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Case No. 22-CE-03-967, 22-CU-03-391**

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

MARIO COOPER,

Complainant(s),

and

DEPARTMENT OF TAXATION, State of
Hawaii; DEPARTMENT OF HUMAN
RESOURCES, State of Hawaii; and
HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO,

Respondent(s).

CASE NO(S). 22-CE-03-967
22-CU-03-391

ORDER NO. 3861

PRELIMINARY PREHEARING
CONFERENCE ORDER

PRELIMINARY PREHEARING CONFERENCE ORDER

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1. Introduction

As the Hawai‘i Labor Relations Board (Board) acknowledged in Order No. 3857, at least one of the parties in this case appears to be a self-represented litigant (SRL). Accordingly, the Board issues this preliminary pre-hearing conference order to promote efficiency at the upcoming pre-hearing conference. This order will lay out basic information about the Board and proceedings before the Board.

2. Factual Circumstances

Based on the Prohibited Practice Complaint (Complaint) filed by Complainant MARIO COOPER (Mr. Cooper or Complainant), this case arises from Mr. Cooper’s discharge from his position with Respondent DEPARTMENT OF TAXATION, State of Hawai‘i (DoTax). Mr. Cooper filed a grievance related to his discharge which both DoTax and Respondent DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, State of Hawai‘i (DHRD and collectively with DoTax, State Respondents or Employer) handled.

Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) issued a notice of intent to arbitrate Mr. Cooper’s grievance. The grievance is still pending.

3. Overview of the Board’s Processes

3.1. General Information on the Board; Burden of Proof

The Board is a quasi-judicial agency, which means that it functions like a court. Therefore, when the Board receives a complaint, the complaint generally goes through full court-like proceedings, including a hearing on the merits where witnesses are called and evidence is presented.

In prohibited practice cases, the party that filed the complaint is known as the “complainant,” and the party responding to the complaint is known as the “respondent.” By law, the complainant has the burden to prove the case by a “preponderance of the evidence.” See Hawai‘i Revised Statutes (HRS) § 91-10(5)ⁱ and Hawai‘i Administrative Rules (HAR) § 12-42-8(g)(16)ⁱⁱ. This means that the complainant must prove that it is more likely than not that the respondent committed prohibited practices. The complainant must prove this case against the respondents by presenting evidence in the form of exhibits and witnesses in the HOM.

The Board must construe a complaint liberally, so the general requirement that the Board follows is that the complaint must contain a “short and plain statement of the claim to provide the respondent with fair notice of the complaint and the relevant grounds.”

3.2. The Hearing on the Merits; Witnesses and Exhibits

The Board must hold the HOM within 40 days of when the complaint was filed unless the parties choose to waive this requirement. See HRS § 377-9(b)ⁱⁱⁱ and HAR § 12-42-46(b)^{iv}.

All parties are responsible for calling their own witnesses for direct examination during the HOM. If a witness is not willing to appear voluntarily, then the party seeking to call that witness can request a subpoena from the Board to order the witness to appear. This subpoena must then be served on the witness by an individual who is not the named complainant.

Because the complainant must present their case first, they must call their own witnesses. Even if a witness is listed by a respondent, that is no guarantee that the respondent will call that witness. Therefore, the complainant must ensure that all witnesses are either willing to appear voluntarily or that the witnesses are properly served with a subpoena.

All subpoenaed witnesses must be paid as laid out in HRS § 607-12.

The complainant must also present exhibits, which are documents or other pieces of evidence. Any proposed exhibits must be submitted to the Board as required by the Board's Pretrial Order. There are specific requirements for how those exhibits must be submitted to the Board.

When proposed exhibits are submitted, the parties can agree to enter those proposed exhibits into the official record without objection. If the parties can do so, it helps to make the proceedings more efficient.

If the parties do not agree to enter proposed exhibits into evidence, then they can be introduced during the HOM. Exhibits are introduced during the HOM through witnesses' testimony, setting out the authentication and relevance of the exhibits. After exhibits are introduced, a party may "move" to have the exhibit entered into the official record. The Board will rule on whether or not the exhibit will be entered into the official record based on, among other things, whether the other parties object to the exhibit being entered into the official record.

The Board will only consider the exhibits entered into the official record when making our decision in this case. Therefore, any proposed exhibits that are not in the official record cannot impact the Board's decision.

4. General Legal Principles

4.1. Prohibited Practices

Prohibited practices are defined by law in HRS § 89-13.

HRS § 89-13 is broken up into two sections: first, the prohibited practices that a public employer can commit, and second, the prohibited practices that a public employee or employee organization can commit.

When dealing with prohibited practices arising from how a union handles grievances, this falls under what is known as a “hybrid case.” While this phrase does not appear in Hawai‘i Revised Statutes (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).

The Board will discuss the hybrid case in more detail below.

4.2. The Board Must Have Jurisdiction to Decide a Case

The Board has a limited jurisdiction or right to hear cases, and the Board cannot do more than the law authorizes it to do. See Awana v. Honolulu Police Dep’t, Board Case Nos. 22-CE-12-965, 22-CU-12-388, Order No. 3842, at *3 (April 22, 2022) (<https://labor.hawaii.gov/hlrp/files/2022/04/Order-No.-3842.pdf>) (Awana). If the Board does not have jurisdiction over a complaint, the Board cannot issue a judgment on the issue. Tamashiro v. Department of Human Services, 112 Hawai‘i 388, 398, 146 P.3d 103, 113 (2006).

The Board’s jurisdiction has been defined by both statute and the courts. See, HRS §§ 89-14, 377-9; Aio v. Hamada, 66 Haw. 401, 404 n. 3, 664 P.2d 727, 729 n. 3 (1983) (Aio).

While the Board’s jurisdiction is made up of many different issues that the Board will not go into here, the Board will discuss two commonly raised issues: timeliness and exhaustion.

4.2.1. Timeliness – Complaints must be filed within the 90-day period that begins, for issues related to grievances, when the Union notifies the grievant that the Union is not going to proceed to arbitration.

HRS § 377-9 requires that the Board can only hear complaints filed within ninety days of the action that the alleged prohibited practice is based on. HRS § 377-9(1); Aio, 66 Haw. at 505 n. 3, 664 P.2d at 729 n. 3. The administrative rules governing the Board proceedings further include this ninety-day limitation. HAR § 12-42-42(a).

The Board has construed the limitations period strictly and will not waive a defect of even a single day. Haw. State Teachers Ass'n v. Hayashi, Board Case No. CE-05-661, Order No. 3855, at *3, (June 7, 2022) (<https://labor.hawaii.gov/hlrp/files/2022/06/Order-No.-3855.pdf>) (Hayashi). This jurisdictional ninety-day limit begins when the complainant knew or should have known that his rights were being violated and is set by statute; neither the Board nor the parties may waive this requirement. Caspillo v. Dep't. of Transp., Case Nos. 17-CE-01-899; 17-CU-01-355, Decision No. 509, at *6 (Nov. 22, 2021) (<https://labor.hawaii.gov/hlrp/files/2021/11/Decision-No.-509.pdf>) (Caspillo).

More specifically, in cases involving employees alleging a breach of the duty of fair representation the 90-day period to bring these type of charges begins when the Union notifies the employee that it will not take the grievance to arbitration. Awana, Order No. 3842, at *4.

4.2.2. Exhaustion – Complainants must exhaust administrative remedies before the Board can consider cases related to grievances.

When considering hybrid cases, the Board has consistently held that a complainant must first exhaust contractual remedies unless attempting to exhaust would be futile, based on the Court's reasoning in Poe v. Haw. Lab. Rels. Bd., 97 Hawai'i 528, 531, 40 P.3d 930, 933 (2002) (Poe) and Poe II, 105 Hawai'i at 101, 94 P.3d at 656. See, Awana, Order No. 3842, at *6.

The HSC has found that:

...a public employee pursuing an individual grievance exhausts his or her administrative remedies when the employee completes every step available to the employee in the grievance process and a request to the employee's exclusive bargaining representative to proceed to the last grievance step, which only the representative can undertake, would be futile.

Poe, 97 Hawai'i at 531, 40 P.3d at 933.

Because the Board cannot provide final and binding resolutions about the interpretation or application of a CBA, complainants must go through as much of the grievance procedure as they are allowed to under the CBA before filing a prohibited practice complaint.^v Poe, 97 Hawai'i at 536, 40 P.3d at 938; see also Poe II, 105 Hawai'i at 102, 94 P.3d at 657.

5. The Hybrid Case

In a hybrid case, the complainant must prove both that the employer wilfully violated the collective bargaining agreement and that the union breached or violated its duty of fair representation. This type of complaint can succeed only if the complainant proves both parts. Failure to prove one part of the hybrid case deprives the complainant of standing to prove the

other side. See, e.g., Siu, Decision No. 505, at *14-15; Kapesi, Decision No. 510, at *14, and Caspillo, Decision No. 509, at *15.

The complainant may choose to bring a case against only one respondent. However, even if there is only one respondent, the complainant must still prove both parts of the case. See Siu, Decision No. 505, at *11-12, citing Poe II, 105 Hawai‘i at 101-02, 94 P.3d at 656-57.

5.1. Violation of the Collective Bargaining Agreement

To prove that the Employer violated the collective bargaining agreement regarding a termination, typically the complainant must show that the Employer did not have just cause to discharge them. Kapesi, Decision No. 510, at *12. The Board has not adopted any particular test for determining just cause.

5.2. Breach of the Duty of Fair Representation

The Board can find a breach of the duty of fair representation only if the Union’s conduct towards the complainant was arbitrary, discriminatory, or in bad faith. Poe II, 105 Hawai‘i at 104, 94 P.3d at 659. These words are technical legal terms that do not necessarily follow the commonly understood meaning.

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.’ Caspillo, Decision No. 509, at *11-12.

5.2.1. Procedural or Ministerial Acts – “Arbitrariness”

The “arbitrary” prong of a breach of the duty of fair representation controls only when the challenged union conduct is procedural or ministerial. Id.^{vi}, at *12. For consideration under this prong, 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 act must have been in reckless disregard of the employee’s rights; and it must prejudice a strong interest of the employee. Id. Mere negligence does not rise to the level of arbitrariness required to show a breach of the duty of fair representation. Id.

If the union ignores or processes a meritorious grievance in a “perfunctory” manner, this would be ministerial and can be considered for a potential breach of the duty of fair representation. Id., citing Mamuad v. Nakanelua, Board Case No. CU-10-331, Order No. 3337F, at *31-32 (May 7, 2018) (<https://labor.hawaii.gov/hlr/files/2019/01/HLRB-Order-3337F.pdf>) (Mamuad). However, a union’s actions are not considered perfunctory unless those actions treat the union member’s claim so lightly as to suggest an “egregious disregard” of their rights. Id. Further, an employee has no absolute right to have a grievance taken to arbitration, and the fact

that an underlying grievance had merit is not enough to establish a breach of the duty of fair representation. Id.

A union does not perfunctorily process a grievance as long as the union undertakes some “minimal investigation” of the grievance. Emura v. Haw. Gov’t Emp. Ass’n, AFSCME, Local 152, AFL-CIO, Board Case No. CU-03-328, Order No. 3028, at *13 (October 27, 2014) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3028.pdf>) (Emura). The required thoroughness of the investigation depends on the particular facts of the case. Id.

5.3. Issues of Judgment – “Discriminatory” or “Bad Faith”

Decisions about how to pursue a particular grievance, including how to present a grievance at the arbitration stage, are matters of judgment for the union, and unions are not liable for good faith, non-discriminatory errors of judgment in making those decisions. Caspillo, Decision No. 509, at *13, citing Tupola v. Univ. of Haw. Prof’l Assembly, Board Case Nos. CU-07-330; CE-07-847, Order No. 3054, at *28 (February 25, 2015) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3054.pdf>) (Tupola).

The union must retain the discretion to act in what it perceives to be their members’ best interest. Therefore, especially when it comes to questions of judgment, the duty of fair representation must be narrowly construed. Caspillo, Decision No. 509, at *14. Therefore, the Board is required to give deference to the Union when substantively examining the Union’s performance. Tupola, Order No. 3054, at *27. The Board is not asking if the Union made the right decision; rather, the Board is asking whether the Union made its decision rationally and in good faith. Emura, Order No. 3028, at *15-16.

5.3.1.1. Discrimination

The Board does not follow a strict standard for discrimination in HRS Chapter 89 hybrid cases, but to succeed on a claim of discrimination requires a showing of “substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.” Caspillo, Decision No. 509, at *14.

A union cannot discriminate based on “protected categories” such as race or other constitutionally protected categories, but discrimination in HRS Chapter 89 hybrid cases can go beyond those categories. Tupola, Order No. 3054, at *33. For example, a union cannot discriminate against an employee based on union membership or if discrimination comes from prejudice or animus. Id.

5.3.1.2. Bad Faith

The bad faith element requires the Board to make a subjective inquiry to determine if the union acted (or failed to act) due to an improper motive. Caspillo, Decision No. 509, at *14.

Claims about the state of mind of individuals or of the union must be supported by other facts and evidence and must show substantial evidence of fraud, deceit, or dishonest conduct. Id. The complainant must do more than suggest that an improper motive is the only “reasonable explanation” for the conduct and must present actual evidence of the improper motive. Emura, Order No. 3028, at *15.

6. Further Proceedings

The Board will hold the prehearing conference on June 28, 2022 at 9:00a.m. via remote video conference as set forth at Order No. 3856.

DATED: Honolulu, Hawai‘i, _____ June 24, 2022 _____.

HAWAI‘I LABOR RELATIONS BOARD



Arnold R. Oshiro

ARNOLD R. OSHIRO, Chair

Sunita A. D. Moepono

SUNITA A.D. MOEPONO, Member

John N. Musto

JOHN N. MUSTO, Member

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- Mario Cooper, Self-Represented Litigant
- Peter Trask, Esq.
- James Halvorson, Deputy Attorney General

ⁱ HRS § 91-10(5) states:

(5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

ⁱⁱ HAR § 12-42-8(g)(16) of the Board’s rules states:

(16) The charging party, in asserting a violation of chapter 89, HRS, or this chapter, shall have the burden of proving the allegations by a preponderance of the evidence. The party

raising any subsequent issue shall have the burden of proving that issue by a preponderance of the evidence.

ⁱⁱⁱ HRS § 377-9(b) states in relevant part:

(b) ...The board shall fix a time for the hearing on the complaint, which shall not be less than ten nor more than forty days after the filing of the complaint or amendment thereof...

^{iv} HAR § 12-42-46(b) states:

(b) The hearing shall be held not less than ten nor more than forty days after the filing of the complaint or amendment thereof...

^v This doctrine of exhaustion is not absolute. Kellberg v. Yuen, 131 Hawai'i 513, 319 P.3d 432, 450 (2014). If exhausting administrative remedies would be futile, it is not required. Poe, 97 Hawai'i at 536, 40 P.3d at 938.

^{vi} "Id." is a short form legal citation which refers to the item cited immediately before it.