

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-03-423
LEWIS W. POE,)	ORDER NO. 1732
)	
Complainant,)	ORDER GRANTING RESPONDENT'S
)	MOTION TO DISMISS PROHIB-
and)	ITED PRACTICE COMPLAINT
)	AND/OR FOR SUMMARY JUDG-
BENJAMIN J. CAYETANO, Governor,)	MENT
State of Hawaii,)	
)	
Respondent.)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
PROHIBITED PRACTICE COMPLAINT AND/OR FOR SUMMARY JUDGMENT

On February 17, 1999, Complainant LEWIS W. POE (POE) filed a prohibited practice complaint against BENJAMIN J. CAYETANO, Governor, State of Hawaii (Employer) with the Hawaii Labor Relations Board (Board). POE alleges that the Employer declined to act upon POE's Step 3 grievance concerning alleged violations of Article 21, Rest Periods, of the Unit 03 collective bargaining agreement (contract) and thereby violated §§ 89-1, 89-8(b), 89-11(a), and 89-13(a) (7) and (8), Hawaii Revised Statutes (HRS).

On April 1, 1999, Respondent Employer, by and through his counsel, filed a motion to dismiss the complaint and/or for summary judgment with the Board. Respondent contends that the complaint fails to state a claim upon which relief can be granted; the Complainant failed to exhaust his contractual remedies; alternatively, there is no genuine issue of material fact in dispute and Respondent is entitled to judgment as a matter of law because the complaint is barred by the doctrine of res judicata;

the Complainant is estopped from bringing the complaint; and the complaint violates Administrative Rules § 12-42-42(f).

On April 7, 1999, the Board conducted a prehearing conference in the matter. On April 14, 1999, POE filed an answering affidavit with the Board.

On April 27, 1999, the Board conducted a hearing on Respondent's motion. All parties had full opportunity to present evidence and argument to the Board.

Based upon a thorough review of the record, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

POE is a Harbor Traffic Controller I¹, employed by the State of Hawaii Department of Transportation (DOT) and is a member of bargaining unit 03. POE is an employee within the meaning of § 89-2, HRS.

BENJAMIN J. CAYETANO is the Governor of the State of Hawaii and a public employer within the meaning of § 89-2, HRS.

By letter dated June 16, 1997, POE filed a Step 1 grievance with Thomas T. Fujikawa (Fujikawa), Harbors Administrator, alleging violations of Article 21, Rest Periods, of the Unit 03 1993-97 contract. POE alleged that the Employer failed to provide rest periods as provided in the contract.

By letter dated July 25, 1997, Fujikawa responded that at the time POE was hired the Employer informed all job applicants

¹In this order, "Harbor Traffic Controller" is used interchangeably with "Tower Operator" and "Marine Traffic Controller."

that they would work alone on an eight-hour rotating shift. The applicants were asked if they would have problems with working without a set meal and rest period. The applicants indicated that they would have no problems working under those conditions. Fujikawa indicated that the working conditions were part of the job requirements of all Tower Operators and that since POE was hired on July 29, 1991, the practice was that Tower Operators eat and take their breaks "on the fly" or whenever time permits because they cannot leave the observation area. Thus, the Employer provided the employees with special accommodations, such as kitchen and other facilities.

By letter dated July 28, 1997, POE filed a Step 2 grievance with DOT Director Kazu Hayashida (Hayashida).

By letter dated December 10, 1997, Hayashida responded to POE's Step 2 grievance acknowledging that the employees had not taken rest periods because of the unique job conditions which all incumbents were informed of at the time of hire. Hayashida indicated that under the present organization of the unit, the division was unable to provide rest periods. Hayashida also indicated that although POE had not specifically requested a remedy in his Step 2 grievance letter, it was the DOT's understanding that POE requested that the department provide rest periods or be otherwise compensated. Hayashida further indicated that POE and the department tentatively agreed to a remedy subject to the concurrence of the union and other employees by way of a memorandum of agreement. The Department agreed to credit Marine Traffic Controllers with two hours of straight time pay per pay period in lieu of the two ten-minute rest periods per shift, retroactive to

June 16, 1997, unless the employee was off duty or on leave for 44 hours within the pay period. Hayashida requested that POE advise the department when he could meet with the union and the department to discuss the terms of the memorandum of agreement.

By letter dated June 17, 1998, POE requested that his union, the Hawaii Government Employees Association (HGEA or Union) represent the class of Harbor Traffic Controller I's to enforce the provisions of Article 21, retroactive to July 1993.

By letter dated June 26, 1998, POE transmitted his June 17, 1998 letter to HGEA to Amador Casupang (Casupang), DOT Personnel Specialist. POE temporarily deferred to the HGEA on the condition that HGEA properly and timely performed its duty of fair representation. If the HGEA did not perform, POE would advance his individual grievance.

By letter dated July 19, 1998, Poe informed Casupang that the HGEA did not respond to his request for representation. POE requested that his individual grievance be processed at Step 2. POE indicated that he represented only himself and requested compensatory time credits from July 1, 1993 which he estimated to be in excess of 320 hours. POE indicated that he wanted to discuss the matter with Casupang by telephone.

By letter dated July 29, 1998, POE wrote to Hayashida regarding the Step 2 meeting held on July 27, 1998. Therein, POE agreed to give Casupang, two more weeks to August 10, 1998 to issue a Step 2 response to his grievance. POE requested that Hayashida designate times when he could take his breaks during each half of his work shift. POE also indicated that although he asked for compensatory time credits it did not mean that he could not opt for

cash payment. The letter also states that Casupang informed POE that the DOT made inquiry only initially with the HGEA and has been consulting with the Department of Human Resources Development (DHRD) and other agencies regarding rest periods.

By letter dated August 19, 1998, POE filed a Step 1 grievance regarding a violation of Article 11 of the contract. POE contended that he did not receive a Step 2 response to his grievance from Hayashida by August 10, 1998 as promised. POE requested that the meeting at Step 1 be waived so that he could proceed to Step 2.

By letter dated August 25, 1998, Fujikawa wrote to POE indicating that he notified Royden Kotake of HGEA of the grievance and agreed to waive Step 1.

By letter dated August 29, 1998, POE filed a Step 2 appeal to Hayashida.

By letter dated September 10, 1998, POE filed a Step 3 appeal to James H. Takushi (Takushi), then Director of DHRD. POE requested a meeting on either September 15, or 16, 1998.

By letter dated September 23, 1998, Takushi indicated that the DOT issued a Step 2 reply to POE on December 10, 1997. Takushi indicated that while the reply was not DOT's final position on the dispute, it served to open the door to further discussions with POE and the HGEA. In addition, Takushi indicated that the DOT and the HGEA were engaged in an ongoing dialog to resolve the Article 21 situation on behalf of all Tower Operators. Takushi found that at the conclusion of the July 27, 1998 meeting with the DOT, the department agreed to provide a written update to him by August 10, 1998 which it failed to do. Takushi directed DOT to

provide the written update as agreed and to make future timely responses to POE. Takushi, however, found no violation of Article 11 and denied the grievance.

On October 13, 1998, POE filed a complaint with the Board in Case No. CE-03-416 regarding the DOT's failure to respond to POE at Step 2.

By letter dated December 1, 1998, Hayashida issued an amended response to POE to advise him that the DOT and the HGEA were working on a resolution of the rest periods issue. The original proposal to resolve the issue was considered not to be in the best interest of all parties and therefore they were considering other options at the time. Hayashida indicated that the objective was to insure that the Marine Traffic Controllers were compensated for each rest period they were unable to take due to operational commitments. Hayashida indicated that the department was working with the Union on the details and that hopefully a satisfactory resolution by way of settlement agreement or memorandum of understanding would be forthcoming.

By letter dated December 6, 1998, POE filed a Step 3 grievance appeal on the rest periods.

By letter dated January 22, 1999, Mike McCartney, Director of DHRD, wrote to POE responding to his Step 3 grievance. McCartney indicated that POE requested the DOT to designate the times for his ten-minute rest period in advance of every shift and compensation for missed rest periods since July 1, 1993. After reviewing the grievance, McCartney found that the DOT and HGEA were currently engaged in efforts to resolve problems associated with the granting of the rest periods. McCartney further indicated that

he was not inclined to disturb the efforts to reach a mutually agreeable resolution and adversely impact HGEA's representative capacity as the exclusive representative for Unit 03 employees. Thus, McCartney indicated that he declined to act on POE's grievance and denied the remedy POE sought as an individual.

On February 17, 1999, POE filed the instant complaint alleging that the Employer violated §§ 89-13(a)(7) and (8), HRS, by violating §§ 89-8(b), 89-11(a), and 89-1 and Article 21 of the contract.

Article 21 of the contract provides as follows:

All Employees shall be allowed rest periods of ten (10) minutes during each half of the workday or work shift and before each two (2) hours of continuous overtime work performed after completing a regular workday or work shift of eight (8) hours. The times and locations at which rest periods shall be taken are to be determined by the department head or a designee of the department head after giving due consideration to the desires of the Employees and the requirements of the department.

Section 89-11(a), HRS, provides as follows:

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.

Section 89-8(b), HRS, provides as follows:

An individual employee may present a grievance at any time to the employee's employer and have the grievance heard without intervention of an employee organization;

provided that the exclusive representative is afforded the opportunity to be present at such conferences and that any adjustment made shall not be inconsistent with the terms of an agreement then in effect between the employer and the exclusive representative.

Section 89-1, HRS, provides as follows:

The legislature finds that joint decision-making is the modern way of administering government. Where employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work, to provide a rational method for dealing with disputes and work stoppages, and to maintain a favorable political and social environment.

The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are best effectuated by (1) recognizing the right of public employees to organize for the purpose of collective bargaining, (2) requiring the public employers to negotiate with and enter into written agreements with exclusive representatives on matters of wages, hours, and other condition of employment, while, at the same time, (3) maintaining merit principles and the principle of equal pay for equal work among state and county employees pursuant to sections 76-1, 76-2, 77-31, and 77-33, and (4) creating a labor relations board to administer the provisions of chapters 89 and 377.

Based upon the foregoing facts, the Board finds that on June 16, 1997, POE filed a grievance with the DOT contending that the Employer violated Article 21, Rest Periods, of the contract by

failing to provide two ten-minute rest periods per workday. POE proceeded through the grievance procedure and at Step 2 on December 10, 1997, Hayashida conceded that based upon a long-standing practice and given their unique job conditions which were explained at the initial job interview, the Employer had not afforded the Marine Traffic Controllers the rest periods provided for in the contract. Hayashida indicated that POE and the DOT tentatively agreed to a remedy affecting all Marine Traffic Controllers subject to the concurrence of the union and the other Marine Traffic Controllers. The remedy affected all Marine Traffic Controllers.

In June 1998, POE requested that the HGEA represent the class of Harbor Traffic Controllers on the rest periods issue and having received no written response by July 19, 1998, POE continued to pursue his individual grievance at Step 2. On December 1, 1998, Hayashida advised POE that the DOT and the HGEA were working on a resolution affecting all of the Marine Traffic Controllers which would compensate them for each rest period they are unable to take due to operational commitments. POE filed a Step 3 grievance requesting an individual remedy and McCartney declined to act on POE's grievance because the DOT and the HGEA were engaging in discussions to resolve the matter for all of the affected employees. Thereafter, POE filed the instant complaint. Throughout the processing of POE's grievance, the Employer apprised HGEA of the grievance meetings but the HGEA declined to attend the meetings.

DISCUSSION

In his complaint, POE contends that the Employer violated § 89-13(a)(7), HRS, by declining to act on his Step 3 grievance and denying him individual relief for the violation of Article 21 of the contract. POE contends that the Employer elevated the HGEA's status over POE where POE had pursued his individual grievance and the Union declined each opportunity to attend the grievance meetings. POE contends that the Employer thereby violated §§ 89-8(b) and/or 89-11(a), HRS. POE also contends that the Employer violated the statement of public policy in § 89-1, HRS, as well. POE further argues that his individual grievance is independent of any potential activity between the DOT and the HGEA in resolving the rest periods issue and that the HGEA does not preempt POE's grievance. POE further contends that the Employer is violating the contract and refusing to act on POE's grievance. POE thus contends that the Employer denied him full and meaningful access to the existing grievance procedure.

In his motion to dismiss complaint, the Employer argues that POE fails to state a claim upon which relief can be granted. The Employer argues that as a matter of law, POE would not be entitled to legal relief even if everything alleged in the complaint were true. The Employer claims that POE's grievance was processed through Step 3 and a final decision was made. No further action by the Employer is required. The Employer further contends that the complaint should be dismissed for failure to exhaust contractual remedies. The Employer contends that the facts are not in dispute that POE's grievance was processed through Step 3 but was not taken to Step 4, Arbitration. The Employer contends that

therefore POE cannot bring a prohibited practice complaint against the Employer based upon the violation of the contract.

Alternatively, the Employer argues that there are no genuine issues of material fact in dispute and he is entitled to judgment as a matter of law. The Employer contends that the Director of DHRD acting in a quasi-judicial capacity as the Step 3 authority ruled that the DOT did not violate the contract. Since no appeal was filed from the Step 3 appeal to Arbitration, the Employer argues that the Step 3 decision is final and binding. The Employer thus contends that POE's complaint is barred by the doctrines of res judicata and/or collateral estoppel.

The Employer also contends that the complaint does not comport with Administrative Rules § 12-42-42(f)² because the instant complaint is the second complaint arising out of the alleged failure of the Employer to grant rest periods in violation of Article 21 of the contract. The Employer contends that in Case No. CE-03-416, POE contested the Employer's processing of the grievance at issue here. Thus, the Employer argues that the instant complaint violates the Board's rule providing that only one complaint shall issue against a person with respect to a single controversy.

In response, POE states in an affidavit that since July 1, 1993, the Employer has violated the provisions of

²Administrative Rules § 12-42-42(f) provides as follows:

Only one complaint shall issue against a person with respect to a single controversy, but any complaint may be amended in the discretion of the board at any time prior to the issuance of a final order based thereon.

Article 21 with respect to the 2d watch (from 7:00 a.m. to 3:00 p.m., Monday through Friday), when a supervisor is available to relieve the employee. POE states that the April 1, 1999 Affidavit of James E. Halvorson is false, without further explanation. POE also asserts that the Employer misquoted certain articles of the contract.

After reviewing the record and considering the arguments presented, the Board finds that POE filed his individual grievance and proceeded through Steps 1, 2, and 3 of the contractual grievance procedure. However, POE did not ask the HGEA to take his grievance to arbitration. POE instead filed the instant complaint contending, inter alia, that the Employer violated § 89-13(a)(8), HRS, by violating Article 21 relating to rest periods.

Article 11 of the contract provides a grievance procedure consisting of an informal step and four steps. Step 4 of the grievance procedure provides, in part, as follows:

Arbitration. If the grievance is not satisfactorily resolved at Step 3 and the Union desires to proceed with arbitration, it shall serve notice on the Employer or designated representative of its desire to arbitrate within (10) working days after receipt of the reply at Step 3. Representatives of the parties shall attempt to select an Arbitrator immediately thereafter.

In Winslow v. State, 2 Haw. App. 50 (1981), the Intermediate Court of Appeals considered whether a State employee whose employment is governed by a labor agreement is required to exhaust the remedies established in the labor agreement for grievance procedures before an action can be brought in circuit court. In that case, the contract, similar to the Unit 03

agreement at issue here, provided that only the union could proceed to arbitration³. The Court in that case stated:

Given the well-settled rule of the doctrine of exhaustion of remedies in administrative law, 2 Am. Jur.2d Administrative Law § 595; this state's public policy favoring arbitration as a means of settling differences to avoid expensive and unnecessary litigation, Kendall v. Kauhi, 53 Haw. 88, 488 P.2d 136 (1971); Rules 52(a) and 56(c), and the facts of this case, we find no error in the court's ruling that the State was entitled to summary judgment. Contrary to appellant's contentions, we hold that where the terms of public employment are covered by a collective bargaining agreement pursuant to HRS Chapter 89 and the agreement includes a grievance procedure to dispose of employee grievances against the public employer, an aggrieved employee is bound by the terms of the agreement. Here the grievance procedure consisted of five steps with the fifth step final and binding arbitration. At steps one through four, either the employee or the union could carry forward the grievance; and if the

³In Black-Clawson Co. v. International Ass'n of Machinists Lodge 355, 313 F.2d 179, 52 LRRM 2038 (2d Cir. 1962), an individual employee sought to compel his employer to arbitrate a grievance for wrongful discharge. The court found that the grievance procedure only allowed the union and the employer to invoke arbitration and concluded that the employee had no right to compel the employer to submit to arbitration. The court's interpretation of the plain language of the collective bargaining agreement was supported by a sound view of labor-management relations. The court stated:

The union represents the employees for the purposes of negotiating and enforcing the terms of the collective bargaining agreement. This is the modern means of bringing about industrial peace and channeling the resolution of intra-plant disputes. Chaos would result if every disenchanted employee, every disturbed employee, and every employee who harbored a dislike for his employer, could harass both the union and the employer . . . by bringing an action to compel arbitration in the face of clear contractual provisions intended to channel the enforcement remedy through the union. Id., 313 F.2d at 186.

employee did so, only the union has the election to take the matter to arbitration (step 5). If the union elected not to go to arbitration, the employee would then have exhausted her administrative remedies and could have brought the employer into court.

Id., p. 55.

The Winslow Court found that the employee failed to exhaust his contractual remedies and therefore could not maintain an action against the employer for contract violations. Thereafter, in Santos v. State, 64 Haw. 648, 646 P.2d 966 (1982), the Supreme Court recognized that as a general rule, before an individual can maintain an action against his employer, the individual must at least attempt to utilize the contract procedures agreed upon between his employer and the union. Similarly in this case, POE pursued his grievance through three steps of the grievance procedure but did not request the HGEA to take his case to arbitration. Instead, POE filed the instant complaint to have this Board determine the Employer's alleged contractual violations in the same way that an arbitrator would review the grievance at Step 4 of the grievance procedure. Like Winslow, POE cannot seek remedies for alleged contractual violations before the Board without first exhausting his contractual remedies. If the exclusive representative declines to take his case to arbitration, POE may elect to file a prohibited practice complaint against the Union alleging a breach of its duty of fair representative because of the Union's refusal to take the matter to arbitration. CBS Inc. v. Snyder, 142 LRRM 2899 (2d Cir. 1993).

With respect to the alleged violations of §§ 89-1 and 89-11(a), HRS, the Board dismisses those allegations for failure to

state a claim for relief. Section 89-1, HRS, provides a general statement of findings and public policy underlying the collective bargaining law. Section 89-11(a), HRS, provides that the public employer may enter into a written agreement providing for a grievance procedure which culminates in a final and binding decision. The Board finds viewing the instant complaint in a light most favorable to POE that it is beyond doubt that POE can prove no set of facts in support of these claims which would entitle him to relief in his complaint.

As to POE's allegations of a violation of § 89-8(b), HRS, the Board finds that there are no material issues of fact in dispute and that Respondent is entitled to judgment as a matter of law. The facts are undisputed that POE presented his grievance to his Employer and had the grievance heard without the intervention of the HGEA. The record establishes that the HGEA was afforded the opportunity to be present at the grievance meetings. It is also undisputed that the HGEA is involved in attempting to reach a resolution of the rest periods issue on behalf of all of the affected employees with the Employer. The Employer responded to POE that he declined to grant POE's individual remedy because of the ongoing discussions with the HGEA. Given the status of the HGEA as the exclusive representative to negotiate on behalf of the affected employees and the obligation of the Employer to deal with the exclusive representative of the employees, the Board finds that the Employer did not violate § 89-8(b), HRS.

CONCLUSIONS OF LAW

Complainant must exhaust his available contractual remedies prior to bringing a prohibited practice complaint against the Employer alleging a violation of the collective bargaining agreement. Under the applicable grievance procedure, the contract provides that only the union can request arbitration of a grievance. In order to exhaust the contractual remedies, Complainant should have asked the union to arbitrate the grievance. If the union elected not to arbitrate the case, Complainant could have filed a prohibited practice complaint against the union for breaching its duty of fair representation. Since Complainant failed to request the union to arbitrate the grievance, the allegations of § 89-13(a)(8), HRS, violations in the complaint are dismissed for failure to exhaust contractual remedies.

Complainant failed to state a claim for relief of § 89-13(a)(7), HRS, where it was beyond a doubt that Complainant could not prove a set of facts in support of his claim that would entitle him to relief for violations of §§ 89-1 and 89-11(a), HRS.

Summary judgment is appropriate where there are no material facts in dispute and the movant is entitled to judgment as a matter of law. The Employer does not commit a prohibited practice by negotiating a resolution of a dispute initially raised by an individual grievant with the exclusive representative. Here, the alleged contract violations apply to the class of Harbor Traffic Controllers and there is no dispute that the union is negotiating a resolution with the Employer. There are no material facts in dispute and the Employer is entitled to judgment as a

matter of law with respect to the alleged violations of § 89-8(b),
HRS.

ORDER

The instant complaint is dismissed with respect to the
allegations of §§ 89-13(a)(8), 89-1, and 89-11(a), HRS.

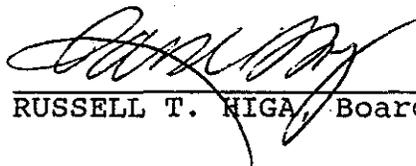
With respect to the alleged violations of § 89-8(b), HRS,
the Board hereby grants summary judgment in favor of Respondent.

DATED: Honolulu, Hawaii, June 15, 1999.

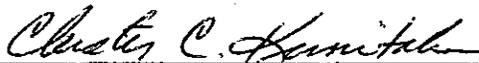
HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. NIGA, Board Member



CHESTER C. KUNITAKE, Board Member

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