

Pursuant to the Board's notice issued September 5, 2002, a hearing was held on Respondents' Motion to Dismiss on September 24, 2002.

At the hearing on September 24, 2002 Complainant filed a written memorandum opposing Respondents Motion to Dismiss, and was provided the opportunity to make oral argument opposing said motion.

Based on the entire record and having considered the oral arguments presented, the Board makes the following findings of fact, conclusions of law and order granting Respondents' Motion to Dismiss.

FINDINGS OF FACT

1. Complainant VINCENT WALKER was, for all times relevant, employed as an Adult Corrections Officer at OCCC, PSD, State of Hawaii and a public employee within the meaning of HRS § 89-2. Complainant is a member of Bargaining Unit (BU) 10, whose exclusive representative is the United Public Workers, AFSCME, Local 646, AFL-CIO.
2. Respondent CAYETANO, was, for all times relevant, the Public Employer within the meaning of HRS § 89-2. Respondents SAKAI and ANDRADE, for all times relevant, represented the interests of the Public Employer within the meaning of HRS § 89-2.
3. At all times relevant, the Employer and UPW were parties to a collective bargaining contract for BU 10 (BU 10 contract), covering the period July 1, 1999 to and including June 20, 2003, which includes a comprehensive grievance procedure under Section 15 that provides for: the right of an employee to file a grievance without union representation; informal resolution; formal grievance; Step 1 Grievance; Step 2 Appeal or Grievance; and Step 3 Arbitration by the Union.
4. The BU 10 Contract in Section 37, covering Sick Leave, provides for Investigation for Patterns of Absences Due to Sickness which includes: 1) Criteria for Determining Patterns of Absences Due to Sickness; 2) Investigation Procedures for Patterns of Absences Due to Sickness; 3) Follow-Up Evaluation for Unacceptable Patterns of Absences Due to Sickness; and 4) Disciplinary Action for Abuse of Sickness.

(8) Violate the terms of a collective bargaining agreement; ...

5. On November 5, 2001, Complainant was placed on leave without pay, and received a written notice from PSD Director SAKAI informing him that based on the investigation of an established pattern of absences due to sickness affirming violations of Section 37.17.b for failing to report to the Medical Corner Clinic as required, he was being discharged on November 19, 2001 and would be afforded a pre-dismissal hearing scheduled for November 16, 2001 before the Departmental Hearings Officer Shelly Nobriga.
6. By letter dated December 28, 2001, the Employer notified Complainant that following a November 16, 2001 Pre-Dismisssal Hearing, it was sustaining Complainant's dismissal. The Employer also informed Complainant of his right to process a grievance as provided under the BU 10 Contract.
7. On January 18, 2002, the UPW, on Complainant's behalf, filed a Step 1 grievance contending Complainant's dismissal was without just and proper cause in violation of Articles 11, 37, 38, 48 and 14 of the BU 10 Contract.
8. On February 19, 2002, the Employer denied Complainant's Step 1 grievance.
9. On August 19, 2002, the UPW issued a notice of intent to arbitrate "subject to further review following the Hawaii Labor Relations Board dispositions in Case No. CE-10-510 and CU-10-205 and any other civil litigation brought by Vincent Walker."
10. On November 13, 2002, the Board issued Order No. 2131 in Case No. CU-10-205 dismissing the prohibited practice complaint filed simultaneously with the instant complaint on August 12, 2002 against the UPW alleging a wilful violation of the duty of fair representation for refusing to pursue Complainant's discharge grievance pursuant to the BU 10 Contract.²

²The Board's Conclusions of Law Nos. 3 and 4 state:

3. Based on the entire record, and viewing the facts in the light most favorable to the Complainant, the Board concludes there are no genuine material issues of fact in dispute to show the Union breached its duty of fair representation to Complainant by refusing to pursue his discharge grievance because it determined the Employer had just and proper cause for disciplining Complainant with dismissal for abuse of sickness as provided under Section 37.17 b.4. of the BU 10 Contract.
4. Having considered the facts in the light most favorable to Complainant, the Board concludes the Union's exercise of its judgment not to pursue Complainant's discharge grievance

DISCUSSION

Respondents move to dismiss the instant complaint on jurisdictional grounds because: 1) the grievance procedure under the BU 10 Contract is the exclusive avenue to remedy Complainant's discharge grievance; 2) the instant complaint is barred by the applicable statute of limitations; and 3) Complainant has failed to exhaust his contractual remedies.

The gravamen of the instant complaint against the Employer is that Complainant seeks to have the Board adjudicate the substance of his discharge grievance and provide the remedies sought therein. In Hokama v. University of Hawai'i, 92 Hawai'i 268, 990 P.2d 1150 (1999) (Hokama), the Hawaii Supreme Court held that the contractual grievance procedure was the exclusive forum for any claims arising from the collective bargaining agreement. The Hokama Court stated:

HRS § 89-11(a) (1993) & Supp. 1998) provides: "A public employer shall have the power to enter into written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in a final binding decision, *to be invoked in the event of any dispute concerning the interpretation or application of a written agreement.*" (Emphasis added.) The plain language of the statute indicates that the grievance procedure shall serve as the exclusive vehicle for resolving disputes regarding the terms of the collective bargaining agreement.

Id. at 272-73.

Respondents submit that the BU 10 Contract contains a grievance procedure, which is Complainant's exclusive forum for attempting to remedy his discharge grievance. We agree.

In Decision No. 436, John Mussack, 6 HLRB ____ (August 23, 2002), the Board articulated its practice to decline jurisdiction when individual employees charge the employer and union with a prohibited practice in violation of the collective bargaining agreement pursuant to HRS §§ 89-13(a)(8) and 89-13(b)(5), respectively, as follows:

. . . Generally, such alleged violations are adjudicated through the collective bargaining agreement's grievance process. And Chapter 89 expressly authorizes parties to a collective

was reasonable, in good faith and non-discriminatory.

bargaining agreement to establish a “grievance procedure culminating in final and binding decision....” (Emphasis added.) HRS § 89-11(a). Chapter 89, however, also provides the Board with jurisdiction over alleged contractual violations by either an employer or exclusive representatives via its authority to adjudicate prohibited practices complaints. (citations omitted.) This jurisdictional dilemma is usually resolved by the Board’s deferral to the arbitration process.³ Thus the Board has deferred to the contractual grievance process⁴ except where there exists countervailing policy considerations⁵ or the Union’s failure to satisfy its duty of fair representation effectively deprives the claimant of access to the grievance process.⁶

Such voluntary declination of jurisdiction is akin to the requirement that parties exhaust contractual remedies before access is afforded by the Board. The Hawaii Supreme Court in Santos v. State, Dept. of Transp., Kauai Div., 64 Haw 648, 655, 646 P.2d 962 (1982) has stated that “It is the general rule that before an individual can maintain an action against his employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his employer and the [union]. (citation omitted.) The rule is in keeping with the prevailing National Labor Relations policy and Hawaii policy favoring arbitration as a dispute settlement mechanism.” (citations omitted.) 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, 1 HPERB 253 (1972).

³“It shall be the policy of this Board 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.” Hawaii State Teachers Association, 1 HPERB 253, 261 (1972).

⁴See, e.g., State of Hawaii Organization of Police Officers, 6 HLRB 25 (1998).

⁵See, e.g., Hawaii State Teachers Association, *supra*, (arbitration fruitless and parties waive arbitration); Hawaii State Teachers Association, 1 HPERB 442 (1974) (speed); and Hawaii Government Employees Association, 1 HPERB 641 (1977) (subject not covered by contract).

⁶Vaca v. Sipes, 386 U.S. 171, 190-91, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

In the instant complaint, the Board can find no countervailing policy considerations which mitigate in favor of assuming jurisdiction. More importantly, Complainant was unsuccessful in his prohibited practice complaint against the UPW to prove a breach of its duty of fair representation in Case No. CU-10-205. In Order No. 2131, dated November 13, 2002, issued in Case No. CU-10-205, the Board found that in UPW's judgment, the Employer's disciplinary action in terminating Complainant was for just and proper cause. On this basis, the Board concluded that UPW's decision not to pursue to arbitration Complainant's discharge grievance was reasonable, in good faith and non-discriminatory.⁷

For all the foregoing reasons, the Board declines jurisdiction in deference to the contractual grievance process properly followed by both the Employer and Union in handling Complainant's discharge grievance.

Accordingly, the Board need not address the statute of limitations argument asserted by the Employer in its motion to dismiss.

Finally, on November 27, 2002, Complainant filed a Motion for Leave to Amend Complainant's Prohibited Practice Complaint in Case No. CE-10-510 Filed on August 12, 2002. Based on the fact that Complainant's motion seeks to adjudicate his discharge, and the Board having decided to decline jurisdiction in deference to the contractual grievance procedure, we hereby deny Complainant's motion for leave to amend the complaint.

CONCLUSIONS OF LAW

1. Pursuant to HRS § 89-11(a), the contractual grievance procedure shall serve as the exclusive vehicle for resolving disputes regarding the terms of the collective bargaining agreement. In Hokama v. University of Hawaii, 92 Hawai'i 268, 990 P.2d 1150 (1999), the Hawaii Supreme Court held that the contractual grievance procedure was the exclusive forum for any claims arising from the collective bargaining agreement. We conclude that the grievance procedure contained in the BU 10 Contract is Complainant's exclusive forum for attempting to remedy his discharge grievance.
2. While the Board has jurisdiction over alleged contractual violations by either an employer or exclusive representatives via its authority to adjudicate prohibited practices complaints under HRS §§ 89-13(a)(8) and 89-13(b)(5), the Board defers to the contractual grievance process as the exclusive forum

⁷The UPW properly reserved the right to pursue arbitration with the Employer in the event the Board found the UPW in breach of its duty in Case No. CU-10-205.

except where there are countervailing policy considerations or the union's failure to satisfy its duty of fair representation effectively deprives the employee of access to the grievance process.

3. In the instant complaint, the Board can find no countervailing policy considerations which mitigate in favor of assuming jurisdiction. Moreover, Complainant was unsuccessful in his prohibited practice complaint against the UPW to prove a breach of its duty of fair representation in Case No. CU-10-205. The Board declines jurisdiction in deference to the contractual grievance process properly followed by both the Employer and Union in handling Complainant's discharge grievance.

ORDER

The Board hereby dismisses Case No. CE-10-510 and denies Complainant's motion to amend the instant prohibited practice complaint.

DATED: Honolulu, Hawaii, December 10, 2002.

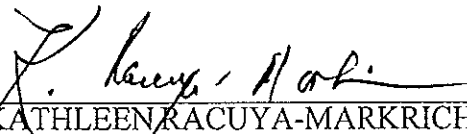
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