STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of BETTY FALK, Complainant, and THE JUDICIARY, State of Hawaii and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Respondents.	CASE NOS.: CE-13-549 CU-13-224 ORDER NO. 2243 ORDER GRANTING RESPONDENTS THE JUDICIARY'S MOTION TO DISMISS, AND HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO'S MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

ORDER GRANTING RESPONDENTS THE JUDICIARY'S MOTION TO DISMISS, AND HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO'S MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

On November 10, 2003, Complainant BETTY FALK (Complainant or FALK), proceeding pro se, filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondent THE JUDICIARY, State of Hawaii (JUDICIARY or Employer) over her alleged improper discharge. FALK also alleged that Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) failed to represent her based on its determination that the JUDICIARY's discharge action did not violate the collective bargaining agreement.

On November 24, 2003, Respondent JUDICIARY moved to dismiss the complaint contending that the Board lacked jurisdiction on grounds the complaint was barred by the statute of limitations and failed to state a claim for relief. Alternatively, the JUDICIARY contended that the Board should defer jurisdiction to the contractual grievance process which Complainant has allegedly failed to exhaust.

On December 10, 2003, Respondent HGEA filed its Motion to Dismiss, or in the Alternative for Summary Judgment on the grounds that HGEA's investigation and decision not to file a grievance over Complainant's alleged improper discharge was not arbitrary, discriminatory or made in bad faith.

On December 19, 2003, Complainant filed a written opposition to Respondents' motions to dismiss, as directed by the Board at the prehearing conference held on

December 10, 2003. Also on December 19, 2003, Respondent JUDICIARY filed its First Supplement to Record and the Declaration of Dee Wakabayashi.

On December 23, 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. FALK was for all times relevant, a Social Worker IV employed by The JUDICIARY's Office of Public Guardian (OPG) and a public employee within the meaning of Hawaii Revised Statutes (HRS) § 89-2. FALK was for all times relevant included in Bargaining Unit (BU) 13.

2. Respondent JUDICIARY is the public employer within the meaning of HRS § 89-2. For all times relevant, Cathy Lowder (Lowder) in her capacity as director of the OPG, was a representative of the JUDICIARY.

3. Respondent HGEA is the exclusive representative, within the meaning of HRS § 89-2, of BU 13. For all times relevant, Waylen Toma (Toma), HGEA business agent, was a representative of the HGEA.

4. As the exclusive representative for employees in BU 13, the HGEA has negotiated and is a party to a BU 13 collective bargaining agreement (Contract), which contains a grievance procedure culminating in final and binding arbitration. The grievance procedure provides that an employee or the Union may file a grievance within 20 working days of the alleged violation. The employee or Union may then appeal to Step 2 within seven working days after receipt of the employer's Step 1 written response. Thereafter, the Union may request Arbitration at Step 3 by serving notice on the employer within ten working days from the employer's Step 2 response.

5. On July 22, 2003, Respondent JUDICIARY issued a written notice informing FALK that her temporary appointment with a not-to-exceed (NTE) date of June 30, 2003 was extended to September 30, 2003, and that:

> ...in accordance with § 22-23-15(d) of the Judiciary Personnel rules, your appointment will not be renewed beyond the NTE

appointment date. Therefore, your appointment to your position will end at the close of business on September 30, 2003.[1]

6. FALK had been employed by the OPG prior to 1996 when a reduction-in-force action moved her to Family Court for several months. In 1996, she left a permanent position to accept a limited term appointment to a temporary position in the OPG. According to FALK, in past years supervisors and the program director have requested to make her position permanent in annual budget requests. Since 1996, FALK's limited term appointment had been renewed annually until she was notified of the non-renewal action on July 22, 2003. Consequently, FALK complained that she was given no reason for the non-renewal action. The JUDICIARY's Employee Handbook, states that: "A person selected for a temporary appointment outside of list may be terminated from his/her position at any time upon completion of the project, or when services are no longer needed." Based on this statement, FALK felt the termination of her position was improper, because the work was not completed and her services were still needed in the OPG. Furthermore FALK argued that the extension date to September 30, 2003 was arbitrary; any reasons for her termination provided by Lowder were not true; and it was not her choice to end her appointment as noted on the JUDICIARY's official Notification of Personnel Action form.

7. On July 24, 2003, FALK sought the assistance of Respondent HGEA and met with business agent Toma over Respondent JUDICIARY's decision not to renew her appointment beyond September 30, 2003.

8. On July 24, 2003, following his meeting with FALK, Toma spoke with the JUDICIARY's Personnel Management Specialist Eric Tanigawa, and asked him to "check on various issues relating to Ms. Falk's claim, including the reason why her temporary appointment was not extended, whether or not her position was being abolished, whether or not her position was going to [be] made permanent, and, if so, why she was not asked to apply for the permanent position." Toma was informed by Tanigawa's supervisor, Dee Wakabayashi, that: "the Employer initially intended to not renew Ms. Falk's temporary position as of the June 30, 2003 NTE date," but decided to extend it to September 30, 2003 because FALK was on sick leave at that time; the Employer was unsure what it was going to do with FALK's position in the future, but did not intend to convert the temporary position to a permanent position because it would require legislative approval; and the Employer was unsure whether it was going to fill the position after September 30, 2003 "because of limited funding."

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[1]See Prohibited Practice Complaint filed November 10, 2003, and Exhibit (Ex.) B, Respondent Judiciary's First Supplement to Record.

9. By letter dated July 28, 2003, Toma informed FALK as follows:

> At this time it is not clear what they intend to do with the position in the future. There is no intention to convert it to permanent at this time because it would require Legislative approval to do that. Also because of funding, it is not clear whether they will fill the position after September 30th.
>
> I received your handwritten note about your conversation with Cathy Lowder. It appears that she may have provided information which can be used. However, as I advised you in the discussion we had on July 24, 2003, you need to write a memorandum to her confirming the discussion that you had stating the points that you raise within a reasonable time. Based on this there may be some room to argue that the non-renewal was improper and disciplinary.
>
> Absent this verification, as I advised you this non-renewal action is proper and well within Management's Right. Please provide a copy of any memorandum which you do send to Lowder on this subject. If you still maintain that this action is related to age discrimination, I again advise you that you can seek remedy at the Department's EEO/AA Office or with the Hawaii Civil Rights Commission.[2]

10. Following Toma's direction, FALK wrote to Lowder[3] regarding the reasons for her "discharge from OPG," stating in part:

> ON 7/22/03 SEVERAL DAYS BEFORE MY VACATION, YOU PROVIDED ME WITH NOTICE THAT I WOULD NOT BE RENEWED IN MY CURRENT POSITION AT OPG. YOU STATED IT WAS THE MOST GRACEFUL WAY TO DO IT, SINCE YOU DIDN'T NEED TO PROVIDE A REASON. I ASKED FOR THE REASON. YOU SAID YOU HAD MORE COMPLAINTS ABOUT ME FROM AGENCIES, THAN ANY OTHER OPG WORKER. I ASKED WHY YOU HADN'T INFORMED ME OF THE COMPLAINTS. SINCE THERE ARE 2 SIDES TO EVERY STORY. YOU STATED THE COMPLAINANTS FEARED REPERCUSSIONS AND ASKED YOU NOT TO INFORM ME. YOU ALSO STATED I WAS

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[2]See Ex. C, Respondent HGEA's Motion to Dismiss or in the Alternative for Summary Judgment.

[3]Ex. D, Respondent HGEA's Motion to Dismiss or in the Alternative for Summary Judgment.

BETTER OFF SINCE I COULD COLLECT UNEMPLOYMENT INSURANCE. YOU EXTENDED POSITION DATE TO 9/30/03, BUT DIDN'T INFORM ME. . . . .

11. On September 2, 2003, Lowder responded to FALK, stating that no reason for the non-renewal was given during their discussion and that such action was an exercise of management's right not to renew a temporary position. Lowder also stated that their discussion on FALK's performance of her duties and any complaints involving FALK's management of clients was not the reason for the non-renewal but was a discussion separate and apart from the non-renewal notification.

12. By letter dated September 12, 2003, Respondent HGEA informed FALK of its decision to close her case following a review of "all of the materials that [FALK has] been forwarding . . . concerning the Judiciary's decision not to renew [her] contract. . . . especially . . . the documents . . . transmitted . . . for any hint of a reason for . . . the non-renewal of appointment." Based on its investigation and review, Respondent HGEA concluded that "it was well within the rights of management to elect not to renew a limited term appointment with an employee. Without any written reason for the non-renewal which may hint at discipline there is no violation of the Unit 13 Collective Bargaining Agreement."[4]

13. The Board finds the Respondent HGEA's conduct in investigating FALK's complaint and upon which it based its decision not to pursue a grievance on FALK's behalf because the non-renewal of FALK's limited term appointment was within management's rights, and therefore, not in violation of the BU 13 Contract, was reasonable and not arbitrary, discriminatory or made in bad faith.

14. On October 10, 2003, FALK without the assistance of Respondent HGEA filed a Step 1 grievance with Respondent JUDICIARY over "wrongful dismissal" and seeking reinstatement, pursuant to the grievance procedure in the BU 13 collective bargaining agreement.[5] FALK's grievance is identical to the charges made against Respondent JUDICIARY relating to her "wrongful dismissal" and seeks reinstatement as a remedy.

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[4]Ex. F, Respondent HGEA's Motion to Dismiss or in the Alternative for Summary Judgment.

[5]See Ex. D, Respondent Judiciary's First Supplement to Record.

15. On November 21, 2003, Respondent JUDICIARY's Nathaniel Kim, Support Services Division Chief, denied FALK's Step 1 grievance.[6]

16. On December 2, 2003, FALK filed a Step 2 grievance with the Administrative Director Thomas Keller.

DISCUSSION

The gravamen of FALK's complaint is that she was wrongfully terminated by the OPG on July 22, 2003 in violation of the BU 13 Contract, and the HGEA breached its duty of fair representation to her by not challenging her termination.

Respondent HGEA moves for summary judgment on the grounds there are no genuine issues of material fact in dispute and as a matter of law, its decision to close her case and not challenge the termination by pursuing a grievance was not arbitrary, discriminatory or made in bad faith. We agree.

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 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) (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 Hawai`i, 85 Hawai`i 61, 937 P.2d 397 (1997) (Konno). Accordingly, the controlling inquiry is whether there is no genuine issue of material fact and the case can be

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[6]Ex. E, Respondent Judiciary's First Supplement to Record. Respondent JUDICIARY's denial of FALK's grievance was based on the following findings:

1. Your position and appointment as a Social Worker IV was a temporary one. Your temporary appointment had a not-to-exceed (NTE) date of September 30, 2003,
2. The non-renewal of your temporary appointment is an exercise of management's rights and is in accordance with [Hawaii Administrative Rules] § 22-23-15(d) of the Judiciary's Personnel Rules which states 'When the duration of a temporary appointment is ended, the employment relationship shall be considered to have been terminated by mutual agreement between the employee and the division head.'
3. Position Number 59492T was subsequently abolished.
4. No specific violations of the BU 13 collective bargaining agreement were cited by you.

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 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 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).

Having viewed the facts in the light most favorable to Complainant, there is no dispute in the record that FALK was employed as a Social Worker IV at the OPG, The JUDICIARY, as a limited term appointment to a temporary position, with a NTE date of June 30, 2003. FALK was notified in writing that the temporary appointment was extended to September 30, 2003 and thereafter would not be renewed in accordance with HAR § 22-23-15(d), Judiciary Personnel Rules. FALK's business agent investigated her claim that her termination was disciplinary and in violation of the BU 13 Contract. The Board finds the Respondent HGEA's conduct was reasonable in investigating FALK's complaint and in concluding not to pursue a grievance on FALK's behalf because the non-renewal of FALK's appointment was within management's rights and not violative of the BU 13 Contract. The Board concludes that the HGEA actions were not arbitrary, discriminatory or made in bad faith.

Respondent JUDICIARY moves for dismissal on grounds the complaint is barred by the statute of limitations; the complaint fails to state a claim for relief, or in the alternative, the Board should defer jurisdiction to the contractual grievance process, which Complainant has allegedly failed to exhaust.

In the instant complaint, HGEA's decision not to pursue a grievance on FALK's behalf did not foreclose Complainant's ability to exhaust her contractual remedies on her own and without Union representation through the grievance procedure except the ultimate step to arbitration. Indeed, FALK's grievance over her termination was filed October 10, 2003, and pending at Step 2, as of December 2, 2003. For this reason, Respondent JUDICIARY urges the Board to defer jurisdiction to the contractual grievance procedure.

In Santos v. State, Dept. of Transp., Kauai Div., 64 Haw. 648, 646 P.2d 962 (1982), the Hawaii Supreme Court stated that "[i]t is the general rule that before an individual can maintain an action against his [or her] employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his [or her] employer and the [union]." (Citation omitted). 64 Haw. at 655. In Winslow v. State, 2 Haw.App. 50, 55, 612 P.2d 1046 (1981) (Winslow), the Hawaii Intermediate Court of Appeals held that where the terms of public employment are covered by a collective bargaining agreement pursuant to HRS Chapter 89 and the agreement includes a grievance procedure to dispose of employee grievances against the public employer, an aggrieved employee is bound by the terms of the agreement. The Court in Winslow found that the employee had failed to exhaust her available remedies because she failed to proceed to Step 4 (appeal to the employer) of the grievance procedure.

In Hokama v. University of Hawai'i, 92 Hawai'i 268, 272, 990 P.2d 1150, 1154 (1999), the Court explained the policy considerations underlying the exhaustion of administrative remedies requirement as follows:

> The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process, allowing the parties to develop their own uniform mechanism of dispute resolution. [Citations omitted.] It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means. [Citations omitted.]

In cases where an employee charges a prohibited practice against the employer alleging a violation of the collective bargaining agreement pursuant to HRS § 89-13(a)(8) before exhausting the contractual remedies, this Board has declined jurisdiction in keeping with the prevailing National Labor Relations policy and Hawaii policy favoring arbitration as a dispute settlement mechanism. Hence, this Board will defer to the grievance process, except where there exists countervailing policy considerations, or the union's conduct in processing a grievance is discriminatory or in bad faith, thereby constituting a breach of its duty of fair representation to the member. See, Stevens v. Moore Business Forms, Inc., 18 F.3d 1443, 1447, 145 LRRM 2668 (9th Cir. 1994).

The record supports findings that on October 10, 2003, FALK without the assistance of Respondent HGEA filed a Step 1 grievance with Respondent JUDICIARY over her "wrongful dismissal" seeking reinstatement, pursuant to the grievance procedure in the BU 13 Contract. FALK's grievance is identical to the instant charges made against Respondent JUDICIARY relating to her "wrongful dismissal" and seeking reinstatement as a remedy. On November 21, 2003, Respondent JUDICIARY's Nathaniel Kim, Support Services Division Chief, denied FALK's Step 1 grievance. At the time the Board heard oral arguments on Respondents' dispositive motions, FALK's grievance was pending with the Employer at Step 2.

In keeping with the policy favoring the dispute settlement mechanism developed between the employer and Union, the Board defers to the grievance process, and declines jurisdiction over the instant claim. Accordingly, the Board need not address jurisdictional issues as grounds for dismissal of the complaint raised by the Employer.

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 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 file a grievance over the termination action. Having investigated the claims by Complainant, it was reasonable for the Union to believe that the Employer's decision not to renew FALK's limited term appointment beyond the NTE date, which was extended to September 30, 2003, was within management's right.

4. Based on the fact that FALK's grievance over her termination was filed October 10, 2003 and was pending at Step 2 on December 2, 2003, the Board concludes that FALK did not exhaust her contractual remedies. In keeping with the policy favoring the dispute settlement mechanism developed between the employer and Union, the Board defers to the grievance process, and declines jurisdiction over the prohibited practice complaint against the Employer.

ORDER

The Board hereby dismisses the instant complaint, with prejudice.

DATED: Honolulu, Hawaii, April 5, 2004.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

BETTY FALK and THE JUDICIARY, State of Hawaii, et al.
CASE NOS.: CE-13-549, CU-13-224
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