

on July 31, 2000, POE filed exceptions to the Board's proposed order and also Proposed Findings of Fact. On August 25, 2000, the Board held a hearing on POE's exceptions to the Board's proposed order. At the hearing, POE requested that the Board continue the hearing pending the Board's decision in Case No. DR-03-81. The Board granted the continuance of the hearing and issued Order No. 1913 in Case No. DR-03-81 on August 31, 2000. On September 19, 2000, the Board held a hearing on POE's exceptions to the Board's proposed order. At the close of the hearing, POE orally moved the Board to defer its ruling in the case pending the outcome of the Hawaii Supreme Court's ruling in a related case. Thereafter, Respondent filed a Statement of No Opposition to Complainant's Oral Motion to Have the Board Take Matter Under Advisement Pending a Ruling by the Supreme Court. Respondents submitted a list of pending appeals before the Hawaii Supreme Court and the First Circuit Court involving similar issues of exhaustion of contractual remedies, including: S.C. No. 23491 (Decision No. 402 in Case No. CE-03-283); S.C. No. 23163 (Order No. 1732 in Case No. CE-03-423); Civ. No. 00-1-1867-06 (Order No. 1866 in Case No. CE-03-237); Civ. No. 00-1868-06 (Order No. 1864 in Case No. CE-03-445); and S.C. No. 23535 (Order No. 1812 in Case No. CE-03-300). The Board thereupon issued Order No. 1933 granting POE's motion to continue the case pending disposition of the appeals on September 26, 2000.

As the respective courts have rendered their rulings in the foregoing appeals, the Board hereby makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. POE was for all time relevant a Tower Operator I employed by the Department of Transportation (DOT), State of Hawaii, an employee within the meaning of HRS § 89-2 and included in Unit 03.
2. TAKUSHI was for all times relevant, the Director, DHRD, State of Hawaii and the representative of the public employer within the meaning of HRS § 89-2.
3. The applicable collective bargaining agreement provides in Article 11 that "[a]ny complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure." The grievance procedure provides for an informal grievance step, three formal steps, and a final formal step of arbitration, which only the union can initiate.
4. By letters dated June 10, 1997, June 12, 1997, and June 16, 1997, POE requested information to process/investigate a grievance from TAKUSHI.

5. TAKUSHI did not specifically respond to the foregoing letters requesting information within seven working days of POE's requests.
6. By letter dated July 7, 1997, POE filed a grievance alleging that TAKUSHI violated Article 11A of the Unit 03 Agreement by failing to respond to POE's requests for information within seven working days. The grievance was processed through Step 3 of the Grievance Procedure of the Agreement.
7. POE did not request his union to take the grievance to arbitration.
8. POE did not file a complaint against the union for refusing to arbitrate his grievance.
9. POE brings his grievance to the Board for the adjudication of the alleged contract violation.

CONCLUSIONS OF LAW

1. HRS § 89-13(a)(8) provides that it shall be a prohibited practice for a public employer or its designated representative wilfully to violate the terms of a collective bargaining agreement.
2. In the instant complaint, POE alleges that TAKUSHI violated Article 11A of the Unit 03 Agreement by failing to respond to his requests for information within seven working days thereby violating § 89-13(a)(8), HRS. POE thus seeks to have this Board adjudicate his grievance, i.e., the merits of his contract claim.
3. Previously, in Order No. 1732, Order Granting Respondents' Motion to Dismiss Prohibited Practice Complaint and/or for Summary Judgment, dated June 15, 1999, in Case No. CE-03-423, Lewis W. Poe, the Board dismissed POE's prohibited practice complaint which alleged the violation of the Agreement and HRS § 89-13(a)(8) for failing to exhaust his contractual remedies. The Board concluded:

Under the applicable grievance procedure, the contract provides that only the union can request arbitration of a grievance. In order to exhaust the contractual remedies, Complainant should have asked the union to arbitrate the grievance. If the union elected not to arbitrate the case, Complainant could have filed a prohibited practice complaint against the union for breaching its duty of fair representation. Since Complainant failed to

request the union to arbitrate the grievance, the allegations of Section 89-13(a)(8), HRS, violations in the complaint are dismissed for failure to exhaust contractual remedies.

Id., Order No. 1732 (6/15/99), Case No. CE-03-423, Lewis W. Poe, affirmed on other grounds in Poe v. Hawai'i Labor Relations Board, 97 Hawai'i 528, 40 P.3d 930 (2002). See also, Decision No. 402, Case No. CE-03-283, Lewis W. Poe, 6 HLRB 55 (1999), affirmed in Civil No. 99-4200-11 on 5/5/00, and affirmed by Summary Disposition Order in S.C. No. 23491 on 2/26/04; Order No. 1812 (11/16/99), Case No. CE-03-300, Lewis W. Poe, affirmed by Summary Disposition Order in S.C. No. 23535 on 2/26/04; and Order No. 1864 (5/16/00), Case No. CE-03-445, Lewis W. Poe, Order No. 1866 (5/17/00), Lewis W. Poe, Case No. CE-03-237, Order No. 1882 (6/14/00), Lewis W. Poe, Case No. CE-03-379, Order No. 1883 (6/16/00), Lewis W. Poe, in Case No. CE-03-416, and Order No. 1885 (6/16/00), Lewis W. Poe, in Case No. CE-03-404, consolidated and affirmed in Poe v. Hawai'i Labor Relations Bd., 105 Hawai'i 97, 94 P.3d 652 (2004).

4. In the foregoing cases, the Board held that before POE, a unionized employee can proceed with a breach of contract claim against his employer before the Board, he must establish that the union breached its duty of fair representation in failing to pursue his grievance through the contractual grievance procedure. Procedurally, the breach of duty claim must first be addressed in order to proceed against the employer.¹
5. There is no evidence in the record that POE requested the union to take his case to arbitration or that the union refused to arbitrate his grievance.
6. POE did not file a complaint against the union for refusing to arbitrate his grievance.

¹In Poe v. Hawai'i Labor Relations Bd., 105 Hawai'i 97, 94 P.3d 652 (2004), the Court held that POE failed to exhaust his contractual remedies in pursuing grievances against employer and thus lacked standing to pursue his claim before the Board. The Court recognized that an employee who is prevented from exhausting his or her contractual remedies may bring an action against an employer for breach of a collective bargaining agreement provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance. The Court found that POE did not request that the union advance four of his claims through arbitration, and POE conceded that he could not prove that union breached its duty of fair representation by denying employee's request to advance the fifth grievance. The Court thus affirmed the Board's dismissal of POE's prohibited practice complaints. This case is dispositive of the issues presented in the instant complaint.

7. The Board concludes that the instant complaint should be dismissed for failure to exhaust contractual remedies.

ORDER

The Board hereby grants Respondent's motion to dismiss the complaint and denies POE's counter motion for summary judgment.

Dated: Honolulu, Hawaii, April 29, 2005.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



CHESTER C. KUNITAKE, Member



KATHLEEN RACUYA-MARKRICH, Member

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