

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

GLEN Y. TANAKA,

Complainant,

and

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO; and DEPARTMENT
OF TRANSPORTATION, Airports Division,
Maui District, State of Hawaii,

Respondents.

CASE NOS.: CU-01-262
CE-01-653

ORDER NO. 2494

ORDER GRANTING RESPONDENTS'
MOTIONS TO DISMISS PROHIBITED
PRACTICE COMPLAINT FOR
FAILURE TO EXHAUST
CONTRACTUAL REMEDIES

ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS PROHIBITED
PRACTICE COMPLAINT FOR FAILURE TO EXHAUST CONTRACTUAL REMEDIES

On January 10, 2008, Complainant GLEN Y. TANAKA (Complainant) filed a prohibited practice complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). Complainant alleged that he was improperly denied overtime work and pay by Respondent DEPARTMENT OF TRANSPORTATION, Airports Division, Maui District, State of Hawaii (DOT), and Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Union) did not represent him fairly because it failed to file a grievance pursuant to the collective bargaining agreement (CBA) on his behalf.

On January 24, 2008, the Union filed its Answer to the Complaint. Also on January 24, 2008, the DOT filed a Motion to Dismiss Complainant's Prohibited Practice Complaint Regarding Respondent Department of Transportation, Airport Division, Maui District, State of Hawaii (DOT's Motion to Dismiss), asserting that Complainant failed to state a claim upon which relief can be granted and that Complainant failed to exhaust his contractual remedies under the CBA. On January 25, 2008, the Union filed its Motion to Dismiss Complaint Filed January 10, 2008, and/or for Summary Judgment (Union's Motion to Dismiss), asserting lack of standing, failure to exhaust contractual remedies, and failure to state a claim for relief.

On February 21, 2008, the Board held a hearing on Respondents' Motions to Dismiss pursuant to Hawaii Revised Statutes (HRS) §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). Participating in the hearing were

Charles K.Y. Khim, Esq., representing the Union, and Christine Kurashige, Deputy Attorney General, representing the DOT. The Board attempted to contact Complainant, pro se, via his telephone number on file with the Board; however, the Board was not able to reach Complainant and accordingly Complainant did not participate in the hearing. The Respondents moved for dismissal due to default or failure to prosecute by the Complainant.

For the reasons discussed below, the Board denies the motions to dismiss due to default or failure to prosecute; the Board grants Respondents' Motions to Dismiss for failure to exhaust contractual remedies and therefore does not reach a decision on the remaining arguments raised by the Respondents in their pleadings.

FINDINGS OF FACT

1. Complainant was or is, at all times relevant to these proceedings, a custodial worker for the DOT, and a public employee within the definition of HRS § 89-2.¹
2. The DOT was or is, at all times relevant to this proceeding, a public employer within the meaning of HRS § 89-2.²

¹HRS § 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).

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. The Union was or is, at all times relevant to this proceeding, an employee organization and the exclusive bargaining representative, within the meaning of HRS § 89-2,³ of employees included in Bargaining Unit 01.
4. Complainant was a member of the Union and included in Bargaining Unit 01 and covered by the Unit 01 CBA.
5. On January 10, 2008, Complainant filed his Complaint against the Respondents with the Board. Complainant alleged that he was improperly denied overtime work and pay by the DOT, and that the Union did not represent him fairly because it failed to file a grievance pursuant to the CBA on his behalf. Specifically, the Complaint states:

Date of my complaint (VIOLATION) is Nov. 23, 24, 2007. Scheduled for (OVERTIME) work on the 23[rd] at 10 PM, and ending on the 24th at 06:30 AM. As I enclosed both exhibit[s] as evidence from "CUSTODIAL SUPERINTENDENT" VIVIAN GABIN. The document show[s] is to which I the first one on the alternates list of four (4) which were[n't] call from superintendent at all. A listed amount of eight (8) employee[s] needed. Only four (4) employee[s] show-up for overtime work.

Again superintendent did[n't] exercise by calling alternate's list. Clearly shows second to the last paragraph admits statement. That upcoming week I notify B/A:EATON by phone/in person about complaint. On my behalf I wanted B/A:EATON to fil[e] a grievance and [follow]-up with me [there] after. True our first discussion in person at our U.P.W. OFFICE. Also B/A EATON agree to submit complaint before the deadline reaches to date. Again, encouraging only to find out I [was] "MIS-REPRESENT[ED]" BY B/A: EATON, by not filing "COMPLAINT/GRIEVANCE" at all.

³HRS § 89-2 provides in relevant part:

"Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

I also enclosed several written documents that were furnished by the employer. These documents were posted for "SPECIAL PROJECT OVERTIME". Again, encouraging the entire custodial staff to sign up. U.P.W. B/A:EATON were well aware of [these] documents. Also B/A:EATON obtained copies, for his [reference] into filing grievance/complaint. [Affirmative] discussion, B/A:EATON will be filing within time element (18 Calendar days).

Two (2) verbal voice messages were left by B/A:EATON on two several occasions. I will [use] both for RELEVANT FACTS in my complaint. 1). On 12/14/2007 at 11:27 AM. 2). On 12/17/2007 at 11:45 AM/

Under SECTION 15 of U.P.W. (UNIT 01) contract agreement, both union [or] B/A violates by not enforcing agreement to [insure] conditions are followed. UNION PRIORITY WELL DOCUMENTED IS MEMBERSHIP "SATISFACTION" TO ALL. That also [was] not followed.

7. On December 12, 2007, the Union initiated a Step 1 Grievance on Complainant's behalf, alleging, inter alia, the following:

On 11/23/07 Tanaka was denied OVER TIME (O.T.) When the Employer failed to contact him on 11/23/07 for 11/24/07 work. The Superintendent, Vivian Gabin, was called by UPW Business Agent Akea Eaton on or around 11/26/07 and initially acknowledged that she was wrong by not officially contacting Tanaka. However, when the union tried to persuade the Employer to remedy the overtime denial, Gabin decided not to pay Tanaka the O.T. and various violations because she said that Harriet Lurendez was on Temporary Assignment and that Lurendez had allegedly notified Tanaka of the O.T. Tanaka claims that only Larry Morrilo (Supervisor) was on duty and that Morrilo did not in fact notify Tanaka of the O.T.

The Grievance alleged a "continuous violation" that was first known to the Union on December 11, 2007, and violations of section 26 ["Overtime"], 32 ["Night Differential"], 33 ["Call-Out"], 34 ["Meal Allowance"], 1 ["Recognition"], and 14 ["Prior Rights, Benefits and Perquisites"] of the CBA.

8. On January 24, 2008, the Union filed its Answer to the Complaint. Also on January 24, 2008, the DOT filed its Motion to Dismiss, asserting that Complainant failed to state a claim upon which relief can be granted and that Complainant failed to exhaust his contractual remedies under the CBA. On January 25, 2008, the Union filed its Motion to Dismiss, asserting lack of standing, failure to exhaust contractual remedies, and failure to state a claim for relief.
9. At the Pre-hearing Conference held by the Board on February 11, 2008, and attended by Complainant via telephone, Complainant expressed concern regarding the date the Grievance was initiated, as the CBA provides that a Step 1 grievance shall be filed with the department head in writing within eighteen calendar days after the occurrence of the alleged violation.⁴
10. On February 21, 2008, the Board held a hearing on Respondents' Motions to Dismiss pursuant to HRS §§ 89-5(i)(4) and (5), and HAR § 12-42-8(g)(3). At 9:00 a.m., the Board attempted to contact Complainant, *pro se*, via his telephone number on file with the Board; however, there was no answer and the Board left a message. At 9:10 a.m., the Board again attempted to contact Complainant but there was no answer and the Board again left a message. The Respondents moved for dismissal due to default or failure to prosecute by Complainant.
11. As of the time of the Board's hearing on the Respondents' Motions to Dismiss, the Grievance was still pending.
12. The Board finds that the Grievance submitted by the Union on December 12, 2007, involves the substance of Complainant's Complaint before the Board. Accordingly, the Board finds that Complainant failed to exhaust his contractual remedies.

⁴Section 15.11 of the CBA provides in part that the term "after the occurrence of the alleged violation" shall mean:

- 15.11 a.4. Other Alleged Violation(s): Eighteen (18) calendar days after the alleged violation(s) occurred unless the violation(s) are continuing as provided in Section 15.11 b.
- 15.11 b. Within eighteen (18) calendar days after the alleged violation first became known to the Employee or the Union if the Employee did not know of the alleged violation if it is a continuing violation.

13. Although Complainant expressed concern regarding the timing of the Grievance, the Board finds that the Grievance is still pending and has not run its course. Should the Grievance ultimately prove to be untimely, and that untimeliness proves to be fatal to the Grievance, Complainant may bring a complaint at that time if he can show that the Union breached its duty of fair representation in its handling of the employee's grievance and that Complainant likely would have prevailed if not for the breach of duty.

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. With respect to Respondents' motions to dismiss due to default or failure to prosecute, made at the hearing on the Motions to Dismiss, the Board denies the motions to dismiss due to default or failure to prosecute. A party need not affirmatively oppose a motion for summary judgment that fails to show prima facie (1) that the undisputed facts foreclose "genuine issues as to any material facts and (2) that the moving party is entitled to judgment as a matter of law." Arakaki v. SCD-Olanani Corp., 110 Hawai'i 1, 6, 129 P.3d 504, 509 (2006) (brackets omitted). A non-movant's failure to oppose the facts averred by the movant may constitute admission of those facts, but those facts must nonetheless establish that the movant is entitled to relief. Id. (citations omitted). This principle appears applicable to motions to dismiss as well as motions for summary judgment. Accordingly, while the Board grants the Respondents' Motions to Dismiss based upon failure to exhaust contractual remedies for the reasons discussed below, the Board denies the motions to dismiss due to default or failure to prosecute.
7. With respect to Respondents' Motions to Dismiss for failure to exhaust contractual remedies, 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 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).
8. 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.

9. The Grievance submitted by the Union on December 12, 2007, involves the substance of Complainant's Complaint before the Board. Although Complainant expressed concern regarding the timing of the Grievance, the Board finds that the Grievance is still pending and has not run its course. Should the Grievance ultimately prove to be untimely, and that untimeliness proves to be fatal to the Grievance, Complainant may bring a complaint at that time if he can show that the Union breached its duty of fair representation in its handling of the employee's grievance and that Complainant likely would have prevailed if not for the breach of duty. However, as it stands, Complainant has not yet been prevented from exhausting his contractual remedies, and remedies provided by the CBA should be pursued prior to bringing a prohibited practice complaint.
10. For the above-discussed reasons, the Board grants Respondents' Motions to Dismiss for failure to exhaust contractual remedies.

ORDER

The Board hereby denies Respondents' motions to dismiss due to default or failure to prosecute. The Board grants Respondents' Motions to Dismiss based upon failure to exhaust contractual remedies and therefore does not reach a decision on the remaining arguments raised by the Respondents in their pleadings.

GLEN Y. TANAKA v. UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,
et al.

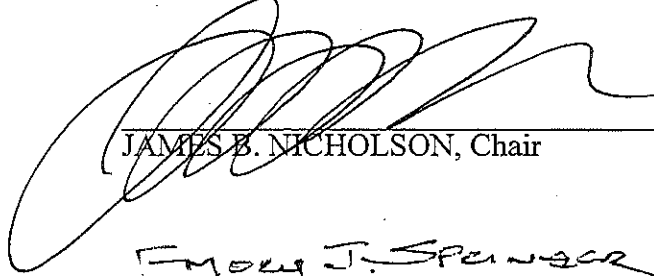
CASE NOS.: CU-01-262, CE-01-653

ORDER NO. 2494

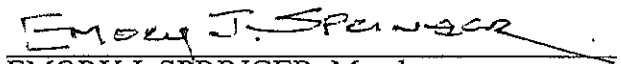
ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS PROHIBITED PRACTICE
COMPLAINT FOR FAILURE TO EXHAUST CONTRACTUAL REMEDIES

DATED: Honolulu, Hawaii, February 27, 2008

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member



SARAH R. HIRAKAMI, Member

Copies sent to:

Glen Y. Tanaka
Charles K.Y. Khim, Esq.
Christine Kurashige, Deputy Attorney General