

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. DR-03-55
	)	
LEWIS W. POE,	)	DECISION NO. 371
	)	
Petitioner,	)	FINDINGS OF FACT, CONCLU-
	)	SIONS OF LAW AND ORDER
and	)	DISMISSING PETITIONS FOR
	)	DECLARATORY RULINGS
HAWAII GOVERNMENT EMPLOYEES	)	
ASSOCIATION, AFSCME, LOCAL 152,	)	
AFL-CIO; UNITED PUBLIC WORKERS,	)	
AFSCME, LOCAL 646, AFL-CIO; and	)	
JOHN D. WAIHEE, III, Governor,	)	
State of Hawaii,	)	
	)	
Intervenors.	)	

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In the Matter of	)	CASE NO. DR-03-56
	)	
LEWIS W. POE,	)	
	)	
Petitioner,	)	
	)	
and	)	
	)	
HAWAII GOVERNMENT EMPLOYEES	)	
ASSOCIATION, AFSCME, LOCAL 152,	)	
AFL-CIO; UNITED PUBLIC WORKERS,	)	
AFSCME, LOCAL 646, AFL-CIO; and	)	
JOHN D. WAIHEE, III, Governor,	)	
State of Hawaii,	)	
	)	
Intervenors.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
ORDER DISMISSING PETITIONS FOR DECLARATORY RULINGS

On September 30, 1994, LEWIS W. POE (POE), a state employee in bargaining unit 03, filed a Petition for Declaratory Ruling with the Hawaii Labor Relations Board (Board) which was designated as Case No. DR-03-55. In his petition, POE requested that the Board declare that certain provisions of the Step 3

grievance procedure, contained in Article 11 of the bargaining unit 03 collective bargaining agreement (agreement) violate Sections 89-3 and 89-8(6), Hawaii Revised Statutes (HRS).

All interested persons were afforded an opportunity to intervene in this matter through a Board notice, dated October 3, 1994. Petitions for intervention were filed by the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA), UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW), and JOHN D. WAIHEE III, Governor, State of Hawaii (Employer). The Board granted the petitions for intervention in Board Order No. 1114, dated October 18, 1994.

On October 20, 1994, POE filed another Petition for Declaratory Ruling with the Board which was designated as Case No. DR-03-56. In this petition, POE requested that the Board declare that certain provisions of the Step 1 grievance procedure violate Section 89-8(b), HRS.

All interested persons were afforded an opportunity to intervene in this matter through a Board notice, dated October 21, 1994. Petitions for intervention were filed by the HGEA, the UPW, and the Employer. The Board granted the petitions for intervention in Board Order No. 1127, dated November 21, 1994.

In Case No. DR-03-55, POE states that the language of the agreement which requires the "Employer and the Union" to meet after an appeal is taken from Step 2, even if the grievance was filed by an employee without union intervention, violates Section 89-8(b), HRS. POE further states that any time limits at Step 3 can only be extended by mutual consent of the Union and the Employer, thereby

interfering with the right of an employee grieving alone by disallowing the employee from extending time limits by mutual consent with the Employer.

In Case No. DR-03-56, POE asserts that the language in the agreement which requires a Step 1 meeting to be held between the grievant and a Union representative with the Employer representative interferes with the right of an employee to grieve alone. POE further contends that the agreement allows only the Union and the Employer to extend time limits, thereby violating the rights of employees grieving without Union intervention.

In Board Order No. 1181, dated April 27, 1995, the Board held that both petitions involve substantially the same parties and issues and, pursuant to Administrative Rules Section 12-42-8(g)(13), consolidated the petitions for disposition.

On October 13, 1995, HGEA filed a motion for summary judgment. The HGEA contends that the case should be dismissed as moot because the agreement has been amended to address the concerns raised by POE in his petitions.

On October 16, 1995, POE filed a memorandum in opposition to HGEA's motion for summary judgment. POE argues that the HGEA's supporting memorandum is too narrow in its premises, the amendment to the agreement is invalid because it has not been ratified by the employees and further, that the cases are not moot.

A hearing on the motion was held on November 20, 1995. POE and counsel for HGEA presented oral arguments. The other intervenors did not participate in the hearing. After hearing



arguments, the Board orally ruled that the petitions would be dismissed.

#### FINDINGS OF FACT

Petitioner POE is an employee as defined in Section 89-2, HRS, in bargaining unit 03.

The HGEA is the exclusive representative, as defined in Section 89-2, HRS, of bargaining unit 03 employees.

The UPW is the exclusive representative, as defined in Section 89-2, HRS, of bargaining units 01 and 10 employees.

At the time the petitions were filed, JOHN D. WAIHEE, III was the Employer, as defined in Section 89-2, HRS, of employees of the State of Hawaii.

The HGEA and the Employer are parties to an agreement covering bargaining unit 03 employees for the period July 1, 1993 to June 30, 1997. Article 11 of the agreement sets forth the grievance procedure. Pertinent provisions of Article 11 which are the subject of these petitions are:

Section C, which reads as follows:

As individual Employee may present a grievance to the Employee's immediate supervisor and have the grievance heard without intervention of the Union, provided the Union has been afforded an opportunity to be present at the conference(s) on the grievance. Any adjustment made shall not be inconsistent with the terms of this Agreement. By mutual consent of the Union and the Employer, any time limits within each step may be extended.

Section D, dealing with Step 1, which reads in pertinent part, as follows:

A meeting shall be held between the grievant and a Union representative with the division head or designee within seven (7) working days after the written grievance is received.

Section G, dealing with Step 3, which reads in pertinent part, as follows:

Within seven (7) working days after the receipt of the appeal, the Employer and the Union shall meet in an attempt to resolve the grievance. . . . The Employer or designee shall reply in writing to the Union within seven (7) working days after the meeting.

On August 2, 1995, the HGEA and the Employer entered into a memorandum of agreement amending certain portions of Article 11 of the agreement. As amended, pertinent provisions of Article 11 read as follows (bracketed portions deleted; underscored portions added):

A. Any complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure. By mutual consent of the Employee or the Union and the Employer, any time limits within each step may be extended. Any relevant information specifically identified by the [grievant] Employee or the Union in the possession of the Employer needed by [grievant] Employee or the Union to investigate and process a grievance, shall be provided to them upon request within seven (7) working days. The grievance shall be presented to the appropriate supervisor within twenty (20) working days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) working days after the alleged violation first became known or should have become known to the Employee involved, except that in the case of an alleged payroll computational error, such allegation shall be presented to the department head or designee in writing within twenty (20) working days after the alleged error is discovered by the [e]Employee, or the grievance may not be considered.



B. An individual Employee may present a grievance [to the Employee's immediate supervisor, and have the grievance heard] without intervention of the Union, up to and including Step 3, provided the Union has been afforded an opportunity to be present at the [conference(s)] meeting(s) on the grievance. Any adjustment made shall not be inconsistent with the terms of this Agreement. [By mutual consent of the Union and the Employer, any time limits within each step may be extended.]

\* \* \*

D. Step 1. If the [grievant is not satisfied with the result of the informal conference] grievance is not satisfactorily resolved at the informal step, the [grievant] Employee or the Union may submit a written statement of the grievance within seven (7) working days after [receiving the answers] receipt of the reply to the informal complaint to the division head or designee; or if the immediate supervisor does not reply to the informal complaint within seven (7) working days, the Employee or the Union may submit a written statement of the grievance to the division head or designee within fourteen (14) working days from the initial submission of the informal complaint; or if the grievance was not discussed informally between the Employee and the immediate supervisor, the Employee or the Union may submit a written statement of the grievance to the division head or designee within the twenty (20) working day limitation provided for in paragraph "A" above.

\* \* \*

G. Step 3. If the grievance is not satisfactorily resolved at Step 2, the [grievant] Employee or the Union may appeal the grievance in writing to the Employer or designee within seven (7) working days after the receipt of the [answer] reply at Step 2. [Within seven (7) working days after the receipt of the appeal, the Employer and the Union shall meet in an attempt to resolve the grievance.] The Employer or designee need not consider any grievance in Step 3 which encompasses [a] different alleged [violation or charge] violations or charges than those presented in Step 2.

No evidence was presented to support a finding that the memorandum of agreement was ratified by bargaining unit 03 employees.

#### CONCLUSIONS OF LAW

The Board may refuse to issue a declaratory order when the question is speculative or purely hypothetical and does not involve existing facts or facts which can be reasonably be expected to exist in the near future. The petitions herein do not involve existing facts or facts which can reasonably be expected to exist in the near future.

The Board may refuse to issue a declaratory order when the petitioner's interest is not of the type which would give the petitioner standing to maintain an action if the petitioner were to seek judicial relief. The petitioner herein is a member of bargaining unit 03 and would not have standing to maintain an action for employees in other bargaining units.

Section 89-10(a), HRS, does not require employee ratification of a memorandum of agreement of the nature involved in the instant case. The memorandum of agreement clarifies employee rights and has no adverse effect on such rights.

#### DISCUSSION

In his petitions, POE contends that the grievance procedure violates the right of employees to grieve without intervention of a union as set forth in Section 89-8(b), HRS, because (1) at Step 1, the employee and a union representative must meet with the division head; (2) at Step 3, the agreement provides



for a meeting between the Employer and Union and the Employer is required to reply to the Union; and (3) at both steps time limits may be extended only by mutual consent between the Employer and the Union.

In an effort to allay POE's concerns as expressed in the petitions, the HGEA during the pendency of this matter negotiated changes to the grievance procedures in the agreement. The memorandum of agreement entered into between the HGEA and the public employers on August 2, 1995 is intended to correct any language in the agreement which could be subject to an interpretation leading to interference with an employee's right to grieve without union intervention. Thus, the amendments make clear that an employee grieving alone may agree with the Employer to extend time limits and remove language mandating that the employee and a Union representative meet with the division head at Step 1. Further, at Step 3, the amendments clarify that a meeting will be held between the parties to the grievance and that the Employer will respond to the employee and the Union. Upon consideration of the memorandum of agreement, the Board concludes that the amendments address and resolve the issues raised in POE's petitions.

In his opposition to the motion, POE makes two main arguments, i.e., that the petitions are not moot because a declaratory ruling may affect other bargaining units with respect to grievance procedures contained in their collective bargaining agreements and that the memorandum of agreement is not valid because it was not ratified as required by Section 89-10(a), HRS.



Administrative Rules Section 12-42-9(f) provide, inter alia, as follows:

(f) The board may, for good cause, refuse to issue a declaratory order. Without limiting the generality of the foregoing, the board may so refuse where:

(1) The question is speculative or purely hypothetical and does not involve existing facts or facts which can reasonably be expected to exist in the near future.

(2) The petitioner's interest is not of the type which would give the petitioner standing to maintain an action if such petitioner were to seek judicial relief.

Applying the rule to the instant case, it is apparent that if the memorandum of agreement is valid, subsection (f)(1) is applicable in that the question presented does not involve existing facts or facts which can reasonably be expected to exist in the near future. For the reasons discussed, infra, the Board finds that the memorandum of agreement is valid. Moreover, subsection (f)(2) is applicable in that POE, as a member of bargaining unit 03, lacks standing to maintain an action involving collective bargaining agreements covering other bargaining units.

With regard to the validity of the memorandum of agreement, Section 89-10(a), HRS, reads as follows:

(a) Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned. The agreement shall be reduced to writing and executed by both parties. The agreement may contain a grievance procedure and an impasse procedure culminating in final and binding arbitration, and shall be valid and enforceable when entered into in accordance with provisions of this chapter.

POE contends that the section requires the memorandum of agreement to be ratified by employees of bargaining unit 03. It is clear that Section 89-10(a), HRS, requires employee ratification of initial or successor master collective bargaining agreements and POE cites no authority for his contention that it applies to a memorandum of agreement which amends an existing agreement.<sup>1</sup>

The Board recognizes some merit in POE's position in that a memorandum of agreement becomes part of a collective bargaining agreement and it could be argued that an agreement could be drastically altered to affect employee rights and benefits without employee participation in the decision-making process envisioned by Section 89-10(a), HRS. However, the Board notes that Section 89-10 requires "collective bargaining agreements" to be ratified and does not specifically mention amendments to such agreements. In the absence of a clear statutory mandate requiring ratification, the

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<sup>1</sup>On December 21, 1995, POE filed an affidavit with the Board citing pages 1330-1331 of the Hawaii State Senate Journal, Regular Session 1970. The pages contain Standing Committee Report No. 745-70 from the Committee on Public Employment on S.B. No. 1696-70 which eventually was enacted as Act 171, Session Laws of Hawaii 1970. Act 171 created Chapter 89, HRS. In discussing what is now Section 89-10, HRS, the Committee Report states, in pertinent part:

(3) Written agreements. To insure that the interests of public employees are best served, your committee has included a provision that any agreement concluded between the public employer and the exclusive representative shall be subject to ratification by the employees in the unit. (Emphasis added.)

Poe contends that the word "any" emphasized above includes a memorandum of agreement. However, the provision referred to in the Committee Report reads any "collective bargaining agreement" and the Board is not persuaded that the Committee Report sheds any light on the intention of the Legislature regarding ratification of a memorandum of agreement.



Board concludes that reasonableness and sound labor relations policy favors a finding that a memorandum of agreement of the nature involved here need not be ratified. A contrary finding would mean that every memorandum of agreement modifying an existing agreement would require ratification. The Board recognizes that labor-management relations is a dynamic process and that during the term of an agreement clarifications or corrections to an agreement may be necessary. Further, unanticipated circumstances may require the parties to negotiate and reach agreement on certain terms and conditions of employment. Requiring employee ratification of all memorandums of agreement would hinder and delay resolution of potential disputes. Additionally, the costs of contract administration would be unnecessarily increased as meetings or mail ballots would be needed to obtain ratification of even minor changes.

The amendments involved in the instant petitions are basically clarifications of the grievance policy and employee rights are not adversely affected. Indeed, the amendments are intended to ensure that the right of employees to grieve alone are protected. This holding of the Board is limited to the memorandum of agreement in this case and should not be construed as a ruling affecting all amendments to collective bargaining agreements.

#### ORDER

The Petitions for Declaratory Ruling are hereby dismissed.




LEWIS W. POE and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and JOHN D. WAIHEE, III, Governor, State of Hawaii; CASE NO. DR-03-55 and LEWIS W. POE v. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and JOHN D. WAIHEE, III, Governor, State of Hawaii; CASE NO. DR-03-56  
DECISION NO. 371  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATED: Honolulu, Hawaii, January 4, 1996.

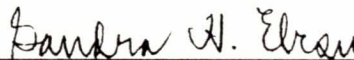
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