STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of ERIK DAVID BARNES, Complainant, and CITY AND COUNTY OF HONOLULU; KEALA WATSON, Administrative Services Officer, Emergency Services, City and County of Honolulu; JIM HOWE, Chief, Ocean Safety/Emergency Services, City and County of Honolulu; RALPH GOTO, Director, Ocean Safety/Emergency Services, City and County of Honolulu; HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; NORA NOMURA, Deputy Executive Director, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO; BOB DOI, Agent, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO; and CAROLEE KUBO, Field Services Officer, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, Respondents.	CASE NOS.: CE-03-727 CU-03-279 ORDER NO. 2704 ORDER

ORDER

On September 9, 2009, Complainant ERIK DAVID BARNES (Barnes or Complainant), pro se, filed a Prohibited Practice Complaint (Complaint) with the Hawaii Labor Relations Board (Board) against the above-named Respondents. Barnes alleged, inter alia, that he was terminated three days before a deadline set by his union agent for allegedly failing a drug test; that he never received chain of custody paperwork showing his test results for over a year-and-a-half and which showed he did not fail the drug test; that his rights to due process were ignored; and he was not afforded the opportunity to sign a "last chance agreement" to keep his job. Barnes alleged violations of Hawaii Revised Statutes (HRS) §§ 89-13(a)(5), (6), and (8) and 89-13(b)(1) and (2).

On September 21, 2009, Respondents HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; NORA NOMURA, Deputy Executive Director, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO; BOB DOI, Agent, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO; and CAROLEE KUBO, Field Services Officer, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (collectively HGEA or Union) filed a Motion for Particularization of the Complaint Filed September 4, 2009. On September 25, 2009, Respondents CITY AND COUNTY OF HONOLULU; KEALA WATSON, Administrative Services Officer, Emergency Services, City and County of Honolulu; JIM HOWE, Chief, Ocean Safety/Emergency Services, City and County of Honolulu; RALPH GOTO, Director, Ocean Safety/Emergency Services, City and County of Honolulu (collectively City Respondents) filed a Joinder in Respondent HGEA/AFSCME's Motion for Particularization of Complaint.

On October 14, 2009, the Board issued Order No. 2651, Order Granting Respondent HGEA/AFSCME and City Respondents' Motion for Particularization of the Complaint filed September 9, 2009. After two extensions, Complainant filed a Statement of Particulars with the Board on November 12, 2009. In the Statement of Particulars, Complainant contended, inter alia, that the HGEA was grossly negligent in representing him based on the agent's close relationship with the employer and its refusal to appeal Judge Sakamoto's decision to the Hawaii Supreme court. Complainant alleged additional violations of HRS §§ 89-13(a)(1), (3) and (7) and 89-13(b)(4) and (5).

On January 11, 2010, Respondent HGEA filed a Motion to Dismiss and/or for Summary Judgment with the Board. HGEA alleged, inter alia, that Barnes complained that the Union did not diligently process Complainant's grievance and in order for Barnes to prevail, he must show that the Union's conduct was arbitrary, discriminatory, or in bad faith; the HGEA filed a grievance on behalf of Complainant and arbitrated the grievance before Arbitrator Russell T. Higa; the Arbitrator found that Complainant was afforded more than ample opportunity to sign the Last Chance Agreement but failed to do so; the Arbitrator found that the employer was compelled to move forward with Complainant's termination and found proper cause to sustain the discipline and denied the grievance; the HGEA thereafter filed an appeal to the Circuit Court and Judge Karl Sakamoto (Sakamoto) denied the motion to vacate the Arbitration Decision and Award on or about June 12, 2009; and on July 8, 2009, the HGEA informed Complainant that it would not challenge Judge Sakamoto's denial of HGEA's motion to vacate to the state appellate court. The HGEA contends that it complied with its duty of fair representation in challenging Complainant's termination.

On January 22, 2010, Complainant filed a Motion for Summary Judgment with the Board. Complainant contends, inter alia, that his drug test results did not constitute a positive result.

On February 1, 2010, City Respondents filed a Motion for Summary Judgment, or in the Alternative, Motion to Dismiss with the Board. The City

Respondents contend that the Board does not have jurisdiction to amend, vacate, modify, correct or clarify the arbitration award; Complainant seeks to relitigate his termination which was upheld by the Arbitrator; the City afforded Complainant the grievance procedure contemplated under the collective bargaining agreement, and thus the City Respondents contend that they have not violated any provision under HRS § 89-13.

On February 22, 2010, the Board conducted a hearing on Respondent HGEA/AFSCME's Motion to Dismiss and/or for Summary Judgment, filed on January 11, 2010 and Respondents City and County of Honolulu, Keala Watson, Jim Howe, and Ralph Goto's Memorandum in Support of Respondent HGEA/AFSCME's Motion to Dismiss and/or for Summary Judgment, filed on January 19, 2010. The Board also heard arguments on Complainant Erik David Barnes' Motion for Summary Judgment, filed on January 22, 2010 and Complainant Erik David Barnes' Motion to Amend Prohibited Practice Complaint. All parties had full opportunity to present evidence and arguments on the motions.

With regard to Complainant's Motion to Amend Prohibited Practice Complaint filed on February 10, 2010 to add a reference to a conversation with Respondent NORA NOMURA (Nomura) in October 2009 regarding the filing of a complaint with the Board, Complainant conceded and the Board concluded, that the allegations were time-barred because they fell outside the Board's 90-day statute of limitations. Accordingly, the Board denied Complainant's motion to amend the instant Complaint.

With regard to the dispositive motions filed, the Board finds that it has jurisdiction over the complaint pursuant to HRS §§ 89-5(i)(5) and 89-14. Barnes' Complaint is considered a "hybrid" action where the employee generally sues the employer for unfair labor practices and the union for breach of the duty of fair representation, though not necessarily both. Conley v. Int'l Bhd. of Elec. Workers, Local 639, 810 F.2d 913, 915 (9th Cir.1987). Because the claims against the employer and the union are "inextricably interdependent," the hybrid determination does not require that the suit be brought against both the employer and the union. Del Costello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164-165 (1983).

A union may be held liable for a breach of its duty of fair representation. See Del Costello, 462 U.S. at 164. The duty of fair representation imposed upon a union stems from its role as the exclusive bargaining representative of the employees. Vaca v. Sipes, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Consequently, courts must extend great deference to the union so as to support the "effective performance of their bargaining responsibilities." Air Line Pilots Ass'n. Int'l. v. O'Neill, 499 U.S. 65, 78, 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991). In granting such deference, courts require a plaintiff to prove that the union's conduct toward a member of the collective bargaining agreement had been "arbitrary, discriminatory or in bad faith." Vaca, 386 U.S. at 190. Mere negligence on the part of the union is insufficient to satisfy this demand. United

Steelworkers of America v. Rawson, 495 U.S. 362, 376, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990); Bazarte v. United Transp. Union, 429 F.2d 868, 872 (3d Cir.1970).

In cases where an alleged breach is predicated on a union's failure to file a grievance, the Supreme Court has allowed unions broad discretion in determining whether or not a termination warrants a grievance. Chauffeurs, Teamsters & Helpers v. Terry, 494 U.S. 558, 567-568, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (citing Vaca, 386 U.S. at 185). This broad discretion allows a union to determine whether a grievance has merit, but with the caveat that "[an] individual employee has no absolute right to have his grievance arbitrated." Vaca, 386 U.S. at 195.

Courts have established high thresholds for arbitrary conduct, holding 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." Air Line Pilots, 499 U.S. at 67 (citing Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S.Ct. 681, 97 L.Ed. 1048, (1953)). Arbitrariness has been further characterized as being so unreasonable as to be "without rational basis or explanation." See Raczkowski v. Empire Kosher Poultry, 185 Fed.App'x 117, 118 (3d Cir. 2006) (citations omitted).

Based upon the record, the Board finds that there are no genuine issues of material fact presented and that Respondent HGEA is entitled to judgment as a matter of law. In the instant case, the HGEA sought numerous continuances from the employer to permit Complainant to sign the Last Chance Agreement; after Barnes' termination, the HGEA filed a grievance on Complainant's behalf and pursued the grievance through six days of arbitration hearings where the HGEA raised the issues presented by Barnes' in his arguments before the Board; after the Arbitrator denied the grievance, the HGEA filed an appeal to the Circuit Court which denied the HGEA's motion to vacate the Arbitrator's award; and the HGEA advised Complainant that it had consulted two experienced attorneys regarding the probability of success in filing a Supreme Court appeal and the Union was advised that the HGEA would not likely prevail at that level and there were concerns of possible negative ramifications to the Union in pursuing the matter further. The Board concludes based on this record that the Union did not act in a perfunctory or arbitrary manner regarding Barnes' termination and therefore did not breach its duty of fair representation. The Board finds that the Union acted within the wide range of reasonableness afforded in deciding not to appeal to the appellate courts because in the Union's opinion, they would not prevail. The Union's actions here were not unreasonable or without basis.

As the Board finds that Barnes failed to establish the elements of a breach of duty of fair representation claim against the Union, his claim against the City Respondents must also fail. See Felice v. Sever, 985 F.2d 1221, 1226 (3d Cir. 1993) (In a hybrid action, "the plaintiff will have to prove that the employer breached the collective bargaining agreement in order to prevail on the breach of duty of fair representation claim against the union, and vice versa." [cites omitted.] Thus, the claims are "inextricably

interdependent."). Therefore, the City Respondents are also entitled to judgment as a matter of law that they did not commit a prohibited practice and violate HRS Chapter 89. Nevertheless, the Board finds that the Arbitrator addressed the substantive concerns against the City Respondents which Complainant seeks to relitigate here, i.e., whether he was terminated for proper cause, including whether he had a positive test result, whether he was denied due process, whether the chain of custody paperwork was proper, and whether he had the opportunity to sign the Last Chance Agreement, etc. The Board finds that the issues raised by Barnes in his Complaint concern solely contractual issues, i.e., whether he was terminated for proper cause, which were addressed by the Arbitrator and the court pursuant to HRS Chapter 658A and do not raise independent statutory violations under HRS Chapter 89 regarding the exercise of protected activity.

Accordingly, the Board grants summary judgment in favor of Respondents HGEA and the City Respondents.

Respondent HGEA has fifteen days, unless such time is extended by the Board, to draft and file the original and five copies of the proposed order, accompanied by a disk with a copy of the order, with the Board. Any party served with the proposed order may file objections thereto and a copy of their proposed order, accompanied by a disc of the order, with the Board within ten working days.

DATED: Honolulu, Hawaii, May 11, 2010.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SARAH R. HIRAKAMI, Member

Copies sent to:

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