STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of STEPHANIE CROWELL STUCKY, Complainant, and JOAN LEE HUSTED, Executive Director, Hawaii State Teachers Association; ROCHELLE GREGSON, Deputy Executive Director; Hawaii State Teachers Association; ERIC NAGAMINE, UniServ Director, Hawaii State Teachers Association; and HAWAII STATE TEACHERS ASSOCIATION, Respondents.	CASE NO. CU-05-227 ORDER NO. 2247 ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING
RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

On January 16, 2004, Complainant STEPHANIE CROWELL STUCKY (STUCKY), pro se, filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board). Complainant alleges that Respondents JOAN LEE HUSTED (HUSTED), Executive Director, Hawaii State Teachers Association (HSTA), ROCHELLE GREGSON (GREGSON), Deputy Executive Director, HSTA, ERIC NAGAMINE (NAGAMINE), UniServ Director, HSTA and the HSTA violated the provisions of Hawaii Revised Statutes (HRS) § 89-13(b)(4), when they breached their duty of fair representation in their handling of two grievances filed by STUCKY and in the implementation of an arbitration award.

On March 22, 2004, Respondents filed Respondents' Motion for Summary Judgment contending that there are no genuine issues of material fact and they are entitled to summary judgment as a matter of law.

On March 29, 2004, Complainant filed a Response to Respondents' Motion for Summary Judgment with the Board.

On March 30, 2004, the Board conducted a hearing on the motion by conference call. The parties were afforded full opportunities to argue their respective positions. After a thorough review of the record, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. STUCKY was for all relevant times, a teacher employed by the Board of Education, State of Hawaii and an employee within the meaning of HRS § 89-2.

2. The HSTA is an employee organization and the exclusive representative as defined in HRS §. 89-2 of bargaining unit 05.

3. HUSTED is the HSTA Executive Director; GREGSON is the HSTA Deputy Executive Director, and NAGAMINE is an HSTA Uniserv Director for the island of Maui. They were for all relevant times, designated agents, within the meaning of HRS § 89-13(b), of the HSTA.

4. For all relevant times, the public employer and the HSTA were parties to a collective bargaining agreement which contained a grievance procedure culminating in arbitration.

5. On May 13, 2003, STUCKY filed a Step 1 grievance in M 03-40 at the district level alleging violations of Articles V, VII, XXI and XXII of the collective bargaining agreement. As of the time the instant complaint was filed, Complainant was unaware of the status of the grievance.

6. On November 24, 2003, STUCKY filed a Step 1 grievance in M 04-06, alleging violations of Articles II, V, XI, and XX of the Unit 05 collective bargaining agreement for interfering with the implementation of a settlement agreement to resolve a grievance. On January 6, 2004, STUCKY spoke with NAGAMINE who explained that the grievance would be filed at Step 2 to meet required timelines.

7. STUCKY left daily phone messages for NAGAMINE who did not return her calls.

8. NAGAMINE spoke with or left messages for STUCKY regarding the grievances on November 6, 2003, January 6, January 16, February 19 and February 26, 2004.

9. The HSTA, on STUCKY's behalf, resolved Grievance M 03-40 by a settlement but prior to implementation, STUCKY reached a different settlement with the employer without HSTA's knowledge or participation.

10. Thereafter, STUCKY changed her mind and informed HSTA that she did not wish to have the second settlement implemented.

11. The HSTA filed Grievance M 04-06 alleging direct dealing seeking the implementation of the original settlement agreement. It was processed through Steps 1 and 2 of the grievance procedure.

12. The HSTA filed a prohibited practice complaint against the employer in Case No. CE-05-551 alleging direct dealing with STUCKY.

13. Grievance M 04-06 was subsequently withdrawn.

14. For all relevant times, Grievance M 03-40 was being held in abeyance pending the resolution of Case No. CE-05-551.

DISCUSSION

Respondents move for summary judgment contending that there are no material issues of fact in dispute and they are entitled to judgment as a matter of law. Respondents contend that they fulfilled their duty of fair representation to Complainant because Grievance M 04-06 was withdrawn by Complainant and Complainant agreed to hold Grievance M 03-40 in abeyance.

Duty of Fair Representation

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). In addition, [t]he evidence must be viewed in the light most favorable to the non-moving party." State ex rel. Bronson v. Yoshina, 84 Hawai'i 179, 186, 932 P.2d 316 (1997). The court must view all of the evidence and inferences drawn therefrom in the light most favorable to the party opposing the motion. State Farm Mut. Auto Ins. Co. v. Murata, 88 Hawai'i 284, 287-88, 965 P.2d 1284 (1998) 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 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).

"A union's course of conduct may be so unreasonable and arbitrary toward an employee as to constitute a violation of its duty of fair representation, even without any hostile motive of discrimination and when conducted in complete good faith. Arbitrary conduct that might breach a union's duty of fair representation is not limited to intentional conduct by union officials. It may also include acts of omission which, while not calculated to harm union members, be so egregious, so far short of minimum standards of fairness to the employee, and unrelated to legitimate union interest as to constitute arbitrary conduct." 48 Am.Jur.2d 853 § 1529; see also, Price v. Southern Pacific Transp. Co., 586 F.2d 750 (9th Cir. 1978).

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). 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 (1978).

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).

In the instant case, Complainant alleges, inter alia, that Respondents failed to communicate with her on the status of her grievances. The Board finds, viewing the facts in the light most favorable to the Complainant, that NAGAMINE was in contact with STUCKY regarding Grievance M 03-40 and the HSTA had reached a settlement, with Complainant's approval, in that case. Thereafter, Complainant modified the terms of the settlement without the Union's participation. NAGAMINE was in contact with Complainant regarding the modification as another grievance was filed on STUCKY's behalf, Grievance M 04-06, as well as a prohibited practice complaint Case No. CE-05-551, to set aside the second settlement. Grievance M 04-06 was later withdrawn with STUCKY's consent and M 03-40 was for all times relevant, held in abeyance pending resolution of the HSTA's prohibited practice complaint, Case No. CE-05-551.

Complainant alleges that the Union breached its duty of fair representation when NAGAMINE failed to return her daily telephone calls. The Board has held that a union breaches its duty of fair representation when it is almost totally unresponsive to Complainant's requests for information. Richard Hunt, 6 HLRB 222 (2001) (Board majority found a prohibited practice in the absence of material justification for eight-month failure to apprise grievant of status of grievance); Bernadine L. Brown, 5 HLRB 16, 25 (1991). Here, based on the totality of the Union's conduct, it is clear that Complainant was informed and aware that her Grievance M 03-40 had been settled; Complainant then modified the terms of the settlement without informing Respondents; and after Complainant again changed her mind, the Board infers that Complainant contacted the Union prompting NAGAMINE and the HSTA to pursue another grievance, M 04-06, to "reinstate" the original settlement. In addition, Respondent HSTA filed a prohibited practice complaint on Complainant's behalf against the employer for direct dealing. Further, the actions taken by the HSTA with respect to the grievances were with STUCKY's concurrence and the Board finds that STUCKY has not been adversely affected by any alleged failure to communicate. Thus, based on the foregoing, the Board finds there are no genuine issues of material fact in dispute and Respondents are entitled to judgment as a matter of law, i.e., that Complainant failed to prove that Respondents breached their duty of fair representation by not communicating with her on the status of her grievances.

Statute of Limitations

Respondents also contend that any claim by Complainant that the Arbitrator's Decision was not implemented is time-barred and the Board lacks jurisdiction over the claim. Based on the record, the Arbitration Award was rendered on November 23, 1999. The Board finds that Complainant has failed to allege any facts to support a charge of arbitrary conduct

by Respondents with respect to the implementation of the arbitration award which occurred within 90 days of the filing of the instant complaint.

Hawaii Administrative Rules § 12-42-42(a) identifies the limitations period applicable to the filing of prohibited practices complaints under HRS § 89-13. It 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 limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HLRB 186 (1983).

Based on the record, the Board concludes that Complainant failed to file a charge against Respondents from the time of the issuance of the award on November 23, 1999 or thereafter when she knew or should have known that Respondents allegedly breached their duty as to the implementation of the award. Accordingly, any such charge is time-barred.

Failure to State a Claim for Relief

Lastly, Respondents contend that Complainant failed to allege any wilful conduct by HUSTED and GREGSON in the instant complaint and accordingly, they should be dismissed as Respondents in this complaint 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 in the 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) (Rosa). 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) (Bertelmann). 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, the Board concludes there are no claims alleging wilful or arbitrary conduct by HUSTED and GREGSON. Thus, viewing the facts in the light most favorable to Complainant, it appears beyond a reasonable doubt that Complainant can

prove no set of facts entitling her to relief against HUSTED and GREGSON. The Board thus dismisses the complaint against those Respondents.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this 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 by failing to communicate with her regarding her grievances.

4. Complaints that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to HRS § 89-13, must be filed within 90 days of the alleged violation.

5. Complainant failed to establish that Respondents' alleged failure to implement the arbitration award issued on November 23, 1999 arose within 90 days of the filing of the complaint. That claim is time-barred and the Board lacks jurisdiction over the claim.

6. 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 in the disclosure of some fact which will necessarily defeat the claim." Rosa, supra. 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, supra.

7. Complainant failed to allege facts sufficient to make a claim against HUSTED and GREGSON for breaching their duty of fair representation. HUSTED and GREGSON are dismissed as Respondents for failure to state a claim for relief.

ORDER

The Board hereby dismisses the instant complaint or alternatively, concludes that there are no genuine issues of material fact and Respondents are entitled to judgment as a matter of law.

DATED: Honolulu, Hawaii April 28, 2004.

HAWAII LABOR RELATIONS BOARD

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KATHLEEN RACUYA-MARKRICH, Member

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