

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

VALERIE STEPHEN,

Complainant,

and

HAWAII HEALTH SYSTEMS
CORPORATION,

Respondent.

CASE NO. CE-09-731

ORDER NO. 2727

ORDER GRANTING RESPONDENT'S
MOTION TO DEFER PROHIBITED
PRACTICE PROCEEDINGS

ORDER GRANTING RESPONDENT'S MOTION
TO DEFER PROHIBITED PRACTICE PROCEEDINGS

On October 6, 2009, Complainant VALERIE STEPHEN (Stephen or Complainant) filed an unfair labor practice complaint against Respondent HAWAII HEALTH SYSTEMS CORPORATION (HHSC or Respondent), alleging that her non-selection for a permanent position was retaliatory for Complainant's exercising her rights under the collective bargaining agreement (Agreement) and labor laws when she filed and participated in a prior grievance regarding a suspension.¹ The complaint alleged violation of Hawaii Revised Statutes (HRS) § 377-6(1).²

On October 13, 2009, Complainant filed a prohibited practice complaint (CE-09-734) against Respondent, alleging similar accusations as the unfair labor practice complaint, except the complaint in CE-09-734 alleged prohibited practice in violation of HRS §§ 89-13(a)(1), (3), (7), (8), (9), and/or (10).

On December 7, 2009, Complainant filed a motion to amend the complaint, specifically regarding relevant facts and the statutory basis of the complaint. Also, on

¹At the time of the filing of the complaint, Complainant also alleged that she had not yet been reimbursed for the reduction in the number of days of suspension resulting from the prior grievance.

²HRS § 377-6(1) provides that it shall be an unfair labor practice for an employer individually or in concert with others to interfere with, restrain, or coerce the employer's employees in the exercise of the rights guaranteed in HRS § 377-4.

December 7, 2009, Respondents filed a Motion to Dismiss Complaint for lack of subject matter jurisdiction and failure to state a claim for relief.

On January 11, 2010, the Board issued its Order Granting Complainant's Motion to Amend Complaint and Denying Respondent's Motion to Dismiss. The Board held that there were two complaints against Respondent on a single controversy; that the allegations in the unfair labor practice complaint improperly referred to violations of HRS § 377-6(1) in that Respondent is not an "employer" as defined in chapter 377; and that the factual allegations in the unfair labor practice complaint provided adequate notice to Respondent such that allowing Complainant to amend the complaint would not prejudice Respondent. Accordingly, the Board granted leave to Complainant to withdraw the complaint in CE-09-734 and amend the initial complaint to correct the statutory basis for the complaint.

On January 13, 2010, Complainant filed a First Amended Complaint, making similar factual allegations that her non-selection for a permanent position was retaliatory for the exercise of rights under the Agreement and labor laws. The First Amended Complaint alleged prohibited practice in violation of HRS §§ 89-13(a)(1), (3), (7), (8), (9), and/or (10).

On June 2, 2010, Respondent filed a Motion to Dismiss First Amended Prohibited Practice Complaint, asserting that Complainant appealed her non-selection for a permanent position through the Administrative Review process/Merit Appeals Board, and that Complainant should exhaust the internal complaint procedure that has been established.

On June 8, 2010, Complainant filed a Memorandum in Opposition to Hawaii Health Systems Corporation's Motion to Dismiss First Amended Complaint, asserting that the retaliation claim is distinguishable from a civil service review; that HRS chapter 89 takes precedence over and preempts any conflicting statute or proceeding; and that Respondent denied the processing of the grievance and therefore the process has been exhausted.

On June 9, 2010, the Board held oral argument on the Motion to Dismiss First Amended Prohibited Practice Complaint.

After careful consideration of the record and argument presented, the Board finds that both the grievance and Internal Complaint/Merit Appeals Board proceedings involve similar factual allegations as the First Amended Complaint and would require inquiry into similar factual issues such as, but not limited to, whether Complainant was one of the best qualified candidates for the permanent positions and whether the selection process was done in a fair manner; and further, that Complainant has not exhausted internal procedures. The Board holds that judicial efficiency is not served by having the

parties proceed in several forums, and accordingly defers to the Internal Complaint/Merit Appeals Board proceeding. The Board will entertain a motion to continue proceedings in this prohibited practice action after the Internal Complaint/Merit Appeals Board proceeding is exhausted, to address issues that were not addressed or remedied by that proceeding.

The Board also notes that the administrative rules governing the Merit Appeals Board provides in relevant part, "In the event an eligible complainant chooses the grievance route rather than the Merit Appeal Board via the Internal Complaints Procedures and the grievance is allowed to proceed, the complainant will not be allowed to utilize the Merit Appeals Process." In the present case, should Complainant's grievance be allowed to proceed and as a result the Internal Complaint/Merit Appeals Board proceeding cannot be utilized, the Board further concludes that Complainant must exhaust the grievance process before the Board will entertain a motion to reopen proceedings in this prohibited practice action.

FINDINGS OF FACT

1. At all times relevant to the First Amended Complaint, Complainant was an employee of the HHSC as defined in HRS § 89-2, which is "any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section 89-6(g)."
2. At all times relevant to the First Amended Complaint, the HHSC was or is a public employer within the meaning of HRS § 89-2, which is "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" (emphasis added).
3. Complainant was hired by HHSC effective December 11, 2005, as Registered Professional Nurse (RPN) III at the Samuel Mahelona Memorial Hospital (SMMH) on a Limited Term Appointment. As a Limited Term Appointment, Complainant was exempt from civil service. Complainant's appointment was on a Not-to-Exceed (NTE) one (1) year for each reappointment. The RPN positions at the SMMH were established as limited-term appointments because it was a new service that was being tried at the SMMH.

4. On August 18, 2008, Complainant received a Notice of Corrective Action that imposed a ten-day suspension.
5. Complainant grieved the suspension pursuant to the Unit 09 Agreement, and after two steps of the grievance process concluded, the suspension was reduced to a three-day suspension. The union representing the three nurses who were suspended, including Complainant, has or had the matter under review for possible arbitration.
6. In 2009, a decision was made to establish new permanent RPN III positions at the SMMH. The filling of the new permanent positions required the following of civil service, collective bargaining, and human resources procedures.
7. Complainant applied for the permanent RPN III positions and was one of nineteen applicants who were deemed qualified for the positions. All qualified applicants were interviewed by a four-person selection panel, consisting of the SMMH Director of Nursing, the acting Supervisor of SMMH Emergency Services, and Supervisor for the Kauai Veterans Memorial Hospital Emergency Department, and the Registered Professional Nurse IV for Education.
8. After the interviews were completed, the panel's scores were tabulated and Complainant was number thirteen (13) of the nineteen (19) applicants. The HHSC filled the eight (8) permanent RPN III positions based upon the recommendation of the selection panel.
9. By letter dated June 16, 2009, Complainant was notified that she was not selected for the position of RPN III. Complainant was notified that she may request an administrative review of the decision within twenty (20) calendar days from the date of the letter.
10. Complainant submitted a Request for Administrative Review dated June 28, 2009, that requested "[r]econsideration for continued employment at SMMH. Awarding of permanent position in the SMMH ED/Acute unit."
11. By letter dated July 1, 2009, counsel for Complainant filed a grievance on behalf of three former employees of SMMH, including Complainant. The basis of the grievance is a violation of the Unit 09 Agreement, Article 15 which governs Temporary Assignment. The grievance letter further states "a prior grievance filed by the above may have been improperly taken into consideration in the selection process, and/or was the basis for a retaliatory motive, and may have been improperly discriminated against the grievants

for the exercise of contractual, statutory, and constitutionally protected rights.”

12. By letter dated July 9, 2009, Respondent acknowledged receipt of the July 1, 2009, grievance letter from Complainant’s counsel, and stated that due to the expiration of the Unit 09 Agreement, grievances filed on or past July 1, 2009, will be held in abeyance until the Agreement is mutually extended or a new Agreement is negotiated; that Respondent has only received one notice to appeal from [Complainant] that meets the 20-day deadline to appeal personnel actions pursuant to the Internal Complaint Procedure; requested the employees provide more information regarding the non-selection being influenced by a previous grievance; that Article 15 of the Agreement governing temporary assignments is not the same issue as the non-selection to a permanent Registered Professional Nurses position in the Emergency Room; that the employer had not received a letter from the Hawaii Government Employees Association (HGEA) waiving their right to representation and thus would continue to communicate with the HGEA and the former employees.
13. The HHSC’s Human Resources and Civil Service Rules provide for an Internal Complaint Procedure that consists of an informal “Administrative Review” process and a Formal Complaint process that may culminate in a decision by the HHSC Merit Appeals Board. An “Administrative Review” constitutes the informal review process; if the complaint cannot be resolved informally at this level, a Formal Complaint may then be filed through the HHSC Formal Complaint Process. The entire process must be exhausted before the complaint can be appealed to the HHSC Merit Appeals Board.
14. The Internal Complaint Procedure may be utilized by an eligible applicant or employee who is adversely affected by a decision or action involving the issues such as, but not limited to:
 - A. Recruitment/examination decisions (such as an applicant’s non-selection or non qualification for a civil service position, or termination of an initial probationary appointment);
 - B. Classification or reclassification except for initial pricing and creation of new classes;
 - C. Disciplinary actions;
 - D. Decisions regarding an employee’s failure to meet performance standards;

- E. Termination actions (including decisions under section 76-30, HRS), but excluding HHSC's identification of employees subject to layoff; or
- F. An alleged violation, misapplication or misinterpretation of a personnel statute, rule or written policy.
- G. If the Merit Appeals Board finds that the reasons for the employer's actions are not substantiated in any material respect, the Merit Appeals Board shall find for the complainant and provide for the appropriate action requested by the complainant or may provide modification for the suggested course of action. If the Merit Appeals Board finds that the reasons for the employer's actions are substantiated in whole or in part, the Merit Appeals Board shall sustain the action of the employer, provided that the Merit Appeals Board may modify the action of the employer if it finds the circumstances of the case so require.

15. The administrative rules governing the Merit Appeals Board provide in relevant part:

Filing a Grievance. In the event an eligible complainant chooses the grievance route rather than the Merit Appeal Board via the Internal Complaints Procedures and the grievance is allowed to proceed, the complainant will not be allowed to utilize the Merit Appeals Process.

In the present case, should Complainant's grievance be allowed to proceed and as a result the Internal Complaint/Merit Appeals Board proceeding cannot be utilized, the Board further concludes that Complainant must exhaust the grievance process before the Board will entertain a motion to continue proceedings in this prohibited practice action.

16. On January 13, 2010, Complainant filed a First Amended Complaint, alleging that:

The complainant is a registered nurse who was employed in the Emergency Department of the Samuel Mahelona Memorial Hospital, a division of the Hawaii Health Systems Corporation. On Feb. 13, 2008, the complainant and two other co-workers . . . were notified by Orianna Skomoroch then-Regional Chief Executive Officer of an

investigation regarding allegations of work-place violence by co-worker nurse.

An investigation followed and concluded on Aug. 18, 2008 imposing a 10-day suspension by a Notice of Corrective Action.

A grievance was filed in a timely manner on Sept. 2, 2008, and two steps of the grievance process concluded on June 19, 2009 with a reduction to a three-day [suspension.]

On June 16, 2009, [Complainant] was notified that she was not selected for a permanent position on the staff. Her employment status was previously listed as a "LTA", or a Long-Term Assignment.

On July 1, 2009 counsel for [Complainant] filed a letter of grievance to Thomas Driskell regarding the decision not to select [Complainant] for a permanent position.

A response was received on July 9, 2009 refusing to submit the matter to a grievance process. This Amended Complaint is timely filed and is a continuing violation of Chap. 89 H.R.S.

[Complainant] states that her non-selection was retaliatory for the exercise of her rights under the collective bargaining agreement, Hawaii State and Federal labor law by filing a grievance over the Notice of Corrective Action and pursuit of Step grievances as stated above.

The employer is in violation of Sec. 89-13 a (1) (3), (7), (8), (9) and/or (10) HRS as the employer has interfered with, restrained, or coerced the employer's employees in the exercise of the rights guaranteed in [chapter 89]; furthermore, has discriminated in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization; violated the terms of a collective bargaining agreement; replaced a nonessential employee for participating in a labor dispute; and/or gave employment preference to an individual employed during a labor dispute and who employment termination date occurs after the end of the dispute, over an employee who exercised the right to join, assist, or engage in lawful collective bargaining or mutual aid or protection through the labor organization involved in the dispute.

17. On June 2, 2010, Respondent filed a Motion to Dismiss First Amended Prohibited Practice Complaint, asserting that Complainant appealed her non-selection for a permanent position through the Administrative Review process/Merit Appeals Board, and that Complainant should exhaust the internal complaint procedure that has been established.
18. On June 8, 2010, Complainant filed a Memorandum in Opposition to Hawaii Health Systems Corporation's Motion to Dismiss First Amended Complaint, asserting that the retaliation claim is distinguishable from a civil service review; that HRS Chapter 89 takes precedence over and preempts any conflicting statute or proceeding; and that Respondent denied the processing of the grievance and therefore the process has been exhausted.
19. The Board finds that the grievance and Internal Complaint/Merit Appeals Board proceedings involve similar factual allegations as the First Amended Complaint and would require inquiry into similar factual issues such as, but not limited to, whether Complainant was one of the best qualified candidates for the permanent positions and whether the selection process was done in a fair manner. The Board finds that a material fact is whether Complainant was one of the top eight (8) out of the nineteen (19) applicants who were interviewed by the selection panel, and that the Internal Complaint/Merit Appeals Board process is the most appropriate forum to make that determination.
20. The Board finds that judicial efficiency is not served by having the parties proceed in both forums, and accordingly defers to the Internal Complaint/Merit Appeals Board proceeding. However, the Board will entertain a motion to continue proceedings in this prohibited practice action after the Internal Complaint/Merit Appeals Board proceeding is exhausted, to address issues that were not addressed or remedied by that proceeding. However, should Complainant's grievance be allowed to proceed and as a result the Internal Complaint/Merit Appeals Board proceeding cannot be utilized, the Board further concludes that Complainant must exhaust the grievance process before the Board will entertain a motion to continue proceedings in this prohibited practice action.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the First Amended Complaint pursuant to HRS §§ 89-5 and 89-14.³
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, 81 137 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. The First Amended Complaint alleges prohibited practice in violation of HRS § 89-13(a)(1), (3), (7), (8), (9), and/or (10). HRS § 89-13(a) provides in relevant part:

It shall be a prohibited practice for a public employer
or its designated representative wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

* * *

- (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;

³The Board, sua sponte, notes that timeliness of the initial unfair labor practice complaint may be an issue concerning the Board's jurisdiction in this matter; however, the parties have not had the opportunity to address this possible issue and the Board therefore concludes that the issue of timeliness can be addressed if and when the prohibited practice proceeding is re-opened, if necessary.

* * *

- (7) Refuse or fail to comply with any provision of this chapter;
 - (8) Violate the terms of a collective bargaining agreement;
 - (9) Replace any nonessential employee for participating in a labor dispute; or
 - (10) Give employment preference to an individual employed during a labor dispute and whose employment termination date occurs after the end of the dispute, over an employee who exercised the right to join, assist, or engage in lawful collective bargaining or mutual aid or protection through the labor organization involved in the dispute.
5. Remedies provided by the collective bargaining agreement should be pursued prior to bringing a prohibited practice complaint. 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." Id., at 272, 990 P.2d at 1154. 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. See, also, HSTA v. Department of Education, 1 HPERB 253, 261 (1972) (Case No. CE-05-41; Decision No. 22) (the Board has discretion to require the parties to utilize the contractual arbitration procedure); Poe v. Cayetano, 6 HLRB 55, 56 (1999) (Case No. CE-03-283; Decision No. 402) (the complainant must exhaust available contractual remedies prior to bringing a prohibited practice complaint against the employer alleging a violation of the collective bargaining agreement).
6. With respect to a claim of retaliation pursuant to HRS § 89-13(a), this Board has previously held that the burden of proof is on the Complainant to show by a preponderance of the evidence that (1) there was an improper motive; (2) that there was a causal connection between the improper motive and for engaging in protected activity; and (3) that the improper motive was

a motivating factor for taking action adverse to the Complainant. Janet Weiss and Catherine Bratt, Case No. CE-05-452, Decision No. 425, 6 HLRB 188 (2001). If the Complainant establishes a prima facie case of retaliation, the burden shifts to the respondent to show the same action would have been taken in any event, establishing legitimate, non-retaliatory reasons for the action. Id.

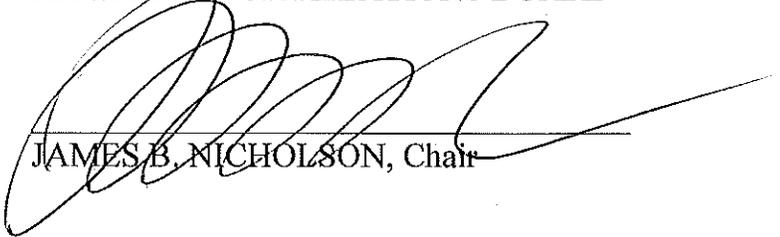
7. In the present case, involving a non-selection for one of eight (8) permanent RPN III positions, the Board concludes that a material fact necessary to establish a prima facie case of prohibited practice is a showing that Complainant was one of the top eight (8) out of the nineteen (19) applicants who were interviewed by the selection panel, and that the Internal Complaint/Merit Appeals Board process is the most appropriate forum to make that determination.
8. Pursuant to HRS § 76-14(c)(1) and (2), the Merit Appeals Board shall not act on an appeal, but shall defer to other authority if the action complained of constitutes a prohibited act that is subject to the jurisdiction of another appellate body or administrative agency or the grievance procedures under a collective bargaining agreement; the Merit Appeals Board shall not proceed on an appeal or shall hold proceedings in abeyance if there is any controversy regarding its authority to hear the appeal until the controversy is resolved by the Hawaii Labor Relations Board.
9. The Board concludes that the Internal Complaint/Merit Appeals Board proceeding involves similar factual allegations as the First Amended Complaint and would require inquiry into similar factual issues such as, but not limited to, whether Complainant was one of the best qualified candidates for the permanent positions and whether the selection process was done in a fair manner.
10. The Board concludes that judicial efficiency is not served by having the parties proceed in both forums, and accordingly defers to the Internal Complaint/Merit Appeals Board proceeding; however, the Board will entertain a motion to continue proceedings in this prohibited practice action after the Internal Complaint/Merit Appeals Board proceeding is exhausted, to address issues that were not addressed or remedied by that proceeding. Furthermore, should Complainant's grievance be allowed to proceed and as a result the Internal Complaint/Merit Appeals Board proceeding cannot be utilized, the Board further concludes that Complainant must exhaust the grievance process before the Board will entertain a motion to continue proceedings in this prohibited practice action

ORDER

For the reasons discussed above, the Board defers proceedings in the present case to the Internal Complaint/Merit Appeals Board proceeding. The Board will entertain a motion to continue proceedings in this prohibited practice action after the Internal Complaint/Merit Appeals Board proceeding is exhausted, to address issues that were not addressed or remedied by that proceeding. Furthermore, should Complainant's grievance be allowed to proceed and as a result the Internal Complaint/Merit Appeals Board proceeding cannot be utilized, the Board holds that Complainant must exhaust the grievance process before the Board will entertain a motion to reopen proceedings in this prohibited practice action.

DATED: Honolulu, Hawaii, August 11, 2010.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SARAH R. HIRAKAMI, Member



NORMAN K. KATO II, Member

Copies sent to:

Stanford H. Masui, Esq.
Steven M. Nakashima, Esq.