

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-03-445
)	
LEWIS W. POE,)	ORDER NO. 1864
)	
Complainant,)	ORDER GRANTING RESPONDENT'S
)	MOTION TO DISMISS PROHIB-
and)	ITED PRACTICE COMPLAINT
)	
BENJAMIN J. CAYETANO, Governor,)	
State of Hawaii,)	
)	
Respondent.)	
_____)	

ORDER GRANTING RESPONDENT'S MOTION
TO DISMISS PROHIBITED PRACTICE COMPLAINT

On February 7, 2000, LEWIS W. POE (POE) filed a prohibited practice complaint against BENJAMIN J. CAYETANO, Governor, State of Hawaii (CAYETANO or Employer) with the Hawaii Labor Relations Board (Board). POE alleged that CAYETANO and Kazu Hayashida, Director, Department of Transportation (DOT), State of Hawaii violated the terms of the Unit 03 collective bargaining agreement (CBA or contract). POE alleges that he requested information needed to process a grievance from Hayashida who subsequently failed to provide the information within seven working days thereby violating Article 11A of the contract. POE alleges that he filed a grievance against Hayashida for repeated violations of the contract and after proceeding through the grievance procedure, Mike McCartney, Director, Department of Human Resources Development (DHRD), State of Hawaii issued a Step 3 response on January 7, 2000. Thereafter, POE asked the Hawaii Government

Employees Association (HGEA) to initiate Step 4 of the grievance procedure and on January 27, 2000, an HGEA representative indicated that there was no merit to POE's grievance and the Union would not proceed to arbitration. POE contends that the Employer violated § 89-13(a)(8), Hawaii Revised Statutes (HRS), and he seeks the enforcement of the CBA, another "Cease and Desist Order" from the Board to the Employer and/or reimbursement for POE's expenses and costs incurred by POE during and after completion of the grievance procedure pursuant to § 89-5, HRS.

On March 8, 2000, CAYETANO, by and through his counsel, filed a motion to dismiss the prohibited practice complaint and/or for summary judgment with the Board. CAYETANO contends that the instant complaint should be dismissed on the grounds that the complaint fails to state a claim upon which relief can be granted; the Complainant failed to exhaust his contractual remedies, and the Complainant failed to name an indispensable party. Alternatively, CAYETANO contends that there are no genuine issues of material fact in dispute and the Respondent is entitled to judgment as a matter of law.

CAYETANO contends that POE's complaint should be dismissed because as a matter of law, POE failed to allege any actions by Respondent which would give rise to any claim or basis upon which he is entitled to relief. CAYETANO alleges that POE's grievance was processed through Step 3 of the grievance procedure and a final decision was made. CAYETANO contends that there is no further action required unless the Union desires to arbitrate the grievance. In addition, CAYETANO contends that POE failed to exhaust his contractual remedies because he cannot maintain the

present action for a contractual violation against the Employer without bringing a breach of duty case against the Union. CAYETANO also argues that the Union is an indispensable party to the action. Alternatively, CAYETANO contends that summary judgment should be granted in his favor because there are no material facts in dispute in this case. CAYETANO submits that POE's grievance was sustained at Step 3 and there are no other claims of contract violations. Since CAYETANO submits that the contract does not provide for the reimbursement of grievance expenses, CAYETANO contends that he is entitled to judgment as a matter of law.

On March 15, 2000, POE filed an Answering Affidavit with respect to Respondent's motion to dismiss and/or for summary judgment with the Board. POE alleges that he exhausted the contractual procedure when he received McCartney's Step 3 response and asked the Union to initiate Step 4 of the grievance procedure. The Union informed POE that it would not proceed to Step 4 and Poe filed the complaint against the Employer in the instant case. POE seeks the reimbursement of expenses which were incurred in the processing of his individual grievance against the Employer. POE contends that his request for reimbursement is not inconsistent with the terms of the contract because he believes that the contract does not address the matter and the contract does not expressly prohibit the payment of grievance expenses to an individual grievance. POE further contends that the following is a genuine issue of material fact present in this case:

Did the Employer or his representative violate the terms of the CBA in **such a wilful and/or repeated manner** to warrant and/or authorize appropriate and/or serious action against the Employer/Hayashida, pursuant to the powers

and/or functions of the HLRB which are enumerated in HRS, § 89-5 and which are implied by HRS, § 89-14 (**Prevention of prohibited practices**) through the effect of the provisions of § 377-9?

POE thus argues that the Employer's dispositive motions filed on March 8, 2000 should be denied because the Employer continues to violate the terms of the CBA.

The Board conducted a hearing on the instant motion on March 16, 2000. The parties had full opportunity to present evidence and argument to the Board. Based upon a thorough review of the record, the Board makes the following findings and conclusions and grants CAYETANO's motion to dismiss the complaint.

FINDINGS OF FACT

POE was for all times relevant, an employee within the meaning of § 89-2, HRS, and a member of bargaining unit 03.

CAYETANO was for all times relevant, the Governor of the State of Hawaii, and an employer within the meaning of § 89-2, HRS.

By letter dated October 21, 1999, POE requested information from DOT Director Kazu Hayashida in order to process a grievance. POE asked, inter alia, who the DOT Personnel Officer was from August 31, 1994 through December 31, 1994; questions regarding the procedures for classification actions; where the DOT maintained position descriptions; whether a certain employee was authorized to take classification actions on behalf of the DHRD Director and what procedures she followed regarding classification actions; and when the DOT Personnel section received a certain form in June of 1997.

By letter dated November 18, 1999, POE filed a Step 1 grievance against Hayashida for not responding to his information request. POE requested a waiver of the Step 1 meeting and also requested reimbursement for his expenses totaling \$4.55.

By letter dated December 2, 1999, POE filed a Step 2 grievance with Hayashida. POE indicated that Fujikawa granted POE's request for a waiver of the Step 1 meeting and requested reimbursement for his costs of \$9.25.

By letter dated December 13, 1999, POE filed a Step 3 appeal of the grievance indicating that Hayashida had not responded at Step 2. POE requested reimbursement of \$13.80 against Hayashida or management as a penalty or fine.

By letter dated January 7, 2000, McCartney sustained POE's grievance finding that the DOT did not comply with the seven working day requirement of Article 11A of the Unit 03 contract in responding to POE. McCartney indicated that the DOT should provide the information requested as soon as possible and should be more diligent in its efforts to comply with the requirements of Article 11. McCartney denied POE's request for costs incurred in the processing of the grievance, totaling \$13.80, because there is no provision in the contract for the reimbursement of costs nor any precedent for such reimbursement in previous grievances filed with the department.

By letter dated January 20, 2000, POE requested the HGEA to initiate the arbitration of his grievance at Step 4 or the grievance procedure.

By letter dated January 27, 2000, Randy Perreira (Perreira), HGEA Deputy Executive Director, responded that the

Employer's Step 3 response indicated that the DOT violated the contract and that the DOT would provide the information as soon as possible and would be more diligent in its efforts to comply with Article 11 in the future. With regard to the reimbursement of expenses, Perreira stated that there were no provisions in the Unit 03 contract or Chapter 89, HRS, which provide such a remedy.

POE filed the instant complaint seeking reimbursement of his costs for processing his grievance against the Employer of \$13.80.

Based upon the foregoing facts, the Board finds that POE filed a grievance with the Employer for failing to provide him with information necessary to process a grievance within seven working days as required by the Unit 03 contract. At Step 3, the DHRD Director sustained the grievance finding that the DOT violated the contract but did not reimburse POE's costs because there is no contract provision nor any case precedent for the reimbursement of costs. POE requested the Union to arbitrate the grievance but the Union declined because the Employer had sustained the grievance and ordered the production of information and indicated that there was no authority for the reimbursement of grievance processing costs. POE filed the instant complaint against the Employer for violation of the contract while he concedes that there is no contract provision requiring the reimbursement for costs.

DISCUSSION

In the instant motion, CAYETANO contends that POE fails to state a claim upon which relief can be granted. CAYETANO submits that as a matter of law, POE would not be entitled to legal

relief even if everything alleged in his complaint were true. The Employer contends that POE's grievance was processed through Step 3 and was sustained as to the contract violation alleged. The Employer denied POE's request for costs because there is no authority for such an award for pursuing the instant grievance. CAYETANO further argues that POE failed to exhaust his contractual remedies because he failed to bring a breach of duty of fair representation claim against the Union for failing to arbitrate his grievance.

Under the facts of the instant case, POE requested the Union to arbitrate his grievance. The Union informed POE that the Employer found that the DOT had violated the contract and was ordered to produce the information POE requested. In addition, the Union found no authority in the contract or in Chapter 89, HRS, to justify the reimbursement of costs. Thus, the Union declined to pursue the arbitration of POE's grievance. POE does not claim here that the Union breached its duty of fair representation for refusing to arbitrate his grievance but rather files the instant complaint against his Employer alleging the violation of the contract and seeking reimbursement of his costs.

In Order No. 1732, Order Granting Respondent's Motion To Dismiss Prohibited Practice Complainant and/or For Summary Judgment, in Case No. CE-03-423, Lewis W. Poe (June 15, 1999), the Board dismissed POE's complaint alleging contract violations against the same Employer. The Board dismissed the pending contract violation finding that POE failed to exhaust his available contractual remedies prior to bringing a prohibited practice complaint against the Employer. The Board concluded:

Under the applicable grievance procedure, the contract provides that only the union can request arbitration of a grievance. In order to exhaust the contractual remedies, Complainant should have asked the union to arbitrate the grievance. If the union elected not to arbitrate the case, Complainant could have filed a prohibited practice complaint against the union for breaching its duty of fair representation. Since Complainant failed to request the union to arbitrate the grievance, the allegations of § 89-13(a)(8), HRS, violations in the complaint are dismissed for failure to exhaust contractual remedies.

Id., Order No. 1732, Case No. CE-03-423, Lewis W. Poe, June 15, 1999, affirmed in Civ. No. 99-2676-99, January 21, 2000; Decision No. 402, in Case No. CE-03-283, Lewis W. Poe, 5 HLRB ___ (October 13, 1999) affirmed in Civil No. 99-4200-11, May 5, 2000; Order No. 1812, Case No. CE-03-300, Lewis W. Poe, November 16, 1999.

The Board's analysis is consistent with federal cases filed under § 301 of the National Labor Relations Act which permits employees to bring suit against their employer or their union for violations of the contract. The U.S. Supreme Court has held that "[w]hether the employee sues both the labor union and the employer or only one of those entities, he must prove the same two facts to recover money damages: that the employer's action violated the terms of the collective-bargaining agreement and that the union breached its duty of fair representation." Teamsters Local 391 v. Terry, 494 U.S. 558, 564 (1990). The purpose for this is that "[i]n passing labor laws, Congress intended in part to encourage dispute resolution by the parties themselves through mutually satisfactory mechanisms negotiated in the collective bargaining process." Kaiser v. U.S. Postal Service, 140 LRRM 2292, 2300

(1992). The U.S. Supreme Court in DelCostello v. Teamsters, 462 U.S. 151, 164-65 (1983), held that the key to the employees action, regardless of who he sues is that he must prove both elements and thus, the action "is not a straightforward breach of contract suit under § 301. . .but a hybrid § 301/fair representation claim." See also, Clayton v. International Union, 451 U.S. 679, 101 S.Ct. 2088 (1981); Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614 (1965) which requires the employee to allege that the union breached its duty of fair representation in order to prosecute a claim against the employer for breach of contract.

Further, in Mahnke v. Wisconsin Employment Relations Commission, 66 Wis.2d 524, 225 N.W.2d 617 (1975),¹ an employee brought a wrongful discharge action against his employer before the Commission. The Commission dismissed the complaint and on appeal the court held that an employee who had not exhausted the grievance procedure could not prosecute a claim that he was discharged in violation of such agreement unless he proved that the union breached its duty of fair representation to him. In Mahnke, the union processed the grievance through the contract procedure but refused to submit the grievance to arbitration and the employee filed the complaint against his employer before the Commission

¹The Board finds the decisions of the Wisconsin Employment Relations Commission instructive because the Wisconsin employment relations statute similarly provides that violations of a collective bargaining agreement where the parties have previously agreed to accept such award as final and binding may constitute unfair labor practices by the employer. § 111.84, Wisconsin Statutes Annotated.

alleging that the employer violated the contract regarding sick leave. The court stated:

We believe the controlling issue to be: Where an employee alleges that his employer has discharged him in violation of a collective bargaining agreement and that his union has failed to proceed to arbitration under the terms of the collective bargaining agreement, does the employee have the burden of proof to establish a want of fair representation on the part of the union before he can proceed to the merits of his claim?

In Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, the court held that an employee who has failed to exhaust the exclusive grievance remedies is foreclosed from suing his employer on an arbitrable claim when his union refuses to pursue the grievance through all steps of the grievance procedure.

The underlying assumption is that the grievance procedure is the exclusive remedy. As stated in Vaca, supra, page 184, footnote 9, 98 S.Ct. page 913: 'If a grievance and arbitration procedure is included in the contract, but the parties do not intend it to be the exclusive remedy, then a suit for breach of contract will normally be heard even though such procedures have not been exhausted. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 657-658, 85 S.Ct. 614, 13 L.Ed.2d 580 . . .' An examination of the Republic Steel Corporation Case (1965), 379 U.S. 650, 657, 658, 85 S.Ct. 614, 619, 13 L.Ed.2d 580, however, reveals that the assumption is more akin to a presumption: 'The federal rule would not of course preclude Maddox' court suit if the parties to the collective bargaining agreement expressly agreed that arbitration was not the exclusive remedy. . .' In the instant contract there is no such express provision. A fair reading of it yields the distinct impression that the procedure was intended to be exclusive. In Vaca, supra, the court stated 386 U.S. at pages 184, 185, 87 S.Ct. at page 914: '. . . if the wrongfully discharged employee himself resorts to the courts before the grievance procedures have been fully exhausted, the employer may well defend on the ground that the exclusive remedies provided by such a contract have not been exhausted. Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound

by terms of that agreement which govern the manner in which contractual rights may be enforced. For this reason, it is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580. . . .'

This general rule clearly embodies the intent of Congress as codified in the Labor-Management Relations Act, 29 U.S.C.A., page 37, sec. 173(d): '(d) Final adjudgment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . .'

* * *

If it is established that the grievance procedure provided for in the collective bargaining agreement has not been exhausted, then it must be proven that the union failed in its duty of fair representation before the employee can proceed to prosecute his claim against the employer.

* * *

. . . We believe the employer is obligated in the first instance by way of an affirmative defense to allege that the contract grievance procedure has not been exhausted. If this fact has been established by proof, admission or stipulation, the employee cannot prosecute his claim unless he proves the union breached its duty of fair representation to him.

In this case the employer did affirmatively allege in its answer that the contract grievance procedure has not been exhausted. This allegation can be taken as a verity because the employee's complaint also alleged that the union refused to submit his claim to arbitration under the agreement. At this stage it became necessary for the employee to come forward with sufficient proof to establish the union breached its duty of fair representation to him before he could pursue his claim based upon a violation of the collective bargaining agreement.

Id., at pp. 529-533.

Thus, the court recognized that one of the situations where the employee may bring suit to enforce his contract right is where the union has sole power under the contract to invoke the higher stages of the grievance procedures and where the employee has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance. Under Vaca, a "wrongful refusal" occurs only when the union breaches its duty of fair representation and a breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. Hence, before a unionized employee can proceed with a breach of contract claim against his employer, he must establish that the union breached its duty of fair representation in failing to pursue his grievance through the contractual grievance procedure. Procedurally, the breach of duty claim must first be addressed in order to proceed against the employer. Gray v. Marinette County, 200 Wis.2d 426, 546 N.W.2d 553 (1996).

Assuming arguendo, however, that the Board has jurisdiction over the instant complaint POE contends that the Employer violated the contract by refusing to provide reimbursement of his costs for pursuing the grievance. The Employer denied the reimbursement of costs on the grounds that the contract did not provide for such costs and there is no precedent for the reimbursement of costs. The Union denied POE's request for arbitration because there is no authority in the contract or Chapter 89, HRS, for reimbursement of his costs. POE himself concedes that the contract does not expressly provide for the reimbursement but contends that the contract does not expressly

prohibit such reimbursement. After reviewing the grievance procedure language in the contract, the Board finds no provision which entitles POE to reimbursement of his costs of pursuing a grievance. Given these undisputed facts,² the Board would further conclude that even if POE's allegations were true, he would not be able to prove that the Employer violated the contract by refusing to reimburse him for his costs as there is no contractual basis for his claims.

CONCLUSIONS OF LAW

Complainant must exhaust his available contractual remedies prior to bringing a prohibited practice complaint against the Employer alleging a violation of the collective bargaining agreement. In order to maintain an action against his Employer alleging a breach of the collective bargaining agreement, Complainant must establish that the union breached its duty of fair representation in failing to pursue his grievance to arbitration. Absent such a claim, the Board hereby dismisses the instant complaint for failure to exhaust contractual remedies.


²POE contends that there is a genuine issue of material fact presented as to whether the employer violated the contract in such a wilful or repeated manner to warrant appropriate action against the Employer pursuant to the powers or functions of the Board which are enumerated in §§ 89-5, 89-14, and 377-9, HRS. The Board however, finds that the scope of the Board's remedial powers is immaterial where POE failed to exhaust his remedies and failed to establish a breach of duty of fair representation claim by the Union and therefore cannot maintain the contract claim against his Employer before this Board.

ORDER

The Board hereby dismisses the instant complaint.

DATED: Honolulu, Hawaii, May 16, 2000.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member


CHESTER C. KUNITAKE, Board Member

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