

**EFiled: Dec 20 2018 08:03AM HAST  
Transaction ID 62789366  
Case No. 17-CU-03-358, 17-CE-03-907**

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

MARIO COOPER,

Complainant,

and

HAWAII GOVERNMENT EMPLOYEES  
ASSOCIATION, AFSCME, LOCAL 152,  
AFL-CIO, and DEPARTMENT OF  
TAXATION, State of Hawai'i,

Respondents.

CASE NO. 17-CU-03-358  
17-CE-03-907

ORDER NO. 3434

ORDER GRANTING DEPARTMENT  
OF TAXATION, STATE OF  
HAWAII'S MOTION TO DISMISS  
PROHIBITED PRACTICE  
COMPLAINT AND GRANTING IN  
PART HGEA/AFSCME'S MOTION TO  
DISMISS PROHIBITED PRACTICE  
COMPLAINT FILED ON DECEMBER  
20, 2017

ORDER GRANTING DEPARTMENT OF TAXATION, STATE OF HAWAII'S MOTION TO  
DISMISS PROHIBITED PRACTICE COMPLAINT AND HGEA/AFSCME'S MOTION TO  
DISMISS PROHIBITED PRACTICE COMPLAINT FILED ON DECEMBER 20, 2017

I. BACKGROUND AND FINDINGS OF FACT

A. Procedural History

On December 20, 2017, MARIO COOPER (Complainant or Cooper), self-represented litigant (SRL), filed a Prohibited Practice Complaint (Complaint) with the Hawai'i Labor Relations Board (Board). In the Complaint, Complainant alleged violations of Hawai'i Revised Statutes (HRS) §§ 89-13(a)(8) and § 377-6(6).

On December 21, 2017, the Board notified Respondents HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) and DEPARTMENT OF TAXATION, State of Hawai'i (DoTax) (collectively, Respondents) of receipt of the Complaint.

On December 26, 2017, HGEA filed HGEA/AFSCME'S ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED ON DECEMBER 20, 2017 and HGEA/AFSCME'S PREHEARING CONFERENCE STATEMENT.

On December 27, 2017, DoTax filed DEPARTMENT OF TAXATION, STATE OF HAWAII'S, ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED ON DECEMBER 20, 2017 (DoTax's Answer), and on January 3, 2018, DoTax filed DEPARTMENT OF TAXATION, STATE OF HAWAII'S PRE-HEARING CONFERENCE STATEMENT (DoTax's Pre-Hearing Statement).

On January 8, 2018, Complainant filed COMPLAINANT'S MOTION TO STRIKE RESPONDENT DOTAX'S ANSWER AND PRE-HEARING CONFERENCE STATEMENT (Complainant's Motion to Strike). Complainant argued, among other things, that DoTax's Answer and DoTax's Pre-Hearing Statement contained alleged confidential information in violation of the Hawai'i Rules of Evidence. That same day, DoTax filed DEPARTMENT OF TAXATION, STATE OF HAWAII'S MEMORANDUM IN OPPOSITION TO COMPLAINANT'S MOTION TO STRIKE RESPONDENT DOTAX'S ANSWER AND PRE-HEARING CONFERENCE STATEMENT (DoTax's Opposition to Motion to Strike), arguing that under Rule 308 of the Hawai'i Rules of Evidence, the evidence was not required to be excluded.

On January 8, 2018, DoTax filed DEPARTMENT OF TAXATION, STATE OF HAWAII'S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT (DoTax's First Motion to Dismiss), based on an alleged failure to exhaust contractual remedies. That same day, Complainant filed COMPLAINANT'S OPPOSITION TO RESPONDENT DOTAX'S MOTION TO DISMISS PROHIBITED PRACTICE[] COMPLAINT (Complainant's Opposition to DoTax's Motion to Dismiss), arguing that the contractual remedies had been exhausted and/or that the case fell within the exceptions to the exhaustion doctrine.

On January 9, 2018, the Board held a pre-hearing conference (Conference). At the Conference, the Complainant represented himself, Peter Liholiho Trask, Esq. represented HGEA and Jeffrey A. Keating, DAG, represented DoTax. At the Conference, the parties agreed to waive the requirements of HRS § 377-9(b) and Hawai'i Administrative Rules (HAR) § 12-42-46(b), mandating that the hearing on the Complaint "be held no less than ten nor more than forty days after the filing of the complaint or amendment thereof..." Based on that waiver, the parties agreed to schedule the Hearing on the Merits (HOM) for February 12, 2018 at 10:00am.

At the Conference, the Board denied Complainant's Motion to Strike based on, among other things, the fact that DoTax's Answer and DoTax's Pre-Hearing Statement were not evidence but were, in fact, required statements of their arguments.

On January 10, 2018, DoTax filed DEPARTMENT OF TAXATION, STATE OF HAWAII'S SECOND MOTION TO DISMISS AND/OR EXCLUDE ANY ALLEGATION

THAT COMPLAINANT WAS DISCHARGED WITHOUT PROPER CAUSE (DoTax's Second Motion to Dismiss). DoTax raised the argument that the Complaint did not include an allegation that Complainant was discharged without proper cause and even if it did, such an allegation would be untimely as it would have been filed outside of the 90-day statute of limitations.

On January 11, 2018, Complainant filed COMPLAINANT'S MOTION FOR SUMMARY [JUDGMENT] AGAINST RESPONDENT HGEA (Complainant's MSJ Against HGEA), which argued, among other things, that HGEA concealed the status of Complainant's Step 1 Grievance, thus performing the grievance procedure in a perfunctory or arbitrary fashion. On January 16, 2018, HGEA filed HGEA/AFSCMES' MEMORANDUM IN OPPOSITION TO COMPLAINANT[S] MOTION FOR SUMMARY JUDGMENT (HGEA's Opposition to Complainant's MSJ), arguing, among other things, that Complainant was attempting to use an incorrect statutory provision against HGEA and that Complainant's MSJ Against HGEA was based solely on Complainant's opinion.

On January 16, 2018, Complainant filed COMPLAINANT'S MOTION FOR SUMMARY [JUDGMENT] AGAINST RESPONDENT DOTAX (Complainant's MSJ Against DoTax), arguing, among other things, that DoTax did not adequately provide access to his personnel files, including his Office Personnel File (OPF) and his Extra-Personnel Files (EPF). On January 17, 2018, DoTax filed DEPARTMENT OF TAXATION, STATE OF HAWAII'S MEMORANDUM IN OPPOSITION TO COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT AGAINST RESPONDENT DOTAX (DoTax's Opposition to Complainant's MSJ), arguing, among other thing, that at the Conference, DoTax stated that if Complainant wanted to make a request for his OPF, DoTax would scan and email the OPF to him.

On January 18, 2018, HGEA filed HGEA/AFSCME'S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED ON DECEMBER 20, 2017 (HGEA's Motion to Dismiss), arguing, among other things, that Complainant failed to state a claim against HGEA. On January 22, 2018, Complainant filed COMPLAINANT'S OPPOSITION TO RESPONDENT HGEA'S MOTION TO DISMISS PROHIBITED PRACTICE[] COMPLAINT (Complainant's Opposition to HGEA's Motion to Dismiss), arguing, among other things, that "notice pleading" did not require Complainant to cite the proper section of HRS § 89-13 in order to receive relief.

On February 9, 2018, the Board held a hearing on dispositive motions (Motion Hearing). At the Motion Hearing, the Complainant represented himself, Peter Liholiho Trask, Esq. represented HGEA and Jeffrey A. Keating, DAG, represented DoTax. At the Motion Hearing, the Board confirmed with the parties that the grievance related to Complainant's discharge was proceeding.

At the Motion Hearing, the Board also confirmed with DoTax that DoTax would provide Complainant with a copy of his OPF and that DoTax would mail Complainant his OPF via certified mail / return receipt requested.

After considering the arguments and filings on the dispositive motions, the Board orally granted both DoTax's First Motion to Dismiss and HGEA's Motion to Dismiss based on a failure to exhaust contractual remedies and directed DoTax to file a proposed order reflecting the Board's ruling in this case.

DoTax filed its PROPOSED ORDER GRANTING DOTAX AND HGEA MOTIONS TO DISMISS PROHIBITED PRACTICE COMPLAINT (Proposed Order) with the Board on February 14, 2018. On February 15, 2018, HGEA filed HGEA/AFSCME STATEMENT OF NO OBJECTION TO PROPOSED ORDER GRANTING DOTAX AND HGEA MOTIONS TO DISMISS PROHIBITED PRACTICE COMPLAINT.

On February 20, 2018, Complainant filed COMPLAINANT'S OBJECTION TO RESPONDENT DOTAX'S PROPOSED ORDER (Complainant's Objection to Proposed Order), in which he submitted additional proposed findings of fact and conclusions of law

The Board has thoroughly reviewed the record and the written submissions of the parties and has considered the arguments presented. After considering the Proposed Order and Complainant's Objection to Proposed Order, the Board has adopted those findings of fact and conclusions of law that support its decision in its case and has modified the Proposed Order accordingly. Therefore, in accordance with HRS § 91-12<sup>i</sup>, the Board issues the following findings of fact, conclusions of law, and written order regarding the Board's oral ruling set forth in the record. Any proposed finding of fact or conclusion of law not specifically incorporated and adopted by this order is rejected.

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.

#### B. Findings of Fact

Until his discharge on or about July 20, 2017, Complainant was an "employee" or "public employee", as defined in HRS § 89-2, of the DoTax, and was a member of Bargaining Unit 3 (Unit 3) (nonsupervisory employees in white collar positions), as provided in HRS § 89-6(a)(3).

DoTax is a department under the supervision of the governor of the State of Hawai'i. HRS § 26-4(6). The governor of the State of Hawai'i (Employer) is an "employer" or "public employer", as defined in HRS § 89-2, with authority over Unit 3. HRS § 89-6(d)(1).

HGEA is the "exclusive representative", as defined in HRS § 89-2, for Unit 3.

At all relevant times, HGEA and the Employer have been parties to the Collective Bargaining Agreement for Unit 3 (CBA).

On or about August 9, 2017, Complainant and HGEA filed a grievance with DoTax related to Complainant's discharge from DoTax effective July 20, 2017 (Grievance).

On or about September 27, 2017, HGEA and DoTax met to present the Grievance at Step 1. By letter dated October 6, 2017, DoTax denied the Grievance at Step 1.

As of February 9, 2018, the Grievance was pending and proceeding through the subsequent steps laid out in the CBA.

## II. CONCLUSIONS OF LAW

In both DoTax's Motion to Dismiss and HGEA's Motion to Dismiss, the Respondents assert, among other things, that the Complaint should be dismissed because the Board lacks subject matter jurisdiction due to Complainant's failure to exhaust contractual remedies.

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. It is undisputed by the parties that the CBA provides 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...
- B. ...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...In such an event the Employee shall identify the discussion as an informal step grievance...
- 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...

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...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...

\*\*\*

According to Hawai'i appellate courts, a complainant must exhaust all available contractual remedies prior to bringing a prohibited practice complaint. "[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. Hawai'i Labor Relations Board, 97 Hawai'i 528, 531, 40 P.3d 930, 933 (2002) (Poe I).

In Poe v. Hawaii Labor Relations Board, 105 Hawai'i 97, 100-01, 94 P.3d 652, 655-56 (2004) (Poe II), decided by the Hawai'i Supreme Court, Poe argued that the circuit court should not have affirmed the Board's decision, claiming that the Board was incorrect in their determination 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 the union 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.

The Complainant has filed two grievances at issue in this case, first challenging his discharge and second related to his access to his OPF. The first grievance is still proceeding, and thus the grievance process has not been exhausted. The second grievance has been rendered moot as DoTax has agreed to send Complainant a copy of his OPF via certified mail / return receipt requested. Okada Trucking Co. v. Bd. of Water Supply, 99 Hawai'i 191, 195-96, 53 P.3d 799, 803-04 (2002) (“Thus, the mootness doctrine is properly invoked where ‘events...have so affected the relations between the parties that the two conditions for justiciability relevant on appeal—adverse interest and effective remedy—have been compromised.’”). As such, the Board does not have subject matter jurisdiction over this case.

#### ORDER

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

- 1) Grants DoTax’s Motion to Dismiss for failure to exhaust contractual remedies;
- 2) Grants in part HGEA’s Motion to Dismiss for failure to exhaust contractual remedies; and
- 3) Dismisses all other dispositive motions and claims as moot.

This case is hereby dismissed and closed.

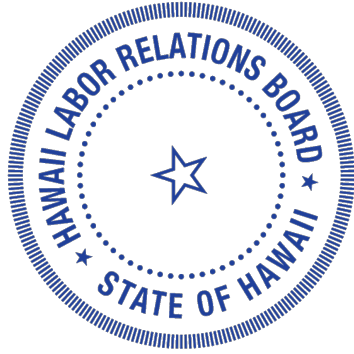
DATED: Honolulu, Hawai'i, December 20, 2018.

HAWAI'I LABOR RELATIONS BOARD



---

MARCUS R. OSHIRO, Chair



*Sesnita A. D. Moepono*  
SESNITA A.D. MOEPONO, Member

*J.N. Musto*  
J.N. MUSTO, Member

Copies sent to:  
Mario Cooper, SRL  
Jeffrey A. Keating, Deputy Attorney General  
Peter Liholiho Trask, Esq.

---

<sup>1</sup> HRS § 91-12 states in relevant part:

**Decisions and orders.** Every decision adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law...