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Case No. 17-CE-01-893, 17-CU-01-348

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

GARRICK D.K. FRANCISCO,

Complainant,

and

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

Respondents.

CASE NO(S).

17-CE-01-893, 17-CU-01-348

ORDER NO. 3399

ORDER GRANTING RESPONDENT
UNITED PUBLIC WORKERS,
AFSCME, LOCAL 646, AFL-CIO,
MOTION TO DISMISS COMPLAINT
AND GRANTING RESPONDENT
STATE OF HAWAII, DEPARTMENT
OF TRANSPORTATION'S MOTION
TO DISMISS PROHIBITED PRACTICE
COMPLAINT FILED ON MARCH 29,
2017

ORDER GRANTING RESPONDENT UNITED PUBLIC WORKERS,
AFSCME, LOCAL 646, AFL-CIO, MOTION TO DISMISS COMPLAINT
AND GRANTING RESPONDENT STATE OF HAWAII,
DEPARTMENT OF TRANSPORTATION'S MOTION TO DISMISS
PROHIBITED PRACTICE COMPLAINT FILED ON MARCH 29, 2017

I. BACKGROUND

On March 30, 2017, GARRICK D.K. FRANCISCO (Complainant or Mr. Francisco) filed a Prohibited Practice Complaint (PPC) with the Hawaii Labor Relations Board (Board). In the PPC, Complainant alleges that the Respondent DEPARTMENT OF TRANSPORTATION, Highways Division, State of Hawaii (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 alleges that Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) violated HRS § 89-13(b)(5) in violation of the CBA.

Specifically, Complainant alleges, among other things, that on May 10, 2016, May 11, 2016, and May 12, 2016, the Complainant's employer, Respondent DOT, assigned a truck driving assignment to a driver who had less seniority than Complainant. Complainant further alleges that on March 10, 2017, Dayton Nakanelua, Director of the UPW, informed the Trade Crews from the

Oahu District Highways Maintenance Section that job assignments under the Multi-Skilled Worker (MSW) pilot program would not be given to workers based on seniority.

On April 20, 2017, the Board notified Respondent DOT and the UPW (collectively, Respondents) of receipt of the PPC. In addition to providing notice of the PPC, the Board scheduled a prehearing conference on April 28, 2017 and a Hearing on the Merits (HOM) on May 8, 2017. The Board further set deadlines for dispositive motions on May 5, 2017 and response to dispositive motions on May 12, 2017.

On April 25, 2017, the UPW filed UNION RESPONDENT'S PRE-HEARING STATEMENT, in which the UPW proposed extending the forty-day deadlineⁱ to begin the HOM so that the Board could re-schedule the deadlines to allow the dispositive motions to be considered before the HOM.

On April 28, 2017, the Board held the prehearing conference at 9:00 a.m. in the Board Hearing Room, as noticed by the Board on April 20, 2017 to the Complainant and the Respondents. At the prehearing conference, Respondent DOT stated that they would be agreeable to extend the forty-day deadline as proposed by the UPW. However, Complainant was not agreeable to extending the forty-day deadline. Therefore, the Board stated that the case would proceed with the deadlines contained in the notice sent by the Board on April 20, 2017.

Also on April 28, 2017, Respondent DOT filed RESPONDENT DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII'S ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED ON MARCH 30, 2017 (Respondent DOT's Answer).

On May 1, 2017, the UPW filed UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO'S ANSWER TO PROHIBITED PRACTICE COMPLAINT (UPW's Answer).

On May 5, 2017, the UPW filed MOTION TO DISMISS COMPLAINT AND/OR FOR SUMMARY JUDGMENT (Respondent UPW's Motion to Dismiss), and Respondent DOT filed RESPONDENT DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII'S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED ON MARCH [29], 2017 (Respondent DOT's Motion to Dismiss, collectively Motions).

On May 8, 2017, the Board held the HOM and received oral arguments on the merits of the case. After reviewing the PPC, the Respondents' Answers, and taking into consideration the oral arguments presented by all parties, the Board adjourned the hearing and ruled that it would review the Motions and determine whether a hearing on the Motions was necessary after the deadline for responses to the Motions, previously set for May 12, 2017, passed.

On June 2, 2017, the UPW filed UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO'S SUPPLEMENTAL SUBMISSION IN SUPPORT OF MOTION TO DISMISS COMPLAINT AND/OR FOR SUMMARY JUDGMENT (UPW's Supplement). UPW's Supplement notes that Complainant did not file response to the Motions and the deadline for responses to the Motions was May 12, 2017ⁱⁱ.

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

II. FINDINGS OF FACT

At all relevant times in the instant case, the Complainant was employed as a Heavy Equipment Operator, General Laborer II in the Highways Division of the DOT. As such, Complainant's position was included in Bargaining Unit 1 pursuant to HRS § 89-6(a)(1). Additionally, the UPW has been certified by the Board as the exclusive representative, as defined in HRS § 89-2, under HRS § 89-8 for Bargaining Unit 1.

The UPW and the State of Hawaii entered into a CBA for Bargaining Unit 1. This CBA was effective from July 1, 2013 through June 30, 2017 and was in place at all relevant times in the instant case.

The Memorandum of Understanding for the Multi-Skilled Workers Pilot Program (MOU) was signed by the final signatory on July 15, 2015. (*See* UPW Exhibit A-8.) This MOU was in place at all relevant times in the instant case.

A letter via certified mail, dated June 6, 2016 and signed by George G. Abcede, Oahu Maintenance Engineer, was sent to GARRICK FRANCISCO. (*See* Complainant Exhibit 1.) Complainant confirms receipt of the letter. The letter states in part, "With the start of the Multi Skilled Worker (MSW) pilot program . . . The crew supervisor is not to assign work by seniority." (*See* Complainant Exhibit 1.)

A letter via certified mail, dated June 14, 2016, written by GARRICK FRANCISCO was sent to Dayton Nakanelua, State Director of the UPW. The letter asks, in part, for "A response in writing from [Mr. Nakanelua]" and for "the section(s) in the MOU or CBA that supports (sic) this action." (*See* Complainant Exhibit 3.)

On March 10, 2017, the UPW held a meeting with the Highways Trades Crew regarding the MSW pilot program. (*See* UPW Exhibit A-50 and UPW Exhibit A-51.) At this meeting, a representative of the UPW stated that, under the MSW pilot program, jobs would not be assigned by seniority. (*See* UPW Exhibit A-51.)

The Complainant GARRICK FRANCISCO was aware that the CBA says that complaints about violations of the CBA were to be handled via the grievance procedure laid out in the CBA. (*See* Hearing and UPW Exhibit A61-48, Lines 6-10.)

The Complainant GARRICK FRANCISCO did not file a formal grievance prior to filing the Complaint filed on March 29, 2017 and did not ask the UPW to file a grievance. (*See* Hearing and UPW Exhibit A61-49, Lines 1-4 and 5-11.)

III. STANDARDS OF REVIEW

The Board follows 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 the complaint 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).

IV. CONCLUSIONS OF LAW

Complainant alleges prohibited practices under HRS § 89-13(a)(8) and (b)(5).

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

In their respective Motions, the Respondents assert that the PPC should be dismissed because the Board lacks subject matter jurisdiction due to Complainant’s failure to exhaust contractual remedies.

The contractual remedies available to a complainant are based on the relevant CBA for their Bargaining Unit. HRS § 89-10.8(a) requires 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,” and that the grievance procedure “shall be valid and enforceable[.]”

As required, the CBA contains a grievance procedure. The CBA provides in relevant part:

SECTION 15. GRIEVANCE PROCEDURE

15.01 PROCESS.

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.

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.

15.03 **GRIEVANCE WITHOUT UNION REPRESENTATION.**

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.

15.05 **REQUIREMENTS.**

15.05 a. A grievance not filed as provided in Section 15, need not be considered by the Employer.

15.05 b. By mutual agreement between the Union and the Employer any requirement of Section 15, may be waived.

15.07 **INFORMAL RESOLUTION.**

A grievance shall, whenever possible, be discussed and resolved informally between the grieving party and/or the Union with the immediate supervisor.

15.08 **MEETING.**

By verbal request, the grieving party and/or the Union representative shall be provided an opportunity to meet in Steps 1 and 2 in an attempt to resolve the grievance.

15.10 **FORMAL GRIEVANCE.**

In the event the grievance is not satisfactorily resolved on an informal basis, the grieving party and/or the Union may file a formal grievance by completing the grievance form provided by the Union.

15.11 **STEP 1 GRIEVANCE.**

The grievance shall be filed with the department head or the department head's designee in writing as follows:

15.11 a. Within eighteen (18) calendar days after the occurrence of the alleged violation. The term "after the occurrence of the alleged violation" as provided in Section 15.11 a. shall mean:

15.11 a.4. Other Alleged Violation(s): Eighteen (18) calendar days after the alleged violation(s) occurred unless the violation(s) are continuing as provided in Section 15.11 b.

15.11 b. Within eighteen (18) calendar days after the alleged violation first became known to the Employee or the Union if the Employee did not know of the alleged violation if it is a continuing violation.

15.12 **STEP 1 DECISION.**

The decision of the department head or the department head's designee shall be in writing and shall be transmitted to the grieving party and/or the Union within thirteen (13) calendar days after receipt of the grievance.

15.13 **STEP 2 APPEAL OR GRIEVANCE.**

15.13 a. In the event the grievance is not resolved in Step 1, the grieving party and/or the Union may file a letter of appeal with the Employer or the Employer's designee specifying the reasons for the appeal together with a copy of the grievance and a copy of the Step 1 decision within nine (9) calendar days after receipt of the Step 1 decision.

15.14 **DIFFERENT ALLEGATIONS.**

The Employer or the Employer’s designee need not consider a Step 2 grievance which encompasses different allegations than those alleged in Step 1.

15.15 **STEP 2 DECISION.**

The decision of the Employer or the Employer’s designee shall be in writing and transmitted to the grieving party and/or the Union within nine (9) calendar days after receipt of the appeal.

15.16 **STEP 3 ARBITRATION.**

In the event the grievance is not resolved in Step 2, and the Union desires to submit the grievance to arbitration, the Union shall notify the Employer within thirty (30) calendar days after receipt of the Step 2 decision.

“[U]nder Hawai’i Revised Statutes (HRS) chapter 89, pertaining to collective bargaining in public employment, a public employee pursuing an individual grievance exhausts his or her administrative remedies when the employee has complete[d] every step available to the employee in the grievance process and a request to the employee’s exclusive bargaining representative to proceed to the last grievance step, which only the representative can undertake, would be futile.” Poe v. Hawaii Labor Relations Board, 97 Hawaii 528, 531, 40 P.3d 930, 933 (2002).

In Poe v. Hawaii Labor Relations Board, 105 Hawaii 97, 100-01, 94 P.3d 652, 655-56 (2004) (Poe II), decided by the Hawaii Supreme Court, Poe argued that the circuit court should not have affirmed the decision of the Hawaii Labor Relations Board because the Board was incorrect in determining that Poe failed to exhaust his remedies under the collective bargaining agreement. Both the Board and the Employer argued, among other things, that Poe failed to prove that the union representing him breached its duty of fair representation by not advancing Poe’s claims through Step 3 arbitration. The Court stated:

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.)

Id. at 101, 94 P.3d at 656. (Internal quotation marks and citations omitted.) The Poe II Court recognized that exceptions to the exhaustion requirement do exist; for example, when pursuing the contractual remedy would be futile. *Id.* at 102, 94 P.3d at 657. However, there is no showing that such an exception exists in this case; therefore, the Complainant was required to exhaust his contractual remedies prior to filing the PPC.

Based on the record in this case, there is no dispute that Complainant was an employee who was included in Bargaining Unit 1 and was thus covered under the CBA; that, under the CBA Section 15, members of Bargaining Unit 1 must follow the grievance procedures laid out in that section; that, under the CBA Section 15.03a provides that an employee may process a grievance and have the grievance heard without union representation up to Step 3 Arbitration; and finally, that the Complainant neither filed a grievance nor asked that the UPW file a grievance on his behalf. Accordingly, as the Complainant failed to exhaust his remedies under the CBA regarding the allegations contained in the PPC, those allegations must be dismissed.

Based on the Board's rulings set forth above, the PPC is dismissed in its entirety based on failure to exhaust contractual remedies. Therefore, the Board does not reach the merits of the case.

V. ORDER

For all of the reasons set forth above, the Board:

1. Grants Respondent DOT's Motion to Dismiss for Complainant's failure to exhaust his CBA remedies; and
2. Grants the UPW's Motion to Dismiss for Complainant's failure to exhaust his CBA remedies.

This case is hereby dismissed and closed.

DATED: Honolulu, Hawaii, October 8, 2018.

HAWAII LABOR RELATIONS BOARD



SESNITA A.D. MOEPONO, Member





J.N. MUSTO, Member

GARRICK FRANCISCO v. DEPARTMENT OF TRANSPORTATION, et al.

CASE NO. 17-CE-01-893

ORDER GRANTING RESPONDENT UNITED PUBLIC WORKERS, AFSCME, LOCAL 646,
AFL-CIO, MOTION TO DISMISS COMPLAINT AND GRANTING RESPONDENT STATE
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ⁱ HRS § 377-9(b) provides in relevant part that, “The [B]oard shall fix a time for the hearing on the complaint, which shall be not less than ten nor more than forty days after the filing of the complaint or amendment thereof . . .”

ⁱⁱ Hawaii Administrative Rules § 12-42-8(g)(3)(C)(iii) provides:

(iii) Answering affidavits, if any, shall be served on all parties and the original and five copies, with certificate of service on all parties, shall be filed with the board within five days after service of motion papers, unless the board directs otherwise.

(Emphasis added.)