

STATE OF HAWAII

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

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|------------------------------|---|---------------------|
| In the Matter of |) | CASE NOS.: CU-13-44 |
| |) | CE-13-77 |
| ANN PARIS, |) | |
| |) | DECISION NO. 173 |
| Complainant, |) | |
| |) | |
| and |) | |
| |) | |
| HAWAII GOVERNMENT EMPLOYEES' |) | |
| ASSOCIATION, AFSCME LOCAL |) | |
| 152, AFL-CIO; BOARD OF |) | |
| EDUCATION, State of Hawaii; |) | |
| DEPARTMENT OF PERSONNEL |) | |
| SERVICES, State of Hawaii, |) | |
| |) | |
| Respondents. |) | |

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

On February 23, 1982, Complainant ANN PARIS filed with the Hawaii Public Employment Relations Board [hereinafter referred to as Board] a prohibited practice complaint against the HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION [hereinafter referred to as HGEA], and the State of Hawaii. As the complaint designates as a Respondent "State of Hawaii, Departments of Education Personnel Services," the Board duly served the complaint upon the BOARD OF EDUCATION [hereinafter referred to as BOE] and DEPARTMENT OF PERSONNEL SERVICES [hereinafter referred to as DPS] in accordance with Section 377-9, Hawaii Revised Statutes [hereinafter referred to as HRS].

Complainant alleged that Respondent HGEA violated, inter alia, Subsections 89-13(b)(1), (2), (3) and (4), HRS, by its failure or refusal to process her grievance.

Complainant also alleged that the State of Hawaii through Respondent BOE violated, inter alia, Subsections 89-13(a)(1), (2), (3), (5), (6), (7) and (8), HRS, by its refusal to process her grievance or to place her on an eligibles list for the position of School Psychologist. In addition, Complainant alleged the State of Hawaii violated its own statutes and rules by hiring a third party to fill the above-mentioned position and by terminating her without cause.

A prehearing conference was held on March 19, 1982.

On April 5, 1982, a Stipulated Withdrawal of Counsel and Substitution of Complainant in Pro Per was filed with this Board. It was agreed therein that Complainant's counsel of record, E. Courtney Kahr, be withdrawn as counsel of record and that Complainant be substituted as her own counsel.

On April 6, 1982, counsel for Respondents BOE and DPS [hereinafter referred to collectively as STATE] filed a Motion to Dismiss the instant prohibited practice complaint on the grounds the Board lacked jurisdiction over the matter since Complainant was not an employee as defined under Chapter 89, HRS, and is therefore not entitled to seek relief before the Board. On April 14, 1982, Respondent HGEA filed a Joinder in Motion to Dismiss thereby joining Respondent STATE's previously filed motion to dismiss.

By Order No. 440, dated April 8, 1982, the Board approved the Stipulated Withdrawal of Counsel and Substitution of Complainant in Pro Per.

On August 9, 1982, after two continuances to allow Complainant the opportunity to secure an attorney, a hearing

on the Motion to Dismiss was held. Since the motion to dismiss basically presented legal issues and Complainant was not represented by an attorney, the Board deferred the hearing on the motion to dismiss until a hearing on the merits of the case was held to elicit the basic facts.

After numerous continuances to again allow Complainant an opportunity to secure an attorney, a hearing on the instant prohibited practice complaint was held on January 14, 1983. At the hearing, Complainant represented herself in pro se. The other parties were represented by counsel. All parties were afforded the opportunity to present witnesses and arguments.

At the conclusion of the hearing, counsel for Respondents STATE and HGEA renewed their motion to dismiss. The Board at that time entertained oral arguments on Respondents' motion to dismiss.

Upon a full review of the record in this case, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Complainant ANN PARIS was for all times relevant, employed at the Department of Education [hereinafter referred to as DOE] as a School Psychologist on an emergency appointment basis.

Respondent BOARD OF EDUCATION is and was, for all times relevant, a public employer as defined in Subsection 89-2(9), HRS.

Respondent DEPARTMENT OF PERSONNEL SERVICES is and was, for all times relevant, a representative of the State

of Hawaii which is a public employer as defined in Subsection 89-2(9), HRS.

Respondent HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION is and was, for all times relevant, an employee organization and the certified exclusive representative, as defined in Subsection 89-2(12), HRS, of employees in bargaining unit 13 (Professional and scientific employees, other than registered professional nurses).

The STATE's witness, Gerald Sada, Personnel Management Specialist III, responsible for administering the civil service personnel program of the DOE, testified that a School Psychologist position was created when the department was appropriated funds by the legislature. Tr.* p. 124. However, since no civil service class existed for the newly created position, a new class had to be established by the DPS. Tr. p. 97. In establishing the position, the DPS reviews the job duties and responsibilities and determines the minimum qualifications for the position. Once the position is established the DPS also determines whether an applicant meets those minimum qualifications. Tr. pp. 92-94. In any event, while waiting for this new class to be established, the DOE requested that an exempt position be established so that services could be provided immediately. Tr. p. 118.

On or about September 4, 1979, Complainant was hired by the State of Hawaii, Department of Education, Kauai District to fill exempt Position No. 21192E entitled School Psychologist on a temporary basis. Tr. pp. 11-12.

* As used herein, the citation to Tr. refers to the transcript from the hearing held on January 14, 1983.

Effective April 1, 1980, Complainant's appointment was extended to June 30, 1980. The bargaining unit code designated on Complainant's State DPS Form 5, Notification of Personnel Action [hereinafter referred to as SF5], was 13. STATE Exhibit 3. This indicates that Complainant belonged to bargaining unit 13. Tr. p. 100.

Effective July 1, 1980, Complainant's exempt appointment was extended to September 30, 1980. The bargaining unit code remained as designated previously on the SF5. STATE Exhibit 3.

Apparently, the reason for the extended exemption of the position was the DPS needed additional time to complete the classification process. Tr. p. 98.

At the start of the school year in 1980, Complainant applied for the regular School Psychologist position. Tr. p. 46. At that time, the DPS apparently had completed establishing the class. The DPS, however, determined that Complainant did not meet the educational requirements of the School Psychologist position and therefore Complainant was denied a provisional appointment to the position. Tr. p. 47.

In addition, since Complainant did not meet the minimum qualifications of the School Psychologist position, effective October 1, 1980, Complainant's employment status with the Kauai District was changed to an emergency appointment to School Psychologist Position No. 29127 pending the establishment of a list of persons eligible for the position. Tr. p. 126. Complainant was authorized to work as an emergency appointee in this position for thirty-day periods starting from October 1, 1980 to February

26, 1982 and also from March 1, 1982 to March 12, 1982.

STATE Exhibit 3. Complainant, however, did not work continuously during this time period.

During the period Complainant worked as an emergency appointee, she took a one-day break in service after each thirty-day work period. Tr. p. 19.

Sada testified that once the list of eligibles was established and a permanent appointment to the regular School Psychologist position was made, Complainant was terminated since the vacancy had become filled. Tr. p. 108.

Sada further testified that it is a common practice to use the emergency hire process to fill vacant positions until the department can find someone qualified for the position. Tr. p. 95. For emergency appointments, there is no qualification requirement since it is an urgent, immediate employment situation. A person is usually appointed for a period of ten days which can be extended to a maximum of thirty days. At the end of thirty days, if the need remains, the department may appoint the same person or a different person to fill the position again for a period of ten days which can be extended to thirty days. One restriction on emergency appointments is there must be a one-day break in service between each thirty-day appointment. Tr. pp. 90-91.

As an emergency appointee, Complainant was employed on a month-to-month basis. As such, she was considered by the DOE as a temporary employee of three months duration or less and therefore not included in any bargaining unit and not entitled to coverage under Chapter 89, HRS, as specified in Subsection 89-6(c), HRS. Board Exhibit 7; Tr. pp. 169-70.

The bargaining unit code of Position No. 29127 was designated as 73 during Complainant's emergency appointments as reflected on the applicable SF5. STATE Exhibit 3.

Sada testified that when the bargaining unit code is designated as 73 on the SF5, the position is excluded from collective bargaining and no deductions for service fees are made. Tr. pp. 99-100.

When Complainant's employment changed from a temporary exempt position to an emergency appointment basis, the amount deducted from her paycheck changed. Tr. p. 55.

With respect to the payroll deductions, Complainant was of the opinion that although the amount deducted changed, this amount still represented her service fee deduction as a Unit 13 member. Tr. p. 58.

During Complainant's temporary appointment to the exempt School Psychologist position from September 4, 1979 to September 30, 1980, service fees to be paid to the HGEA were deducted from her paycheck. Tr. p. 54.

For the pay periods ending October 31, 1980, November 28, 1980 and December 31, 1980, which reflect the deductions for the months of October, November and December 1980, respectively, the first three months of Complainant's emergency appointment, no service fees were deducted from Complainant's paycheck. STATE Exhibit 4.

Complainant's Salary Assignment/Cancellation Form, State Accounting Form D-60 indicates that Complainant assigned \$9.40 each month from her salary beginning April 15, 1981. The form contains the signature of Ann Paris and is dated March 2, 1981. HGEA Exhibit 2. Complainant testified that she did not recall signing the form although

she admitted that the signature on the form "looks kind of like the way I sign my name,. . ." Tr. p. 85.

Chester Kunitake, Respondent HGEA's Contracts Officer testified that Complainant's \$9.40 salary assignment was for an associate membership. Six dollars and forty cents represented her associate membership dues and \$3.00 represented her spouse's dues. There is noted on the form that the spouse's dues should be deleted so her actual salary assignment is \$6.40 per month. Tr. pp. 144-45.

Kunitake further testified that if a person does not belong to a bargaining unit and is not covered by collective bargaining, the person does not possess any contract rights and the HGEA cannot represent that person under the collective bargaining contract. However, although the HGEA cannot provide collective bargaining services to those not in collective bargaining units, if a person pays membership dues to the HGEA, he or she qualifies for various other union services as an associate member. To qualify as an associate member, the person would have to apply for membership with the union and would have to sign a salary assignment form for the deduction of associate membership fees. Tr. p. 135.

In early January, 1982, Complainant approached Clarence "Gadget" Takashima, HGEA's Kauai Division Head, and requested an HGEA grievance form which was provided to her at that time. Tr. p. 156.

On January 22, 1982, Complainant signed the completed grievance form entitled "Labor Agreement Grievance Form HGEA-Unit #13 Step I." Board Exhibit 1.

Complainant requested that Takashima pursue the grievance for her. Tr. p. 156.

Takashima refused to process the grievance on the grounds that Complainant did not belong to any bargaining unit and thus was not entitled to coverage under the collective bargaining law. Moreover, Takashima did not feel that she had a proper grievance. Tr. p. 157.

CONCLUSIONS OF LAW

The instant prohibited practice complaint arises from an incident which occurred on or about January 22 and 25, 1982. On those dates, Complainant alleges that Respondent HGEA committed prohibited practices by refusing to assist her in processing her grievance against the DOE. Complainant also alleges that the STATE, through Respondent BOE, committed prohibited practices by refusing to process her grievance and by refusing to place her on an eligibles list for the School Psychologist position. Complainant alleges that these actions by Respondents HGEA and BOE constituted prohibited practices in violation of various subsections of Section 89-13, HRS.

Subsequent to the filing of the prohibited practice complaint, in accordance with the authority granted to the Board by Subsections 89-5(b)(4) and (5), HRS, the Board conducted proceedings, made inquiries and held hearings on the complaint as it found necessary.

Before the hearing on the merits of this case, Respondent STATE filed a motion to dismiss the instant case on the grounds that the Board lacked jurisdiction over the matter since the Complainant was not an employee as defined

under Chapter 89, HRS. Respondent HGEA subsequently joined in the motion. At the hearing on the motion to dismiss, the Board, in its discretion, deferred ruling on the motion until a hearing on the merits of the complaint was held.

At the conclusion of the hearing on the merits, Respondent STATE and HGEA renewed their motion to dismiss. Oral arguments were presented at that time. While there is no dispute that Complainant was employed by the State of Hawaii as an emergency appointee, there is a question as to whether Complainant is an employee who is entitled to coverage under Chapter 89, HRS. After consideration of the facts in evidence and the arguments presented, the Board hereby grants Respondents' Motion to Dismiss.

Respondents allege that Complainant is not an employee under Chapter 89, HRS, who is entitled to seek relief before this Board. An "employee" under Chapter 89, HRS, is defined in Subsection 89-2(7), HRS, as:

- (7) "Employee" or "public employee" means any person employed by a public employer except elected and appointed officials and such other employees as may be excluded from coverage in section 89-6(c).

Respondents allege that Complainant, as an emergency appointee, is not included in any bargaining unit in accordance with Subsection 89-6(c), which provides in pertinent part:

No. . .temporary employee of three months duration or less. . .shall be included in any appropriate bargaining unit or entitled to coverage under this chapter [89].

Respondents contend that an emergency appointee is a temporary employee of three months duration or less.

In its Memorandum of Law in Support of Motion to Dismiss, Respondent STATE cites to Administrative

Rules Section 14-3-36 which defines an emergency appointment as:

Emergency appointment. In case of emergency, where a position must be filled without delay and where time does not permit the securing of prior authority of the director, the appointing authority may make an emergency appointment for not more than ten working days without examination and without prior approval of the director. An employee so appointed shall be capable of performing the emergency work. The director, for good and sufficient cause, and for reasons given in writing by the department concerned, may extend the appointment for a total appointment period not to exceed thirty calendar days.

Gerald Sada, Respondent STATE's witness, testified that at the end of the thirty days, if the department still required the position to be filled, the department may appoint the same person or a different person to again fill the position on an emergency basis for another period of ten days which can be extended to thirty days. One of the restrictions is there must be a break in service of at least one day between each thirty-day appointment.

The Board therefore concludes that an emergency appointee is a temporary employee of three months duration or less since the appointment to the position is authorized only for a maximum of thirty days. While in this case it may appear that the cumulative appointments spanned a period longer than three months, it is clear that the duration of each appointment was one discrete month.

Since Complainant is a temporary employee of three months duration or less, the Board finds that in accordance with Subsection 89-6(c), HRS, she was properly excluded from a collective bargaining unit and therefore not entitled to coverage under Chapter 89, HRS. Hence, possessing no rights under Chapter 89, HRS, she is not entitled to seek redress

from the termination action or her non-selection before this Board.

Complainant further alleges, however, that she paid union dues to Respondent HGEA during the time she was temporarily appointed to the exempt position as well as during the time she was in the emergency appointed position. She testified that she was under the impression that the amount deducted from her paycheck during her temporary exempt and emergency appointment was for the same purpose-- collective bargaining representation by the union.

The evidence showed, however, that upon Complainant's emergency appointment to the School Psychologist position, deductions for the payment of service fees to the HGEA terminated. Subsequently, Complainant authorized the deduction from her paycheck of associate membership dues to the HGEA. While Complainant did not admit that she signed the Salary Assignment/Cancellation form, she has not denied it. After reviewing the original Salary Assignment/Cancellation form, the Board finds that Complainant did sign the form authorizing the deduction of associate membership dues. Further, by signing the form, Complainant acknowledged that she was aware that she was not a member of any bargaining unit. Hence, since Complainant was not covered by a collective bargaining agreement, Respondent HGEA properly refused to process a grievance on her behalf challenging the termination action.

Therefore, after careful consideration of the arguments presented and the record in this case, the Board concludes that on or about January 22 and 25, 1982, Complainant was a temporary employee of three months dura-

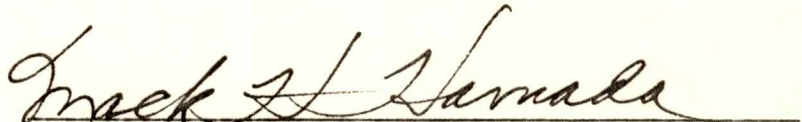
tion or less, who was not included in a collective bargaining unit nor paying service fees to Respondent HGEA. As such, she is not entitled to coverage under Chapter 89, HRS, and she is not entitled to seek relief before this Board. Accordingly, Respondents' Motion to Dismiss is granted since the Board has no jurisdiction over the matter.

ORDER

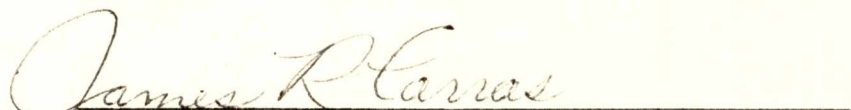
For the reasons set forth above, the Respondents' Motion to Dismiss is granted and the prohibited practice charges brought by Complainant ANN PARIS are hereby dismissed.

DATED: Honolulu, Hawaii, June 6, 1983.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


MACK H. HAMADA, Chairperson


JAMES K. CLARK, Board Member


JAMES R. CARRAS, Board Member

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