

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NOS.: 96-5(CE)
)	96-6(CU)
SALEEM AHMED,)	
)	ORDER NO. 1500
Complainant,)	
)	ORDER CONSOLIDATING CASES
and)	FOR DISPOSITION, DENYING
)	MOTIONS TO DISMISS COMPLAINT
EAST-WEST CENTER and AMERICAN)	AND DENYING MOTION FOR STAY OF
FEDERATION OF STATE, COUNTY)	PROCEEDINGS; NOTICE OF HEARING
AND MUNICIPAL EMPLOYEES,)	
LOCAL 928,)	
)	
Respondents.)	

ORDER CONSOLIDATING CASES FOR DISPOSITION,
DENYING MOTIONS TO DISMISS COMPLAINT AND DENYING
MOTION FOR STAY OF PROCEEDINGS; NOTICE OF HEARING

On August 26, 1997, Complainant SALEEM AHMED (AHMED) filed unfair labor practice complaints against the EAST-WEST CENTER (EWC or Employer) and the AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 928, AFL-CIO (AFSCME or Union) with the Hawaii Labor Relations Board (Board) in Case Nos. 96-5(CE) and 96-6(CU). Complainant alleged that he was laid off by his Employer in violation of Articles A-4(B) and (C) of the applicable collective bargaining agreement (contract), thus violating §§ 377-6(6), 377-6(8), and 377-8, Hawaii Revised Statutes (HRS). Complainant also alleged that AFSCME breached its duty of fair representation in refusing to pursue Complainant's grievance to arbitration thus violating §§ 377-7(3) and 377-8, HRS.

On September 13, 1996, AFSCME filed an amended counterclaim in the instant case alleging that the instant

complaint lacked merit and that Complainant filed the complaints to harass and intimidate the Union. AFSCME contended that AHMED thus violated §§ 377-7(1) and 377-8, HRS. Also on that date, AFSCME filed a separate unfair labor practice complaint against AHMED with the Board in Case No. 96-7(CEE). AFSCME attached a copy of the amended counterclaim filed in the instant case to its complaint.

As these complaints involve the same parties and issues, the Board finds, on its own motion, that consolidation of the proceedings would be conducive to the proper dispatch of business and the ends of justice and will not unduly delay the proceedings. Pursuant to § 377-9, HRS, these complaints and the proceedings thereon are hereby consolidated for disposition.

On September 25, 1996, the Union filed a motion to dismiss the complaint with the Board. The Union alleged that the complaint should be dismissed on the grounds that Complainant AHMED failed to exhaust his internal administrative remedies available from the AFSCME International union. The Union argues that after AFSCME refused Complainant's request to arbitrate his grievance, Complainant should have filed charges against the local union with the International union for violating the local's constitution. The Union argues that since AHMED failed to exhaust his internal union remedies, he is precluded from filing this complaint with the Board at this time.

Thereafter, on September 30, 1996, the EWC filed a motion to stay further proceedings or, in the alternative, to dismiss the complaint. The Employer argues that the Board should stay all proceedings related to AHMED's complaint against the EWC until a

determination is reached regarding the claim and counterclaim brought by AHMED and AFSCME, respectively. The EWC contends that the finding of a breach of duty of fair representation is a condition precedent to an action against the EWC on Complainant's claim in this matter. The Employer contends that it relied upon the Union's determination not to arbitrate the grievance and AHMED failed to challenge the local's determination to the International union. The Employer thus requested that the Board stay further proceedings against the EWC in the underlying complaint pending a decision concerning AHMED's claim against the Union. If the claim against the Union is dismissed, the Employer contends that the claim against the Employer should also be dismissed.

On October 11, 1996, Complainant filed a motion to deny AFSCME's motion to dismiss the complaint with the Board. AHMED contends that he properly exhausted all internal administrative remedies available under the EWC-AFSCME contract. AHMED argued that the Union had advised him that he had exhausted his remedies under the contract and was free to pursue any legal rights he had. Thus, AHMED argues that the Union is estopped from asserting that AHMED was required to exhaust the procedures before the International union. AHMED also argues that he previously brought a case before the Board and the Union did not raise the exhaustion defense. Based upon this past practice, AHMED argues that the Board should deny the instant complaint.

With respect to the Employer's motion to dismiss the complaint, AHMED contends that he has a meritorious grievance which the Union processed in a highly perfunctory fashion. Thus, he is

not bound by the Union's decision not to arbitrate the grievance and may pursue his claim before the Board.

On October 28, 1996, AFSCME filed a reply memorandum arguing that AHMED made numerous factual allegations which are unsupported by sworn testimony and the Board should disregard those statements. AFSCME further argues that AHMED failed to establish that AFSCME wilfully misled him into thinking that he had no other internal union remedies to exhaust against AFSCME. AFSCME also argues that the doctrine of past practice does not apply here and that Article X of the AFSCME International Constitution clearly covers the situation where the AFSCME Executive Board determines whether to take grievances to arbitration. AFSCME moreover contends that AHMED may still file a complaint against the local with the AFSCME International.

On October 29, 1996, the Board held a hearing on the foregoing motions. All parties were present and had the opportunity to present evidence and argument to the Board. Based upon a thorough review of the record and the arguments presented, the Board makes the following findings and hereby denies the instant motions to dismiss the instant complaint for failure to exhaust internal Union remedies.

According to the undisputed facts, AHMED was subject to mandatory retirement from the EWC due to a reduction-in-force (RIF). The collective bargaining agreement between the EWC and AFSCME contains RIF provisions. AHMED filed a grievance on his own behalf, challenging the RIF. According to the contract, only the Union can initiate the arbitration of the grievance. AHMED

exhausted the preliminary steps of the grievance procedure and requested that AFSCME take his grievance to arbitration. The AFSCME business agent investigated AHMED's request and determined that there was little likelihood that AHMED would prevail. AHMED presented his request for arbitration to the Union's Executive Board and the business agent recommended that the grievance not be arbitrated. After review, the Executive Board decided not to take AHMED's grievance to arbitration. AHMED thereafter filed his complaints with the Board alleging, inter alia, that the Union breached its duty of fair representation by refusing to arbitrate his grievance.

In arguing that AHMED must pursue an appeal of the local's decision not to pursue arbitration to the International union, the Union relies on Cheese v. Afram Brothers, Co., 63 LRRM 2358 (1966) and Wiglesworth v. International Brotherhood of Teamsters, Local 592, 93 LRRM 2801 (4th Cir. 1976). In the Cheese case, supra, the Court dismissed a complaint for damages against the union for failing to contest his discharge since the contract did not require the union to contest every discharge and the employee failed to allege an employer-union conspiracy or breach of duty of fair representation. The Court also held that the employee was required to exhaust intra-union remedies prior to filing the complaint in court.

In the Wiglesworth case, supra, the employee brought an action for damages in the federal court pursuant to the Labor-Management Reporting and Disclosure Act (LMRDA or Act) alleging that the union and its president violated his rights under

the Act by preventing him from exercising his rights to free speech, refusing to give him financial information on the union, and denying his request that the membership be informed of their rights under the LMRDA. The Court held that the plaintiff was required to exhaust his available union remedies under the International union's Constitution before seeking redress to the federal district court. The Court relied upon a specific LMRDA requirement to exhaust internal union remedies and reversed a lower court's finding that pursuit of the available grievance routes would have been futile. The Court thus dismissed the plaintiff's complaint for failure to exhaust his internal union remedies.

Upon review, the Board finds that these cases are clearly distinguishable from the instant case. Here, AHMED alleges that he proceeded through the contractual grievance procedure and the Union denied his request to arbitrate the grievance. The facts before the Board confirm that AHMED exhausted the contractual grievance procedure in challenging his breach of contract claims. Further, under the contract, only the Union can request arbitration. The gravamen of AHMED's complaints is that the Employer improperly RIFed him and unlike the plaintiff in the Cheese case, AHMED alleges that the Union breached its duty to fairly represent him by wrongfully refusing to take his case to arbitration. Pursuant to Chapter 377, HRS, the Board has primary jurisdiction to hear complaints alleging the Union's breach of duty of fair representation. Unlike the Wiglesworth case, there is no corresponding statutory requirement which requires the matter to be

further appealed to the International union prior to filing an action for damages in federal district court.

Based upon the record in this case, the Board finds that it has jurisdiction over these complaints pursuant to Chapter 377, HRS. By appealing the decision of the Union agent to the Executive Board of the local union and receiving a determination at that level, the Board finds that AHMED exhausted his contractual remedies and was not required to pursue further remedies to the International union. Accordingly, the Union's and Employer's motions to dismiss the instant complaint on that basis are hereby denied.

With respect to the EWC's motion to stay the proceedings against the Employer, the Board appreciates the Employer's position that the finding of a breach of duty by the Union may preclude a finding against the Employer. However, since the claims against the Union and the Employer are interrelated, the Board believes that to promote efficiency and clarity in the production of evidence in these cases, the proceedings against the EWC should not be stayed. Accordingly, the motion by the EWC to stay the proceedings on AHMED's claims as to the Employer is also denied. In order to simplify the hearing process, however, Complainant is instructed to proceed with his claims against the Union first.

YOU ARE HEREBY NOTIFIED that the hearing on this matter will be held on August 27, 1997 at 9:00 a.m., in the Board's hearings room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii.

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96-6(CU)
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NOTICE OF HEARING

DATED: Honolulu, Hawaii, July 22, 1997.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member

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