

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-03-206
LEWIS W. POE,)	ORDER NO. 1024
Complainant,)	ORDER TO EMPLOYER TO CEASE
and)	AND DESIST FROM COMMITTING
REX D. JOHNSON, Director,)	PROHIBITED PRACTICES AND
Department of Transportation,)	DISMISSING COMPLAINT
State of Hawaii and CALVIN M.)	
TSUDA, Deputy Director, Depart-)	
ment of Transportation, State)	
of Hawaii,)	
Respondents.)	

ORDER TO EMPLOYER TO CEASE AND DESIST FROM
COMMITTING PROHIBITED PRACTICES AND DISMISSING COMPLAINT

On January 25, 1994, Complainant LEWIS W. POE (POE) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondents REX D. JOHNSON, Director, Department of Transportation, State of Hawaii (JOHNSON) and CALVIN M. TSUDA, Deputy Director, Department of Transportation, State of Hawaii (TSUDA) (collectively Employer).

POE, an employee covered by the Bargaining Unit 03 Agreement (contract), alleges that on or about July 27, 1993, he filed two grievances with TSUDA regarding the interpretation of certain provisions in the contract and the denial of his claim for meal compensation, respectively. POE further contends that while a Step 1 meeting was held to discuss the grievances on December 3, 1994, TSUDA did not submit a written answer to him within seven (7) working days after the meeting as required by Article 11(D) of the

contract. In addition, POE claims that on or about December 23, 1993 he filed a Step 2 appeal of his grievances with JOHNSON. A Step 2 meeting was held on January 7, 1994, and JOHNSON also failed to submit a written response to him in a timely manner in violation of Article 11(E) of the contract. Thereafter, POE filed the instant prohibited practice complaint with the Board because of the Employer's noncompliance with the grievance procedure and the denial of his meal compensation claim.

POE contends that Respondents acted in bad faith and violated § 89-13(a)(8), Hawaii Revised Statutes (HRS), by failing to comply with the contract. POE asserts that he need not proceed further through the contractual grievance process because of Respondents' alleged bad faith conduct in failing to timely respond to his grievances.

On February 28, 1994, Respondents filed a motion to dismiss the complaint asserting the Board's lack of jurisdiction. Respondents argue that POE failed to exhaust his contractual remedies as provided in the contract. Thereafter, on March 7, 1994, POE filed a memorandum in opposition to Respondents' motion to dismiss.

On March 8, 1994, Respondents filed a reply to POE's memorandum. In their reply, Respondents again argue that POE is required to follow the contractual grievance process and the Board lacks jurisdiction over this complaint. In addition, Respondents state that POE's complaint is barred by the ninety-day (90) statute of limitations provided in § 377-9(1), HRS, and incorporated by § 89-14, HRS. Respondents further indicate in their reply that the

Department of Personnel Services, Labor Relations Division, which handles Step 3 grievances, will waive the time limitations for filing a Step 3 appeal of POE's grievances if POE's complaint is dismissed by the Board for failure to exhaust contractual remedies. Furthermore, Respondents concede that it failed to comply with the timelines set forth in the contract. Under a strict application of Article 11(E) of the contract, JOHNSON's Step 2 response was due on January 19, 1994 but was in fact dated January 20, 1994 and mailed on January 25, 1994.

On March 9, 1994, the Board heard oral arguments on Respondents' motion to dismiss. At the hearing, counsel for Respondents agreed that they would waive the hearing if the timeliness of JOHNSON's response was the only viable allegation in POE's prohibited practice complaint. Transcript (Tr.) 3/9/94, p. 25. In addition, counsel for Respondents agreed to the issuance of a cease and desist order with respect to POE's allegation that JOHNSON did not respond to POE's Step 2 grievances in a timely manner. Id., pp. 25-26. This would enable POE to submit his grievances to the third step.

At the hearing, based upon Respondents' admissions and affidavits, the Board determined that some of the responses to POE's grievances were untimely. Id., p. 88. While Respondents have not amended their answer, the Board finds that Administrative Rules § 12-42-49 is applicable here. Administrative Rules § 12-42-49(b) provides that where the respondent desires to waive a hearing on the allegations set forth in the complaint and not to contest the proceeding, the answer may consist of a statement that

respondent refrains from contesting the proceeding and consents that the Board may make and enter a cease and desist order to the respondent. Respondents in this case admitted their failure to comply with the applicable contractual timelines and waived their right to a hearing on those allegations. Since the prohibited practice occurred during the processing of POE's grievances, the Board finds that the issuance of a cease and desist order is appropriate here.

Therefore, in accordance with the Board's oral ruling at the March 9, 1994 hearing, the Board finds that Respondent JOHNSON violated the contract and thereby committed a prohibited practice under § 89-13(a)(8), HRS, when he failed to respond to POE's grievances within seven (7) days as provided for in Article 11(E) of the contract.

In addition, with regard to the merits of POE's grievances, the Board stated at the hearing that it was mindful of the general principle of deferral to the contractual provisions relating to the resolution of grievances under a contract. *Id.* Accordingly, the Board, *sua sponte*, granted Respondents' motion to dismiss for lack of jurisdiction on condition that the Board would also issue a cease and desist order against the Employer, ordering the Employer to timely respond to grievances filed. *Id.*, p. 89. In addition, the Board ordered the Employer to allow POE to file a Step 3 appeal of his grievances until the end of the month when the contract is set to expire. *Id.*, pp. 89-91.

In reaching its decision, the Board relied on the holding in Winslow v. State, 2 Haw. App. 50 (1981). In Winslow, the Hawaii

Intermediate Court of Appeals held "that where the terms of public employment are covered by a collective bargaining agreement pursuant to HRS Chapter 89 and the agreement includes a grievance procedure to dispose of employee grievances against the public employer, an aggrieved employee is bound by the terms of the agreement." Id. at 55.

In addition, the Board considered the Hawaii Supreme Court's adoption of this rule in Santos v. State, 64 Haw. 648 (1982). In Santos, the Supreme Court reaffirmed the holding in Winslow by stating that "[i]t is the general rule that before an individual can maintain an action against his employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his employer and the [union]." Id. at 655. Based on these court decisions, the Board concluded that POE failed to exhaust his contractual remedies and the Board lacks jurisdiction over his complaint as it pertains to the merits of his grievances.

ORDER

The Board hereby orders the Employer to cease and desist from violating the contract by responding to POE's grievances in an untimely manner. Furthermore, the Board hereby orders the Employer to allow POE and/or the Hawaii Government Employees Association (HGEA) to file a Step 3 grievance pursuant to Article 11(G) of the contract by March 31, 1994.

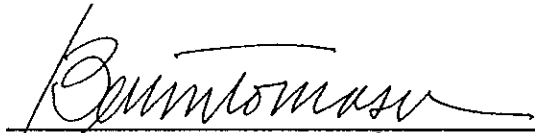
Also, in accordance with the Board's oral ruling, the Board hereby dismisses the instant prohibited practice complaint as to all other matters not covered by the cease and desist order.

LEWIS W. POE and REX D. JOHNSON, Director, Department of Transportation, State of Hawaii and CALVIN M. TSUDA, Deputy Director, Department of Transportation, State of Hawaii; CASE NO. CE-03-206 ORDER NO.

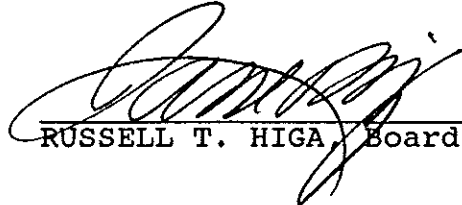
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DATED: Honolulu, Hawaii, March 31, 1994.

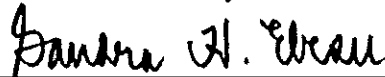
HAWAII LABOR RELATIONS BOARD



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RUSSELL T. HIGA, Board Member



SANDRA H. EBESU, Board Member

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