

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS
ASSOCIATION,

Complainant,

and

BOARD OF EDUCATION, Department of
Education, State of Hawaii; KATHERINE
TOLENTINO, Principal, Honoka`a
Elementary School, Department of
Education, State of Hawaii; and SHANE
SAIKI, Personnel Regional Officer,
Department of Education, State of Hawaii,

Respondents.

CASE NO. CE-05-658

ORDER NO. 2539

ORDER DENYING RESPONDENTS'
SECOND MOTION TO DISMISS
PROHIBITED PRACTICE
COMPLAINT FILED FEBRUARY 19,
2008

ORDER DENYING RESPONDENTS' SECOND MOTION TO
DISMISS PROHIBITED PRACTICE COMPLAINT FILED FEBRUARY 19, 2008

For the reasons discussed below, the Hawaii Labor Relations Board (Board) denies the Second Motion to Dismiss Prohibited Practice Complaint Filed February 19, 2008, filed by Respondents BOARD OF EDUCATION, Department of Education, State of Hawaii (BOE); KATHERINE TOLENTINO, Principal, Honoka`a Elementary School, Department of Education, State of Hawaii; and SHANE SAIKI, Personnel Regional Officer, Department of Education, State of Hawaii, (collectively, Respondents or DOE) on July 9, 2008.

FINDINGS OF FACT

1. Complainant HAWAII STATE TEACHERS ASSOCIATION (HSTA), was or is, at all times relevant to this proceeding, an employee organization and the exclusive bargaining representative, within the meaning of HRS § 89-2,¹ of

¹HRS § 89-2 provides in relevant part:

“Employee organization” means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances,

employees included in bargaining unit 05.²

2. Respondents were or are, at all times relevant to these proceedings, a public employer within the meaning of Hawaii Revised Statutes (HRS) § 89-2.³
3. The HSTA and the BOE are parties to the Unit 05 collective bargaining agreement (Agreement).
4. Article II of the Agreement governs Non-Discrimination, and provides in relevant part in Section A:

The Employer agrees not to interfere with, restrain or coerce any employee of the Employer in the exercise of rights guaranteed in Chapter 89, HRS, including the right to refrain from joining or assisting any employee organization.

5. Article V of the Agreement contains a grievance procedure governing any

labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

²HRS §89-6 provides in relevant part:

Appropriate bargaining units.

(a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

* * *

- (5) Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent; ...

³HRS § 89-2 provides in relevant part:

“Employer” or “public employer” means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees.

claim by the HSTA or a teacher that there has been a violation, misinterpretation, or misapplication of a specific term or terms of the Agreement. The grievance procedure includes provisions for informal discussion, Step 1 and Step 2 of a formal grievance, mediation, and arbitration.

6. On or about December 21, 2007, the HSTA filed a Step 1 grievance form (Grievance, HSTA #WH-07-12-03; DOE #08-5-098) on behalf of a teacher, asserting the following Agreement violations: Article X - Sec. D - Teacher Protection; Article IX - Sec. A - Personnel Information; Article II - Sec. A - Non-Discrimination; Article XX - Miscellaneous; and Article XXI - Maintenance of Benefits. The grievance alleged:

On or about Nov. 26, 2007 the principal sent the grievant a letter stating that she had received complaints about the grievant from other teachers. The Principal required the grievant to sign a letter that was hearsay and derogatory to the grievant as grievant never had a chance to confront the complainants nor respond to the allegations. The grievant was told to sign the letter and that it would be placed in her personnel file. Principal also sent a copy to the District Office before speaking to the grievant about the issue. The grievant feels she is being harassed by the Principal since she became actively involved in the Association. The grievant is now concerned with a hostile work environment.

7. On February 19, 2008, the HSTA filed a prohibited practice complaint (Complaint) against the DOE with the Board. The Complaint alleged, inter alia, that DOE wilfully interfered, restrained, and coerced employees for exercise of protected conduct in violation of HRS § 89-13(a)(1); unlawfully discriminated against an HSTA representative (a teacher at the school and public employee within the meaning of HRS § 89-2⁴) in that employee's terms and conditions of employment to discourage membership in HSTA in violation of HRS § 89-13(a)(3); and violated the statutory rights of employees to be consulted and have input over policies affecting employee-employer relations under HRS § 89-9(c) and to exercise public employee rights free from interference, restraint, or coercion under HRS § 89-3, in violation of HRS § 89-13(a)(7).

⁴HRS § 89-2 provides in relevant part:

“Employee” or “public employee” means any person employed by a public employer except elected and appointed officials and such other employees as may be excluded from coverage in section 89-6.

(HRS § 89-6 governs appropriate bargaining units).

8. The HSTA representative, who is also a teacher, alleging discrimination in the Complaint is also the grievant in the HSTA Grievance filed on or about December 21, 2007.
9. On April 7, 2008, the DOE filed a Motion to Dismiss Prohibited Practice Complaint (Motion to Dismiss), asserting failure to state a claim upon which relief may be granted and failure to exhaust contractual remedies. The DOE argued, inter alia, that the allegations of both the Grievance and the Complaint were the same, and that the HSTA did not exhaust available contractual remedies.
10. On April 8, 2008, the HSTA filed a Motion to Amend Complaint.
11. On April 14, 2008, the HSTA filed its Memorandum in Opposition to Respondents' Motion to Dismiss Prohibited Practice Complaint (Memorandum in Opposition), arguing, inter alia, that the HSTA's Complaint asserts a statutory violation, over which the Board has exclusive original jurisdiction, and that deferral to the arbitration process is inappropriate.
12. At hearing held on April 16, 2008, the Board orally granted the HSTA's Motion to Amend Complaint in Case No. CE-05-658. In fairness to the Employer, the Board allowed the DOE to file supplemental arguments supporting its Motion to Dismiss, due to the Board orally granting the HSTA's Motion to Amend Complaint by noon on April 21, 2008. The Board also scheduled a hearing on April 23, 2008 at 8:30 a.m.
13. On April 16, 2008, the HSTA filed its First Amended Complaint (First Amended Complaint). The First Amended Complaint alleged, inter alia, that DOE wilfully interfered with, restrained, and coerced employees in the exercise of protected conduct under HRS § 89-3, including but not limited to engaging in retaliatory conduct, creating an impression of surveillance, and engaging in other inherently destructive conduct to undermine the collective bargaining process in HRS § 89-13(a)(1); unlawfully discriminated against two employees in the employees' terms and conditions of employment to discourage membership in HSTA in violation of HRS § 89-13(a)(3); and violated the statutory rights of employees to be consulted and have input over policies affecting employee-employer relations under HRS § 89-9(c) and to exercise public employee rights free from interference, restraint, or coercion under HRS § 89-3, in violation of HRS § 89-13(a)(7). One of the two employees against whom the First Amended Complaint asserts discrimination occurred, is the grievant in the Grievance.
14. Specifically, the First Amended Complaint asserts, inter, alia, that HSTA representatives actively participated in concerted activities to improve the

terms and conditions of employment of bargaining unit 05 employees at the school; that one representative (a teacher at the school and public employee within the meaning of HRS § 89-2) attended a faculty meeting during which she raised questions over concerns of faculty members regarding the 2008 to 2009 academic plan for the school, and participated in a consultation process affecting employee-employer relations; that the school principal informed the representative that the principal had received complaints regarding the questions raised by the representative and the principal would be investigating; that the representative exercised her right to union representation and an investigative meeting with an HSTA field representative present was scheduled for November 14, 2007; that when the HSTA field representative arrived for the meeting, the principal abruptly cancelled the meeting and prohibited the HSTA field representative from remaining on the school premises; that the principal refused to identify the source of the anonymous complaints; and that a memorandum was placed in the representative's personnel file and intended as a disciplinary action. The First Amended Complaint also alleged that the principal reassigned another HSTA representative (a teacher at the school and public employee within the meaning of HRS § 89-2) to teach fourth grade during the 2008 to 2009 school year instead of third grade, and that the actions taken against these representatives are part of an on-going pattern of adverse, discriminatory, and retaliatory actions against HSTA representatives at the school. The First Amended Complaint further alleged that a former HSTA representative was previously reassigned from the fourth to the sixth grade in the prior school year by the principal, and reportedly called a trouble maker and union person when she sought transfer to another school.

15. On April 21, 2008, the DOE filed its Additional Argument in Respondents' Motion to Dismiss Prohibited Practice Complaint. On April 22, 2008, the HSTA filed its Supplemental Submission.
16. At hearing on April 23, 2008, the Board granted the parties until April 30, 2008, to submit further supplemental briefing on the Motion to Dismiss. On April 30, 2008, the HSTA filed its Supplemental Memorandum in Opposition to Respondents' Motion to Dismiss Prohibited Practice Complaint. On May 1, 2008, the DOE filed its Supplemental Briefing in Support of its Motion to Dismiss Prohibited Practice Complaint.
17. The Board held further hearing on the Motion to Dismiss on May 1, 2008.
18. On May 13, 2008, the HSTA and the DOE held a Step 1 meeting regarding the Grievance, at which the HSTA made a proposal to resolve the Grievance.

19. On May 21, 2008, the Board denied the DOE's Motion to Dismiss, as part of Board Order No. 2509. In denying the Motion to Dismiss, the Board held in pertinent part, paragraph 15:

In the present case, the Board exercises its discretion to retain jurisdiction over the prohibited practice claims, including claims involving discrimination that may otherwise have constituted a violation of provision(s) of the CBA. In addition to the allegations of discrimination, the [-658] First Amended Complaint also alleges retaliatory conduct, creating an impression of surveillance, and engaging in other inherently destructive conduct to undermine the collective bargaining process in HRS § 89-13(a)(1), and violation of the statutory rights of employees to be consulted and have input over policies affecting employee-employer relations under HRS § 89-9(c) and to exercise public employee rights free from interference, restraint, or coercion under HRS § 89-3, in violation of HRS § 89-13(a)(7). Accordingly, viewing the [-658] First Amended Complaint in the light most favorable to HSTA, it is not clear to the Board that these remaining issues would constitute a violation of the CBA subject to the grievance procedure contained therein. The Board, therefore, concludes that deferral of such claims is not warranted. Because the factual issues (including testimony of key witnesses) surrounding the non-discrimination claims are likely to overlap with the factual issues surrounding the discrimination claims, and because claims of discrimination based upon union activity appear similar in nature to the other anti-union animus claims in the First Amended Complaint over which the Board has jurisdiction, the Board also exercises its discretion to not defer the discrimination claims to the grievance process.

20. On May 23, 2008, the DOE submitted a counter-proposal to the HSTA to resolve the Grievance.
21. On May 29, 2008, the HSTA declined the counter-proposal and requested the Grievance proceed to Step 2. The HSTA also submitted to the DOE a request for information "needed to investigate and process" the grievance.
22. On June 2, 2008, the DOE denied the Grievance at Step 1.

23. On June 4, 2008, counsel for the DOE responded to the HSTA's information request, stating in part (emphases in original):

As you know, this grievance is also the subject of a prohibited practice complaint filed on behalf of HSTA. As you also know, DOE made a motion to the [Board] to defer the prohibited practice complaint on this subject to the grievance/arbitration process (specifically to the grievance/arbitration process for *this* very grievance). As you further know, HSTA opposed that motion and argued that the Board should refuse deferral and accept jurisdiction over this labor dispute.

The Board denied DOE's motion and specifically ruled that it was exercising jurisdiction to adjudicate both the statutory *and* contractual claims (See Paragraph 15 of HLRB Order No. 2509). In accordance with that decision, and per HSTA's choice, this matter will be adjudicated by the Board. Thus, all discovery "requests" will need to be made through the Board.

24. On June 10, 2008, the HSTA filed a prohibited practice complaint, Case No. CE-05-672, against the BOE and Arthur F. Souza, Complex Area Superintendent, West Hawaii Complex Area, Department of Education, State of Hawaii, alleging the respondents committed a prohibited practice pursuant to HRS § 89-13(a)(5), by refusing to provide information requested by the HSTA relating to investigating, processing, and assessing the merits of the Grievance.
25. On June 23, 2008, the HSTA filed a Motion for Summary Judgment in Case No. CE-05-672. On June 30, 2008, the respondents filed their Opposition to [HSTA's] Motion for Summary Judgment in Case No. CE-05-672, arguing that jurisdiction over the underlying dispute now rests with the Board and not the grievance process.
26. On July 9, 2008, the Board held a hearing on HSTA's Motion for Summary Judgment in Case No. CE-05-672.
27. Also on July 9, 2008, the DOE filed its Second Motion to Dismiss Prohibited Practice Complaint in the present case, asserting that the HSTA's persistence in pursuing the grievance procedure, despite taking the position in response to the DOE's Motion to Dismiss that the grievance process was inappropriate, warranted dismissal of the instant complaint.
28. On July 11, 2008, the HSTA filed its Opposition to the DOE's Second Motion to Dismiss.

29. On July 14, 2008, at hearing on the merits in this case, the Board orally ruled to deny the DOE's Second Motion to Dismiss.
30. For reasons discussed in Board Order No. 2509, the Board exercises its discretion to retain jurisdiction over the prohibited practice claims, including claims involving discrimination that may otherwise have constituted a violation of provision(s) of the CBA, and denies the DOE's Second Motion to Dismiss.
31. The factual issues asserted in the Grievance are subsumed within the factual issues asserted in the present prohibited practice proceeding Case No. CE-05-658. The issue of discrimination asserted in the Grievance is also subsumed within the present prohibited practice proceeding. It is likely that any other contractual claims that may be asserted in the Grievance will be addressed, or considered, by the Board in the present prohibited practice proceeding.
32. Because the factual issues and the discrimination claim in the grievance are subsumed in the prohibited practice proceeding, the testimony of key witnesses will likely be identical, as will exhibits and legal arguments, in both the prohibited practice and grievance forums. Judicial efficiency is not served by having the parties proceed in both forums.
33. The Board has accepted primary jurisdiction over the discrimination claim as well as any other statutory claim in the Complaint. Had the Board deferred to the grievance process, such action would have promoted judicial efficiency by encouraging the settlement of disputes through alternative means. In accepting primary jurisdiction over the discrimination claim, however, the Board did not intend to defeat the notion of judicial efficiency and permit the HSTA to concurrently seek its grievance remedies for a claim which on its face mirrors its claim before the Board. The confusion caused by inconsistent results from multiple forums as well as the waste of the parties' resources should be avoided as well.
34. The Board therefore clarifies that as a condition of denying the DOE's Second Motion to Dismiss and retaining jurisdiction over the discrimination claim, the Board orders that the grievance process be stayed. The Board will entertain a motion to lift the stay after all proceedings in this prohibited practice action are concluded, to address residual issues, if any, left in the Grievance that were not raised or considered during these proceedings.

DISCUSSION AND CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant Complaint pursuant to HRS §§ 89-5 and 89-14.
2. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the Complainant. Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. See Yamane v. Pohlson, 111 Hawai'i 74, 81 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).
3. However, when considering a motion to dismiss [pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(1)] the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Id. (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).
4. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter, "relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawai'i 118, 905 P.2d 624.
5. The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. Id.
6. The Hawaii Supreme Court, as well as this Board, has used federal precedent to guide its interpretation of state public employment law. Hokama v. University of Hawai'i, 92 Hawai'i 268, 272 n. 5, 990 P.2d 1150, 1154 n. 5 (1999). Based upon federal precedent, the Hawaii Supreme Court has held that it is "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. Hawaii Labor Relations Board, 105 Hawaii 97, 101, 94 P.3d 652, 656 (2004) (citations omitted). "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 orderly and less time-consuming settlement of disputes through alternative means.” Id. (Citations omitted).

7. Federal cases are split on the issue of exhaustion of contractual remedies. See, e.g., Spielberg Mfg. Corp., 112 NLRB 1080 (1955); Dubo Mfg. Corp., 142 NLRB 431 (1963); C&C Plywood Corp., 385 U.S. 421 (1967); NLRB v. Great Dane Trailers, 388 U.S. 26 (1967); Collyer Insulated Wire, 192 NLRB 837 (1971); General American Transportation Corp., 228 NLRB 808 (1977); United Technologies, 268 NLRB 557 (1984). Similarly, the Board has in the past deferred, refused to defer, and conditionally deferred prohibited practice claims to the grievance process where the claim may constitute both a statutory and contractual violation. See, e.g., Hawaii Nurses Association and Ariyoshi, 2 HLRB 218 (1979); UPW and Watada, Case No. CE-01-594; Hawaii State Teachers Association and DOE, 1 HPERB 253 (1972).
8. For reasons discussed in Board Order No. 2509, the Board exercises its discretion to retain jurisdiction over the prohibited practice claims, including claims involving discrimination that may otherwise have constituted a violation of provision(s) of the CBA, and denies the DOE’s Second Motion to Dismiss.
9. Accordingly, the Board accepts primary jurisdiction over the discrimination claim as well as any other statutory claim in the Complaint. Had the Board deferred to the grievance process, such action would have promoted judicial efficiency by encouraging the settlement of disputes through alternative means. See Poe at 101, 94 P.3d at 656. In accepting primary jurisdiction over the discrimination claim, however, the Board did not intend to defeat the notion of judicial efficiency.)
10. The factual issues asserted in the Grievance are subsumed within the factual issues asserted in the present prohibited practice proceeding; the issue of discrimination asserted in the Grievance is also subsumed within the present prohibited practice proceeding. It is likely that any other contractual claims that may be asserted in the Grievance will be addressed, or considered, by the Board in the present prohibited practice proceeding. Because the factual issues and the discrimination claim in the grievance are subsumed in the prohibited practice proceeding, the testimony of key witnesses will likely be identical, as will exhibits and legal arguments, in both the prohibited practice and grievance forums. Efficiency is not served by having the parties proceed in both forums.
11. The Hawaii Supreme Court has held that “a court which has acquired jurisdiction over a cause retains its power over the same to the exclusion of any court of coordinate jurisdiction until the court renders a final judgment in

the case or until the action is terminated by the parties.” Jordan v. Hamada, 64 Haw. 446, 448, 643 P.2d 70, 72 (1982). Concurrent disposition of the same issue is disfavored because it “would be wasteful of court time and energy. It would involve the hazard of confusing or unseemly discord between two courts . . . concerning essentially the same controversy. It would encourage the practice of ‘forum shopping,’ which is inimical to sound judicial administration.” Id. (quoting Pacific Gas & Electric Co. v. Federal Power Commission, 253 F.2d 536, 541 (9th Cir. 1958)).

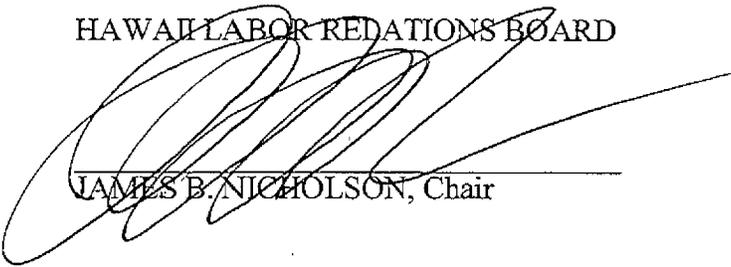
12. The Board denies the DOE’s Second Motion to Dismiss; as a condition of such denial, and to promote efficiency, the Board orders that the grievance process be stayed. The Board will entertain a motion to lift the stay after all proceedings in this prohibited practice action are concluded, to address residual issues, if any, left in the Grievance that were not raised or considered during these proceedings.

ORDER

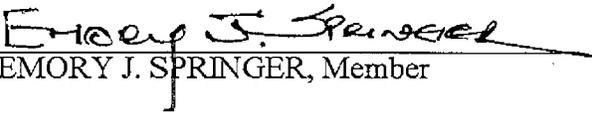
For the reasons discussed above, the Board denies Respondents’ Second Motion to Dismiss Prohibited Practice Complaint Filed February 19, 2008, and orders that the Grievance (HSTA #WH-07-12-03; DOE #08-5-098) be stayed.

DATED: Honolulu, Hawaii, August 4, 2008.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member



SARAH R. HIRAKAMI, Member

Copies sent to:

Danny J. Vasconcellos, Esq.
James E. Halvorson, Deputy Attorney General