

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of
HAWAII FIRE FIGHTERS ASSOCIATION,
LOCAL 1463, IAFF, AFL-CIO,
Complainant,
and
JERRY MATSUDA, Airports Administrator,
Department of Transportation, State of Hawaii
and DEPARTMENT OF TRANSPORTATION,
State of Hawaii,
Respondents.

CASE NO. CE-11-459
ORDER NO. 1990
ORDER RESCINDING APPOINTMENT OF HEARINGS OFFICER AND GRANTING RESPONDENTS JERRY MATSUDA, ET AL.'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

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On November 20, 2000, the HAWAII FIRE FIGHTERS ASSOCIATION, LOCAL 1436, IAFF, AFL-CIO (HFFA, Union or Complainant) filed this prohibited practice complaint against JERRY MATSUDA, Airports Administrator and the DEPARTMENT OF TRANSPORTATION, State of Hawaii (collectively Employer or Respondents) alleging that the Employer fraudulently and intentionally misled the HFFA in the course of adopting and applying a sub-25 VO2 max standard cardio pulmonary stress test as a condition of continued employment, and subsequently has refused to bargain in good faith regarding the impacts of applying the test.

On December 11, 2000, the Hawaii Labor Relations Board (HLRB or Board) issued an order appointing Valri Lei Kunimoto as hearings officer for the case and on January 10, 2001, Respondents filed the instant motion to dismiss and/or for summary judgment.

On January 23, 2000, the Board rescinded its appointment of the hearings officer and resumed direct jurisdiction over the complaint. On that same day, a hearing was held on the instant motion to dismiss and/or for summary judgment. All parties had full opportunity to present evidence and argument to the Board.

For the reasons stated below, the Board hereby grants Respondents' Motion to Dismiss.

FINDINGS OF FACT

1. Complainant HFFA is the exclusive representative for 163 firefighters who work for Respondent Airports Division, DEPARTMENT OF TRANSPORTATION, State of Hawaii and are included in bargaining unit 11.
2. Respondent JERRY MATSUDA was, for all times relevant, the Administrator of the Airports Division, Department of Transportation, State of Hawaii and a representative of the public employer as defined in Hawaii Revised Statutes (HRS) § 89-2.
3. Section 38 of the Unit 11 Collective Bargaining Agreement between Complainant and the public employers provides in relevant part that:

The Employer shall provide each employee an annual physical examination by a physician selected by the Employer at no cost to the employee. The nature and extent of such physical examination shall be determined by the employer.
4. Complainant alleges that in October 1995 the Employer substituted a bicycle cardio pulmonary stress test (CPST) for a treadmill test as a part of the annual physical examination required of State fire fighters.
5. The CPST is designed to measure the maximum level of exercise an individual can perform based upon the amount of oxygen the body absorbs per minute. Performance is measured by oxygen consumption/kilogram weight per minute.
6. Complainant alleges that the Employer concurrently and unilaterally imposed a minimal CPST performance standard of 25 ml/kg/min (VO2 max). Fire fighters who failed to meet the threshold standard were, and have been since 1995, disqualified from duty, subject to the opportunity for reinstatement upon successful passage of the test.
7. On May 23, 1996, Employer transmitted a copy of the new examination to Francis Kennedy (Kennedy), Complainant's business manager. The letter requested the submission of any comments with appropriate rationale within 30 days.

8. Complainant subsequently met with the Employer's fire fighting staff officer, Martinez Jacobs (Jacobs) who, Complainant alleges was aware that the Union maintained that any physical fitness program required mutual agreement.
9. In order to address Complainant's concerns, the Respondents solicited a written response from Respondents' consultant, Loren G. Myhre, which included the representation that the CPST was adopted as the program of choice for all Department of Defense military and civilian fire fighters in 1990 and that it had been recently implemented in major civilian fire departments.
10. Complainant alleges that it also met with Dr. Roy Adaniya, the physician who was conducting Employer's CPST. Dr. Adaniya is alleged to have represented that a sub-25 VO2 max would mean that a fire fighter would be "de-conditioned" and would have a permanent medical disability as measured by the AMA Guides to the Evaluation of Permanent Impairment (4th Ed. 1993).
11. Complainant alleges that based upon the Employer's and physician's representation, it "reluctantly" decided not to object to Employer's adoption of the CPST. This decision was supported by the impression that the CPST dealt with a medical qualification rather than physical fitness or performance requirements and that, under the applicable collective bargaining agreement, the employer had the right to decide the content of an annual medical examination.
12. Between the institution of the CPST and the filing of the instant complaint on November 20, 2000, 82 fire fighters have been temporarily disqualified for duty based on sub-25 VO2 max. They breakdown on an annual basis as follows:
 - a. 1995 10
 - b. 1996 13
 - c. 1997 11
 - d. 1998 15
 - e. 1999 13
 - f. 2000 20
13. On March 9, 1998, Raymondo Domingo (Domingo), a member of Complainant Union who had been placed on sick leave after failing to satisfy the CPST 25 VO2 max, filed a prohibited practice complaint with the Board. Domingo alleged that the State committed a prohibited practice by adopting the CPST and that the HFFA violated their duty of fair representation in the course of his grievance and by its agreement to the use of the CPST.

14. Both the State and HFFA filed motions to dismiss Domingo's complaint for failure to comport with the applicable statute of limitations. The Board granted both motions in Orders Nos. 1664 and 1733, respectively.
15. As late as July 20, 2000, the HFFA, in a letter to a member regarding the CPST, continued to maintain that the CPST fell within the collective bargaining agreement's provision permitting the Employer to determine the nature and extent of a physical examination. Exhibit 6, Respondents Jerry Matsuda and Department of Transportation's Motion to Dismiss and/or for Summary Judgment.
16. On or about August 4, 2000, Kennedy and HFFA President Robert Lee (Lee) attended a convention at which they learned that some fire departments had rejected the use of the VO2 max as the sole basis to disqualify a fire fighter from duty. Kennedy also claims to have learned that the CPST is not a part of a medical examination to qualify a fire fighter for continued duty in any other fire department.
17. On September 21, 2000, Kennedy and Lee met with Respondents to advise that all fire fighters disqualified as a result of the CPST should be reinstated, that use of the sub-25 VO2 max standard should be suspended until a correlation between the standard and fitness for duty had been validated, and that the parties should negotiate over the use of the CPST and sub-25 VO2 max standard.
18. On September 27, 2000, Complainants met with Dr. Adaniya who is alleged to have confirmed that he was unable to verify, or point to any study that verified, that fire fighters with a sub-25 VO2 max would be unfit for duty.
19. Employer is alleged to have subsequently advised the Union that legal action would be necessary to negotiate the use or application of the CPST or reinstatement of fire fighters disqualified as a result of its application.
20. On October 3, 2000, the Complainant filed a class grievance against Respondents under the applicable collective bargaining agreement. The grievance alleged the CPST was not a valid physical examination but rather an unauthorized fitness test not determinative of fitness for duty. The date of the alleged violation was identified as September 27, 2000 -- the meeting with Dr. Adaniya. Relief sought included the reinstatement of fire fighters disqualified as a result of the CPST and actions in conformance with the collective bargaining agreement, related states and rules.

21. The class grievance has not proceeded beyond Step 3 of the grievance process.
22. Complainant alleges that just prior to the filing of the grievance, it learned that no fire department uses the VO2 max standard as the sole basis for disqualification, and that it is biased and unreliable.

DISCUSSION

The HFFA alleges that the “Employer has breached its fundamental duty to bargain in good faith by unilaterally adopting and using the CPST and sub-25 VO2 max without first consulting and conferring with the union, and by refusing to negotiate over their adverse impact on a firefighter.” HFFA’s Supplemental Memorandum Opposing Motion to Dismiss and/or Summary Judgment at 19.

In the instant motion to dismiss and/or for summary judgment, Respondents argue 1) that the complaint is untimely and must be dismissed as failing to comport with the applicable limitations period; 2) that Complainant has failed to exhaust contractual remedies so that the Board should decline jurisdiction; and 3) that the use of the CPST is a contractual and statutory management right so that no duty to negotiate its use or application can attach.

In response to the motion, Complainant argues 1) that Respondents’ misrepresentations regarding the validity and application of the CPST to fire fighters constituted a fraud which equitably tolled the applicable statute of limitations; 2) that arbitration cannot yield meaningful relief so that a declination of jurisdiction based on a failure to exhaust contractual remedies would be misapplied; and 3) that the CPST is a fitness rather than medical examination so that its application and impact must be subject to negotiations.

We concur with Respondents’ arguments with respect to timeliness and exhaustion and accordingly order that the complaint be dismissed for want of jurisdiction.

Statute of Limitations

HRS § 377-9(1), made applicable to the Board by HRS § 89-14 in prohibited practice cases, provides as follows:

No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.

Similarly, Hawaii Administrative Rules (HAR) § 12-42-42(a) identifies the limitations period applicable to the filing of prohibited practice complaints under HRS § 89-13. It provides as follows:

Complaints that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, may be filed... within ninety days of the alleged violation.

The Board has construed the limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HPERB 186 (1983).

In the instant complaint, the complained of event occurred in October of 1995, when Respondents instituted the CPST test. The prohibited practice complaint filed more than five years later would appear to clearly fall outside of the prescribed ninety-day limitations period. Complainant, however, argues that the complaint is not barred because the Employer's representatives fraudulently misrepresented the reliability and application of the CPST in 1996, thereby equitably tolling the limitations period until Complainant learned of the fraud in September 2000.

In oral argument, Complainant suggested that had Kennedy and Lee not attended the August 2000 convention and learned of the alleged invalidity and nonapplication of the CPST, the limitations period might have been tolled indefinitely due to Respondents' alleged fraud. We do not find this to be the case. The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Instead, the period begins to run when "an aggrieved party knew or should have known that his statutory rights were violated." Metromedia Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978) (emphasis added).

In the instant case, Complainant had more than ample cause and opportunity to at least investigate the validity and application of the CPST. Respondents invited comment in May 1996, and even if the Employer's agents may have made misleading statements, Respondents did nothing to prevent or inhibit any investigation. In each succeeding year at least ten fire fighters were disqualified for duty as a result of the test. In 1998, one of the Union's members, Raymondo Domingo, filed a grievance and prohibited practice complaint virtually identical to the instant complaint. Domingo also alleged that the HFFA violated its duty of fair representation by not opposing the imposition of the CPST and the HFFA successfully argued for the dismissal of Domingo's complaint. Each or any of these occurrences might reasonably have triggered an investigation by the HFFA into the application of the CPST. And any such investigation should have yielded the information fortuitously gained at the fire fighters' convention in August 2000.

Accordingly, we conclude that even if alleged fraud equitably tolled the applicable statute of limitations, each or any of the occurrences identified in the paragraph above would have restarted the limitations period so that any prohibited practice complaint would have to have been filed within ninety days. No such complaint having been filed within the period, the complaint must be dismissed.

Failure to Exhaust Contractual Remedies

Even if the instant claim had not been barred by the statute of limitations, the Board would be required to decline jurisdiction due to Complainant's failure to exhaust its contractual remedies.

The Hawaii Supreme Court in Santos v. State of Hawaii, 64 Haw. 648, 655 (1982) has stated that:

It is the general rule that before an individual can maintain an action against his employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his employer and the [union]. (citation omitted) The rule is in keeping with the prevailing National Labor Relations policy and Hawaii policy favoring arbitration as a dispute settlement mechanism. (citations omitted.)

Application of this rule permits a voluntary declination of jurisdiction and has often been adopted and applied by this Board when a claimant has failed to fully exhaust available contractual remedies. See e.g., Hawaii State Teachers Association, 1 HPERB 253 (1972). Here, the Union has filed a class grievance mirroring the instant claim. The grievance has not proceeded beyond Step 3 so that the option of arbitration appears to remain available. A declination of jurisdiction therefore appears to be in order.

The Union argues that declination would not be appropriate because an arbitrator could not provide the injunctive relief prayed for here. We note however, that in its class grievance filed on October 5, 2000, the remedy sought by the HFFA on behalf of its members was:

Return all affected employees to their duties; return all lost sick and vacation leave time and lost opportunities for holiday work. Bring all such actions into conformance with the Collective Bargaining Agreement and related statutes, rules and regulations.

Exhibit 7, Respondents Jerry Matsuda and Department of Transportation's Motion to Dismiss and/or for Summary Judgment.

Complainant apparently believed that this relief would sufficiently remedy any harm done to its members. And it clearly sought such remedy within the context of the bargaining agreement. Even if the Union did not request, and the arbitrator may not have been able to provide, injunctive relief, the Board will not now supercede the application of the bargaining agreement by assuming jurisdiction. Accordingly, jurisdiction will be declined and the complaint dismissed.

CONCLUSIONS OF LAW

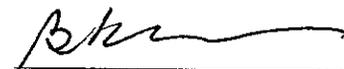
1. Pursuant to HRS § 377-9(1) and HAR 12-42-42(a), the Board has jurisdiction to hear prohibited practice complaints which are filed within ninety days of an alleged violation of HRS Chapter 89. The instant complaint was filed beyond the applicable limitations period and the Board lacks jurisdiction to hear this complaint.
2. Complainant filed a class grievance against the Employer challenging the CPST and seeking relief from the adverse actions taken as a result thereof which is pending at Step 3. The Board declines jurisdiction over the instant complaint because Complainant failed to exhaust its contractual remedies.

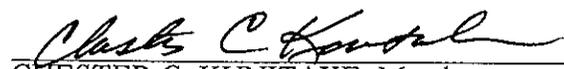
ORDER

Accordingly it is hereby ordered that the appointment of a hearings officer in the instant complaint is rescinded, Respondents' Motion to Dismiss is granted, and the instant case is dismissed.

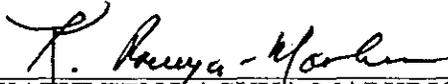
DATED: Honolulu, Hawaii, March 1, 2001

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member

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