

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-06-646

ORDER NO. 2475

ORDER GRANTING RESPONDENT'S  
MOTION TO DISMISS

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

On September 21, 2007, Complainant filed a prohibited practice complaint (Complaint) against Respondent, alleging, *inter alia*, that Complainant was removed as Principal of McKinley High School (MHS) and not granted tenure due to allegedly unsatisfactory performance when in actual fact Complainant fully satisfied or exceeded all relevant performance standards during her probationary period. The Complaint alleges that the removal and denial of tenure was arbitrary, capricious, inadequate, and based on an incomplete and one-sided investigation and ignored or failed to credit the many positive accomplishments Complainant achieved; was not undertaken in good faith; and was undertaken to restrain and coerce Complainant in her lawful attempts to exercise her right to be promoted to Principal VIII, to seek to remain Principal of MHS, to pursue collective bargaining, and to act in concert with other employees in furtherance of their mutual aid and protection. The Complaint alleges violation of Article 4 (Maintenance of Rights, Benefits, and Privileges), Article 12 (Tenure), and Article 14 (Representation) of the collective bargaining agreement (CBA) then in effect between the State of Hawaii and the Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA); Hawaii Revised Statutes (HRS) §§ 89-3 and 89-13(a)(1), (2), (3), (4), (5), (7), and (8); and applicable Department of Education (DOE) regulations for evaluation of school principals.

Respondent filed its Answer to the Complaint on September 28, 2007. On October 22, 2007, Respondent filed a Motion to Dismiss the Complaint for failure to state a claim and failure to exhaust contractual remedies.

On November 1, 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 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 state a claim and failure to exhaust contractual remedies.

### FINDINGS OF FACT

1. Complainant was or is, at all times relevant to this proceeding, the Principal of MHS, which is part of the DOE, State of Hawaii.
2. Respondent was or is, at all times relevant to this proceeding, a public employer within the meaning of HRS § 89-2.<sup>1</sup>
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<sup>2</sup> and a member of the HGEA, included in Unit 06 and covered by the Unit 06<sup>3</sup> CBA.
4. The Complaint was filed on September 21, 2007.

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<sup>1</sup>HRS § 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.

<sup>2</sup>HRS § 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).

<sup>3</sup>See HRS § 89-6(a)(6).

5. The Complaint alleges, inter alia, that Complainant met or exceeded all legitimate standards of performance required by her employer, the DOE, during her probationary period; that from the inception of her appointment, Complainant encountered a factious school faculty and staff and was required to work with personnel who had opposed her selection as Principal and supported another candidate; that a dissident faction acted in concert with the Complex Area Superintendent (CAS) to promote and solicit unwarranted complaints and criticisms against Complainant for the express purpose of removing her as Principal without a fair opportunity to demonstrate her leadership and abilities; that the CAS reprimanded Complainant over a trivial complaint, of which she was not previously informed, concerning her speaking excessively to the Vice Principal in contrast to the treatment of other faculty; that Complainant received a Professional Evaluation Program with markedly unsatisfactory ratings; that by letter dated June 8, 2007, DOE Deputy Superintendent informed Complainant that she would be removed as Principal of MHS and not granted tenure due to allegedly unsatisfactory performance; and that effective July 1, 2007, Complainant was removed as Principal of MHS resulting in a loss in the amount of salary and retirement benefits.
6. The Complaint alleges that her removal and denial of tenure was arbitrary, capricious, inadequate, and based on an incomplete and one-sided investigation and ignored or failed to credit the many positive accomplishments Complainant achieved; was not undertaken in good faith; and was undertaken to restrain and coerce Complainant in her lawful attempts to exercise her right to be promoted to Principal VIII, to seek to remain Principal of MHS, to pursue collective bargaining, and to act in concert with other employees in furtherance of their mutual aid and protection. The Complaint alleges violation of Article 4 (Maintenance of Rights, Benefits, and Privileges), Article 12 (Tenure), and Article 14 (Representation) of the CBA then in effect between the State of Hawaii and 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.
7. On September 28, 2007, Respondent filed its Answer to the Complaint, and on October 22, 2007, Respondent filed a Motion to Dismiss the Complaint for failure to state a claim and failure to exhaust contractual remedies.
8. On July 1, 2006, Complainant was appointed to the position of High School Principal VIII at MHS for a probationary one year school term.
9. On May 3, 2007, Complainant received an "unsatisfactory" performance evaluation from the CAS.

10. 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.
11. Effective July 1, 2007, Complainant was removed as Principal at MHS, resulting in a loss in the amount of salary and retirement benefits. Complainant was re-assigned to her former position as Principal of Royal Elementary School.
12. Article 15 of the Unit 06 CBA provides for a grievance procedure for complaints filed by bargaining unit educational officers or on behalf of bargaining unit educational officers by the HGEA.
13. On or about July 27, 2007, the HGEA filed a Step 1 Grievance on behalf of Complainant, challenging her removal as Principal of MHS. The Grievance alleged violation of Article 4 (Maintenance of Rights, Benefits and Privileges), Article 12 (Tenure), and Article 14 (Representation) of the Unit 06 CBA. The nature of the Grievance was stated as:

“Article 12 – Tenure” states educational officers with tenure cannot be suspended, demoted, discharged, or terminated without proper cause. We also disagree that her performance was unsatisfactory. Therefore, her probationary period should have been extended for an additional year.

“Article 14 – Representation” requires the employer to review and examine all available evidence, including factors supporting the employee, whether or not the employee offers such information in their own defense. This article also requires the educational officer to be informed of any complaint filed against the educational officer.

Since the employer took adverse action against the grievant through a demotion and transfer, we request the following information:

1. How were other educational officers, in similar situations, treated as compared to the grievant?
2. Did the employer inform the grievant of any complaints, including repeated and anonymous complaints filed against her as required under Article 14 – Representation?

3. What were the specific reasons for her removal as principal of McKinley High School?
  4. Did the employer review and consider all available evidence and data, including factors supporting the grievant's position?
  5. Did the employer in this case apply its policies and procedures equally and consistently?
  6. Besides removal from her position at McKinley High School, did management consider any other options?
14. The relief sought in the Grievance is tenure as an educational officer at Principal VIII level; back pay as Principal VIII from the date of removal as MHS Principal; and removal of all derogatory material from Complainant's personnel file related to her removal as MHS Principal.
  15. At the November 1, 2007, hearing on Respondent's Motion to Dismiss, Complainant's Grievance was still pending at the Step 1 level.
  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 DOE regulations for evaluations of school principals. The Grievance, however, covers substantially the same factual issues as the present Complaint.
  17. Although the Complaint alleges generally the actions of Respondent were undertaken to restrain and coerce Complainant in her lawful attempts to exercise her right to be promoted to Principal VIII, to seek to remain Principal of MHS, to pursue collective bargaining, and to act in concert with other employees in furtherance of their mutual aid and protection, in violation of HRS §§ 89-3 and 89-13(a)(1), (2), (3), (4), (5), (7), and (8), there are no specific facts alleged to support these conclusory allegations. 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, that the employer refused a specific request to bargain over a negotiable subject, or any other facts relating to interference or coercion 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 (9<sup>th</sup> Cir. 1989)) (Yamane).

2. The Intermediate Court of Appeals has noted:

A Rule 12(b)(6), [Hawaii Rules of Civil Procedure], dismissal is warranted only if the claim is "clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some facts which will necessarily defeat the claim."

Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 776 P.2d 745, 749 (1983) (quoting 2A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 12.08, at 2271 (2d ed. 1982)).

3. 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. Yamane, 111 Hawai'i 74, 81, 137 P.3d 980, 987 (2006) (citing McCarthy v. United States, 850 F.2d 558, 560 (9<sup>th</sup> Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).
4. The Complaint alleges 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 Department of Education regulations for evaluation of school principals.
5. 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.

6. 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[.]

7. 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 has 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.

8. With respect to the claims of violation of terms of the CBA, violation of DOE regulations for evaluation of school principals, and violation 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.
9. 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." Poe v. Hawaii Labor Relations Board, 105 Hawaii 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).
10. In Poe, 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.

11. 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, in direct conflict with the role of the exclusive representative in its attempt to address an issue on behalf of all similar employees with the employer; by contrast, Complainant's efforts are consistent with and in harmony with her union's role. 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 a conflict with the role of the exclusive representative; 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.
12. 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 Hawaii 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 beyond the grievance procedure.

13. Complainant also 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 September 21, 2007, in order to comply with the 90-day filing rule 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 Complainant was removed from her position as Principal of MHS effective July 1, 2007, the ninety (90) day period from the date of the alleged violation would end on approximately September 29, 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.

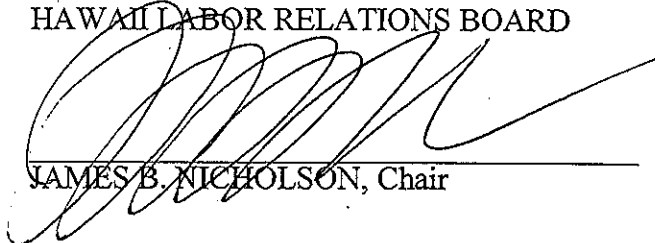
14. Accordingly, the Board hereby dismisses the Complaint for failure to state a claim and for failure to exhaust contractual remedies.

ORDER

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

DATED: Honolulu, Hawaii, November 7, 2007

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member



SARAH B. HIRAKAMI, Member

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