

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-03-148
LEWIS W. POE,)	ORDER NO. 1946
)	
Complainant,)	ORDER CONSOLIDATING CASES,
and)	SUA SPONTE, GRANTING RESPOND-
)	ENT HGEA'S MOTION TO DISMISS
HAWAII GOVERNMENT EMPLOYEES)	FILED SEPTEMBER 18, 2000 AND
ASSOCIATION, AFSCME, LOCAL 152,)	DISMISSING, SUA SPONTE, COM-
AFL-CIO,)	PLAINANT'S PROHIBITED PRACTICE
)	COMPLAINT FILED ON
Respondent.)	OCTOBER 6, 2000
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In the Matter of)	CASE NO. CU-03-174
LEWIS W. POE,)	
)	
Complainant,)	
and)	
)	
HAWAII GOVERNMENT EMPLOYEES)	
ASSOCIATION, AFSCME, LOCAL 152,)	
AFL-CIO,)	
)	
Respondent.)	

ORDER CONSOLIDATING CASES, SUA SPONTE,
GRANTING RESPONDENT HGEA'S MOTION TO DISMISS
FILED SEPTEMBER 18, 2000 AND DISMISSING, SUA SPONTE,
COMPLAINANT'S PROHIBITED PRACTICE COMPLAINT FILED OCTOBER 6, 2000

On July 29, 1998, Petitioner LEWIS W. POE (Complainant) filed a prohibited practice complaint in Case No. CU-03-148 with the Hawaii Labor Relations Board (Board) in which he alleged that Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Respondent) violated Hawaii Revised Statutes § 89-13 by virtue of Respondent's failure to file a class grievance for alleged violations of Article 21¹ of the Unit 03 bargaining agreement then in effect.

¹As represented in the complaint, the Article provides that "All employees shall be allowed rest periods of ten (10) minutes during each half of the workday or work shift..."

On July 30, 1998, the Board issued a Notice to Respondent of Prohibited Practice Complaint (notice). The notice included the direction that respondent "file...five (5) copies of your answer...no later than 4:30 p.m. of the tenth day after service of the complaint."

On August 14, 1998, Respondent filed with the Board an Ex Parte Motion to Extend Time in Which to File an Answer to Prohibited Practice Complaint; Affidavit of Royden Kotake; and Certificate of Service. An Answer was also concurrently filed. Said motion (motion) requested an extension of time in which to file the answer to the prohibited practice complaint to August 14, 1998.

On July 18, 2000, the Board issued Order No. 1902 granting Respondent's ex parte motion to extend time in which to file an answer.

On August 24, 2000, Complainant filed a Motion to Strike Respondent's Answer with the Board. Said motion was orally denied on October 5, 2000.

On September 18, 2000, Respondent filed a Motion to Dismiss Complaint. On September 28, 2000, Complainant filed an opposition to said motion. And on October 5, 2000, a hearing on the motion was conducted before the Board. All parties were afforded a full and fair opportunity to present arguments and evidence.

On October 6, 2000, Petitioner filed another prohibited practice complaint in Case No. CU-03-174 against Respondent based upon the facts and circumstances identical to those alleged in his complaint of July 29, 1998. On October 16, 2000, Respondent filed its answer to this complaint which includes a request that the complaint be dismissed and that Respondent be awarded its costs and reasonable attorney's fees.

For the reasons discussed herein, the Board hereby consolidates, sua sponte, Case Nos. CU-03-148 and CU-03-174, grants Respondent's motion to dismiss Case No. CU-03-148 and dismisses, sua sponte, Case No. CU-03-174.

CONSOLIDATION

Hawaii Administrative Rules (H.A.R.) § 12-42-8(g)(13) authorizes the Board to "on its own initiative...consolidate for hearing or other purposes...two or more proceedings which involve substantially the same parties or issues if it finds that such consolidation of proceedings or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings."

Inasmuch as the above-captioned complaints involve identical parties, issues, facts and alleged violations, the Board finds that consolidation for the purposes of disposition would be conducive to the proper dispatch of its business and to the ends of justice. Accordingly, the Board hereby orders the cases consolidated for the purposes of disposition.

CASE NO. CU-03-148

Facts

1. On or about June and July 1998, Respondent received written communications from Complainant indicating that Complainant had filed a grievance on his own behalf for the alleged denial of rest periods during the work day. These communications further requested that Respondent file class grievances on behalf of other bargaining unit employees.
2. Respondent has never responded in writing to Complainant's request that a class grievance be filed.
3. Prior to, and at the time of the receipt of the instant petition, Respondent was conducting an investigation as to the merits of the grievance, the wishes of the other employees for whom the class grievances is requested, and the possibility of resolving the dispute which underlies the prohibited practice complaint.
4. On or about December 14, 1998, Respondent received a letter from Complainant "effectively revok[ing] my earlier request for formal and/or fair representation in a potential class grievance...."
5. Complainant's purpose in revoking the request for representation via a class grievance was to ensure that Respondent would not be able to moot his prohibited practice complaint filed before the Board by filing the class grievance.
6. With respect to the resolution of the substance of the grievance, Respondent and Complainant's employer, the State of Hawaii Department of Transportation, have entered into settlement negotiations in which the employer has proposed that all harbor traffic controllers, including Complainant, receive twice their pay for morning and afternoon paid breaks irrespective of whether the harbor traffic controllers receive said breaks. Additionally, the employer will endeavor to give traffic controllers morning and afternoon breaks at a practicable time during their shifts.

Discussion

Complainant alleges that Respondent violated its duty of fair representation when it failed to comport with, or reply to, his request that a class grievance be filed on behalf of himself and others similarly situated due to the employer's failure to provide contractually guaranteed rest breaks.

Respondent argues that any such claim is mooted by the Complainant's withdrawal of his request that a class grievance be filed. Respondent also argues that it fully comported with its duty of fair representation by engaging in settlement negotiations with the employer.

There can be no breach of duty of fair representation if there is no request for representation. Service Employees International Union, Local 579, AFL-CIO, 229 NLRB 692 (1997). In the instant case, Complainant revoked his request for representation via class grievance for the admitted purpose of making it impossible for any such grievance to be filed on his behalf. No breach can therefore exist nor can any meaningful relief be granted. The complaint is therefore moot and must be dismissed.

If a nonarbitrary and nondiscriminatory reason is cited by a union as its reason for not pursuing a grievance, its decision will not be actionable. Paul S. Sapla, 5 HLRB 82, 91 (1992). Here, pursuing settlement discussions that have resulted in an attractive offer by the employer is clearly such a nonarbitrary and nondiscriminatory reason. Accordingly no action lies.

Respondent's failure to respond in writing to Complainant's request for the filing of a class grievance is somewhat disturbing. However, absent evidence of personal hostility, discrimination, bad faith or arbitrariness, a union's failure to advise grievants of the status of their grievance will not violate their duty of fair representation. Dean M. Cabatbat, et al., 4 HLRB 718 (1990). No such evidence being offered, suggested or reasonably inferred, a violation cannot be found on the record.

Respondent's motion to dismiss is therefore GRANTED.

CASE NO. CU-03-174

Facts

Facts and circumstances alleged in this complaint are identical to those identified above.

Discussion

In this complaint, Complainant's theory of the case is to apparently assert that Respondent violated their duty of good faith by entering into settlement discussions with the employer without first filing a grievance. Essentially he appears to argue that the grievance procedures provided in the bargaining agreement are the only mechanism available for the resolution of a grievance, or at least an absolute precondition to settlement. Thus by engaging in settlement discussions rather than filing a grievance, Respondent is alleged to have violated the contract and accordingly, its duty of fair representation.

Dismissal is required on any of five grounds:

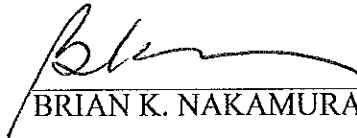
1. H.A.R. § 12-42-42(c) provides that "[o]nly one complaint shall issue against a party with respect to a single controversy." This is the second such complaint arising from the same facts.

2. The complaint is barred by the doctrine of res judicata.
3. The complaint is time-barred. Even if the settlement discussions constitutes the alleged occurrence with which the complaint is concerned, Complainant knew or should have known of such discussions on or around August 14, 1998 when he received service of Respondent's motion for extension of time to file an answer which contained an affidavit describing the ongoing settlement discussions. This is well beyond the 90-day limitation period for the prohibited practice complaint.
4. On the merits, the complaint cannot stand for the reasons identified in "Discussion," above. Moreover, it is axiomatic that settlement of a dispute in lieu of a formal grievance is among the options available to unions in such matters. See, Buddy H. Kimura, 4 HLRB 543 (1988) (When adequate and fair settlement is made, union did not breach duty of fair representation despite its wrongful failure to act promptly upon complainant's grievance.).
5. Even if proceeding to settlement without a formal grievance constituted a distinct grievable action, Complainant has not filed a grievance on the matter and accordingly has not exhausted his contractual remedies.

Accordingly, the complaint is rejected pursuant to HAR § 12-42-42(c) or, in the alternative, DISMISSED.²

DATED: Honolulu, Hawaii, October 24, 2000.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chairperson


CHESTER C. KUNITAKE, Board Member


KATHLEEN RACUYA-MARKRICH, Board Member

Copies sent to:
Lewis W. Poe
Charles K.Y. Khim, Esq.
Peter Liholiho Trask, Esq.
Joyce Najita, IRC

²The Board recognizes that our rules may be construed to require that Complainant be afforded a hearing prior to dismissal. Accordingly, the Board will entertain a motion for reconsideration regarding the dismissal of Case No. CU-03-148 at which time Complainant will be free to identify and present all facts or arguments rebutting the Board's conclusions in this matter.