

STATE OF HAWAI‘I
HAWAI‘I LABOR RELATIONS BOARD

In the Matter of

ERIN K. KUSUMOTO,

Complainant(s),

and

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO; and DEPARTMENT OF
EDUCATION, State of Hawai‘i,

Respondent(s).

CASE NO(S). 20-CU-06-379
20-CE-06-940

ORDER NO. 3745

ORDER BIFURCATING CASE AND
DENYING APPLICATION FOR
DISCOVERY

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1. Statement of the Case

Complainant ERIN K. KUSUMOTO (Complainant or Kusumoto) brings this prohibited practice case alleging that Respondent DEPARTMENT OF EDUCATION, State of Hawai‘i (DOE) committed a prohibited practice under Hawai‘i Revised Statutes (HRS) § 89-13(a)(8) by wilfully violating the terms of the bargaining unit 6 (BU 6) collective bargaining agreement (CBA) when it terminated her; and has alleged that Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) committed a breach of the duty of fair representation when it decided not to take Kusumoto’s grievance to arbitration.

The Hawai‘i Labor Relations Board (Board) held a status conference and motion hearing in this case to discuss the issues before the Board and to hear various motions and requests previously filed with the Board. At the status conference and motion hearing, among other things, the Board went over the issues contained in this order. The Board further issued certain rulings in this case, which are memorialized in this Order.

2. Hybrid Case and Bifurcation

The Hawai‘i Supreme Court (Court) defined the “hybrid case” in HRS Chapter 89 in Poe v. Haw. Lab. Rels. Bd., 105 Hawai‘i 97, 94 P.3d 652 (2004) (Poe). As the Court noted in Poe, the claims of an employer breaching the collective bargaining agreement and a union breaching the duty of fair representation are “inextricably interdependent.” Id., at 102, 94 P.3d at 657. An employee may, if they choose, sue only the employer or only the union, but the case that must be proven is the same, regardless of who is named as a respondent. Id. Therefore, for one to succeed, both must succeed. Tupola v. University of Hawaii Professional Assembly et al., Board Case Nos. CU-07-330; CE-07-847, Order No. 3054, at *39 (2015) (Tupola)

Accordingly, the Board will, in its discretion, bifurcate this case. See HRS § 89-5. In the first phase of these bifurcated proceedings, the Board will take up the case only on the alleged breach of the duty of fair representation by HGEA.

The Board can find a breach of the duty of fair representation only if HGEA’s conduct towards Kusumoto was arbitrary, discriminatory, or in bad faith. Poe, 105 Hawai‘i at 104, 94 P.3d at 659. To determine which of these three elements apply, the Board has adopted a two-step analysis, first looking at whether the alleged union misconduct involved the union’s judgment or whether it was ‘procedural or ministerial.’ Mamuad v. Nakanelua, Board Case No. CU-10-331, Order No. 3337F, at *31 (2018) (Mamuad). Because the union must retain the discretion to act in what it perceives to be their members’ best interest, the duty of fair representation must be narrowly construed. Asato v. Haw. Gov. Emp. Ass’n and Dep’t. of Ed., Board Case Nos. 19-CU-03-375; 19-CE-03-934, Decision No. 504, at *5 (2021) (Asato). The Board must be deferential in its substantive examination of HGEA’s performance. Tupola, at *27.

Of the three ways that the duty of fair representation can be violated, arbitrariness applies only if the alleged misconduct is “procedural or ministerial”. Id. Arbitrariness is controlling only when the challenged conduct is procedural or ministerial, and mere negligence does not rise to the level of arbitrariness. Asato, at *5-6. For alleged misconduct to be arbitrary, the act in question must not require the exercise of judgment; there must be no rational or proper basis for the union’s conduct; the action must have been in reckless disregard of the employee’s rights; and it must prejudice a strong interest of the employee. Id. at *6.

Discriminatory conduct can be established by substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. Mamuad, at *37. The Board has not adopted a strict standard for discrimination in the context of a breach of the duty of fair representation, but the Board has noted that the element of discrimination is not restricted by impermissible or immutable classifications like race or other constitutionally protected categories. Tupola, at *33. In addition to those constitutionally protected categories, a union

cannot discriminate against an employee on the basis of union membership or if discrimination comes from prejudice or animus. Id.

However, despite this expanded view of discrimination, the complainant must demonstrate some evidence of discrimination for a claim of the breach of the duty of fair representation to succeed. Id. Evidence that could be used to demonstrate discrimination may include proving that the union granted benefits to some members of the bargaining unit but not to others or treated similarly situated individuals differently in deciding whether to take their case to arbitration. Id.

The bad faith element requires the Board to make a subjective inquiry and requires the complainant to provide proof that the union acted (or failed to act) due to an improper motive. Tupola, at *34. Because assertions of the state of mind required for the claim must be corroborated by subsidiary facts, and must show substantial evidence of fraud, deceit, or dishonest conduct. Id. The Board is not considering whether the union made the right decision; rather, the Board asks whether the union made its decision rationally and in good faith. Emura v. Haw. Gov't Emp. Ass'n, AFSCME, Local 152, Board Case No. CU-03-328, Order No. 3028, at *15-16 (2014).

Therefore, in this bifurcated proceeding, before the Board hears the claim against the DOE for breach of the collective bargaining agreement, the Board will hear and resolve the claim against HGEA for breach of the duty of fair representation based on these standards.

3. Discovery Before the Board

Kusumoto submitted two applications to engage in certain types of discovery under the Hawai'i Rules of Civil Procedure (HRCP).

The Board's rules permit the parties to take depositions or written interrogatories in the manner prescribed under the Hawai'i Rules of Civil Procedure for good cause shown. Hawai'i Administrative Rules (HAR) § 12-42-8(g)(6)(A). The Board's rules do not permit "requests for production of documents" as provided for by the Hawai'i Rules of Civil Procedure (HRCP). The Board's statutory authority regarding requiring production of documents in HRS Chapter 89 cases is limited to "compel[ling] attendance of witnesses and the production of documents by the issuance of subpoenas" at a hearing before the Board. HRS § 89-5(i)(5).

As can be inferred from the language of the Board's administrative rules, discovery in the manner prescribed in the HRCP is not generally afforded. The Board's typical discovery process occurs at the hearing on the merits or, occasionally, at an evidentiary hearing prior to the hearing on the merits. At such a hearing, witnesses may be subpoenaed. HAR § 12-42-8(g)(7). The Board has the ability to issue subpoena duces tecum, requiring the witnesses to bring documents with them to a hearing before the Board. HAR § 12-42-8(g)(7)(A).

After considering Kusumoto's applications to engage in discovery, the Board finds that Kusumoto's written applications do not establish "good cause" for deviating from the Board's normal procedures. Accordingly, the Board will DENY the applications.

4. Disclosure of Documents in Proceedings Before the Board

Kusumoto filed a motion for an order limiting disclosure of certain documents in this case.

The Board is subject to the requirements of HRS Chapter 92F, which means that the Board has an affirmative disclosure responsibility, and all of the Board's records are open to public in section unless access is restricted or closed by law. HRS § 92F-11. The Board is permitted to "balance the individual privacy interest and the public access interest" when required. HRS § 92F-2.

Further, the Board's proceedings are also open to the public, and so, information contained in transcripts, minutes, reports, or summaries of the Board's proceedings must be disclosed. HRS § 92F-12.

To the extent that any documents filed with the Board may be withheld or redacted, the Board must look at the types of "significant privacy interests" allowed by HRS § 92F-14. Information about employment-related misconduct resulting in discipline, including the nature of the employment related misconduct, the summary of allegations, and any findings of fact and conclusions of law, has been found not to be "highly personal and intimate information"; therefore, such information must be disclosed if requested by the public. State Org. of Police Officers v. Soc'y of Prof'l Journalists-University of Haw. Chapter, 83 Hawai'i 378, 400, 927 P.2d 386, 408 (1996).

Further, the Board has had the experience that, if a case is appealed to the circuit court, the circuit court will unseal any documents that do not fit within the type of redaction or protection allowed by HRS Chapter 92F and the Hawai'i Court Records Rules, as amended.

Accordingly, the Board will not limit the disclosure of documents unless a party or parties provide a reason under HRS Chapter 92F as to why the document must be restricted or closed by law. If a party believes any document must be restricted or closed by law, then, to the extent any personal information is relevant to the Board's consideration of this case, that party must request that the information be redacted and submit the confidential information by means of a Confidential Information Form that substantially conforms to Form 2 of the Hawai'i Court Records Rules, as amended.

Based on the bifurcation of the case, Kusumoto withdrew the motion for an order limiting disclosure of certain documents in this case.

5. Hearing on the Merits

At the status conference and motion hearing, the Board further considered HGEA’s Motion to Schedule Hearing on the Merits (HOMs) for a date certain.

By bifurcating the case, the Board is asserting its intention to move forward with these proceedings. Kusumoto, when discussing the discovery process, indicated a belief that a more extended discovery process, such as that put forth in the HRCP, may push the parties towards settling or withdrawing the case. However, the Board agrees with HGEA that the spirit and intent of HRS § 377-9 and HAR § 12-42-46 is to conduct an expeditious hearing (no less than ten nor more than forty days after the filing of the complaint unless waived by the parties).

While these proceedings have been stayed, in large part due to the COVID-19 pandemic, the Board does intend to move forward on this case and hear and adjudicate it in a timely manner. Prohibited practice HOMs before the Board are not the same as proceedings in circuit court. HOMs are intended to move quickly forward.

Based on the Board’s bifurcation of the case and representation that the Board would be issuing a pretrial order with relevant dates and deadlines, HGEA withdrew its Motion.

The Board will issue a separate Pretrial Order with the relevant dates and deadlines.

DATED: Honolulu, Hawai‘i, May 13, 2021 .

HAWAI‘I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

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