

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

JOHN MUSSACK,

Complainant,

and

DEBRA FARMER, Administrator, Special
Education Section, Department of Education,
State of Hawaii and DONNA TAMASESE,
Educational Specialist, Special Education
Section, Department of Education, State of
Hawaii,

Respondents.

CASE NO. CE-05-486

ORDER NO. 2078

ORDER GRANTING COMPLAINANT'S
MOTION TO WITHDRAW CASE NOS.
CU-05-190 (Part G), CU-05-194 AND
CU-05-195 AND GRANTING STATE
RESPONDENTS' MOTION TO DIS-
MISS CASE NO. CE-05-486

In the Matter of

JOHN MUSSACK,

Complainant,

and

HAWAII STATE TEACHERS ASSOCIA-
TION,

Respondent.

CASE NO. CU-05-194

In the Matter of

JOHN MUSSACK,

Complainant,

and

HAWAII STATE TEACHERS ASSOCIA-
TION,

Respondent.

CASE NO. CU-05-195

In the Matter of
JOHN MUSSACK,

Complainant,

and

HAWAII STATE TEACHERS
ASSOCIATION,

Respondent.

CASE NO. CU-05-190 (PART G)

ORDER GRANTING COMPLAINANT'S MOTION TO WITHDRAW
CASE NOS. CU-05-190 (Part G), CU-05-194 AND CU-05-195 AND
STATE RESPONDENTS' MOTION TO DISMISS CASE NO. CE-05-486

Complainant JOHN MUSSACK (MUSSACK) filed Case No. CE-05-486 on November 2, 2001 with the Hawaii Labor Relations Board (Board) alleging that Respondents DEBRA FARMER, Administrator Special Education Section, Department of Education (DOE), State of Hawaii (FARMER) and DONNA TAMASESE, Educational Specialist, Special Education Section, DOE, State of Hawaii (TAMASESE) (collectively State) violated provisions of the DOE School Code, specifically § 5003(4)d),¹ in handling MUSSACK's complaints filed with DOE's Complaints Resolution Office. MUSSACK contends that the investigation was in retaliation for his "advocacy on behalf of children with disabilities." Thus, MUSSACK contends FARMER and TAMASESE committed a prohibited practice under Hawaii Revised Statutes (HRS) § 89-13(a)(8) by violating Article XXII(A) of the Unit 05 collective bargaining agreement (Contract).²

¹MUSSACK relies upon the language of School Code § 5003(4)(d) which provides in pertinent part:

(A district or state-level educational administrator must comply) with applicable statutes, federal laws, regulations, procedures, contract provisions and the like.

²Article XXII(A)—Maintenance of Benefits states:

Except as modified herein, teachers shall retain all rights, benefits and privileges pertaining to their condition is of employment contained in the School Code at the time of the execution of this Agreement.

On January 11, 2002 the Board heard arguments on the State Respondents' motion to dismiss, inter alia,³ Case No. CE-05-486 for lack of jurisdiction, Complainant's failure to exhaust his contractual remedies, and because the complaint was barred by the statute of limitations. At the conclusion of argument, the Board indicated that it was inclined to dismiss MUSSACK's complaints alleging violations of the Contract under HRS § 89-13(a)(8) for failure to exhaust his contractual remedies.

Thereafter, on January 14, 2002 MUSSACK filed Case No. CU-05-190 against the HAWAII STATE TEACHERS ASSOCIATION (HSTA) for refusing to arbitrate certain grievances, including one involving the DOE's alleged violation of the Complaint Procedures in Part G. MUSSACK also filed Case Nos. CU-05-194 and CU-05-195 against the HSTA on January 30, 2002 and February 11, 2002, respectively, alleging that the HSTA failed or refused to demand arbitration of other grievances.

In Order No. 2063, dated February 15, 2002, the Board consolidated these and other cases for disposition and reserved its ruling on the State's arguments urging the dismissal of Case No. CE-05-486.

On March 11, 2002, MUSSACK filed a Motion to Dismiss Some Cases Without Prejudice; Motion to Amend Orders Consolidating the Remaining Cases for Disposition. On March 15, 2002, by agreement of the parties, the Board considered the positions of the parties on the foregoing motion and MUSSACK filed an Amended Prohibited Practice Complaint on March 18, 2002 reflecting the dismissal of certain complaints and the reconsolidation of the remaining cases. In Order No. 2072, dated March 21, 2002, the Board, inter alia, consolidated the instant complaints for disposition.

On March 22, 2002, Respondent State, by and through its counsel, filed a Supplemental Memorandum in Support of State Respondents' Motion to Dismiss⁴ Case No. CE-05-486, as amended, in the above-consolidated cases.

On April 1, 2002, MUSSACK filed a Supplemental Memorandum in Opposition to State Respondents' Motion to Dismiss.

³MUSSACK filed complaints against various DOE respondents in Case Nos. CE-05-482, CE-05-483, CE-05-484, CE-05-485, and CE-05-486. The State filed a motion to dismiss the complaints on December 18, 2001 and the Board held a hearing on the cases which were consolidated for the purpose of resolving the State's motion to dismiss.

⁴In its Supplemental Motion to Dismiss, the State also renewed its argument on the issue of timeliness in consolidated Case Nos. CE-05-482, CE-05-483, and CU-05-190 (Parts A and B) for Board consideration.

On April 4, 2002, the Board held a hearing on the State's arguments supporting dismissal of the complaint where MUSSACK, counsel for the State and HSTA appeared and were afforded a full and fair opportunity to present oral arguments. Respondent HSTA took no position on the State's Motion to Dismiss.

Upon consideration of the arguments propounded by the parties, the Board indicated that it was inclined to dismiss Case No. CE-05-486, with prejudice, for lack of jurisdiction. In addition, the Board rescheduled the hearing on MUSSACK's remaining complaints on April 15, 2002.

Thereafter, on April 8, 2002, MUSSACK filed Complainant's Motion to Withdraw Complaints in consolidated Case Nos. CE-05-486, CU-05-190 (Part G), CU-05-194 and CU-05-195. There being no objection by the HSTA to the withdrawal of the complaints, the Board hereby approves the withdrawal of Case Nos. CU-05-190 (Part G), CU-05-194 and CU-05-195, pursuant to Hawaii Administrative Rules (HAR) § 12-42-44.⁵

In response to MUSSACK's motion to withdraw Case No. CE-05-486, the State filed a statement of no objection to the dismissal or withdrawal of the complaint. Under HAR § 12-42-44, the Board has the discretion to approve the withdrawal of the complaint upon proper motion. In considering whether to grant MUSSACK's motion to withdraw his complaint against the State, the Board notes that Respondent State has moved to dismiss the complaint and has twice presented argument to the Board; the Board has held two hearings to consider the arguments of the parties and has twice deliberated over the issues presented; and the Board indicated to the parties that it would grant the State's motion to dismiss the complaint for lack of jurisdiction. Given the posture of this case, the Board finds that it would be unfair to the State not to grant its motion to dismiss and therefore will not consent to Complainant's withdrawal of the case but instead will grant the State's motion to dismiss, with prejudice.

Respondent State moved to dismiss the complaint, as amended on March 18, 2002, against FARMER and TAMASESE, arguing that this Board lacks subject matter jurisdiction to determine whether a DOE employee violated the School Code provision that requires them to comply with applicable state and federal laws, procedures, regulations and contracts. The State contends that MUSSACK's allegations of the violation of the Maintenance of Benefits-- Article XXII(A) clause of the Contract is illogical and would lead

⁵HAR § 12-42-22 provides for the withdrawal of prohibited practice complaints and states:

Any complaint may be withdrawn at any time prior to the issuance of a final order thereon, upon motion and with the consent of the board. Whenever the board approves the withdrawal of such complaint, the case shall be closed.

to an absurd result of conferring broad sweeping jurisdiction to the Board "over all matters having some basis in the law." We agree.

MUSSACK complains that the DOE violated its Complaint Procedures because he advocated the rights of children with special needs. In addition, MUSSACK alleges that FARMER and TAMASESE acted in bad faith and violated DOE rules in investigating his complaints which adversely affected his conditions of employment. MUSSACK seeks this Board to construe Article XXII(A) of the Unit 05 Contract as a vehicle to confer jurisdiction over a body of law far beyond and independent of the collective bargaining rights protected by HRS Chapter 89. We find this is an unreasonable interpretation of Article XXII(A) as a means of alleging a wilful prohibited practice by the public employer⁶ under HRS § 89-13(a)(8).

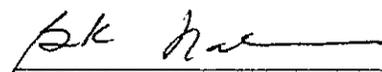
For these reasons, the Board concludes that it lacks jurisdiction over Case No. CE-05-486 and hereby grants the State Respondents' Motion to Dismiss, with prejudice.

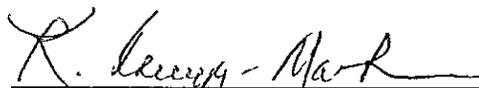
ORDER

The Board hereby approves the withdrawal of Case Nos. CU-05-190 (Part G), CU-05-194 and CU-05-195 and dismisses Case No. CE-05-486, with prejudice.

DATED: Honolulu, Hawaii, April 12, 2002

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


KATHLEEN RACUYA-MARKRICH, Member

Copies sent to:

John Mussack
Francis Paul Keeno, Deputy Attorney General
Vernon Yu, Esq.
Joyce Najita, IRC

⁶The Board questions whether FARMER and TAMASESE in their official capacity represent the public employer within the meaning of HRS § 89-2 and HRS § 89-13(a), but the issue was not raised in State Respondents' Motion to Dismiss.