

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

KEITH J. KOHL,

Complainant,

and

RUSSELL OKATA, RANDY PERREIRA,
and WAYLEN TOMA, Hawaii Government
Employees Association, Local 152, AFSCME,
AFL-CIO,

Respondents.

CASE NO. CU-13-142

ORDER NO. 1917

ORDER DENYING RESPONDENT
TAKUSHI'S MOTION FOR
SUMMARY JUDGMENT AND
DENYING COMPLAINANT
KOHL'S CROSS-MOTION FOR
SUMMARY JUDGMENT; NOTICE
OF PREHEARING CONFERENCE

In the Matter of

KEITH J. KOHL,

Complainant,

and

JAMES TAKUSHI, Director, Department of
Human Resources Development, State of
Hawaii and KEITH KANESHIRO, Director,
Department of Public Safety, State of Hawaii,

Respondents.

CASE NO. CE-13-392

In the Matter of

KEITH J. KOHL,

Complainant,

and

RUSSELL OKATA, RANDY PERREIRA,
and WAYLEN TOMA, Hawaii Government
Employees Association, Local 152, AFSCME,
AFL-CIO,

Respondents.

CASE NO. CU-13-143

In the Matter of)

CASE NO. CE-13-395

KEITH J. KOHL,)

Complainant,)

and)

JAMES TAKUSHI, Director, Department of)
Human Resources Development, State of)
Hawaii and KEITH KANESHIRO, Director,)
Department of Public Safety, State of Hawaii,)

Respondents.)

ORDER DENYING RESPONDENT TAKUSHI'S MOTION FOR SUMMARY JUDGMENT AND DENYING COMPLAINANT KOHL'S CROSS-MOTION FOR SUMMARY JUDGMENT: NOTICE OF PREHEARING CONFERENCE

PROCEEDING

1. On April 24, 1998 and May 8, 1998, KEITH J. KOHL (KOHL) filed prohibited practice complaints against the above-named Respondents in the above cases with the Hawaii Labor Relations Board (Board). KOHL contends that Respondents RUSSELL OKATA, RANDY PERREIRA and WAYLEN TOMA of the Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA) (collectively OKATA or union) breached their 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).

2. KOHL also alleged that Respondent JAMES TAKUSHI, Director, Department of Human Resources Development, State of Hawaii (TAKUSHI or employer) improperly terminated KOHL and 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).

3. On October 14, 1990, 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 KOHL's complaint fails to state a claim upon which relief can be granted and KOHL failed to exhaust his contractual remedies.

4. On July 14, 2000, KOHL filed a Memorandum in Opposition to TAKUSHI's Motion to Dismiss and a Cross-Motion for Summary Judgment. KOHL alleges that summary judgment is warranted because it is undisputed that TAKUSHI failed to respond to his filing of Step 3 grievances in this matter.

5. And on July 24, 2000, a hearing was held 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 denies both TAKUSHI's motion to dismiss and/or for summary judgment, and KOHL's cross-motion for summary judgment.

FACTS

1. On or about August 13, 1997, KOHL received a letter from KEITH KANESHIRO, Director of the Department of Public Safety (PSD), State of Hawaii, informing KOHL that he had been "terminated effective close of business September 15, 1997 from position number 38630, Corrections Recreation Specialist III...."
2. The aforesaid letter advised that the termination was in accordance with State of Hawaii Personnel Rules 14-14-14(a)(10) which authorized the termination of an employee when "No suitable placement can be made for a disabled employee."
3. On or about September 10, 1997, KOHL wrote the HGEA requesting that it file a grievance on the matter of KOHL's termination.
4. On or about September 11, 1997, KOHL, represented by his workers' compensation attorney, David Mikonczyk, attended a hearing with PSD to respond to specific reasons for his termination. At that hearing, KOHL presented a letter from a Dr. Ginandes explaining that he (Dr. Ginandes) expected KOHL to be able to enter a permanent position with the State outside of prison work.
5. On or about September 12, 1997, KOHL received a letter from PSD advising that his termination would be held in abeyance until further notice, and that he would be placed on authorized leave without pay.
6. On or about September 14, 1997, KOHL wrote the HGEA requesting that it file grievances on his behalf for both the termination and leave without pay.
7. On or about September 15, 1997, the HGEA responded by letter, indicating that no grievances would be filed at that time because the "actual reasons for termination has not been identified" and that the HGEA was exploring possible actions regarding the leave without pay.
8. On or about December 10, 1997, PSD wrote KOHL to inform that KOHL was terminated effective November 19, 1997 pursuant to Personnel Rule 14-14-14(a)(10) as Dr. Ginandes "has failed to respond to our inquiries regarding the information (Dr. Ginandes' letter of 9/4/97) you provided at the September 11, 1997 pre-termination hearing." The letter further advised that if KOHL felt that the action was improper he had "the right to process a grievance in accordance with the provisions of your Unit 13 Collective Bargaining Agreement."
9. On or about December 16, 1997, the HGEA sent to PSD a letter "RE: Step 2 Grievance Filed on Behalf of Kenneth Kohl..." in which it maintained that KOHL's termination was "disciplinary in nature" and that the PSD had "not established proper cause to take this action."
10. By affidavit, Wayne Tanaka asserts on behalf of TAKUSHI, that after a thorough search of relevant records, no grievances or files relating to KOHL's termination were found.
11. In a letter dated December 16, 1997, the HGEA wrote KOHL advising KOHL to a) "take steps necessary to have Dr. Ginandes provide whatever information the Department is requesting," b) advise as to the rationale for withholding any

medical documents, and c) that in the "mean time [the HGEA] intend[s] to have the grievance filed and heard on your behalf."

12. In a letter dated December 18, 1997, PSD advised KOHL that the December 10, 1997 letter of termination was "amended" to make the termination date December 19, 1997.
13. In a letter to the HGEA dated January 15, 1998, KOHL asserted that the state's alleged efforts to obtain clarifying information from Dr. Ginandes were evidenced only by "back dated" letters never sent to Dr. Ginandes' office prior to January 12, 1998.
14. In a letter dated February 9, 1998, HGEA wrote to PSD transmitting a letter from Dr. Ginandes "which further clarifies Mr. Kohl's medical condition." The letter further requests that PSD review this information and "reconsider its decision to terminate Mr. Kohl's employment effective December 19, 1997."
15. By letter dated February 13, 1998, PSD advised HGEA that "your request for reconsideration is respectfully denied." Receipt of Dr. Ginandes' letter was acknowledged, that it was further noted that "the questions submitted to Dr. Ginandes for clarification are still unanswered."

DISCUSSION

Both TAKUSHI and KOHL seek summary judgment. Summary Judgment is appropriate only if the record shows that no genuine issues of material fact are presented and the case can be decided solely as a matter of law." Kajiya v. Department of Water Supply, 2 Haw.App. 221, 629 P.2d 635 (1981).

A. TAKUSHI'S MOTION FOR SUMMARY JUDGMENT

1. TAKUSHI asserts that summary judgment should be granted because a) no grievance was ever received by the employers, and b) KOHL failed to exhaust his contractual remedies.
2. With respect to the receipt of any grievance, KOHL has appended as EXHIBIT 1 to his prehearing statement a letter dated December 16, 1997, from the HGEA to the employer. The heading of the letter reads: "RE: Step 2 Grievance Filed on Behalf of Kenneth Kohl..." The body of the letter maintains that KOHL's termination was "disciplinary in nature" and that the PSD had "not established proper cause to take this action." If received, the letter certainly places TAKUSHI on notice regarding the filing of the Step II grievance. In this proceeding, TAKUSHI denies receipt but the presence of the letter in the record clearly establishes an issue of material fact in this regard.
3. Even if the December 16, 1997 letter was not received, EXHIBIT N attached to KOHL's prehearing statement is a letter dated February 9, 1998, from the union to employer asking that TAKUSHI "reconsider" his decision to terminate KOHL. TAKUSHI asserts that this request for reconsideration was not a grievance so that its subsequent denial without a hearing violated no contractual duties. Conversely, KOHL contends that the request for reconsideration was so clearly a

grievance that the employer's subsequent failure to hold a hearing constituted a violation justifying summary judgment.

4. In Decision No. 196, Ronald Caldeira, 3 HPERB 523 (1984), the Board held that Complainant's letter expressing unhappiness with the employer's disciplinary action was in "substantial compliance" with grievance procedures so that employer's subsequent denial of a Step 1 hearing was a prohibited practice. In the instant case, we find that the question of whether the letter requesting reconsideration was in substantial compliance with the grievance procedures to be a material issue of fact so that summary judgment cannot be ordered for either party on the basis of the letter.
5. TAKUSHI further contends that summary judgment is appropriate because KOHL failed to exhaust his contractual remedies. In Board Decision No. 145, Dennis Yamaguchi, 2 HPERB 656 (1981), the Board found that complete exhaustion was not possible when a union's violation of its duty of fair representation made it impossible for a Complainant to proceed to arbitration. In the instant case, KOHL similarly argues that the union violated its duty of fair representation by abandoning his grievance. The question of whether the union violated its duty remains to be addressed and decided. Accordingly, it is a material issue of fact that precludes summary judgment on the duty to exhaust contractual remedies.

B. KOHL'S CROSS-MOTION FOR SUMMARY JUDGMENT

1. 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 grievance meetings within seven working days of their receipt of his Step 2 grievance.
2. The Board has indeed found that an employer's wilful failure to comply with grievance procedure timelines may constitute a prohibited practice. See, United Public Workers, 5 HLRB 570 (1996). However, as discussed above, it is a material issue of fact as to whether or not Step II grievances were received by the employer. Accordingly, summary judgment cannot be granted.

ORDER

It is therefore ordered that TAKUSHI's Motion to Dismiss and/or for Summary Judgment, and KOHL's Cross-Motion for Summary Judgment, are denied.

NOTICE OF PREHEARING CONFERENCE

NOTICE IS HEREBY GIVEN that the Board, pursuant to HRS § 89-5(b)(4) and Hawaii Administrative Rules § 12-42-47, will conduct a prehearing conference on the above-entitled prohibited practice complaint on September 14, 2000 at 9:30 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.

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 (808) 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, September 1, 2000.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chairperson



CHESTER C. KUNITAKE, Board Member



KATHLEEN RACUYA-MARKRICH, Board Member

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