

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-03-225
LEWIS W. POE,)	ORDER NO. 1178
)	
Complainant,)	ORDER DENYING COMPLAINANT'S
)	MOTION TO AMEND COMPLAINT
and)	
)	
CALVIN M. TSUDA, Deputy)	
Director, Department of)	
Transportation, State of)	
Hawaii,)	
)	
Respondent.)	

ORDER DENYING COMPLAINANT'S MOTION TO AMEND COMPLAINT

On July 5, 1994, Complainant LEWIS W. POE filed the instant prohibited practice complaint with the Hawaii Labor Relations Board (Board). On August 12, 1994, Respondent CALVIN S. TSUDA (TSUDA), by and through his attorneys, filed a Motion to Dismiss or, in the Alternative, Motion for Summary Judgment with the Board.

In his motion, Respondent contended that the instant complaint should be dismissed because it violates the Board's Administrative Rules § 12-42-42. That rule states that only one complaint shall issue against a party with respect to a single controversy. TSUDA argued that this complaint is in essence a second complaint filed against him regarding the designation of other Tower Operator I incumbents as essential workers during the public worker strike in 1994. Respondent contended that POE previously filed a prohibited practice complaint before the Board,

Case No. CE-03-220, which deals with the same circumstances. Respondent also argued that POE is equitably estopped from arguing that TSUDA improperly failed to designate him as an essential employee because POE alleged a contrary position in Case No. CE-03-220. Respondent further contended that POE failed to state a claim under § 89-13(a)(4), HRS, because the employer has the right to designate any employee as essential without regard to seniority and further, the facts in this case do not support an inference of discrimination. Lastly, Respondent argued that POE is barred from asserting any claims under Chapters 76 and 84, HRS, and Administrative Rules § 14-3-3(5), because those matters are beyond the Board's jurisdiction. Thus, Respondent argued that this complaint should be dismissed or alternatively, that there are no genuine issues of material fact presented and Respondent is entitled to judgment as a matter of law.

Thereafter, on August 22, 1994, Complainant POE filed an Affidavit with the Board which states in pertinent part:

14. Poe believes that Tsuda's conduct and/or decision involving the protection of the public interest during the early hours of 4-18-94 was unprofessional and constituted a failure or a refusal to comply with the legal requirements adopted and/or established by the HLRB. Poe believes that Tsuda and/or Kim were in violation of § 89-13(a)(7).

15. On 8-11-94, both Tsuda and Kim swore on oath, in substance or words:

That, from a management standpoint the above "sequential" method of designating which employees would be selected to fill the three essential positions was the most efficient and timely methods of ensuring that the notices . . . could be served, and thereby, ensuring that the Tower was adequately staffed to

maintain public health and safety. (Emphasis in original.)

16. Poe intends to move the HLRB, under HAR, § 12-42-8(g)(10), for leave to amend his prohibited practice Complaint, filed 7-5-94.

On August 25, 1994, the Board issued a notice scheduling the hearing on Respondent's motion for September 1, 1994. On September 1, 1994, the Board conducted the hearing on Respondent's motion and all parties had full opportunity to present arguments and evidence to the Board. The Board took the matter under advisement at the close of the hearing.

Thereafter, on September 15, 1994 POE filed the instant Motion for Leave to Amend Prohibited Practice Complaint with the Board. Complainant moved the Board to amend paragraph 5.v. of the Prohibited Practice Complaint as follows (the underscoring indicates which words are added to the original paragraph):

v. Tsuda is the Deputy Director, Department of Transportation, State of Hawaii, who is the Harbors Division Head having overall responsibility and authority for all personnel matters relating to employees in the Harbors Division. Tsuda has not faithfully, professionally and/or ethically discharged the duties of his office and has violated HRS, § 89-13(a)(7), and Tsuda has used his official position to grant and/or secure special consideration and/or special treatment to Perry Oda over Poe.

Complainant states in a memorandum filed in support of his motion that the basis of the motion is to conform the complaint to the preponderant weight of the evidence.

On September 28, 1994, Respondent filed a Memorandum in Opposition to Complainant's Motion for Leave to Amend Prohibited Practice Complaint. Respondent alleged that Complainant's motion

to amend his complaint is untimely because the facts were known to Complainant for some time and he offered no reasonable justification for his late attempt to modify his complaint. In addition, Respondent contended that the motion should be denied because Complainant cited an improper basis to amend the complaint. Respondent argued that Complainant essentially seeks to modify his complaint in response to arguments made by Respondent in support of his Motion to Dismiss on September 1, 1994. Respondent contended that the Complainant is attempting to manipulate the Board's procedural rules to enter a rebuttal response to Respondent's oral arguments made at the hearing and to add new allegations to the complaint.

On October 5, 1994, POE filed a Memorandum-in-Reply to Respondent's Memorandum in Opposition to Complainant's Motion for Leave to Amend Prohibited Practice Complaint with the Board. POE contended that pursuant to Administrative Rules § 12-42-8(g)(10), a document can be amended at any time prior to the issuance of a final order with the Board's approval. POE also contended that he indicated ten days prior to the September 1, 1994 hearing in his Affidavit filed on August 22, 1994 that he intended to move the Board for leave to amend his complaint. POE further contended that as early as July 28, 1994, POE stated in his Prehearing Statement that one issue was, "2. Did Respondent/Employer professionally, faithfully, and/or ethically discharge the duties of his office or employment?" POE contended that this issue is certainly associated with whether HRS, § 89-13(a)(7) was violated. POE further stated

that he was not attempting to manipulate the Board's procedural rules.

Subsequently on April 11, 1995, Complainant filed an Objection to the Board's Inaction on Complainant's Motion for Leave to Amend, Filed Over 200 Days Ago. POE objected to the Board's delay in the issuance of an order on his motion to amend.

Based upon the record and the arguments presented, the Board hereby denies Complainant's motion for leave to amend the Complaint pursuant to Administrative Rules § 12-42-43.

Section 12-42-43 specifically refers to the amendment of prohibited practice complaints and provides as follows:

Any complaint may be amended in the discretion of the board at any time prior to the issuance of a final order thereon.

The foregoing rule which is similar to Administrative Rules § 12-42-8(g)(10) provides that the Board, in its discretion, may permit the amendment of complaints prior to the issuance of a final order. In this case, POE seeks to amend his complaint by adding, inter alia, the following passage:

Tsuda is the Deputy Director, Department of Transportation, State of Hawaii, who is the Harbors Division Head having overall responsibility and authority for all personnel matters relating to employees in the Harbors Division.

POE contends that the amendment is proper to conform to the evidence. POE cites the testimony of Jo-Ann Tokunaga on August 10, 1994 before the Board in Case No. CE-03-220, and also paragraph 3 of her affidavit, dated June 1, 1994, as the basis for the amendment. While the Board agrees with the Respondent that the foregoing facts were available to POE on or about June 1, 1994 and

POE's motion appears to be untimely, more significantly, the specific evidence was not adduced in this case. POE's motion seeks leave to amend the allegations in his complaint to conform to the evidence in Case No. CE-03-220. The Board finds that such amendment would be improper and hereby denies it on that basis.

In addition, the Board denies the further amendment requested which adds a § 89-13(a)(7), HRS, violation to the affected paragraph. In this case, the Board finds that permitting such amendment at this stage of the proceedings would unduly prejudice the rights of Respondent.

POE included the § 89-13(a)(7), HRS, allegation in his Affidavit filed with the Board on August 22, 1994 and indicated that he intended to amend his complaint in a separate paragraph. POE did not indicate, however, how he would amend his complaint in order to put Respondent on notice as to the specific charges. Since POE could have sought leave to amend his complaint prior to the September 1, 1994 hearing and gave no reason for the delay in filing the instant motion until after the hearing on Respondent's dispositive motion, the Board finds that permitting POE to add another count to his complaint at this time would result in substantial unfairness to Respondent.

In any event, POE's proposed § 89-13(a)(7), HRS, allegation does not specify the provisions of Chapter 89, HRS, which he alleges were violated. Section 89-13(a)(7), HRS, provides that it shall be a prohibited practice for a public employer or its designated representative wilfully to refuse or fail to comply with any provision of this chapter, i. e., Chapter 89, HRS. Thus, even

if POE were permitted to amend his complaint as requested by adding the § 89-13(a)(7), HRS, allegation, such allegation would be insufficient to place the Respondent on notice as to the statutory violations of Chapter 89, HRS, being charged.

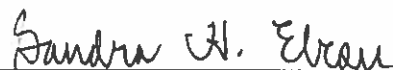
For the foregoing reasons, the Board hereby denies POE's motion for leave to amend his complaint.

DATED: Honolulu, Hawaii, April 19, 1995.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGH, Board Member


SANDRA H. EBESU, Board Member

Copies sent to:

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