

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of
DEPARTMENT OF HUMAN SERVICES,
State of Hawaii,

Complainant,

and

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO,

Respondent.

CASE NO. CU-10-215

ORDER NO. 2192

ORDER GRANTING RESPONDENT
UPW'S MOTION TO DISMISS PROHIB-
ITED PRACTICE COMPLAINT

ORDER GRANTING RESPONDENT UPW'S
MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT

On March 6, 2003, Complainant DEPARTMENT OF HUMAN SERVICES, State of Hawaii (DHS) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW). Complainant alleged that the UPW requested fees and costs in its post hearing brief filed in an arbitration case and thereby committed a prohibited practice in violation of Hawaii Revised Statutes (HRS) §§ 89-11 and 89-13(b)(3), (4), and (5).

On March 12, 2003, the UPW filed UPW's Motion to Dismiss. The UPW contended that the complaint should be dismissed because the subject matter at issue is pending before an arbitrator and deferral to the arbitral process (including court review of the award) is required by the strong public policy underlying HRS Chapter 658.

On March 25, 2003, the UPW filed UPW's Motion to Dismiss for Lack of Prosecution. The UPW argued that Complainant failed to file an answering affidavit, objection to, or responsive pleading in opposition to the motion to dismiss in a timely manner.

On March 27, 2003, the DHS filed a Memorandum in Opposition to UPW's Motion to Dismiss. On April 1, 2003, the UPW filed a First Supplemental Submission in Support of Motion to Dismiss with the Arbitration Decision and Award by Arbitrator Michael F. Nauyokas, dated March 31, 2003.

On April 1, 2003, the Board held a hearing on the motions. The parties were represented by counsel and were afforded full opportunity to argue the motions before the Board. After a thorough review of the record in the case, the Board makes the following findings of fact, conclusion of law and order.

FINDINGS OF FACT

1. DHS is an agency of the State of Hawaii and a representative of a public employer as defined in HRS § 89-2.
2. The UPW is an employee organization and the exclusive representative, as defined in HRS § 89-2, of employees in bargaining unit (BU) 10.
3. The State of Hawaii and the UPW are parties to a collective bargaining agreement (CBA) for BU 10 which includes a grievance procedure that culminates in final and binding arbitration.
4. On or about June 5, 2002, the UPW filed a class grievance on behalf of all Unit 10 workers at the Hawaii Youth Correctional Facility. The grievance was not resolved and was taken to arbitration. Michael F. Nauyokas was selected as the arbitrator. After several days of hearings, post hearing briefs were submitted to the arbitrator. In its post hearing brief, the UPW requested fees and costs incurred by UPW in presenting its case to be paid by the employer.
5. Complainant alleges that the inclusion of the request for fees violates Section 15.21 of the CBA which provides:

The fees of the Arbitrator, the cost of transcription and other necessary general costs, shall be shared equally by the Employer and the Union. Each party will pay the cost of presenting its own case and the cost of and transcript that it requires.

6. In his Arbitration Decision and Award, dated March 31, 2003, Arbitrator Michael F. Nauyokas declined to order the Union reimbursement for its fees and costs.

DISCUSSION

Complainant contends that the UPW committed prohibited practices in violation of HRS §§ 89-11 and 89-13(b)(3), (4), and (5) by requesting attorneys fees and costs for an arbitration. Complainant argues that the UPW refused to participate in good

faith in the arbitration process agreed to by the parties pursuant to HRS § 89-11(a)¹ and by wilfully violating Section 15 of the Unit 10 CBA.

HRS §§ 89-13(b) provides in part:

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

* * *

- (3) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures in section 89-11;
- (4) Refuse or fail to comply with any provision of this chapter; or
- (5) Violate the terms of a collective bargaining agreement.

HRS §§ 89-11 and 89-13(b)(3) and (4)

“The purpose of Rule 12(b)(6), Hawaii Rules of Civil Procedure (HRCPP) 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 for failure to state a claim upon which relief can be granted 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). 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).

HRS § 89-11, refers to the Resolution of disputes; impasses, and provides procedures to resolve impasses in the negotiations process over the terms of an initial or renewed agreement. The Board has in the past determined that this process does not relate

¹HRS § 89-11(a) provides in part:

§ 89-11 Resolution of disputes; impasses. (a) A public employer and an exclusive representative may enter, at any time, into a written agreement setting forth an alternate impasse procedure culminating in an arbitration decision pursuant to subsection (f), to be invoked in the event of an impasse over the terms of an initial or renewed agreement. . . .

to grievances or disputes concerning the interpretation or application of a written agreement² as set forth in HRS § 89-10.8. Thus, as the gravamen of this case is the UPW's conduct in a grievance arbitration rather than an interest arbitration over the terms of an agreement, the Board concludes that HRS §§ 89-11 and 89-13(b)(3) violations are inapplicable to these proceedings and unsupported by the record. The Board concludes that it appears beyond a reasonable doubt that Complainant can prove no set of facts entitling it to relief, and the Board hereby dismiss those allegations for failure to state a claim upon which relief can be granted.

As Complainant's allegations of HRS § 89-13(b)(4) statutory violations also relate to the alleged violation of HRS § 89-11, those allegations are similarly dismissed.

HRS § 89-13(b)(5)

Complainant contends that UPW violated Article 15 of the applicable contract by requesting fees and costs during the grievance arbitration. The UPW, however, contends that the matter is pending before Arbitrator Michael F. Nauyokas and the Board should defer to the pending arbitration rather than address the instant prohibited practice charge. The UPW argues that the Board has previously declined to entertain matters which are deferrable to arbitration consistent with the strong public policy favoring arbitration under HRS Chapter 658. In addition, the UPW submits that on March 31, 2003, Arbitrator Nauyokas rendered a decision in the arbitration at issue and denied the UPW's request for fees and costs which moots the instant charges.

The UPW contends that the case has lost its character as a present, live controversy. Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 734 P.2d 161 (1987) (Lyman). In Wong v. Board of Regents, University of Hawaii, 62 Haw. 391, 616 P.2d 201 (1980) (Wong), the Court dismissed the action on grounds of mootness, stating:

The mootness doctrine is said to encompass the circumstances that destroy the justiciability of a suit previously suitable for determination. Put another way, the suit must remain alive throughout the course of the litigation to the moment of final appellate disposition. Its chief purpose is to assure that the adversary system, once set in operation remains properly fueled. The doctrine seems appropriate where events subsequent to the judgment of the trial court have so affected the relations between the parties that the two conditions for justiciability relevant on appeal – adverse interest and effective remedy – have been compromised.

²Order No. 2131, November 13, 2002, Vincent Walker, Case No. CU-10-205; Order No. 2113, September 12, 2002, Bert Sam Fong, Case Nos. CE-10-503, CU-10-201.

Id., at 394. See also, State v. Rogan, 91 Hawai'i 405, 984 P.2d 1231 (1999); State v. Fukusaku, 85 Hawai'i 462, 946 P.2d 32 (1997); AIG Hawaii Ins. Co. v. Bateman, 82 Hawai'i 453, 923 P.2d 395 (1996); In re Application of J.T. Thomas, 73 Haw. 223, 832 P.2d 253 (1992).

In this case, the Board finds that the conditions of justiciability have been compromised by the issuance of the arbitration award denying the requested fees and costs and the issue is moot. However, there is a well-recognized exception to the mootness doctrine in cases involving questions that affect the public interest and are capable of repetition yet evading review. Okada Trucking Co., Ltd. v. Board of Water Supply, 99 Hawai'i 191, 53 P.3d 799 (2002) (Okada); CARL Corp. v. State, Dept. of Educ., 93 Hawai'i 155, 165, 997 P.2d 567, 577 (Carl II) (quoting In re Thomas, *supra*; accord Mahiai v. Suwa, 69 Haw. 349, 356, 742 P.2d 359, 365 (1987); Kona Old Hawaiian Trails Group v. Lyman, *supra*; Wong, 62 Haw. at 395-96, 616 P.2d at 204; Life of the Land v. Burns, 59 Haw. 244, 252, 580 P.2d 405, 409-10 (1978) (Burns); Johnston v. Ing, 50 Haw. 379, 381, 441 P.2d 138, 140 (1968) (Johnston). "Among the criteria considered in determining the existence of the requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question. Okada, 99 Hawai'i at 196-97, 53 P.3d at 804-05. Johnston, 50 Haw. at 381, 441 P.2d at 140 (quoting In re Brooks' Estate, 32 Ill.2d 361, 205 N.E.2d 435, 437-438 (1965)). The phrase, "capable of repetition, yet evading review," means that "a court will not dismiss a case on the grounds of mootness where a challenged governmental action would evade full review because the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit." CARL II, 93 Hawai'i at 165, 997 P.2d at 577 (quoting Burns, 59 Haw. at 251, 580 P.2d at 409-10).

The issue here is whether the UPW's request for fees and costs during the course of a grievance arbitration violates the contract and constitutes a prohibited practice. While we believe the parties to an arbitration should be free to argue their respective positions, whether right or wrong to an arbitrator, the determination of the final outcome of the positions of the parties is ultimately in the arbiter's hands. HRS § 658A-24 provides for modification or correction of an award on stated grounds and the Board is not persuaded that the issue raised will evade full review if repeated. Thus, the Board concludes that Complainant's allegations of a contract violation are moot as there is no actual controversy between the parties and there is no meaningful remedy that it could impose in this matter at this stage. Moreover, the complaint does not meet the "capable of repetition, yet evading review" exception to the mootness doctrine. Accordingly, the Board hereby dismisses the instant complaint.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14.
2. Complainant failed to state a claim for relief for violations of HRS §§ 89-11, 89-13(b)(3) and (4) because HRS § 89-11 is inapplicable to the facts raised as it refers to interest arbitrations rather than grievance arbitrations.
3. In view of the denial of fees and costs by the Arbitrator in the instant matter, Complainant's allegations of HRS § 89-13(b)(5) contract violations by the UPW are moot and do not fall within an exception to the mootness doctrine because the parties can seek review of any arbitration award under HRS Chapter 658A.

ORDER

The Board hereby dismisses the instant prohibited practice complaint.

DATED: Honolulu, Hawaii, June 17, 2003

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



CHESTER C. KUNITAKE, Member



KATHLEEN RACUYA-MARKRICH, Member

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