



STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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Transaction ID 59061027
Case No. CE-10-849

In the Matter of

JAMES M. IOANE,

Complainant,

and

DEPARTMENT OF PUBLIC SAFETY,
State of Hawaii,

Respondent.

CASE NO. CE-10-849

ORDER NO. 3162

ORDER (1) GRANTING RESPONDENT
STATE OF HAWAII, DEPARTMENT OF
PUBLIC SAFETY'S MOTION TO
DISMISS FOR LACK OF STANDING
AND FAILURE TO EXHAUST
CONTRACTUAL REMEDIES, AND
(2) DISMISSING, SUA SPONTE,
COMPLAINANT'S UNFAIR LABOR
PRACTICE COMPLAINT FOR FAILURE
TO PROSECUTE

**ORDER (1) GRANTING RESPONDENT STATE OF HAWAII,
DEPARTMENT OF PUBLIC SAFETY'S MOTION TO DISMISS FOR
LACK OF STANDING AND FAILURE TO EXHAUST CONTRACTUAL
REMEDIES, AND (2) DISMISSING, SUA SPONTE, COMPLAINANT'S
UNFAIR LABOR PRACTICE COMPLAINT FOR FAILURE TO PROSECUTE**

For the reasons discussed below and based on the record in this case, the Hawaii Labor Relations Board (Board) hereby grants Respondent State of Hawaii, Department of Public Safety's Motion to Dismiss for Lack of Standing and Failure to Exhaust Contractual Remedies (Motion to Dismiss), and also dismisses, sua sponte, Complainant's Unfair Labor Practice Complaint filed with the Board on September 17, 2014 (Complaint) for failure to prosecute his claim.

I. PROCEDURAL BACKGROUND AND 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.

The claim in this case arises from Complainant JAMES M. IOANE'S (Ioane) termination from employment with Respondent DEPARTMENT OF PUBLIC SAFETY, STATE OF HAWAII (DPS) because of an incident that occurred in December of 2011 wherein Ioane allegedly allowed a prison inmate to have an improper visitation while at the Queen's Hospital Emergency

Room. Ioane challenged his termination by filing a grievance with DPS through his union, United Public Workers (UPW). The grievance was denied by DPS, and UPW chose to not take the case to arbitration. On September 17, 2014, Ioane filed with the Board an Unfair Labor Practice Complaint against DPS claiming that he was coerced by Shelly Nobriga (DPS Litigation PREA Coordinator) into admitting that he allowed the said visitation at Queen's Hospital.

On January 25, 2016, DPS filed its Motion to Dismiss. DPS claims in the Motion to Dismiss that in the Complaint Ioane failed to raise any fact or make any allegation that can potentially establish that UPW breached its duty of fair representation when it refused to proceed to arbitration. DPS describes its legal argument as being based on Ioane's failure to exhaust his contractual remedies.

By that certain Notice of Hearing on Respondent State of Hawaii, Department of Public Safety's Motion to Dismiss for Lack of Standing and Failure to Exhaust Contractual Remedies dated May 3, 2016 (Notice), the Board set the hearing on the Motion to Dismiss for May 18, 2016 at 10 a.m., Hawaii time, in the Board's Conference Room. The Notice established (i) a May 12, 2016 deadline for Ioane to file his opposition memorandum and any supporting declaration and exhibits, (ii) a May 16, 2016 deadline for DPS to file and serve its reply memoranda, and (iii) a May 12, 2016 deadline for Ioane to submit to the Board an authenticated copy of that certain alleged letter dated August 2014 wherein Ioane claims his grievance against DPS was closed by his union, United Public Workers (UPW). The Notice was mailed by the Board to Ioane by first class mail on May 3, 2016 to Ioane's last known address.

Ioane failed to submit any opposition to the Motion to Dismiss. He also failed to submit to the Board the alleged August 2014 letter wherein he was informed by UPW that it would not take his case to arbitration. In essence, Ioane failed to file anything with the Board in response to the Motion to Dismiss. Furthermore, Ioane failed to appear before the Board, either in person or by telephone, for the May 18, 2016 hearing on the Motion to Dismiss.

Ioane's failure to defend against the Motion to Dismiss is not the first time that Ioane has failed to take action to prosecute his claim.

On October 6, 2014, DPS filed Respondent State of Hawaii, Department of Public Safety's Motion to Dismiss in Lieu of Answer to the Unfair Labor Practice Complaint filed September 17, 2014, together with a Memorandum in Support of Motion, and Exhibits "A" – "B" (10/6/14 Motion). The 10/6/14 Motion was discussed with all of the parties at the October 10, 2014 Pre-Hearing/Settlement Conference and an October 31, 2014 deadline was set for Ioane to submit any response or opposition to the 10/6/14 Motion. Pursuant to the Board's notice of status conference dated November 12, 2015, the Board held a status conference on November 19, 2015 wherein counsel for DPS was present but Ioane did not appear. Ioane also did not call the Board to

participate by telephone, and the Board's attempts to contact him by telephone were unsuccessful. Because Ioane failed to participate in the status conference, the Board issued a notice continuing the status conference to November 25, 2015. At the November 25, 2015 status conference, both parties, including Ioane, participated by telephone. At the status conference, the Board set the 10/6/14 Motion for hearing on January 25, 2016 and set the deadline for Ioane to submit responses by December 14, 2015. Ioane failed to file any response or opposition to the 10/6/14 Motion. The parties, including Ioane, participated in the January 25, 2016 hearing on the 10/6/14 Motion by telephone. Ioane advised the Board that he was in the process of finding an attorney to represent him in this case and asked for additional time. Also, there was discussion regarding that certain 2014 letter wherein UPW notified Ioane that it would not take his case to arbitration. Ioane said he did not have the letter at that time but that he would send a copy of that letter to the Board. The Board took the 10/6/14 Motion under advisement. It should be noted that Ioane has never delivered to the Board a copy of the alleged 2014 letter from UPW.

II. CONCLUSIONS OF LAW

A. Motion to Dismiss

Although the Board does not agree with DPS' description of its legal basis for a dismissal as being based on Ioane's failure to exhaust his contractual remedies, the Board agrees with DPS that Ioane failed to allege in his Complaint a breach of duty of fair representation by UPW and that such failure is fatal to Ioane's claim against DPS.

The Complaint in this case is known as a "hybrid action," consisting of two separate claims: (1) a claim against the employer, DPS, alleging a breach of the collective bargaining agreement when DPS terminated Ioane from his job, and (2) a claim against the union, UPW, for breach of the duty of fair representation when UPW failed to take his grievance to arbitration. In a hybrid action, "[t]o prevail against either the company or the Union [in a hybrid action], employee-plaintiffs must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. The employee may, if he chooses, sue one defendant but not the other; but the case he must prove is the same whether he sues one, the other, or both." *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164-165 (1983).¹ Therefore, to prevail against DPS, Ioane must prove that UPW breached its duty of fair representation as well as his case against DPS. If he cannot prove his case against one, then neither is culpable. See, *Lee v. United Public Workers, AFSCME, Local 646, AFL-CIO*, 125 Hawaii 317, 321 (Haw.App. 2011) (Lee Case).

Since Ioane has not alleged in the Complaint a breach of UPW's duty of fair representation, nor has Ioane opposed or raised any defense or counter-argument against DPS' argument raised in

¹ Cited in *Poe v. Hawaii Labor Relations Board*, 105 Haw. 97, 102 (2004) (Poe Case).

its Motion to Dismiss, the Board finds and concludes that Ioane cannot meet the requirements of a hybrid action established in the Lee and Poe Cases. As such, a dismissal of the Complaint is proper.

B. Dismissal for Failure to Prosecute

Although the Board's rules are silent with respect to a dismissal of an action for a complainant's failure to prosecute, the "Board has previously relied on the HRCP (Hawaii Rules of Civil Procedure) to assist in resolving ambiguities in its rules or procedures." See Order No. 2014, *United Public Workers and Benjamin J. Cayetano, et al.*, Case Nos. Ce-01-378a, CE-03-378b, CE-10-378c and CE-13-378d, at page 6. Furthermore, Rule 81(b)(12) of the HRCP specifically extends the application of the HRCP to proceedings before the Board provided that there are no statutes or rules that contradict the HRCP provision that is being applied by the Board. Rule 81(b)(12) states as follows:

"These rules shall apply to the following proceedings except insofar as and to the extent that they are inconsistent with specific statutes of the State or rules of court relating to such proceedings:

(12) Proceedings under: . . . chapters 89 and 380, relating to collective bargaining and labor disputes"

Under the HRCP, an involuntary dismissal of an action for failure of the plaintiff to prosecute its claims is governed by the provisions of Rule 41(b) of the Hawaii Rules of Civil Procedure (HRCP). Rule 41(b) states as follows:

"(b) Involuntary dismissal: Effect thereof.

- (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against it.
- (2) For failure to prosecute or to comply with these rules or any order of the court, the court may *sua sponte* dismiss an action or any claim with written notice to the parties. Such dismissal may be set aside and the action or claim reinstated by order of the court for good cause shown upon motion duly filed not later than 10 days from the date of the order of dismissal.
- (3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits. (emphasis in italics)

The Board recognizes that the threshold standard for granting an involuntary dismissal of a complaint with prejudice is high. *Shasteen, Inc. v. Hilton Hawaiian Village Joint Venture*, 79

Haw. 103 (1995) (Shasteen Case). In the Shasteen Case, only if the records show deliberate delay, contumacious conduct or actual prejudice, will involuntary dismissal be allowed under Rule 41(b).

In this case, the Board finds and concludes that Ioane's actions and inactions in this case shows deliberate delay and contumacious conduct by Ioane. He has failed to comply with the Board's repeated requests for the document (i.e., 2014 letter from UPW) which he claims to establish when he received notice that UPW would not be taking his case to arbitration. He also has repeatedly failed to appear and participate, either in person or by telephone, in conferences and hearings on relevant and important matters, including the hearing on the Motion to Dismiss. As such, the Board finds that Ioane has failed to prosecute his claims in this case. As such, Board finds and concludes that a dismissal of the Complaint pursuant to Rule 41(b), HRCPP, is proper.

III. ORDER

Based on the filings of DPS in support of the Motion to Dismiss, the record in this case, and the fact of Ioane's failure to appear before the Board on the hearing for the Motion to Dismiss and comply with the requirements set forth in the Notice, the Board grants the Motion to Dismiss. In addition, the Board finds, sua sponte that Ioane has failed to prosecute his case and that dismissal of the Complaint is warranted under Rule 41(b), HRCPP.²

As such, Ioane's Unfair Labor Practice Complaint filed in this case is hereby dismissed and this case is closed.

Dated: Honolulu, Hawaii, May 25, 2016.

HAWAII LABOR RELATIONS BOARD




KERRY M. KOMATSUBARA, Chair


ROCK B. LEY, Member

² The dismissal of the Complaint pursuant to Rule 41(b), HRCPP, may be set aside for good cause shown upon the filing of a motion by Ioane with the Board not later than 10 days from the date of this Order; provided, however, the filing of any such motion to set aside shall not set aside or impact the Board's other rulings herein, including the granting of the Motion to Dismiss.

Dissenting, in part, and Concurring Opinion of Sesnita A.D. Moepono, Board Member

I respectfully dissent from the first part of the Board majority's order granting Respondent's Motion to Dismiss for lack of standing and failure to exhaust contractual remedies. And, I concur with the second part of the majority's order finding that "In this case, the Board finds and concludes that Ioane's actions and inactions in this case shows deliberate delay and contumacious conduct by Ioane." and dismissing this case *sua sponte* for failure to prosecute.



SESNITA A.D. MOEPONO, Member

Copies to:

James M. Ioane

Bosko Petricevic, Deputy Attorney General



CE-10-849 – James M. Ioane v. Department of Public Safety, State of Hawaii – Order (1) Granting Respondent State of Hawaii, Department of Public Safety's Motion to Dismiss for Lack of Standing and Failure to Exhaust Contractual Remedies, and (2) Dismissing, Sua Sponte, Complainant's Unfair Labor Practice Complaint for Failure to Prosecute. Order No. 3162.