STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of TANYA BENSON, Complainant, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Respondent.	CASE NO. CU-03-334 ORDER NO. 3130 ORDER GRANTING HGEA/AFSCME'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

ORDER GRANTING HGEA/AFSCME'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

I. Background

A. Factual Background

Complainant TANYA BENSON (Benson), *pro se* or self-represented litigant, is employed by the Department of Public Safety (PSD) at the Oahu Community Correctional Center (OCCC). Her employer is the Department of Public Safety (PSD), State of Hawaii. She is a member of Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Respondent).

On or about March 18, 2015, PSD issued a memorandum (3/18/15 Memo) that changed Benson's work schedule. Prior to 3/18/15 Memo, Benson was allowed flexible work hours that included an early start time of 4:45 a.m. with an early end time of 1:30 p.m.

B. Procedural Background

On June 22, 2015, Benson filed a prohibited practice complaint (Complaint) against HGEA claiming, among other things, that HGEA agent Dee Sugihara (Sugihara) "did not mention that as of this day [May 19, 2015] she sent a Step II grievance" to PSD regarding the change in her work schedule pursuant to the 3/18/15 Memo. The Complaint states that "[a]s of this moment no one from the dept [sic] or HGEA has notified me of any Step II grievance" (Step II Grievance).

On July 24, 2015, HGEA filed HGEA/AFSCME Motion to Dismiss and/or for Summary Judgment (HGEA Motion), together with its Memorandum in Support of Motion, the Declaration of Peter L. Trask and Exhibits 1 - 6.[1] The HGEA Motion has been filed pursuant to Hawaii Rules of Civil Procedure (HRCP) Rule 12(b)(6).

On July 24, 2015, Benson filed the Statement of Tanya Benson (Benson Statement), together with Exhibits 1 – 14 and B. The Benson Statement sets forth Benson's objections to the change of her work hours. A copy of the Step II Grievance that HGEA filed for Benson is attached to the Benson Statement as Exhibit B.

On July 29, 2015, HGEA filed Respondents' Memorandum in Opposition to Complainant's Motion for Relief (HGEA Memo). HGEA contends that the Benson Statement is an attempt by Benson to file a "Dispositive Motion for Summary Judgment" after the deadline to file such motion as set forth in the Board's July 13, 2015 Notice of Filing Deadlines; Notice of Motion Hearing; and Waiver of Section 377-9(b), Hawaii Revised Statutes and Section 12-42-46(b), Subchapter 3, Chapter 42, Title 12, Hawaii Administrative Rules. In addition, HGEA argues that Complainant's motion for summary judgment should be denied because: 1) none of the pleadings submitted by Complainant constitute a prohibited practice, establish a violation of the Respondents' duty of fair representation, provide any legal authority to support her remedy of the reinstatement of her "preferred flexible working hours" in violation of DHRD Policy 502.005 ERD/LRO, or establish a wilfull violation of HRS §89-13(b); 2) the Employer PSD is responsible for compliance with all appropriate administrative rules, including but not limited to the DHRD policy; and 3) the Board lacks authority to grant Complainant's requested relief of modifying, amending, or disregarding the policies and procedures of any agency.

The Board received oral arguments from the parties on the HGEA Motion on August 14, 2015.

II. STANDARDS OF REVIEW

The Board adheres to the legal standards set forth by the Hawaii appellate courts for motions to dismiss under the HRCP Rule 12(b).

A. Motion to Dismiss

Regarding a motion to dismiss brought under HRCP Rule 12(b)(6) for failure to state a claim, "Dismissal is warranted only if the claim is clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the support made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Justice v. Fuddy, 125 Hawaii 104, 108, 253 P.3d 665, 669 (App. 2011) (Fuddy), (*citing* Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983)). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. We must therefore view a plaintiffs complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory." Fuddy, 125 Hawaii at 107-08, 253 P.3d at 668-669; Young v. Allstate Ins. Co., 119 Hawaii 403, 412, 198 P.3d 666, 675 (2008). The Board's consideration of a motion to dismiss for failure to state a claim is strictly limited to the allegations of the complaint, and the Board must deem those allegations to be true. However, in weighing the allegations of the complaint as against a motion to dismiss, the Board is not required to accept conclusory allegations on the legal effect of the events alleged. Paysek v. Sandvold, 127 Hawaii 390, 402-03, 279 P.3d 55, 67-68 (App. 2012) (*citing* Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985)); Young, 119 Hawaii at 406, 198 P.3d at 669.

B. Motion for Summary Judgment

Under HRCP Rule 56 (b), a party "may move with or without supporting affidavits for a summary judgment in the party's favo[r]." Ralston v. Yim, 129 Haw. 46, 56, 292 P.3d 1276, 1286 (2013) (Ralston). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any 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. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." *Id.* at 55-56, 292 P.3d at 1285-1286; Querubin v. Thronas, 107 Hawaii 48, 56, 109 P.3d 689, 697 (2005); Thomas v. Kidani, 126 Hawaii 125, 129, 267 P.3d 1230, 1234 (2011). Further, any doubt concerning the propriety of granting a motion for

summary judgment should be resolved in favor of the non-moving party. French v. Hawaii Pizza Hut, Inc., 105 Hawaii 462, 473, 99 P.3d 1046, 1057 (2004) (French).

In addition, for cases in which the non-movant bears the burden of proof at trial, the Hawaii Supreme Court (Court) has adopted the burden shifting paradigm: first, the moving party has the burden of producing support for its claim that (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions, and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law; once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. French, 105 Hawaii at 470, 99 P.3d at 1054.

Thus, where the non-movant bears the burden of proof at trial, a movant may demonstrate that there is no genuine issue of material fact by either: (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the non-movant will be unable to carry his or her proof at trial. Ralston, 129 Hawaii at 56-57, 292 P.3d at 1286-1287; French, 105 Hawaii at 472, 99 P.3d at 1056.

However, "[w]hen a motion for summary judgment is made and supported as provided in [HRCP Rule 56], an adverse party may not rest upon the mere allegations or denials of his [or her] pleading, but his [or her] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he [or she] does not so respond, summary judgment, if appropriate, shall be entered against him [or her]." Foronda v. Hawaii International Boxing Club, 96 Hawaii 51, 58, 25 P.3d, 826, 833 (2001); Tri-S Corp. v. Western World Insurance Co., 110 Hawaii 473, 494 n.9, 135 P.3d 82, 103 n. 9 (2006).

III. DISCUSSION, CONCLUSIONS OF LAW AND ORDER

If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

A. Motion to Dismiss for Failure to State a Claim.

HRS § 89-13(b) states:

> (b) It shall be a prohibited practice for a public employee or for an employee

organization or its designated agent wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
(2) Refuse to bargain collectively in good faith with the public employer;
(3) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;
(4) Refuse or fail to comply with any provision of this chapter; or
(5) Violate the terms of a collective bargaining agreement.

Regarding the Motion to Dismiss brought under HRCP Rule 12(b)(6) for failure to state a claim, the HGEA has argued that Ms. Benson has failed to allege sufficient facts that on its face even arguably constitute a violation of HRS § 89-13(b) by the Union.

In past decisions, the Board has adhered to the principle that the pleadings for a *pro se* or self-represented litigant must be held to less stringent standards than formal pleadings drafted by lawyers and read more liberally than pleadings drafted by counsel. Tupola v. University of Hawaii Professional Assembly, Board Case No. CU-07-330, Order No. 3054, at *36 (2015) (Tupola Order); Erickson v. Pardus, 551 U.S. 89, 94 (2007); Estelle v. Gamble, 429 U.S. 97, 106 (1976). To survive a motion to dismiss, the claim "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009) (*citing* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The Board further notes HRCP Rule 8(f) stating that, "All pleadings shall be construed as to do substantial justice." Nonetheless, the Ninth Circuit has held that "a *pro se* complainant is not excused from knowing the most basic pleading requirements." Am. Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107-08 (9th Cir. 2000). Finally, under HRCP Rule 12(b)(6), the Board is permitted to consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment. U.S. v. Ritchie, 342 F.3d 903, 907-08 (9th Cir. 2003); Morris v. McHugh, 997 F.Supp.2d 1144, 1154 (D. Haw. 2014), *reconsideration denied by* 2014 U.S. Dist. LEXIS 47921 (D. Haw. 2014).

As pointed out by the HGEA, the Complaint in this case fails to set forth: the specific statutory provisions in HRS § 89-13(b), which the Union has violated; an allegation that the Union has breached its duty of fair representation; and for the reasons more fully discussed below, sufficient facts to support a violation of the duty of fair representation and a breach of HRS § 89-13(b). Further, even while considering the email and other communications between Ms. Benson and Sugihara attached to the Complaint, the Board for the reasons more fully set forth below is unable to find a breach of the duty of fair representation. Accordingly, the Board is constrained to find that even holding the Complaint to less stringent standards and reading the Complaint more liberally than formal pleadings drafted by lawyers and viewing the Complaint

in a light most favorable to Ms. Benson, the Complaint in this case must be dismissed for failure to state a claim. Consequently, even deeming all of the allegations to be true, the Board concludes that it appears beyond doubt that the Complainant can prove no set of facts in support of her claim that would entitle her to relief. For these reasons, the Board is required to grant the Motion to Dismiss for a failure to state a claim under HRCP Rule 12(b)(6).

B. Motion to Dismiss or for Summary Judgment for Failure to Show Breach of the Duty of Fair Representation

Even if the Complaint is unable to be dismissed for a failure to state a claim, the Board is also able to grant the Union's Motion because Complainant has failed to show that the HGEA breached the duty of fair representation. From the face of the Complaint and the communications between Ms. Benson and Sugihara attached, the basis for Ms. Benson's allegations against the Union are the following: 1) the failure of Sugihara or anyone to inform Ms. Benson of the filing of a Step 2 grievance; 2) an April 13, 2015 email from Sugihara stating that the issue of flex time "is at management's discretion and authorization and that Complainant has the option of putting in a personal request along with the reasons for times outside of what is suggested;" 3) an April 14, 2015 email stating that Complainant could inquire with the Department of Labor for further clarification and options regarding this flex time issue; 4) the two May 15, 2015 emails from Sugihara informing Complainant that representation for a labor board hearing is outside of the representation provided under the collective bargaining agreement but requesting additional information on how the Union may assist with the prohibited practice complaint; 5) another May 14, 2015 email reiterating that PSD informed HGEA that the work hours worked were outside of the flex times provided in DHRD Policy and Procedure 5002.005 issued on December 3, 2003 and not properly authorized and contrary to the policy and suggesting that Complainant provide as much evidence, supporting documentation, and information to show that PSD committed the alleged prohibited practice; and 6) a May 18, 2015 email from HGEA Field Services Officer Joy Kuwabara confirming her understanding that Sugihara had connected with Complainant regarding Complainant's case and that any further questions should be directed to Sugihara.

While the precise nature of the alleged breaches of fair representation are not articulated, it appears that the Complainant is alleging that HGEA had a duty to have fairly represented her in pursuing a grievance and/or a prohibited practice complainant regarding her flex time issue.

The duty imposed upon a union is broad and demanding. It must "serve the interests of all members without hostility or discrimination toward any...exercise its discretion with complete good faith and honesty, and...avoid arbitrary conduct." Retana v. Apartment, Motel, Hotel & Elevator Operators Union, 453 F.2d 1018, 1023 (1972) (*citing* Vaca v. Sipes, 386 U.S. at 177). Moreover, matters related to the negotiation or administration of the collective bargaining agreement are not beyond the duty of fair representation simply because they do not

involve the breach of a specific provision of the collective bargaining agreement. *Id.* While it is well-settled that the duty of fair representation extends to grievance processing, including proceeding to arbitration, the Board has also concluded that the duty applies to matters involving HRS Chapter 89. Poe v. Haw. Labor Rels. Bd., 105 Hawaii 97, 102-03, 94 P.3d 652, 657-58 (2004) (Poe); Robesky v. Qantas Empire Airways, Ltd., 573 F.2d 1082, 1089-90 (9th Cir. 1978) (Robesky); Tsunezumi v. Hawaii Gov't. Employees Ass'n., AFSCME, Local 152, Board Case Nos. CU-03-128a and CU-04-128b, Order No. 1460 (1997).

Further, the standards regarding a breach of duty of fair representation are well-established. In Poe, the Hawaii Supreme Court stated, a union as the exclusive bargaining representative of the employees in the bargaining unit has a duty to fairly represent all of those employees, both in its collective bargaining and in its enforcement of the resulting collective bargaining agreement. 105 Haw. at 101, 94 P.3d at 656. *See also*: Tupola Order, at *17 (*citing* Vaca v. Sipes, 386 U.S. 171, 177 (1967); Emura v. Haw. Gov't Emp. Ass'n, AFSCME, Local 152, Board Case No. CU-03-328, Order No. 3028, at *12 (October 27, 2014) (Emura Order) (*citing* Vaca, 386 U.S. at 177)). To prevail on this showing, the duty of fair representation is to be narrowly construed because unions must retain discretion to act in what they perceive to be their members' best interest. Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38 (1953); Johnson v. United States Postal Serv., 756 F.2d 1461, 1465 (9th Cir. 1985) (Johnson). Any substantive examination of a union's performance must be highly deferential. Air Line Pilots v. O'Neill, 499 U.S. 65, 78 (1991) (O'Neill).

More specifically, as argued by the HGEA in this case, a breach of the duty of fair representation occurs only when a union's conduct toward a collective bargaining unit member is arbitrary, discriminatory, or in bad faith. Vaca, 386 U.S. at 190. Poe, 105 Haw. at 104, 94 P.3d at 659 (*citing* Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44 (1998) and DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164 (1983) (DelCostello)); Trnka v. Local Union No. 688, United Auto., Aerospace & Agric. Implement Workers, 30 F.3d 60 (7th Cir. 1994) (Trnka); Emura Order, at *12. In order to defeat a motion for summary judgment, a plaintiff must proffer evidence supporting at least one of those three elements. Trnka, 30 F.3d at 61; Emura Order, at *12 (*citing* Filippo v. Nothern [sic] Indiana Pub. Serv. Corp., Inc., 141 F.3d 744, 748 (7th Cir. 1998)). Further, whether a union acted arbitrarily, discriminatorily, or in bad faith requires a separate analysis because each of these requirements represents a distinct and separate obligation. Simo v. Union of Needletrades, 322 F.3d 602, 617 (9th Cir. 2003) (Simo).

Applying these standards to the evidence in this case, the Board concludes that none of the three required elements are shown by Complainant in this case.

1. The Arbitrary Element

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." O'Neill, 499 U.S. at 78; Emura Order, at *13. "Arbitrary conduct" has been defined as "unintentional conduct showing 'an egregious disregard for the rights of union members,' or even a 'reckless disregard' of such rights, conduct 'without a rational basis,' and omissions that are 'egregious, unfair and unrelated to legitimate union interests.'" Johnson, 756 F.2d at 1465 (*citing* Robesky, 573 F.2d at 1089). The "arbitrariness analysis looks to the objective adequacy of the union's conduct." Simo, 322 F.3d at 618.

In cases in which a breach of the duty of fair representation has been found based on a union's arbitrary conduct, it is clear that: the union failed to perform a procedural or ministerial act; the act in question did not require the exercise of judgment; and there was no rational and proper basis for the union's conduct. Galindo v. Stoody Co., 793 F.2d 1502, 1514 (9th Cir.) (*citing* Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir. 1985) (Peterson)). In Peterson, the Ninth Circuit stated that unintentional union conduct may constitute a breach of the duty of fair representation in situations where "the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim."[2] In granting summary judgment for the union in that case, the Ninth Circuit found that the alleged error in that case was one of judgment and not arbitrary, concluding, "In short, we do not attempt to second guess a union's judgment when a good faith, non-discriminatory judgment has in fact been made. It is for the union, not the courts to decide whether and in what manner a particular grievance should be pursued." *Id.* at 1254. If it is determined that the union's refusal to pursue the appellants' grievance was an act involving its judgment, the appellants must provide some evidence of the union's bad faith or discrimination in order to prevail. Stevens v. Moore. 18 F.3d 1443, 1448 (9th Cir. 1994) (Stevens). Moreover, in the handling of a grievance, the union typically has broad discretion in its decision whether and how to pursue an employee's grievance against the employer. Chauffeurs, Teamsters & Helpers v. Terry, 494 U.S. 558, 567-568 (1990). While both intentional and unintentional conduct can constitute arbitrariness, a showing of mere negligence in grievance processing does not suffice. Eichelberger v. NLRB, 765 F.2d 851, 854 (9th Cir. 1985) (*citing* Robesky, 573 F.2d at 1089-1090); Ajifu v. Int'l. Ass'n of Machinists and Aerospace Workers Dist. Lodge 141, 2003 U.S. Dist. LEXIS 26086, at p. *7-8, *aff'd* by 2006 U.S. App. LEXIS 26047 (9th Cir. 2006)). While a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious. Vaca, 386 U.S. at 191; Stevens, 18 F.3d at 1447; Peters, 914 F.2d 1298-1299; Poe, 105 Haw. at 101, 94 P.3d at 656 (*citing* Vaca, 386 U.S. at 191).

None of the aforementioned Union conduct involved a procedural or ministerial act. Rather, the reasons provided in the email communications show that HGEA is exercising judgment regarding the decisions to pursue any grievance or prohibited practice complaint, which in the absence of bad faith or discrimination, cannot be deemed to breach the duty of fair representation. A review of the emails clearly articulates the reasons for the decisions made by the Union regarding the flex time issue. The April 13, 2015 email states that the flex time is a management decision, but that Complainant can pursue a personal request providing the reasons. The Complainant has not presented any evidence, specific arguments, or demonstration that these reasons constitute "no rational and proper basis for the [U]nion's conduct." In the absence of contrary evidence or more specific contentions, the Board is unable to find that any of the alleged Union conduct was arbitrary. In addition, there is no showing that the alleged conduct was taken in bad faith or discriminatory for the reasons set forth below.

2. The Discriminatory Element

Whereas the arbitrariness analysis looks to the objective adequacy of the Union's conduct, the discrimination and bad faith analyses look to the subjective motivation of the Union officials. Simo, 322 F.3d at 618.

Discriminatory conduct may be established by "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge, 403 U.S. 274, 301 (1971) (Lockridge).

In Simo, the Ninth Circuit acknowledged that the U.S Supreme Court and the Ninth Circuit have provided little guidance regarding what constitutes discrimination in the duty of fair representation context. The Simo court noted that the O'Neill U.S. Supreme Court decision suggested that only "invidious" discrimination is prohibited by the duty of fair representation. After citing the Tenth Circuit's explanation that "discrimination is invidious if based upon impermissible or immutable classifications such as race or other constitutionally protected categories, or arises from prejudice or animus," the Ninth Circuit deemed these grounds too restrictive, noting that they have held for example, that a union may not "discriminate on the basis of union membership." 322 F.3d at 618. The Ninth Circuit then concluded that there was no evidence of discriminatory intent in that case.

Regardless of the standard for discrimination, the Board finds and concludes that Ms. Benson has not alleged nor presented any evidence supporting a claim of "discriminatory" conduct by HGEA. As stated above, Ms. Benson has not even alleged any discrimination by the HGEA. Like the Ninth Circuit in Simo, the Board in this case is unable to find evidence that the HGEA sought to grant benefits to some members of the bargaining unit that it denied to others,

nor did it treat similarly situated individuals differently in deciding whether to process their grievance. *Id.* at 619. When faced with the union's motion for summary judgment, conclusory allegations of discrimination cannot satisfy the burden placed on the plaintiff to come forward with facts evidencing the union's bad faith, discriminatory, or arbitrary acts. It is incumbent upon the plaintiff to demonstrate some evidence of discrimination. If she does not, grant of summary judgment for the Union is warranted on a breach of fair representation claim. Hanson v. Knutson, 1981 U.S. Dist. LEXIS 17849, at *p. 6-7 (D. Mt.).

Based on the applicable standard and the lack of sufficient facts and evidence in this case, the Board determines that Ms. Benson has not produced any evidence of discrimination by the HGEA. Accordingly, the Board grants the HGEA's Motion regarding this element.

3. The Bad Faith Element

"Whether or not a union's actions are...in bad faith calls for a subjective inquiry and requires proof that the union acted (or failed to act) due to an improper motive. Bare assertions of the state of mind required for the claim—here 'bad faith' –must be supported with subsidiary facts." Yeftich v. Navistar, Inc., 722 F.3d 911, 916 (7th Cir. 2013). (Citations omitted) (Yeftich); Emura Order, at *15. For a bad faith claim to be established, there must be "substantial evidence of fraud, deceitful action, or dishonest conduct." Humphrey v. Moore, 375 U.S. 335, 348 (1964); Lockridge, 403 U.S.at 299. To show bad faith, the plaintiff must provide subjective evidence that the union official's decisions were improperly motivated. Truhlar v. United States Postal Serv., 600 F.3d 888, 893 (7th Cir. 2010) (Truhlar). Moreover, the structure of the duty is that bad faith is required to show a breach; it is not simply that good faith is a defense to liability. The burden is on the worker to produce evidence of bad faith. Simo, 322 F.3d at 618. As this Board has noted based on Truhlar, our [court's] role is not "to decide with the benefit of hindsight whether [the union representative] made the right calls- we ask only whether his decisions were made rationally and in good faith." Emura Order No. 3028, at *15-16 (*citing* Truhlar, 600 F.3d at 893).

As stated previously, the Complaint contains no allegation of bad faith nor has Ms. Benson presented any proof substantiating any evidence of bad faith by the HGEA. Upon similar showing, courts have granted summary judgment and dismissed the complaint. Nagel v. Int'l Bhd. of Teamsters, 396 F.Supp. 391, 394 (D.N.Y. 1975) (Where plaintiff did not offer opposing affidavits or other proof tending to show bad faith on the part of the union and a complete absence in plaintiff's pleadings of even an allegation of bad faith on the part of the union, summary judgment dismissing the plaintiff's complaint was proper.); Yeftich, 722 F.3d at 916 (Conclusory allegations that the union was guilty of bad faith because it "diverted, stalled, and otherwise terminated" their grievances lacks factual specificity required to state a plausible breach of fair representation claim.). Hence, the Board grants HGEA's Motion regarding this third element.

Based on the Board's grant of HGEA's Motion regarding the elements of arbitrary, discriminatory, or bad faith, the Board holds that there was no breach of the duty of fair representation by HGEA based on any of its alleged conduct, including the failure to process a grievance or represent Ms. Benson in this prohibited practice case. Accordingly, the Board is constrained to grant the HGEA's Motion based on the issue of the duty of fair representation.

For all the reasons set forth above, the Board hereby grants HGEA's Motion to Dismiss and/or for Summary Judgment. This case is closed.

DATED: Honolulu, Hawaii, December 16, 2015.

HAWAII LABOR RELATIONS BOARD

HAWAII LABOR RELATIONS BOARD ★ STATE OF HAWAII ★

KERRY M. KOMATSUBARA, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to:

Ms. Tanya Benson, Pro Se Complainant
Peter Liholiho Trask, Esq., Attorney for Respondent

---

[1] Respondents' Motion to Dismiss also incorporated the records and pleadings filed in this case.

[2] The Ninth Circuit in Peterson noted as examples where the union failed to: 1) disclose to an employee its decision not to submit her grievance to arbitration when the employee was attempting to determine action on her employer's settlement offer; 2) file a timely meritorious grievance; 3) consider individually the grievances of particular employees where the factual and legal differences among them were significant; or 4) permit employees to explain the events leading to their discharge before deciding not to submit their grievances to arbitration. 771 F.2d at 1254.