

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-03-344
HAROLD W. DOE,)	ORDER NO. 1431
Complainant,)	ORDER GRANTING RESPONDENT'S
and)	MOTION TO DISMISS COMPLAINT
MICHAEL D. WILSON, Chairperson,)	
Department of Land and Natural)	
Resources, State of Hawaii,)	
Respondent.)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS COMPLAINT

On January 17, 1997, Complainant HAROLD W. DOE (DOE) filed a prohibited practice complaint against MICHAEL D. WILSON, Chairperson, Department of Land and Natural Resources, State of Hawaii (WILSON or Employer) with the Hawaii Labor Relations Board (Board). Complainant alleged that he initially offered to retire effective the close of business on December 30, 1996 in settlement of a grievance. Thereafter, Complainant withdrew his notice of retirement when he learned that he was ineligible for regular retirement. Complainant alleged that Respondent wrongfully and maliciously treated Complainant's offer of retirement as a resignation and refused to permit Complainant to continue to work after December 30, 1996. Thus, Complainant contends that Respondent WILSON violated Articles 3, 8, 17, and 5 [sic], of the applicable Unit 03 collective bargaining agreement (contract) and § 89-13(a)(8), Hawaii Revised Statutes (HRS).

On March 4, 1997, Respondent, by and through his attorney, filed a motion to dismiss the instant complaint. Respondent alleges that on December 30, 1996, Complainant filed a grievance pursuant to Article 11 of the contract alleging violations of Articles 3, 8, 17, and 50. Respondent contends that the subject matter of Complainant's claims before the Board is governed by the Unit 03 contract and that the instant complaint should be dismissed based upon Complainant's failure to exhaust his contractual remedies. Further, Respondent argues that this Board lacks jurisdiction over Complainant's claims arising under Chapter 88, HRS, pertaining to the Employees' Retirement System of the State of Hawaii (ERS).

On March 11, 1997, Complainant submitted a Response to Respondent's Motion to Dismiss to the Board. Complainant alleges that he received a negative Job Performance Evaluation which he grieved. In settlement of the grievance, on August 21, 1996, Complainant informed his supervisor that he would be retiring at the close of business on December 30, 1996. Thereafter, Complainant contends that he checked with the ERS and found that he would be disadvantaged by retiring at the end of 1996 and Complainant informed the Employer, by letters dated November 22, 1996 and December 23, 1996, that he would not be retiring at the close of business on December 30, 1996. Complainant contends that on December 17, 1996, his Division Administrator wrote to Complainant that his retirement would be effective December 1996 in compliance with Chapter 14, Administrative Rules.

The Board conducted a hearing by conference call on March 12, 1997 on Respondent's motion to dismiss the complaint. Based upon a careful review of the record and the arguments presented, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

HAROLD W. DOE, was for all times relevant, a Conservation and Resources Enforcement Officer III, employed by the Department of Land and Natural Resources, State of Hawaii. DOE was for all times relevant, a member of bargaining unit 03 and an employee within the meaning of § 89-2, HRS.

MICHAEL D. WILSON is the Chairperson of the Department of Land and Natural Resources and representative of the public employer within the meaning of § 89-2, HRS.

After grieving a negative job performance evaluation, DOE informed his immediate supervisor that he would retire at the close of business on December 30, 1996. Subsequently, DOE learned that he would suffer a penalty by retiring on December 30, 1996 and DOE informed his Acting Division Chief on or about November 22, 1996 that he would not be retiring. Thereafter, DOE received a letter on or about December 17, 1996 from his Division Administrator stating that DOE's retirement would be effective December 30, 1996.

On December 30, 1996, DOE reported for work and the Employer's representatives took his office keys, badge, and weapon from him and told him that if he came onto the premises again, he would be arrested for trespassing. On or about December 30, 1996,

DOE filed a grievance with the Employer alleging violations of Articles 3, 8, 17, and 50 of the Unit 03 contract.

DISCUSSION

Respondent contends that the instant complaint should be dismissed because the complaint alleges violations of the Unit 03 contract provisions. As the Complainant is already proceeding through the grievance procedure contesting his termination, Respondent contends that the instant complaint should be dismissed because Complainant failed to exhaust his contractual grievance remedies. In addition, Respondent contends that this Board lacks jurisdiction over any claims arising under Chapter 88, HRS, which pertains to the ERS. Accordingly, those claims should also be dismissed.

Complainant contends that the Respondent misapprehends the issue raised in the complaint. Complainant contends that the issue is whether it is a prohibited practice for the Respondent to terminate the Complainant's employment under the circumstances outlined in the complaint. DOE contends that the Employer coerced Complainant in the exercise of his rights under Chapter 89, HRS, to negotiate a settlement of his grievance. DOE argues that the Employer used the Complainant's good faith offer of retirement to both settle his grievance and effect his termination. DOE contends that he offered to retire in the context of a negative Job Performance Evaluation grievance. Thus, if he rescinded his offer to retire, the Employer could have merely reinstated the negative evaluation. DOE contends that the Employer acted in a coercive

manner and in bad faith. Hence, Complainant contends that the Board has jurisdiction over this complaint.

In reviewing the complaint, the Board finds that Complainant only alleged that Respondent violated contract provisions and § 89-13(a)(8), HRS. Specifically, Complainant alleged that the Employer's refusal to permit Complainant to withdraw his notice of retirement violated Articles 3, 8, 17, and 5 [sic] of the contract. After reviewing Complainant's allegations, the Board concludes that Complainant claims that he was constructively discharged by his Employer. As such, the matter is grievable under the discipline article of the Unit 03 contract and a grievance has, in fact, been filed in the matter and is being pursued.

In Thomas Lepere, 5 HLRB 277 (1994), the Board dismissed allegations of contract violations where the complainant failed to exhaust his contractual grievance remedies. The Board relied upon the Hawaii Supreme Court's ruling in Santos v. State, 64 Haw. 648, 646 P.2d 962 (1982) where the Court recognized the general rule that before an individual can maintain any action against his employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his employer and the union. That rule is consistent with prevailing National Labor Relations policy and Hawaii policy favoring arbitration as a dispute resolution mechanism. Id., at 655. In Santos, supra, the Court cited to Winslow v. State, 2 Haw. App. 50, 625 P.2d 1046 (1981), to the effect that an aggrieved employee is bound by the terms of the agreement where the terms of public

employment are covered by a collective bargaining agreement pursuant to Chapter 89, HRS, and the agreement includes a grievance procedure to dispose of employee grievances against the Employer. Id., at 55. Accordingly, the Board dismisses the instant prohibited practice complaint for failure to exhaust contractual remedies. With respect to any claims raised in the instant complaint arising under Chapter 88, HRS, the Board concludes that such matters are outside of the Board's jurisdiction and accordingly, those claims are also dismissed.

CONCLUSIONS OF LAW

Section 89-13(a)(8), HRS, provides that a violation of a collective bargaining agreement is a prohibited practice. The instant complaint alleges only violations of the contract and Complainant failed to exhaust his contractual remedies prior to filing his complaint with the Board.

Claims arising under Chapter 88, HRS, are outside the Board's jurisdiction and are therefore subject to dismissal.

ORDER

The instant prohibited practice complaint is hereby dismissed.


DATED: Honolulu, Hawaii, March 20, 1997.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson

HAROLD W. DOE and MICHAEL D. WILSON, Chairperson, Department of
Land and Natural Resources, State of Hawaii; CASE NO. CE-03-344
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RUSSELL T. HIGA, Board Member



CHESTER C. KUNITAKE, Board Member

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