

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-10-205
VINCENT WALKER,)	ORDER NO. 2131
)	
Complainant,)	ORDER GRANTING RESPONDENTS'
)	MOTION TO DISMISS AND/OR FOR
and)	SUMMARY JUDGMENT
)	
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO and EDWARD SIAOSI,)	
Business Agent, United Public Workers,)	
AFSCME, LOCAL 646, AFL-CIO,)	
)	
Respondents.)	

ORDER GRANTING RESPONDENTS'
MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

On August 26, 2002, Respondents UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Union or UPW) and EDWARD SIAOSI, UPW Business Agent (SIAOSI), moved to dismiss the prohibited practice complaint filed August 12, 2002 by Complainant VINCENT WALKER (WALKER) with the Hawaii Labor Relations Board (Board) alleging a wilful violation of the duty of fair representation by refusing to pursue Complainant's discharge grievance pursuant to the Unit 10 collective bargaining agreement (Contract).

Pursuant to the Board's notice issued September 5, 2002, a hearing was held on Respondent UPW's Motion to Dismiss and/or for Summary Judgment on September 24, 2002.

At the hearing on September 24, 2002 Complainant, appearing *pro se*, filed a written memorandum opposing Respondent UPW's Motion to Dismiss and/or for Summary Judgment, and was provided the opportunity to make oral argument opposing said motion.

Based on the entire record and having considered the oral arguments and affidavits in the light most favorable to Complainant, the Board makes the following findings of fact, conclusions of law and order granting Respondent UPW's Motion to Dismiss and/or for Summary Judgment.

FINDINGS OF FACT

1. WALKER, at all times relevant, was a Corrections Officer with the Department of Public Safety, State of Hawaii (PSD), and a public employee within the meaning of Hawaii Revised Statutes (HRS) § 89-2.
2. UPW is an employee organization and the exclusive representative within the meaning of HRS § 89-2 for Corrections Officers, including WALKER, who are in bargaining unit (BU) 10.
3. SIAOSI is a UPW Business Agent and a designated agent of the exclusive representative within the meaning of HRS § 89-2.
4. PSD under Director Ted Sakai is the representative of the Public Employer within the meaning of HRS § 89-2.
5. The UPW and the public employers were parties to a BU 10 Contract, covering the period July 1, 1999 to and including June 30, 2003, which includes a comprehensive grievance procedure under Section 15 that provides for: the right of an employee to file a grievance without Union representation; informal resolution; formal grievance; Step 1 Grievance; Step 2 Appeal or Grievance; and Step 3 Arbitration by the Union.
6. The BU 10 Contract in Section 37, covering Sick Leave, provides for Investigation for Patterns of Absences Due to Sickness which includes:
 - 1) Criteria for Determining Patterns of Absences Due to Sickness;
 - 2) Investigation Procedures for Patterns of Absences Due to Sickness;
 - 3) Follow-Up Evaluation for Unacceptable Patterns of Absences Due to Sickness; and
 - 4) Disciplinary Action for Abuse of Sickness.¹

¹Section 37.17.b.4. of the BU 10 Contract states:

4. DISCIPLINARY ACTION FOR ABUSE OF SICKNESS.

Employees who are subject to Section 37.17.b.3.a)2) and Section 37.17.b.3.a)3) shall be disciplined for abuse of sickness for just and proper cause as provided in Section 11.01 as follows:

- a) Each day of not reporting as directed by letter to undergo a medical evaluation by the physician selected by the department head shall be considered one (1) violation.
- b) Each day of not providing notification of an absence due to a workers compensation injury and not

7. On November 5, 2001, Complainant was placed on leave without pay, and received a written notice from PSD Director Ted Sakai informing him that based on the investigation of an established pattern of absences due to sickness affirming violations of Section 37.17.b for failing to report to the Medical Corner Clinic as required, he was being discharged on November 19, 2001 and would be afforded a pre-dismissal hearing scheduled for November 16, 2001 before the Departmental Hearings Officer, Shelley Nobriga.

8. On January 8, 2002, Complainant wrote to UPW State Director Gary Rodrigues regarding his pre-dismissal hearing. Specifically, Complainant asked: 1) about a time frame for a decision; 2) to proceed to Step 1 of the Grievance Procedure; and for a copy of pre-dismissal hearing tape and Step 1

reporting to the treating physician each day of absence for the injury shall be considered one (1) violation.

- c) Each day the medical evaluation does not substantiate the Employee's sickness shall be considered one (1) violation.
- d) Each violation of a), b) and c) shall be considered as unauthorized leave without pay for payroll purposes and shall result in discipline as provided in the following schedule.

<u>Violation</u>	<u>Discipline</u>
1 st	One day suspension
2 nd	Two day suspension
3 rd	Four days suspension
4 th	Eight days suspension
5 th	Twenty days suspension
6 th	Discharge

- e) Repeat patterns of absence due to sickness which are discovered after the end of three (3) months shall be considered one (1) violation and subject to the discipline schedule in d).
- f) Repeat patterns of absence due to sickness which are discovered after the end of three (3) months shall be considered one (1) violation and subject to the discipline schedule in d).
- g) Violations shall be counted continuously for a period of two (2) years retroactive from the date of the most current violation.

grievance response from the employer. By memorandum dated January 28, 2002, Rodrigues responded to Complainant.

9. On January 18, 2002, SIAOSI, on behalf of Complainant, filed a Step 1 grievance over the Employer's decision to sustain Complainant's dismissal following a November 16, 2001 Pre-Dismissal Hearing, UPW Case No. ES-02-02. The UPW alleged, inter alia, a violation of Section 11 "because the Employer disciplined the Employee without just and proper cause" and a violation of Section 37, "because the Employer inappropriately applied this Section of the Agreement in disciplining the Employee and in failing to allow the Employee rights as covered under this section."
10. On March 7, 2002, SIAOSI received the Employer's Step 1 response denying the Union's grievance for violation of Sections 11 and 37 of the BU 10 Contract. The Employer's response states:

At the Step 1 meeting, the Union presented the following:

- The Department failed to consider ACO Walker's leave request in accordance with Section 38.08(g) and (i).
 - The leave request is in compliance with Section 38.
 - The Department improperly applied Section 37.17.b.3.
 - In the past, ACO Walker called the sick call hotline. Upon returning to work, he requested the use of his sick leave for the care of his children and grandmother, and this leave had been approved. He has not been notified that this procedure has changed.
11. On March 7, 2002, the UPW filed a Step 2 grievance on behalf of Complainant. SIAOSI did not receive a Step 2 response from the Employer.
 12. By interoffice memorandum dated May 13, 2002, from SIAOSI to Rodrigues, SIAOSI evaluated the Complainant's discharge grievance by applying a seven point test for discipline for just and proper cause. SIAOSI recommended that the Union drop Complainant's grievance on the basis that: 1) the Employer notified Complainant by letter dated June 6, 2001 that he was required to report to the Employer's designated physician from June 16 through December 15, 2001 when taking sick leave; and by memorandum dated July 17, 2001, the Employer notified all Corrections Officers like Complainant of the procedure for calling in sick and for requesting all other types of leave;²

²The procedure for calling in for unscheduled non-sick leave is:

2) the Employer investigated the misconduct before administering the discipline by conducting a pre-dismissal meeting with Hearings Officer Shelly Nobriga; 3) the Employer's investigation was fair and objective, and included two pre-dismissal meetings to allow Complainant the opportunity to provide additional information in support of his position; 4) the Employer's investigation produced substantial evidence or proof of guilt;³ 5) the Employer

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1. Contact the on-duty Captain for approval. Requests for unscheduled leaves are to be made personally, **NOT VIA THE SICK CALL HOT LINE**. Respondent UPW Exhibit 13.

³In SIAOSI's judgment:

...The Employer established that the Employee was notified of the requirements of Section 37.17b. The Employee stated that he notified the Employer via the Sick call hotline of his absence due to sickness on all the aforementioned dates.

The Employee admitted that he did not report to the Employer's designated physician.

The Employer stated that Captain Roberts denied making a statement to Walker in February 2001. However, Captain Roberts admitted to informing Walker on June 21, 2001, when asked for family leave, that he could not provide it because of manpower shortage on the shift. Roberts further stated that he would note that Walker called the facility and would bring in the necessary medical documentation.

A review of all Leave Request Forms (G-1s) was conducted which indicated only 2 time periods previous to 2001, that Walker was subject to the requirements of Section 37.17 b.; 1995 and 1998-1999.

On September 18, and October 7 and 11, 1995, Walker reported to the Employer's physician in accordance with Section 37.17 b. In reviewing his DPS-7 card and G-1s there were no requests for Family Leave taken 4 months prior to September and 4 months after October 1995 (regarding the 6 month follow up for unacceptable patterns of absences due to sickness).

On December 23, 27, and 28, 1998, Walker failed to report to the Employer's physician (the Employer's investigation later cleared him of the allegations). On April 9, 13, and 23, 1999, Walker again reported to the Employer's physician in accordance with Section 37.17 b. In reviewing the G-1s there were no requests for Family Leave 1 month prior to December 1998 and 1 month after

April 1999.

Therefore there was no precedence on which Walker could claim that while he was on the follow up program, he was allowed to 1) call in sick, 2) not report to the Employer's physician that day, and 3) return with a physician's certificate and complete a G-1 with a request for Family Leave.

In a memo dated January 15, 1999, from IDA Clayton Frank to all concerned parties regarding an alleged violation of Section 37.17 b by Walker on December 23, 27, & 31, 1998, Walker was notified that he needed to report to the Employer's physician for each time he calls in sick. The memo stated:

“NOTE: I will inform Warder (sic) Nolan Espinda, that he will need to appraise (sic) Walker that he received the benefit of the doubt in this case, however, henceforth, he (ACO Walker) will need to comply with the 37.17 b. 3. instructions (report to the applicable Medical Corner of Emergency Room) for each time he calls in sick.”

There were handwritten notations in the margin which read: “Verbally informed Nolan (via telephone) 1/15/99 955 am.”

It was also confirmed by other ACO's (sic) at the facility (ACO IV's Randy Young and Allan Octavio) that for as long as they could remember being at the facility (over 2 years) that any requests for family leave, if it was not requested in advance of the beginning date of the request, they were required to notify and acquire approval from their Watch Commander.

This indicates that Walker knew 1) that he needed to acquire approval from his supervisor in order to utilize his sick leave for family leave, 2) that he needed to report to the Employer's physician for each time he reported his absence due to sickness, and 3) had no basis to make the assumption that while on the follow up program, he would be allowed to call in sick, not report to the Employer's physician, and return with a G-1 requesting for Family Leave.

The primary dispute is the Employee's understanding of how he utilized his sick leave for family leave and the requirements of Section 37.17 b. The Employee's claim of past practice allowing him to just call in sick, not report to the medical physician, and return with a G-1 requesting for Family leave is false. There are no records that

informed Complainant of the requirements of Section 37.17b., including the requirement of calling the Watch Commander to request for Family Leave when an advance notice is not submitted as reflected in the memo dated July 17, 2001, and substantiated by other Corrections Officers; 6) the Employer applied the appropriate disciplinary action required in Section 37.17b.4. of the Contract applicable for all employees subject to the follow-up evaluation for unacceptable patterns of absences due to sickness; and 7) the penalty of discharge was reasonably related to the seriousness of the offense and the employee's past record.

10. The Board finds that SIAOSI found that the employer had just and proper cause to dismiss Complainant from employment.
11. On May 13, 2002, UPW State Director Rodrigues agreed with SIAOSI's recommendation not to pursue Complainant's discharge grievance; and by letter dated May 14, 2002 SIAOSI informed Complainant of the Union's decision not to pursue his grievance, which Complainant received on May 16, 2002.
12. On August 12, 2002, Complainant filed the instant prohibited practice complaint charging the UPW for wilful violations of HRS §§ 89-13(b)(1), (3) and (5) by deciding not to pursue his discharge grievance as set forth in paragraphs 10 and 11 of the complaint.
13. By letter dated August 19, 2002, from Rodrigues to Davis Yogi, Director, Department of Human Resources Development, State of Hawaii, the Union submitted Complainant's discharge grievance to arbitration, "subject to further review following the Hawaii Labor Relations Board dispositions in Case

this had happened in the 2 prior incidences that Walker was placed on the follow up program.

The requirements of Section 37.17 b. were clearly described to him in his letters dated June 6, 2001, placing him on the program, and memo dated January 15, 1999.

The requirement of calling the Watch Commander to request for Family Leave when an advance notice is not submitted is clearly indicated in the memo dated July 17, 2001, and substantiated by other ACOs. Respondent UPW's Exhibit (Ex.) 13. (Emphasis added.)

No. CE-10-510 and CU-10-205 and any other civil litigation brought by Vincent Walker.”⁴

14. Having considered the facts in the light most favorable to Complainant, the Board finds the Union’s exercise of its judgment not to pursue Complainant’s discharge grievance was reasonable, in good faith and non-discriminatory.

DISCUSSION

Duty of Fair Representation

At issue before the Board is Complainant’s contention that the UPW’s decision not to pursue his discharge grievance constitutes a breach of the duty of fair representation.

The Union’s duty of fair representation requires the exclusive representative to “be responsible for representing the interests of all such employees without discrimination and without regard to the employee organization membership.” HRS § 89-8(a). The union’s breach of its duty of fair representation is a prohibited practice in violation of HRS § 89-13(b)(4) and HRS § 89-8(a), when the union’s conduct is arbitrary, discriminatory or in bad faith. Kathleen M. Langtad, 6 HLRB 423 (2001) citing Vaca v. Sipes, 386 U.S. 171, 190-191, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967).

In determining arbitrariness, the Ninth Circuit Court of Appeals has required a finding that the act in question not involve the exercise of judgment, and that the union had no rational reason for its conduct. See Richard Hunt, 6 HLRB 222 (2001) citing Moore v. Bechtel Power Corp., 840 F.2d. 634, 636, 127 LRRM 3023 (9th Cir. 1988).

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

⁴On August 12, 2002, Complainant filed a prohibited practice complaint against public employer, Benjamin Cayetano, Governor, State of Hawaii and Ted Sakai, Director of PSD, alleging wilful violations of HRS §§ 89-13(a)(1), (6) and (8), relating to his discharge grievance.

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.]

The UPW moves for summary judgment on the grounds that there are no genuine issues of material fact in dispute to support a finding that the exercise of its judgment not to pursue Complainant's discharge grievance was arbitrary, discriminatory or in bad faith.

Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact in dispute and it is entitled to judgment as a matter of law. State of Hawaii Organization of Police Officers (SHOPO) v. Society of Professional Journalists - University of Hawaii Chapter, 83 Hawaii 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 Hawaii, 85 Hawaii 61, 937 P.2d 397 (1997).

Based on SIAOSI's application of the test for disciplinary action for just and proper cause, the Union determined the employer had just and proper cause for dismissing Complainant from employment as provided under Section 37.17 b. 4. of the Contract for abuse of sickness. SIAOSI reviewed Complainant's leave records and other documentation relating to the use of sick leave. Based on said review, SIAOSI concluded as follows:

...Walker knew 1) that he needed to acquire approval from his supervisor in order to utilize his sick leave for family leave, 2) that he needed to report to the Employer's physician for each time he reported his absence due to sickness, and 3) had no basis to make the assumption that while on the follow up program, he would be allowed to call in sick, not report to the Employer's physician, and return with a G-1 requesting for Family Leave.

The primary dispute is the Employee's understanding of how he utilized his sick leave for family leave and the requirements of Section 37.17 b. The Employee's claim of past practice allowing him to just call in sick, not report to the medical physician, and return with a G-1 requesting for Family leave is false. There are no records that this had happened in the 2 prior incidences that Walker was placed on the follow up program.

The requirements of Section 37.17 b. were clearly described to him in his letters dated June 6, 2001, placing him on the program, and memo dated January 15, 1999. [Emphasis added.] (See, Respondent UPW's Ex. 13.)

The UPW's State Director agreed with SIAOSI's recommendation to not pursue the grievance based on its determination that the employer had just and proper cause to discharge Complainant. Assuming arguendo, SIAOSI erred in his judgment that Complainant's claim of a past practice allowed him to call in sick, not report to a medical physician, and return with a request for family leave were false, Complainant neither disputes SIAOSI's application of the just and proper cause test for disciplinary action, nor alleges that the Union's decision was discriminatory or in bad faith.

Having considered the facts in the light most favorable to Complainant, the Board concludes the Union's exercise of its judgment not to pursue Complainant's discharge grievance was reasonable, in good faith and non-discriminatory.

Statute of Limitations and Failure to State a Claim

Respondent UPW moves to dismiss Complainant's allegations in paragraph 9 of the instant complaint⁵ asserting violations of HRS §§ 89-13(b)(1), (3) and (5) on the grounds Complainant's claims are: 1) time-barred by the 90-day statute of limitations applicable to prohibited practices; 2) fails to state a claim because the UPW is not the public employer and the grievance procedure under Section 15 of the BU 10 Contract does not obligate the Union to file a grievance or provide information; and 3) Complainant's HRS § 89-13(b)(3) claims are inapplicable to individual grievances.

Complainant submits the complaint is timely as filed on August 12, 2002 and falls within the 90-day period from the May 14, 2002 letter by SIAOSI refusing to pursue the discharge grievance further. The Board agrees. However, while Complainant's claim alleging a breach of the duty of fair representation is timely, the Union argues the claims alleging violations under paragraph 9 of the instant complaint are barred by the

⁵Paragraph 9 of the instant complaint states:

By the aforementioned acts and conduct respondents willfully violated the unit 10 Bargaining Agreement Section 15 Grievance Process.

Section 15.01 Process

Failure to process grievance on behalf of member for violations occurred on August 1st and 2nd, 2001.

Section 15.09 Information

Failure to provide member information needed to process grievance regarding violation on dates August 1st, 2nd and September 15th through 30th, 2001.

applicable 90-day statute of limitations under HRS § 377-9(1) and Hawaii Administrative Rules (HAR) § 12-42-42.⁶ The Board agrees with the Union that it lacks jurisdiction with respect to claims as alleged in paragraph 9 of the instant complaint. Accordingly, the Board need not address Respondents' argument that Complainant fails to state a claim for alleged violations of the grievance procedure for failing to process a grievance and provide information under Section 15 of the BU 10 Contract.

Regarding Complainant's charge against the Union of an alleged violation under HRS § 89-13(b)(3), the UPW moves for dismissal on the grounds that the statutory provision is inapplicable to the instant complaint. 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).

An employee organization commits a prohibited practice under HRS § 89-13(b)(3) for refusing to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in HRS § 89-11. HRS § 89-11 relates to the dispute resolution mechanism intended to address impasses in negotiations over the terms of an initial or renewed collective bargaining agreement between the multi-public employers and the exclusive representative. The Union asserts, and the Board agrees, the statutory provision does not apply to the handling of individual grievances such as Complainant's discharge grievance. Complainant neither asserts, nor can prove a set of facts to show the Union refused to participate in good faith in the mediation, fact-finding and arbitration procedures for negotiating the terms of the renewed collective bargaining agreement.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint pursuant to HRS §§ 89-5 and 89-14, except for alleged violations under paragraph 9 of the instant complaint that are barred by the applicable 90-day statute of limitations under HRS § 377-9(1) and HAR § 12-42-42.
2. The union's breach of its duty of fair representation is a prohibited practice in violation of HRS § 89-13(b)(4) and HRS § 89-8(a), when the union's conduct

⁶HAR § 12-42-42 provides:

(a) A complaint that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation.

is arbitrary, discriminatory or in bad faith. Kathleen M. Langtad, 6 HLRB 423 (2001) citing Vaca v. Sipes, 386 U.S. 171, 190-191, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967).

3. Based on the entire record, and viewing the facts in the light most favorable to the Complainant, the Board concludes there are no genuine material issues of fact in dispute to show the Union breached its duty of fair representation to Complainant by refusing to pursue his discharge grievance because it determined the Employer had just and proper cause for disciplining Complainant with dismissal for abuse of sickness as provided under Section 37.17 b. 4. of the BU 10 Contract.
4. Having considered the facts in the light most favorable to Complainant, the Board concludes the Union's exercise of its judgment not to pursue Complainant's discharge grievance was reasonable, in good faith and non-discriminatory.
5. An employee organization commits a prohibited practice under HRS § 89-13(b)(3) for refusing to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in Section 89-11. HRS § 89-11 relates to the dispute resolution mechanism intended to address impasses in negotiations over the terms of an initial or renewed collective bargaining agreement between the multi-public employers and the exclusive representative. The statutory provision does not apply to the handling of individual grievances such as Complainant's discharge grievance.

ORDER

For the foregoing reasons, the instant complaint is hereby dismissed with prejudice.

DATED: Honolulu, Hawaii, November 13, 2002.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member

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KATHLEEN RACUYA-MARKRICH, Member

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