

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-10-150
MYRON D. WIDRIG,)	ORDER NO. 1723
Complainant,)	ORDER GRANTING RESPONDENT'S
and)	MOTION TO DISMISS COMPLAINT
UNITED PUBLIC WORKERS, AFSCME,)	AND/OR FOR SUMMARY JUDGMENT
LOCAL 646, AFL-CIO,)	
Respondent.)	

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

On October 27, 1998, Complainant MYRON D. WIDRIG (WIDRIG) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board). WIDRIG alleged that Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) failed to investigate charges made against him and to provide him with representation during the processing of a grievance.

On November 2, 1998, Respondent UPW filed a motion for particularization with the Board contending that the complaint was vague because Complainant failed to state how he believes that UPW failed to represent him. In Order No. 1681 dated November 19, 1998, the Board granted UPW's motion to particularize the complaint by specifying the grievance involved, when the alleged failure to represent occurred, and the manner in which the Union allegedly failed to represent him.

Thereafter, the UPW filed a motion to dismiss the complaint for failure to state a claim for relief and/or for summary judgment with the Board. The UPW contended that the complaint should be dismissed for failure to state a claim and in the alternative, that there are no genuine issues of material fact in dispute and that judgment should be entered in favor of the UPW. The UPW alleges that WIDRIG indicated that his complaint pertained to a ten-day suspension issued in a letter dated January 15, 1998. The UPW contends that previously, WIDRIG was suspended for one and two days, respectively,, within the past two years. Thereafter, WIDRIG was suspended for ten days for violating departmental rules prohibiting fraternization between adult correctional officers and inmates. The UPW filed a grievance on WIDRIG's behalf and processed the grievance through Steps 2 and 3 of the grievance procedure. Thereafter, Kauai Division Director and Union Agent Gilbert Nobrega (Nobrega) reviewed the matter and determined that there was no merit to the grievance and informed WIDRIG of the Union's decision not to proceed with the grievance on July 31, 1998.

On November 30, 1998, WIDRIG filed a Response to Motion for Particularization with the Board in the instant matter. WIDRIG confirmed that his complaint referred to a letter dated January 15, 1998 imposing a ten-day suspension on him. WIDRIG alleged, inter alia, that during the course of grieving the suspension, Nobrega provided virtually no assistance to him. WIDRIG alleged that he repeatedly tried to provide information to Nobrega in his defense, including witness statements to dispute the credibility of the inmate witnesses relied upon by the employer, but was told by his

Union agent that he did not need any information from him. WIDRIG also alleged that Nobrega did not attend the meeting at Step 2 because he said that he did not have time to attend the meeting.

The Board held a hearing on the Union's motion on February 18, 1999 by conference call. Complainant was contacted by telephone and UPW's counsel appeared in the Board's hearings room. The parties had full opportunity to present evidence and arguments to the Board. Based upon a careful review of the record, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

MYRON D. WIDRIG is an Adult Correctional Officer (ACO) assigned to the Kauai Community Correctional Center and is a member of bargaining unit 10.

The UPW is the exclusive representative of the employees included in Unit 10.

WIDRIG was previously disciplined by the employer during the past two years. By letters dated March 7, 1997, WIDRIG received one- and two-day suspensions for previous violations of the Standards of Conduct.

On or about July 1, 1997, Nobrega learned that the employer was investigating WIDRIG for an improper relationship with an inmate when he attended an investigative meeting with WIDRIG. By letter dated November 13, 1997, WIDRIG was notified of a pre-disciplinary hearing. The notice indicated that the employer was in the process of determining whether there was cause to discipline WIDRIG for violating the Standards of Conduct by entering into a

personal relationship with an inmate and allowing the relationship to interfere with his duties, including failing to report the inmate for inappropriate dress; bringing contraband into the facility for the inmate; showing favoritism to the inmate; and providing false information to investigators.

Nobrega attended the pre-disciplinary hearing on December 3, 1997 and WIDRIG was offered an opportunity to respond to the allegations against him by December 15, 1997. Nobrega states in an affidavit that WIDRIG declined to respond.

By letter dated January 15, 1998, the employer suspended WIDRIG for ten days. On or about February 27, 1998, Nobrega filed a grievance contesting the suspension. By a letter of appeal dated March 20, 1998, Nobrega filed the grievance at Step 2. By letter dated April 13, 1998, Keith K. Kaneshiro, Director, Department of Public Safety (PSD), denied the grievance addressing primarily the Union's untimely receipt of the suspension letter. By letter dated April 16, 1998, Nobrega filed the grievance at Step 3. By letter dated April 24, 1998, James H. Takushi (Takushi), Director, Department of Human Resources Development, denied WIDRIG's grievance. Takushi indicates in his letter that his review was based upon information presented by PSD and in the absence of information from the Union to support the allegations. With respect to WIDRIG's claim that the Union did not receive the suspension letter in a timely fashion, Takushi found that PSD timely sent the letter to the Union after the Union's request.

By letter dated July 28, 1998, Nobrega informed WIDRIG that UPW had processed the grievance through the grievance procedure. Based upon the review of the entire matter, Nobrega

informed WIDRIG that the Union had decided not to pursue the grievance because it lacked merit.

DISCUSSION

Motions for summary judgment are governed by Rule 56, Hawaii Rules of Civil Procedure (HRCP) which are applicable to proceedings before the Board.¹ Rule 56, HRCP, provides, in part:

(c) Motion and proceedings thereon. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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. . . .

* * *

(e) Form of affidavits; further testimony; defense required. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

¹Rule 81(b), HRCP, states in relevant part, the following:

These [Hawaii Rules of Civil Procedure] shall apply to the following proceedings except insofar as and to the extent that they are inconsistent with specific statutes of the State or rules of court relating to such proceedings:

* * *

(12) Proceedings under: . . . chapters 89 and 380, relating to collective bargaining and labor disputes [.]

In Konno v. County of Hawai'i, 85 Hawai'i 61, 70, 937 P.2d 397, 406 (1997), the Supreme Court articulated the often-cited standard for the granting of summary judgment, stating:

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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.

In deciding the motion, the evidence must be viewed in the light most favorable to the non-moving party. Lau v. Bautista, 61 Haw. 144, 598 P.2d 161 (1979); Windward Partners v. Lopes, 3 Haw. App. 30, 640 P.2d 872 (1982). The non-moving party in a properly supported motion for summary judgment must respond by affidavit or otherwise setting forth specific facts showing a genuine issue of material fact and may not rely on allegations of the pleadings. Costa v. Able Distributors, Inc., 3 Haw. App. 486, 653 P.2d 101 (1983). Under Rule 56(c), HRCPC, once the movant satisfies the initial burden of showing the absence of a genuine issue of material fact, "then the burden shifts to the opponent to come forward with specific facts showing that there remains a genuine issue for trial." Securities and Exchange Commission v. Murphy, 626 F.2d 633, 640 (9th Cir. 1980).

Based upon the record, the Board finds that there is no genuine issue of material fact in this case and the Union is entitled to summary judgment as a matter of law. Nobrega stated in an affidavit submitted in support of the motion that WIDRIG was previously disciplined on two occasions by the employer and that the department strictly enforces rules prohibiting fraternization between ACOs and inmates. Nobrega stated that WIDRIG was

investigated for having an improper relationship with an inmate and for improper performance of duty. Nobrega stated that WIDRIG declined to respond to allegations against him after the pre-disciplinary hearing. Nobrega stated that he filed a grievance on WIDRIG's behalf contesting the ten-day suspension and during the process, Nobrega reviewed the investigative records of the employer, consisting of statements from nine security officers, two inmates, three civilians, as well as other documents in the file. Nobrega stated that he gave WIDRIG an opportunity to respond to the statements in the records and WIDRIG did not provide any statements which were helpful in addressing the merits of the case. After reviewing the files, Nobrega determined that the grievance lacked merit and informed WIDRIG that the Union would not pursue the matter to arbitration.

The UPW contends that WIDRIG was suspended for a serious violation of the employer's rules which prohibits fraternization with inmates. The UPW alleges that another ACO had been terminated for the same offense. Here, WIDRIG was suspended for ten days and the employer appears to have followed progressive discipline principles because WIDRIG had been previously suspended for one and two days, respectively. The Union contends that WIDRIG essentially admitted the violations to his supervisor during the investigation; observing the inappropriately dressed inmate and sharing personal problems with the inmate. The Union moreover argued that WIDRIG cannot dispute the fact that he continued to have contact with the inmate despite the warnings from his captain.

During the hearing before the Board, WIDRIG raised questions about the credibility of certain inmate witnesses and the

accuracy of the witnesses' statements. WIDRIG suggested that the inmate in question may have developed feelings for him but that he denied that he had a relationship with her. WIDRIG further complained that Nobrega was unavailable to him and did not submit any materials to the employer on his behalf although WIDRIG had offered to produce witness statements.

However, Complainant did not submit any competent evidence, by way of affidavit or otherwise, to contradict the facts presented in the Union's affidavit. Thus, based on the record, the Board concludes that the Union pursued the grievance through the contractual procedure and refused to arbitrate the grievance because in its evaluation, based upon the evidence in the case, including WIDRIG's admissions, that the grievance lacked merit. There is no competent evidence in the record to establish that the Union breached its duty of fair representation to WIDRIG.

Accordingly, the Board finds that there are no genuine issues of material fact presented and that Respondent is entitled to judgment as a matter of law. The instant complaint is dismissed for failure to state a claim for relief.

CONCLUSIONS OF LAW

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party clearly demonstrates that he or she should prevail as a matter of law. Complainant's allegations of the Union's handling of his grievance, unsupported by competent evidence, are insufficient to raise a genuine issue of material fact to defeat summary judgment in this case.

ORDER

The Board hereby dismisses the instant complaint.

DATED: Honolulu, Hawaii, May 28, 1999.

HAWAII LABOR RELATIONS BOARD



RUSSELL T. HIGA, Board Member



CHESTER C. KUNITAKE, Board Member

DISSENTING OPINION

I do not believe that summary judgment should be granted against the Complainant.

A review of the record makes it clear that Complainant is alleging that the Union treated his grievance in a perfunctory manner. The Board has previously held that a union breaches its duty of fair representation when it handles a grievance in a perfunctory manner. Sheldon S. Varney, 5 HLRB 508 (1995).

In WIDRIG's initial complaint, his extensive narrative response to the Board's order granting the UPW's motion for particularization of the complaint, and statements made during the hearing of the motion for summary judgment, WIDRIG questions the credibility of certain witnesses and disputes the findings and conclusions of the investigation of his alleged misconduct. He also states that UPW agent Nobrega refused his offers to produce evidence which would be helpful to his defense and offered virtually no defense against the charges made against him.

Nobrega's affidavit in support of the motion for summary judgment states that a grievance was filed in behalf of WIDRIG and processed through Steps 1, 2, and 3 of the grievance process. Nobrega also states that he provided WIDRIG the opportunity to respond to the statements in the investigative record and that WIDRIG did not provide any statements which were helpful to the merits of the case.

I find that the allegation and statements made by WIDRIG and Nobrega's affidavit create a genuine issue of material fact, i.e., whether or not WIDRIG offered to produce evidence which would be helpful in his defense. WIDRIG says he did and Nobrega says WIDRIG provided no helpful statements. Moreover, the documents offered by the UPW seem to indicate that other than an assertion that WIDRIG's notice of suspension was not timely received by the UPW, no information was submitted or arguments made on WIDRIG's behalf during any of the grievance steps. Indeed, the Step 3 response dated April 24, 1998 states that the "response is being rendered without benefit of a Step 3 meeting as the Union was unresponsive to the Employer's offer to meet." This raises a question of fact as to whether or not any efforts were made to advance the grievance other than mere filing and accepting the Employer's response.

Although WIDRIG's pleadings and statements may not be considered "evidence" in a technical sense, I believe they should be considered in evaluating whether or not summary judgment should be granted. Fundamental fairness requires that claims in administrative proceedings be determined on their facts, not on

legal technicalities. Yarnell v. City Roofing, Inc., 8 Haw. App. 543, 557, affirmed in part as modified, reversed in part, 72 Haw. 272 (1991). Further, when administrative agencies handle controversies, simple and non-technical hearings take the place of court trials and informal proceedings supersede rigid and formal pleadings. Carriaga v. Del Monte Corp., 65 Haw. 404, 409 (1982). These principles should apply with even greater force where, as in this case, the Complainant is appearing without assistance of counsel.

For the foregoing reasons, I respectfully dissent.



BERT M. TOMASU, Chairperson

Copies sent to:

Myron D. Widrig
Herbert R. Takahashi, Esq.
Joyce Najita, IRC