

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NOS.: CE-13-385
	)	CU-13-140
KEITH J. KOHL,	)	
	)	ORDER NO. 1916
Complainant,	)	
	)	ORDER GRANTING RESPONDENT
and	)	JAMES TAKUSHI'S MOTION TO
	)	DISMISS COMPLAINT AND
JAMES TAKUSHI, Director, Department of	)	DENYING COMPLAINANT'S
Human Resources Development, State of	)	CROSS-MOTION FOR SUMMARY
Hawaii and RUSSELL OKATA, Executive	)	JUDGMENT; NOTICE OF
Director, Hawaii Government Employees	)	PREHEARING CONFERENCE
Association, AFSCME, Local 152, AFL-CIO,	)	
	)	
Respondents.	)	

ORDER GRANTING RESPONDENT JAMES TAKUSHI'S MOTION TO DISMISS COMPLAINT AND DENYING COMPLAINANT'S CROSS-MOTION FOR SUMMARY JUDGMENT; NOTICE OF PREHEARING CONFERENCE

On February 4, 1998, KEITH J. KOHL (KOHL) filed a prohibited practice complaint against the above-named Respondents with the Hawaii Labor Relations Board (Board). KOHL contends that Respondent RUSSELL OKATA, Executive Director, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (OKATA) breached his duty to fairly represent KOHL in seven grievances. Thus, KOHL contends that OKATA wilfully violated Hawaii Revised Statutes (HRS) §§ 89-13(b)(1), (2), (3), (4), and (5).

KOHL also alleged that Respondent JAMES TAKUSHI (TAKUSHI), Director, Department of Human Resources Development (DHRD), State of Hawaii, failed and/or refused to process his seven grievances. Thus, Complainant contends that TAKUSHI wilfully violated HRS §§ 89-13(a)(1), (3), (4), (5), (6), (7), and (8).

On September 29, 1999, TAKUSHI, by and through his counsel, filed a motion to dismiss and/or for summary judgment with the Board. TAKUSHI alleges that dismissal is required because under Board Order No. 1778, the instant complaint fails to state a claim upon which relief can be granted.

On July 14, 2000, KOHL filed a memorandum in opposition to TAKUSHI's motion to dismiss and a cross-motion for summary judgment. And on July 24, 2000, the Board conducted a hearing on TAKUSHI's motion to dismiss and KOHL's cross-motion for summary judgment.

Based on the entire record before the Board, for the reasons stated below, the Board grants TAKUSHI's motion to dismiss the complaint. As a result of the dismissal of the underlying complaint, KOHL's cross-motion for summary judgment is denied.

### FACTS NOT IN DISPUTE

#### A. THE 1995 GRIEVANCES

1. KOHL filed four grievances against his employer in 1995 which were forwarded to Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA or Union).
2. The HGEA indicated to KOHL that the grievances would be held in abeyance because of KOHL's medical condition until KOHL notified them that he was ready to proceed.
3. The 1995 grievances were never received by the DHRD.
4. On February 4, 1998, KOHL filed the instant prohibited practice complaints against OKATA and TAKUSHI. KOHL alleges that the Union and Employer committed prohibited practices by virtue of their respective failures to prosecute and hear the grievances.
5. In Board Order No. 1778, dated September 21, 1999, the Board denied OKATA's motion to dismiss the instant complaint as it pertained to the 1995 grievances.
6. In response to the instant motion, KOHL stipulated to the dismissal of those portions of the instant complaint against TAKUSHI as it pertains to the four 1995 grievances. TAKUSHI joined in the stipulation.
7. OKATA is thus the only remaining Respondent with respect to the 1995 grievances.
8. The Employer has represented that if the Union seeks to pursue the 1995 grievances, it will assert that the grievances are time-barred.

#### B. THE 1997 GRIEVANCES

1. KOHL filed three grievances against his employer in September and October of 1997. The complaints involved the alleged illegal placement of certain documents in KOHL's personnel file and alleged improper procedures at a September 11, 1997 personnel hearing.
2. KOHL pursued each grievance without the assistance of the Union.
3. The Employer did not respond to any of the Step 1 grievances.
4. KOHL subsequently filed Step 2 grievance/appeals for each grievance. Again, the employer did not respond to any of the Step 2 grievance/appeals.

5. KOHL subsequently filed Step 3 grievance/appeals for each grievance. On or about November 7, 1997, after a period of "abeyance" requested by KOHL, Wayne Tanaka, a personnel program officer at DHRD, responded by letter suggesting that "we discuss all three grievances at the same meeting."
6. On or about November 12, 1997, KOHL replied to Tanaka's letter indicating that he was "not in agreement to combine any of the Grievances."
7. On or about November 25, 1997, KOHL wrote Tanaka to advise, *inter alia*, that unless a Step 3 grievance meeting was held within seven days of the receipt of the letter, Step 3 "will be deemed completed. If the employer fails to meet the remedy requested, I hereby inform you that the grievance will not be arbitrated, and I will reserve all my legal rights to civil process against the Employer."
8. On or about December 9, 1997, Tanaka telephoned KOHL, inquired as to whether KOHL still sought a meeting, and attempted to clarify that he recommended only a discussion of all grievances at the same meeting but not a combination or consolidation of the grievances. KOHL reiterated his refusal to combine any grievances and asked that Tanaka respond in writing.
9. No Step 3 grievance meeting has to date been held on any of the grievances.
10. On or around December 18, 1997, KOHL was terminated from his employment with the State. KOHL was initially advised of the employer's intent to terminate him on or around August 13, 1997.<sup>1</sup> KOHL has filed prohibited practice complaints with the Board against OKATA (Case No. CU-13-143) and TAKUSHI (Case No. CE-13-395) alleging that the Union and employer committed prohibited practices by virtue of their respective failures to prosecute and hear a grievance associated with said termination.
11. On February 4, 1998, KOHL filed the instant prohibited practices complaints against OKATA and TAKUSHI. KOHL alleges that the union and employer committed prohibited practices by virtue of their respective failures to prosecute and hear the grievances.
12. In Order No. 1778 the Board granted OKATA's motion to dismiss the instant complaint as it pertains to the 1997 grievances at issue.
13. TAKUSHI is thus the only remaining Respondent with respect to the 1997 grievances.

---

<sup>1</sup>The Board takes administrative notice of this contained in the files in Case No. CE-13-392 involving the same parties. See, *State v. Akana*, 68 Haw. 164 (1985) (court may take judicial notice of its own records in another case.)

## DISCUSSION

### A. THE 1995 GRIEVANCES

KOHL has stipulated to the dismissal of TAKUSHI, the employer, from the instant case as it pertains to the 1995 grievances. Accordingly, the Board orders the dismissal of the above-captioned complaint against TAKUSHI with respect to those grievances.<sup>2</sup>

### B. THE 1997 GRIEVANCES

In his motion to dismiss and/or for summary judgment, TAKUSHI asserts 1) KOHL fails to state a claim for which relief can be granted; and 2) that there are no genuine issues of material fact and that TAKUSHI is entitled to relief as a matter of law.

In his answer and cross-motion for summary judgment, KOHL argues that he is entitled to relief because of the undisputed fact that the Employer failed to hold Step 2 and 3 grievance meetings within seven working days of the receipt of the respective grievance.

---

<sup>2</sup>The Board has significant reservations regarding the justiciability of the 1995 grievances with respect to the remaining respondent, OKATA. The dismissal of TAKUSHI leaves OKATA as the only Respondent with respect to the 1995 grievances. If the Board finds that the Union breached its duty of fair representation, as is alleged by KOHL, then the Board "may require the respondent to do any or all of the following: to cease and desist from the prohibited practice found to have been committed; to suspend the respondent's rights, immunities, privileges or remedies granted or afforded by Chapter 89, HRS, for not more than one year; or to require the respondent to take such affirmative action as will effectuate the purpose of chapter 89, HRS, including reinstatement of an employee with or without pay as may be deemed proper." Hawaii Administrative Rules (HAR) § 12-42-50.

In the case's current posture, none of the remedies may be either available or meaningful. A cease and desist order would require the union to assume and pursue KOHL's 1995 grievances against the employer. However, the employer has represented that they will consider any 1995 grievance initiated at this time to be time-barred under the applicable collective bargaining agreement. The Board cannot order the employer to consider the complaints because the employer has been dismissed from this case with respect to those grievances and the Board is without jurisdiction over the employer. A cease and desist order would therefore place OKATA in the futile position of having to initiate a set of grievances that will not and need not be considered by the employer or the Board. This outcome would render relief meaningless as to the Complainant and will serve no purpose.

Similarly, the alternative remedies may be without effect. The suspension of the rights of the union will provide no help to Complainant. No affirmative action by the Union will address the employer's rightful denial of jurisdiction, to reinstate the Complainant.

However in Decision No. 369, Sheldon H. Varney, 5 HLRB 508 (1995), the Board acknowledged that a Union which breached its duty of fair representation in the handling of a grievance could be found primarily liable for the employee's damages caused by the Union's breach of duty. Accordingly, if such a breach is established by KOHL after a full hearing on the merits, the Board may consider the award of remedial damages demonstrated to be a direct result of the breach.

The Board has indeed found that an employer's wilful failure to comply with grievance procedure time lines may constitute a prohibited practice. See, United Public Workers, 5 HLRB 570 (1996). However, under the undisputed facts of this case, the Board finds that KOHL knowingly waived his rights as they relate to the employer's duty to comply with the grievance time line.

In Decision No. 242, Hawaii Fire Fighters Association, 4 HLRB 164 (1987), the Board discussed the law applicable to an analogous waiver of bargaining rights:

Case law indicates that waivers must be strictly construed; to find a waiver, a union must clearly and unmistakably waive rights to bargain. Before a waiver can be found, the union must be offered a meaningful opportunity to bargain. Thus the union must be given sufficient opportunity to bargain. The union must be put on notice of employers plans before a waiver can be found. Id. At 203, citations omitted.

The Board hereby adopts this test for the purposes of establishing whether an employee has waived his or her rights under a contractual grievance process. In applying this test, the Board finds that KOHL waived his grievance rights under the contract with respect to the instant grievances.

It is not disputed 1) that KOHL filed three grievances against his employer in September and October of 1997; 2) that KOHL filed Step 3 grievance/appeals for each grievance notwithstanding the employer's failure to hold Step 2 meetings on any of the grievances; 3) that Step 3 meetings were held in abeyance at KOHL's request; 4) that at the conclusion of the abeyance period, KOHL wrote Tanaka to advise, inter alia, that unless a Step 3 grievance meeting was held within seven days of the receipt of the letter, Step 3 "will be deemed completed. If the employer fails to meet the remedy requested, I hereby inform you that the grievance will not be arbitrated, and I will reserve all my legal rights to civil process against the Employer;" and 5) that both prior and subsequent to the receipt of this letter, the employer telephoned KOHL to discuss scheduling a meeting to further discuss each of KOHL's grievances.

By deeming Step 3 "completed" and indicating that there would be no arbitration, KOHL clearly and unmistakably waived his rights under the grievance process. By the written and telephonic communications with Tanaka, KOHL was offered and given sufficient opportunity to pursue his grievance. The initiation of the termination proceedings clearly put KOHL on notice regarding the employer's plans.

The Board thus concludes that KOHL waived his rights under the grievance process identified in the applicable collective bargaining agreement. TAKUSHI is therefore entitled to relief as a matter of law so that dismissal and/or summary judgment must follow.

### **ORDER**

The instant complaint is therefore dismissed with respect to TAKUSHI as to the 1997 grievances.

NOTICE OF PREHEARING CONFERENCE

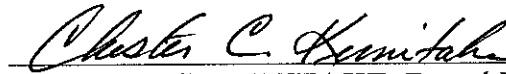
NOTICE IS HEREBY GIVEN that the Board will conduct a prehearing conference on the remaining issues against OKATA on September 14, 2000, at 9:00 a.m. in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The purpose of the prehearing conference is to arrive at a settlement or 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.

DATED: Honolulu, Hawaii, September 1, 2000.

HAWAII LABOR RELATIONS BOARD



\_\_\_\_\_  
BRIAN K. NAKAMURA, Chairperson



\_\_\_\_\_  
CHESTER C. KUNITAKE, Board Member



\_\_\_\_\_  
KATHLEEN RACUYA-MARKRICH, Board Member

Copies sent to:

Eric Krening, Esq.  
James E. Halvorson, Deputy Attorney General  
Peter Liholiho Trask, Esq.  
Joyce Najita, IRC