



Board. After deliberation, the Board indicated to the parties that it was inclined to dismiss the instant complaint.

Thereafter, on January 17, 2003, HUNT filed Complainant's Request for Reconsideration with the Board. After full consideration of the record in the case, the Board makes the following findings of fact, conclusions of law, and order.

### FINDINGS OF FACT

1. HUNT is a teacher at Honokaa High School and an employee of the DOE within the meaning of HRS § 89-2 and is included in bargaining unit 05.
2. BRATT is the principal at Kohala High School and in that capacity, a representative of the Board of Education (BOE), State of Hawaii, a public employer, within the meaning of HRS § 89-2.
3. The Hawaii State Teachers Association (HSTA or Union), exclusive representative of bargaining unit 05, and the BOE are parties to a collective bargaining agreement for Unit 05 with a grievance procedure that culminates in final and binding arbitration.
4. On or about August 10, 2002, Complainant requested a transfer to a math teaching position at Kohala High School. By letter dated August 14, 2002, BRATT informed HUNT that, "Kohala High will not be taking any transfers from tenured teachers outside the transfer period, which has already passed."
5. Complainant concedes that neither he nor Union filed a grievance contesting BRATT's refusal to transfer him. HUNT has previously filed grievances challenging BRATT's refusal to transfer him into that position.
6. With regard to the Athletic Director position, the HSTA filed a grievance on HUNT's non-selection. After the grievance was denied at Steps 1 and 2 of the contractual grievance procedure, HUNT requested the Union to proceed to arbitration.
7. On October 22, 2002 HUNT was notified that the HSTA Board of Directors voted on October 20, 2002 not to take his grievance to arbitration.
8. By letter dated January 6, 2003, which HUNT submitted with his motion for reconsideration, Mark Nakashima, HUNT's HSTA UniServ Director wrote to DOE Superintendent Patricia Hamamoto stating:

This is to inform you that the Demand for Arbitration filed by the Association on behalf of Richard Hunt, a teacher at Honokaa High School (HSTA WHO2-12) is being withdrawn without prejudice effective this date. While the Association maintains that Mr. Hunt has been the victim of discriminatory hiring practices, the HSTA Board of Directors has elected not to pursue Mr. Hunt's non-selection to a position (Athletic Director) currently not included in Bargaining Unit 5.

9. Article V - Grievance Procedure of the Unit 05 collective bargaining agreement defines a grievance and provides:
  - A. DEFINITION. Any claim by the Association or a teacher that there has been a violation, misinterpretation or misapplication of a specific term or terms of this Agreement shall be a grievance.
10. The Athletic Director position is not included in Unit 05. HUNT does not dispute this fact and only states that the position is with the DOE.
11. BRATT's non-selection of HUNT for the Athletic Director position is not covered by the Unit 05 agreement since the position is not included in the bargaining unit and the non-selection does not involve the violation or misapplication of the Unit 05 agreement.

### DISCUSSION

#### **Math Teaching Position**

Complainant seeks redress for BRATT's refusal to select him for two positions at Kohala High School claiming that Respondents violated HRS §§ 89-13(a)(3) and (8).<sup>1</sup>

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<sup>1</sup>HRS § 89-13(a) provides in part:

- (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
  - \* \* \*
  - (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;
    - \* \* \*
  - (8) Violate the terms of a collective bargaining agreement; . . . .

With respect to the math teaching position, HUNT requested a transfer to the position on August 10, 2002 and contends that BRATT violated the transfer provisions of the applicable agreement.

Generally, such alleged violations are adjudicated through the bargaining agreement's grievance process. And Chapter 89 expressly authorizes parties to a collective 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. HRS §§ 89-13(a)(8) and 89-13(b)(5). This jurisdictional dilemma is usually resolved by the Board's deferral to the arbitration process.<sup>2</sup>

In Winslow v. State, 2 Haw.App. 50, 612 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.]

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<sup>2</sup>"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).

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, 145 LRRM 2668 (9<sup>th</sup> cir. 1994).

Here, Complainant concedes that he failed to file a grievance contesting BRATT's refusal to transfer him to the math teaching position. While Complainant argues that he filed numerous grievances challenging BRATT's refusal to transfer him in previous years, it is undisputed that HUNT failed to file a grievance in this instance.<sup>3</sup> As such, the Board concludes that Complainant failed to exhaust his contractual remedies and therefore dismisses his claims arising from his transfer request.

#### **Athletic Director Position**

Complainant further contends that he was improperly denied the Athletic Director position at Kohala High School. Respondents, in their motion to dismiss, argue that these allegations, even if true do not state a claim upon which relief can be granted, see, Hawaii Rules of Civil Procedure (HRCP) Rule 12(b)(6), so that dismissal is required. "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 (6<sup>th</sup> Cir. 1993). Such a dismissal is generally disfavored but warranted "if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts entitling a plaintiff to relief." Bertelmann v. Taas Associates, 69 Haw. 95, 99, 735 P.2d 930 (1987). 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).

In his memorandum of opposition and at hearing HUNT acknowledged that his charge of discrimination is based upon gender and age rather than on the basis of union membership which is protected by HRS § 89-13(a)(3). Therefore, the Board hereby

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<sup>3</sup>Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact in dispute and it is entitled to judgment as a matter of law. State of Hawaii Organization of Police Officers (SHOPO) v. Society of Professional Journalists - University of Hawaii Chapter, 83 Hawaii 387, 389, 927 P.2d 386 (1996). A fact is material if proof of that fact would have the effect of establishing or refuting the essential elements of a cause of action or defense asserted by the parties. Konno v. County of Hawaii, 85 Hawaii 61, 937 P.2d 397 (1997).

dismisses the allegation of a violation of HRS § 89-13(a)(3) for failure to state a claim upon which relief can be granted.

With respect to HUNT's HRS § 89-13(a)(8) claims, Respondents allege and Complainant does not deny that the position is excluded from Unit 05. Thus, viewing the undisputed facts in the light most favorable to HUNT, the provisions of the Unit 05 agreement do not apply to the Athletic Director selection. Accordingly, the Board concludes that Complainant failed to state a claim for relief against Respondents regarding his non-selection under HRS § 89-13(a)(8).

### **Request for Reconsideration**

HUNT filed a request for reconsideration with the Board on January 17, 2003. HUNT enclosed a copy of HSTA's withdrawal of arbitration demand and further argued, inter alia, that BRATT lied in her dealings with him.

In considering HUNT's request as a motion for reconsideration, "[t]he purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion." Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10 (1992). In this case, HUNT failed to present new evidence or arguments that could not have been presented during the earlier motion and the Board is not persuaded to reverse its initial inclination to dismiss this complaint. Accordingly, the instant request for reconsideration is denied.

### **CONCLUSIONS OF LAW**

1. The Board has jurisdiction over the instant complaint challenging the Athletic Director non-selection pursuant to HRS §§ 89-5 and 89-14.
2. Allegations of the employer's violation of the collective bargaining agreement are generally adjudicated through the bargaining agreement's grievance process. Thus the Board has deferred to the contractual grievance process except where there are countervailing policy considerations or the union's failure to satisfy its duty of fair representation effectively deprives the claimant of access to the grievance process.
3. With respect to the math teaching position, HUNT failed to file a grievance contesting BRATT's refusal to consider his transfer request and therefore failed to exhaust his contractual remedies.

4. Dismissal for failure to state a claim for relief is warranted if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts entitling plaintiff to relief.
5. HUNT acknowledged that his charge of discrimination is based upon gender and age rather than on union membership which is protected by HRS § 89-13(a)(3). Therefore, the Board dismisses the allegation of a violation of HRS § 89-13(a)(3) for failure to state a claim upon which relief can be granted.
6. As the Athletic Director position sought by HUNT is not included in Unit 05, the provisions of the Unit 05 collective bargaining agreement are inapplicable to the selection for the position. Thus, HUNT's allegations that Respondents violated the collective bargaining agreement are without merit and fail to state a claim for which relief can be granted.

**ORDER**

The Board hereby dismisses the instant prohibited practice complaint.

DATED: Honolulu, Hawaii, January 29, 2003.

HAWAII LABOR RELATIONS BOARD

  
\_\_\_\_\_  
BRIAN K. NAKAMURA, Chair

  
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