

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of

LESLEY IAUKEA,

Complainant,

and

HONOLULU EMERGENCY MEDICAL SERVICES DIVISION, Honolulu Emergency Services Department, City and County of Honolulu and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,

Respondents.

CASE NOS.: CE-10-693  
CU-10-270

ORDER NO. 2568

ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS COMPLAINT FILED ON OCTOBER 20, 2008 AND/OR FOR SUMMARY JUDGMENT

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On October 20, 2008, Complainant LESLEY IAUKEA (Complainant or IAUKEA), pro se, filed a Prohibited Practice Complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). Complainant alleged, inter alia, that she was not paid for her last two weeks of work at HONOLULU EMERGENCY MEDICAL SERVICES DIVISION, Honolulu Emergency Services Department, City and County of Honolulu (EMS) and monies were also deducted for salary overpayments. Complainant alleges that she called the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) on numerous occasions and was told that she did not receive a reply because she was no longer in the Union. Complainant contends that Respondents committed prohibited practices within the meaning of Hawaii Revised Statutes (HRS) § 89-13.

On October 30, 2008, Respondent UPW, by and through its counsel, filed a Motion to Dismiss Complaint Filed on October 20, 2008 and/or for Summary Judgment with the Board. On November 10, 2008, Respondent EMS, by and through its counsel, filed a Substantive Joinder in UPW's Motion to Dismiss Complaint Filed on October 20, 2008 and/or for Summary Judgment with the Board.

The Board scheduled a prehearing/settlement conference on November 18, 2008. Complainant did not file a prehearing/settlement conference statement and did not appear before the Board for the prehearing/settlement conference.

On December 2, 2008, Respondents' motions to dismiss and/or for summary judgment came on for hearing before the Board. Complainant did not appear at the hearing. Respondents' respective counsel appeared before the Board and presented oral arguments in support of the instant motion.

Based on a review of the record, the Board makes the following findings of fact, conclusions of law, and order dismissing the instant complaint.

### FINDINGS OF FACT

1. Complainant was, for all times relevant, employed as an Emergency Services Technician on a limited term contract with the Emergency Services Department, City and County of Honolulu and included in bargaining unit 10.<sup>1</sup> Complainant was for all relevant times a public employee within the meaning of Hawaii Revised Statutes (HRS) § 89-2.<sup>2</sup>
2. At all times relevant, the EMS was an agency of the City and County of Honolulu and represented the interests of the public employer with respect to employees of the agency within the meaning of HRS § 89-2.<sup>3</sup>

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<sup>1</sup>HRS § 89-6 provides in part:

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

\* \* \*

(10) Institutional, health, and correctional workers; ....

<sup>2</sup>HRS § 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).

<sup>3</sup>HRS § 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

4. At all times relevant, the UPW was an employee organization and exclusive representative within the meaning of HRS § 89-2<sup>4</sup> for EMS employees included in Unit 10.
5. The UPW and the public employers are parties to the Unit 10 Agreement effective July 1, 2007, through June 30, 2009 (Contract).
6. On or about July 18, 2008, Ms. IAUKEA was informed that effective immediately, she was placed on authorized leave with pay until August 1, 2008 at which time her limited term contract would be terminated. During the separation process, the EMS determined that a salary overpayment had been made to Ms. IAUKEA and withheld the amount from her vacation payout.
7. On October 20, 2008, Ms. IAUKEA filed the instant complaint with the Board alleging, inter alia, that she was not paid for her last two weeks of work at EMS and improper amounts of monies were deducted from her salary for overpayments.

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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.

<sup>4</sup>HRS § 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.

8. Previously, Section 23A.02 of the Unit 10 Contract, effective July 1, 2005 - June 30, 2007, provided that Compensation Overpayment Reimbursement was subject to the grievance procedure of the Contract. Section 23A.02 d, provides:

A dispute, which arises out of the alleged Employer violation, misinterpretation, or misapplication of the Unit 10 Agreement as it relates to the determination of the compensation overpayment shall be subject to Section 15 [Grievance Procedure].

9. Section 23A.02 of the Unit 10 Contract, effective July 1, 2007 - June 30, 2009, relating to Compensation Overpayment Reimbursement, was amended and now provides as follows:

The compensation overpayment recovery, dispute, and reimbursement process shall be in accordance with 78-12, Hawaii Revised Statutes.

10. HRS § 78-12, Salary withheld for indebtedness to the government, provides, in part:

(a) In case any officer, agent, employee or other person in the service of a jurisdiction is indebted to a jurisdiction and the indebtedness has been determined by a hearing pursuant to chapter 91, upon demand of the officer charged with the duty of collecting the indebtedness, the disbursing officer charged with the duty of paying the indebted officer, agent, employee, or other person, after notice to the indebted person, shall withhold one-quarter of the salary, wages, or compensation due the indebted person and pay the same, from time to time as the same shall become due, to the officer charged with the duty of collecting the indebtedness, until the fully amount of the indebtedness, together with penalties and interest thereon, is paid.

\* \* \*

(e) If the indebtedness has occurred as a result of salary or wage overpayment, the disbursing officer shall determine the amount of indebtedness and notify the employee in writing of the indebtedness. If the employee contests the disbursing officer's determination of indebtedness, the employee may request a hearing pursuant to chapter 91.

\* \* \*

(h) If an employee is entitled to contest the determination of indebtedness under a collective bargaining grievance procedure,

that procedures shall be used in lieu of a hearing under subsection (e). A collective bargaining agreement may include overpayment recovery procedures; provided that the parties do not agree on any provision that would be inconsistent with subsections (f) and (g).

11. As the applicable Contract provides that salary overpayment issues will be processed pursuant to HRS § 78-12 and HRS § 78-12(e) provides that the employee can request a Chapter 91 hearing, the Board lacks jurisdiction over the salary overpayment issues presented in the Complaint.
12. With respect to the allegations regarding the nonpayment of wages, IAUKEA alleged in her complaint that she was not paid for her last two weeks of work.
13. Roy Kumashiro, Accountant VI, Pre-Audit Section, Accounting and Fiscal Services Division of the Department of Budget and Fiscal Services, stated, inter alia, in an affidavit filed in support of the EMS' Substantive Joinder in UPW's Motion to Dismiss Complaint Filed on October 20, 2008 and/or for Summary Judgment, filed on November 10, 2008, that the City does not have a payroll lag and pays its employees currently for the half month ending on a particular pay day; that Ms. IAUKEA became eligible to receive Temporary Disability Insurance (TDI) benefits on July 30, 2008; that an employee cannot receive both TDI benefits and regular pay; that for pay date July 31, 2008, Ms. IAUKEA received \$3,799.39, which included regular pay of \$1,366.98 for July 16, 2008 to July 29, 2008 and TDI benefits of \$2,214.50 for July 30, 2008 to September 2, 2008; that for pay date August 14, 2008, Ms. IAUKEA was paid a gross amount of \$1,926.76 for TDI benefits from August 1, 2008 to September 2, 2008; that for pay date August 14, 2008, Ms. IAUKEA received regular pay for August 1, 2008 and other premium pay; and that on September 2, 2008, the City notified Ms. IAUKEA that an overpayment of \$2,084.33 (\$157.57 was paid on August 14, 2008 for one day of regular pay for August 1, 2008 when TDI had already been paid for that day and \$1,926.76 was paid on August 14, 2008 for TDI benefits when full TDI pay was already made on July 31, 2008) was made to her and that it would be deducted from her lump sum vacation pay.
14. Based on Mr. Kumashiro's detailed statements supported by copies of Ms. IAUKEA's pay statements and in the absence of any contrary evidence, the Board finds that Ms. IAUKEA was paid for her last two weeks of work.

## CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS §§ 89-5 and 89-14, except as noted infra.
2. 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).
3. 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)).
4. 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)).
5. 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.

6. 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.
7. 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.
8. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. Silva v. City and County of Honolulu, 115 Hawai'i 1, 6, 165 P.3d 247, 252 (2007).
9. Bare allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact, and therefore insufficient to reverse a grant of summary judgment. Reed v. City & County of Honolulu, 76 Hawai'i 219, 225, 873 P.2d 98, 104 (1994); Briggs v. Hotel Corp. of the Pacific, 73 Haw. 276, 281 n. 5, 831 P.2d 1335, 1339 n. 5 (1992)) (citing K.M. Young & Assoc., Inc. v. Cieslik, 4 Haw.App. 657, 658, 675 P.2d 793, 796 (1983)).
10. Section 23A.02 d of the Unit 10 Contract, effective July 1, 2005 - June 30, 2007, provided that Compensation Overpayment Reimbursement was subject to the grievance procedure of the Contract. The Contract provision was amended and Section 23A.02 of the Unit 10 Contract, effective July 1, 2007 - June 30, 2009, relating to Compensation Overpayment Reimbursement, provides that salary overpayment recovery, dispute, and reimbursement will be processed in accordance with HRS § 78-12. HRS § 78-12(e) provides that an employee who contests the determination of indebtedness can request a Chapter 91 hearing.
11. Based on the foregoing, there is no statutory or contractual basis for the Board's jurisdiction to resolve salary overpayment issues, and the Board hereby dismisses the salary overpayment claims in the Complaint for lack of jurisdiction.
12. With respect to the nonpayment of wages, IAUKEA alleged in her Complaint that she was not paid for her last two weeks of work.
13. Mr. Kumashiro, Accountant VI, Pre-Audit Section, Accounting and Fiscal Services Division of the Department of Budget and Fiscal Services, stated in his affidavit, inter alia, that the City does not have a payroll lag and pays its employees currently for the half month ending on a particular pay day;

that Ms. IAUKEA received her regular pay for July 16, 2008 to July 29, 2008 and TDI benefits from July 30, 2008 to September 2, 2008; and that Ms. IAUKEA was notified on September 2, 2008 that overpayments had been made and that such amounts would be deducted from her lump sum vacation pay. Copies of Ms. IAUKEA's pay statements were provided to the Board.

14. In the absence of any evidence from Complainant aside from her bare allegations in the Complaint to rebut Mr. Kumashiro's statements, the Board finds that Ms. IAUKEA was paid for her last two weeks of work.
15. Based on the foregoing, the Board finds there are no material facts in dispute and concludes that the EMS is entitled to judgment as a matter of law that Ms. IAUKEA was paid for her last two weeks of work.

ORDER

The Board hereby dismisses allegations of the instant Complaint alleging improper withholding due to salary overpayments for lack of jurisdiction. The Board also grants summary judgment in favor of Respondents that Complainant was paid for her last two weeks of work and therefore dismisses the instant Complaint.

DATED: Honolulu, Hawaii, December 22, 2008.

HAWAII LABOR RELATIONS BOARD

  
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JAMES B. NICHOLSON, Chair

  
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EMORY J. SPRINGER, Member

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