NOTICE OF CORRECTION

A correction has been made to Decision No. 525

Case Name: In the Matter of Erin K. Kusumoto and Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO; and Department of Education, State of Hawai‘i

Case Nos: 20-CU-06-379, 20-CE-06-940

Date of Notice: October 25, 2024

Case Type: Prohibited Practice Complaint

Correction reason: Section III.A. incorrectly lists HSTA. The proper issue should state "Whether **HGEA** violated its duty of fair representation when it did not arbitrate Complainant's grievance."

The following parties have been notified through File & Serve Express:

Miles T. Miyamoto, Esq., Attorney for Complainant
Peter Trask, Esq., Attorney for Respondent HGEA
Amanda L. Donlin, Esq. Attorney for Respondent DOE

STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of ERIN K. KUSUMOTO, Complainant, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; and DEPARTMENT OF EDUCATION, State of Hawai‘i, Respondents.	CASE NOS. 20-CU-06-379 20-CE-06-940 DECISION NO. 525 FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

I. INTRODUCTION

On August 9, 2024, the Hawai‘i Labor Relations Board (Board) issued Order No. 4055 Minute Order that relayed the procedural history of this case and found that Complainant Erin Kusumoto's (Kusumoto) claims against Respondents Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA) and Department of Education, State of Hawai‘i (DOE) are denied. The Board addresses its decision in full below.

II. FINDINGS OF FACT

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

Kusumoto was a vice principal at Pearl City Highlands Elementary School (PCHES). During her tenure as vice principal at PCHES, Kusumoto had a personal relationship with the

school principal, Michael Nakasato (Nakasato). During the period of her personal relationship with Nakasato, Kusumoto used school facilities and work time to engage in sexual conduct with Nakasato.

A. DOE's First Investigation and Report

On October 23, 2017, Nakasato's wife, Cyd Nakasato (Nakasato's wife), visited PCHES campus to confront Kusumoto about her relationship with her husband. Nakasato's wife informed DOE staff that Kusumoto was having an affair with her husband. That same day, DOE Complex Area Superintendent (CAS) Clayton Kaninau (Kaninau) received a phone call from DOE Assistant Superintendent Rodney Luke regarding the campus visit by Nakasato's wife.

On November 1, 2017, Kaninau met with Kusumoto to discuss the October 23, 2017 visit by Nakasato's wife, and asked Kusumoto whether she and Nakasato were involved in a personal relationship. Kusumoto denied a personal relationship.

Following his discussion with Kusumoto, Kaninau assigned DOE Office of Human Resources, Investigations Section, Personnel Specialist Nanette Hookano (Hookano) to conduct a "fact-finding" report about the October 23, 2017 incident by separately interviewing Kusumoto and Nakasato.

On November 6, 2017, Hookano met with Kusumoto and explained that the facts gathered about the October 23, 2017 incident would be provided to Kaninau. Kusumoto denied any romantic or sexual relationship with Nakasato and denied exchanging personal private texts with him in her interview with Hookano.[1]

Hookano submitted her report to Kaninau that stated Kusumoto did not commit any misconduct. As a result, DOE took no disciplinary action against Kusumoto.

[1] Kusumoto denied discussing the October 23, 2017 incident with Nakasato prior to her interview with Hookano.

B. DOE's Second Investigation and Report

On March 20, 2018, Nakasato's wife emailed DOE employees alleging her husband and Kusumoto were having an affair and having sex at PCHES. On March 23, 2018, Kaninau directed Hookano to conduct an administrative investigation into the claims. Hookano completed her investigation on or about June 1, 2018, where she found that Kusumoto committed misconduct when she:

1. Used school facilities to engage in sexual conduct with the PCHES principal, before, during, and after work hours;
2. Engaged in sexual conduct with the principal off campus, during work hours; and
3. Lied to Kaninau during a face-to-face meeting when he asked her whether she was having a personal relationship with the principal.

Hookano concluded that Kusumoto violated DOE Code of Conduct, Board of Education (BOE) Policy 201-1, Ethics and Code of Conduct, BOE Policy 201-2, Accountability of Employees, and Superintendent's Leave of Absence Memoranda, dated May 6, 2016, and May 1, 2017.

On August 21, 2018, Kusumoto was terminated pursuant to Articles 6 and 12 of the Unit 6 collective bargaining agreement, Regulation #5110, and Procedure 5110.2 (collectively, CBA).

On September 1, 2018, HGEA filed a grievance challenging Kusumoto's termination. DOE denied the grievance. On January 3, 2019, HGEA filed a notice of arbitration, but did not advance Kusumoto's grievance to arbitration.

C. Union's Decision Not to Arbitrate

In an internal Grievance Arbitration Recommendation from HGEA Advocacy Chief Stacy Moniz (Moniz)[2] to HGEA Deputy Executive Director Debra Kagawa-Yogi (Kagawa-Yogi), dated October 23, 2019, Moniz recommended the union not to arbitrate the grievance. Moniz stated, "I do not believe we have the evidence or merit to prevail."

In a letter dated November 18, 2019, Kusumoto's father, Miles Miyamoto, Esq. (Attorney Miyamoto), followed up with HGEA on Kusumoto's previous offers, in letters dated January 27, 2019 and June 10, 2019, to provide Attorney Miyamoto as counsel for HGEA to arbitrate her grievance free of charge and to cover HGEA's share of arbitration costs.

In a letter dated November 26, 2019, HGEA informed Kusumoto that it would not pursue her grievance to arbitration.

III. ISSUES

The issues before the Board are:

A. Whether HSTA violated its duty of fair representation when it did not arbitrate Complainant's grievance.

B. Whether DOE violated HRS § 89-13(a)(8) when it terminated Complainant contrary to the CBA.

IV. ANALYSIS

A. Burden of Proof

HRS § 91-10(5) states:

> 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.

[2] Stacy Moniz joined the Board as a Board Member and Representative of Labor on August 17, 2023, replacing J N. Musto, who retired from the Board on August 16, 2023. Board Member Moniz is recused from this matter.

The Board's rules also provide that the complainant asserting an HRS Chapter 89 claim has "the burden of proving the allegations by a preponderance of the evidence." See Hawai'i Administrative Rules (HAR) § 12-43-34.

Preponderance of the evidence is "proof which leads the factfinder to find that the existence of the contested fact is more probable than its nonexistence." Minnich v. Admin. Dir. of the Courts, 109 Hawai'i 220, 228 (2005). The Board requires that the party carrying the burden of proof must produce sufficient evidence "and support that evidence with arguments in applying the relevant legal principles." State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982).

The Board finds that Kusumoto did not meet her burden of proof by a preponderance of the evidence as discussed further below.

B. Complainant's Hybrid Claim

Allegations against the union for breach of the duty of fair representation and employer for prohibited practices are considered a hybrid action. In Poe v. Hawaii Lab. Rels. Bd., 105 Hawai'i 97, 94 P.3d 653 (2004), the Hawai'i Supreme Court held that in order for an employee to prevail in a hybrid claim, the complainant must establish both 1) a breach of the collective bargaining agreement and 2) a breach of the duty of fair representation because the "two claims are inextricably interdependent. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both." 105 Hawai'i at 101-02, 94 P.3d at 656-57 (citations omitted).

1. Complainant Failed to Prove HGEA Breached Its Duty of Fair Representation

In Board Order No. 3745, the Board informed the parties that a violation of a duty of fair representation claim can be found only if HGEA's conduct toward Kusumoto was arbitrary,

discriminatory, or in bad faith.[3] "Mere negligence on the part of the union does not constitute a breach of the duty of fair representation." Slevira v. W. Sugar Co., 200 F.3d 1218, 1221 (9th Cir. 2000).

The United States Supreme Court held that unions must have "[a] wide range of reasonableness . . . in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Air Line Pilots v. O'Neill, 499 U.S. 65, 67, 78 (1991). A union does not act in an arbitrary manner where the challenged conduct involved the union's judgment in the handling of a grievance. Marino v. Writers Guild of America, East, Inc., 992 F.2d 1480, 1486 (9th Cir. 1993). 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.[4] Consequently, the Board narrowly construes HGEA's duty of fair representation and is deferential in its substantive examination of HGEA's actions.[5]

The United States Court of Appeals for the Ninth Circuit applies a two-step analysis to determine whether a union breached its duty of fair representation. [6] The Board adopted this two-step analysis. [7] First, the Board must determine whether the alleged union misconduct involved the union's judgment or whether it was procedural or ministerial. If the misconduct was within the union's judgment, then the Board must determine whether the action was discriminatory or in bad faith.

[3] Vaca v. Sipes, 386 U.S. 171, 173, 87 S. Ct. 903, 907, 17 L.Ed.2d 842, 848 (1967).
[4] Tupola, Order No. 3054, at *28.
[5] Tupola at *27.
[6] See Beck v. UFCW, Local 99, 506 F.3d 874 (2007).
[7] Mamuad v. Nakanelua, Board Case No. CU-10-331, Order No. 3337F, at *31 (2018).

Kusumoto asserts that HGEA lacked good reason to refuse to arbitrate her grievance even when she offered to provide her own counsel and pay for all costs on behalf of HGEA.[8] It is well-established that while a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, the individual employee has no absolute right to have his grievance taken to arbitration regardless of the provisions of the CBA. Vaca v. Sipes, 386 U.S. 171, 191, 87 S. Ct. 903, 917, 17 L.Ed.2d 842, 858 (1967) ("Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.")

Furthermore, Kusumoto's repeated insistence that her father represent HGEA in arbitration merits the Board to address her pointed argument. To allow any grievant the ability to determine whether to arbitrate or not, merely based on the ability to afford legal counsel and costs, would set a terrible, if not awkward precedent for the union, and divide the membership between the "haves" and "have nots" and directly contravene the very function and purpose of a union. Therefore, it was well within HGEA's judgment to decide to not proceed to arbitration, as a union's duty is not only for one member, but in consideration of its full membership.

The Board now examines whether HGEA's decision was discriminatory or made in bad faith.

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[8] In Complainant's Statement of Issues filed July 30, 2020, Complainant stated:

> Whether when Complainant 1) offered the pro bono services of her own attorney who is experienced in employment law litigation, 2) provided to [HGEA] arguments relied on and presented by [HGEA's Advocacy Chief] during the grievance process, which arguments supported that her removal was not based on proper cause, 3) conveyed to HGEA that she would bear the costs of any legal fees and HGEA's costs of arbitration, and 4) a grievance arbitration recommendation does not even mentioned Complainant's willingness to bear all costs of arbitration . . . HGEA's decision that denied Complainant the opportunity to proceed to arbitration was perfunctory or stemmed from inappropriate motive and was a failure of HGEA to meet its duty of good faith representation. .

Discriminatory conduct is established by substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. See Order No. 3745. "To establish that the union's exercise of judgment was in bad faith, the plaintiff must show substantial evidence of fraud, deceitful action or dishonest conduct." Beck v. UFCW, Local 99, 506 F.3d 874, 876 (9th Cir. 2007).

Kusumoto did not present any evidence to establish that HGEA's decision was discriminatory or in bad faith when it declined to accept her counsel's services free of charge. While Kusumoto alleges that HGEA's decision to deny her the opportunity to proceed to arbitration was perfunctory or based on an inappropriate motive, HGEA's November 26, 2019 letter to Kusumoto proves otherwise.

In this letter, Kagawa-Yogi explained that Kusumoto's termination was based on undisputed, substantiated findings of misconduct and violations of DOE policy. Kagawa-Yogi states:

> The alleged misconduct involves serious violations of the DOE Code of Conduct and BOE policies and is supported by substantial evidence. . . . Arbitral authority reflects that in the absence of compelling evidence that the employer abused its discretion or that the employer's decision to discharge was unreasonable, arbitrary, or capricious, arbitrators will not superimpose their judgment over that of the employer. The evidence in this case does not support a finding that the DOE abused its discretion or otherwise acted unreasonably, arbitrarily or capriciously in determining that your misconduct was egregious, and that termination was appropriate under the circumstances. Based on the foregoing, HGEA will not be pursuing this grievance to arbitration.

Moniz represented Kusumoto in DOE's investigative process as well as the grievances filed on her behalf concerning the same. In a declaration filed on January 10, 2022, Moniz stated:

> [A]fter a review of the entire BU 06 Grievance File, including but not limited to correspondence by and between the parties, DOE notices to [Kusumoto] on Leave Status, the Final Investigative Report, with all attachments, the Recommendation

> For Termination by CAS Kaninau, the Post Recommendation meeting with CAS Kaninau, the Pre-Determination meeting with Superintendent Kishimoto, I prepared my Grievance Arbitration Recommendation against proceeding to arbitration (Joint Exhibit 10) and forwarded the recommendation and grievance file to [Kagawa-Yogi]. . . .

The record shows that contrary to Kusumoto's assertions, HGEA conducted a thorough and legal analysis in determining the merit of the grievance as well as in its ultimate decision not to pursue arbitration. Kagawa-Yogi also testified at hearing extensively concerning the Union's rationale in refusing Kusumoto's offer, which concerned Attorney Miyamoto's inexperience with representing HGEA. Moniz's declaration also shows thorough analysis of the facts of the case before recommending against taking the grievance to arbitration. HGEA, therefore, did not perfunctorily reach its decision in determining it would not arbitrate Kusumoto's grievance. While Kusumoto may not have agreed with HGEA's analysis and decision, differences of opinion, legal or otherwise, is not evidence of discrimination or bad faith. Kusumoto did not present any evidence that Kagawa-Yogi or Moniz's decisions were inappropriately reached. As such, the Board finds that Kusumoto failed to prove that HGEA breached its duty of fair representation.

2. Complainant Does Not Have Standing to Pursue Her Case Against DOE

Because Kusumoto failed to carry her burden of proof showing HGEA violated its duty of fair representation, it is not necessary to address whether DOE violated the collective bargaining agreement when it terminated her on August 21, 2018. Nonetheless, the Board reviewed the pleadings, evidence, and testimonies in the record and find that the DOE did not violate HRS Chapter 89.

Therefore, the Board must dismiss the claims against DOE.

V. ORDER

Based on the above, the Board dismisses all claims against HGEA and DOE.

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

HAWAI‘I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

CLARK HIROTA, Member

Copies sent to:

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