STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of THOMAS C. YOUNG, Complainant, and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and JUNE RABAGO, Business Agent, United Public Workers, AFSCME, Local 646, AFL-CIO, Respondents.	CASE NO..CU-01-239 ORDER NO. 2338 ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

On March 22, 2005, Complainant THOMAS C. YOUNG (YOUNG) filed a prohibited practice complaint with the Hawaii Labor Relation Board (Board). The complaint alleges that Respondents UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW), and JUNE RABAGO (RABAGO), Business Agent, UPW (collectively Union), breached their duty of fair representation when they denied YOUNG representation in his internal complaint against the employer, County of Hawaii, Department of Environmental Management.

On March 31, 2005, the Union filed UPW's Motion to Dismiss. The Union submits that YOUNG's internal complaint seeks a change of his appointment status from temporary to permanent, which is a matter within management's rights under Hawaii Revised Statutes (HRS) § 89-9(d) and which the Union can do nothing about. The Union therefore contends that the complaint fails to state a claim for relief.

Thereafter on April 5, 2005, the Union filed UPW's First Amended Motion to Dismiss contending further that the Board lacks subject matter jurisdiction over new hires and appointments.

On May 10, 2005, the Board held a hearing on the instant motion. YOUNG appeared before the Board and represented himself pro se. The Union was represented by counsel. The parties were given full opportunity to make their arguments before the Board. After a thorough review of the record in the matter, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. YOUNG is a Unit 01 employee employed by the County of Hawaii and a public employee within the meaning of HRS § 89-2.

2. The UPW is the exclusive representative, within the meaning of HRS § 89-2, of employees included in Unit 01. RABAGO is a UPW business agent and a designated agent of the exclusive representative, within the meaning of HRS § 89-13(b).

3. For all times relevant, the Union and the County of Hawaii were parties to a collective bargaining agreement for employees in Unit 01, which contains a grievance procedure, culminating in arbitration.

4. For all times relevant, the County of Hawaii had an internal complaint procedure pursuant to HRS § 76-42[1] for employees of the County.

5. By letter dated January 14, 2005, YOUNG filed an internal complaint, dated January 11, 2005, with Barbara Bell, Director for the Department of Environmental Management, County of Hawaii, requesting, inter alia, that he be made permanent.

6. YOUNG also made several requests to RABAGO for assistance including a written request on or about January 14, 2005. Sometime after January 14, 2005, RABAGO, by phone, after consulting with the State Director of the UPW, denied YOUNG's request for assistance as his complaint raised issues that the Union could not help him with.

---

[1]HRS § 76-42(a) provides for internal complaint procedures, in part, as follows:

> The director shall promulgate a uniform plan for the creation of internal complaint procedures in the various departments that shall apply to matters within the jurisdiction of the merit appeals board. The internal complaint procedures may also be used for other matters, such as when a complaint procedure is required by law to be available or when a jurisdiction deems it would be beneficial to avoid the time and expense of litigation; provided that matters subject to collective bargaining grievance procedures shall not be processed under the internal complaint procedures.

DISCUSSION

In his memorandum in opposition to the UPW's amended motion, YOUNG states that in denying his request for representation, UPW and RABAGO violated HRS §§ 89-13(b)(2), (3), and (4). The statute provides, in part:

> (b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
>
> * * *
>
> (2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;
>
> (3) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in section 89-11;
>
> (4) Refuse or fail to comply with any provision of this chapter; or . . . .

HRS §§ 89-13(b)(2) and (3)

With regard to the violations of HRS §§ 89-13(b)(2) and (3), the Board finds that YOUNG lacks standing to bring these claims. In previous rulings the Board has held that the violations referred to in these provisions of the statutes normally occur during the collective bargaining process where the employer alleges that the union is not negotiating in good faith or participating in the impasse process of the negotiation provisions of the chapter. See, Thomas Lepere, 5 HLRB 263 (1994).[2] Since, YOUNG is neither an "employee organization" nor a "public employer" as defined by HRS § 89-2, he lacks standing to maintain the HRS §§ 89-13(b)(2) and (3) allegations against the Union. Thus, the Board dismisses YOUNG's alleged violations of HRS §§ 89-13(b)(2) and (3).

---

[2]HRS § 89-13(b)(2) prohibits an employee organization from refusing to bargain with the public employer as required in HRS § 89-9. A refusal to bargain charge is properly raised by a public employer who has the reciprocal duty to bargain in good faith. Similarly, HRS § 89-13(b)(3) prohibits an employee organization from refusing to participate in the mediation, fact-finding, and arbitration procedures in HRS § 89-11. These procedures in HRS § 89-11 refer to the impasse resolution mechanism for interest arbitrations involving the terms of the contract rather than the grievance procedures which involve the violation or interpretation of the collective bargaining agreements.

Duty of Fair Representation

YOUNG alleges that the Union breached its duty of fair representation and violated HRS § 89-13(b)(4) by refusing to assist him with his internal complaint filed pursuant to HRS § 76-42. The Union contends that the complaint should be dismissed for failure to state a claim for relief because YOUNG's internal complaint deals with the County's failure to give him a permanent appointment to his position. The Union contends that this is an exercise of management's rights under HRS § 89-9(d) with which the Union cannot assist him. In addition, the Union contends that the Board lacks jurisdiction over YOUNG's appointment status as it is a civil service matter.

"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).

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).

With regard to the remaining charge in the complaint and YOUNG's arguments before the Board, it is clear that YOUNG wants the UPW to represent him in his internal complaint filed under the provisions of HRS Chapter 76 regarding the temporary status of

his position. The Board previously held that "the Union's duty of fair representation recognized in Chapter 89, HRS, extends to matters dealing with collective bargaining and the rights created by the respective collective bargaining agreements and does not encompass the pursuit of claims arising under Chapters 76 and 77, HRS. Thus, the Board concludes that Complainant fails to state a claim for breach of the duty of fair representation where the union has no duty to assist the employee because the claims arise outside the ambit of Chapter 89, HRS." Order No. 1460, Oren J. Tsunezumi, Case Nos.: CU-03-128a, CU-04-128b, May 9, 1997. Thus, on the face of the complaint, the Board concludes that YOUNG failed to state a claim for relief because the Union is not obligated to represent YOUNG in the internal complaint process challenging the nature of his appointment. Further, YOUNG's complaint raises civil service issues which are beyond the jurisdiction of the Board.

CONCLUSIONS OF LAW

1. The Board concludes that Complainant lacks standing to raise claims that the Union violated HRS §§ 89-13(b)(2) and (3).

2. The Board concludes that based on the pleadings, Complainant can prove no set of facts which would entitle him to relief for violation of HRS §§ 89-13(b)(4), i.e., that the Union breached its duty of fair representation. The instant complaint fails to state a claim for relief that the Union breached its duty of fair representation because the internal complaint deals with issues within management's rights and governed by the civil service law.

3. The Board concludes that it lacks jurisdiction over the instant complaint based on the pleadings. YOUNG's underlying dispute relates to recruitment, hiring, and/or matters of classification which fall within the ambit of the civil service law and under the jurisdiction of the Merit Appeals Board.

ORDER

The Board hereby grants the Union's motion to dismiss the instant complaint.

DATED: Honolulu, Hawaii, June 9, 2005.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

Copies sent to:

Thomas Young
Herbert R. Takahashi, Esq.
Joyce Najita, IRC