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**STATE OF HAWAII Case No. CE-10-863, CU-10-335**

**HAWAII LABOR RELATIONS BOARD**

In the Matter of

KENNETH M. FARIA, JR.,

Complainant,

and

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

Respondents.

CASE NOS. CE-10-863; CU-10-335

ORDER NO. 3114

ORDER GRANTING UNION'S MOTION  
TO DISMISS AND CITY  
RESPONDENT'S SUBSTANTIVE  
JOINDER IN UNION RESPONDENT'S  
MOTION TO DISMISS FILED ON JULY  
2, 2015

**ORDER GRANTING UNION'S MOTION TO DISMISS  
AND CITY RESPONDENT'S SUBSTANTIVE JOINDER IN  
UNION RESPONDENT'S MOTION TO DISMISS FILED ON JULY 2, 2015**

**I. FINDINGS OF FACT**

If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

**A. Procedural Background**

On June 26, 2015, Complainant KENNETH M. FARIA, JR. (Faria) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondent EMERGENCY MEDICAL SERVICES, Honolulu Emergency Services Department, City and County of Honolulu (Employer or EMS) (the case against EMS has been designated as CE-10-863) and the UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO (Union or UPW) (the case against UPW has been designated as CU-10-335). Faria's complaint makes no allegation of any specific prohibited practice committed by EMS or UPW, and no section or subsection of Hawaii Revised Statutes, Section 89-19,

**I do hereby certify that this is a full, true and  
correct copy of the original on file in this office.**

  
Hawaii Labor Relations Board

is alleged to have been violated. Faria's complaint relates to the type of seniority which applies to the bidding process for selection of shift and work units. His statement in Section 6 of his complaint states as follows:

1. Recent promotion of 2 MECS I to MECS III into to a limited term appointment and allowing limited term positions to bid over permanent MECS III personnel.
2. The practice of Departmental seniority used for shift bidding and allowing lower class personnel to transfer the entire length of their seniority into the next promoted job classification under their own volition. There is no seniority earned for working in a specific job classification. Seniority is practiced by departmental seniority which is the amount of time spent in a permanent position within the department.
3. As of 6-24-2015, 2 MECS III positions will be cut per Ian Santee assistant deputy director the 2 MECS III that will lose their position are the 2 limited term positions held by Theresa McGregor and Marie Hathaway, these are the two most recently promoted on 6-2-2015 however, if the positions do not get cut, they both will be allowed to shift bid on 7-13-2015 by Departmental seniority which will place Theresa McGregor above me Kenneth Faria.

On July 2, 2015, UPW filed Union's Motion to Dismiss, together with its Memorandum in Support of Motion, Declaration of Dayton M. Nakanelua and Exhibits 1 through 13 (collectively Motion to Dismiss). In the Motion to Dismiss, UPW seeks dismissal of Faria's complaint for failure to exhaust contractual remedies afforded to employees under Section 15.03a of the unit 10 collective bargaining agreement (CBA), and for failure to state a claim for relief under Poe v. Hawaii Labor Relations Bd., 105 Hawaii 97, 102 (2004). UPW also seeks attorney's fees and cost from Faria.

On July 7, 2015, EMS filed City Respondent's Substantive Joinder in Union Respondent's Motion to Dismiss Filed on July 2, 2015 (Joinder).

On July 17, 2015, the Board issued its Notice of Filing Deadlines; Notice of Motion Hearing; and Waiver of § 377-9(b), Hawaii Revised Statutes and § 12-42-46(b), Subchapter 3, Chapter 42, Title 12, Hawaii Administrative Rules, which set a hearing on the Motion to Dismiss on July 30, 2014, with July 17, 2015 as the deadline for Faria to file his response to the Motion to Dismiss and July 24, 2015(sic) as the deadline for UPW and EMS to reply to Faria's response, if any.

On July 17, 2015, Faria requested a two month continuance of the hearing on the Motion to Dismiss. Pursuant to Order No. 3077, the Board granted Faria's request and the hearing was rescheduled to October 21, 2015.



On September 29, 2015, Faria requested another continuance of the hearing on the Motion to Dismiss, and the Board granted Faria's request and rescheduled the hearing from October 21, 2015 to November 3, 2015 pursuant to Order No. 3104.

Faria failed to file any written argument or evidence in opposition to the Motion to Dismiss and Joinder.

On November 3, 2015, the Board received oral arguments from the parties on the Motion to Dismiss and Joinder.

B. Factual Background

Faria is a bargaining unit 10 (BU 10) employee who works for EMS. UPW is the duly certified exclusive bargaining representative for BU 10 employees, including Faria.

The CBA contains in Section 15 a three-step grievance procedure to resolve disputes over the misinterpretation, misapplication and/or violations of the CBA by the employer. Section 15.01 and 15.02 describes the grievance process and defines a grievance as follows:

15.01 PROCESS. A grievance which arises out of alleged Employer violation, misinterpretation, or misapplication of this Agreement, its attachments, exhibits, and appendices shall be resolved as provided in Section 15.

15.02 DEFINITION. The term grievance shall mean a complaint filed by a bargaining unit Employee, or by the Union, alleging a violation, misinterpretation, or misapplication of a specific section of this Agreement occurring after its effective date.

Under Section 15.03, employees may file a grievance without the direct involvement of the union as follows:

15.03 a. An Employee may process a grievance and have the grievance heard without representation by the Union except as provided in Section 15.18.

15.03 b. No meeting shall be held to discuss the grievance without first making an attempt to arrange a mutually acceptable meeting time with the grieving party and the Union, provided that the meeting shall be held within the time limits as provided in Section 15.

15.03 c. No resolution of a grievance filed as provided in Section 15.03 shall be made at any step of the grievance procedure, which is inconsistent with this Agreement.

The relevant terms and conditions of employment affecting employees in EMS are set forth, inter alia, in Section 55 of the CBA. Section 55.02 a.5 gives employees choice of shifts and work unit in the order of departmental seniority for each classification as follows:

55.02 a.5. SHIFTS. Employees shall have three (3) weeks to exercise their choice of shift and Work Unit, however, in choosing shifts and Work Unit each Employee is required to select the same shift and work unit for each work week of the one (1) year work schedule, subject to the manpower coverage, contractual restrictions and limitations in order of Departmental seniority for each classification.

## II. LEGAL STANDARDS

The Board adheres to the legal standards set forth by the Hawaii appellate courts for motions to dismiss under the Hawaii Rules of Civil Procedure (HRCP) Rule 12(b).

A motion to dismiss for lack of subject matter jurisdiction pursuant to HRCP Rule 12(b)(1) is based on the contents of the complaint, the allegations of which must be accepted as true and construed in the light most favorable to the plaintiff. Dismissal is improper unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In considering a motion to dismiss for lack of subject matter jurisdiction, the Board is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawaii 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawaii 1, 7, 175 P.3d 111, 117 (App. 2007).

Regarding a motion to dismiss brought under HRCP Rule 12(b)(6) for failure to state a claim, "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 support made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Justice v. Fuddy, 125 Hawaii 104, 108, 253 P.3d 665, 669 (App. 2011) (Fuddy), (citing Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983)). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. We must therefore view a plaintiffs complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory." Fuddy, 125 Hawaii at 107-108, 253 P.3d at 668-669; Young v. Allstate Ins. Co., 119 Hawaii 403,



412, 198 P.3d 666, 675 (2008) (Young). The Board's consideration of a motion to dismiss for failure to state a claim is strictly limited to the allegations of the complaint, and the Board must deem those allegations to be true. However, in weighing the allegations of the complaint as against a motion to dismiss, the Board is not required to accept conclusory allegations on the legal effect of the events alleged. Paysek v. Sandvold, 127 Hawaii 390, 402-403, 279 P.3d 55, 67-68 (App. 2012) (citing Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985)); Young, 119 Hawaii at 406, 198 P.3d at 669.

### III. DISCUSSION, CONCLUSIONS OF LAW AND ORDER

If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

#### A. Faria failed to exhaust contractual remedies under the CBA.

The Hawaii Supreme Court has held that a prohibited practice complaint should be dismissed if the complainant is unable to establish that he has exhausted contractual remedies through a grievance procedure of the applicable collective bargaining agreement. Poe v. Hawaii Labor Relations Bd., 97 Hawaii 528 (2002). As indicated in Hokama v. Univ. of Hawaii, 92 Hawaii 268, 272 (1999), the exhaustion requirement is well founded in strong public policy considerations, including integrity and autonomy of the collective bargaining process and the need for orderly and less time consuming settlement of disputes.

Faria's dispute with his employer, EMS, is about the type of seniority which applies to the bidding process for shift and work unit selection. Section 55.02 a.5 of the CBA describes how the seniority system works in the shift and work unit bidding process. Section 15 of the CBA establishes a three step process by which Faria could have filed a grievance to challenge EMS' interpretation and application of Section 55.02 a.5 of the CBA; however, Faria failed to do so. As such, the Board finds that Faria failed to exhaust his contractual remedies under the CBA and that his prohibited practice complaint must be dismissed.

#### B. Faria's complaint fails to state a claim for relief either against EMS or UPW.

There is no allegation in Faria's complaint of an alleged violation of the CBA. Furthermore, UPW argues, which EMS substantively joins and Faria does not dispute, that "a review of the collective bargaining agreement and the relevant documents indicate there is no conceivable violation of seniority rights in this case. The provisions (*sic*) of Sections 55.02a.5 and 55.02a.8b clearly require departmental seniority to apply in shift and work unit selection." (*See*, Memorandum in Support of Motion to Dismiss at page 10.) The Board finds that Faria's complaint fails to state a claim for relief under the standards set forth in Fuddy and that Faria's complaint against EMS must be dismissed.

Also absent from Faria's complaint is any claim that UPW breached its duty of fair representation. Under Poe, a hybrid claim complaint must establish both (1) a breach of the collective bargaining agreement by the employer, and (2) a breach of duty of fair representation by the union. The Board finds that Faria's complaint fails to state a claim for relief on both of the Poe elements for a hybrid case, and therefore his complaint against UPW must be dismissed.

C. Order.

Based on the foregoing, the Board hereby grants the Motion to Dismiss and Faria's complaint is dismissed against both UPW and EMS. UPW's request for attorney's fees and cost is denied.

Cases CE-10-863 and CU-10-335 are both closed.

DATED: Honolulu, Hawaii, November 3, 2015.

HAWAII LABOR RELATIONS BOARD



  
KERRY M. KOMATSUBARA, Chair

  
SESNITA A.D. MOEPONO, Member

  
ROCK B. LEY, Member

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