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Case No. 17-CE-01-897, 17-CU-01-351**

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

CATHERINE ELABAN,

Complainant,

and

DEPARTMENT OF TRANSPORTATION,
State of Hawaii; and UNITED PUBLIC
WORKERS, AFSCME, LOCAL 646, AFL-
CIO,

Respondents.

CASE NO(S).

17-CE-01-897, 17-CU-01-351

ORDER NO. 3280

ORDER GRANTING RESPONDENT
UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO, MOTION TO
DISMISS FIRST AMENDED COMPLAINT
AND GRANTING RESPONDENT STATE
OF HAWAII, DEPARTMENT OF
TRANSPORTATION'S MOTION TO
DISMISS FIRST AMENDED PROHIBITED
PRACTICE COMPLAINT FILED ON JUNE
7, 2017 AND DISMISSING UPW'S
MOTION FOR PRE-HEARING
DISCOVERY

ORDER GRANTING RESPONDENT UNITED PUBLIC WORKERS,
AFSCME, LOCAL 646, AFL-CIO, MOTION TO DISMISS FIRST
AMENDED COMPLAINT AND GRANTING RESPONDENT STATE OF
HAWAII, DEPARTMENT OF TRANSPORTATION'S MOTION TO DISMISS
FIRST AMENDED PROHIBITED PRACTICE COMPLAINT FILED ON
JUNE 7, 2017 AND DISMISSING UPW'S MOTION FOR PRE-HEARING DISCOVERY

I. BACKGROUND

On May 19, 2017, Catherine Elaban (Complainant or Ms. Elaban) filed a Prohibited Practice Complaint (PPC) with the Hawaii Labor Relations Board (Board.) The PPC stated that the charge arose out of the events begun when the Complainant's employer, the State of Hawaii, Department of Transportation (Respondent DOT) issued a notice of proposed dismissal on February 24, 2017, to Catherine Elaban, and her subsequent dismissal effective March 10, 2017. The PPC alleges that the Respondent DOT violated Hawaii Revised Statutes (HRS) §89-13(a)(8) without just cause in violation of the collective bargaining agreement (CBA). The PPC further alleged that the Respondent United Public Workers, AFSCME, LOCAL 646, AFL-CIO (UPW),

violated HRS §89-13(b)(5) for the Union's failure to pursue a meritorious grievance arbitrarily and/or in bad faith in violation of the CBA.

On June 7, 2017, the Complainant filed a FIRST AMENDED PROHIBITED PRACTICE COMPLAINT (Amended PPC).

On June 8, 2017, the UPW filed MOTION TO DISMISS FIRST AMENDED COMPLAINT AND IN THE ALTERNATIVE FOR SUMMARY JUDGMENT (UPW's Motion to Dismiss).

On June 9, 2017, Respondent DOT filed RESPONDENT STATE OF HAWAII, DEPARTMENT OF TRANSPORTATION'S MOTION TO DISMISS FIRST AMENDED PROHIBITED PRACTICE COMPLAINT FILED JUNE 7, 2017 (DOT Motion to Dismiss, collectively Motions).

On June 9, 2017, the UPW filed a MOTION FOR PRE-HEARING DISCOVERY.

On June 30, 2017, the Board held a hearing and received oral arguments on the Motions. After the reviewing the Motions, the Complainant's opposition to the Motions, and taking into consideration the oral arguments presented by all parties, the Board ruled that it would hold a hearing limited to addressing the issue of whether the Board has jurisdiction in Cases Nos. 17- CE-01-897, 17-CU-01-351 based on the Complainant's assertion that she has exhausted her contractual remedies.

On June 30, 2017, the Board issued NOTICE OF EVIDENTIARY HEARING ON JURISDICTION AND DEADLINES. The Notice stated the purpose of the Evidentiary Hearing:

Whether the Complainant has established the Board's jurisdiction regarding these prohibited practice complaints by demonstrating that she exhausted her contractual remedies pursuant to the terms of the Collective Bargaining Agreement?

Any conclusion of law that is designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact that is designated as a conclusion of law shall be deemed or construed as a finding of fact.

II. FINDINGS OF FACT

- a. At all relevant times in the instant case, the Complainant's employment as Carpet Cleaner I in the Airport Division of the DOT was included in Bargaining Unit 1

pursuant to HRS §89-6(a)(1), and the Respondent UPW was certified by the Board as the exclusive representative under HRS §89-8 for Bargaining Unit 1.

- b. A letter via certified mail, return receipt requested, dated February 24, 2017 signed by Ford N. Fuchigami, Director of Transportation, State of Hawaii, was sent to Catherine L. Elaban. (see Complainant Exhibit 1) The testimony of Ms. Elaban, Complainant, confirms receipt of the letter. The letter states in part, “The purpose of this letter is to inform you that you are being discharged as A Carpet Cleaner I,…” It goes on to schedule a “...a pre-discharge hearing...” to be held on March 3, 2017 (See Complainant’s Exhibit 1).
- c. On March 3, 2017, UPW Business Agent Amie Miranda-Pesqueira (Ms. Miranda-Pesqueira) attended the pre-discharge hearing with the Complainant as evidenced in the contemporaneous notes taken by Ms. Miranda-Pesqueira in Respondent UPW’s Exhibit CC1.
- d. On March 9, 2017, the employer DOT sent the Complainant a notice of discharge effective March 10, 2017 (See Complainant Exhibit 2). The Complainant states in the both the original PPC and the Amended PPC that the Respondent DOT violated HRS § 89-13(a)(8) and that the Respondent UPW violated HRS § 89-13(b)(5). Both statutory provisions refer to violating the terms of a collective bargaining agreement.
- e. There is no evidence or testimony in the record that the Complainant filed a grievance under the provisions of the CBA in effect between the employer DOT and the exclusive representative UPW.
- f. Ms. Miranda-Pesqueira testified under oath that the Complainant Catherine Eleban, never responded to her question concerning whether Ms. Eleban wanted UPW to file a grievance on her behalf, nor did Ms. Eleban request that the union UPW file a grievance on her behalf. Respondent UPW did not file a grievance on behalf of the Complainant.
- g. The Complainant Catherine Elaban, testified under oath that she was aware that the CBA (See: Board Exhibit 1) in § 15 required that a grievance be filed within eighteen (18) days from the date of an alleged violation of the CBA.
- h. The CBA permits an employee to file a Step 1 grievance without need to wait for union intervention; however, only the union may demand arbitration, the final step. Furthermore, HRS § 89-8(b) provides that an “individual employee may present a

grievance at any time to the employee's employer and have the grievance heard without intervention of an employee organization[.]”

- i. The Complainant testified under oath that she did not file a grievance after receiving the Notice of Discharge, dated March 9, 2017, within the 18 days.
- j. The Complainant Catherine Elaban, testified under oath that she received the Notice of Discharge on March 10, 2017.
- k. The Complainant Catherine Elaban, testified under oath that at no time after her conversation with Ms. Miranda-Pesquira on March 21, 2017 did she ever contact the Respondent UPW to inquire as to whether a grievance was filed on her behalf.

III. CONCLUSIONS OF LAW

Complainant alleges prohibited practices pursuant to HRS § 89-13(a)(8) and (b)(5). HRS § 89-13(a)(8) provides that “[i]t shall be a prohibited practice for a public employer or its designated representative wilfully to . . . [v]iolate the terms of a collective bargaining agreement[.]” Similarly, HRS § 89-13(b)(5) provides that “[i]t shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to . . . [v]iolate the terms of a collective bargaining agreement.”

HRS § 89-10.8(a) requires a collective bargaining agreement to contain 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"** (emphases added).

In Poe v. Hawaii Labor Relations Board, 105 Hawaii 97, 100-01, 94 P.3d 652, 655-56 (2004), decided by Hawaii Supreme Court, Poe contended that the circuit court erred in affirming the decision of the HLRB because the Board incorrectly determined that Poe had failed to exhaust his remedies under the collective bargaining agreement. HLRB and Employer argued, *inter alia*, that Poe's suit was barred because he failed to prove that HGEA breached its duty of fair representation in not advancing Poe's claims through Step 3 arbitration. The Court held:

This court has used federal precedent to guide its interpretation of state public employment law. 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. 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. (Emphasis added). (Internal quotation marks and citations omitted).

There has been no showing of an exception to the doctrine of exhaustion of contractual remedies, such as when exhaustion would be futile. Poe, 105 Hawaii at 102, 94 P.3d at 657.

Furthermore, in Poe, the Court held that Poe lacked standing to pursue his claim before the HLRB because he failed to demonstrate that his union breach the duty of fair representation, and thus failed to exhaust his contractual remedies. (Id. At 104, 94 P.3d at 659). A tribunal's jurisdiction may not be invoked by a party who does not have standing. See, Mottl v. Miyahira, 95 Hawaii 381, 388, 23 P.3d 716, 723 (2001); Akinaka v. Disciplinary Board of Hawaii Supreme Court, 91 Hawaii 155, 171, 997 P.2d 567, 583 (2000)).

IV. ORDER

After the reviewing the pleadings and taking into consideration the oral arguments presented by all parties, the Board therefore finds that the first amended PPC filed in the above reference matter is dismissed for the failure of the Complainant to exhaust the remedies provided in the CBA, and because she has not shown that exhaustion would have been futile.

The Board grants RESPONDENT UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, MOTION TO DISMISS FIRST AMENDED COMPLAINT AND grants RESPONDENT STATE OF HAWAII, DEPARTMENT OF TRANSPORTATION'S MOTION TO DISMISS FIRST AMENDED PROHIBITED PRACTICE COMPLAINT FILED ON JUNE 7, 2017.

In addition, the Board dismisses the Respondent UPW's MOTION FOR PRE-HEARING DISCOVERY, filed June 9, 2017, as being moot. The case is now closed.

DATED: Honolulu, Hawaii, August 2, 2017.

HAWAII LABOR RELATIONS BOARD



SESNITA A.D. MOEPONO, Member





J.N. MUSTO, Member

CATHERINE ELEBAN v. DEPARTMENT OF TRANSPORTATION, State of Hawaii and
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