

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-03-300
	)	
LEWIS W. POE,	)	ORDER NO. 1812
	)	
Complainant,	)	ORDER GRANTING RESPONDENT'S
	)	MOTION TO DISMISS COMPLAINT
and	)	
	)	
BENJAMIN J. CAYETANO, Governor,	)	
State of Hawaii,	)	
	)	
Respondent.	)	
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ORDER GRANTING RESPONDENT'S MOTION TO DISMISS COMPLAINT

On April 4, 1996, LEWIS W. POE (POE) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) alleging that Respondent BENJAMIN J. CAYETANO (Cayetano, Respondent or Employer) violated § 89-13(a)(8), Hawaii Revised Statutes (HRS), when he denied POE's claim for overtime pursuant to the provisions of Article 23 of the Unit 03 Collective Bargaining Agreement (Agreement).

On May 31, 1996, Respondent filed a motion to dismiss and/or for summary judgment. In his motion, Respondent contends that the Complainant has failed to name an indispensable party; that the Complainant has failed to exhaust his contractual remedies; and that there are no genuine issues of material fact in dispute, and the Respondent is entitled to judgment as a matter of law.

On June 19, 1996, the Board held a hearing on the motion to dismiss and/or for summary judgment. The parties were afforded full opportunity to be heard on the motion.

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

#### FINDINGS OF FACT

POE is a Tower Operator I, at the Harbors Division, Department of Transportation, State of Hawaii. POE is an employee, as defined in § 89-2, HRS, and is included in bargaining unit 03.

CAYETANO is the Governor of the State of Hawaii and a public employer, as defined in § 89-2, HRS.

On September 7, 1995, POE departed his home at approximately 7:25 a.m. and reported to the District Court of the First Circuit at 8:00 a.m. pursuant to a subpoena dated August 11, 1995. After being released by the Court at approximately 9:35 a.m., POE returned home and completed his travel at 10:05 a.m. At 2:30 p.m. of the same day, POE reported for work as scheduled. POE requested overtime for the periods 7:25 a.m. to 10:05 a.m. and 2:30 p.m. to 10:30 p.m. The Employer granted POE's request for overtime pay for the period 7:25 a.m. to 10:05 a.m., but denied overtime payment for the period 2:30 p.m. to 10:30 p.m.

POE filed a grievance regarding the denial of overtime without the assistance of the union. The Agreement contains a four step grievance procedure. The first three steps provide for progressively higher levels of review by the employer and the fourth step gives the union the right to proceed to arbitration of

a grievance. With regard to Step 4, the Agreement reads in relevant part:

H. Step 4. Arbitration. If the grievance is not resolved at Step 3 and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or designated representative of its desire to arbitrate within ten (10) working days after receipt of the Employer's decision at Step 3. Representatives of the parties shall attempt to select an Arbitrator immediately thereafter.

After the grievance was denied at Step 3 of the grievance procedure, POE filed the instant prohibited practice complaint in which he contends that he has exhausted the contractual grievance procedure.

#### DISCUSSION

POE contends that the Respondent violated Article 23 of the Agreement by improperly denying him overtime compensation and thereby committed a prohibited practice in violation of § 89-13(a)(8), HRS.

Poe has pursued his allegation of a violation of the Agreement by filing a grievance without the assistance of the union and taking the matter to Step 3 of the grievance procedure. The record does not indicate and POE does not allege in his complaint that he has requested the union to seek arbitration of his grievance under Step 4 of the grievance procedure. By filing this complaint, POE seeks to have the Board consider and decide the Employer's alleged contractual violations in the same way that an arbitrator would review the grievance at Step 4.

The Board has previously held that where a collective bargaining agreement provides for arbitration as the last step of the grievance procedure and where only the union can demand arbitration, an employee filing his or her own grievance must ask the union to take the matter to arbitration in order to exhaust his or her contractual remedies. Failure to request the union to take the grievance to arbitration will result in a dismissal of a prohibited practice complaint for failure to exhaust contractual remedies. Lewis W. Poe, Order No. 1732, Case No. CE-03-423 (June 15, 1999). The decision in that case is applicable to the instant case and requires dismissal of the complaint.

#### CONCLUSIONS OF LAW

Complainant must exhaust his contractual remedies under the collective bargaining agreement prior to bringing a prohibited practice complaint against the Employer alleging a violation of the agreement. Under the grievance procedure in the Agreement, only the union can request arbitration of a grievance. In order to exhaust his contractual remedies, the Complainant should have asked the union to arbitrate the grievance. If the union refused to take the grievance to arbitration, Complainant could have filed a prohibited practice complaint against the union for breaching its duty of fair representation. Because Complainant failed to request the union to arbitrate the grievance, the complaint is dismissed for failure to exhaust contractual remedies.

#### ORDER

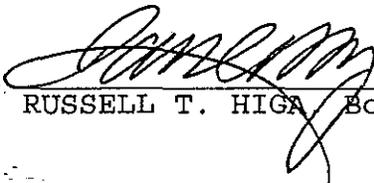
The Board hereby dismisses the instant complaint.

LEWIS W. POE and BENJAMIN J. CAYETANO, Governor, State of Hawaii  
CASE NO. CE-03-300  
ORDER NO. 1812  
ORDER GRANTING RESPONDENT'S MOTION TO DISMISS COMPLAINT

DATED: Honolulu, Hawaii, November 16, 1999.

HAWAII LABOR RELATIONS BOARD

  
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BERT M. TOMASU, Chairperson

  
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RUSSELL T. HIGA, Board Member

Copies sent to:

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