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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. 2719 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING RESPONDENT HGEA/AFSCME'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT AND CITY RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION TO DISMISS

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING RESPONDENT HGEA/AFSCME'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT and CITY RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION TO DISMISS

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. HGEA/AFSCME or Union) filed a Motion for Particularization of the Complaint Filed September 9, 2009. On September 25, 2009, Respondents CITY AND COUNTY OF HONOLULU; KEALA WATSON (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 (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 his 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 Judgement 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 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 Judgement, 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 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 opportunities to present evidence and arguments on the motions. The Board's hearing was conducted pursuant to HRS §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3).

After careful consideration of the record and argument presented, the Board makes the following findings of fact, conclusions of law, and order.[1]

FINDINGS OF FACT

1. Barnes, at all relevant times through November 15, 2007, was employed as a Water Safety Officer II (WSO), assigned to the City's Emergency Services Department, Ocean Safety & Lifeguard Services Division, City and County of

[1]In Order No. 2704, Order, dated May 11, 2010, the Board directed HGEA to draft and file the original and five copies of a proposed order with the Board. The Board also stated that any party served with the proposed order may file objections thereto and a proposed order with the Board within ten working days. On May 25, 2010, the HGEA filed its Proposed Findings of Facts, Conclusions of Law and Order with the Board and no objections to the proposed order were filed with the Board.

Honolulu, and included in bargaining unit (Unit) 03.[2] Barnes was, for all times relevant, an employee, as defined under HRS § 89-2.[3]

2. Respondent HGEA is an employee organization and the exclusive representative, as defined in HRS § 89-2,[4] of employees in Unit 03.

3. City Respondents are individuals who represent one of the statutory employers or act in their interest in dealing with public employees and are therefore an employer or public employer as defined under HRS § 89-2.[5]

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[2]HRS § 89-6 provides in part:

(a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

* * *

(3) Nonsupervisory employees in white collar positions;

...

[3]HRS § 89-2 provides in part:

"Employee" or "public employee" means any person, employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section 89-6(g).

[4]HRS § 89-2 provides in part:

"Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawai`i employee-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

"Exclusive representative" means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

[5]HRS § 89-2 provides:

"Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief

4. The HGEA and the City and County of Honolulu have been parties to collective bargaining agreements (Agreement) covering Unit 03 employees in one form or another continuously from 1993 to the present pursuant to the applicable employer group contemplated under HRS § 89-6. Since February 2003 the Unit 03 Agreement included a negotiated Drug Testing Agreement (DTA) providing for random drug testing for alcohol and controlled substances of employees who occupy positions that have been designated Health Safety and Public Trust (HSPT) positions. WSOs are among those positions that have been designed as HSPT positions.

5. On February 26, 2007, Barnes was informed that he was selected for random controlled substance testing.

6. On March 2, 2007, Dr. Robert Sussman (Sussman), the Medical Review Officer (MRO) informed Barnes by telephone that his test results had registered a positive for a controlled substance - marijuana, and proceeded to go through the MRO checklist with Barnes to determine whether there was a reasonable medical explanation for the positive test result. Based on the information provided by Barnes, Dr. Sussman determined that no reasonable medical explanation was given for the positive result and proceeded to confirm the test result.

7. Barnes filed a workers' compensation claim and was off of work from March through October 2007.

8. On or about October 3, 2007, City Respondent Watson held a meeting with Barnes to discuss the results of the drug test and his options under the DTA. Barnes was informed at this meeting that as a result of his first positive controlled substance test, he could either sign the last chance agreement (LCA) or he would be terminated from employment in accordance with the DTA. Barnes declined to sign the LCA. At this meeting Barnes informed Watson that City Respondent Goto had informed him that the positive test would be thrown out. Watson agreed to confirm that statement with Goto and did not pressure Barnes into signing the LCA.

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justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees.

9. After checking to confirm Barnes' statement with Goto, who denied discussing the positive drug test with him, Watson raised with Barnes the subject of his signing the LCA or face termination from employment. Barnes requested and was granted more time to mull over his options.

10. On October 16, 2007, after not receiving any response from Barnes on his decision, the City by letter informed Barnes that a predetermination meeting would be conducted on October 23, 2007 to discuss possible termination.

11. At the October 23, 2007 predetermination meeting Watson again informed Barnes that he would be terminated unless he signed the LCA. Barnes still did not sign the LCA. The Union agent asked and received a 10-day extension of time for Barnes to consider his options in responding to the City.

12. Barnes remained reluctant to sign the LCA.

13. On November 5, 2007, Watson notified Barnes by letter of his termination from employment effective the close of business November 15, 2007.

14. On December 4, 2007, the HGEA filed a Unit 03 individual grievance on behalf of Barnes challenging the termination and alleged violations of Articles 2, 3, 4, 8 and 19 of the Unit 03 Agreement.

15. On February 12, 2008, at a Step 3 meeting, Barnes was again asked if he would sign the LCA. Barnes responded that he would not sign the LCA as drafted by the City.

16. The Unit 03 grievance on behalf of Barnes remained unresolved, and on March 11, 2008, the HGEA exercised its right to arbitrate the Unit 03 grievance on behalf of Barnes.

17. Russell T. Higa, Esq. (Higa), was mutually selected as arbitrator and an arbitration hearing of the Unit 03 grievance on behalf of Barnes was conducted on July 23, 24, 25, 29, 30 and August 1, 2008.

18. On November 5, 2008 Arbitrator Higa rendered a 48-page Arbitration Decision and Award denying the HGEA's Unit 03 grievance filed on behalf of Barnes. In pertinent part, Arbitrator Higa found that Barnes had been given more than ample opportunity to sign the LCA and failed to do so. In addition, Arbitrator Higa concluded that the "employer had established proper cause to take the disciplinary action on Grievant."

19. On February 4, 2009, the HGEA authorized its attorney, Dennis W.S. Chang, Esq., to file a motion to vacate Arbitrator Higa's Arbitration Decision and Award dated November 5, 2008, with the Circuit Court.

20. On June 10, 2009, after entertaining oral arguments on HGEA's Motion to Vacate, Circuit Court Judge Karl K. Sakamoto denied the HGEA's Motion to Vacate the Award.

21. On July 8, 2009, Barnes was informed in writing that HGEA would not challenge Judge Sakamoto's denial of HGEA motion to vacate by an appeal to the State Supreme Court based upon the HGEA's consultation with two independent counsel.

22. On September 4, 2009, Barnes filed this prohibited practice complaint with the Board alleging, inter alia, that he was terminated without proper cause and the HGEA breached its duty of fair representation in representing him in the grievance procedure.

23. 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 Barnes to sign the LCA; after Barnes' termination, the HGEA filed a grievance on Complainant's behalf and pursued the grievance through the 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 with 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.

24. 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.

25. Moreover, 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 paperwork was proper, and whether he had the opportunity to sign the LCA, etc.

26. The Board finds there are no genuine issues of material facts in dispute and that the HGEA and the City Respondents are entitled to judgment as a matter of law.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant Complaint pursuant to HRS §§ 89-5(i)(5) and 89-14.

2. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (relevant materials), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawaii 516, 521, 904 P.2d 530, 535 (Haw.App. 1995), *aff'd* 80 Hawaii 118, 905 P.2d 624.

3. The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id.

4. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. Id.

5. 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 (l983).

6. The union's breach of its duty of fair representation is a prohibited practice in violation of HRS §§ 89-13(b)(4) and 89-8(a), when the union's conduct is arbitrary, discriminatory or in bad faith.

7. The union's 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 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) (Vaca).

8. To establish a breach of a union's duty of fair representation, an employee must show that the union's conduct was arbitrary, discriminatory or in bad faith. Sheldon S. Varney, 5 HLRB 508, 369 (1995). 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).

9. 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). 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 Ass'n. Int'l. v. O'Neill, 499 U.S. 65, 67 111 S.Ct. 1127, 113 L.Ed.2d 51 (1991), (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.Appx. 117, 118, 179 L.R.R.M. 3017 (3d Cir. 2006) (Citations omitted).

10. 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.]

11. 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 Barnes to sign the LCA; after Barnes' termination, the HGEA filed a grievance on Complainant's behalf and pursued the grievance through the 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 with 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.

12. 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." (Citations 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 did not violate HRS Chapter 89.

13. Moreover, 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 paperwork was proper, and whether he had the opportunity to sign the LCA, etc. The Board finds that the issue 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.

14. In the instant case, Complainant has the burden to prove by a preponderance of evidence that Respondents' conduct in refusing to pursue an appeal of Judge Sakamoto's denial of the HGEA's motion to vacate the arbitration decision and award of Arbitrator Higa to the Supreme Court was arbitrary, discriminatory or in bad faith.

15. Based on the record, the Board concludes that HGEA's handling of Barnes' grievance and its refusal to file an appeal to the Supreme Court challenging Judge Sakamoto's denial of the HGEA motion to vacate the arbitration award was not so far outside the wide range of unreasonable, as to be irrational, arbitrary, discriminatory or in bad faith.

16. Based on the record, the Board concludes that there are no genuine issues of material fact in dispute in the record and that the HGEA and the City Respondents are entitled to judgment as a matter of law.

ORDER

Based on the record, the Board grants summary judgment in favor of Respondents HGEA and the City Respondents.

DATED: Honolulu, Hawaii, July 6, 2010.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SARAH R. HIRAKAMI, Member

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