

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-10-222
)	
DEPARTMENT OF HUMAN SERVICES, State of Hawaii,)	ORDER NO. 2214
)	
Complainant,)	ORDER GRANTING RESPONDENT UPW'S MOTION TO DISMISS PROHIB- ITED PRACTICE COMPLAINT
)	
and)	
)	
UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,)	
)	
Respondent.)	

**ORDER GRANTING RESPONDENT UPW'S
MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT**

On July 25, 2003, Complainant DEPARTMENT OF HUMAN SERVICES, State of Hawaii (DHS) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW). Complainant alleged that at the close of an arbitration proceeding, the UPW requested compensatory damages be paid to UPW. Complainant contends that the request was a disguised means or subterfuge for the reimbursement of costs which is specifically prohibited by the Unit 10 Agreement and thereby committing a prohibited practice in violation of Hawaii Revised Statutes (HRS) §§ 89-11 and 89-13(b), (4), and (5).

On July 30, 2003, the UPW filed UPW's Motion to Dismiss contending that the complaint should be dismissed because the subject matter at issue is pending before an arbitrator and deferral to the arbitral process (including court review of the award) is required by the strong public policy underlying HRS § 658A.

On August 27, 2003, the Board held a hearing on the motion. The parties were represented by counsel and were afforded full opportunity to argue the motion before the Board. After a thorough review of the record in the case, the Board makes the following findings of fact, conclusion of law and order.

FINDINGS OF FACT

1. DHS is an agency of the State of Hawaii and a representative of a public employer as defined in HRS § 89-2.

2. The UPW is an employee organization and the exclusive representative, as defined in HRS § 89-2, of employees in bargaining unit (BU) 10.
3. The State of Hawaii and the UPW are parties to a collective bargaining agreement (CBA) for BU 10 which includes a grievance procedure that culminates in final and binding arbitration.
4. On or about November 21, 2001, the UPW filed a class grievance on behalf of Unit 10 youth correctional officers at the Hawaii Youth Correctional Facility. The grievance was not resolved and was taken to arbitration. Russell T. Higa was selected as the arbitrator. After several days of hearings, post hearing briefs were submitted to the arbitrator. In its post hearing brief, the UPW requested compensatory damages be paid to UPW.
5. Complainant alleges that the inclusion of the request compensatory damages is a disguise for fees and violates Section 15.21 of the CBA which provides:

The fees of the Arbitrator, the cost of transcription and other necessary general costs, shall be shared equally by the Employer and the Union. Each party will pay the cost of presenting its own case and the cost of and transcript that it requires.

6. In his Arbitration Decision and Award, dated March 31, 2003, Arbitrator Russell T. Higa did not address the Union's request for compensatory damages.

DISCUSSION

Complainant contends that the UPW committed prohibited practices in violation of HRS §§ 89-11 and 89-13(b)(3), (4), and (5) by requesting compensatory damages for an arbitration. Complainant argues that the UPW refused to participate in good faith in the arbitration process agreed to by the parties pursuant to HRS § 89-11(a)¹ and by wilfully violating Section 15 of the Unit 10 CBA.

¹HRS § 89-11(a) provides in part:

§ 89-11 Resolution of disputes; impasses. (a) A public employer and an exclusive representative may enter, at any time, into a written agreement setting forth an alternate impasse procedure culminating in an arbitration decision pursuant to subsection (f), to be invoked in the event of an impasse over the terms of an initial or renewed agreement. .

HRS § 89-13(b) provides in part:

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

* * *

- (3) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures in section 89-11;
- (4) Refuse or fail to comply with any provision of this chapter; or
- (5) Violate the terms of a collective bargaining agreement.

HRS §§ 89-11 and 89-13(b)(3) and (4)

“The purpose of Rule 12(b)(6), Hawaii Rules of Civil Procedure (HRCPP) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true.” Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993). A dismissal for failure to state a claim upon which relief can be granted is clearly warranted under Rule 12(b)(6), HRCPP, if the claim is clearly without merit due to “an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or of disclosure of some fact which will necessarily defeat the claim.” Rosa v. CWJ Contractors, Ltd., 4 Haw.App. 210, 215, 664 P.2d 745 (1983) (internal quotes and citation omitted). Such a dismissal is generally disfavored but warranted “if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts entitling a plaintiff to relief.” Bertelmann v. Taas Associates, 69 Haw. 95, 99, 735 P.2d 930 (1987).

HRS § 89-11 refers to the Resolution of disputes; impasses, and provides procedures to resolve impasses in the negotiations process over the terms of an initial or renewed agreement. The Board has in the past determined that this process does not relate to grievances or disputes concerning the interpretation or application of a written agreement² as set forth in HRS § 89-10.8. Thus, as the gravamen of this case is the UPW’s conduct in a grievance arbitration rather than an interest arbitration over the terms of an agreement, the Board concludes that HRS §§ 89-11 and 89-13(b)(3) violations are inapplicable to these proceedings and are unsupported by the record. The Board concludes that it appears beyond a reasonable doubt that Complainant can prove no set of facts entitling it to relief, and the Board hereby dismiss those allegations for failure to state a claim upon which relief can be granted.

²Order No. 2131, November 13, 2002, Vincent Walker, Case No. CU-10-205; Order No. 2113, September 12, 2002, Bert Sam Fong, Case Nos. CE-10-503, CU-10-201.

As Complainant's allegations of HRS § 89-13(b)(4) statutory violations also relate to the alleged violation of HRS § 89-11, those allegations are similarly dismissed.

HRS § 89-13(b)(5)

Complainant contends that UPW violated Article 15 of the applicable contract by requesting, as a remedy in arbitration, that DHS pay compensatory damages to UPW. Complainant further contends that as there is no evidence in the record that UPW suffered any monetary loss other than the costs of processing the grievance, the request for compensatory damages is a disguised means of cost reimbursement which is specifically prohibited by the Unit 10 Agreement. The UPW, however, contends that the matter is pending before Arbitrator Russell T. Higa and the Board should defer to the pending arbitration rather than address the instant prohibited practice charge. The UPW argues that the Board has previously declined to entertain matters which are deferrable to arbitration consistent with the strong public policy favoring arbitration under HRS Chapter 658. In addition, the UPW submits that on March 31, 2003, Arbitrator Russell T. Higa rendered a decision in the arbitration at issue and did not address the UPW's request for compensatory damages which moots the instant charges.

Complainant seeks relief for alleged violations of the applicable collective bargaining agreement. Generally, such alleged violations are adjudicated through the bargaining agreement's grievance process. Chapter 89 expressly authorizes parties to a collective bargaining agreement to establish a "grievance procedure culminating in final and binding decision..." (emphasis added) HRS § 89-10.8. Chapter 89, however, also provides the Board with jurisdiction over alleged contractual violations by either an employer or exclusive representative via its authority to adjudicate prohibited practice complaints. HRS §§ 89-13(a)(6) and 89-13(b)(5). This jurisdictional dilemma is usually resolved by the Board's deferral to the arbitration process. "It shall be the policy of this Board to foster the peaceful settlement of disputes, wherever appropriate, and application by deferral of matters concerning contractual interpretation to the arbitration process agreed to by the parties." Hawaii State Teachers Association, 1 HPERB 253, 261 (1972). Thus the Board has deferred to the contractual grievance process except where there exists countervailing policy considerations or the Union's failure to satisfy its duty of fair representation effectively deprives the claimant of access to the grievance process.

In the instant case, the claim is made by the employer against the union. Generally speaking the employer does not have access to the grievance process as it is the employer that administers the provision of the agreement. However, in the instant case, the action of the union was made in arguments before the arbitrator. In Order No. 2192 involving the same parties and nearly identical circumstances, the Board stated:

The issue here is whether the UPW's request for fees and costs during the course of a grievance arbitration violates the contract and constitutes a prohibited practice. While we believe the

parties to an arbitration should be free to argue their respective positions, whether right or wrong to an arbitrator, the determination of the final outcome of the positions of the parties is ultimately in the arbiter's hands. HRS § 658A-24 provides for modification or correction of an award on stated grounds and the Board is not persuaded that the issue raised will evade full review if repeated.

Here again the Board is hesitant to rule that an advocate's arguments made before an arbitrator constitute a wilful violation of HRS § 89-13. In the instant case the Board finds no countervailing policy considerations which mitigate in favor of assuming jurisdiction. Thus the Board will defer to the arbitration process and decline jurisdiction with respect to the complaint against the UPW. Accordingly, the Board hereby dismisses the instant complaint.

CONCLUSIONS OF LAW

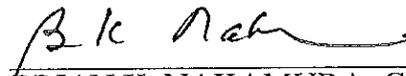
1. The Board declines jurisdiction over the instant complaint.
2. Complainant failed to state a claim for relief for violations of HRS §§ 89-11, 89-13(b)(3) and (4) because HRS § 89-11 is inapplicable to the facts raised as it refers to interest arbitrations rather than grievance arbitrations.

ORDER

The Board hereby dismisses the instant prohibited practice complaint.

DATED: Honolulu, Hawaii, September 8, 2003.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



CHESTER C. KUNITAKE, Member



KATHLEEN RACUYA-MARKRICH, Member

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