O.
NE ✓

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of ARNET PERSONS, Complainant, and PATRICIA McMANAMAN, Director, Department of Human Services, State of Hawaii, Respondent.	CASE NO. CE-03-780 ORDER NO. 2810 ORDER GRANTING RESPONDENT'S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED ON APRIL 28, 2011

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
PROHIBITED PRACTICE COMPLAINT FILED ON APRIL 28, 2011

On April 28, 2011, Complainant ARNET PERSONS ("Complainant" or "Persons"), *pro se,* filed a Prohibited Practice Complaint (Complaint) against Respondent PATRICIA McMANAMAN, Director, Department of Human Services, State of Hawaii, ("Respondent") with the Hawaii Labor Relations Board ("Board"). Complainant alleges, *inter alia,* that Respondent violated ". . . all of section 89-13 prohibited practices; evidence of bad faith. . . ." by conditioning his continued employment on the execution of a Last Chance Agreement and a 20-day suspension and by failing to allow the employee the right to use the grievance procedure.

On May 17, 2011, Respondent filed a Motion to Dismiss Prohibited Practice Complaint Filed on April 28, 2011 asserting Complainant's failure to exhaust contractual remedies.

On May 18, 2011, Respondent filed a First Supplement to Motion to Dismiss Prohibited Practice Complaint Filed on April 28, 2011 arguing that the Board should apply the same analysis used in Linda K. Hadley; Case Nos. CU-09-261 and CE-09-651; Order No. 2567, Order Granting Respondent HYCF's Motion to Dismiss Complaint, dated December 22, 2008.

On May 27, 2011, the Board conducted a Prehearing/Settlement Conference.

On June 8, 2011, Respondent filed a Second Supplement to Motion to Dismiss Prohibited Practice Complaint Filed on April 28, 2011, attaching copies of

Complainant's Temporary Total Disability ("TTD") authorization forms for the period from 06/01/11 through 06/30/11 and notifying the Board that Complainant continued to remain out of work on TTD as of June 30, 2011.

On June 13, 2011, Complainant filed a document entitled "Motion to Request Access to Information held by Respondent". Complainant requested the following information:

1. names of witnesses and clients that Respondent references to justify verbal warnings and written letters starting from 12/2010;

2. verification of unacceptable poor conduct and uncontrollable behavior, threatening verbal and physical conduct in the workplace, badgering, insulting and provoking co-workers; and

3. substantiate claims that Complainant demonstrated towards his supervisor defiant behavior, rejected instruction and supervision.

On June 16, 2011, Complainant filed a Response to Motion to Dismiss Prohibited Practice Complaint Filed on April 28, 2011 listing seven defenses and a witness list.

On June 20, 2011, Complainant filed a document entitled "First Supplement to Prohibited Practices Complaint filed 04/28/11". Complainant alleged that his supervisor created a "Hostile Work Environment" which "created a situation to discredit and ultimately look like what appears to be an employee who was disruptive, threatening to co-workers and clients and detrimental to office operations. . . . This action was intended to overwhelm the Complainant to the point that it would appear that the Complainant was irresponsible and derelect [sic] in his duties as a worker . . . the Complaiant [sic] was left to fend for himself and ultimately fail."

On June 21, 2011, the Board held a hearing on Respondent's Motion to Dismiss Prohibited Practice Complaint filed on April 28, 2011, in accordance with Hawaii Revised Statutes (HRS) § 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). Complainant appeared on his own behalf, and Jeffrey A. Keating (Keating), Deputy Attorney General, appeared on behalf of the Respondent. After hearing arguments and deliberating on the arguments presented, the Board indicated that it would grant Respondent's motion to dismiss and instructed Respondent's counsel to prepare a proposed order.

On July 12, 2011, Keating filed a proposed order with the Board. Complainant did not file a response or objections to Keating's proposed order. HAR § 12-42-8(g)(18)(A) states, "Every decision and order rendered by the board shall be . . . accompanied by separate findings of fact and conclusions of law." The Keating proposed order did not include separate findings of fact and conclusions of law and therefore, the Board is rendering this order. The two findings in Keating's proposed order incorporated herein are as follows:

> (1) the Complainant failed to exhaust the contractual remedies available under the HGEA Unit 03 collective bargaining agreement ("CBA"); and
>
> (2) the proper forum to address Complainant's allegations is the grievance/arbitration process as set forth in the CBA.

After careful consideration of the arguments, record, and filings in this case, the Board makes the following findings of fact, conclusions of law, and decision and order granting Respondent's Motion to Dismiss Prohibited Practice Complaint filed on April 28, 2011.

FINDINGS OF FACT

1. At all times relevant, Complainant ARNET PERSONS was or is a public employee,[1] as defined under HRS § 89-2 and a member of the Hawaii Government Employees Association ("HGEA") which is an employee

---

[1]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(f)].

organization and the exclusive representative[2] as defined in HRS §89-2, of employees included in bargaining unit (BU) 03.[3]

2. At all relevant times, Respondent is an individual who represents the Governor, State of Hawaii, one of the statutory employers or acts in his interest in dealing with public employees and is therefore an employer or public employer[4] as defined in HRS § 89-2.

---

[2]HRS § 89-2 provides in 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 public employees health fund,~~] Hawaii employer-union health benefits trust fund, and other terms and conditions of employment of public employees. [sic] (As amended by Act 43, SLH 2011).

"Exclusive representative" means the employee organization certified by the board under section 89-9 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

[3]HRS § 89-6(a) provides in part:

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

* * *

(3) Nonsupervisory employees in white collar positions;

. . . .

[4]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 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

3. As a member of BU 03, Complainant was or is bound by the terms of the CBA between the State of Hawaii and HGEA. The Memorandum of Agreement, ratified in 2009 appended to the collective bargaining agreement, was in force from October 19, 2009 through the germane time periods in this case. A grievance procedure is included in the CBA and pertinent parts are set out below. The Board takes notice of the CBA in its files received in accordance with HAR § 12-42-128[5] pursuant to HRS § 91-10(4)[6] and HAR § 12-42-8(g)(8)(F) and (G).[7]

---

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.

[5]HAR § 12-42-128 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.

[6]HRS § 91-10(4) provides, in part, 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, ...

[7]HAR § 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.

ARTICLE 11--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 without intervention of the Union, up to and including Step 3, provided the Union has been afforded an opportunity to be present at the meeting(s) on the grievance. . . .

* * *

C. Informal Step. A grievance shall, whenever possible, be discussed informally between the Employee and the immediate supervisor . . . . The Employee may be assisted by a Union representative. If the immediate supervisor does not reply by seven (7) working days, the Employee or the Union may pursue the grievance to the next step.

D. Step 1. If the grievance is not satisfactorily resolved at the informal step, the Employee or the Union may submit a written statement of the grievance within seven (7) working days after receipt of the reply to the informal complaint to the division head or designee; . . . .

* * *

A meeting to discuss the grievance shall be held within seven (7) working days after receipt of the written grievance. . . .

* * *

E. Step 2. If the grievance is not satisfactorily resolved at Step 1, the Employee or the Union may appeal the grievance in writing to the department head or designee within seven (7) working days after receipt of the reply at Step 1. . . .

* * *

A meeting to discuss the grievance shall be held within seven (7) working days after receipt of the appeal. . . .

* * *

G. Step 3. If the grievance is not satisfactorily resolved at Step 2, the Employee or the Union may appeal the grievance in writing to the Employer or designee within seven (7) working days after receipt of the reply at Step 2. . . .

A meeting to discuss the grievance shall be held within seven (7) working days after receipt of the appeal. The Employer or designee shall reply in writing to the Employee and the Union within seven (7) working days after the meeting.

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

4. By letter dated April 4, 2011, Respondent informed Complainant that he would be placed on "Department-Directed Leave of Absence with Pay from his job as an Eligibility Worker II at the Benefit, Employment and Support Services Division (BESSD), Oahu Branch, Oahu Section 1, Kuakini Unit.

The letter stated in part:

This action does not constitute a disciplinary action. The duration of the leave is indefinite and we will notify you of its termination at the appropriate time. You may not return to the worksite unless you receive official notification that you are authorized to do so. . . .

For the duration of this Department-Directed Leave, you are prohibited from entering the premises of any DHS property and prohibited from contacting any BESSD employees in any manner. . . .

Failure to comply with these directives may result in disciplinary action. . . .

Contact Ms. Murakami at 832-3804 if you have questions during your Department-Directed Leave." (Handwritten note: "employee refused to sign")

5. By letter dated April 14, 2011, Respondent gave notice to Complainant that he would be discharged as an Eligibility Worker II, at the BESSD, Oahu Branch, Oahu Section 1, Kuakini Unit effective April 28, 2010 [sic]. (Note: By letter dated May 3, 2011 "2010" was corrected to "2011".) The letter included the reasons for discharge and a notification of a pre-discharge meeting scheduled on April 25, 2011 at 10:00 a.m. at the office of the Acting Oahu Branch Administrator, located at 820 Mililani Street, Suite 710, Honolulu, Hawaii. The letter also offered Complainant an opportunity to enter into a Last Chance Agreement to avoid a discharge subject to correcting his behavior. Respondent also informed Complainant of his right to consult his union representative.

6. On April 25, 2011, a pre-discharge meeting was held with Complainant and Mr. Wesley Okumura ("Okumura"). According to Respondent an agreement was reached with Complainant and memorialized by Respondent in a follow-up letter.

7. By letter dated April 25, 2011, Respondent notified Complainant of her acceptance of Mr. Okumura's recommendation to reinstate Complainant to duty based on (1) the oral Agreement reached between Mr. Okumura and Complainant in the pre-discharge meeting addressing and resolving the reasons cited in the April 14, 2011 letter and (2) Complainant's acceptance and execution of a formal Last Chance Agreement. Respondent further states that deferral of the discharge until May 6, 2011 is intended to provide sufficient time for the execution of the Agreement. Respondent also states Complainant's right to consult his union. (Note: The instant complaint cites this letter as the basis for the complaint.)

8. By letter dated April 27, 2011, Complainant requested Respondent to (1) "Direct Yvonne Tanaka, Luanne Murakami, Wesley Okumura and Georgina Murakami to allow me the opportunity to respond to the untrue and slanderous things that my supervisor Georgia Murakami has included in all the letters she has given me for what she describes as insubordinate, threatening, disruptive behavior, etc. . . . The grievance process is what I have as a tool to use for matters like this one. Unfortunately a grievance or an action may take from one week to 3 or 4 months to be heard. This puts me at a disadvantage because of my side of the story cannot be heard really until then. . . . (2) I request the opportunity to meet with you in person to discuss my take on all this. . . . Hastily terminating my employment

without allowing me the grievance process to use to prove I'm right and they, the accusers are wrong is unfair labor practices."

9. On April 28, 2011, Complainant filed the instant Complaint with the Board.

10. By letter dated May 2, 2011, Respondent responded to Complainant's letter dated April 27, 2011. Respondent cited letters from Complainant's supervisor, Ms. Georgia Murakami ("Murakami") and dated February 14, 2011, February 24, 2011, March 16, 2011, March 23, 2011, and March 29, 2011 notifying Complainant of his unacceptable behavior in the workplace. Respondent noted that Complainant refused to acknowledge these letters and failed to respond. By letters dated March 16, 2011, March 21, 2011, March 23, 2011, March 28, 2011 and March 30, 2011, Ms. Murakami directed Complainant to explain his conduct but Complainant refused to accept those letters and meet with Ms. Murakami. Complainant was provided two opportunities to present his perspective and any other information that he wished for Management to consider prior to his discharge. The first meeting was with his supervisor, Ms. Murakami on April 8, 2011 and the second was with Mr. Okumura on April 25, 2011. Respondent contends that Complainant provided no evidence supporting his contention that Ms. Murakami acted inappropriately in recommending his discharge.

11. By letter dated May 5, 2011, Respondent notified Complainant that his intended discharge was rescinded because Complainant agreed, accepted the terms of and signed an "Employee Agreement to Suspend a Discharge Action" on May 5, 2011. A copy was enclosed. (Note: The Agreement was signed by Complainant and Respondent. HGEA's signature line is blank.)

12. Based upon a review of the record, the Board finds that the gravamen of the Complaint is Complainant's challenge to the underlying disciplinary action taken by Respondent. The Board further finds that Complainant did not exhaust or attempt to utilize the grievance procedure provided in the BU 03 CBA. The contractual grievance procedure is intended to resolve violations and misapplications of the BU 03 CBA, including challenges to discipline. The Board has consistently declined jurisdiction over such claims in deference to the contractual grievance process.

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. The Hawaii Supreme Court noted in Poe v. Hawaii Labor Relations Board, 105 Haw. 97, 94 P. 3d 652, 656 (2004) (Poe II):

> This court has used federal precedent to guide its interpretation of state public employment law. *Hokama v. Univ. of Hawai'i,* 92 Hawai'i 268, 272 n. 5, 990 P.2d 1150, 1154 n. 5 (1999); *see also Poe I,* 97 Hawai'i at 536-37, 40 P.3d at 938-39; *Santos v. State Dep't. of Transp.,* 64 Haw. 648, 655, 646 P.2d 962, 967 (1982). Based on federal precedent, we have held it "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." *Hokama,* 92 Hawai'i at 272, 990 P.2d at 1154 (citing, *inter alia, Santos,* 64 Haw. at 655, 646 P.2d at 967; *Del Costello v. Int'l Bhd. of Teamsters,* 462 U.S. 151, 163-64, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983)). "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 the orderly and less time-consuming settlement of disputes through alternative means." *Hokama,* 92 Hawai'i at 272, 990 P.2d at 1154 (citations omitted).

3. The Hawaii Supreme Court also noted that, "Exceptions to the exhaustion requirement exist, such as when pursuing the contractual remedy would be futile." Poe v. Hawaii Labor Relations Board, 97 Haw. 528, 535, 40 P.3d 930, 937 (2202) (Poe I). In Poe II, *supra*, an employee was prevented from exhausting his contractual remedies because the union denied his request to advance his grievance to arbitration. Id., 97 Haw. at 104. The Poe II Court held that when an employee is prevented from exhausting his or her contractual remedies because the union has wrongfully refused to advance the grievance to arbitration, the employee may bring a claim against his or her employer in the face of a defense based upon the failure to exhaust contractual remedies "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." Vaca, 386, 87 S.Ct. 903.

4. In the instant case, Complainant has not shown any evidence that he or his union, the HGEA, has submitted a complaint with Respondent to start the grievance process as proscribed in Article 11 of Complainant's BU 03 CBA, *supra*.

5. In addition, Complainant has not shown any evidence that meets the exception test under Poe II citing a union's denial to advance a grievance to arbitration. On the contrary, there has been no evidence proffered by Complainant that the HGEA has been involved with these grievances.

6. Therefore, under Poe I and II, *supra*, the appropriate forum for resolution of the issues presented in the instant Complaint is the established grievance/arbitration process contained within the CBA.

7. Because Complainant has not exhausted his contractual right under the grievance/arbitration process, the Board lacks jurisdiction to proceed with his Complaint.

ORDER

For the reasons discussed above, the Board hereby grants Respondent's Motion to Dismiss Prohibited Practice Complaint filed on April 28, 2011.

DATED: Honolulu, Hawaii, August 4, 2011.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

Sesnita A. D. Moepono

SESNITA A.D. MOEPONO, Member

Copies sent to:

Arnet Persons
Jeffrey A. Keating, Deputy Attorney General