

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

DEBRA PIMENTEL,

Complainant,

and

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

Respondent.

CASE NO. CU-10-256

ORDER NO. 2460

ORDER GRANTING RESPONDENT
UPW'S MOTION TO DISMISS AND/OR
FOR SUMMARY JUDGMENT;
DENYING COMPLAINANT'S MOTION
TO MOVE FORWARD WITH CASE
AND/OR SUMMARY JUDGMENT;
AND DENYING COMPLAINANT'S
REQUEST TO STRIKE OR DISMISS
SUPPLEMENTAL SUBMISSION

ORDER GRANTING RESPONDENT UPW'S MOTION
TO DISMISS AND/OR FOR SUMMARY JUDGMENT; DENYING
COMPLAINANT'S MOTION TO MOVE FORWARD WITH CASE
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REQUEST TO STRIKE OR DISMISS SUPPLEMENTAL SUBMISSION

On May 15, 2007, Complainant filed a prohibited practice complaint (Complaint) against Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Respondent, UPW or Union), alleging the Respondent engaged in or is engaging in a prohibited practice or practices within the meaning of Hawaii Revised Statutes (HRS) § 89-13.¹ Complainant specified five grievances that were the subject of prohibited practice complaint, Case No. CU-10-225,² and asserted that her complaints regarding these grievances were repeatedly bounced from union agent to union agent, to no avail. Complainant requested that Respondent “[bring] closure to all pending arbitration matters.”

¹Complainant asserted violation of HRS §§ 89-13(a)(1), (5), (7), and (8); 89-13(b)(1), (4), and (5); 89-16.5; and 89-16.6.

²The Board dismissed the complaint in Case No. CU-10-225 in Order No. 2239, dated March 17, 2004. In that proceeding, Respondent indicated that it planned to arbitrate said grievances.

On May 22, 2007, Respondent filed its answer to the Complaint and filed a Motion to Dismiss and/or for Summary Judgment (Respondent's Motion), asserting lack of jurisdiction, failure to state a claim for relief, failure to exhaust contractual remedies, lack of standing, and absence of judicial controversy.

On June 1, 2007, Complainant filed her Request to Move Forward with Case No. CU-10-256 and/or Summary Judgment (Complainant's Motion).

On July 5, 2007, the Board held a hearing on Respondent's Motion and Complainant's Motion, pursuant to HRS §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). Present at the hearing were Complainant, pro se, and Herbert R. Takahashi, Esq., for Respondent.

On July 11, 2007, Respondent filed a Supplemental Submission in Support of Union's Motion to Dismiss and/or for Summary Judgment (Supplemental Submission).

On July 18, 2007, Complainant filed a request to strike or dismiss the Supplemental Submission (Request to Strike).

On July 20, 2007, Complainant filed a Request to Motion Discovery in Support of Motion to Move Forward with the Board (Request for Discovery). On July 23, 2007, the Respondent filed UPW's Memorandum of Points and Authorities in Opposition to Complainant's Motion for Discovery.

After considering the record and the arguments made before the Board, for the following reasons, the Board grants Respondent's Motion for failure to state a claim with respect to alleged violations of HRS §§ 89-13(a)(1), (5), (7), and (8), 89-16.5, and 89-16.6; and for mootness rendering the dispute non-justiciable for all remaining claims. The Board denies Complainant's Motion and Complainant's Request to Strike.

FINDINGS OF FACT

1. Complainant was or is at all relevant times included in Bargaining Unit 10 and a member of the UPW.
2. Respondent is an employee organization and the exclusive bargaining representative, within the meaning of HRS § 89-2, of employees included in Bargaining Unit 10.
3. The Complaint was filed on May 15, 2007.
4. On May 22, 2007, Respondent filed its answer to the Complaint, and also filed Respondent's Motion asserting lack of jurisdiction, failure to state a

claim for relief, failure to exhaust contractual remedies, lack of standing, and absence of judicial controversy.

5. On June 1, 2007, Complainant filed Complainant's Motion.
6. On July 11, 2007, Respondent filed its Supplemental Submission, consisting of several letters to Complainant, dated July 9, 2007, notifying her that Respondent would not proceed further on the grievances at issue here.
7. The Supplemental Submission contains information that is relevant to the Board's consideration of Respondent's Motion to Dismiss. Based upon the date of the letters contained therein, the documents were not available to be produced to the Board at or before the time of hearing on Respondent's Motion to Dismiss.
8. On July 18, 2007, Complainant filed her Request to Strike, urging the Board to exclude the Supplemental Submission by Respondent.
9. The Complaint alleges Respondent engaged in or is engaging in a prohibited practice or practices within the meaning of HRS § 89-13, and asserted violation of HRS §§ 89-13(a)(1), (5), (7), and (8); 89-13(b)(1), (4), and (5); 89-16.5; and 89-16.6. Complainant asserted that her complaints regarding certain grievances were repeatedly bounced from union agent to union agent, to no avail.
10. Between October 5, 2004, and April 30, 2007, Complainant has repeatedly written to, and met with Respondent's agents, informing them that the assigned attorney has not moved the matters forward in arbitration. Complainant did not receive a response. Complainant later learned, from the attorney's secretary, that the attorney was routinely busy with other urgent/rushed matters, and recently had personal medical issues.
11. Complainant requested that Respondent "[bring] closure to all pending arbitration matters."
12. At hearing, Complainant clarified that the grievances at issue here are ES-03-12, ES-03-29, ES-03-76, ES-03-90, and ES-03-93.
13. Grievance ES-03-12 involved allegations of unsafely handing a vehicle. On March 12, 2003, Respondent filed Grievance ES-03-12 on Complainant's behalf. On April 3, 2003, apparently based upon a fact-finding investigation conducted by the employer in October 2002, the employer

exonerated Complainant of the charge. Complainant did not receive discipline as a result. By letter dated July 9, 2007, Respondent notified Complainant that it would not proceed further with the grievance, as there was insufficient proof the employer violated the collective bargaining agreement.

14. Grievance ES-03-29 involved overtime and compensation or credit for overtime worked. Complainant was ultimately granted credit for compensatory time off in lieu of compensation for overtime worked by the employer. The union considered the employer's action to be a substantial and good faith effort to remedy the grievance. Complainant also requested that the employer submit an amendment to her W-2 for the year 2002 to the Internal Revenue Service (IRS). It is Respondent's position, however, that the collective bargaining agreement does not expressly require the employer to submit W-2 changes or amendments to the IRS. By letter dated July 9, 2007, Respondent notified Complainant that it would not proceed further with the grievance, as there was insufficient proof the employer violated the collective bargaining agreement.
15. Grievance ES-03-76 involved a five-day suspension regarding violation of the Standards of Conduct and performance of duty. The alleged incident occurred December 2, 2002. The suspension was effective September 8 through September 12, 2003. On February 10, 2004, Respondent notified the employer of its intent to arbitrate the dispute. By letter dated July 9, 2007, Respondent notified Complainant that it would not proceed further with the grievance, as there was insufficient proof that the employer violated the collective bargaining agreement. Respondent also recommended that Complainant request the employer to remove all derogatory material concerning her five-day suspension from her personnel file pursuant to the collective bargaining agreement.
16. Grievance ES-03-90 involved the handling of keys. By settlement agreement dated June 21, 2005, the parties agreed to settle the grievance by taking the dispute to mediation. By letter dated July 9, 2007, Respondent notified Complainant that its grievance case file in the matter was closed, and that no further action would be taken by Respondent.
17. Grievance ES-03-93 involved Complainant's detachment from one facility to another. By letter dated July 9, 2007, Respondent notified Complainant that it would not proceed further with the grievance, as it appeared the employer acted within its lawful authority under HRS § 89-9(d).

18. In Case No. CU-10-225, which was ultimately dismissed by the Board, Respondent indicated that it planned to arbitrate the grievances that are the subject of the present Complaint.
19. Respondent sometimes submits notices of intent to arbitrate to the employers as a precaution to preserve its rights under the collective bargaining agreement, given the time limitations in the agreement.

CONCLUSIONS OF LAW

1. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the complainant. Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. See Yamane v. Pohlson, 111 Hawai'i 74, 81 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).
2. However, when considering a motion to dismiss [pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(1)] the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Id., (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).
3. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter, "relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawai'i 118, 905 P.2d 624.
4. The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id.
5. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. Id.

6. The Board's Rules of Practice and Procedure do not specifically address the issue of supplemental submissions in support of motions to dismiss or for summary judgment. However, Board rule HAR § 12-42-8(g)(10) provides in relevant part:

Amendment of documents:

- (A) Any document filed in a proceeding may be amended, in the discretion of the board, at any time prior to the issuance of a final order thereon.

Accordingly, a supplemental submission to a motion may be allowed, in the Board's discretion, as an amendment to the motion if filed prior to the issuance of a final order on the motion.

7. The Supplemental Submission contains information that is relevant to the Board's consideration of Respondent's Motion to Dismiss; the documents were not available to be produced to the Board at or before the time of hearing on Respondent's Motion to Dismiss; they do not unduly delay proceedings or prejudice the other party's ability to respond; and they directly address the issues raised in the Complaint. The Board therefore exercises its discretion to allow the Supplemental Submission and accordingly denies Complainant's Request to Strike.
8. Complainant asserted violation of HRS §§ 89-13(a)(1), (5), (7), and (8); 89-13(b)(1), (4), and (5); 89-16.5; and 89-16.6. HRS § 89-13(a)³ governs

³HRS § 89-13(a) provides in relevant part (emphasis added):

It shall be a prohibited practice for a public employer or its designated representative wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
* * *
- (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;
- (8) Violate the terms of a collective bargaining agreement;

prohibited practices committed by a public employer or its designated representative, and thus on its face does not apply to Respondent. Accordingly, Complainant's allegations of violation of HRS §§ 89-13(a)(1), (5), (7), and (8) are dismissed for failure to state a claim upon which relief can be granted against Respondent.

9. HRS § 89-16.5⁴ governs access to personal records by an employee organization. HRS § 89-16.6⁵ governs the disclosure of information

provides: ⁴HRS § 89-16.5 governs access to personal records by an employee organization, and

Exclusive representatives shall be allowed access to an employee's personal records which are relevant to the investigation or processing of a grievance. The exclusive representative shall not share or disclose the specific information contained in the personal records and shall notify the employee that access has been obtained.

⁵HRS § 89-16.6 governs disclosure to an exclusive representative and provides:

- (a) The appropriate government agencies shall, upon written request, disclose to an exclusive representative information relating to the administration of payroll deductions as authorized by section 89-4, as follows: name; mailing address; social security number; bargaining unit; date of change in bargaining unit status of the employee; full time equivalence of the employee; the employee's leave without pay status with effective dates and duration; basic rate of pay; types and effective dates of personnel actions that affect the amount and payment of the basic rate of pay; salary scale and range or equivalent; salary step or equivalent; amounts and dates of differential pay; amounts and dates of statutory dues deductions; and amounts and dates of other authorized voluntary payroll deductions remitted to the exclusive representative; except that this provision shall not apply to information regarding present or former employees involved in an undercover capacity in a law enforcement agency.
- (b) Information disclosed to the exclusive representative under this section shall be provided within a reasonable time after receipt of the written request.
- (c) An exclusive representative receiving government records

relating to the administration of payroll deductions by government agencies to exclusive representatives . Complainant does not articulate any action or inaction by Respondent that would establish a violation of HRS §§ 89-16.5 or 89-16.6 sufficient to give her standing to bring such a prohibited practice complaint. Accordingly, Complainant's allegations of violation of HRS §§ 89-16.5 and 89-16.6 are dismissed for failure to state a claim upon which relief can be granted against Respondent.

10. With respect to the remaining allegations, violation of HRS §§ 89-13(b)(1), (4), and (5), HRS § 89-13(b) provides that it shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under [HRS chapter 89];

* * *

(4) Refuse or fail to comply with any provision of [HRS chapter 89]; or

(5) Violate the terms of a collective bargaining agreement.

The facts supporting these alleged violations of HRS § 89-13(b) are that Complainant was bounced from one union agent to another without receiving a response to her inquiries, and that Respondent failed to move on the grievances in a timely or reasonable fashion into the arbitration process.

11. It is unfortunate that Complainant did not receive a response to her inquiries until after she filed the instant Complaint. The facts viewed in the light most favorable to Complainant, as the Board must do for purposes of Respondent's Motion to Dismiss, indicate that there was undue delay in responding to Complainant's inquiries and in providing Complainant with a final determination on Respondent's decision to not proceed to arbitration. However, Respondent's Supplemental Submission provides closure for the

pursuant to this section shall be subject to the same restrictions on disclosure of the records as the originating agency.

(d) Information disclosed pursuant to this section shall be provided in a form conducive to electronic data processing; provided the employer possesses appropriate data processing capability.

grievances at issue here, and further, renders “moot” the Board’s ability to provide a meaningful remedy for Respondent’s failure to respond to Complainant’s inquiries and/or act on the pending grievances in a timely manner.

12. Thus, at this stage of the proceedings 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). In Wong v. Board of Regents, University of Hawaii, 62 Haw. 391, 616 P.2d 201 (1980), 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.

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).

13. Accordingly, the Board dismisses the remaining claims as moot and non-justiciable. To the extent Complainant may believe Respondent’s final decision to not pursue the pending grievances any further was itself somehow wrongful under the law, that issue is not before the Board in the present Complaint.
14. Given the Board’s dismissal of the substantive claims in the Complaint, the Board also concludes that the issues raised in Respondent’s Request for Discovery are immaterial to the disposition of the case. Therefore, the Board need not address the merits of Respondent’s Request for Discovery.
15. For the above-discussed reasons, the Board grants Respondent’s Motion for failure to state a claim with respect to alleged violations of HRS §§ 89-13(a)(1), (5), (7), and (8), 89-16.5, and 89-16.6; and for mootness

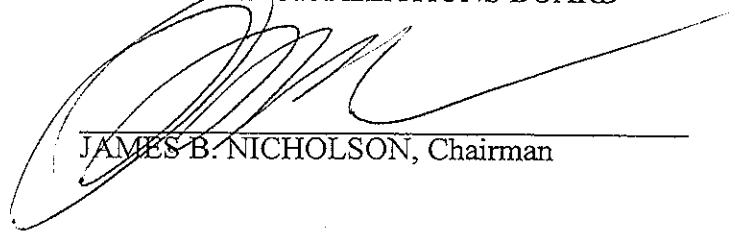
rendering the dispute non-justiciable for all remaining claims. The Board denies Complainant's Motion and Complainant's Request to Strike.

ORDER

The Board hereby grants Respondent's Motion to Dismiss and/or for Summary Judgment in the instant prohibited practice Complaint; denies Complainant's Request to Move Forward with Case No. CU-10-256 and/or Summary Judgment and denies Complainant's request to strike Supplemental Submission.

DATED: Honolulu, Hawaii, July 30, 2007.

HAWAII LABOR RELATIONS BOARD



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JAMES B. NICHOLSON, Chairman



A handwritten signature in black ink, appearing to read 'Emory J. Springer', is written over a horizontal line.

EMORY J. SPRINGER, Member



A handwritten signature in black ink, appearing to read 'Sarah R. HiraKami', is written over a horizontal line.

SARAH R. HIRAKAMI, Member

Copies sent to:

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