

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-03-416
	)	
LEWIS W. POE,	)	ORDER NO. 1883
	)	
Complainant,	)	ORDER GRANTING RESPONDENT'S
	)	MOTION TO DISMISS PROHIB-
and	)	ITED PRACTICE COMPLAINT OR,
	)	IN THE ALTERNATIVE, FOR
KAZU HAYASHIDA, Director,	)	SUMMARY JUDGMENT
Department of Transportation,	)	
State of Hawaii,	)	
	)	
Respondent.	)	
	)	

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

On October 13, 1998, Complainant LEWIS W. POE (POE or Complainant) filed a prohibited practice complaint against KAZU HAYASHIDA (HAYASHIDA), Director, Department of Transportation (DOT), State of Hawaii with the Hawaii Labor Relations Board (Board). Complainant POE alleges that he filed a grievance with DOT Director HAYASHIDA who failed to file a Step 2 response in violation of Article 11 of the applicable Unit 03 collective bargaining agreement (contract) thereby violating § 89-13(a)(8), Hawaii Revised Statutes (HRS).

On November 10, 1998, Respondent HAYASHIDA, by and through his counsel, filed a motion to dismiss prohibited practice complaint or in the alternative, 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 POE failed to exhaust his contractual remedy; and

(2) alternatively, summary judgment should be granted because there are no genuine issues of material fact in dispute, and the Respondent is entitled to judgment as a matter of law. In this regard, HAYASHIDA contends that the complaint is moot, Complainant received relief at Step 3, and the instant complaint is precluded by the doctrines of res judicata and collateral estoppel.

On November 18, 1998, POE filed an opposition to Respondents' motion to dismiss the complaint or alternatively for summary judgment with the Board.

On January 19, 1998, the Board conducted a hearing on HAYASHIDA'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 DOT, State of Hawaii. POE is an employee within the meaning of § 89-2, HRS.

HAYASHIDA was for all times relevant, the Director of the DOT, State of Hawaii and representative of the public employer as defined in § 89-2, HRS, of POE.

POE filed a grievance dated June 16, 1997 at Step 1 alleging that his employer violated § 21 of the Unit 03 contract by failing to provide rest periods to the employees as provided by the contract. The grievance was denied at Step 1 and POE appealed to Step 2.

By letter dated December 10, 1997, HAYASHIDA responded at Step 2. HAYASHIDA indicated that because of the unique job conditions and operations of the Marine Traffic Controllers, they have not been taking any rest periods as a long standing practice. In addition, when POE and other incumbents were interviewed for their jobs, they were informed of the conditions of employment and the employees accepted appointment with the knowledge that each shift was eight hours long with no rest periods and lunch breaks. HAYASHIDA indicated an agreement tentatively agreed to compensate POE and the other Marine Traffic Controllers for the missed rest periods.

By letter dated June 17, 1998, POE requested the Hawaii Government Employees Association, AFSCME, Local 152, (HGEA or union) to process a class grievance on the same issue as his individual grievance. POE agreed to defer to the HGEA in the processing of his grievance.

By letter dated July 19, 1998, POE requested that the DOT begin processing his individual grievance at Step 2 because the HGEA had not responded to his letter of June 17, 1998. POE requested compensatory time credits for missed rest periods retroactive to July 1, 1993.

POE and the employer's designee, Amador Casupang (Casupang), met on July 27, 1998 at which time Casupang agreed to issue an amended Step 2 response. POE agreed to allow until August 10, 1998 for the employer to provide another Step 2 response.

POE filed another Step 1 grievance, dated August 19, 1998, alleging that the employer violated Article 11 of the contract by failing to provide a Step 2 decision within the time limits as agreed to.

By letter dated August 25, 1998, Harbors Administrator Thomas T. Fujikawa agreed to waive the Step 1 grievance meeting pursuant to POE's request. By letter dated August 25, 1998, POE filed a Step 2 appeal with HAYASHIDA. By letter dated September 10, 1998, POE filed a Step 3 appeal with James H. Takushi (Takushi), Director of the Department of Human Resources Development, State of Hawaii. By letter dated September 23, 1998, Takushi found after an investigation that a Step 2 reply was issued by the DOT on December 10, 1997. Takushi indicated that the Step 2 reply did not represent the DOT's final position on the Article 21 dispute but it served to open the door to discussions with POE and the HGEA. Takushi indicated that the DOT and HGEA were engaged in an ongoing dialog in resolving the Article 21 situation on behalf of all Tower Operators. Takushi further found that at the conclusion of the July 27, 1998 meeting with the DOT that there was an agreement for DOT to provide a written update to POE by August 10, 1998. The DOT did not meet the deadline and did not request an extension of time from POE. Takushi directed the DOT to provide an update and make every effort to be timely in future replies. Takushi therefore denied the grievance.

On October 13, 1998, POE filed the instant complaint seeking: 1) an order compelling the Director of Transportation to issue a Step 2 response immediately; 2) an order declaring that the

Director of Transportation is in violation of § 89-13(a)(8), HRS; 3) a cease and desist order that the Director of Transportation stop this prohibited practice now and in the future; and (4) an award of money damages to reimburse POE for the cost of this action before the Board.

There is no evidence that POE requested his union to take his grievance regarding HAYASHIDA's failure to reply at Step 2 to arbitration.

#### DISCUSSION

POE contends that HAYASHIDA violated Article 11 of the applicable contract by failing to respond at Step 2 to his grievance.

In his motion to dismiss and/or for summary judgment, HAYASHIDA contends that the Board lacks jurisdiction over the instant complaint because POE failed to exhaust his contractual remedies since he failed to request the union to arbitrate his grievance.

In his complaint, POE alleges that HAYASHIDA committed a prohibited practice by violating the provisions of the agreement by failing to respond at Step 2. Takushi addressed POE's grievance at Step 3 and directed DOT to render a response as agreed to. There is no evidence in the record that POE requested the HGEA to take his case to arbitration or that the union refused to arbitrate his grievance. In addition, 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; Order No. 1866, Case No. CE-03-237, Lewis W. Poe, May 17, 2000. Further in Order No. 1882, dated June 14, 2000, in Case No. CE-03-379, 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 the instant complaint is moot. HAYASHIDA rendered a Step 2 response and was thereafter directed by Takushi to render an amended response pursuant to the agreement between POE and Casupang. There is no dispute that POE's appeal to Step 3 was not affected by Casupang's failure to issue an amended response to POE. Accordingly, the Board would find that there is no actionable controversy between the parties and that the complaint is moot. At this stage of the proceedings the case has lost its character as a present, live controversy. Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 734 P.2d 161 (1987). In Wong v. Board of Regents, University of Hawaii, 62 Haw. 391, 616 P.2d 201 (1980), the Court dismissed the action on grounds of mootness, stating:

The mootness doctrine is said to encompass the circumstances that destroy the justiciability of a suit previously suitable for determination. Put another way, the suit must remain alive throughout the course of the litigation to the moment of final appellate disposition. Its chief purpose is to assure that the adversary system, once set in operation remains properly fueled. The doctrine seems appropriate where events subsequent to the judgment of the trial court have so affected the relations between the parties that the two conditions for justiciability relevant on appeal - adverse interest and effective remedy - have been compromised.

Id., at 394. See also, State v. Rogan, 91 Hawai'i 405, 984 P.2d 1231 (1999); State v. Fukusaku, 85 Hawai'i 462,

946 P.2d 32 (1997); AIG Hawaii Ins. Co. v. Bateman, 82 Hawai'i 453, 923 P.2d 395 (1996); In re Application of J.T. Thomas, 73 Haw. 223, 832 P.2d 253 (1992).

In this case, the Board would find that the conditions of justiciability have been compromised by the issuance of Takushi's Step 3 response while finding no violation of Article 11, acknowledged that the DOT had not provided a response to POE as agreed to and directing the DOT to provide a response. The Board concludes that the issues are moot as there is no actual controversy between the parties and there is no meaningful remedy that it could impose in this matter at this stage. Accordingly, the Board dismisses the instant complaint.

#### 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.

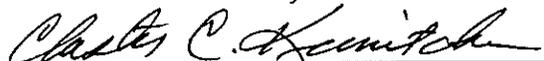
LEWIS W. POE and KAZU HAYASHIDA, Director, Department of Transportation, State of Hawaii  
CASE NO. CE-03-416  
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DATED: Honolulu, Hawaii, June 16, 2000.

HAWAII LABOR RELATIONS BOARD

  
BERT M. TOMASU, Chairperson

  
RUSSELL T. HIGA, Board Member

  
CHESTER C. KUNITAKE, Board Member

Copies sent to:

Lewis W. Poe  
James E. Halvorson, Deputy Attorney General  
Joyce Najita, IRC