

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-03-237
)	
LEWIS W. POE,)	ORDER NO. 1866
)	
Complainant,)	ORDER GRANTING RESPONDENT'S
and)	MOTION TO DISMISS OR IN THE
)	ALTERNATIVE, MOTION FOR
JOHN D. WAIHEE, III,)	SUMMARY JUDGMENT
Governor, State of Hawaii,)	
)	
Respondent.)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

On October 5, 1994, LEWIS W. POE (POE or Complainant) filed a prohibited practice complaint against JOHN WAIHEE, III, Governor, State of Hawaii (Employer or Respondent) with the Hawaii Labor Relations Board (Board). Complainant POE alleges that the Employer or his agents are violating the terms of the applicable bargaining unit 03 collective bargaining agreement (contract), in violation of § 89-13(a)(8), Hawaii Revised Statutes (HRS). POE's complaint involves the Department of Transportation (DOT) Fiscal Officer Gerald Morita's answers to POE's May 2, 1994 memorandum requesting information. POE also alleges that contract provisions relating to ordinary overtime, holiday overtime, and night differential are being incorrectly applied in the processing of his Form D-55, Individual Time Sheet (time sheet).

On November 13, 1994, Respondent, by and through his counsel, filed a motion to dismiss or, in the alternative, motion

for summary judgment with the Board. On November 21, 1994, the Board conducted a hearing on Respondent's motion to dismiss or, in the alternative, motion for summary judgment. The parties were afforded a full opportunity to present exhibits and argument for the Board's consideration. 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 Tower Operator I employed by the Harbors Division, DOT, State of Hawaii. POE is an employee within the meaning of § 89-2, HRS.

JOHN D. WAIHEE, III, was for all times relevant, the Governor of the State of Hawaii and a public employer within the meaning of § 89-2, HRS.

By memorandum, dated May 2, 1994, POE requested information from the Employer relating to the processing of his March 31, 1994 time sheet.

By letter, dated May 11, 1994, Gerald Morita, Fiscal Officer, Harbors Division, DOT, State of Hawaii provided POE with the information requested by filling in the blanks that POE had provided in his memorandum to the Employer.

On May 15, 1994, POE filed a Step 2 grievance alleging that the Employer made computational errors on POE's March 31, 1994 time sheet.

On August 31, 1994, Rex D. Johnson (Johnson), Director, DOT, State of Hawaii, issued a Step 2 response to POE and determined that errors relating to night differential on

Complainant's March 31, 1994 time sheet resulted from a computational error and not a misapplication of the Unit 03 contract. Johnson therefore denied the grievance.

On September 4, 1994, POE filed a Step 3 appeal requesting that the Employer examine and determine the specific articles which pertain to the processing of the time sheet and to correctly cite the articles in answering POE's grievance.

On September 19, 1994, Sharon Y. Miyashiro, Director, Department of Human Resources Development (DHRD), State of Hawaii, issued a Step 3 decision citing the specific articles of the Unit 03 contract applicable to ordinary overtime, holiday overtime, and night differential:

- (1) Ordinary Overtime - Article 23B.1
- (2) Holiday Overtime - Article 23B.4
- (3) Night Differential - Article 30
- (4) Cash Payment for Overtime Work - Article 23H, 23I
- (5) Definitions - Article 23L

On September 23, 1994, POE requested a Step 3 meeting with the Employer and alleged that the Employer's response did not include a definition of Night Differential referenced in the time sheet.

On September 28, 1994, a meeting was held between POE, HGEA business agent Royden Kotake, and Nadine Izu, Personnel Management Specialist, Labor Relations Division, DHRD. During the meeting, the following items were discussed: (a) night differential as defined in Article 30 of the contract and

(b) Complainant's interpretation of the effect of the language in Article 29 of the contract.

By letter, dated October 3, 1994, Nadine Izu informed POE that no amendment of Director Miyashiro's Step 3 decision was warranted.

By letter, dated October 4, 1994, POE responded to the October 3, 1994 letter.

On October 5, 1994, Complainant filed the instant complaint with the Board.

DISCUSSION

POE contends that the Respondent misapplied or failed to apply certain contract provisions in the processing of his time sheet, regarding Ordinary Overtime, Holiday Overtime, and Night Differential. POE requested information as to the applicable contractual sections from the DOT Fiscal Officer but later challenged the applicability of certain contract provisions. POE filed grievances at Step 2 and Step 3 of the Unit 03 contractual grievance procedure. At Step 3, DHRD Director Miyashiro cited the applicable contract provisions articles in response to POE's requested remedy. POE filed the instant complaint contending that the Employer is violating the terms of the Unit 03 contract and requests as relief:

- (1) to precisely define the "N" or red C portion of Form D-55;
- (2) to fully cite those specific Articles which apply to the red A portion; red B portion; and red C portion of Form D-55, etc.

In his motion to dismiss and in the alternative, motion for summary judgment, the Respondent contends that the complaint is

moot because Complainant has already obtained the remedy prayed for in the instant complaint. In addition, Respondent contends that Complainant has not alleged a violation cognizable under § 89-13(a)(8), HRS, since Complainant merely recites his personal opinions and beliefs as to the applicability of the contract provisions without supporting affidavits or documentation to support his opinions. Further, Respondent contends that Complainant has not suffered any injury as a result of the Employer's application of the contract in this case and therefore lacks standing to maintain this action. Respondent argues that Complainant apparently contends that since Article 30C of the contract states that the basic compensation plus the night differential will be used in determining the cash payment for overtime work pursuant to Article 23, he is entitled to an additional night differential of \$.45 per hour to his pay period despite the fact that he already received a night differential under Article 30A. In this regard, Respondent contends that the Board already ruled in Case Nos. CE-03-93 and CE-03-183, Lewis W. Poe, Order No. 986, Orders Granting Respondents' Motion for Summary Judgment, dated October 27, 1993 that POE's interpretation of the above provision results in a double payment of night differential for the same hours worked. Respondent thus contends that at Steps 2 and 3 of the grievance procedure, the DOT properly applied the relevant contractual provisions and while there was a computational error, it was not the result of the misapplication of the contract.

Alternatively, Respondent contends that the Employer is entitled to summary judgment because there is no evidence to support Complainant's prohibited practice charge. POE complains that the Respondent failed to correctly or completely cite the contractual provisions relating to the processing of Complainant's time sheet. Respondent contends that POE has not alleged any facts which show that the Employer's citation of the contractual provisions is incorrect or violates the contract. In fact, the affidavit of the union's business agent indicates that the union agrees with the Employer's responses at Steps 2 and 3 and that the Employer's actions taken in processing the Complainant's time sheet were proper and consistent with the contract and past practice.

POE, in response, contends, inter alia, that the Employer is violating the contract by misapplying Article 23I to certain portions of his time sheet. POE contends that the misapplications of the relevant portions of the contract render the processing of the time sheet to be unreasonable or arbitrary. POE contends that the Employer therefore violated § 89-13(a)(8), which provides:

It shall be a prohibited practice for a public employer or its designated representative wilfully to:

* * *

(8) violate the terms of a collective bargaining agreement; . . .

In his complaint, POE alleges that the Employer committed prohibited practices by violating or misapplying the terms of the contract. According to the record, aside from the attendance of the union business agent during the Step 3 meeting, POE processed his grievance without the assistance of the union. There is no

evidence in the record that POE requested the union to take the case to arbitration or that the union refused to arbitrate his grievance. In addition, POE did not file a complaint against the union for refusing to arbitrate his grievance. In Order No. 1732, Order Granting Respondents' Motion to Dismiss Prohibited Practice Complaint and/or for Summary Judgment, dated June 15, 1999, in Case No. CE-03-423, the Board similarly dismissed a prohibited practice complaint alleging violations of § 89-13(a)(8), HRS, on the grounds that POE failed to exhaust his contractual remedies. The Board concluded:

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.

Id., Order No. 1732, Case No. CE-03-423, Lewis W. Poe, June 15, 1999, affirmed in Civ. No. 99-2676-99, January 21, 2000; Decision No. 402, in Case No. CE-03-283, Lewis W. Poe, 5 HLRB ___ (October 13, 1999) affirmed in Civil No. 99-4200-11, May 5, 2000; Order No. 1812, Case No. CE-03-300, Lewis W. Poe, November 16, 1999. Further in Order No. 1864, dated May 16, 2000, in Case No. CE-03-445, Lewis W. Poe, the Board also dismissed a complaint alleging contract violations for failure to exhaust administrative remedies. The Board finds that the previous cases apply to the instant case and requires dismissal of the complaint. Hence,

before a unionized employee can proceed with a breach of contract claim against his employer before the Board, he must establish that the union breached its duty of fair representation in failing to pursue his grievance through the contractual grievance procedure. Procedurally, the breach of duty claim must first be addressed in order to proceed against the employer. Gray v. Marinette County, 200 Wis.2d 426, 546 N.W.2d 553 (1996).

Assuming arguendo, however, that the Board has jurisdiction over the instant complaint POE contends that the Employer violated the contract by misapplying the terms of the contract. The undisputed facts in the record establish that the Employer's application of the instant contract provisions are consistent with the contract language and past practice. The union agrees that the Employer correctly applied the contract provisions and POE did not offer any evidence to support his position, only his opinion that the contract was misapplied. Thus, if the Board had jurisdiction over this complaint, the Board would find that there were no genuine issues of material fact presented and that Respondent was entitled to judgment as a matter of law.

CONCLUSION 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. In order to maintain an action against his Employer alleging a breach of the collective bargaining agreement, Complainant must establish that the union breached its duty of fair representation in failing to pursue his grievance to arbitration.

Absent such a claim, the Board hereby dismisses the instant complaint for failure to exhaust contractual remedies.

ORDER

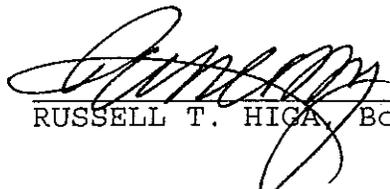
The Board hereby dismisses the instant complaint.

DATED: Honolulu, Hawaii, May 17, 2000.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member

Copies sent to:

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