

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

SUSAN K. ANDERSON,

Complainant,

and

ANN PAULINO, Principal, Keaau High
School, Department of Education, State of
Hawaii; and DEPARTMENT OF
EDUCATION, State of Hawaii,

Respondents.

CASE NO. CE-05-638

ORDER NO. 2461

ORDER GRANTING RESPONDENTS'
MOTION TO DISMISS PROHIBITED
PRACTICE COMPLAINT FILED
MAY 11, 2007

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On May 11, 2007, Complainant filed a prohibited practice complaint (Complaint) against Respondents, alleging that on May 3, 2007, the principal acted in retaliation to a request Complainant made that the principal turn off the security feature on an e-mail to Complainant so that Complainant could print the e-mail out for her records, in violation of Hawaii Revised Statutes (HRS) § 89-14(a)(4); additionally, Complainant alleged that free exchange of ideas is not allowed with the principal, in violation of HRS § 89-1.

On May 23, 2007, Respondents filed their answer to the Complaint, and on June 5, 2007, Respondents filed a Motion to Dismiss Prohibited Practice Complaint Filed May 11, 2007 (Motion to Dismiss). The Motion to Dismiss asserted that Complainant failed to state a claim upon which relief can be granted, failed to exhaust contractual remedies, and that any allegations in the Complaint that occurred more than ninety days prior to the filing of the Complaint were time-barred. Respondents also asserted that the Complaint should more properly be viewed as alleging a prohibited practice under HRS § 89-13(a)(8), for violation of collective bargaining agreement.

On July 26, 2007, the Board held a hearing on Respondent's Motion to Dismiss pursuant to HRS §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). Participating in the hearing were Complainant, pro se, via telephone, and Julian T. White, Deputy Attorney General, for Respondents.

For the following reasons, the Board grants Respondents' Motion to Dismiss for failure to state a claim upon which relief can be granted and for failure to exhaust contractual remedies.¹

FINDINGS OF FACT

1. Complainant was or is, at all times relevant to this proceedings, a special education teacher at Keaau High School, which is part of the Department of Education, State of Hawaii (DOE).
2. Respondents were or are, at all times relevant to this proceeding, public employers within the meaning of HRS § 89-2.²
3. As a special education teacher at Keaau High School, Complainant was or is, at all times relevant to this proceeding, a public employee within the meaning of HRS § 89-2³ and a member of the Hawaii State Teachers Association (HSTA) covered by the Unit 05 collective bargaining agreement (CBA).

¹As discussed in the Board's Conclusions of Law, the applicable statutes and rules require that prohibited practice complaints be filed within 90 days of the alleged violation. To the extent Complainant is asserting allegations that occurred more than 90 days prior to May 11, 2007, such allegations are untimely and the Board will dismiss those allegations; however, the Complaint also contains timely allegations, and accordingly, the Board does not dismiss the entire Complaint based upon the timeliness argument.

²HRS § 89-2 provides in relevant part:

"Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees.

³HRS § 89-2 provides in relevant part:

"Employee" or "public employee" means any person employed by a public employer except elected and appointed officials and such other employees as may be excluded from coverage in section 89-6.

(HRS § 89-6 governs appropriate bargaining units).

4. The Complaint was filed on May 11, 2007, alleging that on May 3, 2007, the principal of Keaau High School retaliated against Complainant after Complainant requested that the principal turn off the security feature on an e-mail to Complainant so that Complainant could print the e-mail out for her records, by shutting down Complainant's "Lotus Notes" used for DOE e-mails, in violation of HRS § 89-13(a)(4). The Complaint also alleged that free exchange of ideas is not allowed with the principal, and that on March 16, 2007, the principal ordered Complainant to only address one parent complaint out of four during a meeting and the principal ended the meeting when Complainant spoke, in violation of HRS § 89-1.
5. Additional facts alleged in the Complaint are that the principal accused Complainant of being insubordinate in a summary of conference letter, dated March 21, 2007; the principal retaliated by turning off Complainant's e-mail capability at the school, impairing Complainant's job performance as a special education English teacher; on-going harassment by the principal for the past two years; and Complainant's teaching line that she has had for four years at the school is being changed to a line nobody wants, thus her teaching career is being damaged by an assignment that she does not want.
6. For purposes of the Motion to Dismiss, the Board accepts the foregoing allegations in the Complaint as true.
7. At the Board's hearing on the Motion to Dismiss, Complainant explained to the Board that she feels she is being targeted, by being threatened and harassed, because she enforces the school's rules and discipline policy, that she considers the issue to be about workplace violence, and that Administration does not support her. Complainant alleges the manner in which her Lotus Notes were taken away was violent, discriminatory, and capricious.
8. Complainant uses Lotus Notes e-mail as part of her job to receive notices such as sign-ups, case manager updates, and similar work-related notices. Complainant stated that she was accused by the principal of using Lotus Notes for non-professional purposes; however, for purposes of the Motion to Dismiss, the Board accepts the Complainant's assertion that she uses Lotus Notes for professional purposes as true.
9. During the 2006-2007 school year, Complainant was a member of the school's Association Policy Committee (APC). Teachers can bring up complaints to the APC, and one representative from the school goes to the District meeting. The APC is organized by the school, not the HSTA.

10. Complainant is not an HSTA agent or steward, and has not alleged any union-related activities relevant to this proceeding, or interference with rights or activities under HRS chapter 89.
11. On May 15, 2007, the HSTA filed a Grievance on Complainant's behalf, pursuant to the CBA.
12. The Grievance covers substantially the same factual issues as the present Complaint; however, Complainant asked that the Board also consider the issue of workplace violence in this proceeding.
13. On May 23, 2007, Respondents filed their answer to the Complaint.
14. On June 5, 2007, Respondents, in their Motion to Dismiss, assert that Complainant failed to state a claim upon which relief can be granted, failed to exhaust contractual remedies, and that any allegations in the Complaint that occurred more than ninety days prior to the filing of the Complaint were time-barred. Respondents also asserted that the Complaint should more properly be viewed as alleging a prohibited practice under HRS § 89-13(a)(8), for violation of collective bargaining 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. With respect to Respondent's argument that allegations which occurred more than ninety days prior to the filing of the Complaint are time-barred, HAR § 12-42-42 provides in relevant part:

(a) A complaint that any public employer, public employee, or public organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation. (emphasis added).

4. Additionally, HRS § 89-14 provides that “[a]ny controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9[.]” In turn, HRS § 377-9, dealing with the prevention of unfair labor practices, clearly provides that, “No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.” HRS § 377-9(1).
5. The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. This limitation is jurisdictional and provided by statute; accordingly, it may not be waived by either the Board or the parties. Tri County Tel. Ass’n., Inc. v. Wyoming Public Service Comm’n., 910 P.2d 1359, 1361 (Wyo. 1996) (holding that, “As a creature of the legislature, an administrative agency has limited powers and can do no more than it is statutorily authorized to do”); see generally, HOH Corp. v. Motor Vehicle Industry Licensing Bd., Dept. of Commerce and Consumer Affairs, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) (“The law has long been clear that agencies may not nullify statutes”).
6. Accordingly, to the extent Complainant asserts allegations that occurred more than ninety days prior to May 11, 2007, such allegations are untimely and the Board hereby dismisses those allegations (for example, allegations of harassment occurring two years ago); however, the Complaint also contains timely allegations, and accordingly, the Board does not dismiss the entire Complaint based upon the timeliness argument.
7. With respect to Complainant’s claim of violation of HRS § 89-13(a)(4), that portion of the statute provides in relevant part:

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

* * *

- (4) Discharge or otherwise discriminated against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any

information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization[.]

8. Complainant has not alleged, and the facts presented to the Board and viewed in a light most favorable to Complainant have not demonstrated, that Complainant was discharged or otherwise discriminated against because of activity that is protected under HRS § 89-13(a)(4). Although Complainant recently (school year 2006-2007) served on the school's APC committee, such activity does not fall under HRS Chapter 89, nor has there been any assertion of facts to show employee was discriminated against for informing, joining, or being represented by the HSTA.⁴ The APC committee is organized by the school, not the HSTA. Thus, any alleged retaliation for her acts as a teacher of enforcing school policy and discipline does not violate HRS § 89-13(a)(4), nor do the allegations regarding Lotus Notes, or workplace violence.
9. Accordingly, the Board dismisses the HRS § 89-13(a)(4) claim for failure to state a claim upon which relief can be granted.
10. With respect to Complainant's HRS § 89-1⁵ claim, the Hawaii Supreme Court, in Poe v. Hawai'i Labor Relations Board, 97 Hawai'i 528, 40 P.3d 930 (2002), stated:

HRS § 89-1, the statement of policy, does not impose rights or duties upon which an enforceable claim will lie. The general rule of statutory construction is that policy declarations in statutes, while useful in gleaning the purpose of the statute, are not, of themselves, a substantive part of the law which can limit or expand upon the express terms of the operative statutory provisions.

* * *

Therefore, the broad policy statements within HRS § 89-1, entitled "Statement of findings and policy," do not impose binding duties or obligations upon any parties but, rather,

⁴Pursuant to HRS § 89-8(a), the employee organization which has been certified by the Board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit; in the present case, the exclusive representative is the HSTA.

⁵HRS § 89-1 is entitled "Statement of findings and policy."

provide a useful guide for determining legislative intent and purpose. These statements, therefore, do not implicate the prohibited practice provision of refusing or failing to comply with any provision of HRS chapter 89, as set forth in HRS § 89-13(7).

Id., at 540-41, 40 P.3d at 942-43 (quotation marks and brackets omitted).

11. Accordingly, the Board dismisses the HRS § 89-1 claim for failure to state a claim upon which relief can be granted, as that statute does not impose rights or duties upon which an enforceable claim will lie.
12. With respect to Respondent's argument that Complainant's claim should more appropriately be viewed as alleging a prohibited practice under HRS § 89-13(a)(8), for violation of collective bargaining agreement, HRS § 89-13(a)(8) provides in relevant part:

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

* * *

(8) Violate the terms of a collective bargaining agreement;

13. The Hawaii Supreme Court, as well as this Board, has used federal precedent to guide its interpretation of state public employment law. Hokama v. University of Hawai'i, 92 Hawai'i 268, 272 n. 5, 990 P.2d 1150, 1154 n. 5 (1999). Based upon federal precedent, the Hawaii Supreme Court has held that it is "well-settled that an employee must exhaust any grievance . . . procedures provided under a collective bargaining agreement before bringing a court action pursuant to the agreement." Id., at 272, 990 P.2d at 1154. The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process, allowing parties to develop their own uniform mechanism of dispute resolution. It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means. Id. See, also, HSTA v. Department of Education, 1 HPERB 253, 261 (1972) (Case No. CE-05-41; Decision No. 22) (the Board has discretion to require the parties to utilize the contractual arbitration procedure); Poe v. Cayetano, 6 HLRB 55, 56 (1999) (Case No. CE-03-283; Decision No. 402) (the complainant must exhaust available contractual remedies prior to bringing a prohibited

practice complaint against the employer alleging a violation of the collective bargaining agreement).

14. Here, Complainant conceded during the hearing that her Grievance probably echos the present proceeding, although Complainant also raised the issue of workplace violence at the hearing. While workplace violence is a subject matter to be taken seriously, it is not within the Board's jurisdiction absent a showing that it somehow falls within the purview of HRS Chapter 89.
15. Accordingly, even if Complainant intended to assert a claim under HRS § 89-13(a)(8) before Board, Complainant has not exhausted her remedies under the CBA to address her claims. Moreover, Complainant currently has a Grievance pending which was filed by the HSTA, and remedies provided by the CBA must be pursued.⁶ The Board dismisses any claim of violation of HRS § 89-13(a)(8) for failure to exhaust contractual remedies.
16. For the above-discussed reasons, the Board grants Respondents' Motion to Dismiss for failure to state a claim upon which relief can be granted and for failure to exhaust contractual remedies.

ORDER

The Board hereby grants Respondents' Motion to Dismiss Prohibited Practice Complaint Filed May 11, 2007.

DATED: Honolulu, Hawaii, August 2, 2007.

HAWAII LABOR RELATIONS BOARD


JAMES B. NICHOLSON, Chairman

⁶“It shall be a 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).

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EMORY J. SPRINGER, Member


SARAH R. HIRAKAMI, Member

Copies sent to:

Susan Anderson
Julian T. White, Deputy Attorney General