STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LEWIS W. POE, Complainant, and JAMES H. TAKUSHI, Director, Department of Human Resources Development, State of Hawaii, Respondent.	)	CASE NO. CE-03-379 ORDER NO. 1882 ORDER GRANTING RESPONDENT JAMES H. TAKUSHI'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

ORDER GRANTING RESPONDENT JAMES H. TAKUSHI'S
MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

On December 17, 1997, Complainant LEWIS W. POE (POE or Complainant) filed a prohibited practice complaint against JAMES H. TAKUSHI (TAKUSHI), Director, Department of Human Resources Development, State of Hawaii with the Hawaii Labor Relations Board (Board). Complainant POE alleges that he filed a Step 2 grievance with DOT Director Kazu Hayashida regarding a payroll computational error or overpayment. Thereafter, POE filed a grievance at Step 3 with TAKUSHI who replied to POE's grievance but allegedly did not indicate that the night differential was calculated in accordance with the terms of the Unit 03 agreement. POE contends that he was overpaid $2.20 for Night Differential (for four hours at $.55 per hour) in violation of Articles 23 and 30 of the Unit 03 agreement. Thus, POE contends that TAKUSHI violated § 89-13(a)(8), Hawaii Revised Statutes (HRS).

On December 27, 1997, Respondent TAKUSHI, by and through his counsel, filed a motion to dismiss and/or for summary judgment with the Board. TAKUSHI contends that the complaint should be dismissed and/or summary judgment should be entered in his favor on the grounds (1) that the Complainant lacks standing to bring this claim before the Board; (2) the Complainant has failed to name an indispensable party; (3) the Complainant has failed to exhaust his contractual remedies; and (4) alternatively, there is no genuine issue of material fact in dispute, and the Respondent is entitled to judgment as a matter of law.

On January 2, 1998, POE filed an answering affidavit with the Board.

On January 29, 1998, the Board conducted a hearing on TAKUSHI's motion to dismiss and/or 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 Harbor Traffic Controller I employed by the Harbors Division of the Department of Transportation, State of Hawaii. POE is an employee within the meaning of § 89-2, HRS.

JAMES H. TAKUSHI was for all times relevant, the Director of the Department of Human Resources Development, State of Hawaii and representative of the public employer as defined in § 89-2, HRS.

POE worked from 10:30 p.m. on August 14, 1997 until 6:30 a.m. on August 15, 1997 which was a holiday. POE elected to take compensatory time off in lieu of overtime pay. In addition, POE earned night differential at time-and-a-half for work between 6:00 p.m. and 6:00 a.m. Thus, the employer paid POE night differential of $.55 per hour for 8 hours of overtime work multiplied by 1-1/2 or for 12 hours. POE contends that he was only entitled to eight hours of night differential and that he was overpaid by $2.20.

On August 29, 1997, POE filed a grievance at Step 2. POE subsequently filed a Step 3 appeal to TAKUSHI on October 13, 1997. By letter dated October 23, 1997, HAYASHIDA responded to POE's Step 2 grievance that after investigating his grievance, the department found that POE was properly paid in accordance with Articles 23 I.1 and 2 and Article 30 C of the applicable contract. In addition, the department found that the night differential is calculated in the same manner regardless of whether an employee elects to claim cash payment or compensatory time off for overtime work performed. The department found that its practice was consistent throughout all of the departments of the State and POE's grievance was denied. Thereafter, by letter dated October 28, 1997, TAKUSHI concurred with the Step 2 decision and denied POE's grievance.

There is no evidence that POE requested his union to take his grievance to arbitration or that the Union refused to arbitrate his grievance.

DISCUSSION

POE contends that the Respondent violated the agreement by miscalculating his night differential alleging that he was overpaid $2.20 because the differential was calculated at time-and-one-half as opposed to the actual number of hours worked.

In his motion to dismiss and/or for summary judgment, TAKUSHI contends that the Board previously dismissed POE's claims in Order No. 986, Case Nos. CU-03-93 and CE-03-183, for lack of standing where POE argued that the employer overpaid him by using the overtime rate instead of the straight time rate. The Board there found POE was not prejudiced by any miscalculation. In addition, TAKUSHI contends that POE failed to name an indispensable party in his complaint, i.e., the Hawaii Government Employees Association (HGEA or union). TAKUSHI contends that since the HGEA is a party to the contract in question, the HGEA should be joined as a party to this action so that the employer need not stand alone to defend the agreement of the parties and risk being subject to conflicting interpretations and subsequent attacks. TAKUSHI further contends that POE failed to exhaust his contractual remedies since he failed to request the Union to arbitrate his grievance.

In his complaint POE alleges that TAKUSHI committed a prohibited practice by violating the provisions of the agreement. There is no evidence in the record that POE requested the union to take his case to arbitration or that the union refused to arbitrate his grievance. Also, POE has not filed 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; Order No. 1864, Case No. CE-03-445, Lewis W. Poe, May 16, 2000. Further in Order No. 1866, dated May 17, 2000, in Case No. CE-03-237, Lewis W. Poe, the Board also dismissed a complaint alleging contract violations for failure to exhaust administrative remedies. The Board finds that its previous cases apply to the instant case and require 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 the Board would find that POE lacks standing to bring this complaint before the Board as POE was not prejudiced by the alleged miscalculation of his night differential. The Board would find that POE has not suffered any injury by the Employer's interpretation of the applicable contract and therefore has no standing to bring this claim to the Board.

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, June 14, 2000.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

LEWIS W. POE and JAMES H. TAKUSHI, Director, Department of Human Resources Development, State of Hawaii
CASE NO. CE-03-379
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RUSSELL T. HIGA, Board Member

CHESTER C. KUNITAKE, Board Member

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