

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CU-10-157
	)	
JAMES LEVI MAKAIIO,	)	ORDER NO. 1848
	)	
Complainant,	)	ORDER DENYING RESPONDENTS'
	)	MOTION TO DISMISS COM-
and	)	PLAINT; NOTICE OF PREHEAR-
	)	ING CONFERENCE AND HEARING
ROLAND KADOTA, United Public	)	ON PROHIBITED PRACTICE COM-
Workers, AFSCME, Local 646, AFL-	)	PLAINT
CIO and UNITED PUBLIC WORKERS,	)	
AFSCME, LOCAL 646, AFL-CIO,	)	
	)	
Respondents.	)	

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ORDER DENYING RESPONDENTS' MOTION TO DISMISS  
COMPLAINT; NOTICE OF PREHEARING CONFERENCE  
AND HEARING ON PROHIBITED PRACTICE COMPLAINT

On October 7, 1999, Complainant JAMES LEVI MAKAIIO (MAKAIIO) filed a prohibited practice complaint against ROLAND KADOTA (KADOTA), United Public Workers, AFSCME, Local 646, AFL-CIO and the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (collectively UPW or Union) with the Hawaii Labor Relations Board (Board). MAKAIIO alleged that he was denied a promotion from ACO III to ACO IV because of a grievance filed by ACO III Ernest Suguitan. MAKAIIO claims that the grievance was filed on or about September 21, 1998 and that KADOTA told him that the matter would go to arbitration. MAKAIIO alleges that there has been no resolution reached on the grievance. MAKAIIO contends that the UPW is violating §§ 89-13(b)(1) through (5), Hawaii Revised Statutes (HRS) and is restraining him in his right to be promoted.

On October 25, 1999, Respondents, by and through their counsel, filed a motion to dismiss the complaint with the Board. Respondents contend that the instant complaint should be dismissed for lack of jurisdiction since MAKAIIO failed to exhaust his contractual remedies, lacks standing to maintain this complaint, and filed the complaint after the applicable statute of limitations had elapsed.

On November 1, 1999, Complainant filed a memorandum with the Board. MAKAIIO alleges that he took the promotional examination for an ACO IV position in November 1998 and May 1999. Three ACO IV Sergeant positions were to be filled and Complainant was told by the HCCC administrator that he would not be promoted because of a pending grievance by Suguitan. MAKAIIO further alleges that he brought his complaint to KADOTA on July 21, 1999 but was told that since the Union was representing Suguitan in a pending grievance, the Union could not help him. KADOTA told MAKAIIO to contact the State Ombudsman who referred him to the Board.

The Board conducted a hearing on the instant motion by conference call on November 23, 1999. At that time, the Union withdrew its challenge to the timeliness of the complaint. The parties had full opportunity to present evidence and arguments to the Board.

Based upon a thorough review of the record and arguments presented, the Board makes the following findings and order.

In the UPW's motion to dismiss the instant complaint, the Union contends that the Board lacks jurisdiction over this matter because MAKAIIO failed to exhaust his contractual remedies over his

non-selection to the ACO IV position prior to bringing his case before the Board. Gary Rodrigues, UPW State Director, states in an affidavit attached to the motion that on or about September 10, 1998, Suguitan was notified that he was not selected for promotion to ACO IV. Suguitan requested assistance from the Union and on or about September 24, 1998, the UPW filed a grievance contesting Suguitan's non-selection. Rodrigues states that the grievance is in arbitration but the parties have been exploring settlement options since February 1999. Rodrigues states that MAKAIIO contacted KADOTA on or about July 21, 1999 contesting his non-selection and was advised that the Union was pursuing a grievance for Suguitan and that if he wanted to challenge his non-selection, he should have filed a grievance much earlier. MAKAIIO was told that the Union could not pursue a grievance and that it appeared that the employer had the right not to fill all vacancies in the ACO positions.

The UPW relies upon Carr v. Pacific Maritime Ass'n, 904 F.2d 1313, 134 LRRM 2319 (9<sup>th</sup> Cir. 1990) and Croston v. Burlington Northern R. Co., 999 F.2d 381, 143 LRRM 2702 (9<sup>th</sup> Cir. 1993), for the proposition that when an employee fails to exhaust contractual remedies jurisdiction over the action is lacking. The UPW argues that MAKAIIO did not file a timely grievance to contest his non-selection and Respondents would not and could not take any action since MAKAIIO did not exhaust his contractual remedies.

In Carr, supra, the Court found that the claims of unsuccessful applicants for registration as longshoremen and clerks

were not properly before the court because the employees had not exhausted their contractual remedies. The Court recognized that as a general rule, members of the collective bargaining unit must first exhaust contractual procedures before bringing an action against the employer for a breach of the collective bargaining agreement as well as a claim against the union for breach of the duty of fair representation in the courts. The Court also recognized two situations where the breach of duty of fair representation excuses the failure to comply with the grievance procedure, i.e., where the union has the sole power under the contract to invoke the higher stages of the grievance procedure and the employee has been prevented from exhausting the grievance procedure by the union's wrongful refusal to process the grievance, and where the grievance alleged a breach of the duty of fair representation with regard to negotiating the collective bargaining agreement. The Court held in Carr, supra, that the alleged breach of duty did not excuse the failure of the unsuccessful applicants to exhaust collective bargaining agreement grievance procedures before bringing suit challenging the registration process because the employees could utilize the process without help or approval of the union.

In Croston, supra, the Court held that the employee was required to exhaust contractual grievance procedures before bringing a claim against the union for the breach of duty of fair representation. The Court recognized that generally, employees must exhaust contractual grievance procedures before bringing an action against the employer for breach of a collective bargaining

agreement and against a union for breach of the duty of fair representation. The Court further recognized the two instances cited in Carr, supra, which excused the exhaustion requirement. In Croston, supra, the collective bargaining agreement allowed any party to submit a dispute to an arbitration board and that the employee was not precluded from arbitrating his claim for a cash settlement.

After reviewing the Union's arguments, the Board finds the cases cited to be inapplicable to the facts presented in this case. The cited cases involve hybrid situations in the federal labor law where an employee sues the employer for a breach of the collective bargaining agreement and the union for a breach of the duty of fair representation. In addition, while the federal courts recognize that complainants must exhaust available contractual procedures before seeking relief in the courts, the courts also recognize an exception where the union has the sole power to invoke the higher steps of the grievance procedure and the union has breached its duty of fair representation in wrongfully refusing to process a grievance. Nevertheless, while MAKAIIO complains that he did not receive a promotion to ACO IV, he does not seek redress from his employer but rather filed the instant complaint against the Union contending that he was not promoted because of the Union's pursuit of the Suguitan grievance, i.e., that the Union breached its duty of fair representation. Since MAKAIIO does not allege contract claims but only breach of duty claims which are inappropriate for pursuit through a grievance procedure which permits redress against an employer's alleged contract violations,

the Board denies the UPW's motion to dismiss the complaint for failure to exhaust contractual remedies. It may very well be that MAKAIIO's claim ultimately lies against his employer for not appointing him to the ACO IV position notwithstanding the pendency of the Suguitan grievance. However, there are insufficient competent facts in this record for the Board to determine MAKAIIO's claim of entitlement to the promotion, the employer's reasons for not appointing him to the position, who received the promotion that Suguitan is grieving, as well as the Union's alleged breach of duty. The Complainant filed this complaint against the Union and he need not exhaust his contractual remedies to pursue a breach of duty claim before the Board.

With respect to the MAKAIIO's standing to assert a claim against Respondents, there is no dispute that MAKAIIO is included within the bargaining unit and represented by the Union. While the Union contends that MAKAIIO has no standing to complain about Respondents' conduct and the length of time involved in resolving Suguitan's grievance, MAKAIIO maintains that he is not attempting to enforce Suguitan's rights but rather, his own right to be promoted to the ACO IV position. The gravamen of MAKAIIO's complaint appears to be that he was selected to fill the ACO IV position but did not receive the promotion because of Suguitan's pending grievance. It is thus clear that MAKAIIO does not have similar interests with Suguitan and the Board finds that the instant complaint, on its face, is sufficient to withstand the Union's motion to dismiss the complaint for lack of jurisdiction.

Accordingly, the Board hereby denies the Union's motion to dismiss the instant complaint.

YOU ARE HEREBY NOTIFIED that the Board, pursuant to § 89-5(b)(4), HRS, and Administrative Rules § 12-42-47, will conduct a prehearing conference on the above-entitled prohibited practice complaint on April 17, 2000 at 9:00 a.m. by conference call. The Board will contact the Complainant at the telephone number on file with the Board. Counsel for Respondents is requested to appear in the Board's hearings room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii at the designated time. The purpose of the prehearing conference is to arrive at a settlement or clarification of issues, to identify and exchange witness and exhibit lists, if any, and to the extent possible, reach an agreement on facts, matters or procedures which will facilitate and expedite the hearing or adjudication of the issues presented. The parties shall file a Prehearing Statement which addresses the foregoing matters with the Board two days prior to the prehearing conference.

YOU ARE ALSO NOTIFIED that the Board will conduct a hearing, pursuant to §§ 89-5(b)(4) and 89-14, HRS, and Administrative Rules §§ 12-42-49 and 12-42-8(g) on the instant complaint on May 3, 2000 at a time and location to be set at the prehearing conference. The purpose of the hearing is to receive evidence and arguments on whether Respondents committed prohibited practices as alleged by the Complainant. The hearing may continue from day to day until completed.


The parties shall submit to the Board four copies of all exhibits identified and offered into the record. Additional copies for opposing counsel shall also be provided.

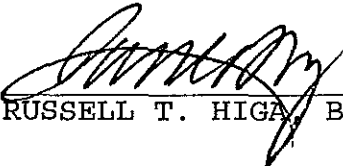
All parties have the right to appear in person and to be represented by counsel or other representative.

Auxiliary aids and services are available upon request, call Mrs. Kato at 586-8610, (808) 586-8847 (TTY), or 1-888-569-6859 (TTY neighbor islands). A request for reasonable accommodations should be made no later than ten working days prior to the needed accommodation.

DATED: Honolulu, Hawaii, April 10, 2000.

HAWAII LABOR RELATIONS BOARD

  
BERT M. TOMASU, Chairperson

  
RUSSELL T. HIGA, Board Member

  
CHESTER C. KUNITAKE, Board Member

Copies sent to:

James Levi Makaio  
Herbert R. Takahashi, Esq.  
Joyce Najita, IRC