



EFiled: Dec 01 2015 01:28PM HAST
Transaction ID 58232408
Case No. CE-03-858

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

TANYA BENSON,

Complainant,

and

STATE OF HAWAII, DEPARTMENT OF
PUBLIC SAFETY,

Respondent.

CASE NO. CE-03-858

ORDER NO. 3125

ORDER GRANTING RESPONDENT
STATE OF HAWAII, DEPARTMENT OF
PUBLIC SAFETY'S MOTION TO
DISMISS

ORDER GRANTING RESPONDENT STATE OF HAWAII,
DEPARTMENT OF PUBLIC SAFETY'S MOTION TO DISMISS

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On May 1, 2015, COMPLAINANT TANYA BENSON (Ms. Benson or Complainant) filed a prohibited practice complaint (Complaint) against RESPONDENT STATE OF HAWAII, DEPARTMENT OF PUBLIC SAFETY (DPS or Respondent). The Complainant alleges that DPS committed a prohibited practice in violation of HRS § 89-13 based on Article 45 Alternative Work Schedules. More specifically, the Complaint alleges, among other things, that: Michael Hoffman (Hoffman) became the new director of the Oahu Community Correctional Center (OCCC) on February 2, 2015; prior to Hoffman's arrival, Complainant had worked for 12 years on flexible work hours starting at 4:45 a.m. to 13:30 p.m. under a May 1, 2003 Memo from Governor Lingle (Lingle Memo) without any problem with operational needs; Complainant is the secretary for the Chief of Security, who "runs" all correctional officers in a 24-hour operation at OCCC; Complainant assisted the first, second, and third watch, passed out pay stubs to all uniformed staff, and prepared work for and was relied on by her boss, who arrived at 7 a.m., without any problems, on March 18, 2015; a Memo was issued

informing all section heads that beginning April 1, 2015, the flexible working hours would be changed to 6:30 a.m. to 15:15 p.m.; both Complainant and her boss explained to the warden that Complainant comes in early, but the warden said his word was a final “no”; since arriving at 630 a.m., Complainant does not know how to start work and feels stripped of her job and stressed out; at 3:15 p.m., Complainant is stuck in major traffic getting to Pearl City; the Lingle Memo stated that flexible work hours would alleviate traffic congestion and boost morale by helping employees with work family balance; OCCC is a 24-hour operation that deals with all pre-trial detainees and transports inmates to court from all correctional facilities; Halawa’s flex hours are from 5 am – 6 pm and the Women’s flex hours from 6 am – 6 pm; because of leaving at 315 p.m. since April 1, 2015, Complainant has had more gas “fill up” and stress on the commute home due to getting home at 5 p.m.; when Complainant was on the early schedule, her section had coverage until 5 p.m. and no operational problems, and she had a 15 minutes to and 20 minute from work commute; and now Complainant has a hard time sleeping and arrives at work at 5:45 but is unable to start until 6:30 a.m.

On May 13, 2015, DPS filed Respondent State of Hawaii, Department of Public Safety’s Motion to Dismiss Complaint (Motion to Dismiss) with supporting documents. The Motion to Dismiss has been filed pursuant to Board Rule Section 12-42-8(g)(3) and asserts that the Board lacks subject matter jurisdiction over this case because Ms. Benson failed to exhaust the administrative remedies contained in the bargaining unit 3 (BU 3) collective bargaining agreement.

On May 14, 2015, DPS filed a Supplement to Respondent State of Hawaii, Department of Public Safety’s Motion to Dismiss Complaint.

On May 20, 2015, DPS filed an Errata Re: Exhibit A to Declaration of Miriam P. Loui and Exhibit D to Declaration of Colleen Miyasato, of Respondent State of Hawaii, Department of Public Safety’s Motion to Dismiss Complaint, Filed Herein on May 13, 2015.

On May 21, 2015, DPS filed a Second Supplement to Respondent State of Hawaii, Department of Public Safety’s Motion to Dismiss Complaint.

On May 29, 2015, Ms. Benson filed the Statement of Tanya Benson (Benson Statement). In her Statement, Ms. Benson sets forth her OCCC work history and more specific facts regarding the problems created by the change in her work hours and the lack of problems under her previous work schedule. She summarizes the problems created by the change in work schedule, stating, among other things, that “[e]ver since the change in hours I don’t look forward to work at all, the traffic, my routine is messed up, my whole family and life got turned upside down.” Complainant concludes by requesting that the Board “give me grandfather rights in work hours” or, if deciding in favor of the state, “then all correctional facilities in the State of Hawaii should run by this DHRD policy or “reflect[] 24 hour operation for correctional facilities.”

On June 1, 2015, DPS filed Respondent Department of Public Safety's Reply to Complainant Tanya Benson's Statement, Filed on May 29, 2015 (DPS Reply). DPS confirmed that HGEA filed a Step II Grievance on May 19, 2015 and requested dismissal of the Complaint "so that [the] parties may address Complainant's grievance in accordance with Article 11 [of the Unit 3 Contract]."

On August 14, 2015, the Board held a hearing on the Motion to Dismiss.

B. Factual Background

Complainant Tanya Benson is and was for all relevant times a public employee¹ of DPS at OCCC and a member of BU 3² represented by the Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA).³

Ms. Benson's employment with DPS is governed by the BU 3 collective bargaining agreement, in effect from July 1, 2013 – June 30, 2015 (BU 3 CBA). The BU 3 CBA contained Article 11- Grievance Procedure⁴ and Article 45 – Alternative Work Schedules.⁵

On May 1, 2003, then Governor of the State of Hawaii Linda Lingle issued a Memorandum (Lingle Memo),⁶ which stated in relevant part:

To help alleviate the worsening traffic congestion problem, we all must take an active part in exploring and pursuing solutions. One such solution, which is oftentimes overlooked, is to expand flexible work hours or alternative work schedules for our employees.

The State has had guidelines governing flexible work hours and alternative work schedules for a number of years. Generally, under the flexible work hours program, i.e., other than 7:45 a.m. to 4:30 p.m., employees can arrive at and depart from work during flexible bands at fixed-time intervals (staggered hours) or start work at any time during a given time span within the flexible band, known as glide time. Under the alternative work week program, non-traditional work schedules may be arranged, such as four ten-hour days with three days off.

I highly encourage you to promote flexible work hours and alternative work schedules in your workforce to the extent possible, and recognize that the decision to allow your employees these options will require that you take into

consideration public service operational needs. Please keep in mind that the benefits of implementing those options wherever possible will be great since it would not only help to alleviate traffic congestion, but also boost morale in helping your employees balance their work and family needs.

Please work with your Department Personnel officer since negotiations of changes in work hours with the unions would be required for affected employees covered under a collective bargaining agreement. Thank you.

On September 6, 2011, DPS Director Jodie Maesaka-Hirata sent a September 6, 2011 Memorandum to PSD (Public Safety Division) AAFES Building Staff transmitting the Department of Human Resources Development's Policy No. 502.005, Flexible Working Hours which "lays out the conditions under which an employee may request to work alternative work hours."

On or about March 18, 2015, DPS Acting Warden of OCCC Hoffman issued a memorandum (3/18/15 Memo) that changed Ms. Benson's work schedule. Prior to the 3/18/15 Memo, Ms. Benson was allowed flexible work hours that included an early start time of 4:45 a.m. with an early end time of 1:30 p.m. The Memo stated in relevant part:

In accordance with the Department of Human Resources Development (DHRD) Policies and Procedures 502.005 - Flexible Working Hours, the State provides a plan for flexible working hours for non-shift, non-uniformed employees of the State, provided that there is no disruption to normal business hours (7:45 a.m. to 4:30 p.m.) during which a government office is open.

The flexible working hours shall be from 6:30 a.m. - 9:00 a.m. (starting time) and shall not exceed 5:45 p.m. (ending time). Therefore, employees shall not be allowed to start before 6:30 a.m. or end their day before 3: 15 p.m.

Section heads shall be responsible for ensuring appropriate work coverage, operational requirements, the flexibility that will be permitted and preventing abuse of flexible working hours privileges.

Subsequent to the filing of the Complaint, on May 19, 2015, HGEA filed a Step II grievance on behalf of Ms. Benson on this flexible hours issue (Step II Grievance) alleging violations of the BU 3 CBA, Articles 1-Recognition, 3-Maintenance of Rights and Benefits, 4-Personnel Policy Changes, 5-Rights of the Employer, and 8-Discipline. The Step II Grievance also included a request for certain information.

On June 9, 2015, the Board held a hearing on the Motion to Dismiss.

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. 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).

B. Exhaustion

In support of its Motion to Dismiss, DPS contends that the Board has no jurisdiction over the Complaint in this case because the BU 3 CBA contains Article 11- Grievance Procedure; and accordingly, the Complainant is required but failed to timely exhaust any grievance or arbitration procedures under a collective bargaining agreement before filing a prohibited practice complaint based on the Board's Order in Univ. of Hawaii Prof'l Assembly v. Bd. of Regents, Univ. of Hawaii, Board Case No. CE-07-804, Order No. 2939 (2013) (UHPA Order).

The Board concurs with Respondent that the Complaint should be dismissed for lack of jurisdiction based on a failure to exhaust contractual remedies.

HRS § 89-10 states in relevant part:

Except for cost items and any non-cost items that are tied to or bargained against cost items, all provisions in the agreement that are in conformance with this chapter, including a grievance procedure..., shall be valid and enforceable

and shall be effective as specified in the agreement, regardless of the requirements to submit cost items under this section and section 89-11.

(Emphasis added)

HRS § 89-10.8(a) states in relevant part:

[§ 89-10.8] Resolution of disputes; grievances. (a) A public employer shall enter into a written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. The grievance procedure shall be valid and enforceable and shall be consistent with the following:

(Emphasis added)

HRS § 89-13(a) provides in pertinent part as follows:

(a) It shall be a prohibited practice for a public employer or its designated agent wilfully to:

(8) Violate the terms of a collective bargaining agreement[.]

HRS § 89-14 provides in relevant part:

§ 89-14 Prevention of prohibited practices. Any controversy concerning prohibited practices shall be submitted to the board in the same manner and with the same effect as provided in section 377-9....

A review of the foregoing statutory provisions shows that HRS § 89-14 gives the Board jurisdiction over prohibited practice controversies, which pursuant to HRS § 89-13(a)(8) include BU 3 CBA violations. On the other hand, HRS § 89-10.8 specifically requires a public employer to enter into a written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision to be invoked in the event of any dispute. Further, pursuant to HRS §§ 89-10 and 89-10.8, the grievance procedure “shall be valid and enforceable.”

As noted in the UHPA Order, the Hawaii appellate courts have addressed the quandary of this dual jurisdiction of the Board and the arbitrator. UHPA Order, at * 11. It has become a well-recognized general rule that an employee is required to exhaust his available contractual

remedies prior to bringing a prohibited practice complaint alleging an HRS § 89-13(a)(8) violation. Santos v. State of Hawaii, 64 Haw. 648, 655, 646 P.2d 962, 967 (1982); Poe v. Hawaii Labor Rels. Bd., 105 Hawaii 97, 101, 93 P.3d 652, 656 (2004).

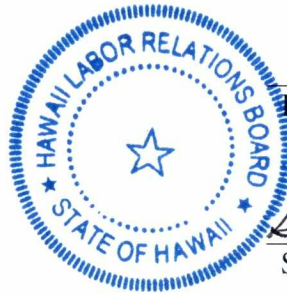
As stated above, in accordance with HRS § 89-10.8, the BU 3 CBA contains Article 11 establishing a grievance procedure culminating in a final and binding decision to be invoked in the event of a dispute. Article 11 provides that, "Any complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure." Moreover, the grievance procedure provides for an informal step, two formal steps, and a final step three of arbitration, which only the Union has the authority to pursue. In this case, from the face of the Complaint, there is no question that Ms. Benson's claim involves the application and interpretation of the BU 3 CBA because the Complaint sets forth BU 3 Article 45 Alternative Work Schedules⁷ as the basis for the HRS § 89-13 allegations. The record in this case shows that the HGEA, on behalf of Ms. Benson filed a Step 2 grievance regarding this claim, which was pending at the time that this Motion was heard. Accordingly, the present case falls squarely within the line of cases in which both the Hawaii courts and the Board have held that under HRS Chapter 89, 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 representative to proceed to the last grievance step, which only the representative can undertake, would be futile. Poe v. Hawaii Labor Rels. Bd., 97 Hawaii 528, 531, 40 P.3d 930, 933 (2002) (Poe); Winslow v. State of Hawaii, 2 Haw. App. 50, 55, 625 P. 2d 1046, 1050 (1981); Mussack v. Harano, Board Case No. CE-05-482, Decision No. 436, 6 HLRB 274, 279 (2002); Lum v. Anderson, Board Case No. CE-13065, Decision No. 203, 3 HPERB 611, 624 (1985). While the Court has further recognized exceptions to this exhaustion principle, such as where the resort to administrative procedures would be futile, Ms. Benson has failed to assert, much less, prove that any of these exceptions apply. Poe, 97 Hawaii at 536-37, 40 P.3d at 938-39; UHPA Order, at *12 n. 3. Hence, the Board is compelled to find that the exhaustion rule applies and that the Complaint must be dismissed for failure to exhaust contractual remedies.

ORDER

For the reasons discussed above, the Board hereby finds that the Complainant failed to exhaust her contractual remedies under the BU 3 CBA; and therefore, the Board lacks subject matter jurisdiction. Consequently, the Board hereby dismisses this case. This case is closed.

DATED: Honolulu, Hawaii, December 1, 2015.

HAWAII LABOR RELATIONS BOARD




KERRY M. KOMATSUBARA, Chair


SESNITA A.D. MOEPONO, Member


ROCK B. LEY, Member

Copies sent to:

Ms. Tanya Benson, Pro Se Complainant
Miriam P. Loui, Deputy Attorney General, Attorney for DPS

¹ HRS § 89-2 **Definitions** 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)].

² HRS. § 89-6(a) provides in part:

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

* * *

(3) Nonsupervisory employees in white collar positions[.]

³ HRS § 89-2 **Definitions** 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, 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 BU 3 CBA Article 11-Grievance Procedure states in relevant part:

A. Any complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure. ...The grievance shall be presented to the appropriate supervisor within twenty (20) working days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) working days after the alleged violation first became known or should have become known to the Employee involved,....

B. An individual Employee may present a grievance to the Employee's immediate supervisor and have the Employee's 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.

C. Informal Step. A grievance shall, whenever possible, be discussed informally between the Employee and the Employee's immediate supervisor within the twenty (20) working day limitation provided for in paragraph "A" above. In such an event the Employee shall identify the discussion as an informal step grievance. The grievant may be assisted by the grievant's Union representative. The immediate supervisor shall reply within seven (7) working days. In the event the Employer does not respond within the time limits prescribed herein, the Union may pursue the grievance to the next step.

D. Step 1. If the grievant is not satisfied with the result of the informal conference, the grievant 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 department head or department head's 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 department head or department head's 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 the Employee's immediate supervisor, the Employee or the Union may submit a written statement of the grievance to the department head or department head's 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 department head or department head's designee within seven (7) working days after the written grievance is received. Either side may present witnesses. The department head or the department head's 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 Employer or the Employer's designee within seven (7) working days after receiving the written answer. The Employer or the Employer's 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 Employer or the Employer's designee shall reply in writing to the grievant or the Union within seven (7) working days after the meeting.

G. Step 3. Arbitration. If the grievance is not resolved at Step 2 and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or the Employer's representative of its desire to arbitrate within ten (10) working days after receipt of the Employer's decision at Step 2. Representatives of the parties shall attempt to select an Arbitrator immediately thereafter....

⁵ BU 3 CBA Article 45 – Alternative Work Schedules states:

The Union may present alternative work schedules for an office, program or work unit, for the Employer's consideration. If a proposal for alternative work schedule is considered and approved by the Employer, a memorandum of understanding shall be entered into between the Union and the Employer.

If the Union believes that the denial of the Union's proposal for an alternative work schedule is arbitrary and capricious, the Union may process a grievance in accordance with Article 11 - Grievance Procedure, provided such grievance shall not be subject to the provisions of Step 4 - Arbitration.

⁶ On May 22, 2003, then DPS Acting Director James L. Propotnick sent a Memorandum to clarify and transmit the Lingle Memo for DPS purposes.

⁷ While the Complaint states under paragraph 5. ALLEGATIONS "Article 45 Alternative Work Schedules" without a specific reference to BU 3 CBA, the parties do not dispute that the Article 45 allegation references the BU 3 CBA.