STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of ALVIN M. IKEMOTO, Complainant, and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and GILBERT NOBREGA, Business Agent, United Public Workers, AFSCME, Local 646, AFL-CIO, Respondents.	CASE NO. CU-10-204 ORDER NO. 2121 ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

On July 23, 2002, ALVIN M. IKEMOTO (IKEMOTO) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against GILBERT NOBREGA (NOBREGA), Business Agent, United Public Workers, AFSCME, Local 646, AFL-CIO and the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (collectively UPW or Union). IKEMOTO alleges that the Union breached its duty to represent him and denied him due process by refusing to file a grievance on his behalf regarding the denial of a promotion for the position of Adult Corrections Officer (ACO) VI. IKEMOTO contends that the Union violated the provisions of Hawaii Revised Statutes (HRS) § 89-13(b).

On July 26, 2002, the UPW filed Respondents' Motion for Particularization. On August 5, 2002, the UPW filed its Motion to Dismiss contending that this dispute relates to a promotion to a non-bargaining unit position over which the Board lacks jurisdiction and about which the UPW owes no duty of fair representation to IKEMOTO.

On August 7, 2002, the Board issued Order No. 2104, Order Denying Respondents' Motion for Particularization and set a hearing date for the Motion to Dismiss.

On August 23, 2002, the Board held a hearing on the Motion to Dismiss. The parties were afforded full opportunity to argue their positions. After a thorough review of the record, the Board makes the following findings of facts, conclusions of law, and order.

FINDINGS OF FACT

1. IKEMOTO is an ACO V at the Kauai Community Correctional Center (KCCC), Department of Public Safety (PSD) and an employee as defined in HRS § 89-2. IKEMOTO is a member of bargaining unit 10 composed of institutional, health, and correctional workers.

2. The UPW is the certified exclusive representative, as defined in HRS § 89-2, of the employees in bargaining unit 10 and NOBREGA is a business agent representing the Union.

3. IKEMOTO applied for promotion to the Captain's position at KCCC, ACO VI, Position No. 28215, which is excluded from bargaining unit 10.

4. In Decision No. 215, George R. Ariyoshi, 4 HLRB 25 (1986), the Board found that ACO VI positions, including Position No. 28215, were properly excluded from collective bargaining unit 10 as top-level managerial positions.

5. By letter dated April 24, 2002, IKEMOTO was notified by Clayton Kitamori, Personnel Management Specialist, that he was not selected for the position.

6. IKEMOTO requested NOBREGA to file a grievance on the denial of the promotion.

7. By letter dated April 25, 2002, NOBREGA responded to IKEMOTO stating that the Union has not filed grievances for Unit 01 or Unit 10 members who are denied promotions to other bargaining unit or exempt positions based on a prior arbitration decision.

8. On May 21, 2002, IKEMOTO, by his representative, filed a grievance with PSD contending that Section 16.06d of the collective bargaining agreement was violated when IKEMOTO was not given a written statement of the reasons for the denial of promotion within three working days.

9. By letter dated May 24, 2002, Ted Sakai (Sakai), PSD Director responded to IKEMOTO's representative denying the grievance because the position being sought is an excluded position and not covered by the bargaining unit 10 agreement. Sakai recognized that IKEMOTO had also filed an appeal with the Civil Service Commission contesting the denial of promotion.

DISCUSSION

Complainant alleges that the UPW breached its duty of fair representation by refusing to file a grievance on his behalf or assist him in contesting the denial of promotion to the position of ACO VI thereby committing a prohibited practice in violation of HRS §§ 89-13(b) and 89-8(a).

The UPW contends that the ACO VI Captain's position is a top-level managerial position which is excluded from collective bargaining under HRS § 89-6(c).[1]

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[1]HRS § 89-2, Definitions, provides in part, as follows:

> "Employee" or "public employee" means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section 89-6(c).

In spite of the foregoing reference to HRS § 89-6(c) containing the statutory exclusions of positions from collective bargaining, HRS § 89-6(f), as amended in 2002 in Act 253, presently contains the exclusions.

HRS § 89-6(f) provides as follows:

> The following individuals shall not be included in any appropriate bargaining unit or be entitled to coverage under this chapter:
>
> (1) Elected or appointed official;
> (2) Member of any board or commission;
> (3) Top-level managerial and administrative personnel, including the department head, deputy or assistant to a department head, administrative officer, director, or chief of a state or county agency or major division and legal counsel;
> (4) Secretary to top-level managerial and administrative personnel under paragraph (3);
> (5) Individual concerned with confidential matters affecting employee-employer relations;
> (6) Part-time employee working less than twenty hours per week except part-time employees included in unit (5);
> (7) Temporary employee of three months' duration or less;
> (8) Employee of the executive office of the governor or a household employee at Washington Place;
> (9) Employee of the executive office of the lieutenant governor;
> (10) Employee of the executive officer of the mayor;
> (11) Staff of the legislative branch of the State;

Thus, the UPW argues that the Board lacks jurisdiction over a promotional dispute for an excluded position and over a constitutional due process claim which does not involve state actions. The UPW further argues that the UPW owes no duty of fair representation under the circumstances presented since the duty does not extend to supervisory or other excluded positions. The UPW contends therefore that the complaint should be dismissed for lack of subject matter jurisdiction and failure to state a claim for relief.

Complainant argues that as a current member of Unit 10 and the senior applicant, the UPW should have investigated his concerns and determined whether a grievance should be filed or another course of action pursued. Complainant alleges that the Union failed to conduct an investigation into the merits of his claim and therefore breached its duty of fair representation.

Jurisdiction

The UPW contends that the Board lacks jurisdiction over a promotional dispute for an excluded position. The UPW agrees with PSD that the denial of promotion is properly before the Civil Service Commission. Complainant, however, contends that as a current member of Unit 10, he is entitled to the protection and provisions of the collective bargaining agreement and that the Board has jurisdiction over this case.

The Board agrees with the UPW that its remedial authority is limited because the gravamen of the complaint is UPW's failure to represent Complainant in the denial of his promotion to a position which is excluded from collective bargaining and therefore not subject to the provisions of the collective bargaining agreement. However, as Complainant alleges that the UPW breached its duty of fair representation and therefore committed a prohibited practice, the Board clearly has jurisdiction under HRS §§ 89-14 and 89-5 to determine whether the Union fulfilled its duty to Complainant.

Duty of Fair Representation

The Board discussed the Union's duty of fair representation in Order No. 2105, dated August 8, 2002, in Helen L. Gabriel, Case Nos. CU-01-189, CE-01-493, stating:

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(12) Staff of the legislative branches of the counties, except employees of the clerks' offices of the counties;
(13) Any commissioned and enlisted personnel of the Hawaii national guard;
(14) Inmate, kokua, patient, ward or student of a state institution;
(15) Student help; or
(16) Staff of the Hawaii labor relations board.

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).

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).

The Board's concern in this matter is when a bargaining unit member requests assistance from the exclusive representative to file a grievance, that the request is reasonably investigated and addressed. In this regard, NOBREGA conducted a reasonable investigation to necessarily determine that IKEMOTO was denied a promotion to a position which was excluded from the bargaining unit. The Board notes that NOBREGA relied upon prior arbitral authority. In the arbitration of Frank Pavao, Jr. (June 9, 1977), Arbitrator Stanley Ling found that a grievance arising from a promotion between bargaining units 01 and 02 was nonarbitrable. Although not directly on point, the Pavao decision is instructive and arguably directly applicable to the instant case which involves the promotion to an excluded position outside of the bargaining unit. Equally important, NOBREGA promptly advised IKEMOTO that his challenge on the nonselection was not grievable because the promotion entailed movement outside of the bargaining unit.

Thus, in the instant case, having viewed the facts in the complaint in a light most favorable to Complainant, 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. The record establishes that NOBREGA investigated the matter and promptly and reasonably advised IKEMOTO that the Union would not assist him. The Board therefore finds that the Union was not arbitrary or discriminatory or acted in bad faith in the handling of IKEMOTO's request to file a grievance and therefore did not breach its duty of fair representation to him.

CONCLUSIONS OF LAW

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

2. The breach of duty of fair representation is a prohibited practice in violation of HRS §§ 89-13(b)(4) and 89-8(a), when the union's conduct is arbitrary, discriminatory or in bad faith.

3. Based on the entire record, the Board concludes there are no genuine material issues of fact in dispute and Respondents are entitled to summary judgment in its favor; i.e., that it did not breach its duty of fair representation to IKEMOTO by deciding that they would not pursue a grievance on his behalf and notifying him as such. The Board concludes that Respondents' conduct was nonarbitrary or nondiscriminatory when it refused to represent IKEMOTO in his grievance or to take the matter to arbitration.

ORDER

The instant prohibited practice complaint is hereby dismissed.

DATED: Honolulu, Hawaii, October 3, 2002.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

ALVIN M. IKEMOTO and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, et al.
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KATHLEEN RACUYA-MARKRICH, Member

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