STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LEWIS W. POE, Petitioner, and UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY; BENJAMIN J. CAYETANO, Governor, State of Hawaii; and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Intervenors.	CASE NO. DR-03-64 ORDER NO. 1728 ORDER GRANTING HGEA'S MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING HGEA'S MOTION FOR SUMMARY JUDGMENT

On June 5, 1997, LEWIS W. POE (POE) filed a Petition for Declaratory Ruling with the Hawaii Labor Relations Board (Board). In his petition, POE submits that an employee has a statutory right to present a grievance to the employer "alone," without the assistance or approval of the exclusive representative, and to exercise this right beyond Step 3 of the grievance procedure. POE contends that this right cannot be modified or interfered with and that the grievance procedure in question is partially invalid and in violation of statutory provisions and/or beyond the authority as provided by Chapter 89, Hawaii Revised Statutes (HRS).

POE cites to Article 11, Grievance Procedure, of the Unit 03 collective bargaining agreement (contract) which provides:

> B. An individual Employee may present a grievance without intervention of the Union, up to and including Step 3, provided the Union has been afforded an opportunity to be present

at the meeting(s) on the grievance. Any adjustment made shall not be inconsistent with the terms of this Agreement.

Step 4 of the grievance procedure provides for arbitration of the grievance, and states, in part:

> If the grievance is not resolved at Step 3 and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or designated representative of its desire to arbitrate within ten (10) working days after receipt of the reply at Step 3. Representatives of the parties shall attempt to select an Arbitrator immediately thereafter.

According to his petition, POE requests an interpretation of §§ 89-8(b), 89-3, and 89-10, HRS.

Section 89-8(b), HRS, provides as follows:

> An individual employee may present a grievance at any time to the employee's employer and have the grievance heard without intervention of an employee organization; provided that the exclusive representative is afforded the opportunity to be present at such conferences and that any adjustment made shall not be inconsistent with the terms of an agreement then in effect between the employer and the exclusive representative.

Section 89-3, HRS, provides as follows:

> Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except to the extent of making such payment of amounts equivalent to regular dues to an exclusive representative as provided in section 89-4.

Section 89-10(a), HRS, provides as follows:

> Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned. The agreement shall be reduced to writing and executed by both parties. The agreement may contain a grievance procedure and an impasse procedure culminating in final and binding arbitration, and shall be valid and enforceable when entered into in accordance with provisions of this chapter.

On June 18, 1997, the UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA), the exclusive representative of Unit 07, by and through its attorneys, filed a Petition for Intervention in the instant proceedings with the Board. Thereafter, on June 19, 1997, BENJAMIN J. CAYETANO, Governor, State of Hawaii (State), public employer and party to the contract, by and through his attorneys, filed a Petition for Intervention with the Board. On June 24, 1997, after the deadline set by the Board, the HGEA, Unit 03 exclusive representative and party to the contract, by and through its attorney, filed a Petition for Intervention with the Board.

On July 25, 1997, the Board issued Order No. 1503, granting the petitions for intervention filed by UHPA and the State. The Board also granted the HGEA's petition for intervention over POE's objection.

On September 4, 1997, the HGEA filed a Motion for Summary Judgment with the Board. The HGEA contends that POE's petition is untimely because the petition in substance alleges that the HGEA breached its duty of fair representation by negotiating a contract provision which provides that only the HGEA has the right to commence arbitration. The HGEA contends that the petition is in

the nature of a prohibited practice complaint and is subject to the applicable 90-day statute of limitations. Guy Tajiri, HGEA Field Services Officer, states in an affidavit attached to the HGEA's motion, that the contract provision at issue became effective upon the execution of the Unit 03 contract on April 29, 1994 and remained in effect throughout the duration of the contract. The HGEA alleges that in a previous case, Case No. DR-03-56 filed on October 20, 1994, POE contended that the grievance procedure violated his right to agree to continue grievance meetings as an individual employee pursuing a grievance without the assistance of the union. The HGEA argues that POE was aware or should have been aware at that time that the contract provided that only the Union can pursue arbitration and thus, this petition is filed too late.

In addition, the HGEA contends that the negotiation of the instant contract provision does not violate the Union's duty of fair representation. The HGEA further contends that § 89-8(b), HRS, affords employees the right to present grievances but does not give the employees the right to arbitrate the cases.

On September 11, 1997, POE filed an answering affidavit with the Board. POE contends that there is a question of which Step 3 procedure is valid in light of the provisions of § 89-8(b), HRS, etc. POE argues that according to § 89-8(b), HRS, a Unit 03 employee has a statutory right to grieve alone to the employer at any time and that he believes that he has a statutory and/or contractual right to pursue the due process provisions of the grievance procedure of the contract. POE also submits that he does not allege that the HGEA breached its duty of fair representation.

POE stated that he was aware that the grievance procedure expressly allowed the HGEA to initiate Step 4 but that he was not aware that the contract prohibited him from initiating the Step 4 process. POE contends that it is not apparent from §§ 89-10(a), 89-11(a), and 89-8(b), HRS, that the drafters were well aware of the difference between a grievance meeting and an arbitration hearing and that §§ 89-9(b), HRS, does not clearly indicate that individual employees may only present a grievance to the employer.

POE also incorporated his affidavit filed with the Board on August 21, 1997, where he states that the applicability of §§ 89-8(b) and/or 89-10, HRS, the issue of the validity of the unratified Memorandum of Agreement, was raised in Case Nos. DR-03-55, DR-03-56, DR-03-64, DR-03-66, DR-03-67, DR-03-60, and CU-03-112 which he filed with the Board. POE indicated that the Board previously ruled in Case No. DR-03-55, Decision No. 371, Lewis W. Poe, 5 HLRB 546 (1996), that the 1995 Memorandum of Agreement was valid.[1] POE contends that in the previous case, he challenged the unlimited power of the HGEA and the Employer to control the grievance process at step 3. POE states that in the instant case, POE challenges the power of the HGEA to initiate/control the grievance process at Step 4. POE contends that prior to August 1995, the original language of Article 11 did not expressly bar an employee from initiating the Step 4 of the grievance procedure. POE believes that the Union should not be

[1]The Hawaii Supreme Court affirmed Decision No. 371 in S.Ct. No. 20615 on July 22, 1998. Thus, the Board declines to address any issues relating to the validity of the Memorandum of Agreement or any requirements for ratification.

permitted to fully control the initiation of the grievance process at Step 4 at the expense of the employee or grievant.

On September 22, 1997, the HGEA filed a memorandum in reply to POE's affidavit filed on September 11, 1997 with the Board. The HGEA contends that nothing in § 89-10(a), HRS, affords an employee the right to invoke the arbitration clause in the Unit 03 contract. The HGEA argues that Chapter 89, HRS, affords the HGEA, as the exclusive representative of employees in Unit 03, the right to enter into a collective bargaining agreement which provides for final and binding arbitration of a grievance and authorizes the HGEA and the public employers to agree to a grievance and arbitration procedure which grants only the HGEA the right to present the case to arbitration. The HGEA further contends that if POE were allowed to adjust his grievance by invoking the arbitration provision, the adjustment would breach the contract language permitting only the Union to pursue arbitration.

On September 24, 1997, UHPA filed a memorandum in support of HGEA's motion for summary judgment with the Board. In a well-reasoned memorandum, UHPA submits that POE seeks a ruling declaring that pursuant to §§ 89-8(b), 89-3, 89-10(a), and 89-11(a), HRS, an employee has the right to take his/her grievance to arbitration without the intervention or consent of the Union. UHPA contends that the Board previously held in Decision No. 89, Case No. CE-12-25, Bruce J. Ching, 2 HPERB 23 (1978) (Ching), that § 89-8(b), HRS, does not grant an individual employee the right to compel his employer to arbitrate his/her grievance. UHPA also contends that POE's interpretation is contrary to the policies

underlying Chapter 89, HRS, which recognizes that the union, the exclusive representative of the employees, has the right to negotiate with the employer and defend the agreement on behalf of the employees. UHPA contends that an interpretation of Chapter 89 which creates individual negotiation rights would destroy the union's ability to negotiate the contract and would create chaos in the management of the contract. UHPA further contends that the HGEA contract which allows an employee to take his/her grievance directly to the employer for hearing and adjustment but reserves arbitration to the union to enforce breaches of the contract is consistent with the governing statutes. If POE disputes the HGEA's discretion in demanding arbitration, UHPA contends that he may file an action against the union for breach of the duty of fair representation.

On September 29, 1997, POE filed a Motion to Strike UHPA's Memorandum with the Board arguing that UHPA's Memorandum was actually a motion for summary judgment filed after the deadline set by the Board for motions. In response, on September 30, 1997, UHPA filed a Memorandum in Opposition to POE's Motion to Strike with the Board, contending that it addressed arguments not covered in the previously filed memoranda. UHPA submits that since this case is a request for declaratory ruling, it should be an intellectual discussion on the merits of the question posed by the Petition rather than an inconsequential squabble over procedures. UHPA further submitted that POE was not prejudiced by the filing of UHPA's memorandum since POE had sufficient time to respond thereto prior to the scheduled hearing.

Thereafter, on October 3, 1997, the State filed a memorandum in support of HGEA's motion for summary judgment with the Board. The State disputes POE's interpretation that paragraphs h and i of the contract are authorized by §§ 89-11(a) and 89-10(a), HRS. The State contends that under the applicable statutes, the Employer and the exclusive representative may enter into an agreement which contains a grievance procedure. The State contends that POE fails to understand the difference between the terms "grievance procedure is authorized" and "have the power to enter into a written agreement . . . setting forth a grievance procedure culminating in a final and binding decision." Thus, the State contends that the Board should grant the HGEA's motion for summary judgment and hold that §§ 89-8(b), 89-10(a), and 89-11(a), HRS, do not provide that individual members of collective bargaining units have the right to demand arbitration of their grievances without the consent of the union.

Also on that date, POE filed a motion with the Board for a continuance of the hearing scheduled in the matter which was granted by the Board in Order No. 1535, dated October 7, 1997.

On October 28, 1997 HGEA filed a Motion to Dispense with Hearing and Determination of Petition on Submitted Briefs with the Board which POE opposed on November 3, 1997.

On November 25, 1997, the Board issued Order No. 1559 denying POE's motion to strike UHPA's memorandum and permitting POE additional time to respond to UHPA's and the State's arguments. The Board also denied HGEA's motion to dispense with a hearing

because POE represented that he sought to call Guy Tajiri as a witness.

On December 12, 1997, POE filed a response to UHPA's memorandum with the Board. POE contends that the grievance procedure of each bargaining unit is unique and its actual meaning depends on the intent of the parties at the time of the contract execution. POE contends that if an employee has a right to grieve alone, then the employee has this right throughout the procedure.

On December 18, 1997, the Board conducted a hearing on the HGEA's motion for summary judgment. All parties were given a full opportunity to present evidence and argument before the Board. At the hearing, the State contended that the parties to the contract, the HGEA and the State, do not dispute the facts presented in this matter and agree that the contract provides only that the Union can request arbitration of the grievance. UHPA argued that the HGEA contract language is clear that only the Union can take a grievance to arbitration. UHPA contended that the Board's previous decision in Ching was dispositive of the question of whether the contract can provide that only a union can take a case to arbitration. POE nevertheless contended that there is a question of material fact presented as to the intent of the parties as to the meaning of the contract. POE argues that the contract does not specifically exclude the employee from requesting arbitration. POE further argued that the individual grievant should be permitted to initiate Step 4.

On December 19, 1997, the HGEA filed an Affidavit of Guy Tajiri with the Board. Tajiri states that portions of the contract

submitted to the Board in a previous exhibit were amended to render moot a different petition for declaratory order filed by POE.

At the outset, the HGEA contends that the petition is in substance an untimely prohibited practice complaint alleging a breach of duty of fair representation for the negotiation of the contract provision at issue. POE however, submits that there are no allegations in his petition of a breach of duty by the HGEA. Thus, the Board finds that it has jurisdiction over the instant petition under §§ 89-5 and 91-8, HRS.

After reviewing the record and the arguments made during the hearing before the Board, the issue before the Board is an interpretation of the Unit 03 contract with respect to who can request arbitration of a grievance. As set forth previously, the contract states:

> If the grievance is not resolved at Step 3 and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or designated representative of its desire to arbitrate within ten (10) working days after receipt of the Employer's decision at Step 3.

POE contends that there is a question of material fact presented regarding the intent of the parties negotiating the contract. However, contrary to POE's contentions, the Board finds that the intent of the parties is clear from the language of the contract which clearly and unambiguously provides that only the Union can request arbitration.

It is commonly said that where the language of a contract is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids. 17A Am Jur 2d § 337. The

intention of the parties must be gathered from that language, and from that language alone. Id.

The Board finds no basis in the contract language to suggest that an employee can initiate arbitration. Thus, as there is no ambiguity in the contract, there is no reason to resort to any aids to the construction of the contract, i.e., independent evidence of the intent of the parties during negotiations.

In the Ching case, a nearly identical Unit 12 arbitration clause was construed to permit only the union to request arbitration. In addition, the Board found that the contract provision did not violate § 89-8(b), HRS. In Ching, the employer refused to permit the employee to arbitrate the grievance without the union's participation because the employer interpreted the arbitration clause as reserving that right to the union. The Board found that based upon the similarity between § 89-8(b), HRS, and § 9(a) of the Labor Management Relations Act (LMRA) and decisions interpreting § 9(a) of the LMRA, that § 89-8(b), HRS, does not grant an individual employee the right to compel the employer to arbitrate his or her grievance. Black-Clawson Company, Inc. v. International Association of Machinists, Lodge 355, 313 F.2d 179 (2nd Cir. 1962)[2]. The Board concluded that the terms of the

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[2] In Black-Clawson, supra, the court stated:

> Our conclusion is dictated not merely by the terms of the collective bargaining structure, and history of section 9(a), but also by what we consider to be a sound view of labor-management relations. The union represents the employees for the purposes of negotiating and enforcing the terms of the collective bargaining agreement. This is the

contract which reserved the right to demand arbitration solely to the union do not conflict with § 89-8(b), HRS, which merely grants an individual employee the privilege of approaching his or her employer for an adjustment of the grievance, rather than the right to have that grievance adjusted.

POE argues that the Ching case is instructive because under the facts of that case, the union was willing to permit the individual employee to proceed to arbitration without its participation. The union requested arbitration but later withdrew its request and advised the employee of his right to pursue the arbitration on his own. The employer agreed to permit arbitration only if the union participated as a co-representative of the grievant but the union refused to participate. Thereafter, the employer's negotiation notes revealed that the parties had agreed to the union's proposal to limit access to arbitration to the union alone. Thereupon, the union adopted the employer's interpretation that only the union can proceed to arbitration.

Based upon the Ching case, POE argues that there is a question of fact as to the interpretation of the instant contract provision because there is no evidence of the intent of the parties

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> modern means of bringing about industrial peace and channeling the resolution of intra-plant disputes. Chaos would result if every disenchanted employee, every disturbed employee, and every employee who harbored a dislike for his employer, could harass both the union and the employer by processing grievances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration in the face of clear contractual provisions intended to channel the enforcement remedy through the union. [Citations omitted.] 313 F.2d at 186.

in the record. As stated previously, the Board finds that the contract language is clear and unambiguous; the contract clearly states that if the Union desires to arbitrate the grievance, it shall serve notice on the employer. Unlike Ching, however, there is no ambiguity created by the differing interpretations of the parties to the contract. Both parties here agree that only the Union can request arbitration and the Board finds no support for POE's strained suggestion that the provision can be reasonably read to permit the individual employee to pursue arbitration without the union. Further, the Board previously ruled in Ching, that the contract language did not violate § 89-8(b), HRS, and POE fails to present any compelling authorities to revisit the issue.

Hence, based upon the record in this case, the Board grants the HGEA's motion for summary judgment. The Board finds that there are no genuine issues of material fact in this case and the HGEA is entitled to judgment as a matter of law. Article 11 of the Unit 03 contract clearly and unambiguously provides that only the Union can request arbitration of a grievance and such provision does not violate § 89-8(b), HRS.

DATED: Honolulu, Hawaii, June 4, 1999.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

LEWIS W. POE and UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY; et al.
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CHESTER C. KUNITAKE, Board Member

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