

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

LINDA K. HADLEY,

Complainant,

and

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO and HAWAII YOUTH
CORRECTIONAL FACILITY, Department
of Human Services, State of Hawaii,

Respondents.

CASE NOS.: CU-09-261
CE-09-651

ORDER NO. 2567

ORDER GRANTING RESPONDENT
HYCF'S MOTION TO DISMISS
COMPLAINT

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On December 5, 2007, Complainant LINDA K. HADLEY (HADLEY), pro se, filed a prohibited practice complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). HADLEY alleges, inter alia, that she filed a lawsuit under the whistleblowers act against Respondent HAWAII YOUTH CORRECTIONAL FACILITY, Department of Human Services (DHS), State of Hawaii (HYCF), and others, because she was harassed and retaliated against after testifying at joint judicial hearings in 2005. Complainant alleges that she reached a settlement in the lawsuit on or about July 24, 2007 and prior to signing the agreement, she was denied payments for consultative calls from July 24, 2007 to September 2007. Complainant alleges that her position has been circumvented by her administrators and she was being investigated by DHS although she was not officially notified of the investigation. Complainant alleges she filed two grievances with the Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) subsequent to July 2007 for nonpayment of overtime and consultative calls. Complainant also alleges she filed several grievances regarding harassment, retaliation, and for circumventing her position. Complainant alleges that her grievances have been ignored and the Union has failed to fairly represent her in her concerns.

On December 11, 2007, Respondent HYCF filed a Motion for Particularization of the Complaint because, inter alia, it was unable to determine what

provisions of Hawaii Revised Statutes (HRS) § 89-13 were violated. On December 17, 2007, the HGEA filed its answer to the Complaint. On December 18, 2007, the Board granted HYCF's Motion for Particularization of the Complaint in Order No. 2481.

On December 24, 2007, HADLEY filed a Particularization of the Complaint indicating that, *inter alia*, she was the employed by the State of Hawaii, Office of Youth Services and HYCF for more than seven years; she was the only Registered Professional Nurse III (RPN III) at the facility for one year; she was upset with the HGEA because of its representation at an arbitration hearing; since July 24, 2007, she filed a number of grievances with HGEA without any action taken by the Union; she was informed that she was being investigated by DHS; she had to file two grievances before being reimbursed for consultative calls and overtime from July 24, 2007 to September 2007; and HYCF violated HRS § 89-13(a)(8) by violating the collective bargaining agreement, i.e, by failing to promptly pay her for extra pay in violation of the pay lag ruling of the federal court; by making new protocol rules without her input; by rejecting her proposed policies and procedures for the healthcare service protocols of the section; by investigating her in an effort to bring disciplinary actions against her, and by paying standby pay to other state employees and not to her.

Thereafter, on December 26, 2007, HYCF filed an answer and a motion to dismiss the instant complaint.

The Board¹ conducted a hearing on the HYCF's motion to dismiss on January 24, 2008. Based on a careful review of the record and the arguments presented, the Board makes the following findings of fact, conclusions of law, and order granting Respondent HYCF's Motion to Dismiss the Complaint.

FINDINGS OF FACT

1. At all times relevant, HADLEY was a Registered Professional Nurse V at the HYCF and a public employee within the meaning of HRS 89-2² and included in Unit 09.³

¹Board Chair James B. Nicholson recused himself from these proceedings.

²HRS § 89-2 provides in part:

“Employee” or “public employee” means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section 89-6(g).

³HRS § 89-6 provides in part:

2. At all times relevant, the HYCF was an agency of the State of Hawaii and represented the interests of the public employer with respect to employees of the agency within the meaning of HRS § 89-2.⁴
3. At all times relevant, the HGEA was an employee organization and exclusive representative within the meaning of HRS § 89-2⁵ for HYCF employees belonging to Unit 09.

(a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

* * *

- (9) Registered professional nurses;

⁴HRS § 89-2 provides in 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 the interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

⁵HRS § 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.

* * *

“Exclusive representative” means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

4. The HGEA and the public employers are parties to the Unit 09 Agreement effective July 1, 2007, through June 30, 2009 (Contract). The Board takes notice of the Contract in its files received in accordance with Hawaii Administrative Rules (HAR) § 12-42-128⁶ pursuant to HRS § 91-10(4)⁷ and Hawaii Administrative Rules (HAR) §§ 12-42-8(g)(8)(F) and (G).⁸
5. HADLEY attached to her complaint a copy of her letter dated October 20, 2007 to the HGEA requesting the Union to initiate a grievance against "OYS, Martha Torney, EDIR, HYCF, Kale Au, and AYFA." HADLEY complained that she was being harassed, circumvented in her position, and placed in a hostile work environment. HADLEY wrote that 1) she had to write two letters to HGEA as step one and step two of the grievance process to be reimbursed from July 24, 2007 to September 2007 before she was compensated; 2) the EDIR conducted "educational sessions" with agency nurses and the RPN III to instruct them as to when they were permitted to

⁶HAR § 12-42-128 which provides as follows:

The public employer entering into a written collective bargaining agreement pursuant to chapter 89, HRS, shall file a copy of the agreement with the board within thirty days after execution and issuance.

⁷HRS § 91-10-(4) provides as follows:

In contested cases:

* * *

(4) Agencies may take notice of judicially recognizable facts. In addition, they may take notice of generally recognized technical or scientific facts within their specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed;

⁸HAR § 12-42-8(g) provides, in part, as follows:

- (F) The board may take notice of judicially recognizable facts.
- (G) The board may take notice of generally recognized technical or scientific facts within its specialized knowledge, however, parties shall be notified either before or during the hearing of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.

call HADLEY; 3) the EDIR invited a consultant to a Monday morning meeting without notifying her; 4) she found out that two people had been on call; and 5) she learned she was under investigation.

6. HADLEY also attached to her complaint a letter dated October 23, 2007, from Union Agent Jeff P. Morgan indicating that after review of the five items cited in her [October 20, 2007] letter, the Union was unable to recognize any violations of the BU (Unit) 09 agreement, and consequently determined the matters were not grievable.
7. In its Motion to Dismiss, the HYCF contends that any allegations which are more than 90 days old from the filing of the Complaint are time-barred and should be dismissed as violative of the Board's statute of limitations. The HYCF argued that the Board should order HADLEY to provide the dates of the alleged violations for each allegation set forth in the complaint. HYCF also contends that a Settlement, Release and Indemnification Agreement (Settlement Agreement) to resolve a hybrid action and Whistleblower court action applies to this Complaint and bars any claims against the State that occurred prior to July 4, 2007. HYCF also contends that HADLEY failed to exhaust her contractual remedies and the Board lacks jurisdiction over any matters which should be grieved. HYCF lastly argues that HADLEY failed to allege any facts which would support a contractual violation.
8. The Settlement Agreement, between Complainant and the State of Hawaii, the Department of Human Services, and Kaleve Tufono-Iosefa, dated September 12, 2007, attached as Exhibit A to HYCF's Motion to Dismiss the Complaint, was reached in Civil No. 06-1-0633-04 KSSA. The Settlement Agreement provides, in part:

WHEREAS, Plaintiff filed a Complaint on April 11, 2006 in the above Lawsuit, in the Circuit Court of the First Circuit, State of Hawaii, Civil No. 06-1-0633-04 KSSA; and

WHEREAS, each and every cause of action alleged by Plaintiff in the Lawsuit has been denied by the Defendants; and

WHEREAS, Plaintiff may claim other potential causes of action against the Defendants and one or more of any of their officers, agents, employees or representatives which may or may not have been initiated or asserted to date, arising out of or related to the alleged injuries and damages claimed to have been suffered by Plaintiff and/or arising out of or related to her employment with the State of Hawaii; and

WHEREAS, in order to avoid further expense and risk of litigation, the Plaintiff and Defendants now desire, upon the terms set forth herein, to release, settle, terminate, and discharge all claims, demands, actions, whether known or unknown and whether previously asserted or not asserted, which Plaintiff claims to have related to her employment with the State of Hawaii; and

WHEREAS, this Agreement shall not be construed as an admission by the Defendants of any fault, wrongdoing or liability whatsoever, and is entered into solely as a compromise and to avoid further costs and expenses;

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein, Plaintiff and Defendants hereby agree as follows:

1. Plaintiff will dismiss with prejudice any and all claims asserted or which could have been asserted against the Defendants in the State Court Action, including all claims against the State, any State agency and/or any State employee.

2. Plaintiff agrees to withdraw the appeal against the Defendant State of Hawaii, the Department of Human Services and/or any State agency or State employee, currently pending in Case No. 06-15642, United State Court of Appeals for the Ninth Circuit, Linda K. Hadley v. Hawaii Government Employees' Association (HGEA), AFSCME, Local 152, AFL-CIO; and State of Hawaii, Department of Human Services. Plaintiff will continue with the appeal against Hawaii Government Employees' Association (HGEA) in Case No. 06-15642.

3. Plaintiff further agrees to dismiss with prejudice any and all claims asserted or which could have been asserted against the Defendant State of Hawaii, the Department of Human Services and/or any State agency or State employee in Civ. No. 05-00660 ACK/KSC, Linda K. Hadley v. Hawaii Government Employees' Association, AFSCME, Local 152, AFL-CIO, and State of Hawaii, Department of Human Services.

4. Plaintiff will withdraw and not pursue any and all pending grievances relating to Plaintiff's employment with the State. Plaintiff further agrees that she will not pursue any new grievances for the time period from her initial date of employment with the State up to and including July 24, 2007.

5. Within five business days after execution of this Agreement, Plaintiff shall withdraw all grievances and shall take all necessary action to cause the HGEA to submit all necessary documents dismissing with prejudice all of the grievance claims that Plaintiff made or could have made related to her employment up through July 24, 2007, against the State of Hawaii, the Department of Human Services, the Office of Youth Services, the Hawaii Youth Correctional Facility, any State agency and/or any State officer, agent, employee, or representative. This does not cover grievances from events after July 24, 2007.

* * *

9. On January 4, 2008, Complainant, by her counsel, filed an Opposition to Respondent HYCF's Motion to Dismiss the Complaint with the Board. Complainant argued, inter alia, that the facts alleged in this Complaint fall within the 90-day statute of limitations of HRS § 377-9(1) since Complainant alleged the last date of harassment and retaliation as being on October 4, 2007; documents appended to the Particularization referred to incidents involving Martha Torney occurring on September 10 - 17, 2007; on November 17, 2007, Complainant sent communications to DHS Director Lillian Koller about expressing her concerns for medication coverage at HYCF on or about November 17, 2007; the September 12, 2007 Settlement Agreement where Complainant agreed to withdraw any pending claims against the State and not pursue pending grievances for the time period from her employment up to and including July 24, 2007 does not bar the instant claims because these claims arose after July 24, 2007; the State's request for sanctions against her for violating the terms of the Settlement Agreement appears to violate Hawaii Administrative Rules (HAR) § 12-42-8(a)(5); Complainant's failure to exhaust contractual remedies is excused because the Union refused to pursue the grievance procedure by letter dated October 23, 2007; Complainant alleged sufficient facts to support violations of the collective bargaining agreement, i.e., failure to promptly pay extra pay, the State does not have the right to develop protocol without Complainant's input pursuant to UPW v. Hannemann, 106 Haw. 359, 105 P.3d 23 (2005) (Hannemann decision), Article 20 of the Contract required the employer to inform her of the investigation under the bill of rights, and she is being discriminatorily denied standby pay when she is on call 24 hours.
10. On January 17, 2008, the HYCF filed a reply to Complainant's opposition with the Board and requested the Board to take judicial notice of the HGEA Unit 09 July 1, 2007 - June 30, 2009 Collective bargaining agreement and

argued, inter alia, re: failure to pay Complainant promptly - Complainant failed to specify what provision of the Contract was violated by failing to promptly pay her what is due; Linda Kamimoto, Acting Business Services Supervisor II, stated in a Declaration, dated January 18, 2008, that Complainant had been paid in full for all work for which she submitted claims (for July 24, 2007 to present) and that she would receive payment for claims submitted on January 11, 2008 for November 1 - December 31, 2007 on February 5, 2008; re: failure to establish protocol rules without her analysis and advice - Complainant failed to specify what provision of the Contract was violated; management has an absolute right to establish protocols without Complainant's analysis and advice pursuant to Article 5, Rights of the Employer, HRS § 89-9(d), and the Hannemann decision; the alleged violations are barred by the Settlement Agreement (See B-27); re: circumventing calling Complainant to make medical decisions and diagnoses for the youth which only Complainant can make after hours - Complainant failed to specify what provision of the Contract was violated; the subject was repeatedly raised in the Circuit Court case and addressed in interrogatories in the Circuit Court case (B-4 and B-5); re: rejecting Complainant's proposed policies and procedure for medical protocols - Complainant failed to specify what provision of the Contract was violated; the allegation is barred by the Settlement Agreement (B-5); re: investigating Complainant without advising her of the nature of the investigation - Article 20 is not applicable to an investigation where the allegation is conducted by the employer; re: paying other employees who are on-call - Complainant failed to specify what provision of the Contract was violated; and this allegation is barred by the Settlement Agreement (B-27).

11. At the hearing held on January 24, 2008, Complainant's counsel, inter alia, requested the Board to strike the State's Reply because it is not permitted by the rules; argued that the State's motion was a motion for summary judgment rather than a motion to dismiss; and argued that the State interfered with the exercise of her rights guaranteed by statute, discriminated against her, and violated the terms of the Contract and committed prohibited practices pursuant to HRS §§ 89-13(a)(1), (4), and (8). Complainant, by and through her counsel, argued that the Union breached its duty of fair representation because it wouldn't support her in violation of HRS §§ 89-13(b)(1), (4), and (5).
12. The Board finds based upon the Complaint filed herein, that Complainant alleges that she was harassed and retaliated against because she testified at judicial hearings in 2005.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-14 and 377-9.
2. Complainant contends that the State committed prohibited practice in violation of HRS §§ 89-13(a)(1), (4), and (8). 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;

* * *
 - (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;

* * *
 - (8) Violate the terms of a collective bargaining agreement[.]
3. The applicable statutes and rules require that prohibited practice complaints be filed within 90 days of the alleged violation. The Board's Hawaii Administrative Rules ("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. TriCounty 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. The Board has construed the 90-day limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HPERB 186, 199 (1983). The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Instead, the period begins to run when “an aggrieved party knew or should have known that his statutory rights were violated.” Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978).
7. As the instant complaint was filed on December 5, 2007, claims which arose prior to 90 days of the filing of the complaint or September 6, 2007 would be barred by the Board’s statute of limitations. However, based on the pleadings in this case, it does not appear that any of Complainant’s specific claims against the HYCF are time-barred.
8. 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)) (Yamane).
9. 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)).

10. 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 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).
11. 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.
12. In her Complaint, HADLEY alleges, inter alia, that she was harassed or suffered retaliation by HYCF because she testified at judicial hearings in 2005. Complainant does not allege that her rights under Chapter 89 were interfered with, that she suffered any discrimination due to testimony given under HRS Chapter 89, or because she joined or supported the Union.
13. With respect to HRS §§ 89-13(a)(1) and (4), the Board finds Complainant has not sufficiently alleged facts to support her claims of violation of HRS §§ 89-13(a)(1) and (4). Accordingly, the Board dismisses these claims for failure to state a claim upon which relief can be granted.

14. Complainant also contends that HYCF committed prohibited practices by violating provisions of the Contract; i.e., HYCF failed to promptly pay extra pay, the HYCF developed protocols without Complainant's input pursuant to UPW v. Hannemann, 106 Hawai'i 359, 105 P.3d 23 (2005) (Hannemann decision), the employer failed to inform her of an investigation under the bill of rights set forth in Article 20, and she is being discriminatorily denied standby pay when she is on call 24 hours. In reviewing Complainant's allegations, the Board finds that while the Union failed or refused to file grievances on these issues on Complainant's behalf, Complainant did not file grievances on her own behalf.
15. The Grievance Procedure of the Contract provides, in part:

Article 14 - Grievance Procedure

A. Any complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure. ...

B. An individual Employee may present a grievance to her immediate supervisor and have her grievance heard without intervention of the Union, provided the Union has been afforded an opportunity to be present at the conference(s) on the grievance. Any adjustment made shall not be inconsistent with the terms of this Agreement. By mutual consent of the Union and the Employer, any time limits within each step may be extended.

* * *

D. Step 1. If the grievant is not satisfied with the result of the informal conference, she or the Union may submit a written statement of the grievance within seven (7) working days after receiving the answers to the informal complaint to the division head or her designee, or if the immediate supervisor does not reply to the informal complaint within seven (7) working days, the Employee or the Union may submit a written statement of the grievance to the division head or her designee within fourteen (14) working days from the initial submission of the informal complaint; or if the grievance was not discussed informally between the Employee and her immediate supervisor, the Employee or the Union may submit a written statement of the grievance to the

division head or her designee within the twenty (20) working day limitation provided for in paragraph "A" above.

A meeting shall be held between the grievant and a Union representative with the division head or her designee within seven (7) working days after the written grievance is received. Either side may present witnesses. The division head or her designee shall submit a written answer to the grievant or the Union within seven (7) working days after the meeting.

E. Step 2. If the grievance is not satisfactorily resolved at Step 1, the grievant or the Union may appeal the grievance in writing to the department head or her designee within seven (7) working days after receiving the written answer. The department head or her designee need not consider any grievance in Step 2 which encompasses different alleged violations or charges than those presented in Step 1. A meeting to discuss the grievance shall be held within seven (7) working days after receipt of the appeal. The department head or her designee shall reply in writing to the grievant or the Union within seven (7) days after the meeting.

* * *

G. Step 3. If the grievance is not satisfactorily resolved at Step 2, the grievant or the Union may appeal the grievance in writing to the Employer or her designee within seven (7) working days after receipt of the answer at Step 2. Within seven (7) working days after the receipt of the appeal, the Employer and the Union shall meet in an attempt to resolve the grievance. The Employer or her designee need not consider any grievance in Step 3 which encompasses a different alleged violation or charge than those presented in Step 2. The Employer or her designee shall reply in writing to the Union within seven (7) working days after the meeting.

H. Step 4: Arbitration. If the grievance is not resolved at Step 3 and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or her representative of its desire to arbitrate within ten (10) working days after receipt of the Employer's decision at Step 3.

16. Pursuant to Article 14 of the applicable Contract, either the Union or the employee is entitled to file a grievance at Step 1 of the Grievance Procedure but only the Union can request the grievance be arbitrated.
17. 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) (Poe). "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).
18. 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.

19. 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 in Poe 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.
20. 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 beyond the grievance procedure. See also, Poe v. HLRB, 97 Hawai'i 528, 531, 40 P.3d 930, 933 (2002) (holding that a "public employee pursuing an individual grievance exhausts his or her administrative remedies when the employee completes every step available to the employee in the grievance process and a request to the employee's exclusive bargaining representative to proceed to the last grievance step, which only the representative can undertake, would be futile").

21. Accordingly, based on the foregoing, the Board concludes that Complainant lacks standing to raise her contractual claims against HYCF before the Board because Complainant failed to exhaust her contractual remedies. Although the Complainant alleges that the Union refused to file grievances on her behalf, Complainant was nevertheless required to pursue the

grievances on her own behalf and exhaust the contractual grievance procedure.

ORDER

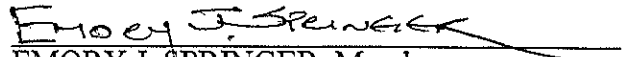
For the above-discussed reasons, the Board hereby grants Respondent HYCF's Motion to Dismiss the Complaint.

NOTICE OF SECOND PREHEARING CONFERENCE

NOTICE IS HEREBY GIVEN, that the Board will conduct a Second Prehearing Conference on **January 6, 2009 at 9:00 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii.

DATED: Honolulu, Hawaii, December 22, 2008.

HAWAII LABOR RELATIONS BOARD


EMORY J. SPRINGER, Member


SARAH R. HIRAKAMI, Member

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