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STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-03-218
RICHARD K. CONDON,)	ORDER NO. 2191
Complainant,)	ORDER GRANTING RESPONDENTS'
and)	MOTION TO DISMISS
MARVIS TAUALA, Union Agent, Hawaii)	
Government Employees Association, AFSCME,)	
Local 152, AFL-CIO and HAWAII GOVERN-)	
MENT EMPLOYEES ASSOCIATION,)	
AFSCME, LOCAL 152, AFL-CIO,)	
Respondents.)	

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

On May 15, 2003, Respondents MARVIS TAUALA (TAUALA), Union Agent, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA) and the HGEA (collectively Union or Respondents), filed a Motion to Dismiss Remaining Claim of Prohibited Practice Complaint filed on March 28, 2003, in the above-captioned case, and in accordance with representations made at the Prehearing Conference held by the Hawaii Labor Relations Board (Board) on May 8, 2003.

Complainant RICHARD K. CONDON (Complainant or CONDON), proceeding pro se, filed an Opposition to Respondents' Motion to Dismiss Prohibited Practice Complaint on May 22, 2003.

On May 27, 2003, the Board conducted a hearing on Respondents' motion to dismiss to afford the parties an opportunity to be heard. The parties were afforded full opportunity to submit evidence and argue their respective positions. After deliberation, the Board indicated it was inclined to grant Respondents' motion and dismiss the instant complaint.

After full consideration of the record in the case, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. Complainant CONDON is employed by the State of Hawaii, Department of Public Safety (PSD) at the Oahu Intake Service Center as a Social Services Assistant V. As such, CONDON is a public employee as defined under Hawaii Revised Statutes (HRS) § 89-2, and a member of Bargaining Unit (BU) 03.
2. As a member of BU 03, CONDON is covered by the terms of the Unit 3 - Non-Supervisory Employees, Collective Bargaining Agreement in effect from July 1, 1999 to June 30, 2003 (BU 03 Contract).
3. Respondent HGEA is the exclusive representative, as defined under HRS § 89-2, of all employees in BU 03, including CONDON.
4. Respondent TAUALA is an HGEA union agent representing members of BU 03, including CONDON.
5. On March 28, 2003, CONDON, proceeding pro se, filed the instant complaint alleging the Respondents breached their duty of fair representation for delays in agreeing to pursue through the grievance procedure certain contractual violations over the employer's refusal to follow his medical restrictions related to his workers' compensation injury and alleged discriminatory treatment including, inter alia, the employer's refusal to temporarily assign CONDON.¹ The complaint alleged that the Respondents violated Articles 3, 8, 12, 15, 16, and 23 of the BU 03 Contract and HRS §§ 89-13(b)(2), (3), (4), and (5). General make whole relief sought by CONDON in his complaint, includes temporary assignment to a Social Worker II position then permanent placement.
6. On April 11, 2003, Respondents filed an Answer to Prohibited Practice Complaint filed on March 28, 2003.
7. CONDON's Prehearing Statement filed on May 1, 2003, articulates further his claim that the employer was excluding him from temporary assignments to the Social Worker II position, while at the same time temporarily assigning all other Social Services Assistants to the position.
8. On May 8, 2003, at the Prehearing Conference held before the Board, CONDON and Respondents agreed to settle claims raised by CONDON's

¹CONDON's complaint states: "Based on HGEA BU 13 Temporary Assignments (TA) are to rotate. OISC refuses to rotate me in that position."

complaint, except for one. The Board approved CONDON's withdrawal of all claims against Respondents alleging a breach of duty of fair representation, except CONDON's complaint against HGEA regarding the employer's alleged discriminatory treatment by excluding him from being temporarily assigned to a Social Worker II position while temporarily assigning all other Social Services Assistants. The parties agreed that if further settlement discussions failed to resolve the temporary assignment issue, Respondents could file a dispositive motion by May 15, 2003; CONDON could file an opposition on May 22, 2003; and the Board would convene a hearing on May 27, 2003.

9. The Social Worker II position is included in BU 13, not BU 03. Consequently, the temporary assignments to the Social Worker II position by CONDON's employer are governed by the BU 13 Contract, not the BU 03 Contract.
10. The reason HGEA will not pursue CONDON's complaint against the employer for refusing to temporarily assign him to a BU 13 position, is because such personnel action by the employer is not subject to the BU 03 grievance procedure since no violation of the BU 03 Contract can be asserted against the employer.
11. The Board finds the HGEA's reasons for not pursuing CONDON's complaint against the employer for refusing to temporarily assign him to the Social Worker II position is reasonable, and not arbitrary, capricious or in bad faith.

DISCUSSION

The sole issue raised by Respondents' motion to dismiss is whether HGEA has breached its duty of fair representation² to CONDON in violation of HRS §§ 89-13(b)(4) and

part:

²The union's duty of fair representation is embodied in HRS § 89-8, which states in

a. 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. . . .

(5)³ by refusing to pursue CONDON's complaint against the employer for not rotating him to a Social Worker II position based on the temporary assignments article of the BU 13 Contract.

CONDON claims that pursuant to the BU 13 Contract, temporary assignments are to rotate and that the Oahu Intake Service Center "refuses to rotate him in [the Social Worker II] position." Contrary to TAUALA's declaration in support of Respondents' motion to dismiss, CONDON asked the Union to grieve contending that the employer's refusal to temporarily assign him to a Social Worker II position but rotating other Social Services Assistants is discriminatory and in violation of Article 3, Maintenance of Rights and Benefits, of the BU 03 Contract. Consequently, CONDON seeks relief in the form of a temporary assignment to a Social Worker II position and then permanent placement in that position.

Respondents submit that temporary assignments to the Social Worker II position by CONDON's employer are governed by the BU 13 Contract, not the BU 03 Contract. Consequently, HGEA is unable to pursue CONDON's complaint against the employer for refusing to temporarily assign him to a BU 13 position, because such personnel action by the employer is not subject to the BU 03 grievance procedure and no violation of the BU 03 Contract can be asserted against the employer. Furthermore, the relief sought by CONDON, i.e., to be temporarily assigned to the Social Worker II position and then permanently placed, falls within the discretion of the employer, and can neither be obtained, nor provided by Respondents. Therefore, Respondents contend that CONDON has failed to state a claim for relief and dismissal is warranted.

"The purpose of Rule 12(b)(6), Hawaii Rules of Civil Procedure (HRCP) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993). A dismissal is clearly warranted under Rule 12(b)(6), HRCP, if the claim is clearly without merit due to "an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or of disclosure of some fact which will necessarily defeat the claim." Rosa v. CWJ Contractors, Ltd., 4 Haw.App. 210, 215, 664 P.2d 745

³HRS § 89-13(b) provides in part:

(b) 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.

(1983) (internal quotes and citation omitted). Such a dismissal is generally disfavored but warranted “if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts entitling a plaintiff to relief.” Bertelmann v. Taas Associates, 69 Haw. 95, 99, 735 P.2d 930 (1987).

Although there is no dispute that the Social Worker II position is included in BU 13, and not BU 03, neither party provided the Board with the content of either the BU 03 or BU 13 Contract and temporary assignment provisions in their pleadings or motion papers. In order to fully consider the instant motion, the Board has taken notice of the BU 03 and BU 13 Contracts, pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(g)(8)(F). This consideration of matters outside the pleadings require the motion to be treated as one for summary judgment. See, Rule 12(b)(6), HRCPP; Hall v. State, 7 Haw.App. 274, 756 P.2d 1048 (1988) (When matters outside the pleadings are considered order of dismissal reviewed as one of granting summary judgment.) 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 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 Hawaii, 85 Hawai`i 61, 937 P.2d 397 (1997). Accordingly, the controlling inquiry is whether there is no genuine issue of material fact and the case can be decided solely as a matter of law. Kajiya v. Department of Water Supply, 2 Haw.App. 221, 629 P.2d 635 (1981).

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) (Hunt) 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 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.]

In order for CONDON to prevail against his Union, he must establish by a preponderance of evidence that the Union's conduct is arbitrary, discriminatory or in bad faith. Sheldon S. Varney, 5 HLRB 508 (1995). Proof of Union error due to negligence, inefficiency, inexperience, or even a misguided interpretation of contract provisions will not suffice. Bruce J. Ching, 2 HLRB 23 (1978). CONDON's burden of proof is to show by a preponderance of evidence that HGEA's reason for not pursuing his alleged contractual violation against the employer for excluding him when temporarily assigning Social Services Assistants to the Social Worker II position, is arbitrary, capricious or in bad faith.

In Case No. CU-10-204, Alvin M. Ikemoto (Ikemoto), the Board considered whether the union breached its duty of fair representation to its member when it refused to file a grievance contesting the denial of a promotion to an excluded position. In Order No. 2121, dated October 3, 2002, the Board stated:

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.

In Ikemoto, supra, the union's refusal to file a grievance on behalf of its member contesting the denial of promotion to a position outside of the unit was based upon the business agent's judgment that the grievance lacked merit. Accordingly, the Board concluded that the union was not arbitrary and did not breach its duty of fair representation.

Similarly, in this case, the Board finds the HGEA's reasons for not pursuing CONDON's complaint against the employer for refusing to temporarily assign him to the Social Worker II position in another bargaining unit are reasonable and not arbitrary, capricious or in bad faith. This is not to say that HGEA has no duty of fair representation to CONDON when he asks for assistance in pursuing a grievance. There is at least an affirmative duty that the Union's conduct not be a product of indifference to a grievant or his rights and interests. For example, this Board has found that a union agent's eight-month failure to apprise a member of the status of his grievance, absent some material justification or reason, violates the duty of fair representation. Hunt, supra.

CONDON admittedly understands the HGEA's explanation for not grieving the temporary assignment issue, but finds it unacceptable. However unacceptable, CONDON cannot show that HGEA's explanation is arbitrary, capricious or in bad faith. The fact that the employer's temporary assignment to the Social Worker II position is governed by BU 13 Contract is fatal to CONDON's breach of duty of representation claim against the Union.

Accordingly, the Board hereby grants summary judgment in favor of Respondents and dismisses the instant complaint.


CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.
2. Dismissal for failure to state a claim for relief is warranted if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts entitling a plaintiff to relief.
3. The Board concludes that Complainant can prove no set of facts entitling him to be temporarily assigned to the Social Worker II position when it is governed by the BU 13 Contract, and not the BU 03 Contract.
4. Based on the entire record, and viewing the facts in the light most favorable to the Complainant, the Board concludes that there are no genuine issues of material fact in dispute to show the Union breached its duty of fair representation to Complainant in violation of HRS §§ 89-13(b)(4) and (5) for not pursuing a grievance against the employer for excluding Complainant

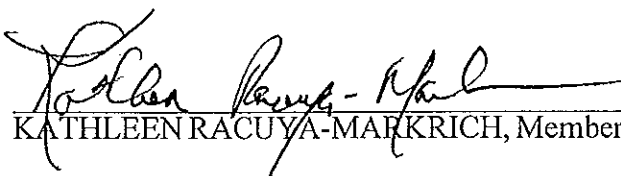
when temporarily assigning Social Services Assistants to the Social Worker II position governed by the BU 13 Contract. HGEA's explanation that it cannot pursue a grievance for Complainant against the employer for refusing to temporarily assign him to a BU 13 position because such personnel action by the employer is not subject to the BU 03 grievance procedure and no violation of the BU 03 Contract can be asserted against the employer, is not arbitrary, capricious or made in bad faith.

DATED: Honolulu, Hawaii, June 6, 2003.

HAWAII LABOR RELATIONS BOARD


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