

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-03-148
LEWIS W. POE,)	DECISION NO. 439
)	FINDINGS OF FACT, CONCLUSIONS
Complainant,)	OF LAW, AND ORDER
and)	
HAWAII GOVERNMENT EMPLOYEES)	
ASSOCIATION, AFSCME, LOCAL 152,)	
AFL-CIO,)	
)	
Respondent.)	

In the Matter of)	CASE NO. CU-03-174 (On Remand)
LEWIS W. POE,)	
)	
Complainant,)	
and)	
HAWAII GOVERNMENT EMPLOYEES)	
ASSOCIATION, AFSCME, LOCAL 152,)	
AFL-CIO,)	
)	
Respondent.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

LEWIS W. POE's (POE or Complainant), prohibited practice complaint filed on October 6, 2000 in Case No. CU-03-174 was remanded for further action to the Hawaii Labor Relations Board (Board) pursuant to Order Vacating Board's Order No. 1946, Reversing and Modifying Board's Rulings, and Remanding Consolidated Case to Board with Instruction for Further Proceedings, issued July 3, 2001 by the First Circuit Court.¹

¹Civil No. 00-1-3607-11 EEH, Lewis W. Poe, Complainant-Appellant, vs. Hawaii Labor Relations Board, State of Hawaii, Appellee, and Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, Respondent-Appellee.

On July 31, 2001, the Board held a Pre-hearing Conference with Complainant, proceeding pro se, and the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union).

On September 4, 2001, the Board held an evidentiary hearing and on October 18, 2001, the parties filed post-hearing briefs. Having considered the arguments, testimony, and evidence presented, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. Complainant POE is a public employee and a member of Bargaining Unit (BU) 03 within the meaning of Hawaii Revised Statutes (HRS) § 89-2. POE is employed as a Harbor Traffic Controller at Aloha Tower by the State of Hawaii, Department of Transportation (DOT), Harbors Division.
2. Respondent HGEA is the exclusive representative, within the meaning of HRS § 89-2, of BU 03 members including Complainant.
3. The HGEA and the State of Hawaii, at all times relevant, have been parties to a BU 03 collective bargaining agreement (Contract).
4. On or about June or July of 1998, Complainant wrote to HGEA business agent Royden Kotake (Kotake) to inform the HGEA that the employer was violating Article 21 of the BU 03 Contract by not providing any ten minute breaks to the Harbor Traffic Controllers, i.e., Complainant and his co-workers at the Aloha Tower. Kotake investigated the merits of Complainant's complaint. The HGEA was asked by Complainant to file a class grievance on behalf of Complainant and his co-workers.
5. On July 29, 1998, Complainant filed a prohibited practice complaint against the HGEA for failing to file a class grievance on behalf of Complainant and his co-workers based on the employer's violation of Article 21 for not providing any ten minute breaks in Case No. CU-03-148.
6. During the course of Board proceedings in Case No. CU-03-148, Complainant received an Affidavit by Kotake dated September 18, 2000, and learned that the HGEA and employer had "entered into settlement negotiations in which it is being proposed that all harbor traffic controllers, including Complainant Poe, will receive twice their pay for their ten minute morning and afternoon

paid breaks, irrespective of whether the harbor traffic controllers actually receive said breaks.”²

7. Upon learning that the HGEA had entered into negotiations with the employer, Complainant filed the instant complaint on October 6, 2000 in Case No. CU-03-174 alleging that HGEA entered into negotiations with the public employer outside of the contractual grievance procedure framework to settle a dispute over the failure to provide rest breaks in accordance with Article 21 (Rest Periods) for Complainant and his co-workers employed by the DOT Harbors Division in violation of the BU 03 Contract and HRS § 89-11(a),³ thereby violating HRS §§ 89-13(b)(4) and (5).⁴

²See Affidavit of Royden Kotake, September 18, 2000, paragraph 4. The pertinent text of paragraphs 4 and 5 states:

4. . . . and in addition the aforesaid Employer will endeavor to give the harbor traffic controllers their ten minute morning and afternoon breaks at a practicable time during their shifts; and

5. This proposal, if adopted, will adequately compensate the harbor traffic controllers, including Complainant Poe, for the foregoing dispute in the underlying grievance, inasmuch as they will be receiving double their pay for the break period to compensate them for the fact that there may be a few times in which they have to forego their break period because of a congested situation in the harbor which prohibits the harbor traffic controllers from safely taking their breaks, and in addition affords the harbor traffic controllers the opportunity to take their morning and afternoon breaks whenever possible. Rarely is there a situation for the harbor traffic controllers in which they are totally unable to take their morning or afternoon breaks at some time during their daily work shifts.

³HRS ' 89-11 states:

(a) A public employer shall have the power to enter into written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. In the absence of such a procedure, either party may submit the dispute to the board for a final and binding decision. A dispute over the terms of an initial or renewed agreement does not constitute a grievance.

⁴HRS ' 89-13(b) states in part:

8. On October 24, 2000, the Board issued Order No. 1946, Order Consolidating Cases, Sua Sponte, Granting Respondent HGEA's Motion to Dismiss Filed September 18, 2000 and Dismissing, Sua Sponte, Complainant's Prohibited Practice Complaint filed on October 6, 2000.
9. On POE's appeal, the First Circuit Court ruled that the Board's dismissal of Case No. CU-03-148 was improper and contrary to law "because it dismissed the complaint that Poe had brought, which should have been defaulted under the board's rules in his favor."⁵ HGEA's failure to file a class grievance vis-a-vis its duty of fair representation was at issue in Case No. CU-03-148, but is not an issue in the instant complaint.
10. Although HGEA failed to file a class grievance for the Aloha Tower Harbor Traffic Controllers over rest periods under Article 21, Complainant on his own behalf filed an individual grievance as provided under Article 11, Grievance

It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

* * *

- (4) Refuse or fail to comply with any provision of this chapter; or
- (5) Violate the terms of a collective bargaining agreement.

⁵See, Partial Transcript of Proceedings before the Honorable Eden Elizabeth Hifo, Judge Presiding, hearing held on Tuesday, June 12, 2001. See also, Order Vacating Board's Order No. 1946, Reversing and Modifying Board's Rulings, and Remanding Consolidated Case to Board with Instruction for Further Proceedings, issued July 3, 2001 in Civil No. 00-1-3607-11.

Procedure, against the DOT for failing to provide rest breaks in 1998.⁶ The Board finds that Complainant invoked the grievance procedure within the meaning of HRS § 89-11(a) over the DOT's failure to provide Complainant rest breaks.

11. The BU 03 Contract contains Article 11, Grievance Procedure, amended by Memorandum of Agreement on July 17, 2000, which provides for both an Informal Step and formal Steps 1 to 3, and Step 4 Arbitration, “[i]f the grievance is not satisfactorily resolved at Step 3 and the Union desires to proceed with arbitration.” Article 11 also provides, in part, that:

A. Any complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure. By mutual consent of the Employee or the Union and the Employer, any time limits within each step may be extended. . . .

B. An individual Employee may present a grievance without intervention of the Union, up to and including Step 3, provided the Union has been afforded an opportunity to be present at the meeting(s) on the grievance. Any adjustment made shall not be inconsistent with the terms of this Agreement.

* * *

F. If the Union has a class grievance involving Employees within a department, it may submit the grievance in writing to the department head or designee. Time limits shall be the same as in individual grievances, as prescribed in Paragraph “A”, and the procedures for appeal shall be the same as in Step 3.

⁶See Exhibit 4b, Affidavit of Royden Kotake, September 18, 2000, attachment “A.” Upon filing Case No. CU-03-148, Complainant informed HGEA by letter to Kotake, dated December 10, 1998, that he “effectively revoked” his earlier requests for formal and/or fair representation in a potential class grievance.

DISCUSSION

Complainant seeks to have this Board find a prohibited practice against HGEA because it entered into negotiations to resolve the employer's failure to provide rest breaks to Harbor Traffic Controllers at Aloha Tower under Article 21 without filing a class grievance under Article 11F of the BU 03 Contract. Complainant alleges the HGEA violated both the grievance procedure under Article 11F of the BU 03 Contract and HRS § 89-11(a) by entering into negotiations with a proposal to resolve a violation of Article 21, without filing a class grievance on behalf the Harbor Traffic Controllers, including Complainant.

The issue before the Board is whether HGEA's failure to file a class grievance before entering into negotiations with the employer to resolve a violation of the rest periods provision on behalf of a class of Harbor Traffic Controllers, including Complainant, violates HRS § 89-11(a) and Article 11F of the BU 03 Contract. The burden of proof is on Complainant to show by a preponderance of the evidence that the HGEA violated HRS § 89-11(a) and Article 11 of the BU 03 Contract.

Complainant submits that HRS § 89-11(a) requires the Union to follow the grievance procedure and that the integrity of the collective bargaining agreement is being undermined by the HGEA for not having done so. To support his interpretation of HRS § 89-11(a), Complainant relies on Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965) (Maddox), and the Court's reasoning that "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes . . ." ⁷ Finally, Complainant argues that as an individual grievant Complainant is

⁷The Supreme Court in Maddox, supra, at pp. 652-53, explained the exhaustion of remedies policy as follows:

As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress. (Footnote omitted.) If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. (Citations omitted). But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant. (Citations omitted). Union interest in prosecuting employees grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved

bound by the terms of the Contract's grievance procedure, and therefore it is only fair that the Union be bound as well.

The HGEA counters, that Complainant's reliance on Maddox, supra, is misplaced and factually inapposite. The issue was whether an employee was required to exhaust the grievance procedures of his collective bargaining agreement before filing a lawsuit against the employer in court. The Supreme Court held that under the Labor Management Relations Act exhaustion of contractual remedies by an employee was required. However, HGEA argues that Maddox does not support the proposition that the Union is required by statute to invoke the grievance procedure before entering into negotiations with the employer as a means of settling the dispute over rest breaks in accordance with the Contract.

In Santos v. State, Dept. of Transp., Kauai Div., 64 Haw. 648, 646 P.2d 962 (1982) (Santos), the Hawaii Supreme Court relied on Maddox for the proposition "that before an individual can maintain an action against his employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his employer and the [union]." Id., at 655. "The rule is in keeping with prevailing National Labor Relations policy and Hawaii policy favoring arbitration as a dispute settlement mechanism." Id.; see also, Winslow v. State, 2 Haw.App. 50, 625 P.2d 1046 (1981) (Winslow).

Since Santos, the Court has recognized strong policy considerations supporting the exhaustion requirement to "preserve the integrity and autonomy of the collective bargaining process, allowing the parties to develop their own uniform mechanism of dispute resolution;" and in addition, to promote judicial efficiency "by encouraging the orderly and less time-consuming settlement of disputes through alternative means." Hokama v. University of Hawaii, 92 Haw. 268, 287, 990 P.2d 1150 (1999).

The Board finds Maddox instructive in that it distinguishes the responsibility of an individual grievant/employee to exhaust the contractual remedies from the Union's responsibility as exclusive bargaining representative to "participate actively in the continuing administration of the contract." Id. at 653. Complainant fails to appreciate the distinction in his role as an individual grievant and that of his exclusive bargaining representative within the context of the grievance procedure to resolve employee grievances against the public employer. Under the terms of the Article 11 Grievance Procedure an individual Employee, like Complainant, can proceed with or without assistance from a Union agent from the Informal Step, through Steps 1 to 3. When the employee proceeds without the assistance of a Union agent, the Union must be "afforded an opportunity to be present at the meetings on the

employee until the employee has attempted to implement the procedures and found them so. [Emphasis added.]

grievance. Any adjustment made shall not be inconsistent with the terms” of the Contract. Articles 11(A) and 11(B) of the Unit 03 Contract. The Arbitration is the last step in the grievance procedure for the Union, not the individual grievant. Whether a grievance is settled prior to or in the course of arbitration, negotiating a settlement with the employer is ultimately the responsibility of the exclusive bargaining representative, not the individual grievant.

Indeed, the Board finds the Union’s negotiations and proposal to resolve the DOT’s violation of Article 21 rest breaks for the impacted class of Harbor Traffic Controllers, are part and parcel of its job as the exclusive bargaining representative and consistent with its duty of fair representation under HRS § 89-8(a), which states, in part:

The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regarding to employee organization membership. (Emphasis added).

Complainant’s interpretation of HRS § 89-11(a) seeks to impose the exhaustion requirement on the Union by assuming it must begin with the filing of a class grievance. To impose the rule of exhaustion against the Union as Complainant argues, rather than the employee, as articulated in Maddox, and adopted in Santos, and Winslow is without legal precedent. Moreover, it would tie the hands of the exclusive bargaining representative by limiting its ability to negotiate a settlement at anytime in the course of the grievance procedure including the Informal Step where no written grievance is filed. Such a result would undermine the method of resolving disputes agreed to by the Union and public employer. On this basis, the Board declines to adopt Complainant’s interpretation of HRS § 89-11(a).

While Complainant had no problem proving that the Union did not file a class grievance, the record does not support a finding that when the Union entered into negotiations with the DOT to resolve the violation of Article 21 for all of the Harbor Traffic Controllers, it was operating outside the grievance procedure.

In the instant case, there is no dispute that HGEA failed to file a class grievance on behalf of all the Harbor Traffic Controllers before entering into negotiations. Nevertheless, it was Complainant who first informed Union Agent Kotake in writing that the employer was violating the rest periods provision. Kotake investigated the merits of the allegations by Complainant. And although the Union failed to file a class grievance, the

record shows that Complainant filed and pursued an individual grievance on his own behalf over the employer's failure to provide rest breaks in accordance with the grievance procedure.

According to HGEA business agent Kotake:

With regard to the resolution of the underlying grievance in this case, the HGEA/AFSCME and the Employer of Mr. Poe, namely the Honorable Benjamin J. Cayetano, in his capacity as Governor of the State of Hawaii, have entered into settlement negotiations in which it is being proposed that all harbor traffic controllers, including Complainant Poe, will receive twice their pay for their ten minute morning and afternoon paid breaks, irrespective of whether the harbor traffic controllers actually receive said breaks, and in addition the aforesaid Employer will endeavor to give the harbor traffic controllers their ten minute and morning and afternoon breaks at a practicable time during their shifts; and

5. This proposal, if adopted, will adequately compensate the harbor traffic controllers, including Complainant Poe, for the foregoing dispute in the underlying grievance, inasmuch as they will be receiving double their pay for the break period to compensate them for the fact that there may be a few times in which they have to forego their break period because of a congested situation in the harbor which prohibits the harbor traffic controllers from safely taking their breaks, and in addition affords the harbor traffic controllers in the opportunity to take their morning and afternoon breaks whenever possible. Rarely is there a situation for the harbor traffic controllers in which they are totally unable to take their morning or afternoon breaks at some time during their daily work shifts. See, Exhibit 4b.

The Union entered into negotiations with the DOT to resolve Complainant POE's underlying individual grievance filed in 1998 over the failure to provide rest breaks in accordance with Article 21 of the BU 03 Contract. Consequently, the Union's proposal to "adequately compensate the harbor traffic controllers, including Complainant Poe, for the underlying grievance" was properly within its responsibility as the exclusive bargaining representative. Therefore, it was not necessary for the Union to file a formal class grievance in order to enter into negotiations knowing that all of the Harbor Traffic Controllers were impacted, and not just Complainant. For these reasons, the Board cannot agree with Complainant that the Union has failed to follow the grievance procedures provided under

Article 11 of the contract by not filing a class grievance at the outset and is therefore, precluded from negotiating in good faith with the Employer, under the facts as presented by the instant complaint.

Whether the Union formally filed a class grievance, or, as in this case, knows that Complainant has filed an individual grievance over the employer's failure to provide rest breaks, it is the Union's status as exclusive bargaining representative within the meaning of HRS § 89-8(a) that affords it the capacity to enter into good faith negotiations to resolve a dispute involving a misapplication of a contractual provision that impacts a group of its members. Moreover, in the event the Union is unable to negotiate a settlement, the option of filing a class grievance that includes arbitration is not foreclosed based on information that the violation continues.

The Board concludes that HRS § 89-11(a) does not prohibit the Union from entering into good faith negotiations with the public employer absent the initial filing of a class grievance to resolve an underlying grievance filed by Complainant. Accordingly, its failure to file a class grievance prior to entering into negotiations with the DOT, does not violate the terms of the grievance procedure, Article 11 of the BU 03 Contract. Furthermore, the Board concludes that HGEA entered into negotiations consistent with its responsibility as the exclusive bargaining representative under HRS § 89-8(a) to bargain in good faith to settle a dispute over the failure to provide rest breaks in accordance with Article 21 (Rest Periods) for Complainant and his co-workers employed by the DOT Harbors Division.

Finally, the Board denies Respondent's Motion to Strike Affidavit of Lews (sic) W. Poe which is designed for and directed to Case No. CU-03-148, filed October 2, 2002, and Poe's Motion to Unconsolidate Case Nos. CU-03-174 and CU-03-148, filed December 3, 2002.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject complaint pursuant to HRS §§ 89-5 and 89-13, and Order Vacating Board's Order No. 1946, Reversing and Modifying Board's Rulings, and Remanding Consolidated Case to Board with Instruction for Further Proceedings, issued July 3, 2001 in Civil No. 00-1-3607-11.
2. In the instant case, the Complainant has the burden to prove by a preponderance of the evidence that Respondent's failure to file a class grievance before entering into negotiations to resolve the employer's failure to provide rest periods to DOT Harbor Traffic Controllers, including Complainant, provided under Article 21 of the BU 03 Contract violated the Article 11, Grievance Procedure of the BU 03 Contract and HRS § 89-11(a),

and therefore committed a prohibited practice in wilful violation of HRS § 89-3(b)(4) and (5).

3. HRS § 89-11(a) does not prohibit the Union from entering into good faith negotiations with the public employer absent the initial filing of a class grievance in an effort to resolve an underlying grievance filed by Complainant.
4. The Board concludes that HGEA acted on behalf of all impacted Harbor Traffic Controllers in BU 03 when it entered into negotiations consistent with its responsibility as the exclusive bargaining representative under HRS § 89-8(a) to settle a dispute over the failure to provide rest breaks in accordance with Article 21 (Rest Periods) for Complainant and his co-workers employed by the DOT Harbors Division.
5. Complainant failed to prove by a preponderance of evidence that the Union violated Article 11, Grievance Procedure, of the BU 03 Contract by not filing a class grievance before entering into negotiations with the employer to settle a dispute over the DOT's failure to provide rest breaks in accordance with Article 21 (Rest Periods) for Complainant and his co-workers employed by the DOT Harbors Division.

ORDER

Having found no violation of the BU 03 Contract and HRS § 89-11(a) as alleged, and no prohibited practice in wilful violation of HRS §§ 89-13(b)(4) and (5), the instant complaint is dismissed.

DATED: Honolulu, Hawaii, January 13, 2003.

HAWAII LABOR RELATIONS BOARD

/s/BRIAN K. NAKAMURA
BRIAN K. NAKAMURA, Chair

/s/CHESTER C. KUNITAKE
CHESTER C. KUNITAKE, Member

/s/KATHLEEN RACUYA-MARKRICH
KATHLEEN RACUYA-MARKRICH, Member

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