

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

VALERIE STEPHEN,

Complainant,

and

HAWAII HEALTH SYSTEMS
CORPORATION,

Respondent.

CASE NO. **CE-09-731**

ORDER NO. 2675

ORDER GRANTING
COMPLAINANT'S MOTION TO
AMEND COMPLAINT, AND
DENYING RESPONDENT'S
MOTIONS TO DISMISS

In the Matter of

VALERIE STEPHEN,

Complainant,

and

HAWAII HEALTH SYSTEMS
CORPORATION,

Respondent.

CASE NO. CE-09-734

ORDER GRANTING COMPLAINANT'S MOTION TO AMEND
COMPLAINT, AND DENYING RESPONDENT'S MOTIONS TO DISMISS¹

On October 6, 2009, Complainant VALERIE STEPHEN (Complainant) filed an Unfair Labor Practice Complaint (Complaint) against Respondent HAWAII HEALTH SYSTEMS CORPORATION (Respondent or HHSC) in Case No. CE-09-731. The Complaint alleges, inter alia, that Complainant is a registered nurse who was

¹After the contemporaneous consideration of the pending motions in unconsolidated Case No. CE-09-731 and Case No. CE-09-734, the Board issues the instant order disposing of the motions.

employed in the Emergency Department of the Samuel Mahelona Memorial Hospital, a division of the HHSC; that on February 13, 2008, Complainant and other co-workers were notified of an investigation regarding allegations of workplace violence by a co-worker nurse; that an investigation followed and concluded on August 18, 2008, imposing a 10-day suspension by a Notice of Corrective Action; that a grievance was timely filed on September 2, 2008, and two steps of the grievance process concluded on June 19, 2009, with a reduction to a 3-day suspension; that the HHSC declined to engage in a third step and HGEA has the matter under review for possible arbitration; that despite action of the HHSC to reduce the suspension period to three days, employer has not reimbursed or otherwise provided back pay for the seven days adjusted through the grievance process; that on June 16, 2009, Complainant was notified that she was not selected for a permanent position on the staff; that Complainant's employment status was previously listed as "LTA" or Long Term Assignment; that on July 1, 2009, Complainant's counsel filed a letter of grievance to the HHSC regarding the decision not to select Complainant for a permanent position; and that a response was received on July 9, 2009, refusing to submit the matter to a grievance procedure.

The Complaint alleges that Complainant's non-selection for a permanent position was "retaliatory for the exercise of her rights under the collective bargaining agreement, Hawaii State and Federal labor law by filing a grievance over the Notice of Corrective Action and pursuit of Step grievance[.]" The Complaint alleges violation of Hawaii Revised Statutes (HRS) § 377-6(1), that "employer has interfered with, restrained, or coerced the employer's employees in the exercise of the rights guaranteed in section 377-4."

On October 13, 2009, Complainant filed a Prohibited Practice Complaint against Respondent in a new case, Case No. CE-09-734. That complaint makes similar allegations as contained in the instant Complaint; however, the prohibited practice complaint in CE-09-734 alleges a prohibited practice in violation of HRS §§ 89-13(a)(1), (3), (7), (8), (9), and/or (10), specifically, that the employer has interfered with, restrained, or coerced the employer's employees in the exercise of the rights guaranteed in [chapter 89]; furthermore, has discriminated in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization; violated the terms of a collective bargaining agreement; replaced a nonessential employee for participating in a labor dispute; and/or gave employment preference to an individual employed during a labor dispute and who employment termination date occurs after the end of the dispute, over an employee who exercised the right to join, assist, or engage in lawful collective bargaining or mutual aid or protection through the labor organization involved in the dispute.

On October 26, 2009, Respondent filed its Answer to the Complaint in Case No. CE-09-731.

On December 7, 2009, Complainant filed a Motion to Amend Complaint in Case No. CE-09-731.

On December 7, 2009, Respondent filed a Motion to Dismiss the Complaint in Case No. CE-09-731, asserting that the HHSC is not an “employer” pursuant to definitions in HRS § 377-1², and therefore the Board lacks jurisdiction.

Also on December 7, 2009, Respondent filed a Motion to Dismiss Complaint in Case No. CE-09-734, asserting the Board lacked jurisdiction because the prohibited practice complaint was not filed within 90 days of the alleged prohibited practice and is therefore untimely.

On December 29, 2009, Complainant filed a Memorandum of Law in Support of Motion to Amend Complaint.

On January 6, 2010, the Board heard oral argument on Complainant’s Motion to Amend Complaint and Respondent’s Motion to Dismiss in Case No. CE-09-731, and Respondent’s Motion to Dismiss in Case No. CE-09-734.

CASE NO. CE-09-734

The Board finds that there are two complaints against Respondent on a single controversy: CE-09-731 and CE-09-734. Hawaii Administrative Rules (HAR) § 12-42-42, governing complaints, provides in relevant part:

- (f) Only one complaint shall issue against a party with respect to a single controversy.

Accordingly, the Board will allow Complainant to withdraw the prohibited practice complaint in Case No. CE-09-734³ prior to filing an amended complaint in Case No. CE-09-731; otherwise, the Board shall sua sponte dismiss the complaint in Case No.

²HRS § 377-1 defines “Employer” in relevant part as “a person who engages the services of an employee, and includes any person acting on behalf of an employer, but shall not include the State or any political subdivision thereof[.]”

³HAR §12-42-44, governing withdrawal of a complaint, provides in relevant part:

Any complaint may be withdrawn at any time prior to the issuance of a final order thereon, upon motion and with the consent of the board. Whenever the board approves withdrawal of such complaint, the case shall be closed.

CE-09-734, with prejudice. The Board thus denies Respondents' Motion to Dismiss Complaint in Case No. CE-09-734 because it is moot.⁴

CASE NO. CE-09-731

The Board concludes that the allegations in Complaint in Case No. CE-09-731 improperly refer to provisions of HRS chapter 377, in that the HHSC is not an "employer" under that chapter. The proposed amended complaint in Case No. CE-09-731 would allege violations on chapter 89, under which the HHSC may be deemed an "employer" or "public employer."⁵

The Board also finds that the factual allegations in Case No. CE-09-731 provided adequate notice to Respondent such that allowing Complainant to amend the Complaint to allege violations of chapter 89, rather than chapter 377, would not prejudice Respondent.

Pursuant to HAR § 12-42-43, governing amendment of complaints, "[a]ny complaint may be amended in the discretion of the [B]oard at any time prior to the issuance of a final order thereon."

Accordingly, the Board grants Complainant's Motion to Amend Complaint. Complainant shall file her First Amended Complaint in Case No. CE-09-731 following the withdrawal of the complaint in Case No. CE-09-734. Respondent shall then be afforded the opportunity to answer the First Amended Complaint prior to the Board

⁴A case is moot if it has lost its character as a present, live controversy of the kind that must exist if courts are to avoid advisory opinions on abstract propositions of law. Kemp v. State of Hawai'i Child Support Enforcement Agency, 111 Hawai'i 367, 385, 141 P.3d 161, 165 (2006).

⁵HRS § 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. 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.

scheduling further proceedings in this case. Respondent may also file a motion to dismiss or other motion responsive to the First Amended Complaint.

ORDER

As discussed above, the Board hereby grants Complainant's Motion to Amend Complaint in Case No. CE-09-731, and denies Respondent's respective Motions to Dismiss in Case Nos. CE-09-731 and CE-09-734. Complainant shall withdraw the prohibited practice complaint in Case No. CE-09-734 prior to filing her First Amended Complaint in Case No. CE-09-731.

DATED: Honolulu, Hawaii, January 11, 2010.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SARAH R. HIRAKAMI, Member

Copies sent to:

Stanford H. Masui, Esq.
Solette Perry