

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-03-574
HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO,	)	ORDER NO. 2321
Complainant,	)	ORDER DENYING RESPONDENTS' MOTION TO DISMISS
and	)	
LINDA LINGLE, Governor, State of Hawaii; PETER YOUNG, Chairman, Department of Land and Natural Resources, State of Hawaii; CARL T. WATANABE, Registrar, Department of Land and Natural Resources, Bureau of Conveyances, State of Hawaii; NICOLE GEGA-CHANG, Conveyancing Supervisor, Land Court Recording Branch, Bureau of Conveyances, Department of Land and Natural Resources, State of Hawaii; and DEPART- MENT OF LAND AND NATURAL RESOURCES, State of Hawaii,	)	
Respondents.	)	

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ORDER DENYING RESPONDENTS' MOTION TO DISMISS

On September 27, 2004, the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, LOCAL 152, AFL-CIO (HGEA, Union or Complainant) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Governor LINDA LINGLE (LINGLE); PETER YOUNG, Chairman of the Department of Land and Natural Resources, State of Hawaii; CARL T. WATANABE (WATANABE), Registrar of the Bureau of the Conveyances, Department of Land and Natural Resources, State of Hawaii; NICOLE GEGA-CHANG (GEGA-CHANG), Conveyancing Supervisor, Land Court Recording Branch, Bureau of Conveyances, Department of Land and Natural Resources, State of Hawaii; and the DEPARTMENT OF LAND AND NATURAL RESOURCES, State of Hawaii (collectively Employer or Respondents). The HGEA alleges, *inter alia*, that the Respondents unilaterally implemented a work site visitation policy and procedure for Union representatives. Thereafter, Respondent GEGA-CHANG threatened to call the police because of a Union agent visit and further threatened to discipline employees who did not follow her directive. The HGEA contends that the Respondents violated Hawaii Revised Statutes (HRS) §§ 89-3, and 89-9(a) and (c) as well as Articles 1, 7, and 8 of the Unit 03 collective bargaining agreement thereby violating HRS §§ 89-13(a)(1), (2), (5), (7) and (8).

On October 6, 2004, Respondents filed the instant motion to dismiss the complaint. After exchanges of opposition, filed on October 22, 2004, and supplemental memoranda, filed on November 10, 2004, the Board scheduled and convened a hearing on the Motion to Dismiss on November 29, 2004. The Board conducted a hearing on the scheduled day and afforded each party a full and fair opportunity to be heard.

### DISCUSSION

The genesis of this complaint is a memorandum, dated July 22, 2004, from WATANABE to GEGA-CHANG and Ms. Harriet Enrique, Acting Conveyancing Supervisor, Regular Reporting Branch regarding "Notification of Work Site Visits by Union Representatives." The memorandum reads as follows:

Pursuant to Article 7 of the BU 03 Collective Bargaining Agreement, whenever a Union Representative is visiting the work site, the Union Representative is required to "notify the appropriate supervisor" when they arrive at the work site." **Please be informed that for employees within the Bureau of Conveyances, I, as the Registrar of Conveyances am the designated "appropriate supervisor" to be notified.** Consequently, whenever Mr. Jeff Morgan or any other BU 03 Union Representative visits the Bureau of Conveyances, they are required by the BU 03 CBA to notify me of their arrival at the work site. We have so informed Mr. Morgan of this matter and we expect his full cooperation for all future visits. See our letter to Mr. Morgan which we have enclosed herein.

Furthermore you, as the Branch Chiefs, will be required to aid in the enforcement of the CBA provision. **You are hereby directed to verify with Mr. Morgan that he has in fact notified me (or my designee if I am unavailable) of his visit to the Bureau of Conveyances.** For example, if Mr. Morgan is meeting with you or one of your subordinates, please ask Mr. Morgan if he has notified me (or my designee) of his arrival and visit. If he answers "yes", then that will be the end of it. If Mr. Morgan answers "no", then please remind him that, by virtue of the BU 03 CBA, he needs to notify me (or my designee) of his presence at the work site. This is a directive, so your compliance in this matter is mandatory.

Finally, if Mr. Morgan tells you that he has not yet notified me of his visit, you are directed to terminate your meeting

immediately. At that point, Mr. Morgan has the choice of either notifying me in accordance with Article 7 of the BU 03 CBA before resuming his meeting with you or leaving the work site.

Inasmuch as this matter is governed by the CBA, your cooperation with these directives will be greatly appreciated. Thank you for your attention to this matter. [Emphasis in original.]

The Union alleges that WATANABE's memorandum unilaterally imposes stricter procedures than are set forth in the Unit 03 collective bargaining agreement and that the intent and effect of WATANABE's directive are to interfere with the statutory and contractual right of the Union to meet with and assist its members. The Union further contends that this constitutes a unilateral change in conditions of employment that was neither negotiated nor consulted over with the Union and therefore violated the employer's duty in this regard.

Respondents in the instant motion argue that the complaint should be dismissed by the Board for failure to state a claim for relief and alternatively, the complaint should be dismissed for lack of jurisdiction because the Union failed to exhaust its contractual remedies. Respondents also submitted the declarations of WATANABE and GEGA-CHANG in a supplement to their motion to dismiss the instant complaint.

### **Motion to Dismiss**

The Employer argues for dismissal on the grounds that these allegations fail to state a claim. "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). A dismissal is clearly warranted under Rule 12(b)(6), HRCF, 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). 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).

The right of an employee to communicate with the employee's exclusive representative is a fundamental corollary of the rights of employees identified in HRS § 89-3:

**§ 89-3 Rights of employees.** Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4.

By the unequivocal language of the memorandum, WATANABE conditioned Union agent visits upon being informed of their presence upon arrival, i.e., “whenever Mr. Jeff Morgan or any other BU 03 Union Representative visits the Bureau of Conveyances, they are required by the BU 03 CBA to notify me of their arrival at the work site.” Bargaining unit members and their supervisors were threatened with disciplinary action for noncompliance with WATANABE’s directive, i.e., “This is a directive to your compliance in this matter is mandatory;” and “...if Mr. Morgan tells you that he has not yet notified me of his visit, you are directed to terminate your meeting immediately.” The Union alleges that this condition and threat of discipline were motivated by a desire to effectuate a curtailment of the right of union/member communication. This would constitute a violation of at least HRS § 89-13(a)(1). Thus, the Union alleges a colorable claim of a statutory violation and we cannot say that it appears “beyond a reasonable doubt that the plaintiff can prove no set of facts entitling a plaintiff to relief.” Thus, the Board denies Respondents’ motion to dismiss this complaint for failure to state a claim for relief.

### **Deferral to the Grievance Procedure**

Respondents also argue that the Board lacks jurisdiction over this complaint because the Union failed to exhaust its contractual remedies prior to bringing the instant complaint before the Board. Respondents submit that the Board should decline to take jurisdiction over what is essentially a contractual dispute and dismiss the complaint for lack of jurisdiction in deference to the grievance/arbitration process. Respondents rely on Lewis W. Poe v. Hawaii Labor Relations Board, et al., 105 Hawai’i 97, 94 P.3d 652 (2004) (Poe) contending that the Union is required to exhaust contractual remedies prior to filing a complaint before the Board.

Generally, alleged contractual 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 § 89-10e. 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 in the appropriate case. ("It shall be the policy of this Board to attempt to foster the peaceful settlement of disputes, where 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) (HSTA). Thus, the Board has deferred to the contractual grievance process except where there exists countervailing policy considerations or the Union's failure to satisfy its duty of fair representation effectively deprives the claimant access to the grievance process. See, e.g. HSTA, supra (arbitration fruitless and parties waive arbitration); Hawaii State Teachers Association, 1 HPERB 442 (1974) (speed); Hawaii Government Employees Association, 1 HPERB 641 (1977) (subject not covered by contract).


As noted above, this complaint raises issues regarding the fundamental rights of union/member communications as embodied in HRS § 89-3. This right is at the core of Chapter 89 and the Board concludes that addressing questions regarding its parameters represent fundamental questions of policy which compel the assumption of jurisdiction. Moreover, unlike Poe, the Union alleges here that Respondents violated various statutory provisions prohibiting employer interference with employee rights and discrimination as well as noncompliance with HRS § 89-9 provisions requiring consultation which are clearly within the Board's exclusive jurisdiction in addition to the attendant contractual violations. Thus, the deferral of the alleged contractual violations to the contractual grievance procedure while retaining jurisdiction over the statutory disputes arising from the same set of facts would result in the duplication of litigation in the different forums and invite potentially conflicting results. Accordingly, the Board denies Respondents' motion to dismiss the instant complaint for lack of jurisdiction.

DATED: Honolulu, Hawaii, APRIL 6, 2005.

HAWAII LABOR RELATIONS BOARD

  
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BRIAN K. NAKAMURA, Chair

  
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CHESTER C. KUNITAKE, Member

  
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KATHLEEN RACYA-MARKRICH, Member

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