

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

ANN A. SUGIBAYASHI,

Complainant,

and

DEPARTMENT OF EDUCATION, Office of
Personnel Services, State of Hawaii,

Respondent.

CASE NO. CE-06-642

ORDER NO. 2471

ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS, FILED ON SEPTEMBER 5,
2007

ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS FILED ON SEPTEMBER 5, 2007

On July 31, 2007, Complainant filed a prohibited practice complaint (Complaint) against Respondent, alleging, inter alia, that a dissident faction of the school did not support her appointment as Principal and acted in concert with the Complex Area Superintendent (CAS) to promote and solicit complaints and criticisms against Complainant for the purpose of removing Complainant as Principal without affording her a fair opportunity to demonstrate her leadership and abilities. Complainant also alleged that the CAS reprimanded Complainant over a trivial criticism; that Complainant was provided a copy of her Professional Evaluation Program which gave Complainant markedly unsatisfactory ratings; that the evaluation was arbitrary, capricious, inadequate, and based upon an incomplete and one-sided investigation; that the evaluation was not undertaken in good faith but rather with a preconceived goal of removing Complainant as Principal; and that the evaluation was undertaken to restrain and coerce Complainant in her attempts to exercise her rights to be promoted to Principal VIII, to remain Principal of the high school, to pursue collective bargaining, and to act in concert with other employees in furtherance of their mutual aid and protection. Complainant alleged that Respondent's actions violated Article 4 (Maintenance of Rights, Benefits, and Privileges), Article 12 (Tenure), and Article 14 (Representation) of the collective bargaining agreement then in effect between the State of Hawaii (State) and the Hawaii Government Employees Association; Hawaii Revised Statutes (HRS) §§ 89-3 and 89-13(a)(1), (2), (3), (4), (5), (7), and (8); and applicable Department of Education regulations for evaluation of school principals.

Respondent filed its Answer to the Complaint on August 9, 2007. On September 5, 2007, Respondent filed a Motion to Dismiss the Complaint for failure to exhaust contractual remedies.

On September 20, 2007, the Board held a hearing on Respondent's Motion to Dismiss pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(g) and HRS §§ 89-14 and 89-5(i)(4) and (5). The hearing was attended by Lowell K.Y. Chun-Hoon, Esq., for Complainant and Julian T. White, Deputy Attorney General, for Respondent.

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

FINDINGS OF FACT

1. Complainant was or is, at all times relevant to this proceeding, the Principal of McKinley High School (MHS), which is part of the Department of Education, State of Hawaii (DOE).
2. Respondent was or is, at all times relevant to this proceeding, a public employer within the meaning of HRS § 89-2.²

¹The Board takes notice that on September 21, 2007, Complainant filed a second prohibited practice complaint against Respondent in Case No. CE-06-646, and that the parties are considering consolidating that case with the present case; however, as the cases have not yet been consolidated, the Board's decision here is applicable only to the present case, although the legal issues in Case No. CE-06-646 are likely to be similar.

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.

3. As the Principal of MHS, Complainant was or is, at all times relevant to this proceeding, a public employee within the meaning of HRS § 89-2,³ a member of the Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA), included in bargaining unit 06,⁴ and covered by the Unit 06 collective bargaining agreement (CBA).
4. The Complaint was filed on July 31, 2007.
5. The Complainant alleges that a dissident faction of the school did not support her appointment as Principal and acted in concert with the CAS to promote and solicit complaints and criticisms against Complainant for the purpose of removing Complainant as Principal without affording her a fair opportunity to demonstrate her leadership and abilities; that the CAS reprimanded Complainant over a trivial criticism; that Complainant was provided a copy of her Professional Evaluation Program which gave Complainant markedly unsatisfactory ratings; that the evaluation was arbitrary, capricious, inadequate, and based upon an incomplete and one-sided investigation; that the evaluation was not undertaken in good faith but rather with a preconceived goal of removing Complainant as Principal; and that the evaluation was undertaken to restrain and coerce Complainant in her attempts to exercise her rights to be promoted to Principal VIII, to remain as Principal of the high school, to pursue collective bargaining, and to act in concert with other employees in furtherance of their mutual aid and protection.
6. The Complainant alleges that Respondent's actions violated Article 4 (Maintenance of Rights, Benefits, and Privileges), Article 12 (Tenure), and Article 14 (Representation) of the collective bargaining agreement then in effect between the State and the HGEA; HRS §§ 89-3 and 89-13(a)(1), (2), (3), (4), (5), (7), and (8); and applicable DOE regulations for evaluation of school principals.

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).

⁴Bargaining unit 06 is composed of Educational officers and other personnel of the department of education under the same pay schedule. See HRS § 89-6(a)(6).

7. On August 9, 2007, Respondent filed its Answer to the Complaint, and on September 5, 2007, filed a Motion to Dismiss the Complaint for failure to exhaust contractual remedies.
8. Complainant's attorney proposed that the parties stipulate to continuing proceedings before the Board while the grievance process continued forward towards a resolution; however, Respondent did not agree to such a stipulation.
9. In July of 2006, Complainant was appointed to the position of High School Principal VIII at MHS.
10. On May 3, 2007, Complainant received an "unsatisfactory" performance evaluation from the CAS.
11. Article 15 of the Unit 06 CBA provides for a grievance procedure for complaints alleging a violation concerning the interpretation or application of a specific provision of the CBA filed by bargaining unit educational officers or by the HGEA on behalf of bargaining unit educational officers.
12. On June 5, 2007, the HGEA filed a Grievance on behalf of Complainant. The Grievance alleged violation of Article 4 (Maintenance of Rights, Benefits and Privileges), Article 12 (Tenure), and Article 14 (Representation). The nature of the Grievance was stated as:

On May 3, 2007, the grievant was provided her final performance evaluation (PEP-SL) for the period of July 2006 to May 1, 2007 from Dr. Raelene Chock, Complex Area Superintendent. The grievant received a rating of "1" unsatisfactory for each of the four standards and the annual rating of overall professional leadership performance.
13. The relief sought in the grievance is expungement of the PEP-SL for the period of July 2006 to May 1, 2007; that Complainant be tenured as a High School Principal VIII; that Complainant not be subject to any retaliation as a result of the filing of the grievance; and that all wages, rights, and benefits be restored to Complainant.
14. As of the date of the hearing on the Motion to Dismiss, the grievance was still pending at the Step 1 level.

15. By letter dated June 28, 2007, Complainant was informed by the Deputy Superintendent that she would be removed as Principal of MHS due to unsatisfactory performance during her probationary period.
16. The Complaint here alleges actions by the employer that, if true, may constitute a breach of the CBA, such as Articles 4 (Maintenance of Rights, Benefits, and Privileges), 12 (Tenure), and 14 (Representation), and/or standards surrounding the completion of employee evaluations. The grievance, however, covers substantially the same factual issues as the present Complaint.
17. Although the Complaint alleges generally that the evaluation was undertaken to restrain and coerce Complainant in her attempts “to pursue collective bargaining, and to act in concert with other employees in furtherance of their mutual aid and protection[,]” there are no specific facts alleged to support this conclusory allegation. Complainant has not alleged that she is a union agent or steward, and has not alleged any union-related activities that were restrained or interfered with, or any other facts relating to interference or restraint of collective bargaining activities or action in concert with other employees for mutual aid or protection as protected by HRS Chapter 89.

CONCLUSIONS OF LAW AND DISCUSSION

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. The Complaint alleges the violation of Article 4 (Maintenance of Rights, Benefits, and Privileges), Article 12 (Tenure), and Article 14 (Representation) of the CBA; HRS §§ 89-3 and 89-13(a)(1), (2), (3), (4), (5), (7), and (8); and applicable DOE regulations for evaluation of school principals.

4. HRS § 89-3 provides:

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, including retiree health benefit contributions, 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.

5. HRS § 89-13, provides in relevant part:

(a) 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;
- (2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;
- (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;
- (4) Discharge or otherwise discriminate 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;
- (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; [or]

(8) Violate the terms of a collective bargaining agreement[.]

6. With the exception of HRS § 89-13(a)(8) (violation of the terms of a collective bargaining agreement), Complainant has not sufficiently alleged facts to support her claims of violation of HRS §§ 89-3 and 89-13(a)(1), (2), (3), (4), (5), or (7). Complainant has not alleged that she is a union agent or steward, and has not alleged any union-related activities that were restrained or coerced, or any other facts relating to interference or coercion of collective bargaining activities or action in concert with other employees or mutual aid or protection as protected by HRS Chapter 89, or similar allegations, nor have there been facts alleged to support a claim of refusal to bargain in good faith. Accordingly, the Board dismisses these claims for failure to state a claim upon which relief can be granted.
7. With respect to the claims of violation of the terms of the CBA, violation of DOE regulations for evaluation of school principals, and violation of HRS § 89-13(a)(8) (prohibited practice of violating the terms of the CBA), the Board dismisses those claims for failure to exhaust contractual remedies.
8. The Hawaii Supreme Court, as well as this Board, has used federal precedent to guide its interpretation of state public employment laws. Hokama v. University of Hawai'i (Hokama), 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." Hokama, 92 Hawai'i at 272, 990 P.2d at 1154; Poe v. Hawai'i Labor Relations Board (Poe), 105 Hawai'i 97, 101, 94 P.3d 652, 656 (2004) (citations omitted). "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 orderly and less time-consuming settlement of disputes through alternative means." Id. (Citations omitted).
9. In Poe, supra, the Hawaii Supreme Court discussed when an employee who is covered by a grievance procedure in a collective bargaining agreement may bring an action against the employer:

Based on analogous federal cases previously cited by this [C]ourt and the policy considerations articulated in them, we

hold 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.”

Id. at 103-04, 94 P.3d at 658-59 (quoting Vaca v. Sipes, 386 U.S. 171, 186 (1967)). Accordingly, an employee may bring an action against the employer for breach of a collective bargaining agreement when the employee is prevented from exhausting his or her contractual remedies, and the employee can prove that the union breached its duty of fair representation in the handling of the grievance.

In Poe, because Poe did not prove that his union breached its duty of fair representation, the Hawaii Supreme Court concluded that Poe “lacked standing” to pursue his claim against the employer before the Board. Id. at 104, 94 P.3d at 659.

10. Complainant argues that the circumstances surrounding Poe are distinguishable from her situation in that she is working with her union in pursuing her grievance, while Poe pursued his grievance without requesting union assistance thus circumventing the established grievance machinery of collective bargaining. However, a public employee may pursue a grievance in his or her own name without intervention of the union, except for the final step of arbitration. That Poe chose to pursue the grievance steps on his own (short of arbitration) as provided for in the collective bargaining agreement cannot therefore be viewed as an attempt to circumvent the established machinery of collective bargaining; furthermore, even where Poe asked the union to pursue his grievance (to Step 4 arbitration) the Court held that Poe nevertheless lacked standing to pursue his claim against the employer because he failed to establish that the union breached its duty of fair representation in refusing to do so. Similarly, here, Complainant has not shown (or alleged) that there was a breach of duty of fair representation by the union preventing her from exhausting contractual remedies.
11. Complainant also asserts that appellate and Board precedent beyond Poe support denying Respondent’s Motion to Dismiss. While Complainant cites Board precedent such as HSTA v. Department of Education, 1 HPERB 253, 261 (1972) for the proposition that the Board retains concurrent jurisdiction

over a prohibited practice involving alleged breach of collective bargaining agreement even where there is a grievance procedure, such precedent pre-dates the Hawaii Supreme Court's Poe decision. In Poe, the Court acknowledged that there are issues relating to the exhaustion requirement that the Court had not addressed in previous opinions:

Although this [C]ourt's opinion in *Poe I* cited federal cases for the proposition that exceptions to the exhaustion requirement exist, it had no occasion to address the requirement under federal law that the employee demonstrate that the union breached its duty of fair representation in order to bring a claim that the employer breached its duty of fair representation. However, this court has, in prior cases, alluded to the duty of fair representation.

105 Hawai'i at 103, 94 P.3d at 658 (emphasis added). The Board must evaluate labor law in the state in light of the Hawaii Supreme Court's evolving guidance. In the present case, the most recent Poe decision discusses in depth the requirements that must be met before an employee may bring an action against the employer alleging violations of the CBA beyond the grievance procedure.

12. Complainant argues that the Board should hold the present proceedings in abeyance pending the outcome of the grievance, and that dismissal would be prejudicial to Complainant because she was required to file her Complaint on July 31, 2007, in order to comply with the 90-day filing requirement in HAR § 12-42-42(a), which provides:

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 by a public employee, employee organization, public employer, or any party in interest within ninety days of the alleged violation.

Complainant argues that since the PEP-SL evaluation for Complainant was conducted on May 3, 2007, the 90-day period from the date of the alleged violation would end on August 1, 2007, and that had the Complaint been filed after that time, it would be vulnerable to dismissal without adjudication as untimely.

However, the Board does not view Complainant's cause of action as "accruing" until Complainant is prevented from exhausting the grievance

procedure and can prove that the union breached its duty of fair representation in the handling of the grievance. Accordingly, although the Board hesitates to speculate on any future ruling regarding the timeliness of such an action, the Board must read the 90-day statute of limitations in light of the Court's ruling in Poe that an employee may not bring an action until such time as the employee is prevented from exhausting the grievance procedure and can prove that the union breached its duty of fair representation in the handling of the grievance.

13. Finally, the Board notes that HRS § 89-10.8(a) provides in relevant part:

A public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. The grievance procedure shall be valid and enforceable and shall be consistent with the following:

* * *

- (3) With respect to any adverse action resulting from an employee's failure to meet performance requirements of the employee's position, the grievance procedure shall provide that the final and binding decision shall be made by a performance judge as provided in this section.

14. Accordingly, the Board hereby dismisses the Complaint for failure to state a claim and for failure to exhaust contractual remedies.

ORDER

For the above-discussed reasons, the Board hereby grants Respondent's Motion to Dismiss the Complaint.

DATED: Honolulu, Hawaii, October 9, 2007.

HAWAII LABOR RELATIONS BOARD



JAMES B. MICHOLSON, Chair

ANN A. SUGIBAYASHI, Complainant, and DEPARTMENT OF EDUCATION, Office of
Personnel Services, State of Hawaii
CASE NO. CE-06-642
ORDER NO. 2471
ORDER GRANTING RESPONDENT'S MOTION TO DISMISS, FILED ON SEPTEMBER 5,
2007


EMORY J. SPRINGER, Member


SARAH R. HIRAKAMI, Member

Copies sent to:

Lowell K. Y. Chun-Hoon, Esq.
Julian T. White, Deputy Attorney General