

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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| In the Matter of |) | CASE NO. CE-03-404 |
| |) | |
| LEWIS W. POE, |) | ORDER NO. 1885 |
| |) | |
| Complainant, |) | ORDER GRANTING RESPONDENTS' |
| |) | MOTION TO DISMISS PROHIB- |
| and |) | ITED PRACTICE COMPLAINT |
| |) | AND/OR FOR SUMMARY JUDG- |
| JAMES H. TAKUSHI, Director, |) | MENT |
| Department of Human Resources |) | |
| Development, State of Hawaii; |) | |
| KAZU HAYASHIDA, Director, |) | |
| Department of Transportation, |) | |
| State of Hawaii and THOMAS T. |) | |
| FUJIKAWA, Harbors Administrator, |) | |
| Department of Transportation, |) | |
| State of Hawaii, |) | |
| |) | |
| Respondents. |) | |

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS
PROHIBITED PRACTICE COMPLAINT AND/OR FOR SUMMARY JUDGMENT

On August 12, 1998, Complainant LEWIS W. POE (POE) filed a prohibited practice complaint against JAMES H. TAKUSHI (TAKUSHI), Director, Department of Human Resources Development, State of Hawaii; KAZU HAYASHIDA (HAYASHIDA), Director, Department of Transportation (DOT), State of Hawaii; and THOMAS T. FUJIKAWA (FUJIKAWA), Harbors Administrator, DOT, State of Hawaii with the Hawaii Labor Relations Board (Board). POE alleges that he refused to perform assigned computer tasks without an appropriate compensation adjustment and was suspended for one day. POE alleges that Respondents misinterpret 17H of the applicable Unit 03 collective bargaining agreement thereby violating § 89-13(a)(8), Hawaii Revised Statutes (HRS).

On September 25, 1998, the Respondents, by and through their counsel, filed a motion to dismiss prohibited practice complaint and/or for summary judgment with the Board. Respondents contend that the instant complaint should be dismissed because POE's complaint is an appeal from the denial of an affirmative defense POE raised against his discipline for refusing to perform assigned work. Further, the Respondents contend that there are no material facts in dispute and Respondents are entitled to judgment as a matter of law. The Respondents submit that POE had no good cause to refuse to perform his duties because the assigned computer work was found to be within his class of work. In addition, the Respondents contend that POE is barred by the doctrines of res judicata and collateral estoppel from relitigating issues concerning the assignment of computer work before the Board. The Respondents contend that POE is also collaterally estopped from bringing these cases before the Board because the Board previously decided that it did not have jurisdiction over the classification and pricing of Complainant's new position description.

On October 8, 1998, POE filed an answering affidavit with the Board.

On January 19, 1998, the Board conducted a hearing on the Respondents' motion to dismiss and/or for summary judgment.

The parties were afforded a full opportunity to present exhibits and argument for the Board's consideration. Based upon a thorough review of the record, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

POE is a Harbor Traffic Controller I employed by the Harbors Division of the DOT, State of Hawaii and is an employee within the meaning of § 89-2, HRS.

TAKUSHI, Director, Department of Human Resources Development, State of Hawaii was for all times relevant a representative of the public employer as defined in § 89-2, HRS.

HAYASHIDA was for all times relevant, the Director of the DOT, State of Hawaii and the appointing authority of POE and a representative of the public employer as defined in § 89-2, HRS.

FUJIKAWA, Harbors Administrator, DOT, State of Hawaii is a representative of the appointing authority and the public employer as defined in § 89-2, HRS.

By letter dated July 6, 1997, POE requested FUJIKAWA to asked the employer to explain the meaning of "good cause" in reference to Article 17 of the contract. By letter dated July 11, 1997, FUJIKAWA responded to POE that "good cause" in the context of Article 17H¹ was synonymous with "good reason" or "justifiable reason."

By letter dated July 13, 1998, HAYASHIDA responded to POE's Step 2 grievance dated September 7, 1997 alleging a violation of Article 17H of the Unit 03 contract. POE contended that the Harbors Division, DOT, violated Article 17H, Personal Rights and

¹Article 17H provides as follows:

The Employee shall have the right to refuse for good cause as determined by the Employer to work overtime, to accept a temporary assignment, and to perform any work not representative of the Employee's class.

HRS, on the grounds that POE failed to exhaust his contractual remedies. 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; Order No. 1864, Case No. CE-03-445, Lewis W. Poe, May 16, 2000; Order No. 1866, Case No. CE-03-237, Lewis W. Poe, May 17, 2000; Order No. 1882, Case No. CE-03-379, Lewis W. Poe, June 14, 2000. Further in Order No. 1883, dated June 16, 2000, in Case No. CE-03-416, Lewis W. Poe, the Board also dismissed a complaint alleging contract violations for failure to exhaust administrative remedies. The Board finds that its holding in the previous cases apply to the instant case and requires dismissal of the complaint. Hence, before a unionized employee can proceed with a breach of contract claim against his employer before the Board, 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). Based on the foregoing, the Board dismisses POE's prohibited practice complaint alleging the breach of contract claim and the interpretation of Article 17H.

POE claims that TAKUSHI's response at Step 3, dated August 6, 1998, violated 11G of the contract because it was issued more than seven working days after the meeting which was held on July 23, 1998. TAKUSHI's response should have been issued on August 3 instead of August 6, 1998. If the Board had jurisdiction over this claim, the Board would find that while there is a technical violation of the contract, TAKUSHI in fact responded to POE and the three-day delay incurred is di minimus. POE was not prejudiced by the delay. Accordingly, the Board would dismiss the prohibited practice complaint premised on the violation of Article 11G.

CONCLUSION 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.


ORDER

The Board hereby dismisses the instant complaint.

LEWIS W. POE and JAMES H. TAKUSHI, Director, Department of Human
Resources Development, State of Hawaii; et al.
CASE NO. CE-03-404
ORDER NO. 1885
ORDER GRANTING RESPONDENT'S MOTION TO DISMISS PROHIBITED PRACTICE
COMPLAINT AND/OR FOR SUMMARY JUDGMENT

DATED: Honolulu, Hawaii, June 16, 2000.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member


CHESTER C. KUNITAKE, Board Member

Copies sent to:

Lewis W. Poe
James E. Halvorson, Deputy Attorney General
Joyce Najita, IRC