

EFiled: Aug 07 2017 03:53PM HAST
Transaction ID 60951692
Case No. CE-01-706

DEPARTMENT OF THE CORPORATION COUNSEL

DONNA Y. L. LEONG 3226-0
Corporation Counsel
ERNEST H. NOMURA 4829-0
Deputy Corporation Counsel
530 South King Street, Room 110
Honolulu, Hawaii 96813
Telephone: 768-5120
E-Mail: enomura@honolulu.gov

Attorneys for Respondent

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO,

Complainant,

and

MUFI HANNEMANN, Mayor, City and
County of Honolulu,

Respondent.¹

CASE NO. CE-01-706

RESPONDENT'S PROPOSED
FINDINGS OF FACTS, CONCLUSIONS
OF LAW, AND ORDER GRANTING
RESPONDENT'S MOTION TO DISMISS
~~CERTIFICATE OF SERVICE~~ *SH* *gnm*

ORDER NO. 3281

RESPONDENT'S PROPOSED FINDINGS OF FACTS, CONCLUSIONS
OF LAW, AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

Pursuant to the Hawaii Labor Relations Board's ("Board") Minute Order Directing
the Parties to Submit Proposed Findings of Fact, Conclusions of Law, and Order
Granting or Denying Respondent's Motion to Dismiss, entered on March 2, 2017,

¹ For purposes of consistency in the filings and record in this case, Respondent shall continue to designate "Respondent" in this case as "Mufi Hannemann, Mayor," recognizing that the current Mayor of the City and County of Honolulu is the Honorable Kirk Caldwell.

Respondent MUFI HANNEMANN, Mayor, City and County of Honolulu ("Respondent"), by his attorneys, the Department of the Corporation Counsel, Donna Y. L. Leong, Corporation Counsel, and Ernest H. Nomura, Deputy Corporation Counsel, submits this Proposed Findings of Fact, Conclusions of Law, and Order Granting Respondent's Motion to Dismiss, filed on July 10, 2009, as follows:

FINDINGS OF FACT

1. On May 4, 2009, the United Public Workers, AFSCME, Local 626, AFL-CIO ("Complainant" or "UPW") filed with the Hawaii Labor Relations Board ("Board") a prohibited practices complaint against Respondent Mufi Hannemann, Mayor, City and County of Honolulu ("Respondent" or "City").

2. The complaint alleges that Respondent violated Haw. Rev. Stat. § 89-13(a)(5), and further alleges that in 2004, a dispute arose between UPW and the City regarding training of certain Unit 1 employees on the operation of heavy cranes and the certification of said employees as being properly skilled in the operation of the equipment.

3. This dispute resulted in a grievance under the applicable collective bargaining agreement ("CBA"). On or about May 18, 2005, UPW filed a grievance, Case No. DA-04-32, pursuant to and consistent with the CBA arbitration procedure. The grievance procedure had been invoked and the case was scheduled for an arbitration hearing on October 5-7, 2009, before Arbitrator Glenn D. Choy, Esq.

4. The CBA then in force between the City and County of Honolulu and UPW provides, in relevant part, that "[a] grievance that 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 [the CBA's grievance procedure]."

5. Prior to the arbitration hearing, the parties met in an attempt to compromise and settle the dispute, which appeared to be successful in that a tentative agreement was reached on or about March 2008.

6. The parties thereafter exchanged drafts of the settlement agreement but were unable to finalize the document.

7. On or about March 19, 2009, Respondent forwarded to UPW an amended written settlement agreement that did not include certain terms that UPW required to be included. The parties were then unable to agree to the final written terms of the settlement.

8. The complaint filed in this case before the Board arises out of the underlying dispute detailed above.

9. On or about July 10, 2009, Respondent filed a Motion to Dismiss the complaint for failure to exhaust contractual remedies, among other bases.

10. On or about August 28, 2009, UPW filed its memorandum in opposition to the Motion.

11. On or about September 2, 2009, the Board heard oral arguments on the Motion. Charles K. Y. Khim appeared on behalf of UPW. John S. Mukai appeared on behalf of Respondents. The Board took the matter under advisement.

CONCLUSIONS OF LAW

1. Haw. Rev. Stat. § 89-10.8 provides in pertinent part that "[a] public employer shall enter into 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."

2. The plain language of the statute specifies that the grievance procedure shall serve as the exclusive vehicle for resolving disputes regarding the terms of the collective bargaining agreement ("CBA"). The subject complaint should, accordingly, be dismissed as the grievance procedure is the exclusive forum for pursuing claims arising from the interpretation and application of the terms of the CBA and UPW has failed to exhaust its contractual remedies under the Unit 1 CBA.

3. It is well-settled that an employee must exhaust any grievance or arbitration procedures provided under a CBA before filing a complaint pursuant to the agreement. Santos v. State of Hawaii, Dept. of Transp., Kauai Div., 64 Haw. 648, 646 P.2d 962 (1982); Marshall v. Univ. of Hawai'i, 9 Haw. App. 21, 30, 821 P.2d 937, 943 (1991); Winslow v. State, 2 Haw. App. 50, 55, 625 P.2d 1046, 1050 (1981); DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 163-64 (1983).

4. The Hawaii Supreme Court has held that "where the terms of public employment are covered by a collective bargaining agreement pursuant to Haw. Rev. Stat. ch. 89 and the agreement includes a grievance procedure to dispose of employee grievances against the public employer, an aggrieved employee is bound by the terms of the agreement." Santos, 64 Haw. at 655, 646 P.2d at 967.

5. Strong policy considerations support this rule. The exhaustion requirement preserves the integrity and autonomy of the collective bargaining process, allowing the parties to develop their own uniform mechanism of dispute resolution. See

generally DelCostello, 462 U.S. at 169; Clayton v. Int'l Union, United Auto., Aerospace, and Agr. Implement Workers of America, 451 U.S. 679, 686 (1981). At the same time, the rule promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means. See Dorrance v. Lee, 90 Haw. 143, 147, 976 P.2d 904, 908 (1999) (quoting Richardson v. Sport Shinko (Waikiki Corp.), 76 Haw. 494, 510, 880 P.2d 169, 185 (1994)).

6. The rule is also in keeping with prevailing National Labor Relations policy and Hawaii policy favoring arbitration as a dispute settlement mechanism. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Warrior Gulf Co., 363 U.S. 574 (1960); Steelworkers v. Enterprise Wheel Car Corp., 363 U.S. 593 (1960); Gregg Kendall & Assoc., Inc. v. Kauhi, 53 Haw. 88, 488 P.2d 136 (1971).

7. This Board has determined that alleged violations of Haw. Rev. Stat. § 89-13(a)(8) should be dismissed on the grounds that a contractual dispute is a grievable matter and that process must be exhausted prior to filing a prohibited practice complaint. Thomas Lepere v. John Waihee and Dep't of Public Safety, 5 HLRB 277, 288-90 (1994); State of Hawaii Organization of Police Officers v. Maryanne Kusaka and George Freitas, 6 HLRB 25, 28-9 (1998).

8. There is no dispute that the CBA between the parties provide a specific grievance procedure in order to resolve contractual disputes. See § 15 of the CBA. Because the disputed actions by Respondent were scheduled to be determined in the arbitration of the underlying grievance, the Board is without jurisdiction to entertain the allegations herein.


9. Further, the Board lacks subject matter jurisdiction relating to UPW's complaints regarding discovery. As made clear under Haw. Rev. Stat. § 658A-17, discovery in an arbitration proceeding is within the sole province of the arbitrator.

10. Haw. Rev. Stat. § 658A-17 specifically provides as follows:

(c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.

(d) If an arbitrator permits discovery under subsection (c), the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

11. The Board, therefore, dismisses with prejudice all allegations set forth in the complaint, ~~that concern acts occurring after the underlying grievance was submitted to arbitration in light of the specific legislative directive that delegated discovery issues to the arbitrator.~~ 

ORDER

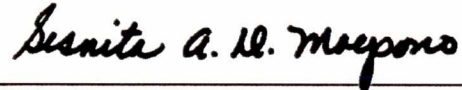
Based on the foregoing Findings of Fact and Conclusions of Law, the Board hereby orders as follows:

1. Respondent's Motion to Dismiss, filed on July 10, 2009, is **GRANTED**. The prohibited practices complaint filed by United Public Workers, AFSCME, Local 646, AFL-CIO, on May 5, 2009, is dismissed with prejudice in its entirety.

2. Given the Board order herein, Respondent's alternative request to defer the hearing on the complaint pending arbitration is denied as moot. This case is closed.

DATED: Honolulu, Hawaii, August 7, 2017.

HAWAII LABOR RELATIONS BOARD



SESNITA A.D. MOEPONO, Member



J.N. MUSTO, Member