

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)
TUI ISAIA,)
)
Complainant,)
)
and)
)
UNITED PUBLIC WORKERS, AFSCME,)
LOCAL 646, AFL-CIO; EDWIN SIAOSI,)
Business Agent, United Public Workers,)
AFSCME, Local 646, AFL-CIO; MEL)
RODRIGUES, Business Agent, United Public)
Workers, Local 646, AFL-CIO; PETER)
TRASK, Administrator, United Public Workers,)
AFSCME, Local 646, AFL-CIO; GARY)
RODRIGUES, Former State Director, United)
Public Workers, AFSCME, Local 646,)
AFL-CIO; SAU GOGO, Correctional Officer,)
Oahu Community Correctional Center, Depart-)
ment of Public Safety, State of Hawaii;)
DEPARTMENT OF PUBLIC SAFETY, State)
of Hawaii; TED SAKAI, Former Director,)
Department of Public Safety, State of Hawaii;)
MARIAN TSUJI, Former Deputy Director,)
Department of Public Safety, State of Hawaii;)
and EDWIN SHIMODA, Administrator,)
Institution Division, Department of Public)
Safety, State of Hawaii,)
)
Respondents.)

CASE NOS.: CU-10-219
CE-10-529

ORDER NO. 2216

ORDER GRANTING UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT, AND STATE RESPONDENTS' JOINDER IN UPW'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

ORDER GRANTING UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO'S MOTION TO DISMISS AND/OR FOR
SUMMARY JUDGMENT, AND STATE RESPONDENTS' JOINDER IN
UPW'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

On April 25, 2003, Complainant TUI ISAIA (Complainant or ISAIA), proceeding pro se, filed a complaint alleging that his Union and Employer, Respondents captioned above, are engaging in prohibited practices by paying him less than co-workers who have less seniority, i.e., who were hired after him. Complainant also alleges he has been discriminated against regarding his inadequate pay because of his race and national origin.

On May 21, 2003, the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and its agents EDWIN SIAOSI (SIAOSI), MEL RODRIGUES (MEL RODRIGUES), PETER TRASK (TRASK) and GARY RODRIGUES (RODRIGUES) (collectively UPW or Union) moved for a dismissal of the complaint and/or for summary judgment. The UPW alleges that: 1) the complaint is time-barred; 2) Complainant fails to state a claim against UPW for violating the collective bargaining agreement; and 3) summary judgment should be entered in favor of the Union because there are no genuine issues of material fact in dispute and as a matter of law, the UPW did not breach its duty of fair representation to ISAIA by failing to pursue a grievance over his base salary.

On May 28, 2003, the STATE OF HAWAII, DEPARTMENT OF PUBLIC SAFETY (PSD) and its agents, SAU GOGO (GOGO), TED SAKAI (SAKAI), MARIAN TSUJI (TSUJI), AND EDWIN SHIMODA (SHIMODA) (collectively Employer or Respondents), filed a Joinder in UPW's Motion to Dismiss and/or For Summary Judgment, on the grounds that the complaint against the Employer over the difference in pay for ISAIA which is less than his co-workers of the same rank, is time-barred.

On June 2, 2003, at the Prehearing Conference attended by the parties, the Board directed Complainant to file any written opposition to Respondents' motion to dismiss by the close of business on June 5, 2003. Complainant's opposition filed on June 5, 2003 provides no sworn declaration but includes a request that the Board appoint legal counsel.

On June 9, 2003, the Board conducted a hearing to afford the parties notice and a fair opportunity to present evidence and arguments to the Board. Based on the entire record and arguments presented, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. TUI ISAIA is an Adult Corrections Officer (ACO) V, employed since January 20, 1975 by PSD at the Oahu Community Correctional Center (OCCC), and a public employee within the meaning of Hawaii Revised Statutes (HRS) § 89-2. ISAIA is a member of Bargaining Unit (BU) 10.
2. The Respondent UPW is the exclusive representative, within the meaning of HRS § 89-2, of ACOs in BU 10.
3. Respondents MEL RODRIGUES, EDWIN SIAOSI, PETER TRASK and GARY RODRIGUES, at all times relevant, were representatives of the exclusive representative within the meaning of HRS § 89-2.
4. Respondent PSD is the public employer within the meaning of HRS § 89-2.

5. Respondents SAU GOGO, TED SAKAI, MARIAN TSUJI, and EDWIN SHIMODA, at all times relevant, were representatives of the public employer within the meaning of HRS § 89-2.
6. At all times relevant, the Employer and Union have been parties to a BU 10 Contract covering institutional, health and correctional workers, in effect for the periods covering July 1, 1995 to June 30, 1999 and July 1, 1999 to June 30, 2003, that provides for union recognition, a grievance procedure, wages and compensation adjustments.
7. Sometime in 1999, Complainant complained to UPW Business Agent MEL RODRIGUES that his monthly pay and compensation were improper because other employees of the same rank at OCCC were being paid more than he was. MEL RODRIGUES investigated the matter by contacting PSD's personnel technician Louella Rogers, "reviewed Complainant's personnel file, read the applicable collective bargaining agreement and various memoranda of agreement on shortage and retention differentials, and discussed the matter with Ms. Rogers." MEL RODRIGUES' "investigation disclosed that Lt. Isaia was paid above the salary schedule negotiated in the unit 10 agreement because his pay had been adjusted in the past for a shortage differential, and that the actual compensation level of Lt. Isaia and Lt. Christopher Cabellero was not the same because of how the shortage and retention differentials were applied. [MEL RODRIGUES] was advised by Ms. Rogers that Lt. Isaia's pay was in order, and there was nothing in his personnel file to indicate any error since differential pay varies with longevity and other factors." MEL RODRIGUES informed Complainant of his investigative efforts and findings. He told Complainant that if he was not satisfied he could make an appointment with the personnel office so that he could jointly review his record, to which Complainant responded, "it would be a waste of time." See, Declaration of MELVIN RODRIGUES.
8. In late 2000, Complainant complained to UPW Business Agent SIAOSI about the discrepancy in his monthly pay compared with Christopher Cabellero (Cabellero). SIAOSI investigated the matter by contacting PSD's personnel office and reviewing Complainant's employee history card and SF-5 forms "to verify that he was properly compensated. [Siaosi] informed [Complainant] what had been done and told him that he was not entitled to any more pay." No grievance was filed for Complainant. See, Declaration of EDWARD SIAOSI.
9. On February 21, 2003, Complainant met with SIAOSI and again expressed his continued dissatisfaction over the Union's failure to file a grievance because

his base salary was less than other ACOs with the same rank at OCCC who have less seniority. See, Declaration of SIAOSI.

10. On April 25, 2003, Complainant filed the instant complaints¹ alleging the Union is refusing to give him fair representation over the discrepancy in his monthly pay compared with other employees in the same rank, but with less seniority; and that the Employer is violating the Contract based on the pay discrepancy; and that both the Employer and Union are discriminating against him in this matter because of his race and origin.
11. Based on the salary schedule in effect on January 1, 2003, ISAIA's monthly compensation as an ACO V for his classification of CO-09, Step 03, is \$3,668. ISAIA's monthly compensation is less than his co-worker, Cabellero, who is also an ACO V, with a classification of CO-09, Step 04. Cabellero's base salary is \$3,829. The difference in Step designation for ISAIA compared to Cabellero, results in a higher pay for Cabellero, notwithstanding ISAIA's seniority. The step difference between Cabellero and Complainant occurred on July 16, 1994, when Cabellero was promoted from an ACO IV at Step 04, to the higher rank of ACO V. In accordance with Section 23A.08b² of the

¹ISAIA alleged in the complaints filed on April 25, 2003 as follows:

Base salary inadequate regarding pay skill by seniority. I am receiving (sic) a less monthly pay salary than most lieutenants junior to myself in the same rank same responsibilities at OCCC. I was hired on January 20, 1975 600.00 (monthly) Criss (sic) Cabellero was hired on; May 7, 1975 To date, I am earning 3668.00 monthly, which is 151.00 less than Lt. Cabellero, a month, 3819.00 (monthly).

Further, lieutenant Dennise Johnston (hired) 10-15-84 and lieutenant Dennis Corrigan (hired) 2-9-87, making the same amount a month with me.

I was promoted to the rank of sergeant (sic) and lieutenant before any of them. For a fact, I trained all of them during probational until they reach the rank of lieutenant.

I feel that I've been discriminated because of my race and origin. I have been under a lot of stress and pressure because of this.

²Section 23A.08b of the Contract states:

A regular Employee who is promoted shall be compensated at the lower step in the higher pay grade which rate exceeds the Employee's basic rate of pay by five percent (5%). If there is no step

Contract, because Cabellero was already at Step 04 when promoted, the Employer was required to apply a five percent step increase at the higher step level, to maintain a 5 percent differential.

DISCUSSION

The gravamen of the instant complaint is that Complainant's monthly salary is less than other ACOVs, like his co-worker Cabellero, who has less seniority. Complainant alleges that because of this discrepancy in his salary, the Employer is violating the BU 10 Contract and the Union breached its duty of fair representation when he last met with and asked his Union agent on or about February 21, 2003 about filing a grievance to correct this discrepancy in his salary.

The Respondents move to dismiss the complaints on the grounds the complaints are time-barred and therefore the Board lacks jurisdiction; and Complainant has failed to state a claim for relief absent a showing of a contractual violation, to support a breach of the duty of fair representation by the Union. In the alternative, Respondents move for summary judgment on the grounds there are no genuine issues of material fact in dispute as alleged by Complainant, i.e., that his monthly compensation is less than his co-worker Cabellero, even though Complainant has more seniority, and the Union twice investigated this matter in 1999 and 2000 as requested by Complainant, and determined there was no basis to file a grievance over the discrepancy in his base salary. Therefore, the Union argues its conduct in this matter did not breach of the duty of fair representation to Complainant.

Jurisdiction

Hawaii Administrative Rules (HAR) § 12-42-42(a) provides as follows:

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 . . . within ninety days of the alleged violation.

The limitations period is also prescribed by statute. HRS § 89-14 requires controversies "concerning prohibited practices . . . be submitted . . . in the same manner and with the same effect as provided in section 377-9; . . ." HRS § 377-9(1) in turn provides

in the higher pay grade which rate exceeds the Employee's basic rate of pay by at least five percent (5%), the Employee shall be compensated at the maximum step in the higher pay grade or at the Employee's basic rate of pay, whichever is greater.

that, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence."

Respondents contend the complaints are time-barred because the matter over Complainant's base pay was investigated in 1999 by Union agent MEL RODRIGUES and in 2000 by Union agent SIAOSI. Based on the Union's investigations, it was determined that the pay difference was attributed to the manner in which shortage and retention differentials were applied and ISAIA was being properly paid. Respondents argue that since the instant complaint raises no new claims, Complainant should have filed the prohibited practice complaint "after he was told in 1999 and 2000 by union agents Rodrigues and Siaoasi that they investigated the matter and found it without merit." The Board disagrees.

Complainant contends that he asked the Union to file a grievance over the pay difference in 1999 and 2000, and again on February 21, 2003, when he met with Union agent SIAOSI.³ There is no dispute, SIAOSI met with Complainant on February 21, 2003 on another matter, and Complainant continued to voice his dissatisfaction that a grievance had not been filed over his pay differential. Accordingly, the Board finds February 21, 2003 is the date of the alleged prohibited practice violation against the Union, which falls within the

³At the hearing on the motions before the Board, Complainant argued as follows:

The Union failed to represent me, that's my complaint. I ask Sau the first time I run into this, Sau, could you check and file a grievance for me? Sau went on, and then he came back after two months, tell me that he told Rodrigues, Rodrigues said he would take care of it. Eight months later I run into Rodrigues, Mel Rodrigues. He said he will take care of it. You know, we hardly find these people. Later on I found out Siaoasi was a new agent, so I talk to Siaoasi about the same thing, as is stated in this. They discovered that I been talking to them about the same thing, you know, how can I not if I know that I'm - my pay scale and my pay raise is - I mean my salary is not adequate, and I feel that, you know, they not treating me right. . . . And when I ask Siaoasi to file a grievance for me, when he came back, finally I ran into him on February 21st of this year, I never see a copy of the complaint. But then yet I found out later he file a complaint for another lieutenant of the same thing, same pay, that's Carl Huntsberry, on May 20 of this year, and he failed to file my complaint, so that's why I'm saying, you know, this whole thing, you know, that's a waste of time putting all kind of people they don't have anything to do with the pay raise. All I concerned about is the Union, they fail to represent me, give me a fair representation,"

Transcript, dated June 9, 2003, pp. 9-10.

90-day time period of the instant complaint filed on April 25, 2003. The Board, therefore, has jurisdiction over the complaint⁴ pursuant to HRS §§ 89-5 and 89-13.

Failure to State a Claim/Summary Judgment

Respondent Union contends that assuming the allegations in the instant complaint are true, ISAIA fails to properly state a breach of duty of fair representation claim upon which relief can be granted, and therefore dismissal is required. See, Hawaii Rules of Civil Procedure (HRCPP) Rule 12(b)(6). In the alternative, Respondent Union contends that based on the declarations of Union agents MEL RODRIGUES and SIAOSI, and documentation comparing the salary base of Complainant with his co-worker Cabellero, there is no material issue of fact in dispute that the pay discrepancy at issue is the result of a step difference, and in accordance with the Contract.

The Board's consideration of matters outside the pleadings requires the motion to be treated as one for summary judgment. See, HRCPP Rule 12(b)(6); 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 granting summary judgment.) 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. Dept. of Water Supply, 2 Haw.App. 221, 629 P.2d 635 (1981).

"The purpose of Rule 12(b)(6) 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). 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). While the allegations in the complaint are deemed true, the court is not required to accept conclusory allegations on the legal effect of the events alleged. Marsland v. Pang, 5 Haw.App. 463, 474, 701 P.2d 175 (1985).

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."

⁴At the Prehearing Conference held on June 2, 2003, Complainant was informed that the Board has no jurisdiction over the claims of discrimination based on race and national origin contained in the complaint, and pleaded in Complainant's prehearing statement and labelled "Complaint," which was filed with the Board on June 2, 2003.

The burden of proof is on the complainant-employee 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 Air Line 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 processing of grievances.” (Citations omitted). 18 F.3d at 1447.

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 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) (SHOPO). 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) (Konno).

Having viewed the facts in the light most favorable to Complainant, there is no dispute in the record that the discrepancy in pay is a result of a difference in Step designation for Complainant, i.e., Step 03, compared to his co-worker Cabellero, at Step 04. The step difference between Cabellero and Complainant occurred on July 16, 1994, when Cabellero was promoted from an ACO IV at Step 04, to the higher rank of ACO V. In accordance with Section 23A.08b of the Contract, the Employer was required to apply a five percent step increase at the higher step level, to maintain a 5 percent differential because Cabellero was already at Step 04 at the time of his promotion.

Therefore, based on the salary schedule in effect on January 1, 2003, and a comparison of the pay records between Complainant and his co-worker, Complainant can prove no set of facts showing the Union's decision not to pursue a grievance over the pay discrepancy, was arbitrary, discriminatory⁵ or in bad faith. Furthermore, Complainant's pay discrepancy had been investigated in 1999 and 2000 by Union agents MEL RODRIGUES and SIAOSI, respectively, and both found Complainant's compensation to be in order. Neither pursued a grievance for Complainant, which the Union believed lacked merit. When Complainant met with SIAOSI on February 21, 2003 and expressed his continued dissatisfaction that a grievance had not been filed, it was reasonable for SIAOSI to rely on his investigation in 2000, and his determination that pursuing a grievance for Complainant lacked merit.⁶

Furthermore, Complainant can prove no set of facts showing Respondent Employer's monthly salary payments to Complainant compared with Cabellero's violate the Contract, even though Cabellero has less seniority, and shares the same rank of ACO IV. In a hybrid case such as this, where the Complainant raises a breach of duty of fair representation claim against the Union and a contract violation claim against the Employer, the claims against the Employer and Union are "inextricably interdependent."⁷ In order to

⁵And, although during the hearing on the dispositive motions, Complainant alluded to the Union having filed a grievance over a similar pay discrepancy for another ACO, he failed to file a sworn declaration or affidavit to oppose Respondents' motions and the affidavits attached thereto.

⁶The Union's determination that pursuing a grievance for Complainant lacks merit, does not foreclose Complainant's ability to exhaust his contractual remedies on his own and without Union representation through the grievance procedure except the ultimate step to arbitration.

⁷See DelCostello v. International Broth. of Teamsters, 462 U.S. 151, 164, 76 L.Ed.2d 476, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) (DelCostello); United Parcel Service, Inc. v. Mitchell,

prevail against the Employer, Complainant would need to show not only that the Employer violated the collective bargaining agreement, but also prove a breach of duty of fair representation.

In the instant complaint, Complainant's burden of proof is to show that the Union's failure to file a grievance over the pay discrepancy, which is less than an ACO V co-worker with less seniority, is arbitrary, discriminatory or in bad faith. In addition, Complainant has the burden of proving the Employer's payment of his base salary violates the Contract. The Board concludes, that there are no material facts in dispute which would carry Complainant's burden.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.
2. 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. SHOPO, supra. 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, supra.
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 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) by failing to

451 U.S. 56, 66-67, 67 L.Ed.2d 732, 101 S. Ct. 1559 (1981); Scott v. United Auto., 242 F.3d 837, 839 (8th Cir. 2001). In DelCostello, supra, the Court stated:

Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. (Footnote omitted.) "Yet the two claims are inextricably interdependent. 'To prevail against either the company or the Union,...[the employee] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union.'" (Citations omitted.) Id., at 165.

file a grievance over the discrepancy in his base salary compared with the salary of a co-worker of the same rank, but with less seniority. Having investigated the matter of Complainant's pay discrepancy in 1999 and 2000, it was reasonable for the Union to believe Complainant's pay was in accordance with the Contract, and that pursuing a grievance lacked merit.

4. Based on the record, and viewing the facts in the light most favorable to Complainant, the Board concludes there are no genuine issues of material fact in dispute to show the Employer violated the Contract even though Complainant's base salary is less than a co-worker of the same rank, but with less seniority.

ORDER

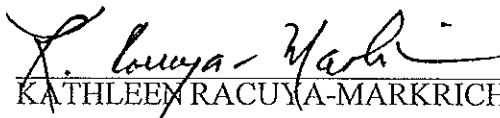
The Board hereby dismisses the instant complaint.

DATED: Honolulu, Hawaii, September 12, 2003

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member


KATHLEEN RACUYA-MARKRICH, Member

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