFSCME, Local
646, AFL-CIO and UNITED PUBLIC
WORKERS, AFSCME, LOCAL 646, AFL-
CIO,

Respondents.

CASE NO. CU-10-259

ORDER NO. 2465

ORDER GRANTING UPW'S MOTION
TO DISMISS COMPLAINT AND/OR
FOR SUMMARY JUDGMENT

ORDER GRANTING UPW'S MOTION TO DISMISS
COMPLAINT AND/OR FOR SUMMARY JUDGMENT

On July 3, 2007, Complainant filed a prohibited practice complaint (Complaint) against Respondents, alleging unfair treatment in that Respondents assigned a union representative to represent Complainant in her worker's compensation case despite a conflict, while Complainant's work partner was assigned a lawyer to represent her in an identical case.

On July 12, 2007, Respondents filed their Answer to the Complaint. Also on July 12, 2007, Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a Motion to Dismiss Complaint and/or for Summary Judgment (Motion to Dismiss), asserting lack of subject matter jurisdiction, failure to state a claim for relief, lack of standing, and that there are no genuine issues of material facts in dispute and the Union is entitled to judgment as a matter of law.

On July 26, 2007, the Board issued a Notice of Hearing on UPW's Motion to Dismiss Complaint and/or for Summary Judgment (Notice). The Notice stated in relevant part:

NOTICE IS HEREBY GIVEN that the [Board] will conduct a hearing pursuant to Hawaii Revised Statutes §§ 89-5(i)(4) and (i)(5) and 89-14, and Hawaii Administrative Rules § 12-42-8(g) on UPW's Motion to Dismiss and/or for Summary Judgment, filed on July 12, 2007

on August 14, 2007 at 9:30 a.m., by conference call. The Board will contact Complainant at her telephone number on file with the Board.

The Notice was sent to Complainant via USPS certified mail, return receipt requested, on July 26, 2007. The return receipt indicated that Complainant received the Notice on July 27, 2007.

On August 14, 2007, at 9:30 a.m., the Board held a hearing on UPW's Motion to Dismiss pursuant to Hawaii Revised Statutes (HRS) §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). Present at the hearing was Herbert R. Takahashi, Esq., for Respondents. The Board attempted to reach Complainant via telephone; however, Complainant was unavailable. The Board proceeded to hear argument on the UPW's Motion to Dismiss and took the motion under advisement.

Based upon a review of the record and consideration of the argument presented, the Board grants Respondents' Motion to Dismiss for lack of jurisdiction and failure to state a claim upon which relief can be granted for the following reasons.

FINDINGS OF FACT

1. Complainant was or is, at all times relevant to this proceeding, an employee within the meaning of HRS § 89-2¹ and a member of the UPW Unit 10 bargaining unit.
2. UPW is an employee organization within the meaning of HRS § 89-2.²

¹HRS § 89-2 provides in relevant part:

“Employee” or “public employee” means any person employed by a public employer except elected and appointed officials and such other employees as may be excluded from coverage in section 89-6.

²HRS § 89-2 provides in relevant part:

“Employee organization” means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

3. Respondent DAYTON NAKANELUA, at all times relevant to this proceeding, was and is the duly elected State Director of the UPW and is the chief executive officer of the UPW.
4. The Complaint was filed on July 3, 2007, against Respondents. The following contents of the Complaint are accepted as true and construed in the light most favorable to Complainant³:

On June 21, 2007 at 11:20 Dayton Nakanelua returned a telephone call that I made to him earlier in the morning. My question to him is why is my work partner that went out on workers [sic] compensation almost the same time as I went out and for the same reason is being represented by an attorney through UPW. Why am I being represented by a union representative. Dayton claims that it was his decision because they're waiting for my medical papers so they can review it and at that time they will decide if it's too complex then they will refer it to lawyers. I paid \$50.00 and had an appointment with Danny Paleka to fill out all the necessary paperwork to forward to Oahu for representation because according to Danny it would be a conflict of interest because of our situation regarding stress related to our immediate Sgt. After waiting over 2 months and numerous calls to our local Hilo office, not to mention calls that I made to Oahu office to follow up. I was told by Danny Paleka Oahu sent back my application because I needed to be up to date with my union dues. In April I paid another \$250.00 to bring me up to date. Needless to say I was appointed Danny Paleka of Hilo to represent me. My friend paid her union dues and her application was sent and now she has a lawyer through the union. We haved [sic] the same identical case as I stated she is my partner at work. I have a hearing on August 7th and need alot [sic] of things done to prepare for this case. I believe its [sic] a conflict of interest for Danny Paleka to represent me as he was employed as an ACO and are [sic] friends with the Sgt. In ques [sic]. Dayton claims they need to wait for my medical file to determine if there is a conflict[.] That's not true my partner was referred to an attorney long

³See Yamane v. Pohlson, 111 Hawai'i 74, 81 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).

before receiving her medical files. Danny Paleka told me he doesn't think June sent it out to Oahu[.] She appointed him to represent me. Both June and Danny said it was a conflict of interest for them to represent us. I'm running out of time to work on my case. I'm back in my mortgage because of no payment from workers [sic] compensation. I don't want my case to be reset. Dayton Nakanelua didn't want to hear what I had to say about my partner being referred to a lawyer before she received her medical file. Her case and mine is [sic] identical and for the same reasons he said no its [sic] not if you keep talking I'm gonna hang up the phone. He made it very clear that he calls the shot with no concern what so ever [sic] of my explanation. I paid union dues for over 16 years and now I'm being treated unfairly. Dayton hung up the phone on me. How can I be tried differently from my partner? Even her lawyer said it would be easier to handle both cases., alleging unfair treatment in that Respondents assigned a union representative to represent Complainant in her worker's compensation case despite a conflict, while Complainant's work partner was assigned a lawyer to represent her in an identical case.

5. On July 12, 2007, Respondents filed their Answer to the Complaint.
6. On July 12, 2007, Respondent UPW filed its Motion to Dismiss, asserting lack of subject matter jurisdiction, failure to state a claim for relief, lack of standing, and that there are no genuine issues of material facts in dispute and the Union is entitled to judgment as a matter of law.
7. On July 26, 2007, the Board issued its Notice, which stated in relevant part:

NOTICE IS HEREBY GIVEN that the [Board] will conduct a hearing pursuant to Hawaii Revised Statutes §§ 89-5(i)(4) and (i)(5) and 89-14, and Hawaii Administrative Rules § 12-42-8(g) on UPW's Motion to Dismiss and/or for Summary Judgment, filed on July 12, 2007 on **August 14, 2007** at 9:30 a.m., by conference call. The Board will contact Complainant at her telephone number on file with the Board. Respondents' counsel is requested to appear in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii at the designated time.

8. The Notice was sent to Complainant via USPS certified mail, return receipt requested, on July 26, 2007. The return receipt indicated that Complainant received the Notice on July 27, 2007.
9. On August 14, 2007, at 9:30 a.m., the Board held a hearing on UPW's Motion to Dismiss. Present at the hearing was Herbert R. Takahashi, Esq., for Respondents. The Board attempted to reach Complainant via telephone; however, Complainant was unavailable.
10. Historically, the UPW has offered its members in good standing various programs which are separate and distinct from what is available to bargaining unit employees who are represented through the collective bargaining process.
11. For example, the UPW provides representation to eligible claimants who sustain work injuries which are covered under HRS Chapter 386, before the Disability Compensation Division of the Department of Labor and Industrial Relations. These cases are handled by Union business agents unless the State Director determines that the issues are complex and require the services of a labor attorney. Union business agents receive training to handle workers' compensation claims.
12. The representation of claimants by the UPW under the workers' compensation statute, HRS Chapter 386, is not part of either the grievance or the negotiating process covered by Chapter 89. The UPW likens the assistance provided in workers' compensation cases to the assistance provided to retirees under HRS Chapter 88, which are statutory claims and benefits outside the parameters of Chapter 89.
13. Subject matter jurisdiction over workers' compensation claims and benefits is governed by HRS Chapter 386. In pursuing a claim under HRS Chapter 386, claimants may hire their own attorneys, and payment for the services rendered by such attorneys is governed by HRS § 386-94 and regulated by the Director of Labor and Industrial Relations.
14. The decision whether a worker's compensation case should be referred to Union counsel rests in the discretion of the State Director and is made on a case-by-case basis.
15. In Complainant's case, a decision regarding substituting an attorney for the business agent is pending review of the medical records and files which have recently been transmitted to the division director.

CONCLUSIONS OF LAW

1. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the complainant. Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. See Yamane v. Pohlson, 111 Hawai'i 74, 81 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).
2. However, when considering a motion to dismiss [pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(1)] the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Id. (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).
3. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter, "relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawai'i 118, 905 P.2d 624.
4. The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id.
5. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. Id.
6. Prohibited Practice Complaints against employee organizations and their designated agents are governed by HRS § 89-13(b), which provides:

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

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
 - (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 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.
7. The facts alleged in the Complaint, viewed in the light most favorable to Complainant, do not establish a claim under HRS § 89-13(b). There is no allegation that Respondents interfered, restrained, or coerced Complainant in the exercise of any right under chapter 89; that Respondents refused to bargain collectively in good faith as required in § 89-9; that Respondents refused to participate in good faith in the mediation and arbitration procedures set forth in § 89-11; that Respondents refused or failed to comply with a provision of chapter 89; or that Respondents violated the terms of a collective bargaining agreement.
8. Workers' compensation claims and proceedings are governed by HRS chapter 386, not chapter 89. Pursuant to HRS § 386-73, "[u]nless otherwise provided, the director of labor and industrial relations shall have original jurisdiction over all controversies and disputes arising under this chapter." Accordingly, the Board does not have jurisdiction over workers' compensation matters.
9. The Board does not have jurisdiction over matters concerning public employees unless they fall within the purview of HRS chapter 89. An administrative agency can only wield powers expressly or implicitly granted to it by statute. TIG Insurance Co. v. Kauhane, 101 Hawai'i 311, 327, 67 P.3d 810, 826 (Haw. App. 2003).
10. Although it is undisputed that the UPW offers to its members in good standing assistance in workers' compensation matters, such assistance does

not appear to fall within the purview of chapter 89; the assistance provided by the UPW is not part of either the grievance or the negotiating process covered by Chapter 89.

11. Not all activities undertaken by a union are part of the union's duties as exclusive representative for dealing with the employer in labor-management issues. The United States Supreme Court has recognized that some union activities are germane to collective bargaining, contract administration, and grievance adjustment, which are labor-management issues, while some activities such as charitable, social, or political events, are not. See, e.g., Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, 466 U.S. 435, 104 S. Ct. 1883 (1984); Communications Workers of America v. Beck, 487 U.S. 735, 108 S. Ct. 2641. Accordingly, the Court held that unions may only charge objecting members fees for expenditures that are "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." 466 U.S. at 448, 104 S. Ct. at 1892.
12. Similarly, here, not all activities undertaken by the UPW are germane to performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues under chapter 89. One example provided by the UPW is assistance provided to retirees under HRS chapter 88, which are statutory claims and benefits outside the parameters of chapter 89.
13. The Board concludes that the assistance provided by the UPW in workers' compensation claims or proceedings under chapter 386 is not a matter that is part of a union's duties under chapter 89 to represent employees in dealing with the employer on labor-management issues.
14. The Board has previously held that the union's duty of fair representation extends to matters dealing with collective bargaining agreements, and does not encompass the pursuit of claims arising under the workers' compensation statutes.⁴ In Board Decision No. 410, Sandra Pelosi and

⁴Similarly, the Board has also held that the union's duty of fair representation does not encompass the pursuit of claims arising under HRS Chapters 76 and 77 (civil service and compensation laws). Oren J. Tsunezumi, Case Nos. CU-03-128a, CU-04-128b, Order No. 1460, Order Granting Respondents' Motion to Dismiss Complaint (5/9/97). In Tsunezumi, the Board held that the complainant failed to state a claim for relief against the union where the claims arose under

Hawaii Government Employees Association, 6 HLRB 101, 105 (2000), the Board specifically concluded that:

[C]laims arising under the workers' compensation statutes are beyond the scope of Chapter 89, HRS, and the duty of fair representation does not extend to representation of Complainant's workers' compensation claims arising under Chapter 386.

* * *

Nothing in Chapter 89, HRS, and in particular § 89-13(b), HRS, imposes an affirmative duty upon Respondent, explicitly or implicitly, to represent Complainant in matters which exist beyond the terms of the collective bargaining agreement.

15. Even assuming, for the sake of argument, that the Board has jurisdiction in this matter, Complainant cannot establish a claim for breach of duty of fair representation here, where the UPW does not hold exclusive authority to prosecute her worker's compensation claim. Unlike the authority to take a grievance to arbitration, which rests solely with the union, claimants may represent themselves or hire private counsel to represent them through the workers' compensation proceedings. As the Fifth Circuit⁵ noted in Barrett v. Ebasco Constructors, 868 F.2d 170 (5th Cir. 1989) (citations omitted),

The union did not represent Barrett at any point during his litigation in court, nor was it obligated to do so. The scope of the duty of fair representation is coextensive only with the union's statutory authority to act as the exclusive representative of all employees within the bargaining unit. If a union does not serve as the exclusive agent for the members of the bargaining unit with respect to a particular matter, there is no corresponding duty of fair representation. In this case, the union did not have the exclusive right to seek judicial

Chapter 76, HRS (the civil service law), which was outside of the Board's jurisdiction and beyond the scope of the union's duty of fair representation.

⁵The Hawaii Supreme Court, as well as this Board, has looked to federal decisions to guide its interpretation of state public employment law. Hokama v. University of Hawai'i, 92 Hawai'i 268, 272 n. 5, 990 P.2d 1150, 1154 n. 5 (1999).

review of the arbitrator's award, as it did under the collective bargaining agreement to determine whether his case should be grieved and arbitrated. Indeed, Barrett exercised his own individual remedies outside the collective bargaining agreement when he filed this suit.

16. Additionally, an employee's "right" to have counsel provided by a union is limited, as exemplified in cases involving grievance arbitrations. The court in Lettis v. U.S.P.S., 39 F.Supp.2d 181, 198 (E.D.N.Y. 1998), 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).

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

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. Stoodly Co., 793 F.2d 1502, 1513 (9th Cir.1986) (stating a union "need not process a meritless grievance").

And 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).

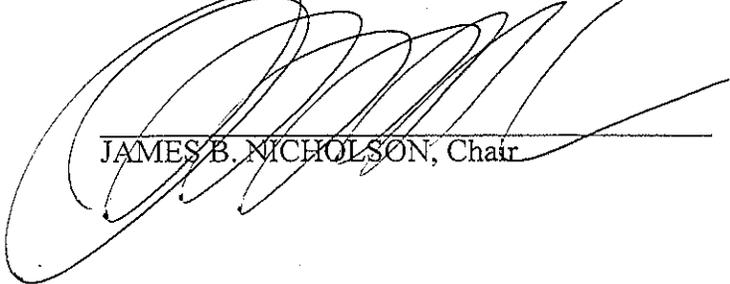
17. Although the present case involves a claim under the workers' compensation scheme and not a grievance arbitration, the Board concludes that the general principle articulated in the cases cited above applies equally to the present situation: the circumstances under which an attorney will be supplied to a claimant is a business decision to be made by the union.
18. Accordingly, the Board concludes that Complainant failed to state a claim upon which relief can be granted, and Respondents are entitled to judgment as a matter of law.
19. For the above-discussed reasons, the Board grants UPW's Motion to Dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted.

ORDER

The Board hereby grants UPW's Motion to Dismiss Complaint and/or for Summary Judgment; the Complaint is dismissed against Respondents.

DATED: Honolulu, Hawaii, August 23, 2007.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair

NELLIE K. FEJERAN and DAYTON NAKANELUA, State Director, United Public Workers,
AFSCME, Local 646, AFL-CIO and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646,
AFL-CIO

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EMORY J. SPRINGER, Member


SARAH R. HIRAKAMI, Member

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