

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-10-516
NENA B. PATTUGALAN,)	ORDER NO. 2136
Complainant,)	ORDER GRANTING RESPONDENTS'
and)	MOTION TO DISMISS PROHIBITED
DEPARTMENT OF HEALTH, State of Hawaii;)	PRACTICE COMPLAINT
and DEPARTMENT OF HUMAN)	
RESOURCES DEVELOPMENT, State of)	
Hawaii,)	
Respondents.)	

ORDER GRANTING RESPONDENTS' MOTION
TO DISMISS PROHIBITED PRACTICE COMPLAINT

On October 4, 2002, NENA B. PATTUGALAN (PATTUGALAN), *pro se*, filed a prohibited practice charge with the Hawaii Labor Relations Board (Board) against the DEPARTMENT OF HEALTH (DOH), State of Hawaii and the DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT (DHRD), State of Hawaii (collectively Employer). PATTUGALAN alleges that she was displaced by a reduction in force in the DOH and moved to Oahu Community Correctional Center, Department of Public Safety, State of Hawaii. PATTUGALAN alleges that she should have been able to "bump" an employee within DOH and contends the Employer discriminated against her in the reduction in force and violated Section 12.08d of the Unit 10 collective bargaining agreement in violation of Hawaii Revised Statutes (HRS) §§ 89-13(a)(3) and (8), respectively.

On October 17, 2002, the Employer filed Respondents' Motion to Dismiss Prohibited Practice Complaint contending the alleged violation of HRS § 89-13(a)(3) should be dismissed because Complainant failed to state a claim for relief. In addition, the Employer contended that the Board should decline jurisdiction over the alleged violation of HRS § 89-13(a)(8) because PATTUGALAN failed to exhaust her contractual remedies.

On November 14, 2002, the Board held a hearing on the motion to dismiss where Respondents' counsel appeared and Complainant appeared *pro se*. The parties were afforded full opportunity to present argument to the Board. After careful consideration of the record, the Board makes the following findings of fact, conclusions of law and order granting Respondents' motion to dismiss the complaint.

FINDINGS OF FACT

1. PATTUGALAN is a Para Medical Assistant employed by the Oahu Community Correctional Center, Department of Public Safety, State of Hawaii and was previously employed by the DOH. PATTUGALAN is a public employee within the meaning of HRS § 89-2.
2. The State of Hawaii is the Public Employer within the meaning of HRS § 89-2. The DOH and DHRD are departments within the State of Hawaii which represent the interests of the Public Employer.
3. PATTUGALAN was, for all times relevant, a member of Bargaining Unit (BU) 10 whose exclusive representative is the United Public Workers, AFSCME, Local 646, AFL-CIO (UPW).
4. At all times relevant, the State of Hawaii and the UPW were parties to a collective bargaining agreement for BU 10 which includes a comprehensive grievance procedure in Section 15.
5. Section 15.02 of the BU 10 agreement defines a grievance as follows:

The term grievance shall mean a complaint filed by a bargaining unit Employee, or by the Union, alleging a violation, misinterpretation, or misapplication of a specific section of this Agreement occurring after its effective date.
7. Section 15.07 of the BU 10 agreement provides for Informal Resolution as follows:

A grievance shall, whenever possible, be discussed and resolved informally between the grieving party and/or the Union with the immediate supervisor.
8. Section 15.10 of the BU 10 agreement provides for a Formal Grievance as follows:

In the event the grievance is not satisfactorily resolved on an informal basis, the grieving party and/or the Union may file a formal grievance by completing the grievance form provided by the Union.
9. Section 15.11 of the BU 10 agreement provides for the Step 1 Grievance, in part, as follows:

The grievance shall be filed with the department head in writing as follows:

- 15.11a. Within eighteen (18) calendar days after the occurrence of the alleged violation. ...
10. The BU 10 agreement provides further for a Step 2 Appeal or Grievance to be filed by the grieving party and/or the Union and Step 3 Arbitration to be filed by the Union.
 11. On or about June 17, 2002, the DOH implemented a reduction in force under the BU 10 Agreement which affected PATTUGALAN who was displaced and assigned to the Department of Public Safety.
 12. PATTUGALAN contends that provisions of the BU 10 agreement, specifically Section 12.08d regarding placement in an Employer-wide layoff, were unfairly applied to her.
 13. By letter dated July 19, 2002, PATTUGALAN wrote to Gary Rodrigues (Rodrigues), UPW State Director, requesting assistance.
 14. On or about July 25, 2002, PATTUGALAN met with UPW business agent Sharlene Moriwaki who informed her that her case lacked merit and did not file a grievance on her behalf.
 15. By letter dated July 26, 2002, PATTUGALAN wrote to Rodrigues requesting another business agent to represent her in filing a grievance. The last letter was not responded to.
 16. PATTUGALAN did not file a grievance contesting the application of the reduction in force provisions of the BU 10 Agreement.

DISCUSSION

It is uncontested that PATTUGALAN did not file a grievance and instead filed the subject prohibited practice complaint with the Board. PATTUGALAN asks the Board, under the provisions of HRS § 89-13(a)(8), to determine the applicability of the contract provisions.

In Winslow v. State, 2 Haw.App. 50, 55, 625 P.2d 1046 (1981) (Winslow), the Hawaii Intermediate Court of Appeals held that 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. The Court in Winslow found that the employee had failed to exhaust her available remedies because she failed to proceed to Step 4 (appeal to the employer) of the grievance procedure.

In Santos v. State, Dept. of Transp., Kauai Div., 64 Haw. 648, 646 P.2d 962 (1982), the Hawaii Supreme Court stated that “[i]t is the general rule that before an individual can maintain an action against his [or her] employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his [or her] employer and the [union].” (Citation omitted). 64 Haw. at 655.

In Hokama v. University of Hawai`i, 92 Hawai`i 268, 272, 990 P.2d 1150, 1154 (1999), the Court explained the policy considerations underlying the exhaustion of administrative remedies requirement as follows:

The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process, allowing the parties to develop their own uniform mechanism of dispute resolution. [Citations omitted.] It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means. [Citations omitted.]

Thus, in cases where an employee charges a prohibited practice against the employer alleging a violation of the collective bargaining agreement pursuant to HRS § 89-13(a)(8) before exhausting the contractual remedies, this Board has declined jurisdiction in keeping with the prevailing national labor relations policy and Hawaii policy favoring arbitration as a dispute settlement mechanism. Hence, this Board will defer to the grievance process, except where there exists countervailing policy considerations, or the union’s conduct in processing a grievance is discriminatory or in bad faith, thereby constituting a breach of its duty of fair representation to the member. See, Stevens v. Moore Business Forms, Inc., 18 F.3d 1443, 1447 (9th Cir. 1994).

The Board finds on the record that Complainant contacted the UPW upon learning of her displacement and was told by her business agent that her case did not have merit. Thereafter, she requested another agent to be assigned to her case, but failed to file a grievance on her own behalf. Thereafter, PATTUGALAN brought the instant complaint and did not file a complaint against the UPW. Based on these facts, the Board concludes that PATTUGALAN did not exhaust her contractual remedies with the Employer. In keeping with the policy favoring the dispute settlement mechanism developed between the Employer and the Union, the Board defers to the grievance process, and declines jurisdiction over the instant HRS § 89-13(a)(8) contract violation claim.

In addition, Respondents contend that Complainant failed to state a claim for relief which is grounds for dismissal of the HRS § 89-13(a)(3) discrimination claim pursuant to Rule 12(b)(6), Hawaii Rules of Civil Procedure (HRCPP). “The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true.” Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993).

A dismissal is clearly warranted under Rule 12(b)(6), HRCPP, if the claim is clearly without merit due to “an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or of disclosure of some fact which will necessarily defeat the claim.” Rosa v. CWJ Contractors, Ltd., 4 Haw.App. 210, 215, 664 P.2d 745 (1983) (internal quotes and citation omitted). While the allegations in the complaint are deemed true, the court is not required to accept conclusory allegations on the legal effect of the events alleged. Marsland v. Pang, 5 Haw.App. 463, 474, 701 P.2d 175 (1985).

HRS § 89-13(a)(3) states, in pertinent part, that it shall be a prohibited practice for a public employer or its designated representative wilfully to :

Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization; ...

Assuming for the purpose of this motion, that the allegations of discrimination are true, PATTUGALAN has failed to allege any facts which would support a finding that she was discriminated against to encourage or discourage membership in an employee organization. Thus, we conclude that Complainant has failed to allege sufficient facts which would give rise to any claim pursuant to HRS § 89-13(a)(3) upon which she is entitled to relief.

CONCLUSIONS OF LAW


1. By failing to pursue on her own a grievance over the alleged violation of Section 12.08d of the Unit 10 contract, the Board concludes that PATTUGALAN failed to exhaust her contractual remedies through Steps 1 and 2 with the Employer. In keeping with the policy favoring the dispute resolution mechanism developed between the employer and union, the Board defers to the contractual grievance process, and declines jurisdiction over the HRS § 89-13(a)(8) claim.
2. PATTUGALAN failed to allege sufficient facts which would give rise to any claim of discrimination upon which she is entitled to relief because of her union membership under HRS § 89-13(a)(3).

ORDER

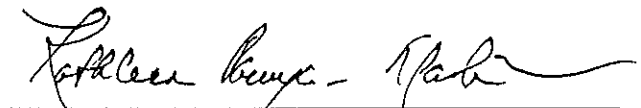
For the reasons given above, the Board hereby dismisses the instant prohibited practice complaint.

DATED: Honolulu, Hawaii, December 10, 2002.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member


KATHLEEN RACUYA-MARKRICH, Member

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