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STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of ALICIA OMELAU, Complainant, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Hawai‘i Island Division, Respondent.	CASE NOS.: 24-CU-03-403a 24-CU-04-403b DECISION NO. 530 FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

I. INTRODUCTION AND STATEMENT OF CASE

On June 5, 2024, Complainant ALICIA OMELAU (Complainant) filed a prohibited practice complaint (Complaint) with the Hawai‘i Labor Relations Board (Board) against Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Hawai‘i Island Division (HGEA or Union).

During a prehearing conference on July 12, 2024, Complainant orally requested to amend her complaint to include her employer, the DEPARTMENT OF FINANCE, County of Hawai‘i (Employer or County). The Board granted Complainant's request and set June 26, 2024 as the deadline to file her amended complaint.

Complainant filed her First Amended Prohibited Practice Complaint on June 27, 2024. [1]

On July 8, 2024, HGEA and Employer each filed a Motion to Dismiss in Lieu of Answer.

[1] Complainant's first amended prohibited practice complaint was filed on June 26, 2024 at 4:44 p.m. Hawai‘i Standard Time. Pursuant to Hawai‘i Administrative Rule 12-43-5(c)(3), because the Board's office was closed, the document is deemed to have been filed the next day, when the Board's office is open. However, because the lateness of Complainant's filing was caused by issues with the Board's third-party filing system File & ServeXpress (FSX), the Board accepted the amended complaint.

On July 12, 2024, the Board held a prehearing conference, where Complainant requested to amend her First Amended Prohibited Practice Complaint because she failed to file her allegations against the Union due to an inadvertent error. HGEA objected to Complainant's motion while Employer took no position. The Board, over the HGEA's objection, granted Complainant's second motion to amend her prohibited practice complaint. Further, in light of Complainant's second motion to amend, the Board found HGEA's and Employer's Motions to Dismiss in Lieu of Answer moot and dismissed both motions.

On July 18, 2024, Complainant filed her Second Amended Prohibited Practice Complaint.[2]

The County and HGEA each filed a Motion to Dismiss Second Amended Prohibited Practice Complaint (collectively, Motions to Dismiss) on July 30, 2024, and July 31, 2024, respectively. Complainant filed her opposition to both motions on August 5, 2024.

After a prehearing conference on August 6, 2024, where the Board heard oral arguments on the County's and HGEA's respective Motions to Dismiss, the Board issued Order No. 4056 dismissing Employer as a party to the case. The Board also denied HGEA's Motion to Dismiss Complainant's Second Amended Prohibited Practice Complaint.

On October 2 and 3, 2024, the Board held a hearing on the merits. Complainant filed her post hearing brief on October 30, 2024, and HGEA filed its post hearing brief on November 3, 2024.

II. ISSUE

Did HGEA wilfully breach its duty of fair representation to Complainant in violation of Hawai‘i Revised Statutes (HRS) § 89-13(b)?

III. FINDINGS OF FACT

Based on the full record herein, including the testimony and documentary evidence presented at the hearing on the merits, the Board makes the following Findings of Fact. Any conclusion of law improperly designated as a finding of fact, shall be deemed or construed as a conclusion of law; any finding of fact improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

Complainant was employed by the County as a Supervising Vehicle Registration & Licensing Clerk. Complainant was, at all relevant times, an "employee" or "public employee," as defined in HRS § 89-2, of the DEPARTMENT OF FINANCE, County of Hawai'i, and a member of bargaining unit 4 (supervisory employees in white collar positions). [3]

[2] FSX experienced technical difficulties. As such, even though Complainant filed her Second Amended Complaint after 4:30 p.m. HST, the Board allowed the late filing.

[3] Complainant was a member of BU 04. However, when she was demoted to a nonsupervisory position, she became a member of BU 03 (non-supervisory employees in white collar positions).

HGEA is an employee organization within the meaning of HRS § 89-2 and duly certified as the exclusive bargaining representative, as defined in HRS § 89-2 of employees in bargaining units 03 and 04.

DEPARTMENT OF FINANCE, County of Hawai'i was, at all relevant times, an "employer" or "public employer" as defined in HRS § 89-2.

A. Personal Improvement Plan

On or about March 1, 2021, Complainant contacted HGEA and spoke with HGEA Union Agent John Higgins (Higgins) when she allegedly started to experience issues at the workplace involving harassment and a hostile work environment.

On or about May 18, 2021, Complainant again contacted HGEA when she was placed on a personal improvement plan (PIP) by Employer. As a result, on June 8, 2021, Higgins filed a step 1 grievance on Complainant's behalf and requested among other things, rescission of Employer's actions. HGEA also requested that Employer provide Complainant's entire personnel file. The Employer did not respond to the step 1 grievance and no further action was taken by HGEA.

During the weekly PIP meetings between Employer and Complainant, an HGEA union representative was also present. However, around October 6, 2021, Employer informed Complainant and HGEA that it objected to having an HGEA union representative present at the PIP meetings. Thereafter, an HGEA union representative was not present at the PIP meetings.

On February 8, 2022, Employer informed Complainant that she failed her PIP and as a result demoted her to Vehicle Registration & Licensing Clerk effective March 1, 2022.

On February 28, 2022, HGEA Hawaii Division Chief Solette Perry (Perry) had an email exchange with Employer regarding Complainant's work location in light of her demotion.

B. Verbal Reprimands Regarding Tardiness

On July 2021, Higgins filed a step 1 grievance on Complainant's behalf regarding four verbal reprimands Complainant received from Employer documenting Complainant's tardiness; and requested, among other things, rescission of Employer's actions. HGEA also requested that Employer provide Complainant's entire personnel file. The Employer did not respond to the step 1 grievance and no further action was taken by HGEA.

On August 9, 2021, Higgins filed an almost identical step 1 grievance letter as the July 30, 2021 letter regarding the verbal reprimands that Complaint received for tardiness. However, no further action was taken by HGEA on this grievance. The Employer did not respond to the step 1 grievance and no further action was taken by HGEA.

C. Overtime Investigation

On September 1, 2021, Complainant received a letter from Employer informing her that she was being investigated for requesting 54 minutes of overtime without prior authorization.

As a result, HGEA Union Agent Higgins had an email exchange with Employer, who clarified that no discipline would result from the investigation.

At the conclusion of the investigation, Employer granted the additional overtime and closed the investigation.

D. Workplace Relocation

At some point, Complainant was informed that her office was being moved from the Hilo Drivers License Office to a desk right outside her immediate supervisor's office, whom Complainant alleged was the source of the workplace harassment and retaliation claims. Consequently, on September 17, 2021, Higgins sent a "cease and desist" letter on Complainant's behalf to Employer regarding her workplace relocation and requested a consultation on the issue.

After Employer sent HGEA a written response declining to consult on the relocation, HGEA Union Agent Higgins sent Employer a step 1 grievance letter on September 29, 2021, regarding Complainant's workplace relocation and requested, among other things, recission of Employer's actions. HGEA also requested that Employer provide Complainant's entire personnel file.

Employer argued that the matter was not grievable and denied the grievance in a written letter to HGEA. Higgins then filed another step 1 grievance on October 20, 2021, again requesting recission of Employer's actions and that Employer provide Complainant's entire personnel file. However, no further action was taken by HGEA on this grievance.

E. HGEA Step 2 Grievance Letter

On July 11, 2022, Perry filed a step 2 grievance with Employer on Complainant's behalf regarding the hostile work environment, the workplace relocation, and Complainant's demotion. [4] HGEA requested a recission of Employer's actions and requested Complainant's entire personnel file.

Employer responded by letter to HGEA's step 2 grievance stating that it was untimely. Specifically, that the Complainant's demotion occurred on March 1, 2022; and according to the collective bargaining agreement, any grievance should have been filed within 20 working days of the action. Further, in regard to the workplace relocation that occurred in 2021, after Employer denied the step 1 grievance, HGEA could have filed a step 2 grievance but did not. As for the hostile workplace claims, again Employer stated according to the collective

[4] The title of the letter indicates that it was a step 2 grievance, while the body of the letter references it as a step 1 grievance. However, Employer, HGEA, and Complainant all refer to it as a step 2 grievance.

bargaining agreement, any grievance should have been filed within 20 working days of the violation when the violation first became known or should have become known.

HGEA then requested arbitration for the step 2 grievance and hired attorney Peter Trask to represent Complainant.

During the arbitration, Perry explained in a declaration that in her professional judgment, she felt it would be futile to file a step 1 grievance given all the prior step 1 grievances HGEA filed on behalf of Complainant; hence, she didn't file a step 1 grievance and instead filed a step 2 grievance.

During the course of the arbitration, the County brought up the issue of whether the grievance was subject to arbitration, or the "arbitrability of the grievance." On February 20, 2024, the arbitrator issued a decision finding that it was not an arbitrable grievance because the process for filing and adjudicating the grievance as laid out in the CBA was not followed. Specifically, the CBA required that a step 1 grievance be filed first, then to a step 2 grievance, if necessary. However, that was not done in Complainant's case. Rather, HGEA chose to immediately file a step 2 grievance. The arbitrator questioned why none of the prior step 1 grievances were advanced to a step 2 grievance. Further, by filing this all-encompassing step 2 grievance, it created an issue of timeliness of the grievance.

Despite the arbitration decision being issued on February 20, 2024, Complainant was not informed or provided the arbitration decision from HGEA until April 24, 2024. Further, HGEA only provided the arbitration decision to Complainant after she learned of it and requested it.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Relevant Statutory Provisions

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.

The preponderance of the evidence is defined as "proof which leads the [trier of fact] to find that the existence of the contested fact is more probable than its existence." Minnich v. Admin. Dir. of the Courts, 109 Hawaii 220, 228 (citing Masaki v. Gen. Motors Corp., 71 Haw. 1, 14, 780 P.2d 566, 574 (1989)); Coyle v. Compton, 85 Hawaii 197, 202-03 (1997) (citing Strong, McCormick on Evidence § 339, at 439 (4th ed. 1992)).

The Board has further interpreted this section "to mean that the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles. Henceforth, if any party fails

to present sufficient legal arguments with respect to any issue, the Board shall find that the party failed to carry its burden of proof and dispose of the issue accordingly." State of Hawaii Organization of Police Officers v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982).

HRS §89-13(b) provides in relevant part:

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

B. Duty of Fair Representation

HGEA, as the exclusive bargaining unit representative of bargaining units 03 and 04 employees, shall be responsible for representing the interest of all employees without discrimination and without regard to employee organization membership. See HRS § 89-8(a).

The Supreme Court has said, "the undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation." Humphrey v. Moore, 375 U.S. 335, 342, 11 L. Ed. 2d 370, 84 S. Ct. 363 (1964).

A union breaches this duty only when its "conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967). This duty is designed to ensure that unions fairly represent the interests of all of their members without exercising hostility of bad faith. Id. The Supreme Court has further held that "an employee has no absolute right to have a grievance taken to arbitration, but a union may not arbitrarily ignore a meritorious grievance nor process it perfunctorily. Id. at 191. However, the grievance process need not be error free – to constitute a breach of the duty of fair representation, more than a mere error of judgment must occur. Hines v. Anchor Motor Freight, 4247 U.S. 554, 571, 47 L.Ed. 2d 231, 96 S. Ct. 1048 (1976).

Therefore, a breach of the duty of fair representation violates HRS § 89-8(a) and constitutes a prohibited practice under HRS § 89-13(b)(4). Lee v. United Pub. Workers, AFSCME, Local 646, AFL-CIO, 125 Hawai'i 317, 324, 260 P.3d 1135, 1142 (Haw. Ct. App. 2011).

However, the Supreme Court recognized that unions have broad discretion to act in what they perceive to be their members' best interests. Ford Motor Co. v. Huffman, 345 U.S. 330, 337-39, 97 L. Ed. 1048, 73 S. Ct. 681 (1953). As a result, courts have "stressed the

importance of preserving the union's discretion by narrowly construing the unfair representation doctrine. Johnson v. United States Postal Serv., 756 F.2d 1461, 1465 (9th Cir. 1985).

i. Arbitrary Standard

As this Board has previously held, a union's actions are arbitrary "only if in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." Air Line Pilots v. O'Neill, 499 U.S. 65, 78 (1991). Arbitrary conduct has been defined as "unintentional conduct showing 'an egregious disregard for the rights of union members,' or even a 'reckless disregard' of such rights, conduct 'without a rational basis,' and omissions that are 'egregious, unfair and unrelated to legitimate union interests.'" Johnson v. United States Postal Serv., 756 F.2d 1461, 1465 (9th Cir. 1985) (citing Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1089 (9th Cir. 1978)). The "arbitrariness analysis looks to the objective adequacy of the union's conduct." Simo v. Union of Needletrades, 322 F.3d 602, 618 (9th Cir. 2003).

A union does not act arbitrarily where the challenged conduct involved the union's judgment in the handling of a grievance. Patterson v. Int'l Bhd. of Teamsters, Local 959, 121 F.3d 1345, 1349 (9th Cir. 1997).

The courts have consistently held that unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances. See, e.g, Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1482; Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1273; Singer v. Flying Tiger Line, Inc., 652 F.2d 1349, 1355; Ness v. Safeway Stores, Inc., 598 F.2d 558, 560 (9th Cir. 1979); see also Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 571, 47 L. Ed. 2d 231, 96 S. Ct. 1048 (1976).

A union's conduct may not be deemed arbitrary simply because of an error in evaluating the merits of a grievance, in interpreting particular provisions of a collective bargaining agreement, or in presenting the grievance at an arbitration hearing. See Dutrisac, 749 F.2d at 1273. Courts have held that they will not attempt to second-guess a union's judgment when a good faith, non-discriminatory judgment has in fact been made. Peterson v. Kennedy, 771 F. 2d 1244, 1254, 1985 U.S. App. LEXIS 23077, 26 (1985). It is for the union, not the courts, to decide whether and in what manner a particular grievance should be pursued. Id.

Applying these standards to the evidence in this case, the Board finds that HGEA's actions in handling Complainant's grievances against Employer were a valid exercise of its judgment and not arbitrary for the following reasons.

While Complainant argues that HGEA's "vague assurances about the strength of her case and how her case is moving forward" and what she feels was HGEA's mishandling of her grievances demonstrate that HGEA violated their duty of fair representation to her, the Board finds that it does not.

It is undisputed that HGEA filed grievances on behalf of Complainant each time she reached out to them regarding an issue that arose with Employer. When Complainant was placed on a PIP, HGEA filed a step 1 grievance, as well as attended the weekly PIP meetings. And as HGEA correctly pointed out, being placed on a PIP is not a grievable matter but HGEA still took action on behalf of Complainant when she reached out to them about the PIP.

When Employer issued a written letter documenting Complainant's continued tardiness, HGEA filed a step 1 grievance letter. When Employer relocated Complainant's workplace, HGEA filed a step 1 grievance letter. And eventually, HGEA filed a step 2 grievance letter on July 11, 2022 regarding the hostile work environment, the workplace relocation, and Complainant's demotion. Thus, HGEA responded every time Employer took a negative action against Complainant.

While it is undisputed that HGEA did not advance any of the step 1 grievances to a step 2 grievance when Employer failed to respond; the Board finds that such a decision to not file any step 2 grievances is considered a valid exercise of HGEA's judgment.

Similarly, the Board finds that HGEA's decision to file a step 2 grievance in July 2022 was a valid exercise of the union's judgment, despite it creating a potential issue of timeliness of such a filing as pointed out by the arbitrator. The courts have clearly stated that it is not for the Board to second guess how a union processed a grievance

In light of the wide deference that is given to the unions' judgment in processing grievances, the Board finds that HGEA's actions are not considered arbitrary pursuant to well-settled case law.

ii. Discriminatory Standard

Whereas the standard of arbitrariness looks to the objective adequacy of the union's conduct, the discrimination and bad faith analyses look to the subjective motivation of the union officials. Unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances. Discriminatory conduct may be established by substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. Mamuad v. Nakanelua, Order No. 3337, Board Case No. CU-10-33, at *37 (2018) (Citations omitted). The burden of proof is on the party initiating the action.

In the instant case, Complainant has not produced any evidence of discriminatory conduct on the part of HGEA. Therefore, the Board finds that HGEA did not discriminate against Complainant.

iii. Bad Faith

Whether or not a union's actions are in bad faith calls for a subjective inquiry and requires proof that the union acted (or failed to act) due to an improper motive. Bare assertions of the state of mind required for 'bad faith' must be supported with subsidiary facts. For a bad faith claim to be established, there must be "substantial evidence of fraud, deceitful action, or

dishonest conduct." Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 301, 91 S. Ct. 1909, 29 L.3d. 2d 473 (1971). As the party initiating the complaint, the burden is on the Complainant to produce evidence of bad faith.

In this case, the Board finds that Complainant produced no evidence of bad faith. While Complainant argues that HGEA repeatedly assured her that she had a strong case yet could not locate her files or any of the emails she provided, requiring her to resubmit them to HGEA, and that she only had one conversation with Peter Trask, the attorney handling her grievance, these actions do not rise to the level of bad faith. Therefore, the Board finds that HGEA did not act in bad faith in handling Complainant's grievances.

Looking at all of the evidence presented, the Board finds that HGEA did not breach its duty of fair representation to Ms. Omelau and therefore HGEA's conduct does not rise to the legal standard of wilful violation of a prohibited practice under HRS Chapter 89. However, the Board notes that HGEA actions came perilously close to it.

C. No Violation of the CBA

It is a prohibited practice for a union to wilfully violate the terms of a collective bargaining agreement (CBA). See HRS § 89-13(b)(5). In other words, did HGEA "consciously, knowingly, or deliberately" intend to violate the terms of the CBA when Perry filed a step 2 grievance. See Hawaii Government Employees Association v. Casupang, 116 Hawai'i 73, 97, 170 P.3d 324, 348 (2007).

Article 11 in the Unit 03 and Unit 04 CBA govern the grievance procedure and Article 11A defines the timeline for a grievance for HGEA. Specifically, Article 11 Paragraph D of the CBA provides for the procedures for a Step 1 grievance, Article 11 Paragraph E provides for the procedures for a Step 2 grievance, and Articles 11 Paragraph G provides for the procedures for arbitration.

Article 11 Paragraph D of the CBA states that if the grievant is not satisfied with the result of the informal conference, the grievant of the Union may submit a written statement of the grievance.

Article 11 Paragraph E states: "if the grievance is not satisfactorily resolved at Step 1, the grievant of the Union may appeal the grievance in writing.

Article 11 Paragraph G states: "if the grievance is not resolved at Step 2 and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or the Employer's representative of its desire to arbitrate. . ."

The Board finds that HGEA's action of filing a step 2 grievance instead of filing a step 1 grievance as required by the CBA, was not a wilful violation. Rather, as explained by Perry, given Employer's response to all of the other step 1 grievances that were filed on behalf of Complainant, Perry determined that it would be futile to file another grievance at step 1 and executed a calculated decision in her judgment to advance the grievance directly to step 2.

Perry's judgment appeared to be a continued attempt to follow the CBA, not an intention to violate its terms.

V. ORDER

Based on the above, the Board finds that Complainant failed to prove that HGEA breached its duty of fair representation and thereby failed to show that HGEA committed a prohibited practice under HRS § 89-13(b). This case is closed.

DATED: Honolulu, Hawai'i, June 17, 2025.

HAWAI'I LABOR RELATIONS BOARD

SHARI MONIZ, Member

CLARK HIROTA, Member

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