EFiled: May 30 2018 08:22AM HAST
Transaction ID 62078755
Case No. CE-01-609

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and HAWAII HEALTH SYSTEMS CORPORATION – HILO MEDICAL CENTER, State of Hawaii, Respondent.	CASE NO.: CE-01-609 DECISION NO. 494 FINAL DECISION ADOPTING PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

FINAL DECISION ADOPTING PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

On May 15, 2018, the Hawaii Labor Relations Board (Board) issued Proposed Findings of Fact, Conclusions of Law, Decision and Order (Proposed FOF/COL). The Proposed FOF/COL granted the HAWAII HEALTH SYSTEMS CORPORATION – HILO MEDICAL CENTER, State of Hawaii's motion for judgment as a matter of law, denied the UPW's Motion for Reconsideration, and Motion to Amend Complaint as moot, and dismissed the prohibited practice complaint, filed on November 22, 2005 (Complaint), in its entirety. The Proposed FOF/COL included Proposed Findings of Fact and Conclusions of Law and further provided in pertinent part:

> Pursuant to Hawaii Revised Statutes (HRS) § 91-11,[i] the Hawaii Labor Relations Board (Board) issues these Proposed Findings of Fact, Conclusions of Law, and Decision and Order (Proposed FOF/COL). All Board members have thoroughly reviewed the files in this case. Any party adversely affected by the Board's Proposed FOF/COL may file exceptions and legal argument with the Board pursuant to HRS § 91-11 within ten days of the issuance of this Proposed FOF/COL. The exceptions shall specify which proposed finding(s) or conclusion(s) is/are being excepted to, with full citations to the factual and legal authorities therefor. A hearing for the presentation of oral arguments will be scheduled should any party file exceptions, and the parties will be notified thereof. Any proposed finding of fact or conclusion of law submitted by a party not expressly adopted by

the Board herein, or rejected by clearly contrary findings of conclusions, is hereby deemed denied and rejected.

(Emphasis added) The ten-day period from the issuance of this Proposed FOF/COL ended on May 25, 2018. No exceptions were filed during the period from May 15, 2018, the date of Proposed FOF/COL, and May 25, 2018.

Accordingly, the Board hereby adopts the Proposed Findings of Fact, Conclusions of Law, and Decision and Order, filed on May 15, 2018 and attached hereto, as the final decision and dismisses the Complaint. This case is closed.

DATED: Honolulu, Hawaii, May 30, 2018.

HAWAII LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

HAWAII LABOR RELATIONS BOARD ★ STATE OF HAWAII ★

SESNITA A. D. MOEPONO, Member

J.N. MUSTO, Member

Copies to:

Charles K.Y. Khim, Esq.
Richard M. Rand, Esq.

[ii] HRS § 91-11 provides:

Examination of evidence by agency. Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or portions thereof as may be cited by the parties.

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and HAWAII HEALTH SYSTEMS CORPORATION – HILO MEDICAL CENTER, State of Hawaii, Respondent.	CASE NO.: CE-01-609 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

Pursuant to Hawaii Revised Statutes (HRS) § 91-11,[1] the Hawaii Labor Relations Board (Board) issues these Proposed Findings of Fact, Conclusions of Law, and Decision and Order (Proposed FOF/COL). All Board members have thoroughly reviewed the files in this case. Any party adversely affected by the Board's Proposed FOF/COL may file exceptions and legal argument with the Board pursuant to HRS § 91-11 within ten days of the issuance of this Proposed FOF/COL. The exceptions shall specify which proposed finding(s) or conclusion(s) is/are being excepted to, with full citations to the factual and legal authorities therefor. A hearing for the presentation of oral arguments will be scheduled should any party file exceptions, and the parties will be notified thereof. Any proposed finding of fact or conclusion of law submitted by a party not expressly adopted by the Board herein, or rejected by clearly contrary findings or conclusions, is hereby deemed denied and rejected.

---

[1] HRS § 91-11 states:

> **Examination of evidence by agency.** Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

Any conclusion of law improperly designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

FINDINGS OF FACT AND PROCEDURAL BACKGROUND

The Board finds that the United Public Workers (UPW or Complainant) and the Hawaii Health Systems Corporation (HHSC or Respondent) at all relevant times were and are parties to a collective bargaining agreement (CBA) for bargaining unit 01 employees. The Unit 01 CBA contains a grievance procedure culminating in a final and binding arbitration decision, to be invoked in the event if any dispute concerning the interpretation or application of the CBA.

On October 28, 2004, the UPW submitted a Step 1 grievance on behalf of Grievant D.V., Janitor II at Hilo Medical Center, alleging that his non-selection for a Building Maintenance Helper I position violated the Unit 1 CBA (Grievance JR-04-15).

By letter dated October 28, 2004, counsel for the UPW requested that eleven (11) types of documents be produced and delivered to the UPW.

On December 9, 2004, the HHSC produced the requested records.

A Step 2 grievance meeting was held on December 20, 2004, after which the HHSC concluded that the selection processes were consistent with HHSC's practices, and denied the grievance.

By letter dated January 20, 2005, the UPW informed HHSC that it was submitting the grievance to arbitration.

By letter dated October 14, 2005, counsel for UPW informed the HHSC that he had been engaged to represent UPW in the arbitration and requested that the HHSC produce additional documents. In this letter, UPW's counsel also made a second request for documents not included in the HHSC's December 9, 2004 production.

On November 22, 2005, the UPW filed a Prohibited Practice Complaint (Complaint) in this matter, alleging that on "November 4, 2005, the UPW made a second demand for the information that was demanded in the UPW's October 14, 2005 demand for information but which was withheld by HHSC." The Complaint alleged prohibited practices pursuant to HRS

§ 89-13(a)(5) and (8)[2], based upon Respondent failure to fully respond to a demand for information relevant to the investigating and processing of a grievance.

On December 19, 2005, the HHSC filed Respondent's Motion to Dismiss Prohibited Practices Complaint filed November 25, 2005, arguing in part that the Board lacked jurisdiction over the controversy because the discovery dispute, i.e., the HHSC's failure to produce documents, arose after arbitration had commenced on January 20, 2005, prior to UPW's October 14, 2005 request for documents and therefore an arbitrator had jurisdiction over the discovery dispute. The HHSC also asserted that a discovery dispute does not constitute a violation of § 89-13(a)(5) (refusal to bargain collectively in good faith).

On December 29, 2005, the UPW filed UPW's Memorandum in Opposition to Respondent's Motion to Dismiss Prohibited Practice Complaint Filed November 25, 2005, asserting that an employer breaches its statutory duty to bargain in good faith with a union with which it has a collective bargaining relationship, when said employer refuses a request from the union to disclose information relevant to the investigating and processing of a grievance, and that refusing to disclose information demanded by the union at the arbitration step also violates the CBA, and thus violates § 89-13(a)(8).

The Board heard oral arguments on Respondent's Motion to Dismiss on January 19, 2006, during which the Board stated, "With regard to the information requests that were made after demand for arbitration, our inclination is to defer to the joint decision making of the parties and forward the arbitrator finding — final and binding jurisdiction."

On April 7, 2006, the UPW filed a Motion to Schedule Hearing, which the Board granted, stating that the Board would "hear any claims that Respondent breached its duty to bargain

---

[2] HRS § 89-13(a) provides in relevant part:

> It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9; [or]
>
> * * *
>
> (8) Violate the terms of a collective bargaining agreement[.]

in good faith under Hawaii Revised Statutes (HRS) § 89-13(a)(5) and (8) to disclose any information necessary to the investigating and processing of the grievance which was requested by Complainant prior to the appointment of an arbitrator in this matter and which Respondent did not fully respond to" (emphasis added).

On April 19, 2006, the Board entered an Order Granting Complainant's Motion to Set Hearing and set the hearing for May 4, 2006. The hearing was scheduled for a continued hearing on June 15, 2006.

On April 24, 2006, the HHSC filed Respondent's Motion to Amend Order of 4/19/06 Granting Complaint's [sic] Motion to Schedule Hearing, arguing that during the hearing on the HHSC's Motion to Dismiss, the Board had denied claims "for information that were made after the demand for arbitration."

On June 9, 2006, the UPW moved to continue the hearing scheduled for June 15, 2006.

On September 27, 2006, the UPW filed a Motion to Schedule Hearing.

On October 25, 2006, the Board entered an Order Granting Complainant's Motion to Set Hearing, and set the hearing for December 5 and 6, 2006.

The hearing on the merits commenced on December 5, 2006, and was continued on December 13, 2006. After the close of the UPW's case, the HHSC orally moved for a directed verdict or judgment as a matter of law on the basis that the Board lacked jurisdiction; the UPW orally moved to amend the Complaint to allege a violation of HRS §89-13(a)(5).

On January 16, 2007, the HHSC filed Respondent's Motion for Judgment as a Matter of Law (Motion for Judgment as a Matter of Law). The HHSC asserted that the evidence at hearing revealed the only discovery dispute that arose prior to the notice to arbitrate involved a request made by the UPW on October 28, 2004, and was responded to by the employer on December 9, 2004, and accordingly a claim based upon that dispute was untimely and barred by HRS § 377-9(l).[3] The HHSC also asserted that no evidence was produced at the hearing on the

---

[3] HRS § 377-9(l) provides in relevant part that "[n]o complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." HRS § 377-9 is made applicable to prohibited practice proceedings by HRS § 89-14, which provides in relevant part that "[a]ny controversy concerning prohibited practices may be submitted to the [B]oard in the same manner and with the same effect as provided in section 377-9[.]"

merits that the employer failed to respond to discovery requests after the notice of intent to arbitrate was submitted.

On January 26, 2007, the UPW filed its Motion to Amend Prohibited Practice Complaint (Motion to Amend Complaint), seeking to add a count to the Complaint alleging the CBA provides, when making promotions, one of several options be utilized, and that the HHSC changed the terms and conditions of the CBA when it enacted a unitary system when making promotions, constituting a violation of § 89-13(a)(5) by bargaining in bad faith.

Also on January 26, 2007, the UPW filed a Motion for Reconsideration (Motion for Reconsideration), requesting the Board to reconsider its order to defer a portion of the Complaint to the arbitrator.

Also on January 26, 2007, the UPW filed its opposition to the Motion for Judgment as a Matter of Law, asserting the Board has jurisdiction over the dispute, and that the failure to provide information was a continuing violation and thus timely.

On February 6, 2007, the HHSC filed its opposition to the Motion for Reconsideration, asserting that the Board previously held it would defer "whenever appropriate" and deferral is appropriate in this case.

On June 21, 2007, the Board heard oral arguments on the Motion for Judgment as a Matter of Law, the Motion to Amend Complaint, and the Motion for Reconsideration. Following the presentation of oral arguments, the Board orally held that it would grant the Motion for Judgment as a Matter of Law and dismiss the case; further, the Board therefore need not address the Motion to Amend. The Board also reiterated its deference to arbitration.

Based upon the presentation of evidence at the hearing on the merits, the Board finds that the only discovery dispute in this matter that arose prior to the notice to arbitrate involved a request made by the UPW on October 28, 2004, that was responded to by the employer on December 9, 2004, and accordingly a claim based upon that dispute is untimely and barred by HRS § 377-9(l). With respect to any request for information that was made after the notice of intent to arbitrate, the Board finds that the UPW failed to exhaust its contractual and statutory remedies, and furthermore defers the matter to the arbitration process.

On February 24, 2017, and pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(g)(17)(C),[4] the Board entered Order No. 3228, Minute Order Directing Respondent to Submit Proposed Findings of Fact, Conclusions of Law, and Decision and Order In this Matter.

On January 9, 2018, the HHSC filed Respondent Hawaii Health Systems Corporation – Hilo Medical Center's Proposed Findings of Fact, Conclusions of Law, Decision and Order; and on January 11, 2018, filed an errata to its proposed findings of fact to correct the grievance designation.

CONCLUSIONS OF LAW, DISCUSSION, DECISION AND ORDER

Generally, the filing of a motion is governed by § 12-42-8(g)(3) of the Board's administrative rules; however, the Board's rules do not expressly address the various specific motions that could be brought, such as motions for judgment as a matter of law. In civil matters, a motion for judgment as a matter of law is governed by Hawaii Rules of Civil Procedure (HRCP) Rule 50. Pursuant to HRCP Rule 50(a)(1), if during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Prohibited practice proceedings before the Board are contested cases subject to the Hawaii Administrative Procedure Act (HAPA) contained in HRS chapter 91. Pursuant to HRS § 91-10(5), the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. Furthermore, HAR § 12-42-8(g)(16) likewise provides that the "charging party, in asserting a violation of chapter 89, HRS, or this chapter, shall have the burden of proving the allegations by a preponderance of the evidence." Accordingly, in this case, the UPW had the burden of proof at hearing. After being fully heard on the issues and resting its case, if the UPW failed to produce sufficient evidence to convince the Board, it is subject to a motion for judgment as a matter of law brought by the HHSC.

---

[4] HAR § 12-42-8(g)(17)(C) provides that the "[B]oard may direct oral arguments or the filing of briefs or proposed findings of fact, conclusions of law, or both, when it deems the submission of briefs or proposed findings, or both, is warranted by the nature of the proceeding or the particular issues therein."

As found above, the Board finds that the only discovery dispute in this matter that arose prior to the notice to arbitrate involved a request made by the UPW on October 28, 2004, that was responded to by the employer on December 9, 2004. Accordingly, a claim based upon that dispute is untimely and barred by HRS § 377-9(l).

HRS § 377-9(l) states, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence" (emphasis added). This provision is made applicable to prohibited practice complaints by HRS § 89-14. The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. This limitation is jurisdictional and provided by statute, and may not be waived by either the Board or the parties (*see* Thomas v. Commonwealth of Pennsylvania Labor Relations Board, 483 A.2d 1016 (Pa. 1984) (failure to comply with the statute of limitations for unfair labor practices goes to the subject matter jurisdiction of the labor relations board); HOH Corp. v. Motor Vehicle Indus. Licensing Bd., Dept. of Commerce and Consumer Affairs, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) (agencies may not nullify statutes)). *See also,* Hikalea v. Department of Environmental Services, City and County of Honolulu, Case No. CE-01-808, Order No. 3023 at *5-6 (October 3, 2014) (*citing* Thomas v. Commonwealth of Pennsylvania Lab. Rels. Bd.).

In construing and applying this statutory time limit, the Board's approach has been to adhere to the principle that statutes of limitations are to be strictly construed, and because time limits are jurisdictional, the defect of missing the deadline even by one day is may not be waived. Valeho-Novikoff v. Okabe, Board Case No. CU-05-302, Order No. 3024, at *10 (2014) (*citing* Fitzgerald v. Ariyoshi, 3 HPERB 186, 198-99 (1983); Cantan v. Dep't. of Env. Waste Mgmt., Board Case No. CE-01-698, Order No. 2599, at *8-9 (3/24/2009); Kang v. Hawaii State Teachers Ass'n., Board Case No. CE-05-440, Order No. 1825, at *4 (12/13/99)).

Finally, the Board is guided by the principle that if a court lacks jurisdiction over the subject matter of a proceeding, any judgment rendered in that proceeding is invalid; therefore, such a question is appropriate at any stage of the case. *See* Bush v. Hawaiian Homes Comm'n, 76 Hawai'i 128, 133, 870 P.2d 1272, 1277 (1994). A tribunal is obliged to first insure that it has jurisdiction. Id.; *see also,* HRCP Rule 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"); Tamashiro v. Dep't of Human Serv's., 112 Hawai'i 388, 398-99, 146 P.3d 103, 113-14 (2006).

With respect to any request for information that was made after the notice of intent to arbitrate, the Board finds that the UPW failed to exhaust its contractual and statutory remedies, and furthermore defers the matter to the arbitration process.

HRS § 89-10.8, which was enacted in the year 2000 as part of Act 253 and governs the "[r]esolution of disputes; grievances[,]" provides in relevant part that "[a] public employer ***shall enter into written agreement*** with the exclusive representative ***setting forth a grievance procedure*** culminating in a final and binding decision, ***to be invoked in the event of any dispute concerning the interpretation or application of a written agreement***. The grievance procedure ***shall be valid and enforceable***[.] (Emphases added). As found above, the UPW and the HHSC at all relevant times were or are parties to a Unit 01 CBA, which contains a grievance procedure culminating in a final and binding arbitration decision.

Pursuant to HRS § 658A-9, "[a] person initiates an arbitration proceeding by giving notice in a record to the other party to the agreement to arbitrate in the agreed manner between the parties[.]" Pursuant to HRS § 658A-17, an Arbitrator controls discovery during Arbitration:

> (a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena shall be served in the manner for service by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of a subpoena in a civil action.
>
> * * *
>
> (c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost-effective.
>
> (d) If an arbitrator permits discovery under subsection (c), the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action against a noncomplying party to the extend a court could if the controversy were the subject of a civil action in this State.
> . . .

The Board has consistently held that a complainant alleging a prohibited practice involving breach of a collective bargaining agreement, must first exhaust contractual remedies unless attempting to exhaust would be futile. See, for example, Board Order No. 2939 in Case No. CE-07-804, University of Hawaii Professional Assembly v. Board of Regents (Aug. 22, 2013). Moreover, the Hawaii Supreme Court has held it "well-settled that an employee must exhaust any grievance . . . procedures provided under a collective bargaining agreement before bringing a court action pursuant to the agreement." Poe v. Hawai'i Labor Relations Board, 105 Hawai'i 97, 101, 94 P.3d 652, 656 (2004) (*citing* Hokama v. University of Hawai'i, 92 Hawai'i 268, 272, 990 P.2d 1150, 1154 (1999)). The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process, allowing parties to develop their own uniform mechanism of dispute resolution. It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means. Id. In Poe, the Court held that because the complainant failed to exhaust his contractual remedies, he lacked standing to pursue his claim before the Board.

The Hawaii Supreme Court has recognized exceptions to the doctrine requiring the exhaustion of contractual remedies, such as "when pursuing the contractual remedy would be futile." Poe, 105 Hawai'i at 102, 94 P.3d at 657. However, in the present case, it has not been shown that requiring the UPW to exhaust contractual or statutory remedies would be futile.

Accordingly, the Board finds that it lacks jurisdiction over any discovery request made after the UPW's notice of intent to arbitrate, due to the UPW's failure to exhaust its remedies under the CBA and HRS chapter 658A.

However, assuming for the sake of argument that the Board possesses jurisdiction, the Board nevertheless defers the issue to arbitration. As a general rule, an employer must provide a union with relevant information necessary for the performance of its duties (NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36, 87 S. Ct. 565, 567-68 (1967)), including the processing of a grievance (see Detroit Edison Co. v. NLRB, 440 U.S. 301, 99 S. Ct. 1123 (1979)). However, as discussed above, the present grievance was processed to the arbitration stage. The Board concludes that the proper authority to determine what information is "relevant" and "necessary" to a union during the arbitration stage of a grievance, is the arbitrator. For this reason, assuming the Board possesses jurisdiction over the Complaint, the Board defers to the arbitrator regarding any information request made after the UPW's notice of intent to arbitrate.

For these reasons, the Board GRANTS the HHSC's motion for judgment as a matter of law, denies the UPW's Motion for Reconsideration and Motion to Amend Complaint as moot, and dismisses the Complaint in its entirety.

DATED: Honolulu, Hawaii, January 17, 2018.

HAWAII LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copy:

Charles K.Y. Khim, Esq.
Richard M. Rand, Esq.

Signature: Milton Hirata

Email: milton.y.hirata@hawaii.gov