

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of ) DEBRA PIMENTEL, ) Complainant, ) and ) ED SIAOSI, Business Agent, United Public ) Workers, AFSCME, Local 646, AFL-CIO; ) MEL RODRIGUES, Oahu Division Director, ) United Public Workers, AFSCME, Local 646, ) AFL-CIO; CLIFFORD UWAINE, Field ) Services Director, United Public Workers, ) AFSCME, Local 646, AFL-CIO; and UNITED ) PUBLIC WORKERS, AFSCME, LOCAL 646, ) AFL-CIO, ) Respondents. )	CASE NO. CU-10-225 ORDER NO. 2239 ORDER GRANTING RESPONDENTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT
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ORDER GRANTING RESPONDENTS'  
MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

On November 17, 2003, Complainant DEBRA PIMENTEL (PIMENTEL) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondents ED SIAOSI (SIAOSI), Business Agent, United Public Workers, AFSCME, Local 646, AFL-CIO (UPW or Union), MEL RODRIGUES (RODRIGUES), Oahu Division Director, UPW, CLIFFORD UWAINE (UWAINE), Field Services Director, UPW, and the UPW. PIMENTEL alleges that Respondents violated the provisions of Hawaii Revised Statutes (HRS) §§ 89-13(a)(1), (5), (7), and (8), 89-13(b)(1), (4) and (5), 89-16, 89-16.5 and 89-16.6 when they breached their duty of fair representation with respect to a number of grievances where she has requested Union representation.

On December 8, 2003, Respondents filed Respondents' Motion to Dismiss and/or for Summary Judgment. Respondents contend that the complaint should be dismissed and/or summary judgment should be granted in their favor because (1) the Board lacks jurisdiction over claims raised in late 2002 and early 2003 which are not the subject of pending grievances; (2) the complaint fails to state a claim for relief against the Union and its agents under HRS § 89-13(a) or under the duty of fair representation; (3) PIMENTEL lacks standing to assert certain claims for which no injury has been sustained by her; and (4) there is an absence of a justiciable controversy over pending grievances or about access to personnel

files. Alternatively, the UPW argues that there are no genuine issues of material fact in dispute and Respondents are entitled to judgment as a matter of law.

On December 22, 2003, Respondents filed UPW's Motion to Dismiss for Lack of Prosecution. The UPW submits that the instant complaint should be dismissed because PIMENTEL failed to timely oppose its motion to dismiss in accordance with applicable Board rules.

On December 29, 2003, PIMENTEL filed a Request for 30-day Extension for Family Hardship And/or Legal Representation.

On January 7, 2004, the Board held a hearing on Respondents' motions. The Board, after first hearing the motion for a 30-day extension, continued the hearing for 30 days to allow PIMENTEL to retain legal counsel.

On February 5, 2004, PIMENTEL filed a memorandum in opposition to Respondents' motion to dismiss and/or for summary judgment. On February 6, 2004, the Board convened a hearing on the UPW's motion. The UPW was represented by counsel and PIMENTEL proceeded Pro Se. The parties were allowed full opportunity to present argument to the Board. After a thorough review of the record in the case, the Board makes the following findings of fact, conclusions of law, and order.

### **FINDINGS OF FACT**

1. PIMENTEL, an Adult Correctional Officer (ACO) III employed by the Department of Public Safety, State of Hawaii, is a public employee, as defined in HRS § 89-2, and included in bargaining unit 10.
2. The UPW is an employee organization and the exclusive representative, as defined in HRS § 89-2, of employees in bargaining unit 10. SIAOSI, RODRIGUES, and UWAINÉ are representatives of the UPW.
3. As the exclusive representative for the employees in bargaining unit 10, the UPW has negotiated and is a party to a collective bargaining agreement, which contains a grievance procedure culminating in final and binding arbitration. The grievance procedure requires that a grievance be filed at Step 1 within 18 calendar days from the occurrence of a violation and provides that an employee may process a grievance without representation by the Union.
4. PIMENTEL raised numerous concerns with SIAOSI between October 2002 and February 2003 which were not grieved. PIMENTEL raised concerns regarding overtime, assignments to gender specific posts, firearms policies and disciplinary meetings but did not request SIAOSI to file grievances on the matters.

5. The UPW filed five grievances with the employer on PIMENTEL's behalf relating to a "hostile work environment," compensatory time off, a five-day disciplinary suspension, harassment by another employee, and an involuntary transfer. The Union has demanded arbitration for four of the grievances. One of the grievances is pending at Step 1 of the grievance procedure. Prior to filing the instant complaint, PIMENTEL was not advised that the grievances would be arbitrated.
6. On or about September 2, 2003, PIMENTEL submitted a written request to see her personnel file. On October 7, 2003, she contacted SIAOSI advising him that she was not being afforded the right to review her personnel file. On October 21, 2003, SIAOSI contacted Captain Lea'e (Lea'e) who indicated that he did not know which file PIMENTEL wanted to review. SIAOSI asked Lea'e to send PIMENTEL a letter to clarify the matter and notified PIMENTEL of the conversation. PIMENTEL then contacted the Office of Information Practices (OIP) on November 3, 2003 and the OIP wrote to the warden of the facility on November 6, 2003. On November 13, 2003, PIMENTEL told SIAOSI she had not received anything from Lea'e. SIAOSI contacted Lea'e and told him that if no action was being taken the Union would file a grievance. PIMENTEL reviewed both her facility and departmental personnel files on November 26, 2003. On or about November 29, 2003, copies of the personnel files were obtained and transmitted by the UPW to PIMENTEL.
7. On September 30, 2003, PIMENTEL also requested SIAOSI to file three grievances on matters within the purview of the Equal Employment Opportunity Commission (EEOC) and two post detachment orders dated January 29, 2003 and June 24, 2003. After reviewing the information, SIAOSI found that the complaints lacked merit and refused to file grievances on them. SIAOSI advised PIMENTEL that she could file a grievance on her own behalf and provided her with the grievance forms.

## DISCUSSION

The gravamen of Ms. PIMENTEL's complaint is the UPW's alleged inactivity and uncommunicativeness with respect to a myriad of complaints and grievances that she had referred to the Union. In the instant motion, the Union moves for dismissal of the complaint based on the applicable statute of limitations, its alleged satisfaction of their duty of fair representation, and the inapplicability of certain allegedly violated provisions.

### **Statute of Limitations**

Hawaii Administrative Rules (HAR) §12-42-42(a) identifies the limitations period applicable to the filing of prohibited practice complaints pursuant to HRS § 89-13. The rule provides as follows:

Complaints that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, may be filed...within ninety days of the alleged violation.

The Board has construed the 90-day limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HPERB 186, 199 (1983).

As this complaint was filed on November 12, 2003, any actionable wrongs by the Union must have occurred within 90 days of the filing of the complaint or August 19, 2003 to be within the Board's jurisdiction. In her complaint PIMENTEL alleges a number of contractual violations that occurred prior to this date. These violations relate to overtime payments, gender specific posts, and a firearms policy which allegedly occurred before October 2002 and were brought to the Union's attention. The Union claims that PIMENTEL made no requests to file grievances on these matters and after investigation, it determined that no contract violations occurred. PIMENTEL cites to the instances as part of her continuing dissatisfaction with the UPW but the record does not reflect that she renewed her requests or timely voiced her dissatisfaction with the UPW regarding these instances. Thus it appears, and the Board concludes, that any claims based on these violations are time-barred.

#### **Failure to State a Claim for Relief**

PIMENTEL also asserts that the Union violated various statutory provisions, i.e., HRS §§ 89-13(a)(1), (5), (7) and (8), 89-13(b)(1), (4) and (5), 89-16, 89-16.5 and 89-16.6.<sup>1</sup>

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<sup>1</sup>HRS § 89-13, Prohibited practices, evidence of bad faith, provides in pertinent part:

(a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

\* \* \*

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

\* \* \*

(7) Refuse or fail to comply with any provision of this chapter;

(8) Violate the terms of a collective bargaining agreement;

....

(b) It shall be a prohibited practice for an public employee or for an employee organization or its designated agent wilfully to:

(1) Interfere, restrain or coerce any employee in the exercise of any right guaranteed under this chapter;

\* \* \*

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- (4) Refuse or fail to comply with any provision of this chapter; or
  - (5) Violate the terms of a collective bargaining agreement.

HRS § 89-16, Public records and proceedings, provides as follows:

The complaints, orders, and testimony relating to a proceeding instituted by the board under section 377-9 shall be public records and be available for inspection or copying. All proceedings pursuant to section 377-9 shall be open to the public.

HRS § 89-16.5, Access to personal records by an employee organization, provides as follows:

Exclusive representatives shall be allowed access to an employee's personal records which are relevant to the investigation or processing of a grievance. The exclusive representative shall not share or disclose the specific information contained in the personal records and shall notify the employee that access has been obtained.

HRS § 89-16.6, Disclosure to an exclusive representative, provides as follows:

(a) The appropriate government agencies shall, upon written request, disclose to an exclusive representative information relating to the administration of payroll deductions as authorized by section 89-4, as follows: name; mailing address; social security number; bargaining unit; date of change in bargaining unit status of the employee; full-time equivalence of the employee; the employee's leave without pay status with effective dates and duration; basic rate of pay; types and effective dates of personnel actions that affect the amount and payment of the basic rate of pay; salary scale and range or equivalent; salary step or equivalent; amounts and dates of differential pay; amounts and dates of statutory dues deductions; and amounts and dates of other authorized voluntary payroll deductions remitted to the exclusive representative; except that this provision shall not apply to information regarding present or former employees involved in an undercover capacity in a law enforcement agency.

(b) Information disclosed to the exclusive representative under this section shall be provided within a reasonable time after receipt of the written request.

(c) An exclusive representative receiving government records pursuant to this section shall be subject to the same restrictions on disclosure of the records as the originating agency.

(d) Information disclosed pursuant to this section shall be

The Union, in the instant motion, argues for dismissal of certain claims in PIMENTEL's complaint on the grounds that these allegations fail to state a claim for which relief can be granted.

"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 (6<sup>th</sup> Cir. 1993). A dismissal is clearly warranted under Rule 12(b)(6), HRCF, 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).

After reviewing the record, it appears beyond a reasonable doubt that Complainant can prove no set of facts entitling her to relief on the following claims. The Board thus concludes that the alleged violations fail to state a claim for which relief can be granted. HRS § 89-13(a) relates to a commission of prohibited conduct by an employer and is therefore inapplicable to the instant complaint. While the Union is named as a Respondent and HRS § 89-13(b) identifies prohibited conduct by unions, any violation arising out of the failure to service a member is incorporated in its duty of fair representation, a violation of § 89-13(b)(4) as discussed, *infra*. The Board finds that PIMENTEL failed to state a claim upon which relief can be granted for an HRS § 89-13(b)(1) interference charge by the Union. The Board also finds PIMENTEL fails to state a claim upon which relief can be granted with respect to HRS § 89-13(b)(5) alleged violations as she has not established that Union violated the collective bargaining agreement. In the same way, PIMENTEL failed to state a claim of an HRS § 89-16 violation as that statute provides for the public nature of Board proceedings and records which are not at issue here. In addition, HRS §§ 89-16.5 and 89-16.6 relate to Union access to employee information in the possession of an employer. Thus, any such statutory rights accrue to the Union and not to PIMENTEL.

Accordingly, the Board grants UPW's motion to dismiss the foregoing statutory claims for failure to state a claim upon which relief can be granted.

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provided in a form conducive to electronic data processing; provided the employer possesses appropriate data processing capability.

## Duty of Fair Representation

PIMENTEL's nontime-barred claims include allegations that the UPW has not afforded her "productive, fair and just representation" regarding five grievances that were filed on her behalf by the Union, the Union's failure to file grievances regarding EEOC claims, and the Union's failure to provide adequate assistance in her request to review her personnel file. The Board concludes, and the Union concurs, that these claims allege that the Union breached its duty of fair representation in violation of HRS § 89-13(b)(4).

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 182, 184 (2001) citing Vaca v. Sipes, 386 U.S. 171, 190-191, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) (Vaca).

The burden of proof is on the complainant-employee to show by a preponderance of evidence that decisions made regarding a member, including a decision not to proceed with a grievance or to arbitration was arbitrary, discriminatory or in bad faith. Sheldon S Varney, 5 HLRB 508, 520 (1995) (Varney). See also, Vaca, 386 U.S. 190-191. "[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 (9<sup>th</sup> 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 (6<sup>th</sup> Cir. 1981); Whitten v. Anchor Motor Freight, Inc., 521 F.2d 1335, 1341, 90 LRRM 2161 (6<sup>th</sup> 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) citing Moore v. Bechtel Power Corp., 840 F.2d 634, 636, 127 LRRM 3023 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 1994) (Stevens), or by acting negligently, Patterson v. International Brotherhood of Teamsters, Local 959, 121 F.3d 1345, 1349, 156 LRRM 2008 (9<sup>th</sup> 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 PIMENTEL to prevail against her Union, she must therefore establish by a preponderance of evidence that the Union's conduct was arbitrary, discriminatory or in bad faith. Varney, supra. Proof of union error due to negligence, inefficiency, inexperience, or even a misguided interpretation of contract provisions will not suffice. Bruce J. Ching, 2 HPERB 23, 34-35 (1978).

As the Board has considered matters outside the pleadings, i.e., the affidavit, declarations, and exhibits submitted by the Complainant and Respondents, the Board will treat the instant motion as a motion for summary judgment. See, Rule 12(b)(6), HRCF; 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 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). 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).

PIMENTEL complains the Union was inattentive and failed to advise her of the status of five grievances filed on her behalf by the Union. During the hearing on the instant motion PIMENTEL learned, ostensibly for the first time, that the UPW had demanded arbitration of four of the grievances and was awaiting the Step 1 response on the remaining grievance. PIMENTEL was pleased by these steps in that they represented the exercise of the Union's powers in these matters to the fullest extent possible. PIMENTEL, however, complains that the Union failed to keep her apprised of the status of the grievances prior to her filing of the instant complaint. The Union contests her allegations. But even if this is true, the Union's demands for arbitration and the knowledge of the Complainant create a circumstance where Complainant's substantive rights have not been prejudiced. The complaints regarding the processing of the grievances must accordingly be dismissed.

With regard to the Union's refusal to file a grievance regarding PIMENTEL's EEOC complaints, there is no dispute that the Union agent met with PIMENTEL regarding the allegations. The Union agent reviewed documents and information provided by PIMENTEL and advised PIMENTEL of his judgment that the matters were not within the purview of the contract. He advised PIMENTEL that she could independently file a grievance or complaint. It therefore is not disputed that the Union agent exercised his studied judgment on the merits



of her claims in deciding not to file these claims on her behalf. As much as PIMENTEL might disagree with the Union's decision, based on the foregoing authorities the Board will not substitute its judgment for that of the Union.

In the same way, SIAOSI reviewed her claims regarding the detachment orders and concluded that the employer did not violate the contract. Thus, in the exercise of his judgment, SIAOSI found that the complaints lacked merit and refused to file a grievance thereon. The Board will not substitute its judgment for that of the Union.

Similarly, with respect to the Union's alleged failure to assist PIMENTEL in obtaining a copy of her personnel file to review, it is undisputed that PIMENTEL advised the Union of her request and SIAOSI followed up with a meeting with PIMENTEL's captain where he received assurances of prompt follow through. Notwithstanding the failure of the employer to produce PIMENTEL's personnel file without the assistance of the OIP, the undisputed facts demonstrate that the Union acted reasonably and in good faith and did not violate its duty of fair representation.

#### **CONCLUSIONS OF LAW**

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.
2. Prohibited practice complaints must be filed within 90 days of the alleged violative occurrence.
3. PIMENTEL's allegations of contractual violations relating to overtime payments, gender specific posts, and a firearms policy which allegedly occurred between October 2002 and February 2003 occurred prior to August 19, 2003 and are therefore time-barred.
4. PIMENTEL failed to state a claim for relief against the UPW under HRS § 89-13(a) as these provisions relate to employer conduct.
5. PIMENTEL failed to state a claim for relief under HRS § 89-13(b)(1) as she failed to prove that the Union interfered with her rights under Chapter 89.
6. PIMENTEL failed to state a claim for relief under HRS § 89-13(b)(5) as there is no proof supporting a contract violation by the UPW.
7. PIMENTEL failed to state a claim for relief that the Union violated HRS § 89-16 which provides for the public nature of Board proceedings.

8. PIMENTEL failed to state a claim for relief that the Union violated HRS §§ 89-16.5 and 89-16.6 which relate to the Union's right to obtain information from the employer to process a grievance or process payroll deductions.
9. A union breaches its duty of fair representation when its conduct is arbitrary, discriminatory, or in bad faith.
10. PIMENTEL failed to prove by a preponderance of evidence that the Union treated her complaints arbitrarily, discriminatorily, or in bad faith. To the contrary, SIAOSI filed five grievances on her behalf and requested arbitration in four instances. One grievance is pending reply at a lower step of the grievance procedure. Even if it were true that the Union failed to keep PIMENTEL apprised of the status of her grievances prior to her filing the instant complaint, there was no evidence presented that PIMENTEL's substantive rights were prejudiced thereby. The Board finds no genuine issue of material fact in dispute and concludes that the Union is entitled to summary judgment.
11. The Union did not breach its duty of fair representation by not pursuing her claims at EEOC as the duty of fair representation does not extend to these matters which are beyond the purview of the contract. PIMENTEL's Union agent SIAOSI reviewed her claims and based upon his assessment of the merits of the case advised her that she could file a grievance or complaint on her own behalf. The Board will not substitute its judgment for that of the Union agent. The Board finds no genuine issue of material fact in dispute and concludes that the Union is entitled to summary judgment.
12. The Union did not breach its duty of fair representation by refusing to grieve the post detachment orders dated January 29, 2003 and June 24, 2003 because SIAOSI reviewed the information and did not believe the employer violated the collective bargaining agreement. SIAOSI advised PIMENTEL to file a complaint or grievance on her own behalf. The Board will not substitute its judgment for that of the Union agent. The Board finds no genuine issue of material fact in dispute and concludes that the Union is entitled to summary judgment.
13. The Union did not breach its duty of fair representation by not providing her a copy of her personnel file. The Board concludes that the Union did not treat her arbitrarily or in bad faith because the Union agent contacted PIMENTEL's captain and was told that the personnel files would be provided. Although PIMENTEL sought the assistance of the OIP and was able to obtain the records, the undisputed facts demonstrate the Union acted reasonably and in good faith with respect to her request. The Board finds no genuine issue of material fact in dispute and concludes that the Union is entitled to summary judgment.

**ORDER**

The Board grants the UPW's motion to dismiss and/or for summary judgment.

DATED: Honolulu, Hawaii, March 17, 2004.

HAWAII LABOR RELATIONS BOARD

  
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BRIAN K. NAKAMURA, Chair

  
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CHESTER C. KUNITAKE, Member

  
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KATHLEEN RACUYA-MARKRICH, Member

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