STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of J. TEK YOON, Complainant, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; and DEPARTMENT OF PARKS AND RECREATION, City and County of Honolulu, Respondents.	CASE NOS.: CU-13-217 CE-13-526 ORDER NO. 2224 ORDER GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT AND DISMISSING PROHIBITED PRACTICE COMPLAINT

ORDER GRANTING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT AND DISMISSING PROHIBITED PRACTICE COMPLAINT

On March 24, 2003, Complainant J. TEK YOON (YOON), pro se, filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board). In his complaint YOON alleges that Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) committed a prohibited practice when it refused to take his grievance to arbitration. YOON further alleges that Respondent DEPARTMENT OF PARKS AND RECREATION (DPR), City and County of Honolulu (CITY) committed a prohibited practice when they suspended him for three days for delegating bank deposits.

On April 4, 2003, DPR filed Respondent Department of Parks and Recreation, City and County of Honolulu's Motion to Dismiss Complaint. DPR contends that YOON failed to state a claim under Hawaii Revised Statutes (HRS) § 89-13.

On May 5, 2003, at the prehearing conference, YOON, appearing, pro se, requested the Board to set the hearing in this matter, previously scheduled on May 5, 2003, to the third week of August. YOON represented that his request was due to his work schedule and the unavailability of his counsel whom he refused to name. After objections by the DPR, the Board set the hearing on the DPR's motion and any other motions on August 26, 2003.

On August 21, 2003, the HGEA filed Respondent Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO's Motion for Summary Judgment.

HGEA contends that there are no genuine issues of material fact and HGEA is entitled to judgment as a matter of law.

On August 26, 2003, at the hearing on Respondents' motions, YOON, pro se, requested a continuance to obtain counsel because he had received a letter from Ted H.S. Hong, Esq., dated August 22, 2003 stating that he would not represent YOON. YOON further stated that he needed legal representation because he has since been terminated. After hearing objections by Respondents, the Board granted a 30-day continuance of the hearing.

On September 29, 2003, the Board held a hearing on the dispositive motions filed by the respective Respondents. All parties were represented by counsel[1] and were afforded a full and fair opportunity to be heard. Based on a review of the record in this case, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. At all times relevant, YOON was employed by DPR as a Recreation Director III and an employee as defined in HRS § 89-2. At all times relevant, YOON was a member of bargaining unit (BU) 13.

2 HGEA is an employee organization and the exclusive representative, as defined in HRS § 89-2, of employees in BU 13.

3. The CITY is the public employer, as defined in HRS § 89-2, of employees of the City and County of Honolulu. The DPR is a representative of a public employer as provided in HRS § 89-13.

4. At all times relevant, the CITY and the Union have been parties to a BU 13 collective bargaining agreement covering professional and scientific employees, who cannot be included in any of the other bargaining units, which provides a grievance procedure which culminates in arbitration.

5. On or about November 9, 2001, DPR suspended YOON for a period of three working days for allegedly failing to follow proper fiscal procedures which led to inaccurate records of 2001 Summer Fun fees, receipts and deposits and the untimely deposits of such fees.

6. The HGEA represented YOON in Steps 1 through 3 of the grievance process. After the denial at Step 3, the HGEA filed a letter with the CITY of its intent to proceed to arbitration.

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[1]YOON was represented by Arthur Ross, Esq.

7. By letter dated February 11, 2003, the HGEA notified YOON that it would not proceed to arbitration on his case. The HGEA stated its reasons as follows:

> In reviewing our investigation, and discussing the matter with our staff, I have concluded that our determination was sound, that this case lacks merit to pursue. Specifically, our investigation found that despite your claim of past practice being a factor, the past practice doctrine would not hold here since you had repeatedly been warned and finally directed to deposit monies yourself, and not delegate to a subordinate. Interviews with co-workers you identified did not produce information that would validate your position. Based on the evidence, we are convinced that you had, in fact, received sufficient training for the purpose of this task, and it appears that your actions seem to be the result of your disagreement with management about the delegation of this task, and not your inability to perform the work.

8. By letter dated February 20, 2003, the HGEA notified the CITY that it was withdrawing the grievance and not pursuing the case to arbitration.

DISCUSSION

In the instant complaint, YOON contends that the DPR violated provisions of the contract by suspending him for three days. YOON further claims that the HGEA breached its duty of fair representation by not taking his grievance to arbitration.

The HGEA contends that there are no genuine issues of material fact in the record and that summary judgment should be granted in the Union's favor. The HGEA alleges that YOON was suspended for three days for insubordination, i.e., for failing to deposit monies after receiving multiple specific verbal warnings and written instructions and failing to report misplaced funds. The HGEA claims that it acted properly when it withdrew its request to arbitrate YOON's suspension grievance based upon its investigation. The HGEA argues that YOON failed to carry his burden to prove that HGEA's conduct was arbitrary, discriminatory or in bad faith and that the HGEA breached its duty of fair representation in this instance.

The DPR claims that it performed its obligations under the contractual grievance procedure and the HGEA withdrew its request for arbitration. Accordingly, the DPR contends that the complaint should be dismissed for failure to state a claim for relief.

"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). 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 (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). 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).

As the Board has considered matters outside the pleadings, i.e., the affidavit, declarations, and exhibits submitted by the respective Respondents, the Board will treat the instant motions as motions for summary judgment. See, Rule 12(b)(6), HRCP; 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 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 Journalist-University of Hawaii Chapter, 83 Hawaii 387, 389, 927 P2d 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). 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 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." 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).

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 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). 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).

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 YOON 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).

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 YOON's grievance contesting his discipline are reasonable and not arbitrary, capricious or in bad faith.

Under subsection (c) of Rule 56, HRCP, once the movant satisfies the initial burden of showing the absence of a genuine issue of material fact, the burden then shifts to the opponent to come forward with specific facts showing that there remains a genuine issue for trial. Arimizu v. Financial Sec. Ins. Co., 5 Haw.App. 106, 679 P.2d 627 (1984).

At the hearing, YOON argued that the Union abandoned him without telling him and that there was a verbal agreement regarding disciplining YOON, that the Union and CITY would work collaboratively on issues with YOON. Complainant, however, did not set forth by way of answering affidavits[2] any "specific facts showing that there is a genuine issue for trial." Rule 56(e), HRCP.[3] A party opposing a motion for summary judgment has an obligation to file a response by affidavits or otherwise, setting forth the specific facts showing that there is a genuine issue for trial. Brodie v. Hawaii Automotive Retail Gasoline Dealers Ass'n., Inc., 2 Haw.App. 316, 631 P.2d 600 (1981), rev'd on other grounds, 65 Haw. 598, 655 P.2d 863 (1982). Thus, the Board does not credit YOON's claims of a verbal agreement because there are no affidavits in the record attesting to this fact. The Board concludes based on the undisputed facts in the record that the Union conducted an investigation into the events underlying the disciplinary action and acted reasonably by informing YOON that it would not take his grievance to arbitration because in its judgment, the grievance lacked merit.

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[2]Under the Board's rules of practice and procedure, answering affidavits, if any, shall be served on all parties, in accordance with Hawaii Administrative Rules § 12-42-8(g)(3)(C)(iii).

[3]Rule 56(e), HRCP, provides, in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

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."[4] In order to prevail against the Employer, Complainant needs to show not only that the Employer violated the collective bargaining agreement, but also prove a breach of duty of fair representation. As YOON failed to prevail on his breach of duty of fair representation claim against the Union, YOON is likewise barred from pursuing his contract claims against the Employer before the Board. Thus, the Board concludes that Complainant can prove no set of facts which would entitle him to relief and his complaint against the Employer is dismissed for failure to state a claim for relief.

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. Summary judgment is appropriate where the moving party demonstrates there are no issues of material fact in dispute and, therefore is entitled to judgment as a matter of law. 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 by the parties.

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

4. As the moving party, the HGEA met its burden in showing that it is entitled to judgment as a matter of law because Complainant failed to show by way of answering affidavits any specific facts showing that there is a genuine issue for trial. Based on the entire record, 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 that the Union breached its duty of fair representation to Complainant.

5. In order to 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 against the Union. As the Board dismissed YOON's breach of duty of fair representation claims against the Union, the Board similarly dismisses YOON's claims against the employer for unjust discipline for failure to state a claim for which relief can be granted.

ORDER

Based on the foregoing, the Board hereby dismisses the instant complaint.

DATED: Honolulu, Hawaii, November 6, 2003.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

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