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Case No. 19-CE-03-925, 19-CU-03-371**

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

FRANCINE K. GUZMAN,

Complainant(s),

and

HONOLULU POLICE DEPARTMENT, City
and County of Honolulu; and HAWAII
GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO,

Respondent(s).

CASE NO(S). 19-CE-03-925
19-CU-03-371

DECISION NO. 512

FINDINGS OF FACT, CONCLUSIONS OF
LAW, DECISION AND ORDER

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1. Introduction

Complainant FRANCINE K. GUZMAN (Complainant or Ms. Guzman) filed her prohibited practice complaint (Complaint) with the Hawai'i Labor Relations Board (Board), alleging, among other things, that Respondent HONOLULU POLICE DEPARTMENT, City and County of Honolulu (HPD or Employer) committed a prohibited practice in the interview and selection process for the Secretary II position of the Communications Division (Secretary II Position), and that Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union and, collectively with HPD, Respondents) committed a prohibited practice when it declined to take her grievance regarding this process to arbitration.

The Board heard and denied motions to dismiss or in the alternative for summary judgment brought by the Respondents and determined that this case would continue to the hearing on the merits (HOM). The Board laid out its understanding of the issues and relevant legal principles in Order No. 3485A2 before beginning the HOM.

1.1. Issues

Based on the charging document and the record, as discussed in Order No. 3804, the issues in this case are:

1. Whether HPD wilfully discriminated against Ms. Guzman in regard to her hiring, tenure, or any term or condition of employment in the interview and selection process for the Secretary II Position, for the purpose of encouraging or discouraging membership in any employee organization, committing a prohibited practice under Hawai'i Revised Statutes (HRS) § 89-13(a)(3);
2. Whether HPD wilfully discharged or otherwise discriminated against Ms. Guzman in the interview and selection process for the Secretary II Position because Ms. Guzman signed or filed an affidavit, petition, or complaint or gave any information or testimony under HRS Chapter 89 or because Ms. Guzman informed, joined, or chose to be represented by any employee organization, committing a prohibited practice under HRS § 89-13(a)(4);
3. Whether HPD wilfully violated the terms of the bargaining unit 3 (BU 3) collective bargaining agreement (CBA) in the interview and selection process for the Secretary II Position, committing a prohibited practice under HRS § 89-13(a)(8); and
4. Whether HGEA arbitrarily, discriminatorily, or in bad faith violated its duty of fair representation owed to Ms. Guzman, committing a prohibited practice under HRS § 89-13(b)(4).

1.2. Statement of the Case

The Board held the HOM on November 30, 2021. At the HOM, Ms. Guzman called five witnesses and submitted exhibits into evidence. After Ms. Guzman rested her case, and HGEA and HPD each orally moved for a directed verdict.

The Board issued Order No. 3817 which set out the relevant legal principles of a Motion for Directed Verdict, reiterated the burden of proof that Ms. Guzman was required to meet in her case-in-chief, and set a deadline for Ms. Guzman to submit a written response to the Motions for Directed Verdict. Ms. Guzman submitted her opposition to the Motions for Directed Verdict, and the Board now issues this final Decision and Order.

After a full and complete review of the record, the Board finds that Ms. Guzman has not met her burden of proof.

2. Background and Findings of Fact

Ms. Guzman, a member of BU 3¹, is an employee² of HPD.³ HGEA is the exclusive representative⁴ for BU 3. HGEA and the relevant employer group⁵ for BU 3 are parties to a CBA covering the relevant time.

Ms. Guzman has worked for HPD for over thirty years in various capacities and has generally received positive annual evaluations. She has applied for numerous positions with the HPD, and she has appealed certain denials to the Civil Service Commission (CSC) and to the Board.

In 2018, Ms. Guzman applied for a transfer to the Secretary II Position in the Communications Division of HPD (Secretary II Comm. Position). The interview and selection process for this position included a panel interview where participants needed to score a minimum of 54 out of 90. The panel interview is considered an important part of the process.

Ms. Guzman participated in a panel interview for the position, with three individuals sitting on the panel. Based on the scores from the panel interview Ms. Guzman scored a 36 out of 90, the lowest of the three candidates, and she was not selected for the position.

After her non-selection, Ms. Guzman contacted HGEA and requested that it file a grievance on her behalf. HGEA did so and filed a grievance. After the grievance proceeded through the process, HGEA decided not to pursue the grievance at arbitration and informed Ms. Guzman of this decision by letter dated April 4, 2019.

3. Discussion

3.1. Legal Standards for Motion for Directed Verdict; Burden of Proof; Due Process

Ms. Guzman has raised issues of due process based on the Motions for Directed Verdict. The Board addresses these issues here.

The Board can hear motions akin to a motion for directed verdict if the party opposing the motion has a full and fair opportunity to be heard on the motion after reasonable notice and if the Board's rules are not otherwise violated. Parker v. Dep't of Pub. Safety, State of Haw., Board Case Nos. 18-CU-10-370, 19-CE-10-923, Decision No. 502, at *42 (March 23, 2021) (<https://labor.hawaii.gov/hlrb/files/2021/03/Decision-No.-502.pdf>) (Parker) *citing* Los Banos v. Haw. Lab. Rels. Bd., No. CAAP-17-0000476, at *33 (App. Nov. 22, 2019) (mem.) (Los Banos).

In this case, the Board laid out the legal standards that the Board has used to consider motions akin to a motion for directed verdict in Order No. 3817. The Board considers these

motions under the Board’s administrative rules, Hawai‘i Administrative Rules (HAR) § 12-42-8(g)(3).

HAR § 12-42-8(g)(3) reads:

(3) Motions:

(A) All motions made during a hearing shall be made part of the record of the proceedings.

(C) All motions other than those made during a hearing shall be subject to the following:

(i) Such motions shall be made in writing to the board, shall briefly state the relief sought, and shall be accompanied by affidavits or memoranda setting forth the grounds on which they are based...

The Motions for Directed Verdict in this case were made during a hearing. As such, subsection (C) does not apply to these motions. The Motions were part of the record of the proceedings in that they are both in the official record of the HOM and memorialized by the Board in Order No. 3817. The Board, thus, complied with the relevant administrative rules.

As the Board explained in Order No. 3817, motions for directed verdicts are made after the non-moving party—in this case, Ms. Guzman—has been fully heard on the issue. *See Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Hawai‘i 92, 102 n. 14, 176 P.3d 91, 101 n.14 (2008). The question that the Board must answer when such a party makes a motion such as a motion for directed verdict is whether the complainant has met her required burden of proof after presenting all of her evidence and resting her case.

In prohibited practice cases, HRS § 91-10(5) and HAR § 12-42-8(g)(16) sets forth that the complainant—in this case, Ms. Guzman—has the burden or obligation to prove that her allegations are more likely than not true (also known as the burden of proof by a preponderance of the evidence). To meet this burden of proof, Ms. Guzman must produce evidence and persuade the Board that it is more likely than not that HPD and HGEA committed prohibited practices.

If Ms. Guzman has not provided enough evidence and legal argument to succeed on a claim after she finishes presenting her case, the Board must find that she failed to carry her burden of proof and dispose of the issue. *Mamuad v. Nakanelua*, Board Case No. CU-10-331,

Order No. 3337F, *25 (May 7, 2018) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3337F.pdf>) (Mamuad).

The Board provided Ms. Guzman with notice of the relevant law and standards surrounding motions, such as a motion for directed verdict, in Order No. 3817 and complied with its rules. Accordingly, the Board is permitted to hear motions such as the Motions for Directed Verdict in this case.

Ms. Guzman further argues that due process requires that HPD and HGEA to detail their arguments as to why she has not met her burden of proof. The Board disagrees.

The Board's rules do not require motions made during a hearing to be made in writing. That requirement applies only to motions made outside of a hearing. HAR § 12-42-8(g)(3)(C). The Board provided Ms. Guzman with a detailed explanation of what a motion for directed verdict means. The Board further reminded Ms. Guzman of the relevant standards that HRS § 91-10(5) and HAR § 12-42-8(g)(16) put forth as to Ms. Guzman's required burden of proof and what her obligation was in her case-in-chief.

Due process refers to the amount of process that is due, not the amount of process a litigant may desire. The procedures under HRS Chapter 89 have been held to satisfy the requirements for procedural due process. Lee v. United Pub. Workers, AFSCME, Local 646, AFL-CIO, 125 Hawaii 317, 328, 260 P.3d 1135, 1146 (Haw. Ct. App. 2011) As the Board complied with its administrative rules and the relevant law under HRS Chapter 89, Ms. Guzman received due process in this case. Therefore, the Board rejects Ms. Guzman's claim of lack of due process, and turns to the question of whether Ms. Guzman met her required burden to prove the claims at issue in this case.

3.2. HRS § 89-13(a)(3) – Discrimination

Beginning with Ms. Guzman's allegation that HPD committed prohibited practices under HRS § 89-13(a)(3), the Board is unable to find that Ms. Guzman met her burden of proof.

HRS § 89-13(a)(3) deals with incidents where the employer allegedly discriminates against the employee to encourage or discourage membership in an employee organization.

The conduct at issue in this case is HPD's conduct in the interview and selection process for the Secretary II Comm. Position. Ms. Guzman alleges that HPD discriminated against her because, among other things, she has participated in proceedings before the CSC and the Board.

Ms. Guzman has not provided any evidence that HPD's motivation behind the alleged discrimination was to encourage or discourage her membership in HGEA or any other employee organization. Accordingly, the Board cannot find that HPD committed a prohibited practice under HRS § 89-13(a)(3).

3.3. HRS § 89-13(a)(4) - Retaliation

The Board further finds that Ms. Guzman has not met her burden of proof as to her allegation that HPD committed prohibited practices under HRS § 89-13(a)(4).

HRS § 89-13(a)(4) claims focus on incidents where the Employer retaliates because the employee has signed or filed documents or has given information or testimony under HRS Chapter 89, or because the employee informed, joined, or chose to be represented by an employee organization.

Ms. Guzman alleges that HPD discriminated against her in the Secretary II Comm. Position interview and selection process because, among other things, she has exercised her HRS Chapter 89 rights in the past. The evidence in this case does not support this allegation.

The panel interview conducted by HPD resulted in Ms. Guzman being given the lowest score of the three candidates. Ms. Guzman did not call any of the panel members as witnesses, and she did not provide any evidence regarding why those panel members would have any improper motivation to score her unfairly.

The panel interview is considered an important factor in the interview and selection process, and minimum scores from that interview must be met for an applicant to be considered for a position. Ms. Guzman's score of 36 was below the minimum for the Secretary II Comm. Position. No improper motivation on behalf of the panel members has been proven.

Accordingly, the Board cannot find that Ms. Guzman met her burden of proof as to the HRS § 89-13(a)(4) claim.

3.4. Hybrid Case

The remaining issues in this case make up the "hybrid case." While this phrase does not appear in HRS Chapter 89, the Hawai'i Supreme Court (HSC) laid out the requirements for a hybrid case in Poe v. Haw. Labor Rels. Bd., 105 Hawai'i 97, 102, 94 P.3d 652, 657 (2004) (Poe II).

A hybrid case alleges that the employer committed a prohibited practice under HRS § 89-13(a)(8) and that the union breached its duty of fair representation, which is a prohibited practice under HRS § 89-13(b)(4). See Siu v. Haw. Gov't. Emples. Ass'n, AFSCME, Local 152, AFL-CIO, Case No. CU-04-291, Decision No. 505, at *11 (June 14, 2021) (<https://labor.hawaii.gov/hlrp/files/2021/06/Decision-No.-505.pdf>) (Siu); see also Kapesi v. Dep't. of Pub. Safety, Case Nos. 17-CU-10-908; 17-CU-10-359, Decision No. 510, at *11 (March 2, 2022) (<https://labor.hawaii.gov/hlrp/files/2022/03/Decision-No.-510.pdf>) (Kapesi).

These two claims are “inextricably interdependent.” Poe II, 105 Hawai‘i at 102, 94 P.3d at 657. This means that Ms. Guzman must prove both parts to succeed in a hybrid case. Id., Kapesi, Decision No. 510, at *11.

3.4.1. HRS § 89-13(a)(8) Claim – Employer’s Conduct

To establish her case against HPD, Ms. Guzman must prove that they wilfully violated the CBA in the interview and selection process for the Secretary II Comm. Position. Ms. Guzman argues, among other things, that she could perform the duties of the Secretary II Comm. Position, that she received positive evaluations and reviews, that HPD has retaliated against whistleblowers in the past, and that she previously brought a retaliation complaint against HPD that was substantiated.

Ms. Guzman did not argue HPD violated any specific article of the CBA. Instead, she argues that HPD failed to provide a fair and unbiased selection process, effectively challenging the interview process HPD relies on.

The Board does not have jurisdiction over HPD’s internal policies, and any issues of consulting on or negotiating those internal policies are claims that the Union may bring, not an employee.

Based on the evidence, by conducting the panel interview, HPD followed its standard process in evaluating the candidates for the Secretary II Comm. Position. Ms. Guzman argues that this process was tainted and asks the Board to consider that she has been passed over for multiple positions. However, by failing to present subjective evidence of this improper motive and implying that an improper motive is the only “reasonable explanation” for the conduct, Ms. Guzman has failed to prove her case. *See Emura v. Haw. Gov’t Emp. Ass’n, AFSCME, Local 152, AFL-CIO*, Board Case No. CU-03-328, Order No. 3028, at *15 (October 27, 2014) (<https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3028.pdf>).

Accordingly, the Board must find that Ms. Guzman has failed to prove that HPD committed a prohibited practice by violating the BU 3 CBA.

3.4.2. Breach of the Duty of Fair Representation – Union’s Conduct

As noted above, the hybrid claim requires that the complainant succeed on both issues; if the complainant fails to prove one, the other cannot succeed. Given that the Board finds that Ms. Guzman has not proven that HPD violated the CBA, the Board cannot find that HGEA committed a prohibited practice by breaching its duty of fair representation owed to Ms. Guzman.

Therefore, the Board dismisses the claim of the breach of the duty of fair representation for lack of standing and makes no other findings as to this claim.

4. Order

Based on the above, the Board GRANTS the Motions for Directed Verdict and dismisses the Complaint in its entirety. This case is closed.

DATED: Honolulu, Hawai‘i, _____ July 8, 2022 _____.

HAWAI‘I LABOR RELATIONS BOARD



Markus R. Oshiro

MARKUS R. OSHIRO, Chair

Sesnita A. D. Moepono

SESNITA A.D. MOEPONO, Member

J.N. Musto

J.N. MUSTO, Member

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¹ HRS § 89-6(a)(3) defines bargaining unit 3 as, “Nonsupervisory employees in white collar positions.”

² HRS § 89-2 defines employee or public employee as:

“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(f)].

³ In this capacity, HPD is an Employer within the meaning of HRS § 89-2, which defines “employer” or “public employer” as:

“Employer” or “public employer” means...the respective mayors in the case of the counties...and any individual who represents one of these employers or acts in their interest in dealing with public employees...

⁴ HRS § 89-2 defines exclusive representative as:

“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 § 89-6(a)(3) defines BU 3 as, “Nonsupervisory employees in white collar positions.”