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STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of JENNIFER KRAMER, Complainant, and DEPARTMENT OF EDUCATION, State of Hawai'i, Respondent.	CASE NO. 23-CE-05-977 DECISION NO. 524 FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

I. Introduction and Statement of the Case

On March 6, 2023, Complainant JENNIFER KRAMER (Complainant or Ms. Kramer) filed a prohibited practice complaint (Complaint) against Respondent DEPARTMENT OF EDUCATION State of Hawaii, (Respondent or DOE), with the Hawai'i Labor Relations Board (Board). Her Complaint alleges, among other things, that the DOE committed a prohibited practice by violating the terms of the relevant collective bargaining agreement (CBA) when the DOE implemented the Salary Compression Adjustment Plan (Repricing).

On March 20, 2023, Complainant filed a Motion for Summary Judgment because of DOE's failure to file an answer to the Complaint.

On April 3, 2023, DOE filed a Motion to Dismiss for Failure to Join an Indispensable Party in lieu of Answer, arguing that the case must be dismissed because Complainant did not bring in Hawaii State Teachers Association (HSTA), the exclusive representative for Ms. Kramer's bargaining unit, as a respondent. Complainant opposed DOE's motion and moved for summary judgment. The Board denied DOE's Motion to Dismiss and found Complainant's Motion for Summary Judgement to be moot in Order No. 3951.

On April 5, 2023, the Board issued Order No. 3950, Regarding Admitted Material Facts, finding among other things, that DOE admitted the material facts in the Complaint by failing to file a timely answer.

The Board held a hearing on the merits (HOMs) on April 13 – 14, 2023 and April 21, 2023. Upon review of the entire record, including the pleadings and arguments made in this case, the Board finds that Complainant did not meet her burden by a preponderance of the evidence to show that DOE violated the CBA for the reasons stated in this Decision and Order.

After the Board's rulings on the dispositive motions, the Board found that the remaining issues in the case were:

- Whether DOE committed a prohibited practice by willfully violating the 2021 - 2023 CBA when it implemented its repricing plan; and

- Whether HSTA committed a prohibited practice by breaching the duty of fair representation owed to Ms. Kramer.

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.

II. Findings of Fact

Ms. Kramer[1] has been employed by DOE[2] since 2003 as a teacher and is a member of bargaining unit 5 (BU 05)[3]. HSTA is the exclusive representative for BU 05[4].

[1] In this capacity, Ms. Kramer 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)].

[2] In this capacity, DOE 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…

[3] HRS § 89-6(a)(5) defines BU 5 as, "Teachers and other personnel of the department of education under the same pay schedule. . ."

[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.

When Ms. Kramer began working for DOE, a CBA covering the years 2003-2005 was in effect. A CBA covering the years 2021-2023 applies to the period when the allegations occurred in this case. HSTA and the relevant employer group[5] are parties to these CBAs.

Under the terms of the 2003-2005 CBA, when Ms. Kramer began working for DOE, she was credited with six years of verified non-BU 05 service.

In 2022, DOE implemented the Salary Compression Adjustment Plan, also known as "repricing" or a "Compression Fix", which changed the metrics of how DOE paid teachers.

DOE's repricing plan was developed and implemented pursuant to Section 89-9(f)(2) of the Hawaii Revised Statute (HRS). As such, DOE consulted with HSTA regarding the repricing plan, however, DOE did not negotiate with HSTA because it was employer initiated and did not alter the Salary Schedule or the 2021-2023 BU 5 CBA.

Only BU 05 service was considered for the Repricing Salary Schedule. Non-BU 05 service was not considered.

Under repricing, teachers who had between 0 to 2 years of BU 05 service were placed on step 5 of the Salary Schedule. For each additional 2 years of BU 05 service, a teacher was placed one step higher and so on and so on. There are 12 steps in the Repricing Salary Schedule.

Repricing was a one-time step adjustment for DOE employees. On November 18, 2022, teachers received retroactive pay pursuant to the repricing plan, which was based on their BU 05 years of service. After the repricing process, teachers with up to six years of non-DOE service credit in their initial placement in the salary schedule did not move up the pay scale in tandem with their DOE counterparts.

At the start of the 2022-2023 school year, before repricing, Complainant was on Step 12 of the Salary Schedule with 22.9 years of service, which consisted of 16.9 years of BU 05 service and 6 years of credited non-BU 05 service and earned a monthly salary of $6,815.10.

After repricing, Complainant was retroactively moved up one step to Step 13 and earned a monthly salary of $7,016.26. Complainant's 16.9 years of BU 05 service and 6 years of non-BU 05 service were maintained.

On December 17, 2022, Complainant submitted a Step 1 grievance, alleging that repricing violated the 2021 – 2023 BU 05 CBA. The DOE responded to Complainant's grievance on February 16, 2023, denying any 2021 – 2023 BU 05 CBA violations.

On February 20, 2023, Complainant requested via email to HSTA Deputy Executive Director Andrea Eshelman (HSTA Eshelman) that HSTA moved her case to arbitration.

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[5] HRS § 89-6(d)(3) defines the employer group for BU 5 as:

> (3) For bargaining units (5)…the governor shall have three votes, the board of education shall have two votes, and the superintendent of education shall one vote.

Complainant felt that it "would be futile to do a Step 2 grievance based on the totality of correspondence with DOE and HSTA." *See* Complainant's Motion for Summary Judgment.

HSTA sent a letter dated February 21, 2023 to DOE requesting arbitration. However, that same day, HSTA decided to deny Complainant's request to send her case to arbitration. After a review of her case, HSTA Board of Directors sent a letter dated February 27, 2023 to Complainant upholding its decision to not arbitrate the case.

On March 6, 2023, Complainant filed the instant case with the Board alleging that DOE committed a prohibited practice in violation of HRS § 89-13 when it violated the 2021 - 2023 CBA.

The following are the relevant sections of CBA:

- Article 20 Section E

  E. New hire teachers entering the salary schedule in 2021-2023 who hold a degree with a SATEP shall be placed in Step 5. Those teachers with prior experience shall be placed in the same step as in-service teachers with equivalent years of service. No more than six (6) years of verified non-DOE teaching experience may be credited as determined by the DOE.

- Article 24 Section B

  Any individual contract between the Employer and an individual teacher shall be expressly made subject to and consistent with the terms of this Agreement.

- Article 24 Section C

  Except where contrary to law, this Agreement shall supersede any rules, regulations or practices of the Employer which shall be contrary to or inconsistent with this Agreement.

- Article 25 Section A.

  Except as modified herein, teachers shall retain all rights, benefits and privileges pertaining to their conditions of employment contained in the Standard Practices at the time of the execution of this Agreement.

III. Principles of Law

HRS § 89-13, provides in relevant part:

> (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

* * *

(7) Refuse or fail to comply with any provision of this chapter;

(8) Violate the terms of a collective bargaining agreement . . .

* * *

(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;

* * *

(4) Refuse or fail to comply with any provision of this chapter

(5) Violate the terms of a collective bargaining agreement.

HRS § 89-9(f), provides:

(f) The repricing of classes within an appropriate bargaining unit shall be negotiated and determined as follows:

(1) At the request of the exclusive representative and at times allowed under the collective bargaining agreement, the employer shall negotiate the repricing of classes within the bargaining unit. The negotiated repricing actions that constitute cost items shall be subject to the requirements in section 89-10; and

(2) If repricing has not been negotiated under paragraph (1), the employer of each jurisdiction shall ensure establishment of procedures to periodically review, at least once in five years, unless otherwise agreed to by the parties, the repricing of classes within the bargaining unit. The repricing of classes based on the results of the periodic review shall be at the discretion of the employer. Any appropriations required to implement the repricing actions that are made at the employer's discretion shall not be construed as cost items.

IV. Discussion and Conclusions of Law

A. Hybrid Case

Under HRS § 91-10(5) and Hawai‘i Administrative Rules (HAR) § 12-42-8(g)(16), the party initiating the proceeding has the burden of proof, including the burden of producing evidence and the burden of persuasion. The degree of the burden of proof is by the

preponderance of the evidence. Hawai'i Gov't Emp. Ass'n., AFSCME, Local 152, AFL-CIO v. Kawakami, Board Case Nos. 20-CE-03-946a, 20-CE-04-946b, and 20-CE-13-946c, Decision No. 506, at *18 (June 23, 2021) (https://labor.hawaii.gov/hlrb/files/2021/06/Decision-No.-506.pdf).

Therefore, Ms. Kramer has the burden to present both evidence and argument to prove her allegations against DOE and HSTA.

If the party with the burden of proof does not present sufficient evidence and legal arguments regarding an issue, the Board will find that the party failed to carry its burden of proof and dispose of the issue accordingly. Mamuad v. Nakanelua, Board Case No. CU-10-331, Order No. 3337F, at *25 (May 7, 2018). (https://labor.hawaii.gov/hlrb/files/2021/05/HLRB-Order-3337F.pdf).

Ms. Kramer's claims comprise a "hybrid case," as defined by the Hawaii Supreme Court in Poe v. Haw. Lab. Rels. Bd., 105 Hawai'i 96, 102, 94 P.3d 656, 657 (2004) (Poe II). 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 it duty of fair representation. Id. A hybrid complaint can only 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 v. HGEA, Decision No. 505, at *14-15; Kapesi v. Dep't of Public Safety, Decision No. 510, at *14, and Caspillo v. Dep't of Transportatoin, 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. Poe II, 105 Hawai'i at 101-02, 94 P.3d at 656-57.

Therefore, the claim that the DOE violated the terms of the CBA and the claim that HSTA breached its duty of fair representation are "inextricably dependent." Id. As the Board stated in Order No. 3951, this means that while Ms. Kramer did not include the HSTA as a party in her prohibited practice complaint before the Board, she must prove both parts to succeed in a hybrid case. Id. Failure to prove one part means that Ms. Kramer has no standing to pursue the other.

1. DOE's repricing plan did not violate the terms of the 2021-2023 CBA.

To prevail on a prohibited practice complaint against the DOE, Ms. Kramer must prove that DOE wilfully violated the terms of the CBA. Section 89-13(a), HRS, provides in part, that it shall be a prohibited practice for a public employer or its designated representative wilfully to:

* * *

(7) refuse or fail to comply with any provision of this chapter;

(8) violate the terms of a collective bargaining agreement;

HRS § 89-13

In a prohibited practice complaint, the Board must decide whether DOE acted "wilfully"; that is, with the "conscious, knowing, and deliberate intent to violate the provisions of" Chapter 89 of the Hawaii Revised Statutes. Hawaii Government Employees Association v. Casupang, 116 Hawai'i 73, 97, 170 P.3d 324, 348 (2007).

Ms. Kramer contends that DOE's repricing plan violates Article 20 Section E, Article 24 Section B, Article 24 Section C, and Article 25 Section A of the 2021-2023 CBA[6].

It is undisputed that DOE's repricing plan was developed and implemented pursuant to HRS § 89-9(f)(2) which states that the "repricing of classes shall be at the discretion of the employer." Therefore, DOE's repricing plan did not need to be negotiated with HSTA before it was implemented.

As such, the Board turns to whether the repricing plan violated any provision of the 2021-2023 CBA. After hearing the testimony of the witnesses and reviewing the evidence, the Board finds that Ms. Kramer failed to prove that the DOE wilfully violated the CBA when it implemented its repricing plan.

Article 20 Section E of the CBA provides in part, that "those teachers with prior experience shall be placed in the same step as in-service teachers with equivalent years of service. No more than six (6) years of verified non-DOE teaching experience may be credited as determined by the DOE."

The Board finds that there is no evidence to show that Article 20 Section E, Article 24 Section B, Article 24 Section C, and Article 25 Section A of the 2021 – 2023 CBA was wilfully violated when DOE implemented its repricing plan.

As Sean Bacon (Bacon), DOE Assistant Superintendent, testified, while the repricing salary schedule does not recognize non-BU 05 service, a teacher receives credit of up to six years of non-BU 05 service to determine their step at the time of their initial placement onto the CBA salary schedule, in compliance with Article 20 Section E of the CBA.

The Board finds that none of the other articles of the CBA alleged by Ms. Kramer were violated by DOE's repricing plan. Nor did repricing change or affect any salary schedules contained in the CBA.

[6] In her prohibited practice complaint, Ms. Kramer also alleges that the DOE violated Article 17 Section D of the 2003 – 2005 CBA; however, the Board notes that while the 2003 – 2005 CBA was the relevant CBA at the time of her hire, the 2003 – 2005 CBA is no longer the relevant CBA in effect during the alleged violation.

In Ms. Kramer's case, prior to DOE's repricing plan, she was on Step 12 of the salary schedule and was earning $6,815.10 a month. However, after the repricing plan was implemented, she was given a one-time adjustment on the salary schedule and was placed on Step 13, earning $7,016.26 a month. Also, DOE confirmed that Ms. Kramer's 16.9 years of BU 05 service and 6 years of non-BU 05 service were maintained after repricing was implemented. Thus, there is no evidence that Article 20 Section E, Article 25 Section A, Article 24 Section C, Article 24 Section B were violated. As such, the Board finds that Ms. Kramer failed to prove that DOE's repricing plan violated the 2021 – 2023 CBA.

2. Failure to plead a HRS § 89-13(a)(7) violation.

For a HRS § 89-13(a)(7) allegation to be sufficient, it requires a specification of the HRS Chapter 89 provision that is alleged to be violated to provide notice to the employer as to the statutory violations of HRS Chapter 89 being charged. Poe v. Tsuda, Board Case No. CE-03-225, Order No. 1178, at *6-7 (April 19, 1995).

In the instant case, Ms. Kramer fails to specify the HRS Chapter 89 provision alleged as the basis for the HRS § 89-13(a)(7) violation. Therefore, this violation is dismissed.

The Board finds that Ms. Kramer failed to prove that the DOE committed a prohibited practice under HRS §§ 89-13(a)(7) and (a)(8).

a. HSTA's Duty of Fair Representation

Because Ms. Kramer failed to carry her burden of showing that DOE violated the terms of the CBA, it is not necessary to address whether HSTA breached its duty of fair representation to Ms. Kramer.

II. Order

Based on the above, the Board finds that Ms. Kramer failed to prove that the DOE committed a prohibited practice under HRS §§ 89-13(a)(7) and (a)(8). Therefore, the Board must dismiss the claims against DOE.

DATED: Honolulu, Hawai‘i, October 25, 2024.

HAWAI‘I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

STACY MONIZ, Board Member

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