STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of VALERIE ASATO, Complainant(s), and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION; and DEPARTMENT OF EDUCATION, State of Hawai‘i, Respondent(s).	CASE NO(S). 19-CU-03-375 19-CE-03-934 DECISION NO. 504 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 VALERIE ASATO (Complainant or Asato) filed a prohibited practice complaint (Complaint) with the Hawai‘i Labor Relations Board (Board), alleging Respondents HAWAII GOVERNMENT EMPLOYEES ASSOCIATION (HGEA) and DEPARTMENT OF EDUCATION, State of Hawai‘i (DOE and, collectively with HGEA, Respondents) committed prohibited practices against her.

Asato’s Complaint stems from a prior case, Board Case No. 17-CU-03-352, which the parties settled. After settling the case, HGEA took Asato’s grievance to arbitration, where Peter Trask, Esq. (Trask) represented HGEA. The arbitrator determined that the DOE did not violate the collective bargaining agreement when it terminated Asato and that DOE had proper cause to terminate Asato.

Asato’s claims in this case arise from Trask’s behavior before and during the arbitration. Asato argues that HGEA “threw the fight” in bad faith due to Trask’s treatment of Asato during arbitration preparation, the arbitration result, and HGEA’s failure to move to set aside the arbitration.

After hearing but not ruling on a Motion to Dismiss or in the Alternative, Motion for Summary Disposition (MTD), the Board held hearings on the merits (HOMs) on November 13

and 20, 2019. Asato called several witnesses, including both Asato and Trask. On the second day of the HOMs, Asato rested her case-in-chief. HGEA then moved for a directed verdict, and the Board gave Asato time to submit her opposition in writing, which she did.

Based on the full record and for the reasons set forth below, the Board GRANTS the HGEA's Motion for Directed Verdict, finding that Asato failed to carry the burden of proof necessary to sustain the Complaint. Based on the granting of the Motion for Directed Verdict, the Board dismisses the MTD as moot.

2. Background and Findings of Fact

Until December 28, 2012, DOE[i] employed Asato[ii] as an Office Assistant III, a member of bargaining unit 3[iii] (BU 3). Asato's grievance regarding her termination went through the Step 1 and Step 2 processes found in the BU 3 collective bargaining agreement (CBA). Nearly three years after Asato's termination, in October 2015, HGEA, the exclusive representative[iv] for BU 3, filed a Notice of Intent to Arbitrate Asato's grievance with DOE.

On July 6, 2017, Asato filed a prohibited practice complaint with the Board against HGEA in Board Case No. 17-CU-03-352 (352). On July 19, 2017, HGEA notified Asato that HGEA was withdrawing its Notice of Intent to Arbitrate in her case. Asato then amended her prohibited practice complaint in 352, and the parties reached a settlement and stipulated to dismiss this case on May 2, 2018.

HGEA proceeded to arbitrate Asato's grievance in December of 2018 and selected Trask to serve as its attorney for the arbitration. During the preparation for the arbitration, Trask took the position that HGEA was his client, not Asato, and he made comments that Asato found inappropriate.

After the conclusion of the arbitration, the arbitrator issued his decision, which HGEA sent to Asato on July 9, 2019. In the decision, the arbitrator found, among other things, that DOE did not violate the CBA when it terminated Asato and that DOE terminated Asato for proper cause.

3. Analysis and Conclusions of Law

3.1. Jurisdiction and Scope of the Case

3.1.1. Timeliness

Although Respondents did not raise the issue of timeliness in the MTD or the substantive joinders, Asato brought up the issue herself. Accordingly, the Board will address its jurisdiction to hear the case in terms of the timeliness of the matter.

Contrary to Asato's assertions, the seminal cases dealing with timeliness in HRS Chapter 89 cases are those found in Hawai'i law, not in federal law. Federal law does not govern HRS Chapter 89 cases, as Hawai'i Revised Statutes (HRS) Chapter 89 is a state statute, not a federal one. Therefore, while federal law may, occasionally, be instructive to considering prohibited practice cases, the only cases that are actually relevant are those which specifically deal with HRS Chapter 89, those found in decisions issued by Hawai'i state courts and by this Board itself.

The HRS and the courts have defined the Board's procedural jurisdiction, in part, based on HRS § 377-9. *See*, HRS § 89-14; Aio v. Hamada, 66 Haw. 401, 404 n.3, 664 P.2d 727, 729 n.3 (1983) (Aio). These limits are jurisdictional and provided by statute, neither the Board nor the parties may waive this ninety-day requirement. Hikalea v. Department of Environmental Services, City and County of Honolulu, Case No. CE-01-808, Order No. 3023 at *6 (October 3, 2014).

The Board's approach to the 90-day timeline has been to follow the principles that require the Board to strictly follow the timelines and that, even if the complainant misses the deadline by a single day, the Board cannot waive that ninety-day requirement. Fitzgerald v. Ariyoshi, 3 HPERB 186, 198-199 (1983). The Board has further followed the principle that this ninety-day period begins when the complainant knew or should have known that his rights were being violated. United Public Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443, 6 HLRB 319, 330 (2003).

Asato filed the Complaint on October 4, 2019. Accordingly, the 90-day period began on July 6, 2019. Asato received the arbitration decision on July 11, 2019. Her allegations stem from the conduct of HGEA's preparation for and at the arbitration. Therefore, the decision marks the beginning of the period when Asato knew or should have known that her rights were allegedly violated. Accordingly, the majority of this case is timely.

However, what is not timely is Asato's allegation that HGEA's July 19, 2017 letter constituted a prohibited practice in violation of HRS § 89-13(b)(1). There is no question that July 19, 2017 falls far outside of the relevant period.

3.1.2. Constitutional Questions

In her filings, among other things, Asato raises a question regarding the Fourth Amendment of the United States Constitution. The Board has no jurisdiction to render a decision on constitutional issues. *See, e.g.*, Hawaii Gov't Emp. Ass'n, AFSCME Local 152 v. Lingle, 124 Hawai'i 197, 207, 239 P.3d 1, 11 (2010) (Lingle). Further, constitutional analyses are unnecessary for the Board to decide the statutory issues presented by prohibited practice complaints. *Id.* at 207, 239 P.3d at 11.

Accordingly, the Board will not address any of the constitutional issues raised by Asato.

3.2. **Relevant Legal Standards**

3.2.1. Motion for Directed Verdict

The Board is permitted to hear motions for directed verdict, as long as the party opposing the motion is given a full and fair opportunity to be heard on the motion and the rules applicable to the Board are not otherwise violated. Parker v. UPW and PSD, Board Case Nos. 18-CU-10-370; 19-CE-10-923, Decision No. 502, *42 (2021). Asato had a full and fair opportunity to be heard through filing a written opposition to the motion within the time allowed by the Board, which was greater than the amount of time typically permitted under Hawai‘i Administrative Rules (HAR) § 12-42-8(g)(3)(C)(iii).

In deciding a motion for directed verdict, the Board must consider the evidence and the inferences fairly drawn from the evidence in the light most favorable to the non-moving party, and the motion cannot be granted unless there is only one reasonable conclusion as to the proper judgment. Makino v. County of Hawaii and UPW, Board Case Nos. CE-01-856, CU-01-332, Decision No. 492, *19 (2017).

3.2.2. Burden of Proof

Under both HRS § 91-10(5) and HAR § 12-42-8(g)(16), Asato bears the burden of proof. This burden of proof includes both the burden of producing evidence and the burden of persuasion and must be met by a preponderance of the evidence. HRS § 91-10(5). Therefore, for Asato's claims to survive a motion for directed verdict, in her case-in-chief, with the evidence and inferences viewed in the light most favorable to Asato, she must have shown that Respondents committed prohibited practices through evidence and argument. United Public Workers, AFSCME, Local 646 v. Waihee, Board Case No. CE-01-122, Decision No. 309, 4 HLRB 742, 750 (1990).

If, in her case-in-chief, Asato has not presented sufficient evidence and legal arguments with respect to an issue, the Board will find that she failed to carry her burden of proof and dispose of the issue accordingly. Mamuad v. Nakanelua, Board Case No. CU-10-331, Order No. 3337F, *25 (2018) (Mamuad).

3.3. **HRS § 89-13(b)(4) and (5) Allegations**

The Board first dispenses with Asato's HRS § 89-13(b)(4) allegation because she did not plead a statutory violation independent of HRS § 89-13. The Board has long held that statutory violations under HRS § 89-13(b)(4) must specify additional violations of HRS Chapter 89 outside of HRS § 89-13. *See* Souza v. Honolulu Fire Department et al., Board Case Nos. CE-11-759, CU-11-293, Order No. 2759, *13 (2011). Accordingly, the Board must dismiss Asato's HRS § 89-13(b)(4) claim.

Next, the Board turns to Asato's HRS § 89-13(b)(5) claim. Asato argues that HGEA violated Article 11, Grievance Procedure, of the CBA because Asato was entitled to "non-discriminatory/non-retaliatory union representation". While the Board does not disagree that HGEA has a duty to fairly represent all employees in its bargaining units, none of Asato's evidence points to HGEA violating Article 11 against Asato.

Asato's claims in this case all center around the preparation for and actual arbitration of her grievance. Article 11(G), Step 3. Arbitration, provides the procedures for HGEA to proceed with arbitration. These procedures are not procedures that involve employees, as arbitration is a matter between the union and the employer. Further, there is nothing in Article 11 that speaks to discrimination or retaliation. Accordingly, the Board must dismiss Asato's HRS § 89-13(b)(5) claim.

3.4. The Arbitration of Asato's Grievance; The Duty of Fair Representation

Turning to Asato's surviving claim that HGEA violated HRS § 89-13(b)(1)[v] and breached the duty of fair representation, the Board considers this claim based on the evidence presented. As Asato frames her claim that HGEA violated HRS § 89-13(b)(1) primarily as a breach of the duty of fair representation; the Board will analyze the claim accordingly.

As the exclusive bargaining representative for BU 3, HGEA has a duty to fairly represent all of the employees in BU 3, both in collective bargaining and in the enforcement of the resulting CBA. Poe v. Hawaii Labor Relations Board, 105 Hawai'i 97, 101, 94 P.3d 652, 656 (2004) (Poe). However, HGEA must retain the discretion to act in what it perceives to be their members' best interest; therefore, the duty of fair representation must be narrowly construed. Campos v. University of Hawai'i at Mānoa et al., Board Case Nos. 18-CE-07-917; 18-CU-07-362, Order No. 3455A, at *11 (2019); Tupola v. University of Hawaii Professional Assembly et al., Board Case Nos. CU-07-330; CE-07-847, Order No. 3054, at *27 (2015) (Tupola). Accordingly, any substantive examination of HGEA's performance must be deferential. Tupola, at *27.

More specifically, the Board can find a breach of the duty of fair representation only if HGEA's conduct towards Asato was arbitrary, discriminatory, or in bad faith. Poe, 105 Hawai'i at 104, 94 P.3d at 659. The Board must perform separate analyses for each of these elements because each represents a distinct and separate obligation, Tupola, at *27. 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, at *31.

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. Moore v. Bechtel Power Corp., 840 F.2d 634, 636 (9th Cir. 1988). 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. Further, the way that the grievance is presented at an arbitration hearing is not an arbitrary decision. Tupola, at *28.

Decisions as to 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. Id.

Asato argues that HGEA's conduct was arbitrary because HGEA "lack[s] a rational basis to treat the employee with contempt as it proceeds through the arbitration process"; and that HGEA subverted the arbitration process, acting in bad faith by "thr[owing] the fight.". Asato does not specifically allege discriminatory conduct on HGEA's behalf.

3.4.1. The Arbitrary Element

Asato first argues that "HGEA's actions lack a rational basis to treat the employee with contempt as it proceeds through the arbitration process."

There is no evidence in the record that HGEA failed to perform a procedural or ministerial act, and Asato's argument does not fall under the umbrella of procedural or ministerial actions. The Board has previously referenced the Ninth Circuit's examples of a union acting arbitrarily, including where a union failed to:

> 1) disclose to an employee its decision not to submit her grievance to arbitration when the employee was attempting to determine whether to accept or reject a settlement offer from her employer; 2) file a timely grievance after it decided that the grievance was meritorious and should be filed; 3) consider individually the grievances of particular employees where the factual and legal differences among them were significant; or 4) permit employees to explain the events which led to their discharge before deciding not to submit their grievances to arbitration.

Tupola, at *28.

Asato's arbitrariness argument resembles none of these examples. The way that a union chooses to approach an arbitration is a matter of judgment, not a procedural or ministerial action. Accordingly, Asato's claims of a breach of the duty of fair representation must fail as to arbitrariness. However, the Board will address the substance of the claim in its discussion of

HGEA's alleged bad faith as well, given that the Board must consider inferences in the light most favorable to Asato.

3.4.2. The Discriminatory Element

Asato does not specifically allege any discrimination on the part of HGEA. The closest argument that Asato makes to an argument as to the discriminatory element is where she argues that she was entitled to "non-discriminatory/non-retaliatory union representation". However, while Asato references the discriminatory element, she has no clear argument as to on what basis HGEA discriminated against her.

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. Tupola, at *33. 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.

Here, Asato has not presented any such evidence. Based on the applicable standard and the lack of sufficient facts or evidence, any claim of discrimination must fail.

3.4.3. The Bad Faith Element

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.

Because Asato bears the burden of proof, she must produce evidence of bad faith to prove this element. Mamuad, at *37-38. The Board is not considering whether HGEA made the right decision; rather, the Board asks whether HGEA made its decision rationally and in good faith.

Emura v. Haw. Gov't Emp. Ass'n, AFSCME, Local 152, CU -03-328, Order No. 3028, at *15-16 (2014).

Asato argues that HGEA subverted the arbitration process, acting in bad faith by "thr[owing] the fight". As evidence, Asato submits that Trask's actions during arbitration preparation, the result of arbitration, and the failure to move to vacate or set aside the arbitration all add up to HGEA "thr[owing] the fight".

As previously noted, HGEA's decision as to how to pursue a particular grievance, including at arbitration, is a matter of judgment, and the Board must give HGEA a wide degree of deference when considering a potential breach of the duty of fair representation based on a question of HGEA's judgment. Tupola, at *28-29. Further, HGEA has broad discretion in its decision as to how to pursue an employee's grievance against the employer. Id., at *28.

The Board expects all parties to act with a level of decorum and civility in interacting with one another. Sometimes, parties may fall short of the level the Board would expect or hope for; however, falling short of that level of decorum and civility is not enough to sustain a breach of the duty of fair representation.

The selection of the attorney to represent the union at an arbitration hearing and the strategy employed at an arbitration hearing—including decisions about steps to take after the arbitration decision is issued—are questions of HGEA's judgment. Although Asato may have wanted HGEA to pursue a different strategy or prepare for the arbitration differently, HGEA has the right to make judgment calls on these matters. The Board cannot substitute its judgment for HGEA's.

Therefore, the Board must consider whether Asato has presented sufficient facts to prove that HGEA's judgment calls show substantial evidence of fraud, deceit, or dishonest conduct. Based on the record, the Board cannot find any of these.

Trask's conduct during the preparation for the arbitration while, perhaps, not the most civil, was not dishonest and did not show evidence of fraud or deceit. Some of Trask's answers to Asato and positions that Trask took may have been disappointing or frustrating to Asato. However, that does not mean that his conduct rose to the level of a breach of the duty of fair representation[vi].

HGEA hired Trask to represent HGEA at the arbitration hearing. While the underlying grievance involved Asato, the union has the exclusive right to arbitration under the CBA. This means that, at the arbitration stage, that grievance belongs to HGEA, not to Asato. HGEA, not Asato, makes the judgment calls as to how to proceed at this stage, and even if HGEA made the "wrong" call, that does not constitute a breach of the duty of fair representation.

Accordingly, the Board cannot find that HGEA violated its duty of fair representation to Asato by acting in bad faith.

3.5. Other Claims

Asato's remaining HRS § 89-13(a)(8) claim and the claim of a breach of the duty of fair representation are inextricably interdependent. Poe, 105 Hawai'i at 102, 94 P.3d at 657. If Asato does not prove HGEA breached its duty of fair representation, she lacks standing to pursue her claim against the employer. Poe, 105 Hawai'i at 104, 94 P.3d at 659. To put it another way, Asato's failure to prove that HGEA breached its duty of fair representation means that her HRS § 89-13(a)(8) claim against DOE must also fail. Tupola, at *39

Based on the Board's findings above, the Board must also dismiss the HRS § 89-13(a)(8) claim.

4. Order

For all of the foregoing reasons, the Board hereby grants HGEA's Motion for Directed Verdict because of Asato's failure to meet her burden of proof after the conclusion of her case-in-chief. This case is closed.

DATED: Honolulu, Hawai'i, May 5, 2021.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

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James Halvorson, Deputy Attorney General

[i] DOE is an "employer" or "public employer" within the definition found in HRS § 89-2, which defines such as:

> "Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

[ii] In this role, Asato was an "employee" or "public employee" within the definition found in HRS § 89-2, which defines such 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)].

[iii] HRS § 89-6 defines bargaining unit 3 as "Nonsupervisory employees in white collar positions".

[iv] 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.

[v] HRS § 89-13 states in relevant part:

> ***
>
> (b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wailfully to:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
>
> ***

[vi] To the lay person, the following remarks may be offensive, demeaning, and certainly unbecoming to an attorney and officer of the court:

> "Does this have anything to do with the case? I don't have time for stupid questions or general questions. Don't give me scenarios. I'm not your private attorney. I work for the union. If you want to learn the law, go to law school. I'm trying to plan and strategize the case. I don't want to give the DOE ammunition for their case. Only ask me things that are relevant to my case only."
>
> "Why you sue the union for? You're stupid to sue the union. You wanted this arbitration. I know if you lose this case, you're going to sue and blame the union, and when you do, I'm going to tear your ass apart on the witness stand."
>
> "Kevin is a fuck up, screw up, wimp. He does things half-assed. He's lazy. Well, sometimes the union does stupid things, and I have to go and clean up their mess."

> "Do you pay dues? Because this case is going to cost the union $40,000.00 and even if you get your job back, I don't think you could pay it back in dues. You know, 6 years ago, I wouldn't have even taken your case. If Sanford brought this case to me, I would have rejected it right there. I give this case a 30% chance of winning. Not even that, maybe a 20% chance."

These remarks are, however, insufficient to support a finding of a breach of the duty of fair representation in the instant case. The law, and not sensitive ears or thin skin, must prevail. Still, Respondent's counsel may have merely dodged the bullet and should take heed that these same words may, in other circumstances, be fairly construed as evidence to find a violation of an employee's right to fair representation and/or a prohibited practice.