

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CU-10-102
	)	
CHARLES KIMO DAVIDSON,	)	ORDER NO. 1111
	)	
Complainant,	)	ORDER GRANTING RESPONDENT'S
	)	MOTION TO DISMISS AND/OR
and	)	FOR SUMMARY JUDGMENT
	)	
UNITED PUBLIC WORKERS, AFSCME,	)	
LOCAL 646, AFL-CIO,	)	
	)	
Respondent.	)	
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ORDER GRANTING RESPONDENT'S MOTION  
TO DISMISS AND/OR FOR SUMMARY JUDGMENT

On April 29, 1994, Complainant CHARLES KIMO DAVIDSON (DAVIDSON) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW). DAVIDSON alleges that the UPW engaged in prohibited practices when it refused to pursue his grievance to arbitration and failed to respond to his letter concerning the alleged mishandling of his grievance. Therefore, DAVIDSON alleges that the UPW violated §§ 89-13(b)(2), 89-13(b)(3), 89-13(b)(4), and 89-13(b)(5), Hawaii Revised Statutes (HRS).

On May 12, 1994, the UPW filed a Motion to Dismiss and/or for Summary Judgment. The UPW contends that the Board should dismiss the instant complaint because DAVIDSON lacks standing to complain and failed to state a claim for relief. The UPW further contends that the Board should grant summary judgment since there are no genuine issues of material fact in dispute and the UPW is entitled to judgment as a matter of law.

On June 1, 1994, DAVIDSON filed a response to the UPW's motion. Thereafter, on June 2, 1994, the UPW filed a reply memorandum in support of its motion.

On June 6, 1994, the Board held a hearing on the UPW's motion to dismiss and/or for summary judgment. At the hearing, the parties presented oral arguments on the motion.

Based upon a thorough review of the record, the Board makes the following findings.

Complainant DAVIDSON is a former Adult Corrections Officer III (ACO) with the Department of Public Safety, State of Hawaii (PSD), and a former member of bargaining unit 10 (Institutional, health and correctional workers).

Respondent UPW is the exclusive representative of employees included in bargaining unit 10.

By Notice of Pre-Discipline Due Process Hearing dated September 7, 1993 (Notice), PSD Evaluation and Compliance Inspector Clayton Frank (Frank) informed DAVIDSON that PSD was in the process of determining whether there was just and proper cause to take disciplinary action against him for alleged violations of PSD's Standards of Conduct. See UPW Exhibit (Ex.) A attached to Respondent's Motion to Dismiss and/or for Summary Judgment filed on May 12, 1994. Frank informed DAVIDSON that:

On Friday March 12, 1993 at approximately 2230 hours while in the HCCC [Hawaii Community Correctional Center] Processing Room you allegedly got into a physical altercation with inmate Carlos Caraballo. It is also alleged that you failed to get proper authorization to move inmate Caraballo from one housing unit to another, and you failed to provide appropriate

medical referral reports on the incident of March 12, 1993.

Id. at p. 2.

On September 24, 1993, Frank conducted a pre-disciplinary due process hearing to provide DAVIDSON an opportunity to respond to the alleged charges in the Notice. UPW Business Agent Ann Delos Santos (Delos Santos) attended the pre-disciplinary due process hearing. UPW Ex. B.

By letter dated October 12, 1993, then PSD Director George W. Sumner (Sumner) informed DAVIDSON that he would be dismissed from his ACO position effective the close of business on November 5, 1993. UPW Ex. C. Sumner informed DAVIDSON that:

In considering all of the information gathered and the seriousness of your actions, we are dismissing you from employment in accordance with Title 14, Subtitle I, State of Hawaii Personnel Rules, Section 12-15-4.

Id. at 2.

By letter dated October 27, 1993, the UPW, by and through Delos Santos, filed a Step 2 grievance on behalf of DAVIDSON with Sumner. The UPW alleged that PSD placed DAVIDSON on leave without pay pending an investigation, returned DAVIDSON to "regular duty status" with restrictions, and notified DAVIDSON of his impending dismissal, without just and proper cause. UPW Ex. D.

Also by letter dated October 27, 1993, Delos Santos requested from Sumner certain documents necessary for investigating, processing, and reviewing DAVIDSON's grievance, including, inter alia, "[r]ecords of other employees who have been similarly disciplined for the same cause." UPW Ex. E.

By letter dated November 5, 1993, PSD Personnel Management Specialist Arvid T. Hara (Hara) responded to Delos Santos' request for information. UPW Ex. F. In the letter, Hara indicated that "[o]ur [PSD] records do not reflect any other employees who have been similarly disciplined for the same cause." Id. at 1.

By letter dated November 12, 1993, Delos Santos filed a Step 3 grievance on behalf of DAVIDSON with Sharon Y. Miyashiro (Miyashiro), Director, Department of Personnel Services, State of Hawaii (DPS),<sup>1</sup> in part due to a "lack of a timely response." UPW Ex. G.

By letter dated November 24, 1993, Sumner denied DAVIDSON's Step 2 grievance. See Complainant's Exhibit (C's Ex.) D attached to Complainant's Prehearing Statement filed on June 1, 1994. In the letter addressed to Delos Santos, Sumner stated:

Efforts were made to hold a Step 2 telephonic meeting with [Delos Santos] by PSD Labor Relations staff Frank Vaughan and Arvid Hara. Due to prior commitments and inadequate time to review the documents submitted, [Delos Santos] decided against a Step 2 meeting.

Id. at 1.

In addition, Sumner informed Delos Santos that the UPW "did not establish that [Davidson's] dismissal was not for just and proper cause." Id.

By letter dated November 26, 1993, Miyashiro denied DAVIDSON's Step 3 grievance. UPW Ex. H. Despite the UPW's

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<sup>1</sup>As of July 1, 1994, DPS officially changed its name to the Department of Human Resources Development.

argument that it was not unusual for DAVIDSON to move the inmate and that the inmate involved lacks credibility, Miyashiro determined that DAVIDSON's dismissal was for just and proper cause. Id. Miyashiro noted that DAVIDSON admitted that he transferred the inmate without authorization, punched and slammed the inmate against the wall, and failed to submit an incident report. Id.

By letter dated December 10, 1993, Miyashiro addressed UPW's additional contention that DAVIDSON's dismissal lacked due process because of the excessive length of time between the March 12, 1993 incident and his dismissal. UPW Ex. I. Miyashiro concluded that DAVIDSON was "afforded due process through a full and fair investigation" and reaffirmed DPS's denial of DAVIDSON's Step 3 grievance. UPW Ex. I, p. 2.

By Inter Office Memorandum to UPW State Director Gary Rodrigues (Rodrigues) dated December 22, 1993, Delos Santos recommended against taking DAVIDSON's grievance to arbitration because she "would not know how to proceed in a case like this, and too, the grievant is not truthful." UPW Ex. J.

On January 31, 1994, Delos Santos was informed that Rodrigues agreed with her recommendation and was instructed to advise DAVIDSON that his grievance lacked merit and would not be arbitrated. See Affidavit of Ann Delos Santos attached to Respondent's Motion to Dismiss and/or for Summary Judgment filed on May 12, 1994.

On February 3, 1994, Delos Santos notified DAVIDSON that the UPW would not proceed to arbitration on his grievance because

DAVIDSON's case lacked merit and the UPW did not feel that it could prevail on the merits. Affidavit of Ann Delos Santos, p. 3.

By letter to Rodrigues dated February 23, 1994, DAVIDSON requested that the UPW inform him of the specific reasons why his grievance was not taken to arbitration. See Letter dated February 23, 1994 attached to Complainant's Prohibited Practice Complaint.

Thereafter, on April 29, 1994, DAVIDSON filed the instant prohibited practice complaint.

DAVIDSON contends that the UPW failed to respond to his letter and failed to properly represent him in violation of §§ 89-13(b)(2), 89-13(b)(3), 89-13(b)(4) and 89-13(b)(5), HRS.

Section 89-13, HRS, provides in pertinent part:

**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:

\* \* \*

- (2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in Section 89-9, HRS;
- (3) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in section 89-11, HRS;
- (4) Refuse or fail to comply with any provision of this chapter; or
- (5) Violate the terms of a collective bargaining agreement.

At the outset, the Board hereby dismisses DAVIDSON's claims of §§ 89-13(b)(2), 89-13(b)(3), and 89-13(b)(5), HRS, violations because DAVIDSON lacks standing to raise these charges and the evidence in the record fails to support such charges.

Subsection 89-13(b)(2), HRS, prohibits an employee organization from refusing to bargain with the public employer as required in § 89-9, HRS. In this case, there is no evidence that the UPW refused to bargain with the public employer. Moreover, a refusal to bargain charge is properly raised by a public employer who has a reciprocal duty to bargain in good faith. Thus, the Board finds that DAVIDSON cannot raise a refusal to bargain charge against the UPW.

Subsection 89-13(b)(3), HRS, prohibits an employee organization from refusing to participate in the mediation, fact-finding and arbitration procedures set forth in § 89-11, HRS. The mediation, fact-finding and arbitration procedures in § 89-11, HRS, refer to the impasse resolution mechanism for interest arbitrations involving the terms of the contract rather than the grievance resolution mechanism which involves the violation or interpretation of the contract. The Board finds that this provision is inapplicable to the facts in this case and hereby dismisses the allegations of a § 89-13(b)(3), HRS, violation.

Subsection 89-13(b)(5), HRS, prohibits an employee organization from violating the terms of a collective bargaining agreement. Parties to the collective bargaining agreement include the public employer and the exclusive representative. Since DAVIDSON does not fall within the definition of an "Employer," he

lacks standing to maintain this allegation against the UPW. In addition, the facts in this case do not support a charge of a contract violation by the UPW. As such, the Board hereby dismisses DAVIDSON's allegations of a § 89-13(b)(5), HRS, violation.

The remaining allegation against the UPW is an alleged violation of § 89-13(b)(4), HRS, for the UPW's breach of duty of fair representation. DAVIDSON alleges that the UPW refused to pursue his grievance to arbitration and failed to respond to his letter seeking an explanation for the UPW's inaction.

Rule 56, Hawaii Rules of Civil Procedure, provides that a party is entitled to summary judgment if there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law. In deciding whether to grant a motion for summary judgment, the Board will review the record and inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion.

Based upon a review of the record, the Board concludes that with respect to DAVIDSON's allegation of a § 89-13(b)(4), HRS, violation, there is no genuine issue as to any material fact and the UPW is entitled to summary judgment as a matter of law.

Specifically, the record indicates that on March 12, 1993, DAVIDSON was assigned to work the third watch in the Waianuenu Complex at the Hawaii Community Correctional Center (HCCC). UPW Ex. B, p. 2. During his shift, DAVIDSON went to HCCC's Punahale Complex to speak with Sergeant Wally Kahapea (Kahapea). Id. at 3. DAVIDSON informed Kahapea that he had a "personal problem" with Carlos Caraballo (Caraballo), an inmate who



was housed at the Waianuenu Complex. Id. at 4. Apparently, DAVIDSON believed that Caraballo had "sexually forced himself" upon his wife and sister-in-law years ago. See UPW Ex. F, p. 84.

Subsequently, DAVIDSON, with the assistance of ACO Robert Bechert, moved Caraballo from the Waianuenu Complex to the Punahale Complex. UPW Ex. B, p. 5; UPW Ex. F, p. 85. DAVIDSON admitted that he lacked the authority to move the inmate within the prison complex, but he "kinda took it upon [himself] to go down and move [Caraballo]." UPW Ex. B, p. 4; see also UPW Ex. F, p. 85.

The record indicates that a physical altercation between DAVIDSON and Caraballo ensued; however, it is not clear whether DAVIDSON or Caraballo instigated the altercation. Id. at 86-89 (DAVIDSON's version of physical altercation); Id. at 47-48 (Caraballo's version of physical altercation). Nevertheless, DAVIDSON admitted that he struck the inmate "about fifteen times," Id. at 88, and "slammed [the inmate] backward against the wall" during their physical encounter. Id. at 89.

Furthermore, DAVIDSON admitted that he failed to report the incident involving Caraballo and that his failure to submit a report was a mistake. UPW Ex. B, p. 11. In this regard, DAVIDSON stated, "I blame myself because I'm not making the report and I learned that in the BCT [Basic Correctional Training] you always gotta do follow-up with the report." Id. at 13.

In effect, DAVIDSON's admissions in the record corroborate the charges brought against him by PSD. Thus, even when considered in the light most favorable to DAVIDSON, the undisputed facts before the Board indicate that the UPW's decision

not to pursue DAVIDSON's case to arbitration was based on a reasonable assessment that his grievance lacked merit.

With respect to DAVIDSON's claim that the UPW failed to respond to his letter of inquiry, the Board finds that the weight of the evidence in the record does not support this claim. DAVIDSON admitted that "Ann Delos Santos told me [the grievance] not going to be taken to arbitration." Transcript of Hearing held on Monday June 6, 1994. (Tr.), p. 24. Moreover, the record indicates that on February 3, 1994, Delos Santos notified DAVIDSON that the UPW "would not be proceeding to arbitration on his grievance." See Affidavit of Ann Delos Santos, p. 3.

In addition, the UPW explained that DAVIDSON was not provided with a written statement of reasons why the UPW would not take his case to arbitration because such a document would be prejudicial and might be used against him in future civil actions. Tr., pp. 25-26. In this regard, the UPW informed the Board that it is the UPW's practice not to comment on the evidence and not to put into writing the reasons for deciding against taking a case to arbitration. Id.

Based upon the foregoing, the Board concludes that the record in this case does not support a finding that the UPW treated DAVIDSON in an arbitrary or discriminatory manner or in bad faith so as to constitute a breach of duty under Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, 64 L.R.R.M. 2369 (1967). Accordingly, the Board hereby grants the UPW's motion to dismiss and/or for summary judgment.

ORDER

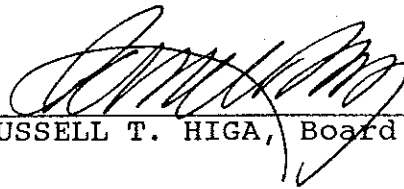
The instant prohibited practice complaint is hereby dismissed.

DATED: Honolulu, Hawaii, September 30, 1994.

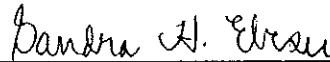
HAWAII LABOR RELATIONS BOARD



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