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STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of ROBERT BRETT, Complainant, and WILFRED OKABE, President, Hawaii State Teachers Association; RAY CAMACHO, Deputy Executive Director, Hawaii State Teachers Association; DAVID FORREST, Central UniServ Director, Hawaii State Teachers Association; ERIC NAGAMINE, Maui UniServ Director, Hawaii State Teachers Association; DWIGHT TAKENO, Interim Executive Director, Hawaii State Teachers Association; ROGER TAKABAYASHI, Director; National Education Association; and HAWAII STATE TEACHERS ASSOCIATION, Respondents.	CASE NO. CU-05-288 ORDER NO. 2740 ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS OR IN THE ALTERNATIVE GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS
In the Matter of ROBERT BRETT, Complainant, and PATRICIA HAMAMOTO, Superintendent, Department of Education, State of Hawaii; LINDSAY BALL, Maui Complex Area Superintendent, Department of Education, State of Hawaii; BRUCE ANDERSON, Maui Complex Area Superintendent, Department of Education, State of Hawaii; JULIE LINDBERG,.Personnel Regional Officer, Maui District, Department of Education, State of Hawaii; JERI BALICK, Contracted Consultant for Hana High & Elementary School, Department of Education, State of Hawaii; RICHARD PAUL, Principal, Hana High & Elementary School, Department of Education, State of Hawaii; GARY DAVIDSON, Vice-Principal, Hana High &	CASE NO. CE-05-743

Elementary School, Department of Education State of Hawaii; and JUDY TANAKA, Secretary, Maui District Office, Department of Education, State of Hawaii,

Respondents.

ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS OR IN THE ALTERNATIVE GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS

Case No. CU-05-288

On December 24, 2009, Complainant ROBERT BRETT (Brett), pro se, filed a Prohibited Practice Complaint (Complaint) against WILFRED OKABE (Okabe), President, Hawaii State Teachers Association (HSTA); RAY CAMACHO (Camacho), Deputy Executive Director, HSTA; DAVID FORREST (Forrest), Central UniServ Director, HSTA; ERIC NAGAMINE (Nagamine), Maui UniServ Director, HSTA; DWIGHT TAKENO (Takeno), Interim Executive Director, HSTA; ROGER TAKABAYASHI (Takabayashi), Director; National Education Association; and the HAWAII STATE TEACHERS ASSOCIATION (collectively Union Respondents or HSTA) in Case No. CU-05-288 with the Hawaii Labor Relations Board (Board). Complainant alleged, inter alia, that on November 2, 2009, he received a letter from Okabe indicating disappointment with Complainant's pursuing an action with the Board and that Okabe would seek attorney's fees from Complainant; that in September and October 2009, Forrest restrained Complainant in the exercise of his rights and did not properly represent him during the grievance process challenging adverse actions taken against him by his employer; that during the grievance hearing process, that Union Respondents did not properly represent Complainant in his grievances against the employer's adverse actions; that Nagamine ignored grievance timelines and neglected Complainant's grievances; that he was not properly represented in challenging a written reprimand for insubordination, a marginal job performance evaluation and the non-renewal of his contract. Brett contends that the Union Respondents violated Hawaii Revised Statutes (HRS) §§ 89-13(b)(1), (4), and (5).

Case No. CE-05-743

On December 24, 2009, Complainant filed a Complaint against PATRICIA HAMAMOTO (Hamamoto), Superintendent, Department of Education (DOE), State of Hawaii; LINDSAY BALL (Ball), Maui Complex Area Superintendent, DOE; BRUCE ANDERSON (Anderson), Maui Complex Area Superintendent, DOE; JULIE LINDBERG (Lindberg), Personnel Regional Officer, Maui District, DOE; JERI BALICK (Balick), Contracted Consultant for Hana High & Elementary School, DOE; RICHARD PAUL (Paul), Principal, Hana High & Elementary School, DOE; GARY DAVIDSON (Davidson), Vice-Principal, Hana High & Elementary School, DOE; and JUDY

TANAKA (Tanaka), Secretary, Maui District Office, DOE (collectively Employer or DOE Respondents) in Case No. CE-05-743 with the Board. Complainant alleges, inter alia, that the Employer discriminated against Complainant "based on a collusive plan by the contracted service provider from ETS Pulliam to get rid of complainant"; that he was subjected to continuous harassment and retaliation from Paul and Davidson; that the Employer relied upon a marginal PEP-T Evaluation as the reason for the non-renewal of Complainant's contract; that the marginal rating was based upon an improper written reprimand for insubordination from Paul; that he was denied due process and unfairly investigated based upon complaints from a parent and a teacher; that Complainant's probationary contract was not renewed; and that on numerous occasions he was discriminated against and subject to retaliation from his Employer. Complainant contends that the Employer violated numerous contractual provisions and committed prohibited practices in violation of HRS §§ 89-13(a)(3), (4), (7) and (8).

On January 7, 2010, the DOE Respondents filed a Motion to Dismiss and, in the Alternative, Answer to Prohibited Practice Complaint Filed December 24, 2009 with the Board. The DOE Respondents contend that the Complaint is untimely.

On January 27, 2010, the Board issued Order No. 2683, Order Consolidating Cases for Disposition, Notice of Prehearing/Settlement Conference and Hearing on UPW's Motion to dismiss Complaint and/or for Summary Judgment, filed on January 13, 2010.

At the prehearing/settlement conference held on February 8, 2010, the Board set February 16, 2010 as the deadline to file any motions with the Board and February 23, 2010 as the deadline for any response.

On February 16, 2010, the HSTA filed Respondents' Motion to Dismiss and/or for Summary Judgment with the Board.

On March 2, 2010, the Board conducted a hearing on the motions by conference call. Complainant appeared by telephone and Respondents' respective counsel appeared in the Board's hearing room. The parties had full opportunity to present argument to the Board.

After a review of the record and consideration of the arguments presented, the Board makes the following findings of fact, conclusions of law and order granting Respondents' motion to dismiss the instant complaints.

FINDINGS OF FACT

1. Complainant was for all times relevant, a probationary teacher on contract assigned to Hana Elementary School. For all relevant times, Complainant

was an employee[1] of the Department of Education, State of Hawaii (DOE) and a member of bargaining unit (Unit) 05 as set forth in HRS § 89-6(a)(5).[2]

2. Respondent HSTA is an employee organization[3] and the exclusive representative[4] certified by the Board to represent the interests of Unit 05. Okabe, President, HSTA; Camacho, Deputy Executive Director, HSTA; Forrest, Central UniServ Director, HSTA; Nagamine, Maui UniServ Director, HSTA; Takeno, Interim Executive Director, HSTA; and Takabayashi, Director; National Education Association, were for all times relevant, agents of the HSTA.

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[1]HRS 89-2 provides in part as follows:

"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).

[2]HRS § 89-6(a)(5) provides as follows:

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

* * *

(5) Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent; .....

[3]HRS 89-2 provides in part as follows:

"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 Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

[4]HRS 89-2 provides in part as follows:

"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.

3. The Board of Education, State of Hawaii (BOE) is an employer within the meaning of HRS § 89-2.[5] Respondents Hamamoto, Superintendent, DOE, State of Hawaii; Ball, Maui Complex Area Superintendent, DOE; Anderson, Maui Complex Area Superintendent, DOE; Lindberg, Personnel Regional Officer, Maui District, DOE; Balick, Contracted Consultant for Hana High & Elementary School, DOE; Paul, Principal, Hana High & Elementary School, DOE; Davidson, Vice-Principal, Hana High & Elementary School, DOE; and Tanaka, Secretary, Maui District Office, DOE are individuals who act in the interest of the BOE with respect to employees and are deemed to be "employers" under HRS Chapter 89.

4. The BOE and the HSTA are parties to a collective bargaining agreement (Contract) dated July 1, 2007 to June 30, 2009, and extended from July 1, 2009 to June 30, 2011, as modified.

5. On or about July 24, 2009, the DOE notified Complainant that his probationary contract was not being renewed "based upon the overall marginal rating as indicated on the PEP-T Rating dated May 12, 2009."

6. Brett was given an opportunity for a hearing with the principal prior to the principal's recommendation of non-renewal, which was declined on June 9, 2009.

7. On June 8, 2009, the HSTA filed a grievance, Case No. M-09-20, on Brett's behalf, contesting the DOE's action.

8. On June 22, 2009, the HSTA submitted an intent to arbitrate the grievance pending a review of the underlying merits of the grievance.

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[5]HRS 89-2 provides in part as follows:

> "Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief 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. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid contact.

9. After the review was completed on or about August 25, 2009, Dwight Takeno (Takeno), HSTA Interim Executive Director, recommended that the grievance "not be taken to arbitration", by letter dated August 28, 2009.

10. By letter dated August 28, 2009, Complainant was notified of the HSTA Board of Directors' decision not to proceed with arbitration.

11. Complainant was afforded an opportunity to appeal the action of the HSTA Board of Directors which he did on or about September 2, 2009.

12. By letter dated September 25, 2009, Okabe notified Brett that the HSTA Board of Directors sustained the decision not to take the case to arbitration.

13. By letter dated October 7, 2009, Okabe informed Complainant that:

> It was the Board's decision and judgment that HSTA is not likely to prevail in the arbitration on the merits. The employer's action relating to non-renewal of a contract for a probationary teacher under the circumstances presented is not arbitrable under Article VIII(O) of the collective bargaining agreement.

14. Article VIII(O) of the Unit 05 collective bargaining agreement provides as follows:

> No teacher shall be adversely evaluated without proper cause, but only adverse evaluations used as the basis for any disciplinary action against a tenured teacher shall be subject to the Grievance Procedure.
>
> Any adverse evaluation used as the basis for any disciplinary action against a probationary teacher shall be subject to the Grievance Procedure up to but not including arbitration.
>
> The non-renewal of a probationary or non-tenured teacher contract shall be at the discretion of the Employer and shall not be subject to the Grievance Procedure except for procedural defects. A probationary or non-tenured teacher whose contract is not renewed shall be given an opportunity for a hearing with the principal and an Association representative present if desired by the teacher, prior to the principal's recommendation of non-renewal.

15. Brett also filed three grievances - M-09-21 on June 9, 2009, regarding the release of confidential information by a contracting party to DOE, M-09-23 on June 29, 2009, regarding the use of an investigation report; and M-09-24 on June 29, 2009 - pertaining to the use of an investigation report following a complaint by a parent. The grievances were processed through the grievance procedure and resolved without any adverse or disciplinary actions against Complainant by the Complex Area Superintendent.

16. By letter dated December 10, 2009, Forrest notified Complainant that the Union would not be taking the grievances to arbitration, stating:

> Since the Complex Area Superintendent did not take any disciplinary action against you pursuant to the recommendations made by your principal for your suspension and termination, there is nothing to arbitrate. The Complex Area Superintendent quite clearly indicated that had you not been non-renewed, then he would have implemented the recommended disciplinary actions. Consequently, since you have been non-renewed, and are no longer a member of the bargaining unit (bargaining unit 5) there is no further action for HSTA to pursue.

17. Complainant filed his respective prohibited practice complaints with the Board in Case Nos. CU-05-288 and CE-05-743 on December 24, 2009.

CONCLUSIONS OF LAW

1. The applicable statutes and rules require that prohibited practice complaints be filed within 90 days of the alleged violation. HRS § 89-14 provides that "[a]ny 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[.]" In turn, HRS § 377-9, dealing with the prevention of unfair labor practices, clearly provides that, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." (HRS § 377-9(l)).

2. Similarly, the Board's Administrative Rules, HAR § 12-42-42 provides, in relevant part:

> (a) A complaint that any public employer, public employee, or public 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. (emphasis added).

3. The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. This limitation is jurisdictional and provided by statute; accordingly, it may not be waived by either the Board or the parties. TriCounty Tel. Ass'n., Inc. v. Wyoming Public Service Comm'n., 910 P.2d 1359, 1361 (Wyo. 1996) (holding that, "As a creature of the legislature, an administrative agency has limited powers and can do no more than it is statutorily authorized to do"); see generally, HOH Corp. v. Motor Vehicle Industry Licensing Bd., Dept. of Commerce and Consumer Affairs, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) ("The law has long been clear that agencies may not nullify statutes").

4. The Board has construed the 90-day limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HPERB 186, 199 (1983). The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Instead, the period begins to run when "an aggrieved party knew or should have known that his statutory rights were violated." Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978).

5. 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.

6. 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.

7. 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.

8. With regard to the dispositive motions filed, the Board finds that the instant 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). In order to prevail in a hybrid

claim, complainant must establish both (1) a breach of the duty of fair representation by the union, and (2) a breach of the collective bargaining agreement by the employer. Poe v. Hawaii Labor Relations Bd., 105 Hawai`i 97, 102, 94 P.3d 652, 657 (2004).

9. 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).

10. 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.

11. 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 (l991), (citing Ford Motor Co.v. Huffman, 345 U.S. 330, 338, 73 S.Ct. 681, 97 L.Ed. 1048 (l953)). 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).

12. 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.]

13. Based upon a review of the record, the Board finds that on or about August 28, 2009, Complainant was informed that the HSTA Board of Directors decided not to proceed with arbitration on his non-renewal grievance. The Board concludes that Complainant knew or should have known at that time that his statutory rights were violated. Thus; the Board finds his Complaint against the HSTA filed on December 24, 2009 to be time-barred. As Complainant is unable to prevail against the HSTA on the breach of duty of fair representation charges, since this is a hybrid case, the Board also dismisses the Complaint against the DOE.

14. Alternatively, assuming arguendo, that the Complaints are timely, based upon a review of the record, the Board finds that there are no genuine issues of material fact presented and that Respondent HSTA is entitled to judgment as a matter of law. Respondent HSTA reviewed the merits of the grievance and concluded that under Article VIII(O) of the Unit 05 collective bargaining agreement, Complainant did not have a right to proceed to arbitration of his grievance contesting the non-renewal of his probationary contract. Thus, Complainant failed to establish that the HSTA's actions in not proceeding to arbitration were arbitrary or discriminatory or otherwise breached its duty of fair representation to Complainant. The contract provision clearly states that adverse evaluations used as the basis for disciplinary action against a probationary teacher shall be subject to the grievance procedure up to but not including arbitration.

15. Moreover, based upon the record, the Board finds that the three grievances relating to investigations were resolved without adverse or disciplinary actions taken by the Complex Area Superintendent against Complainant,

thus the HSTA could not pursue the grievances further. Thus, the Board concludes that the HSTA's decision not to appeal the three grievances to arbitration was within the wide range of reasonableness because in the Union's opinion, they would not prevail.

16. As the Board finds that Complainant failed to establish the elements of a breach of duty of fair representation claim against the HSTA, his claim against the DOE 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 DOE Respondents are also entitled to judgment as a matter of law that they did not commit a prohibited practice and violate HRS Chapter 89.

17. Accordingly, the Board alternatively grants summary judgment in favor of HSTA and the DOE Respondents.

ORDER

Based on the foregoing, the Board hereby dismisses the instant Complaint because the Complaints are untimely filed. Alternatively, the Board grants summary judgment in favor of HSTA and DOE Respondents.

DATED: Honolulu, Hawaii, September 29, 2010.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SARAH R. HIRAKAMI, Member

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