STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII FIRE FIGHTERS ASSOCIATION, LOCAL 1463, IAFF, AFL-CIO, Complainant, and HONOLULU FIRE DEPARTMENT, City and County of Honolulu, Respondent.	CASE NO. CE-11-543 ORDER NO. 2234 ORDER GRANTING RESPONDENT'S MOTION TO DISMISS COMPLAINT

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS COMPLAINT

On October 16, 2003, Complainant HAWAII FIRE FIGHTERS ASSOCIATION, IAFF, LOCAL 1463, AFL-CIO (HFFA or Union) filed the instant prohibited practice charge with the Hawaii Labor Relations Board (Board). Complainant alleges that Respondent HONOLULU FIRE DEPARTMENT, City and County of Honolulu (HFD or Employer) conducted multi-company night exercises or night alarm drills without compensating employees under applicable contractual provisions, Article 23, Night Alarm Premium. Complainant further contends that the Employer failed or refused to bargain and/or consult with Complainant in good faith with respect to the night exercises thereby violating the provisions of Hawaii Revised Statutes (HRS) §§ 89-9, 89-13(a)(5), (7), and (8).

On October 30, 2003, the Employer filed Respondent's Motion to Dismiss Complaint. Respondent contends that the Board should dismiss this complaint as untimely and because Complainant failed to exhaust its contractual remedies.

On December 11, 2003, the Board held a hearing on Respondent's motion to dismiss. During the hearing Complainant withdrew any alleged contractual violations and its allegations of HRS § 89-13(a)(8) violations. The parties were afforded full opportunity to be heard on the motion. After a thorough review of the record in this case, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Complainant HFFA is an employee organization and the exclusive representative, as defined in HRS § 89-2, for employees in bargaining unit 11 (Unit 11).

2. Respondent HFD represents the public employer with respect to Unit 11 employees and is therefore deemed to be a public employer as provided in HRS § 89-2.

3. At all times relevant, the HFFA and public employer were parties to a collective bargaining agreement (Agreement) covering employees in Unit 11. The Agreement includes a grievance procedure that culminates in final and binding arbitration.

4. Article 23 of the Agreement, entitled Night Alarm Premium, states, in part:

> An employee, who is assigned to work more than an average of 40 hours per week, who is required to perform work between the hours of 8:00 P.M. and 6:00 A.M., shall be paid, in addition to the employee's basic compensation, an amount equal to 25 percent of the employee's hourly rate of pay per hour for each full hour or portion thereof in excess of ½ hour of actual work and 13 percent of the employee's hourly rate of pay for each ½ hour or less.

5. On May 29, 2003, Fire Chief Attilio K. Leonardi issued HFD's interpretation of Article 23 of the Agreement in Special Notice SN-03-089 stating that the premium was only applicable when responding to an alarm and that relocations and night drills did not qualify for the night alarm premium (FDN).

6. On June 3, 2003, HFFA filed a Step 3 Class Grievance on behalf of all firefighters. The grievance alleges that Section 23 is not restricted to fire alarms and is applicable to night drills. The grievance is presently in arbitration and pending the selection of an arbitrator.

7. Robert H. Lee, HFFA President, stated in a declaration, that after participating in night drills on June 25, 2003, he expressed concerns about, inter alia, fatigue and the number of fire fighters required to participate in the drills. The Employer suspended the drills pending an evaluation. Lee understood that no further night drills would be conducted pending the grievance filed by the Union. Lee further stated that at the end of a meeting on September 3, 2003, the Employer notified the Union that night drills would resume on September 18,

2003 without permitting the Union an opportunity to respond or engage in discussions on the issue.

8. The Employer's actions occurring within 90 days of the filing of the instant complaint, including the resumption of night drills in September 2003, are properly within the Board's jurisdiction.

DISCUSSION

In its complaint, the HFFA contends that the Employer violated Section 23 of the contract, Night Alarm Premium, and HRS § 89-13(a)(8), for refusing to pay night alarm premiums for drills conducted between 8:00 p.m. and 6:00 a.m., as well as violating other statutory provisions. At the hearing on the instant motion, the HFFA withdrew the allegations of Article 23 and HRS § 89-13(a)(8) violations from the instant complaint, leaving the alleged HRS §§ 89-9, 89-13(a)(5) and (7) violations.

Those sections provide, in part, as follows:

> **§ 89-9. Scope of negotiations; consultation.**
>
> (a) The employer and the exclusive representative shall meet at reasonable times, . . .and shall negotiate in good faith with respect to wages, hours, . . . and other terms and conditions of employment which are subject to collective bargaining and which are to be embodied in a written agreement as specified in section 89-10, but such obligation does not compel either party to agree to a proposal or make a concession; . . . .
>
> (b) The employer or the exclusive representative desiring to initiate negotiations shall notify the other party in writing, setting forth the time and place of the meeting desired and the nature of the business to be discussed, sufficiently in advance of the meeting.
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> (c) Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.
>
> **§ 89-13. Prohibited practices; evidence of bad faith.**
>
> (a) It shall be a prohibited practice for a public employer or its designated representative to wilfully to:

* * *

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

* * *

(7) Refuse or fail to comply with any provision of this chapter; . . . .

With regard to the statutory violations, the HFFA contends that the Employer failed to confer and consult with the Union relating to the night drills. The Union asserts that the Employer had suspended night drills pending evaluation in late June 2003 due to concerns raised by HFFA President Lee. On September 3, 2003, the Employer notified the Union that it intended to resume the drills on September 18, 24, and 30, 2003 without prior notice or opportunity to discuss the decision. The Union contends that the Employer thus unilaterally resumed the night drills and did not give the Union any opportunity, either before or after the notification, to respond or engage meaningfully in a discussion on the issue.

The Employer argues that the HFFA's failure to bargain in good faith allegations are untimely as any alleged violation occurred, if at all, on or about May 29, 2003, when the Chief issued HFD's interpretation of Section 23. Alternatively, the Employer contends that the HFFA clearly knew of any alleged violation on June 3, 2003 when the Union filed the pending grievance. The Employer contends that these events occurred well outside of the limitations period and are time-barred from the Board's consideration. The Employer argues that the HFFA's argument that the limitations period began on September 25, 2003 is absurd and would place a chilling effect on attempts by employers and unions to work out their differences since it is clear that the Employer merely resumed the night drills in the manner in which they were implemented in February 2003. Finally, the Employer contends that the Board should allow the parties to abide by their Agreement and defer the matter to the grievance procedure. The Employer submits that "all issues raised in the subject prohibited practice complaint can be resolved through the grievance process." Respondent's Reply Memorandum to Complainant's Memorandum in Opposition to Respondent's Motion to Dismiss Complaint, p. 4.

HRS § 377-9(l), made applicable to these proceedings by HRS § 89-14, provides that "[n]o complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." Accordingly, Hawaii Administrative Rules (HAR) § 12-42-42(a) sets forth the limitations period applicable to the filing of prohibited practices complaints under HRS § 89-13. The rule provides as follows:

> A complaint that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed...within ninety days of the alleged violation.

The Board has construed the limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HPERB 186 (1983). The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Instead, the period begins to run when "an aggrieved party knew or should have known that his statutory rights were violated." Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978).

The Union contends that the Employer specifically failed to confer and consult with the Union relating to the resumption of night drills in violation of HRS §§ 89-9, 89-13(a)(5), and (7) on and after September 3, 2003. As these alleged violations occurred within the 90 days preceding the filing of the instant complaint filed on October 16, 2003, the Board concludes that the complaint is timely filed.

In this case, the HFFA alleges that Respondent failed and refuses to bargain and/or consult with Complainant in good faith with respect to the multi-company night exercises, in violation of the foregoing statutory sections. The allegations are premised on the resumption of night drills on or about September 18, 2003 without further negotiation or consultation with the Union after a 2½ month suspension pending evaluation by the Employer. It is uncontested that there is presently an arbitration currently pending to address the Article 23 contractual violations. If the Arbitrator finds for the HFFA then the matter at issue, "night drills," was in fact negotiated and the subject is covered by the provisions of the contract. If the Arbitrator denies the grievance, either the issue of night drills was not covered by the provisions of the contract and needs to be negotiated or the employees are not entitled to compensation under the applicable contractual provision. Here, the Employer submits in its arguments that the issues raised in this complaint can be resolved in the grievance process.

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.[1] Thus the Board has deferred to the contractual grievance process[2] except where there

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[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).

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

exists countervailing policy considerations[3] or the Union's failure to satisfy its duty of fair representation effectively deprives the claimant of access to the grievance process.[4]

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) (HSTA).

In reviewing the instant complaint, the Board finds that the parties are proceeding through the contractual grievance process. Further there are no countervailing policy considerations which mitigate in favor of assuming jurisdiction of the complaint and no pending duty of fair representation charges against the Union. Given the Employer's position that the pending charges can all be resolved in the grievance process, the Board hereby defers this complaint to the pending grievance and arbitration. Moreover, the Board's declines jurisdiction over the issues presented in this complaint in the interest of administrative efficiency to avoid the possibility of conflicting rulings as well as the duplication of efforts.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint under HRS §§ 89-5 and 89-14.

2. The Board lacks jurisdiction over prohibited practice complaints filed more than 90 days after the occurrence of the alleged violations.

3. Complainant's allegations of HRS §§ 89-9, 89-13(a)(5) and (7) arising from the Employer's resumption of night drills in September 2003 were filed within the applicable limitations period.

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[5]See, 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).

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

4. The Board declines jurisdiction over the instant dispute and defers the dispute to the arbitration proceedings as all matters raised in the complaint can be resolved through the arbitration process. In addition, deferral in this case would be in the interest of administrative efficiency to avoid redundancy and the possibility of inconsistent rulings.

ORDER

The Board hereby grants Respondent's motion to dismiss the instant prohibited practice complaint.

DATED: Honolulu, Hawaii, March 1, 2004.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

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