STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of EMILY DE COSTA, Complainant, and PATRICIA HAMAMOTO, Superintendent of Education, Department of Education, State of Hawaii, Respondent.	CASE NO. CE-06-613 ORDER NO. 2373 ORDER GRANTING RESPONDENT'S MOTION TO DISMISS IN LIEU OF ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED FEBRUARY 10, 2006

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On February 10, 2006 Complainant EMILY DE COSTA (Complainant or DE COSTA), proceeding pro se, filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) alleging Respondent was engaged in a prohibited practice in wilful violation of Hawaii Revised Statutes (HRS) § 89-13(a) because of her non-selection for the Principal IV position at Lihikai Elementary School. On February 22, 2006, Respondent PATRICIA HAMAMOTO (HAMAMOTO or Employer), Superintendent of Education, Department of Education, State of Hawaii moved to dismiss the prohibited practice complaint.

Pursuant to notice issued March 2, 2006, the Board conducted a hearing on Respondent's Motion to Dismiss in Lieu of Answer to Prohibited Practice Complaint on March 21, 2006. At the hearing on March 21, 2006, Complainant submitted documents listed as Exhibits 1 to 8 regarding the Principal IV position at Lihikai Elementary, and was provided the opportunity to make oral argument opposing said motion.

Based on the entire record and having considered the oral arguments presented, the Board makes the following findings of fact, conclusions of law and order granting Respondent's Motion to Dismiss.

FINDINGS OF FACT

1. Complainant DE COSTA is a principal at Makawao School, and a public employee within the meaning of HRS § 89-2. Complainant is a member of Bargaining Unit (BU) 06, whose exclusive representative is the Hawaii Government Employees Association (HGEA or Union).

2. Respondent HAMAMOTO is the Superintendent of Education, Department of Education, State of Hawaii and the designated representative of the Public Employer within the meaning of HRS § 89-2.

3. On or about June 24, 2004, the HGEA filed a grievance on Complainant's behalf over her non-selection for the Principal IV position (no. 65840) at Lihikai Elementary. The HGEA withdrew the grievance on or about July 7, 2004, after the Complainant was called for a re-interview on or about July 2, 2004.

4. On July 14, 2004, after Complainant was informed of her non-selection following the re-interview, the HGEA filed a second grievance over Complainant's non-selection for the prinicipal position at Lihikai Elementary.

5. On July 28, 2004, Complainant accepted the principal position at Makawao School. At the time, she informed the Employer that she intended to proceed to grieve her non-selection for the principal position at Lihikai Elementary.

6. On September 8, 2004, the HGEA received the Employer's Step I Grievance response denying a violation of Articles 4 and 11 of the BU 06 Contract. The HGEA filed a Step II Grievance, and a Step II meeting was held with the Employer's representatives at the Maui District DOE Office.

7. On October 22, 2004, Claudia Chun (Chun), the Superintendent's Designated Representative, issued a Step II Response finding that Article 4-Maintenance of Rights, Benefits, and Privileges was violated and recognizing "inconsistencies in the interview/selection process." Nevertheless, Chun determined that said inconsistencies in the interview process "did not warrant the remedy sought by the union," i.e., awarding the position to DE COSTA. Therefore, Chun recommended that the "interview and selection process for the position no. 65840, Principal IV, Lihikai Elementary School, be re-done following the procedures of the SARSA."

8. On December 14, 2004, Complainant was informed by Lee Matsui of HGEA that the Step II hearing officer recommended that a third interview be

conducted with Complainant. Complainant requested that the HGEA proceed to arbitration.

9. Approximately ten months later, on or about November 2, 2005, Complainant received a letter from the HGEA informing her that ". . . after carefully conducting an independent investigation and review of the facts and circumstances applicable to [her] non-selection into the Principal IV position at Lihikai Elementary School," the HGEA would not proceed to arbitration with her grievance. The HGEA also informed Complainant that the "Employer's decision to re-do the interview process for the third time is reasonable and will notify them accordingly. As such, this letter will serve as notice to you that HGEA/AFSCME will be withdrawing as your representative on this matter effective immediately and considers the matter closed."

10. On February 10, 2006, approximately 101 days after receiving the HGEA's letter advising Complainant of its decision to settle the underlying grievance rather than proceed to arbitration, Complainant filed the instant complaint against the Employer, only, alleging prohibited practices under HRS §§ 89-13(a)(3), (7) and (8). Complainant failed to allege a prohibited practice claim against the Union for breach of duty of fair representation under HRS § 89-13(b)(4).

11. During the grievance process, the Employer found procedural or technical violations with the selection procedures requiring it to effectively rescind DE COSTA's non-selection and re-do the interview process. The Board finds the Union and the Employer effectively settled DE COSTA's underlying grievance by the Employer's admission of technical and procedural violations during the selection process, rescission of her non-selection, and order to redo the selection process.

12. By email dated March 5, 2006, HAMAMOTO informed DE COSTA that the Employer had not determined its "next steps" and apologized for the premature announcement at a faculty meeting that there would be a new interview for the Lihikai Principal's position because the Grievant, i.e., DE COSTA, won her appeal. HAMAMOTO also indicated that the Employer was also considering HGEA's proposal to reclassify DE COSTA's current Principal II position.

DISCUSSION

Complainant claims she was denied the principal position at Lihikai Elementary School "due to unfair and discriminatory practices" allegedly in wilful violation

of HRS §§ 89-13(a)(3),[1] (7) and (8).[2] The gravamen of the instant complaint against the Respondent is that Complainant seeks to have the Board adjudicate her non-selection for the Principal IV position at Lihikai Elementary School which was the subject of her grievance.

Respondent contends, in her motion to dismiss, that Complainant has failed to exhaust her administrative remedies and failed to prove the Union has breached its duty of fair representation by agreeing to resolve her grievance and denying her request to proceed to arbitration. In addition, Respondent contends the Board lacks jurisdiction on the grounds the complaint is barred by the statute of limitations. Respondent argues that even assuming the allegations set forth in the complaint are true, DE COSTA has failed to state a claim upon which relief can be granted against the Employer and therefore, dismissal is required. See, Hawaii Rules of Civil Procedure (HRCP) Rule 12(b)(6). "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). 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).

With respect to DE COSTA's claim of discrimination by the Employer, DE COSTA claims the Employer discriminated against her on the basis of her gender and race, and not to encourage or discourage membership in an employee organization as proscribed in HRS § 89-13(a)(3). Accordingly, the Board concludes that Complainant has failed to allege sufficient facts which would give rise to any claim for relief pursuant to HRS § 89-13(a)(3) and accordingly, dismisses that claim.

In Winslow v. State, 2 Haw.App. 50, 55, 625 P.2d 1046 (1981) (Winslow), the Hawaii Intermediate Court of Appeals held that where the terms of the 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

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[1]HRS § 89-13(a)(3) states that it shall be a prohibited practice for a public employer or its designated representative wilfully to:

> Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization; ...

[2]HRS § 89-13(a)(8) states that it shall be a prohibited practice for a public employer or its designated representative wilfully to:

> Violate the terms of a collective bargaining agreement; . . .

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 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 Hokama v. University of Hawaii, 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 to encouraging the orderly and less time-consuming settlement of disputes through alternative means. [Citations omitted.]

"Exceptions to the exhaustion requirement exist, such as when pursuing the contractual remedy would be futile." Poe v. Hawaii Labor Relations Board, 97 Hawai`i 528, 535, 40 P.3d 930, 937 (2002) (Poe I). In Poe v. Hawaii Labor Relations Board, 105 Hawai`i 97, 103 (2004) (Poe II), an employee was prevented from exhausting his contractual remedies because the union denied his request to advance his grievance to arbitration. Id., 97 Haw. at 104. The Poe II Court held that when an employee is prevented from exhausting his or her contractual remedies because the union has *wrongfully* refused to advance the grievance to arbitration, the employee may bring a claim against his or her employer in the face of a defense based upon the failure to exhaust contractual remedies "provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." *Vaca*, 386 U.S. at 186, 87 S.Ct. 903.

The Poe II Court stated as follows:

> Thus, an employee who is prevented from exhausting the remedies provided by the collective bargaining agreement, may, nevertheless, bring an action against his or her employer. Under federal precedent, such an action consists of two separate claims: (1) a claim against the employer alleging a breach of the collective bargaining agreement and (2) a claim against the

union for breach of the duty of fair representation. *DelCostello*, 462 U.S. at 164, 103 S.Ct. 2281.

> [T]he two claims are inextricably interdependent. To prevail against either the company or the Union, employee-plaintiffs 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. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both. Id. at 164-65, 103 S.Ct. 2281 (citation, brackets, quotation marks, and ellipsis points omitted); see also *DiGuilio v. Rhode Island Bhd. of Corr. Officers*, 819 A.2d 1271, 1273 (R.I.2003) (without a showing that the union breached its duty of fair representation, the employee does not have any standing to contest the merits of his contract claim against the employer in court). [Emphasis added.]

The union's duty of fair representation requires the exclusive representative to "be responsible for representing the interests of all such employees without discrimination and without regard to the employee organization membership." HRS § 89-8(a). 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) (Varney). See also, Vaca, supra, 386 U.S. at 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 (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) 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 Complainant to prevail against her Union, she must show that the union's conduct is arbitrary, discriminatory or in bad faith. In the grievance context, a union will breach its duty of fair representation if it ignores a meritorious grievance or processes the grievance in a perfunctory manner. However, a union does not breach its duty of fair representation when it does not process a meritless grievance or engages in mere negligent conduct. Varney, supra, at 520. 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).

> If the union has made an honest, informed, and reasoned decision not to proceed, it has not breached its duty, even though the decision leaves the individual employee without recourse, other reasonable men might have decided differently, or the union appears in hindsight to have been simply mistaken in the factual premises of its reasoning.

Baldini v. Local 1095, United Auto Workers, 581 F.2d 145, 151 (7th Cir. 1978).

In the instant complaint, Complainant claims the Employer violated the collective bargaining agreement, but failed to bring a claim against the Union for breach of duty of fair representation. Even though Complainant has filed the instant complaint against her Employer only, and not the HGEA over its decision to settle the underlying grievance rather than proceed to arbitration, Complainant's burden of proof is the same. Poe II, 97

Hawai`i at 102 citing DelCostello, 462 U.S. at 164-165, 103 S.Ct. 2281. Therefore, in order to state a claim against the Employer, Complainant must show not only that she was prevented from exhausting her administrative remedies, but also that the union breached its duty of fair representation. In other words, that the Union *wrongfully* refused to advance her grievance to arbitration.

In the instant case, the Board finds that during the grievance process, the Employer found procedural or technical violations with the selection procedure requiring it to effectively rescind DE COSTA's non-selection and re-do the interview process. The Union and the Employer effectively settled DE COSTA's underlying grievance by the Employer's admission of technical and procedural violations during the selection process, rescission of her non-selection, and order to redo the selection process. When Complainant asked her Union to proceed to arbitration, the Union conducted its own independent investigation of the facts and circumstances surrounding her non-selection for the Principal IV position at Lihikai Elementary School, and determined that the "Employer's decision to re-do the interview process for the third time [was] reasonable."

Based on these facts, the Board concludes that the Union's decision to settle the underlying grievance rather than advance it to arbitration was not arbitrary, discriminatory or made in bad faith. Merely settling a grievance short of the arbitration process, without more, fails to establish a breach of the duty of fair representation. Vaca, 386 U.S. at 192, 87 S.Ct. 903. Therefore, although DE COSTA can show that she was prevented from exhausting her administrative remedies because the Union did not advance her grievance to arbitration, DE COSTA cannot prove that her Union breached its duty of fair representation. Consequently, DE COSTA lacks standing to pursue her contract claim against the Employer. Poe II, 97 Hawai`i at 104.

Furthermore, the instant complaint is barred by the statute of limitations, under HRS § 377-9(1)[3] made applicable under HRS § 89-14[4] and incorporated in the Board's rules of practice and procedure in Hawaii Administrative Rules (HAR) § 12-42-42(a).[5] It is a

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[3]HRS § 377-9 states:

(1) No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of the occurrence.

[4]HRS § 89-14 states, in part:

Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9; . . . .

[5]HAR § 12-42-42 states:

(a) A complaint that any public employer, public employee,

well-established practice of the Board to strictly construe the 90-day statute of limitations period under HRS § 377-9(l), and dismiss complaints even when they are one day late. Alvis W. Fitzgerald, 3 HPERB 186, 198-99 (1983).

In order to be timely filed, Complainant's claims of a prohibited practice against the Employer for violating the collective bargaining agreement brought under HRS §§ 89-13(a)(7) and (8) must fall within the 90-day period between November 1, 2005 and February 10, 2006. Complainant, however, failed to present any facts that the Employer took any adverse actions against her within the applicable limitations period. The resolution of her grievance at Step II occurred on or about October 22, 2004. Notwithstanding Complainant's belief that the matter was still "open," the Employer's decision to resolve the grievance by redoing the selection was final.

The same time deadline for bringing an actionable claim against the Union alleging a breach of duty of fair representation is also applicable. The Board concludes therefore that its lacks jurisdiction over this matter because the instant complaint was filed 101 days after Complainant received the Union's October 31, 2005 notice that it was settling the underlying grievance rather than proceeding to arbitration. Thus, any breach of duty claim against the Union and corresponding contract claim against the Employer was extinguished 90 days after the Union's notice.

CONCLUSIONS OF LAW

1. DE COSTA's claim of discrimination by the Employer is based on gender and race, and not to encourage or discourage membership in an employee organization as proscribed in HRS § 89-13(a)(3). Accordingly, the Board concludes that Complainant has failed to allege sufficient facts which would give rise to any claim pursuant to HRS § 89-13(a)(3) upon which she is entitled to relief and accordingly, dismisses that claim.

2. The instant complaint fails to state a claim upon which relief can be granted because Complainant cannot prove a breach of the duty of fair representation by the Union actionable under HRS § 89-13(b)(4). Consequently, DE COSTA lacks standing to pursue her contract claim against the Employer.

3. The Board lacks jurisdiction because the instant complaint against the Employer is barred by the 90-day statute of limitations period under HRS

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or employee organization has engaged in any prohibited practice pursuant to section 89-13, HRS, may be filed by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation.

§ 377-9(1) made applicable by HRS § 89-14 and incorporated in the Board's rules of practice and procedure in HAR § 12-42-42(a).

ORDER

For the reasons given above, the Board hereby dismisses the instant prohibited practice complaint.

DATED: Honolulu, Hawaii, April 25, 2006.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

EMORY J. SPRINGER, Member

KATHLEEN RACUYA-MARKRICH, Member

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