

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

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| In the Matter of |) | CASE NO. CE-03-283 |
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| LEWIS W. POE, |) | DECISION NO. 402 |
| |) | |
| Complainant, |) | FINDINGS OF FACT, CONCLUSIONS |
| |) | OF LAW, AND ORDER |
| and |) | |
| |) | |
| BENJAMIN J. CAYETANO, Governor, |) | |
| State of Hawaii, |) | |
| |) | |
| Respondent. |) | |
| |) | |

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On November 28, 1995, LEWIS W. POE (POE) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) alleging that Respondent BENJAMIN J. CAYETANO (CAYETANO or Employer) violated Section 89-13(a)(8), Hawaii Revised Statutes (HRS), by denying POE's claim for meal compensation pursuant to Article 25(A)(4)(a) of the Unit 03 Collective Bargaining Agreement (Agreement). POE also alleged that CAYETANO violated Section 89-13(a)(8), HRS, by failing to respond to POE's Step 2 grievance in a timely manner.

On January 23, 1996, the Board held a hearing on the instant complaint. The parties were afforded full opportunity to present evidence and argument to the Board.

Based upon a thorough review of the evidence and the record, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

POE is a Tower Operator I at the Harbors Division, Department of Transportation, State of Hawaii. POE is an employee, as defined in Section 89-2, HRS, and is included in bargaining unit 03.

CAYETANO is the Governor of the State of Hawaii and a public employer, as defined in Section 89-2, HRS.

On August 10, 1995, POE reported to his shift and found several subpoenas. Two of the subpoenas ordered POE to appear in District Court at 8:00 a.m. on August 11, 1995. The subpoenas related to his duties as a State employee. At the end of his shift at 6:30 a.m. on August 11, 1995, POE returned home from work and departed for court at 7:26 a.m. Complainant returned home from court at 9:36 a.m., the same morning. The time actually spent in court was approximately one hour. From the time POE departed for court and returned home from court, 2 hours and 10 minutes had elapsed and he requested overtime compensation in addition to \$4.75 for lunch.

By letter dated August 13, 1995, POE filed a Step 1 grievance with Thomas Fujikawa (Fujikawa), Chief, Harbors Division, Department of Transportation, State of Hawaii, when his claim for an overtime meal was denied. By letter dated August 31, 1995, Fujikawa denied POE's grievance. POE's claim for the overtime meal was denied because under the relevant provision of the Agreement, the Employer held that POE's commuting time was not included in the calculation of hours of overtime worked. Thus, while POE was paid for 2.25 hours of overtime work, for the purpose of calculating

meal compensation, the Employer determined that POE only worked for the one hour that he was physically present in the courthouse. Consequently, the Employer held that POE was not entitled to meal compensation.

By letter dated September 8, 1995, POE appealed Fujikawa's denial to Step 2 of the grievance procedure. The Step 2 grievance meeting occurred on October 9, 1995. By letter dated October 26, 1995, Kazu Hayashida (Hayashida), Director of the Department of Transportation, denied POE's Step 2 grievance. While the letter was dated October 26, 1995, it was postmarked on October 30, 1995 and received by POE on October 31, 1995. Article 11 of the Agreement requires the employer to respond in writing to the grievance within seven working days of the Step 2 meeting.

By letter dated November 1, 1995, POE appealed Hayashida's denial to Step 3. By letter dated November 14, 1995, James H. Takushi (Takushi), Director of the Department of Human Resources Development, denied POE's Step 3 grievance.

On November 28, 1995, POE filed the instant complaint with the Board.

DISCUSSION

The record is clear that Hayashida was untimely in responding to his Step 2 grievance, and therefore violated Article 11 of the Agreement. The Board finds, however, that the late response did not interfere with nor unduly delay the processing of POE's grievance to the next step. POE was able to timely file his grievance at Step 3 and in fact received a response

at that step. As POE suffered no injury and was not prejudiced by Hayashida's late response, the Board finds that any violation was de minimis.

POE also contends that the Employer improperly denied him meal compensation and thereby violated Article 25 of the Agreement. POE contends that these contractual violations constitute prohibited practices in violation of Section 89-13(a)(8), HRS.

The Employer argues that the Complainant failed to exhaust his contractual remedies prior to filing this action with the Board. The Employer contends that after Complainant proceeded through the various steps of the grievance procedure, Complainant failed to request that the union process his grievance to Step 4, which entails arbitration. As POE does not claim that the union wrongfully refused to process his grievance to arbitration, the Employer contends that this complaint should be dismissed because of POE's failure to exhaust his contractual remedies.

By filing this complaint, POE seeks to have the Board consider and decide the Employer's alleged contractual violations in the same way that an arbitrator would review the grievance at Step 4 of the grievance procedure. In this case, POE proceeded through the first three steps of the grievance procedure contained in the Agreement without the assistance of the union. However, the Agreement also provides for a fourth step of review which provides in relevant part:

H. Step 4. Arbitration. If the grievance is not resolved at Step 3 and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or designated representative of its desire to arbitrate within ten (10) working days after receipt of

the Employer's decision at Step 3. Representatives of the parties shall attempt to select an Arbitrator immediately thereafter.

Pursuant to the foregoing provision, only the Union can proceed to arbitration after completion of Step 3.

The Board has previously held that where a collective bargaining agreement provides for arbitration as the last step of the grievance procedure and where only the union can demand arbitration, an employee filing his or her own grievance must ask the union to take the matter to arbitration in order to exhaust his or her contractual remedies. Failure to request the union to take the grievance to arbitration will result in a dismissal of a prohibited practice complaint for failure to exhaust contractual remedies. Lewis W. Poe, Order No. 1732, Case No. CE-03-423 (June 15, 1999).

CONCLUSIONS OF LAW

While the Employer was untimely in its response to POE at Step 2, POE was not prejudiced by the technical violation of the agreement and any violation of Section 89-13(a)(8), HRS, was de minimis.

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. 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 Section 89-13(a)(8), HRS, violations in the complaint are dismissed for failure to exhaust contractual remedies.

ORDER

The Board hereby dismisses the instant complaint.

DATED: Honolulu, Hawaii, October 13, 1999.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member

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