

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of) RICHARD HUNT,)) Complainant,)) and) CATHERINE BRATT, Principal, Kohala High) & Intermediate School; DEPARTMENT OF) EDUCATION, State of Hawaii; and MARK) NAKASHIMA, Uniserv Specialist, Hawaii) State Teachers Association,)) Respondents.)	CASE NOS.: CE-05-460 CU-05-177 ORDER NO. 2007 ORDER GRANTING RESPONDENT CATHERINE BRATT, ET AL.'S MOTION TO DISMISS COMPLAINT AND DENYING RESPONDENT MARK NAKASHIMA'S MOTION TO DISMISS COMPLAINT; NOTICE OF SECOND PREHEARING CONFER- ANCE AND HEARING
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ORDER GRANTING RESPONDENT CATHERINE BRATT, ET AL.'S
MOTION TO DISMISS COMPLAINT AND DENYING RESPONDENT
MARK NAKASHIMA'S MOTION TO DISMISS COMPLAINT;
NOTICE OF SECOND PREHEARING CONFERENCE AND HEARING

On December 18, 2000, RICHARD HUNT (HUNT) filed a prohibited practice complaint against CATHERINE BRATT, Principal of Kohala High & Intermediate School (BRATT) and the DEPARTMENT OF EDUCATION, State of Hawaii (DOE) (collectively Employer) and MARK NAKASHIMA (NAKASHIMA), Uniserv Specialist, Hawaii State Teachers Association (HSTA or Union) with the Hawaii Labor Relations Board (Board).

In his complaint, HUNT alleged that BRATT's conduct in the course of Steps 1 and 2 grievance meetings violated Hawaii Revised Statutes (HRS) § 89-13(a). Specifically, HUNT alleges that BRATT lied during her testimony in the hearings held on HUNT's grievance over his non-selection for transfer to a math teaching position at the Halaula campus of Kohala High & Intermediate School and also discriminated against him because of his sex and age.

HUNT's complaint against NAKASHIMA alleges a breach of duty of fair representation for not responding to his September and November, 2000 requests to take his grievance to arbitration. HUNT also alleges prohibited practices by NAKASHIMA for not being adequately prepared in his questioning of BRATT at the Steps 1 and 2 grievance meetings.

On March 2, 2001, NAKASHIMA filed Respondent MARK NAKASHIMA's Motion to Dismiss Prohibited Practice Complaint Filed on December 18, 2000. NAKASHIMA contends that the HSTA Board of Directors has not yet decided whether to proceed to arbitration and there has been no refusal to arbitrate the case, therefore the claim is not ripe for adjudication. Regarding the allegations over NAKASHIMA's preparation and questioning of BRATT at the Steps 1 and 2 meetings held on June 15, 2000 and August 3, 2000, respectively, NAKASHIMA contends they are time-barred by the 90-day limitation period under Hawaii Administrative Rules (HAR) §12-42-42.

On March 23, 2001, the Employer filed Respondents CATHERINE BRATT and DEPARTMENT OF EDUCATION, State of Hawaii's Motion to Dismiss Prohibited Practice Complaint Filed on December 18, 2000. The Employer argues the complaint is untimely, vague and ambiguous, and that HUNT has failed to exhaust his administrative remedies.

On April 11, 2001, the Board heard oral arguments on BRATT and NAKASHIMA'S motions to dismiss by conference call. The parties were given full opportunity to present evidence and arguments. Based on the motions filed, evidence and arguments presented, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. HUNT is a teacher employed by the DOE at Honokaa High School and a public employee as defined in HRS § 89-2 and a member of bargaining unit 05.
2. NAKASHIMA is a Uniserv representative employed by HSTA, the exclusive representative, as defined in HRS § 89-2, of teachers in bargaining unit 05.
3. BRATT is the principal of Kohala High & Intermediate School employed by the DOE and the representative of the public employer, as defined in HRS § 89-2.
4. On May 23, 2000, the HSTA filed a grievance on HUNT's behalf challenging BRATT's denial of his application to transfer to a math teaching position at the Halaula campus of Kohala High & Intermediate School alleging violations of the Unit 05 Collective Bargaining Agreement (Contract). Step 1 and Step 2 hearings were held by the DOE on May 23, 2000 and June 27, 2000, respectively. At Step 1, the DOE denied the grievance in a decision issued June 22, 2000; and again at Step 2, in a decision issued July 20, 2000.

5. By memorandum dated August 21, 2000, the HSTA filed a Demand for Arbitration with the DOE. Such request was acknowledged by the DOE by letter dated August 23, 2000. The Demand for Arbitration was filed to protect the time limits for arbitration under the Contract, pending the HSTA Board of Directors' review and decision whether or not to go forward with the case.
6. Nearly eight months have passed without a decision by the HSTA Board of Directors to arbitrate HUNT's grievance.
7. The DOE is waiting for HSTA's decision before it proceeds to the selection of an arbitrator.

DISCUSSION

The Employer submits that on August 21, 2000, after its decision to deny HUNT's grievance at Step 2, the HSTA filed a Demand for Arbitration under Article V(E)(2) of the Contract. The HSTA submits that a Demand for Arbitration was filed to preserve HUNT's grievance, but the HSTA Board of Directors has requested additional information of NAKASHIMA, and has not yet decided whether in fact it will proceed to arbitration.

Respondents BRATT and the DOE argue that the complaint is untimely, the complaint is vague and ambiguous, and HUNT has failed to exhaust his contractual remedies. Respondent NAKASHIMA contends that the complaint is untimely and not ripe because the HSTA has not yet decided whether to pursue HUNT's grievance to arbitration.

In response, HUNT argues that Respondents have failed to act within appropriate time lines and charges the Employer of discrimination based on his age and sex. He also asserts that since his request for arbitration, NAKASHIMA has provided no information that a Demand for Arbitration was filed, or that the HSTA Board of Directors' final determination on whether to proceed to arbitration is currently pending.

Case No. CE-05-460

In support of its motion to dismiss the complaint filed against BRATT and the DOE, the Employer contends that HUNT has failed to exhaust his contractual remedies because the grievance has not proceeded to arbitration.

Before an individual brings a prohibited practice complaint against the Employer that asserts a violation of the collective bargaining agreement under HRS § 89-13(a)(8), this Board has consistently applied the general rule articulated by the Hawaii Supreme Court in Santos v. State, 64 Haw. 648, 655, 646 P.2d 962, 967 (1982). "Where the terms of public employment are covered by a collective bargaining agreement pursuant to

HRS Chapter 89 and the agreement includes a grievance procedure to dispose of employee grievances against the public employer, an aggrieved employee is bound by the terms of the agreement.” Santos, supra, 64 Haw. at 653, 646 P.2d at 966. See also, Winslow v. State, 2 Haw.App. 50, 55, 625 P.2d 1046, 1050 (1981).

This Board has continued to follow the policy articulated in Decision No. 22, Hawaii State Teachers Association, 1 HPERB 253 (1972), “to attempt to foster the peaceful settlement of disputes, wherever appropriate, and application by deferral of matters concerning contractual interpretation to the arbitration process agreed to by the parties.” Id., at 261. See also, Ronald Caldeira, 3 HPERB 523, 547 (1984) and Lewis W. Poe, Case No. CE-03-423, Order No. 1732, June 15, 1999.

Application of this rule permits a voluntary declination of jurisdiction and has often been adopted and applied by this Board when a claimant has failed to fully exhaust available contractual remedies. See, e.g., Hawaii State Teachers Association, supra.

Here, HUNT, represented by the HSTA, has filed a grievance over BRATT’S denial of his application for transfer to a math teaching position. The grievance is pending a decision by the HSTA Board of Directors whether to take the matter to arbitration. Time lines have been preserved by the filing of the Demand for Arbitration.

Nearly eight months have passed since HSTA presented a Demand for Arbitration to the Employer. However, because the Employer is unable to proceed to select an arbitrator until the HSTA Board of Directors makes a final determination to proceed, HUNT’S prohibited practice complaint against the Employer is barred by the doctrine of exhaustion of contractual remedies. Accordingly, the Board declines jurisdiction and dismisses the complaint against BRATT and the DOE, without prejudice.¹

In view of the foregoing, the Board need not address the Employer’s arguments that HUNT’S complaint is vague, ambiguous and fails to meet the 90-day statute of limitations requirement set forth in Hawaii Administrative Rules (HAR) § 12-42-42(a).

Case No. CU-05-177

HUNT alleges that NAKASHIMA has been unresponsive to his request for arbitration. HUNT alleges that since he made his requests in September and November of 2000, he has heard “NOTHING for or against [his] request, to date 12-14-00.” HUNT also alleges that NAKASHIMA failed to represent him during the Steps 1 and 2 hearings of his grievance.

¹Should the HSTA Board of Directors decide not to proceed to arbitration, HUNT may file a complaint alleging a breach of duty against the HSTA and re-file his prohibited practice complaint against the Employer.

In support of his motion to dismiss, NAKASHIMA contends that HUNT's complaint is not ripe because there has been no refusal to arbitrate. NAKASHIMA alleges that the HSTA Board of Directors' decision to proceed to arbitration has been pending since filing a Demand for Arbitration on August 21, 2000. HSTA's Board of Directors meets once a month and additional information was requested of NAKASHIMA regarding HUNT's grievance. In addition, NAKASHIMA contends that the Board lacks jurisdiction over HUNT's allegations that NAKASHIMA failed to represent him properly during the grievance hearings since they are outside the Board's 90-day statute of limitations.

At the Board's hearing held on April 11, 2001, HUNT stated he did not know that a Demand for Arbitration had been sent to the Employer, nor was he given any information about questions by the HSTA Board of Directors in determining whether to proceed to arbitration. He argues that NAKASHIMA's unresponsiveness coupled with the delay to date by the HSTA Board of Directors constitute a breach of duty of fair representation.

A breach of fair representation occurs when the exclusive representative's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386, U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed. 842, 857, 64 LRRM 2369, 2376 (1967).

NAKASHIMA argues that in Decision No. 45, Edward A. Arrigoni, 1 HPERB 435 (1974), the Board held that an excessive amount of time in which grievances are processed is insufficient to establish a prohibited practice against the union and employer. The issue in Arrigoni was the reasonableness of the time it takes to resolve a grievance. Arrigoni, proceeding pro se, questioned witnesses for the employer and union on "what is a reasonable time in which a grievance is to be resolved." The Board in Arrigoni found there were insufficient facts to establish a prohibited practice charge. In this case, HUNT complains of the lack of responsiveness by his HSTA representative on the status of his grievance as well as the delay in deciding whether to proceed to arbitration. Thus, given the state of the record at this stage of the case, this Board finds Arrigoni is not persuasive to warrant a dismissal of this complaint.

Given the fact that a decision whether to proceed to arbitration on HUNT's behalf has been pending since August of 2000, the Board disagrees that HUNT's complaint against NAKASHIMA is not ripe for adjudication. The Board has held that a breach of the union's duty occurred because of the Union's "all but absolute unresponsiveness to Complainant's requests for information regarding her grievance, regardless of the validity of claims raised." Bernadine L. Brown, 5 HLRB 16 (1991).

In addition to NAKASHIMA's alleged unresponsiveness to HUNT, the Board finds there is a genuine issue of fact as to whether the delay of nearly eight months by the HSTA Board of Directors in deciding to proceed to arbitration is arbitrary, discriminatory,

or in bad faith. Under the circumstances, the Board concludes that in accordance with HRS § 89-5(b)(4), it is both “necessary and proper”² to proceed to hear HUNT’s prohibited practice complaint against NAKASHIMA on the issue of whether the delay in determining whether to proceed to arbitration and the alleged unresponsiveness by NAKASHIMA is a breach of the duty of fair representation and a prohibited practice under HRS § 89-13(b)(4).

NAKASHIMA also argues that HUNT’s prohibited practice allegations over NAKASHIMA’S preparation and questioning of BRATT at the Steps 1 and 2 grievance meetings are time-barred by the 90-day limitations period under HAR § 12-42-42. The Board disagrees. HUNT’s prohibited practice complaint is predicated on NAKASHIMA’s conduct beginning with Step 1 of the grievance process up to and including his requests to proceed to arbitration made in September and November, 2000. The Board therefore will apply a totality of the circumstances analysis regarding HUNT’s alleged breach of NAKASHIMA’s duty of fair representation. See, Decision No. 420, Janet Weiss, 6 HLRB __ (2001).

Accordingly, the Board denies NAKASHIMA’s motion to dismiss.

CONCLUSIONS OF LAW

1. The Board concludes that HUNT’s prohibited practice complaint against BRATT and the DOE is barred by the doctrine of exhaustion of contractual remedies. The Board declines jurisdiction over the instant complaint because Complainant failed to exhaust his contractual remedies against the Employer challenging his non-transfer to the math teaching position at Kohala High & Intermediate School, which is pending a determination by the HSTA Board to take the matter to arbitration.
2. The Board has jurisdiction over HUNT’s prohibited practice complaint against NAKASHIMA pursuant to HRS §§ 89-5 and 89-13(b).
3. A breach of the duty of fair representation occurs when the exclusive representative’s conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith.
4. HUNT’s complaint against NAKASHIMA alleging a breach of the duty of fair representation over his request for arbitration is ripe for adjudication by the Board.

²Under HRS § 89-5(b)(4), this Board is authorized to “[c]onduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper.”

4. HUNT's complaint against NAKASHIMA alleging a breach of the duty of fair representation over his request for arbitration is ripe for adjudication by the Board.
5. The Board concludes it is necessary and proper to proceed to hear HUNT'S prohibited practice complaint against NAKASHIMA and the HSTA as to whether the delay by the HSTA Board of Directors in deciding whether to proceed to arbitration and NAKASHIMA's conduct is a breach of the duty of fair representation and a prohibited practice under HRS § 89-13(b)(4).

ORDER

For the reasons set forth above, Respondents BRATT and DOE's Motion to Dismiss the Complaint is granted and the prohibited practice complaint in Case No. CE-05-460 is dismissed without prejudice.

Respondent NAKASHIMA's Motion to Dismiss is denied.

NOTICE OF SECOND PREHEARING CONFERENCE AND HEARING

NOTICE IS HEREBY GIVEN THAT the Board, pursuant to HRS § 89-5(b)(4) and HAR § 12-42-47, will conduct a second prehearing conference on the above-entitled prohibited practice complaint on May 15, 2001 at 11:00 a.m. by conference call. Complainant will be contacted at his telephone number on file with the Board. Respondent's counsel is requested to appear in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii at the designated time. The purpose of the second 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 may file an Amended Prehearing Statement, if appropriate, which addresses the foregoing matters with the Board two days prior to the prehearing conference.

YOU ARE ALSO NOTIFIED that the Board will conduct a hearing, pursuant to HRS §§ 89-5(b)(4) and 89-14, and HAR §§ 12-42-49 and 12-42-8(g) on the instant complaint on May 29, 2001 at a location to be announced. The purpose of the hearing is to receive evidence and arguments on whether Respondent committed prohibited practices as alleged by the Complainant. The hearing may continue from day to day until completed.

Appropriate provisions of the notice issued on January 23, 2001 remain applicable.

RICHARD HUNT and CATHERINE BRATT, et al.

CASE NOS: CE-05-460; CU-05-177

ORDER NO. 2007

ORDER GRANTING RESPONDENT CATHERINE BRATT, ET AL.'S MOTION TO DISMISS COMPLAINT AND DENYING RESPONDENT MARK NAKASHIMA'S MOTION TO DISMISS COMPLAINT; NOTICE OF SECOND PREHEARING CONFERENCE AND HEARING

DATED: Honolulu, Hawaii, April 26, 2001

HAWAII LABOR RELATIONS BOARD


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KATHLEEN RACUYA-MARKRICH, Member

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