

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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| In the Matter of |) | CASE NOS.: CU-01-189 |
| |) | CE-01-493 |
| HELEN L. GABRIEL, |) | |
| |) | ORDER NO. 2105 |
| Complainant, |) | |
| |) | ORDER DENYING RESPONDENTS' |
| and |) | MOTION TO DISMISS FOR FAILURE |
| |) | TO COMPLY WITH BOARD ORDER |
| UNITED PUBLIC WORKERS, AFSCME, |) | NO. 2053; DENYING RESPONDENT |
| LOCAL 646, AFL-CIO and DEPARTMENT |) | UPW'S MOTION TO STRIKE OR IN |
| OF PARKS AND RECREATION, County of |) | THE ALTERNATIVE TO DISREGARD |
| Hawaii, |) | HELEN GABRIEL'S AFFIDAVIT |
| |) | DATED MAY 1, 2002; GRANTING |
| Respondents. |) | RESPONDENT UPW'S MOTION |
| |) | TO DISMISS AND/OR FOR SUM- |
| |) | MARY JUDGMENT; AND GRANTING |
| |) | DISMISSAL OF COMPLAINT AGAINST |
| |) | RESPONDENT COUNTY |

ORDER DENYING RESPONDENTS' MOTION TO DISMISS
FOR FAILURE TO COMPLY WITH BOARD ORDER NO. 2053; DENYING
RESPONDENT UPW'S MOTION TO STRIKE OR IN THE ALTERNATIVE TO
DISREGARD HELEN GABRIEL'S AFFIDAVIT DATED MAY 1, 2002; GRANTING
RESPONDENT UPW'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT;
AND GRANTING DISMISSAL OF COMPLAINT AGAINST RESPONDENT COUNTY

On January 10, 2002, Complainant HELEN L. GABRIEL (Complainant or GABRIEL), proceeding *pro se*, filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against her union, Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Union or UPW) and her employer, Respondent DEPARTMENT OF PARKS AND RECREATION, County of Hawaii (Employer or County), alleging a wilful violation of the collective bargaining agreement pursuant to Hawaii Revised Statutes (HRS) §§ 89-13(b)(8) (sic) and 89-13(a)(8), respectively.

By Board Order No. 2053, issued on January 22, 2002, the Board granted Respondents' Motions for Particularization because the complaint failed to specifically identify the particular actions each Respondent undertook in allegedly violating HRS § 89-13.

On March 6, 2002, Complainant filed a Declaration to UPW and County of Hawaii Motion for Particularization alleging the Employer improperly denied her promotion to a Tractor Mower Operator position which the Union refused to take to arbitration without

explanation; and adding an allegation that she was denied a promotion to a Power Mower Operator position by the Employer, which the UPW would not grieve.

The UPW filed a Motion to Dismiss for Failure to Comply with Board Order No. 2053 on March 6, 2002, and answered the complaint on March 12, 2002. The County answered the complaint on March 22, 2002 in addition to filing a Motion to Dismiss on the grounds that Complainant failed to particularize the complaint as ordered by the Board in Order No. 2053. Complainant opposed UPW's Motion to Dismiss on March 14, 2002. While the Board finds that GABRIEL failed to particularize her complaint as directed by the Board, Respondents nevertheless adequately answered the complaint. Therefore, the Board denies Respondents' motions to dismiss on the grounds that Complainant failed to particularize as ordered by the Board.

On March 12, 2002, the UPW filed a Motion to Dismiss and/or for Summary Judgment. On April 9, 2002, the County joined UPW's Motion to Dismiss and/or for Summary Judgment filed March 12, 2002.

By Order No. 2076, issued March 28, 2002, the Board granted Complainant's Motion for Extension of Time to Respond to UPW's Motion to Dismiss and/or for Summary Judgment and directed Complainant to file her response to the UPW's motion with the Board on or before May 1, 2002. On April 29, 2002, Complainant sought a third extension of time. The Board denied Complainant's request for an extension and scheduled a hearing on May 10, 2002.

On May 1, 2002, Complainant filed the Affidavit of Helen L. Gabriel opposing Respondents' Motion to Dismiss and/or for Summary Judgment. On May 6, 2002, UPW moved to strike or in the alternative to disregard Helen Gabriel's Affidavit dated May 1, 2002. The Board finds Complainant's affidavit adequately complies with the Board's order and rules, and therefore denies UPW's motion to strike.

On May 10, 2002, the Board held a motions hearing and provided the parties a full and fair opportunity to be heard, present oral arguments, and give evidence in the form of sworn testimony.

Based on the entire record and having considered the oral arguments, testimony and affidavits, the Board makes the following findings of fact, conclusions of law and order denying Respondents' motion to dismiss for failure to comply with Board Order No. 2053 and Respondent UPW's motion to strike or in the alternative Helen Gabriel's affidavit filed on May 1, 2002; granting Respondent UPW's motion to dismiss and/or in the alternative for summary judgment; and granting dismissal of the complaint against the Respondent County.

FINDINGS OF FACT

1. GABRIEL is a Park Caretaker I employed by the DEPARTMENT OF PARKS AND RECREATION, County of Hawaii and a public employee within the meaning of HRS § 89-2.
2. The UPW is an employee organization and the exclusive representative within the meaning of HRS § 89-2 for Park Caretakers, including GABRIEL, who are included in bargaining unit (BU) 01.
3. The DEPARTMENT OF PARKS AND RECREATION, County of Hawaii is the designated representative of the GABRIEL's public employer, as defined in HRS § 89-2.
4. The UPW and the public employers have entered into a collective bargaining agreement for BU 01 (BU 01 Contract) which includes an informal and formal grievance procedure under Section 15. The formal grievance provides for two steps, which an employee can pursue without assistance from the Union, and the final formal step of arbitration which only the UPW can pursue.¹

¹Section 15, Grievance Procedure, of the applicable collective bargaining agreement provides, in part:

15.10 Formal Grievance.

In the event the grievance is not satisfactorily resolved on an informal basis, the grieving party and/or the Union may file a formal grievance by completing the grievance form provided by the Union.

15.11 Step 1 Grievance.

The grievance shall be filed with the department head in writing as follows:

15.11a. Within eighteen (18) calendar days after the occurrence of the alleged violation.

15.11b. Within eighteen (18) calendar days after the alleged violation first became known to the Employee or the Union if the Employee did not know of the alleged violation if it is a continuing violation.

* * *

15.12 Step 1 Decision.

The decision of the department head shall be in writing and shall be transmitted to the grieving party and/or the Union within thirteen (13) calendar days after receipt of the grievance.

5. On May 10, 2001, June Rabago (Rabago), UPW business agent for the Hawaii Division filed a Step 1 grievance with the Employer over the Employer's failure to select GABRIEL for a vacant Tractor Mower Operator, BC-04 position. Because of errors by the interviewers in checking different responses for both GABRIEL and the selectee Reginald Ignacio (Ignacio) during the course of the oral interview, Rabago recommended to UPW State Director Gary Rodrigues (Rodrigues) that the grievance be resolved by re-doing the selection.² UPW Exhibit (Ex.) 2-93. Based upon his review of the grievance

15.13. Step 2 Appeal or Grievance.

15.13a. In the event the grievance is not resolved in Step 1, the grieving party and/or the Union may file a letter of appeal with the Employer specifying the reasons for the appeal together with a copy of the grievance and a copy of the Step 1 decision within nine (9) calendar days after receipt of the Step 1 decision.

15.13b. In the event a grievance is filed at Step 2 as provided in Section 15.04, the grievance shall be filed as provided in Section 15.11 except that the grievance shall be filed with the Employer instead of the department head.

15.14 Different Allegations.

The Employer need not consider a Step 2 grievance which encompasses difference allegations than those alleged in Step 1.

15.15 Step 2 Decision.

The decision of the Employer shall be in writing and transmitted to the grieving party and/or the Union within nine (9) calendar days after receipt of the appeal.

15.16 Step 3 Arbitration.

In the event the grievance is not resolved in Step 2, and the Union desires to submit the grievance to arbitration, the Union shall notify the Employer within thirty (30) calendar days after the receipt of the Step 2 decision.

²By memorandum dated July 19, 2001, Rabago recommended to Rodrigues that the Union drop the grievance and agree to the Employer's redoing of the interview process. Rabago noted that GABRIEL insisted that she did not want to accept the redo and the grievance be arbitrated. Rabago disagreed because of the following:

1. The questions asked during the oral interview were related to the duties of a tractor mower operator. Helen actually came in last of all five of the candidates. Although errors were made by the interview panel in marking some of the

case files, the contract and the arbitral case law, Rodrigues agreed with Rabago's recommendation (See, Declaration of Gary W. Rodrigues, dated March 12, 2002) and the Employer thereupon vacated the promotion and redid the selection.³

6. The re-selection panel recommended Ignacio for the Tractor Mower Operator position because his overall evaluation scores were six excellent and six good. GABRIEL's overall evaluation was three fair and nine poor. The same selection panel rated Charles Labrador (Labrador) as the "next best candidate to assume the position." The recommendation to select Ignacio was approved by the County Director of Parks and Recreation, Patricia Engelhard, on August 14, 2001.
7. By letter dated August 25, 2001, the Employer notified GABRIEL that she was not selected for the Tractor Mower Operator position.

candidates (sic) responses, Helen would have been even further behind the Selectee if the errors were corrected. When I made the argument during the Step 1 meeting, I did not point that out to the Employer, I just noted that errors had been made which meant that the interviews were flawed.

2. I did not believe there is any way for us to prove that Gabriel is relatively equal to the selectee using the interview documents included in this grievance file.
3. The redo gives Helen an opportunity to improve on her interview score, which I believe she is capable of doing if she sets her mind to it.
4. I believe the Step 1 response is a partial remedy and that we would not fare any better in arbitration.

³The Step 1 response by Patricia G. Engelhard, Director, Department of Parks and Recreation, County of Hawaii stated as follows:

"Based on the errors noted above...I find that the promotion of Reginald Ignacio should be overturned and the interviews should be conducted again. I also find that a performance test should be given as part of the selection process. Reginald Ignacio should immediately be returned to his former position until a new selection panel can be convened and an interview and performance test can be given to all of the original applicants. If Parks Maintenance determines that a written test would also be an effective tool in deciding the qualifications of the applicant, a written test may be administered." UPW Exs. 2-89 to 2-90.

8. On September 11, 2001, Rabago filed a second grievance over GABRIEL's non-selection for the Tractor Mower Operator position based on Sections 14 and 16 of the BU 01 Contract, which includes the seniority provision in Section 16.06c.

9. Section 16.06c of the BU 01 Contract covering Selection states in part:

When the qualifications between the qualified applicants are relatively equal, the Employer shall use the following order of priority to determine which applicant will receive the promotion:

1. The qualified applicant with the greatest length of Baseyard/Workplace or Institutional Workplace Seniority in the Baseyard/Workplace or Institutional Workplace where the vacancy exists.

a) When filling a full-time vacancy by promotion, full-time applicants shall be given preference over part-time applicants.

b) When filling a part-time vacancy by promotion, part-time applicants shall be given preference over full-time applicants. [Emphasis added.]

10. GABRIEL's baseyard seniority date is August 13, 1996 and Ignacio's seniority date is November 1, 1996. GABRIEL grieved because she had greater seniority and believed her non-selection violated Section 14, Prior Rights, Benefits, and Perquisites and Section 16, Seniority of the BU 01 Contract.

11. The Union's Position and statements in support of GABRIEL's second grievance considered by the Employer at Step 1⁴ included the following:

a) Seniority should be the governing factor. The selectee, Reggie Ignacio, had the least baseyard seniority of all the applicants.

b) The selectee had an unfair advantage because he had time on the tractor mower.

⁴See, UPW Ex. 3-64. According to the Employer's Step 1 response, GABRIEL "spent a good deal of time explaining her history with the department and elaborating why she thought the selection was unfair."

- c) Helen Gabriel did not drive the tractor mower to the field on which the performance test was done. She used good judgment because she wasn't familiar enough with the mower.
 - d) The performance test should have been whether or not she could do the work, not whether she could operate the mower. She had minimal training on that particular mower although Helen had driven power mowers successfully as a temporary assignment.
 - e) Helen Gabriel has many commendation letters in her file. She also has ranked "more than satisfactory" in many of her job performance reports (JPRS). Helen is a meticulous worker with a good record and she should be selected for the position based on that and the factors above.
12. On September 28, 2001, the Employer denied GABRIEL's second Step 1 grievance. Based on the re-selection panel's interview, performance test observations and recommendation, Engelhard found that the "qualifications of the grievant (GABRIEL) and the selectee are not relatively equal and, therefore, seniority is not a consideration."⁵ UPW Exs. 3-64 to 3-65.
13. On October 3, 2001, Rabago filed a Step 2 grievance with the Employer's representative from the Employer's denial at Step 1.
14. At the Step 2 meeting held on October 16, 2001 with GABRIEL and Employer's Personnel Specialist Ron Takahashi, Rabago asked that GABRIEL be given the position and use the probationary period as her chance to "prove that she can do the job." According to the notes taken of the Step 2 meeting, GABRIEL "reviewed training that she had on power mower by Manuel Moniz, reviewed the difference between power mower and tractor power. The tractor mower is mainly used for the soccer field, the rest of the time you are using the power mower. [She] has done well on TA [temporary assignment]"

⁵See, UPW Ex. 3-64. The factors the Employer considered included the following:

- 1) Of the five persons interviewed for the position, GABRIEL ranked lower than anyone else did.
- 2) Of the five persons given the performance test, GABRIEL and one other person were unsatisfactory in their performance.
- 3) Baseyard seniority is a factor in promotions when applicant's qualifications are relatively equal. Interviews, performance tests and other selection methods are used to determine the qualifications of the applicants.

to the power mower. She does not do well in interviews, but put her on the machine and she can do the job." UPW Ex. 3-67.

15. On October 30, 2001, the Director of Personnel Michael R. Ben, County of Hawaii, Department of Civil Service, denied GABRIEL's Step 2 grievance. See, UPW Ex. 3-69.
16. On November 5, 2001, Rabago recommended to Rodrigues not to pursue GABRIEL's grievance to arbitration.⁶
17. On November 14, 2001, Rodrigues informed GABRIEL of UPW's decision not to submit her grievance to arbitration. Rodrigues stated that, "We do not believe we can prevail on the merits before an arbitrator." See, UPW Ex. 3-74. Rodrigues' decision not to arbitrate GABRIEL's grievance over her non-selection for the Tractor Power Operator position was based on the grievance file, provisions of the BU 01 Contract, recommendation of business agent Rabago, and his review of arbitration case law in promotion cases. Rodrigues' decision not to pursue arbitration was based on the merits and his judgment that the UPW would not prevail before an arbitrator.
18. Rodrigues properly exercised his judgment in concluding that the UPW would not prevail before an arbitrator.
19. On January 10, 2002, GABRIEL filed the instant prohibited practice complaint alleging a violation of the collective bargaining agreement by the Union for deciding not to proceed to arbitration, and by the Employer for denying her promotion to the Tractor Mower Operator position.

⁶See, UPW Ex. 3-70. The reasons for Rabago's recommendation were:

1. The questions asked during the oral interview were related to the duties of a tractor mower operator. Gabriel scored less than all of the other candidates. She scored unsatisfactory on the practical test for the tractor mower.
2. There is no way for us to prove that Gabriel is relatively equal to the selectee using the interview documents and practical performance test results included in this grievance file.
3. This was a redo for the promotion that Gabriel did not receive for which I filed an earlier grievance (JR/01/5). Her scores on this interview were less than on the original interview. The redo was an opportunity to improve her score, which she failed to do.

20. On February 22, 2002, the Employer notified GABRIEL that she was not selected for a Power Mower Operator position, HC-0365, with the County's Parks Maintenance Division, for which she applied during the recruitment period from December 17 to 31, 2001.
21. On March 1, 2002, GABRIEL contacted the Union and discussed the Power Mower Operator promotion with Roland Kadota, UPW division director.
22. The Employer selected Labrador for the Power Mower Operator position, whose baseyear seniority is August 8, 1994. Labrador's selection became effective on March 18, 2002.
23. On March 11, 2002, Rabago wrote to GABRIEL because the particularization of her instant prohibited practice complaint added a charge against the UPW and Employer over her non-selection for the Power Motor Operator position. Rabago notified GABRIEL that the UPW would not pursue a grievance on her behalf over her non-selection for the Power Motor Operator position. In addition, Rabago informed GABRIEL of her right to grieve on her own.⁷
24. GABRIEL did not file a grievance pursuant to Section 15 of the BU 01 Contract within the 18 days from the effective date of Labrador's promotion to the Power Mower Operator position, and therefore did not attempt to exhaust her contractual remedies through Steps 1 and 2 of the grievance procedure of the BU 01 Contract.
25. With respect to the Tractor Mower Operator position, GABRIEL exhausted her contractual remedies provided under the formal grievance procedure of the BU 01 Contract, and the UPW properly refused to proceed to arbitration.

DISCUSSION

GABRIEL's prohibited practice complaint arises over her non-selection for a Tractor Mower Operator position. The UPW grieved the non-selection pursuant to the grievance procedure established by the BU 01 Contract. After the Employer denied the grievance at Step 2 on October 30, 2001, the UPW decided not to proceed to arbitrate the grievance. After filing the instant complaint, GABRIEL added an allegation over her non-

⁷Rabago notified GABRIEL that 1) the UPW would not pursue a grievance on her behalf over the non-selection for the Power Mower Operator position, and 2) GABRIEL could pursue a grievance on her own as provided in Section 15.03 of the BU 01 Contract. Rabago also enclosed a grievance form for GABRIEL to complete and submit to the Employer.

selection for a Power Motor Operator position, which the UPW chose not to grieve but informed GABRIEL of her right to file a grievance on her own.

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As against the UPW, GABRIEL charges a breach of the duty of fair representation brought under HRS § 89-13(b)(4) and a violation of the collective bargaining agreement under HRS § 89-13(b)(5).⁸

Failure to State a Claim for Relief

Respondent UPW asserts in its Motion to Dismiss and/or for Summary Judgment that GABRIEL fails to state a claim for relief under HRS § 89-13(b)(5) because the UPW is not a public employer and Section 16, Seniority clause, imposes responsibility on the Employer only. We agree.

A motion to dismiss is appropriate when complainant can prove no set of facts to support a claim for relief. Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (Conley). Section 16.06c of the BU 01 Contract, supra, requires the Employer, not the Union, to consider baseyard/workplace seniority in promotions. Therefore, GABRIEL can prove no set of facts that the Union violated Section 16 of the Contract and the Board dismisses the HRS § 89-13(b)(5) allegation against the Union.

⁸HRS § 89-13(b) states, in part:

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.

Duty of Fair Representation

The UPW contends that summary judgment is proper because the undisputed material facts show no breach of the UPW's duty of fair representation⁹ to GABRIEL. We agree.

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."

In the instant complaint, the burden of proof is on GABRIEL 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).

The U.S. Supreme Court in Airlines 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).

⁹HRS § 89-8(a) sets forth the Union's duty of fair representation and provides, in part, as follows:

The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.

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 the processing of grievances.” (Citations omitted). 18 F.3d at 1447. [Emphasis added.]

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).

Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact in dispute and, therefore it is entitled to judgment as a matter of law. State of Hawai‘i Organization of Police Officers (SHOPO) v. Society of Professional Journalists - University of Hawai‘i Chapter, 83 Hawai‘i 387, 389, 927 P.2d 386 (1996). A fact is material if proof of that fact would have the effect of establishing or refuting the essential elements of a cause of action or defense asserted by the parties. Konno v. County of Hawai‘i, 85 Hawai‘i 61, 937 P.2d 397 (1997).

In the instant complaint, GABRIEL contends that Union agent Rabago violated the Contract “by telling the employer to redo the interview process with the five (5) applicants, when in fact she should have said that the process of selection was in violation of Sec. 14-16 of the Bargaining Agreement and a second interview would not be necessary.”¹⁰ Although not specifically pleaded as against the UPW, GABRIEL also contends that the UPW breached its duty of fair representation by not fully processing and investigating both grievances over the non-selection for the Tractor Mower Operator position; not proceeding to arbitration; and not notifying her that it would not pursue a

¹⁰See, Affidavit of Helen L. Gabriel, filed May 1, 2002, paragraph A. GABRIEL also raises a violation of HRS § 89-13(b)(3) claiming the “Union did not bother to participate in good faith in fact finding with arbitration procedures.” The Board, however, dismisses this claim because HRS § 89-13(b)(3) pertains to mediation, fact-finding, and arbitration procedures for interest arbitration disputes, and not an individual’s contractual grievance. Therefore, HRS § 89-13(b)(3) does not apply to the instant complaint.

grievance over the Power Motor Operator position until after the time for filing a grievance lapsed. See, Affidavit of Helen L. Gabriel, filed May 1, 2002.

First, regarding Rabago's conduct, the record shows that a first grievance was filed for GABRIEL on May 10, 2001. Because of errors by the interviewers in checking different responses by both GABRIEL and the selectee during the course of the oral interview, the Employer agreed to vacate the promotion and re-do the selection process to include not only an oral interview, but also a performance test. We find that the Union's agreeing to the Employer's decision to re-do the selection process, for the reasons set forth in footnote 2, supra, was reasonable and non-arbitrary because the original selection process was faulty. GABRIEL participated in the re-selection and Rabago filed a subsequent grievance after being notified of GABRIEL's non-selection. Consequently, the Board finds that the undisputed facts establish that the Union did not breach its duty of fair representation in agreeing to the re-selection process.

Second, there is no dispute that UPW's State Director Rodrigues decided not to arbitrate GABRIEL's grievance because he believed GABRIEL could not prevail on the merits. Rodrigues considered the grievance file, provisions of the BU 01 Contract, and Rabago's recommendation not to arbitrate. He also reviewed the arbitral case law in promotion cases. See, Declaration of Gary W. Rodrigues, dated March 12, 2002. Therefore, the Board finds that Rodrigues, properly and in good faith, exercised his judgment in concluding that the UPW would not prevail before an arbitrator and therefore decided not to proceed to arbitration.

We find that Rabago's recommendation to Rodrigues not to arbitrate the grievance on the re-selection was also reasonable given the fact that: 1) GABRIEL scored less than all of the other candidates; and 2) the UPW could not prove that GABRIEL was relatively equal to the selectee using the interview documents and practical performance test results. Moreover, Rodrigues relied not only on Rabago's recommendation, but also reviewed the grievance file, provisions of the BU 01 Contract, and the arbitration case law on promotions. Based on these undisputed facts, we find that the UPW exercised its judgment in good faith and was not arbitrary in its decision not to arbitrate GABRIEL's grievance.

The UPW's actions in handling GABRIEL's grievance; its decision not to arbitrate; and its notice informing GABRIEL of the decision based on Rodrigues' determination that it could not prevail on the merits were reasonable. Having viewed this complaint in a light most favorable to GABRIEL, the Board concludes that there are no genuine material issues of fact in dispute and the Union is entitled to summary judgment in its favor; i.e., that it did not breach its duty of fair representation to GABRIEL in its handling of the Tractor Mower Operator grievances.

Third, regarding the Power Mower Operator position, there is no dispute that GABRIEL had ample time to file a grievance on her own after she was notified by the UPW that it would not pursue a grievance on her behalf.

On March 11, 2002, Rabago wrote to GABRIEL because the particularization of her instant prohibited practice complaint added a charge against the UPW and Employer over her non-selection for the Power Mower Operator position. Rabago informed GABRIEL that the UPW would not pursue a grievance on her behalf over her non-selection for the Power Motor Operator position. In addition, Rabago informed GABRIEL of her right to file her own grievance and provided her with the grievance forms.

Contrary to GABRIEL's contention that the time to file a grievance on her own had lapsed, the undisputed facts show otherwise. The promotion of Labrador to the Power Mower Operator position became effective on March 18, 2002. Consequently, under Section 15 of the BU 01 Contract, GABRIEL had 18 days from March 18, 2002 to file a grievance on her own after receipt of Rabago's March 11, 2002 letter. More importantly, there is no dispute that GABRIEL failed to file her own grievance over her non-selection for the Power Mower Operator position at Steps 1 and 2 of the contractual grievance procedure.

Based on these undisputed facts over her non-promotion to the Power Motor Operator position, we find that Rabago's timely letter to GABRIEL informing her of UPW's decision not to pursue a grievance and of her right to pursue a grievance on her own is reasonable and non-arbitrary and consistent with the Union's duty of fair representation. Therefore, we also conclude that there are no genuine issues of material fact in the record and the UPW is entitled to summary judgment as a matter of law; the UPW did not breach its duty of fair representation by deciding not to file a grievance over GABRIEL's non-selection for the Power Mower Operator position.

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On January 18, 2002, the Employer moved for a particularization of the instant complaint contending it was so vague and indefinite that it could not "reasonably be required to frame an answer thereto." By Order No. 2053 issued on January 22, 2002, the Board granted Respondents' motions for particularization "because the complaint does not specifically identify which particular actions each Respondent undertook which allegedly violated the contract as well as HRS § 89-13."¹¹

¹¹By Order No. 2053, Complainant was directed to specify:

- 1) the actions by each Respondent which allegedly violate which specific provisions of the collective bargaining agreement, if any;
- 2) the statutory provisions allegedly violated by each

On January 22, 2002, the Employer filed its answer without the benefit of Complainant's declaration particularizing her complaint. Against the Employer, GABRIEL charges a violation of Section 16, Seniority clause, of the Unit 01 contract and HRS § 89-13(a)(8), based on her non-selection for the Tractor Mower and Power Mower Operator positions.¹²

The Employer contends that: 1) the complaint fails to state a claim upon which relief may be granted to Complainant; 2) "paragraph 6 of the complaint, which references Complainant's grievance, Complainant's seniority was not considered due to the material difference of the qualifications of the candidate which was selected for the promotion to the vacant Tractor Mower Operator, BC-04 position in the South Kohala/Hamakua baseyard;" 3) the person promoted was the best qualified candidate, thereby precluding first consideration by reason of Complainant's seniority;" 4) the complaint fails to state any prohibited practice by the Employer under HRS § 89-13; and 5) the Board lacks jurisdiction to hear the complaint.¹³

Tractor Mower Operator Position

With respect to the Tractor Mower Operator position, the Board finds the Employer followed the grievance procedure as provided under Section 15 of the BU 01 Contract. The Employer agreed to re-do the selection process to resolve GABRIEL's first grievance at Step 1. Subsequently, on September 11, 2001, the UPW, through its Union agent Rabago, filed a second Step 1 grievance over GABRIEL's non-selection. The Employer's representative Patricia Engelhard held a Step 1 meeting with GABRIEL and her Union agent on September 26, 2001. On September 28, 2001, the Employer denied GABRIEL's grievance "finding that the qualifications of the grievant (GABRIEL) and the selectee are not relatively equal and, therefore, seniority is not a consideration." See, UPW Ex. 3-65. Therefore, GABRIEL and her Union agent filed a Step 2 grievance on October 3, 2001. The Employer's representative, Ron Takahashi, held a Step 2 meeting with GABRIEL

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- Respondent; and
- 3) the facts underlying the contractual or statutory violations.

¹²On March 6, 2002, after the Board granted Complainant a 30-day extension of time to particularize her complaint, the Complainant filed a Declaration as follows:

1. I was denied promotion to **Tractor Mower Operator** by the County of Hawaii and the UPW refused to arbitrate my case.
2. I was also denied promotion to **Power Mower Operator** by the County of Hawaii and the UPW will not hear my case.
3. As of this date I have been unable to obtain legal counsel.

¹³See, Respondent Department of Parks and Recreation, County of Hawaii's Answer to Prohibited Practice Complaint filed on January 11, 2002.

and her Union agent. On October 30, 2001, the Employer denied the Step 2 grievance. See, UPW Ex. 3-69.

The Board concludes that GABRIEL went as far as she could go through the grievance procedure and thus, exhausted her contractual remedies. In a recent Hawaii Supreme Court decision, Lewis W. Poe v. Hawai'i Labor Relations Board, et. al., 97 Hawai'i 528, 40 P.3d 930 (2002), the Court held that an employee had exhausted his administrative remedies under the grievance procedure after Step 3 because imposing a requirement that the employee ask his Union to pursue a grievance to arbitration would be futile. Relying on Winslow v. State, 2 Haw.App. 50, 612 P.2d 1046 (1981) (Winslow), the Poe Court reasoned that "where a collective bargaining agreement provides that only a union may exercise the ultimate grievance step of requesting arbitration, the employee is bound thereby, and if the union elected not to exercise that option, the employee has exhausted his or her administrative remedies." Id., citing Winslow, 2 Haw.App. at 55, 625 P.2d at 1051.

At Steps 1 and 2 of the grievance procedure, the Employer determined that GABRIEL and the selectee were not "relatively equal." GABRIEL did not dispute the overall evaluation scores given by the re-selection panel for the Tractor Mower Operator to the selectee versus her overall evaluation of three fair, and nine poor. As a result, GABRIEL can prove no set of facts to show that the Employer engaged in a prohibited practice in wilful violation of the BU 01 Contract within the meaning of HRS § 89-13(a)(8). See, Conley, 355 U.S. at 47.

Having failed to state a claim for relief against the Employer over the Tractor Mower Operator position, the Board therefore dismisses GABRIEL's prohibited practice complaint against the Employer alleging a violation of the collective bargaining agreement over her non-selection to the Tractor Mower Operator position.¹⁴

Power Mower Operator Position

With respect to the Power Mower Operator position, there is no dispute that GABRIEL failed to file her own grievance contesting her non-selection for the position. Instead, on March 6, 2002, GABRIEL added the charge to the instant complaint in response to Board Order No. 2053 directing her to particularize her allegations.

On March 11, 2002, Rabago wrote to GABRIEL because the particularization of her instant prohibited practice complaint added a charge against the UPW and Employer

¹⁴Assuming arguendo, GABRIEL's complaint is intended as an appeal over the Employer's non-selection for both the Tractor Mower Operator and Power Mower Operator positions, this Board lacks jurisdiction over any such appeal. Personnel actions taken by the Director of Personnel Services are appealable under HRS Chapter 76, Civil Service Law, to the appropriate Civil Service Commission or Merit Appeals Board pursuant to Act 253 SLH 2000.

over her non-selection for the Power Motor Operator position. Rabago informed GABRIEL that the UPW would not pursue a grievance on her behalf over her non-selection for the Power Motor Operator position. Rabago also notified GABRIEL that she could pursue a grievance on her own as provided in Section 15.03 of the BU 01 Contract and enclosed a grievance form for GABRIEL to complete and submit to the Employer.

In Winslow, 2 Haw.App. at 55, the Hawaii Intermediate Court of Appeals held that where the terms of public employment are covered by a collective bargaining agreement pursuant to HRS Chapter 89 and the agreement includes a grievance procedure to dispose of employee grievances against the public employer, an aggrieved employee is bound by the terms of the agreement. The Court in Winslow found that the employee had failed to exhaust her available remedies because she failed to proceed to Step 4 (appeal to the employer) of the grievance procedure.

In Santos v. State, Dept. of Transp., Kauai Div., 64 Haw. 648, 646 P.2d 962 (1982), the Hawaii Supreme Court stated that “[i]t is the general rule that before an individual can maintain an action against his [or her] employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his [or her] employer and the [union].” (Citation omitted). 64 Haw. at 655.

In Hokama v. University of Hawai`i, 92 Hawai`i 268, 272, 990 P.2d 1150, 1154 (1999), the Court explained the policy considerations underlying the exhaustion of administrative remedies requirement as follows:

The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process, allowing the parties to develop their own uniform mechanism of dispute resolution. [Citations omitted.] It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means. [Citations omitted.]

In cases where an employee charges a prohibited practice against the employer alleging a violation of the collective bargaining agreement pursuant to HRS § 89-13(a)(8) before exhausting the contractual remedies, this Board has declined jurisdiction in keeping with the prevailing National Labor Relations policy and Hawaii policy favoring arbitration as a dispute settlement mechanism. Hence, this Board will defer to the grievance process, except where there exists countervailing policy considerations, or the union’s conduct in processing a grievance is discriminatory or in bad faith, thereby constituting a breach of its duty of fair representation to the member. See, Stevens, 18 F.3d at 1447, supra.

In the instant complaint, there is no dispute that GABRIEL failed to file a grievance on her own over the non-selection for the Power Mower Operator position,

pursuant to Section 15 of the BU 01 Contract. Therefore, the Board concludes that GABRIEL did not exhaust her contractual remedies through Steps 1 and 2 with the Employer. In keeping with the policy favoring the dispute settlement mechanism developed between the employer and Union, the Board defers to the grievance process, and declines jurisdiction over the instant claim.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over this complaint pursuant to HRS §§ 89-5 and 89-14, except for GABRIEL's claim against the Employer over her non-selection to the Power Mower Operator position.
2. A union breaches its duty of fair representation in violation of HRS §§ 89-8(a) and 89-13(b)(4), when its conduct towards its member is arbitrary, discriminatory, or in bad faith.
3. Viewing the facts in the light most favorable to the non-moving party, the Board concludes that the Union exercised its judgment in good faith in determining that it could not prevail on the merits of the grievance over GABRIEL's non-selection for the Tractor Mower Operator position. Therefore, the Union's decision not to proceed to arbitration was within the wide range of reasonableness permitted.
4. The Union's conduct in the processing of two grievances over GABRIEL's non-selection for the Tractor Mower Operator position was not arbitrary, discriminatory, or in bad faith.
5. The Union's decision not to pursue on GABRIEL's behalf a grievance over the non-selection for a Power Motor Operator position, and notification to GABRIEL of her right to file a grievance on her own was timely and reasonable under the circumstances. Therefore, the Union did not breach its duty of fair representation to GABRIEL.
6. A motion to dismiss is appropriate when Complainant can prove no set of facts to support a claim for relief. Conley, supra. Section 16.06c of the BU 02 Contract requires the Employer, not the Union, to consider GABRIEL's baseyard/workplace seniority in promotions. Therefore, GABRIEL could prove no set of facts that the Union violated Section 16 of the Contract.
7. An employer violates HRS § 89-13(a)(8), when it violates the provisions of the applicable collective bargaining agreement.

8. Based on the record, the Employer determined that GABRIEL and the selectee were not "relatively equal," and GABRIEL did not dispute the overall evaluation scores given by the re-selection panel for the Tractor Mower Operator to the selectee versus her overall evaluation of three fair, and nine poor. As a result, GABRIEL can prove no set of facts to show that the Employer engaged in a prohibited practice in wilful violation of the BU 01 Contract within the meaning of HRS § 89-13(a)(8).

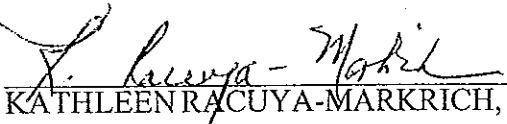
9. By failing to pursue on her own a grievance over the Power Motor Operator position, the Board concludes that GABRIEL did not exhaust her contractual remedies through Steps 1 and 2 with the Employer. In keeping with the policy favoring the dispute settlement mechanism developed between the employer and union, the Board defers to the grievance process, and declines jurisdiction over the claim.

DATED: Honolulu, Hawaii, August 8, 2002.

HAWAII LABOR RELATIONS BOARD


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