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Case No. 22-CU-01-387**

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

PATRICK ISHIDA,

Complainant(s),

and

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO; ~~and AMERICAN
FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES,~~

Respondent(s).

CASE NO(S). 22-CU-01-387

DECISION NO. 516

FINDINGS OF FACT, CONCLUSIONS OF
LAW, DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

1. Introduction and Statement of the Case

Complainant PATRICK ISHIDA (Complainant or Mr. Ishida) filed a prohibited practice complaint (Complaint) with the Hawaii'i Labor Relations Board (Board) alleging, among other things, that Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) and Respondent AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME) breached the duty of fair representation owed to Mr. Ishida as a bargaining unit 01 (BU 1) member.

Mr. Ishida alleges, among other things, that UPW and AFSCME "interfered and restrained Complainant from processing his termination grievance."

UPW and AFSCME filed a Motion to Dismiss, or in the Alternative, for Summary Judgment (MTD/MSJ), which the Board granted, in part, and denied, in part. Specifically, the Board dismissed AFSCME from the case and denied the MTD/MSJ on all other counts.

The Board proceeded to a pretrial conference and entered Board Exhibit 1, Joint Exhibits 1-10, and Complainant Exhibits B, C, D, E, F, I, J, P, S, and T into the record.

At the hearing on the merits (HOM), the Board heard testimony from the AFSCME Regional Field Service Director, Elizabeth C. Ho (Ms. Ho). The parties did not request any additional exhibits to be entered into the record.

After Ms. Ho testified, Mr. Ishida rested his case-in-chief. UPW orally moved to dismiss the case, or, in the alternative, for a directed verdict. The Board requested that UPW submit the motion in writing so that Mr. Ishida could have a full and fair opportunity to respond to the arguments.

UPW submitted its Motion to Dismiss, or in the Alternative, for Directed Verdict (MTD/MDV), and Mr. Ishida submitted his opposition to the MTD/MDV.

Upon review of the entire record, including the pleadings and arguments made in this case, the Board grants, in part, the MTD/MDV for the reasons contained in this Decision and Order.

Any findings of fact improperly listed as conclusions of law are findings of fact. Any conclusions of law improperly listed as findings of fact are conclusions of law.

2. Findings of Fact

2.1. Findings of Fact

The Department of Parks and Recreation, County of Kaua‘i (DPR or Employer)¹ employed the Complainant² until Mr. Ishida’s discharge. In his position with DPR, Mr. Ishida was a member of BU 1.³ UPW is BU 1’s exclusive representative.⁴

UPW and the relevant employer group⁵ for BU 1 are parties to a collective bargaining agreement (CBA) for the bargaining unit.

By letter dated May 3, 2021, the Employer notified Mr. Ishida of its intent to terminate his employment, effective May 17, 2021.

The Employer discharged Mr. Ishida, effective May 17, 2021.

UPW filed a Step 1 grievance, dated June 2, 2021, to challenge Mr. Ishida’s discharge.

On June 21, 2021, Mr. Ishida requested a status update from UPW. He followed up on this request on June 24, 2021, and he further requested that UPW file a new grievance based on the grievance processing time limits in the CBA.

On June 24, 2021, UPW responded that it was waiting for a response from the Employer.

On June 30, 2021, UPW informed Mr. Ishida that it had received the requested information from the Employer. Mr. Ishida requested that UPW escalate his grievance to Step 2, and UPW responded the same day.

On July 13, 2021, UPW informed Mr. Ishida that the Step 1 Meeting would be held on July 16, 2021 and requested that Mr. Ishida attend the meeting. Mr. Ishida agreed.

On July 15, 2021, Mr. Ishida asked for clarification as to why the Step 1 Meeting was proceeding when the time limits specified in the CBA had passed. UPW responded the same day.

A Step 1 Meeting was held on July 16, 2021. At the Step 1 Meeting, UPW represented Mr. Ishida. UPW allowed Mr. Ishida to submit additional facts and evidence at the Step 1 Meeting to the Employer.

By letter dated July 30, 2021, UPW informed the Employer that it would proceed to Step 2 of the grievance procedure. The same day, Mr. Ishida requested information from UPW about the status of the grievance, which UPW provided.

By letter dated August 2, 2021, the Employer denied the Step 1 grievance.

On August 4, 2021, Mr. Ishida requested a status update on his grievance, and UPW responded.

A Step 2 meeting was held on August 12, 2021. UPW represented Mr. Ishida at the Step 2 meeting. The same day, Mr. Ishida submitted an additional grievance statement, which included his legal conclusions.

By letter dated August 23, 2021, the Employer denied the Step 2 grievance.

On August 24, 2021, Mr. Ishida let UPW know that he was preparing a request for arbitration. He requested copies of prior arbitrations.

On August 30, 2021, Mr. Ishida requested that UPW take his grievance to arbitration.

By letter dated October 1, 2021, UPW declined to take Mr. Ishida's grievance to arbitration (UPW Grievance Withdrawal).

Mr. Ishida did not receive the UPW Grievance Withdrawal until it was emailed to him on November 22, 2021.

3. Discussion and Conclusions of Law

3.1. Witness Credibility

In assessing Ms. Ho's credibility, the Board primarily relied on her demeanor, the context and consistency of her testimony, and the quality of her recollections. The Board also considered whether any evidence corroborated or refuted the testimony and the weight of such evidence. The Board further looked at established or admitted facts, inherent probabilities, and reasonable inferences that can be drawn from the entire record. Most of the credibility determinations regarding Ms. Ho's testimony are incorporated into the findings of fact above.

3.2. Subject Matter Jurisdiction

Based on the requirement in HRS § 377-9, the Board can only hear complaints filed within ninety days of the action that gave rise to the alleged prohibited practice. HRS § 377-9(1); Aio v. Hamada, 66 Haw. 401, 404 n.3, 664 P.2d 727, 729 n.3 (1983). The Board's administrative rules also include this ninety-day limit. HAR § 12-42-42(a).

The issue of subject matter jurisdiction may be raised at any time. Taum v. Dep't of Pub. Safety, Board Case No. 17-CE-10-906, Decision No. 514, at *34 (February 21, 2023) (<https://labor.hawaii.gov/hlrh/files/2023/02/Decision-No.-514.pdf>) (Taum).

The Board uses the contents of the Complaint as the basis to consider the MTD/MDV's arguments regarding lack of subject matter jurisdiction, and the Board must accept the factual allegations in the Complaint as true and view those allegations in the light most favorable to Mr. Ishida. See Taum, Decision No. 514, at *34. The Board does not have to accept conclusory allegations about the legal effect of the events alleged in the complaint. *Id.*

If the Board finds it appears beyond a doubt that Mr. Ishida can prove no set of facts that would support the claim and entitle him to relief, the Board may dismiss the claim. Haw. State Teachers Ass'n v. Abercrombie, 126 Hawai'i 13, 19 265 P.3d 482, 488 (App. 2011).

As the Complainant, Mr. Ishida must establish that jurisdiction exists. Caspillo v. Dep't of Transp., Board Case Nos. 17-CE-01-899; 17-CU-01-355, Decision No. 509, at *6 (November 22, 2021) (<https://labor.hawaii.gov/hlrh/files/2021/11/Decision-No.-509.pdf>) (Caspillo). The Board may review evidence, including affidavits and testimony, to resolve factual disputes about whether the Board has jurisdiction to hear the case. Casumpang v. ILWU, Local 142, 94 Hawai'i 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Comm. v. City Council, City and Cnty. of Honolulu, 117 Hawai'i 1, 7, 175 P.3d 111, 117 (App. 2007).

The Board construes the limitations period strictly and, because the period is set by law, the Board cannot waive a defect of even a single day. Taum, Decision No. 514, at *34. The limitations period begins when UPW notified Mr. Ishida that it was not going to take his

grievance to arbitration. Awana v. Honolulu Police Dep't, Board Case Nos. 22-CE-12-965, 22-CU-12-388, Order No. 3842, at *4 (April 22, 2022) (<https://labor.hawaii.gov/hlrb/files/2022/04/Order-No.-3842.pdf>).

Mr. Ishida filed the instant complaint on February 18, 2022. Therefore, the limitations period began on November 20, 2021.

Although the UPW Grievance Withdrawal is dated October 1, 2021, Mr. Ishida asserts that he did not receive the document until it was emailed to him on November 22, 2021.

Ms. Ho testified that she believes that her secretary would have sent the UPW Grievance Withdrawal out on the day that it was dated. However, Ms. Ho did not have any proof that it was, in fact, sent out on that date.

Without any evidence such as proof of delivery of the UPW Grievance Withdrawal, while considering the MTD/MDV the Board is compelled to accept Mr. Ishida's assertion that he did not receive the UPW Grievance Withdrawal until November 22, 2021. Following a "simple point-to-the-point analysis," Mr. Ishida had until February 21, 2022⁶ to file his Complaint.

Therefore, the Board finds that the Complaint is timely and denies the MTD/MDV on this claim.

3.3. Standards for Directed Verdict

The Board can hear motions such as a motion for directed verdict as long as the party opposing the motion has a full and fair opportunity to be heard on the motion after reasonable notice and the Board's rules are not otherwise violated. Guzman v. Honolulu Police Dep't, Board Case Nos. 19-CE-03-925, 19-CU-03-371, Decision No. 512 at *3 (July 8, 2022) (<https://labor.hawaii.gov/hlrb/files/2022/07/Decision-No.-512.pdf>) (Guzman).

Motions for directed verdicts are made after the non-moving party—in this case, Mr. Ishida—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).

Under HRS § 91-10(5) and HAR § 12-42-8(g)(16), the complainant—Mr. Ishida—has the burden or obligation to prove that his allegations are more likely than not (also known as by a preponderance of the evidence). He is required to produce enough evidence and to support that evidence with arguments in applying the relevant legal principles. Mamuad v. Nakanelua, Board Case No. CU-10-331, Order No. 3337F, *25 (May 7, 2018) (Mamuad) (<https://labor.hawaii.gov/hlrb/files/2019/01/HLRB-Order-3337F.pdf>).

Mr. Ishida's claims comprise a "hybrid case," as defined by the HSC in Poe v. Haw. Lab. Rels. Bd., 105 Hawai'i 96, 102, 94 P.3d 656, 657 (2004) (Poe II). The claim that the Employer

violated the terms of the CBA and the claim that UPW breached its duty of fair representation are “inextricably independent.” *Id.* This means that Mr. Ishida must prove both parts to succeed in a hybrid case. *Id.*, see also Guzman, Decision No. 512, at *7. Failure to prove one part means that Mr. Ishida has no standing to pursue the other. *Id.*

3.4. UPW Did Not Breach Its Duty of Fair Representation Owed to Mr. Ishida

The Board can find a breach of the duty of fair representation only if UPW’s conduct towards Mr. Ishida was arbitrary, discriminatory, or in bad faith. Poe II, 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, Order No. 3337F, at *31.

Mr. Ishida argues, among other things, that UPW acted perfunctorily in the processing of his grievance; discriminated against Mr. Ishida because he was an employee of the County of Kaua‘i; and acted in bad faith in deciding not to take Mr. Ishida’s grievance to arbitration. UPW denies these allegations.

3.4.1. Procedural or Ministerial – Arbitrariness

Mr. Ishida argues that UPW submitted the Step 1 grievance in a perfunctory way because, among other things, it was not supported with the facts and evidence that Mr. Ishida provided to UPW.

The choice as to include or exclude facts and evidence in a grievance filing is a matter of judgment, not a procedural or ministerial task. See Tupola v. Univ. of Haw. Prof’l Assembly, Board Case No. CU-07-330, Order No. 3054, at *28 (February 25, 2015) () (Tupola). Therefore, the issue of UPW’s judgment choices will be dealt with below.

Mr. Ishida further argues that he was not notified of the date for the Step 1 grievance meeting or response until he requested that information. Further, he argues that the delay in proceeding to Step 2 showed that UPW proceeded in a perfunctory manner. The Board must disagree.

The “arbitrary” prong of a breach of the duty of fair representation controls only when looking at procedural or ministerial union conduct. Caspillo, Decision No. 509, at *12. If the union ignores or processes a meritorious grievance in an arbitrary or perfunctory manner, such actions are ministerial and can be considered as potential breaches of the duty of fair representation. *Id.*

UPW’s actions will not be considered “perfunctory” unless those actions treat Mr. Ishida’s claim so lightly as to suggest an “egregious disregard” of his rights. Campos v. Univ. of

Haw. Prof'l Assembly, Board Case No. 19-CU-07-374, Decision No. 511, at *9 (June 28, 2022) (<https://labor.hawaii.gov/hlrp/files/2022/06/Decision-No.-511.pdf>) (Campos II).

If the union undertakes at least some “minimal investigation” of a grievance before making its decision as to whether to arbitrate the grievance, the union has not acted perfunctorily. Caspillo, Decision No. 509, at *12 (citing 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 particular facts of the case define the requisite thoroughness of the investigation. *Id.*

Contrary to Mr. Ishida's assertions, the evidence shows that UPW processed his grievance and generally provided him information within a reasonable time.

While UPW did not submit all the information that Mr. Ishida may have wanted them to use, that choice is a judgment issue dealt with below. The evidence shows that UPW responded to Mr. Ishida in a timely manner, even though it may not have proceeded with the grievance as quickly as he wanted.

The Step 1 grievance shows that UPW requested additional information from the Employer to help it proceed with its investigation. Based on that information, UPW proceeded with the grievance process and continued to represent Mr. Ishida throughout the process.

The UPW business agent responded to Mr. Ishida within a reasonable time each time he reached out to her. Further, she provided information to Mr. Ishida as she received it.

Based on the evidence, the Board cannot find that UPW breached its duty of fair representation in an arbitrary manner based on any procedural or ministerial act.

3.4.2. Acts of Judgment – Discrimination and/or Bad Faith

Decisions about how to pursue a particular grievance, including whether to arbitrate a grievance, are matters of judgment for the union, and unions are not liable for good faith, non-discriminatory errors of judgment in making those decisions. Tupola, Order No. 3054, at *28; *see also* Mamuad, Order No. 3337F, at *31.

UPW must retain discretion to act in what it believes to be their members' best interest. Therefore, especially when it comes to questions of judgment, the duty of fair representation is narrowly construed, and the Board must be deferential in substantively examining UPW's performance. Caspillo, Decision No. 509, at *14. The Board is not considering whether UPW made the right decision; rather, the Board is only asking whether UPW made its decision rationally and in good faith. Emura, Order No. 3028, at *15-16.

3.4.2.1. Discrimination

Mr. Ishida argues that UPW's refusal to submit his grievance to arbitration is discriminatory because:

- a. The UPW submitted numerous successful awards upholding the intent of the Unit 1 and Unit 10 Agreement Sections that are in dispute in Complainant's grievance to the Court for Confirmation thereby adding further protection for the Unit 1 and Unit 10 Employees.
- b. The UPW pursued Contempt of Court Orders for violations of previous Arbitration decisions involving [CBA], Sections 1.02 and 37, against Employers when Employers violated the Confirmed Arbitration Awards and received \$5,000 per violation.
- c. The UPW did not research and use the...cited cases [provided by Mr. Ishida] to support the grievance of Complainant.

The Board must disagree that UPW's conduct was discriminatory.

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 discrimination is not restricted by impermissible or immutable classifications like race or other constitutionally protected categories. Caspillo, Decision No. 509, at *14. In addition to constitutionally protected categories, a union cannot discriminate against an employee based on union membership or if discrimination comes from prejudice or animus. *Id.*

To prove discriminatory conduct, the complainant must show substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. Mamuad, Order No. 3337F, at *37.

Mr. Ishida's arguments about UPW's alleged discriminatory conduct are not supported by evidence and are generally irrelevant. Whether UPW submitted other cases to arbitration or court is irrelevant to whether Mr. Ishida's case was taken to arbitration.

Each case is different because each case has specific facts relevant to that case. UPW has the right to determine each case based on its individual facts and merits. UPW's prior actions with other cases, unless those cases are entirely factually identical, are irrelevant to UPW's decisions made in this case.

Further, Mr. Ishida has not provided any theory as to why UPW may have discriminated against him, other than briefly alleging that UPW did not want to represent someone who worked for the County of Kaua'i. Mr. Ishida has provided no evidence to support this accusation.

Accordingly, the Board cannot find that UPW breached its duty of fair representation in a discriminatory way.

3.4.2.2. Bad Faith

The bad faith element requires the Board to subjectively determine if UPW acted (or failed to act) due to an improper motive. Tupola, Order No. 3054, at *34. Mr. Ishida must corroborate any assertions of the requisite state of mind with subsidiary facts and must show substantial evidence of fraud, deceit, or dishonest conduct. *Id.* If Mr. Ishida fails to present subjective evidence of an improper motive and merely suggests that an improper motive is the only “reasonable explanation” for the conduct, he fails to prove his case. Emura, Order No. 3028, at *15.

Mr. Ishida has provided no evidence of fraud, deceit, or dishonest conduct. His primary argument is that UPW failed to use the information and cases he provided to them. Without evidence of fraud, deceit, or dishonest conduct, and without facts showing the requisite state of mind, the Board cannot find that UPW refused to take his grievance to arbitration in bad faith.

Accordingly, the Board cannot find that UPW breached the duty of fair representation owed to Mr. Ishida.

4. Order

Based on the above, the Board denies UPW’s MTD/MDV as to the issue of timeliness and grants UPW’s MTD/MDV as to the merits of the case. This case is closed.

DATED: Honolulu, Hawai‘i, _____ June 30, 2023 _____.

HAWAI‘I LABOR RELATIONS BOARD




M. OSHIRO, Chair


A.D. MOEPONO, Member


J.N. MUSTO, Member

Copies sent to:

Gary Rodrigues, Representative for Complainant
Jonathan Spiker, Esq.

¹ In this capacity, DPR is a public employer within the definition 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...

² In this capacity, Mr. Ishida was a public employee within the definition of HRS § 89-2, which 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 HRS § 89-6(a)(1) defines BU 1 as, “Nonsupervisory employees in blue collar positions.”

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(d)(1) defines the employer group for BU 1 as:

(1) For bargaining units (1)...the governor shall have six votes and the mayors, the chief justice, and the Hawaii health systems corporation board shall each have one vote if they have employees in the bargaining unit[.]

⁶ The ninetieth day, February 20, 2022, was President’s Day, which is a holiday. *See* HRS § 89-1. Under HAR § 12-42-8(c), the limitations period, “runs until the end of the next day which is not a Saturday, a Sunday, or a holiday.” Therefore, the last day of the limitations period was February 21, 2022.