

order

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NOS.:	CE-03-97
)		CU-03-50
RONALD R. CALDEIRA,)		
)	ORDER NO.	714
Complainant,)		
)	ORDER GRANTING MOTION FOR	
and)	SUMMARY JUDGMENT	
)		
TONY T. KUNIMURA, Mayor, County)		
of Kauai, and HAWAII GOVERNMENT)		
EMPLOYEES ASSOCIATION, AFSCME)		
LOCAL 152, AFL-CIO,)		
)		
Respondents.)		

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

On April 8, 1985, Complainant RONALD R. CALDEIRA filed the instant prohibited practice complaint with the Hawaii Labor Relations Board [hereinafter referred to as Board] against Respondents TONY T. KUNIMURA, Mayor of the County of Kauai [hereinafter referred to as Employer or Kauai County]; HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO [hereinafter referred to as HGEA or Union]; Charles K. Y. Khim; and Stanley Ling. The complaint, in a detailed and extended manner, relates Complainant's work history with Kauai County as a lifeguard since his initial hiring in 1978. The complaint reviews the conflicts Complainant experienced with his superiors at the worksite and in administration, with work colleagues. It covers an incident in 1983 when Complainant was ordered to do some yard and janitorial work and his subsequent discharge for insubordination for refusal to do that work. It finally covers

the arbitration proceedings at which Complainant contested his discharge and questions the propriety of the representation provided by Respondent HGEA at the said arbitration. The complaint charges violations by the County of Subsection 89-13(a)(8), Hawaii Revised Statutes [hereinafter referred to as HRS], and violations by Respondent HGEA, Khim and Ling of Subsection 89-13(b)(5), HRS.

Motions to dismiss were entered by Stanley Ling, the HGEA, Charles Khim and Kauai County on April 23, 1985, April 29, 1985, April 29, 1985 and May 8, 1985, respectively. Kauai County also filed a Motion for Particularization of Complaint on April 25, 1985. This motion was denied by the Board in an order dated May 3, 1985.

At a hearing on May 10, 1985, on the motions to dismiss of Ling, the HGEA and Khim, Complainant stated that the remedy he sought was an overturning of the arbitration decision, reversion of his grievance to Step III of the grievance process or re-arbitration, and reinstatement to his job. Transcript of Hearing [hereinafter referred to as Tr.], May 10, 1985, pp. 5-8. At said hearing, Complainant raised allegations regarding alleged misinformation furnished by the County to the arbitrator, the overlooking by the arbitrator of the role Complainant's industrial leave played in his job absence, and the effectiveness of representation furnished by the HGEA at the arbitration. Tr., May 10, 1985, pp. 6, 9, 10 and 11.

The motions to dismiss of Ling, the HGEA and Khim were taken under advisement after the hearing on May 10, 1985, after

statements by the Board Chairperson that the proper venue to seek vacation of an arbitration decision under statute would be the Circuit Court, and that the Board's jurisdiction to overturn arbitration decisions extends only to arbitration decisions based on collective bargaining law but not on the applicable collective bargaining contract. Tr., May 10, 1985, pp. 14-16.

On January 15, 1987, Complainant filed an Amended Complaint in the federal District Court alleging that Kauai County, since about 1978, subjected Complainant to a conspiracy to obtain Complainant's discharge; and that HGEA participated knowingly in the County conspiracy to discharge Complainant. Complainant, therefore, sought restoration of his job with Kauai County. Federal Amended Complaint, attached to Kauai's Memorandum of Points and Authorities, Exhibit E, p. 14.

On September 3, 1987, Complainant, through attorney Robert A. Smith, filed a Motion for Withdrawal of Complaint. Said motion was filed prior to the issuance of a final order herein and asked that the Board consent to the withdrawal.

On September 18, 1987, the HGEA and Khim filed a Motion to Dismiss Complainant's Motion for Withdrawal. Said motion requested that Complainant's motion to withdraw complaint be dismissed on the ground that said motion was improper, on the alleged basis that Respondents had not been served with Complainant's foregoing motion.

On September 18, 1987, the HGEA and Khim also filed a Counter Complaint, or in the Alternative, Counter Petition for Declaratory Order. Therein, the HGEA and Khim petitioned the

Board for a declaratory order stating that Respondent HGEA did not violate Chapter 89, HRS, in any action it took on behalf of Complainant or in regard to Complainant, in conjunction with the grievance and arbitration of Complainant's discharge from Respondent KUNIMURA's employ.

On September 23, 1987, Complainant filed a Memorandum in Opposition to Motion to Dismiss Complainant's Motion for Withdrawal.

The Circuit Court for Kauai County confirmed the arbitration decision on September 25, 1987.

On September 28, 1987, Complainant filed a Motion to Dismiss Counter Complaint or Counter Petition for Declaratory Order with the Board.

On October 9, 1987, the federal District Court issued an Order Granting Motion for Summary Judgment and to Dismiss. Federal Order, p. 13, attached to Kauai's Memorandum of Points and Authorities filed in support of its Motion to Dismiss, Exhibit D.

The Circuit Court for Kauai County denied reconsideration of the confirmation on October 15, 1987 (Kauai's Memorandum, supra, p. 15).

On October 21, 1987, Complainant filed Claimant's Withdrawal of Motion for Withdrawal of Complaint. In an affidavit attached thereto, Complainant's counsel stated that in light of recent adverse decisions in both the State circuit and federal courts, Complainant was reassessing the intent to

withdraw his original complaint, and thus now sought to preserve the original complaint before this Board.

On October 21, 1987, and concurrently with the aforementioned Claimant's Withdrawal of Motion for Withdrawal of Complaint, Complainant filed a Motion for Leave to File First Amended Complaint. The stated grounds for this motion was that the complaint, as originally filed, was filed by Complainant without benefit of legal counsel. See Notice of Hearing, dated November 2, 1987.

After a hearing on November 16, 1987 on the filings enumerated in the Notice of Hearing, dated November 2, 1987, the Board, in Order No. 653, dated November 25, 1987, granted Claimant's Withdrawal of Motion for Withdrawal of Complaint. Respondent HGEA and Khim's Withdrawal of Counter Complaint, or in the Alternative, Counter Petition for Declaratory Order, proffered at the hearing on November 16, 1987 were also granted in Order No. 653. In addition, Complainant's Motion for Leave to File First Amended Complaint was granted. Pursuant to said motion, Khim and Ling were dismissed as parties to the instant case. Also, as enumerated in Order No. 653, all parties agreed to submit written briefs on the issue of which charges included in Complainant's First Amended Complaint fall under the jurisdiction of the Board, and which charges are foreclosed by the statute of limitations, doctrine of res judicata or other jurisdictional doctrines.

I. STANDARD FOR BOARD DELIBERATION

Kauai County filed a Motion to Dismiss, dated December 16, 1987, and the HGEA also filed Motion to Dismiss, or in the Alternative, for Summary Judgment, dated December 16, 1987.

On a motion to dismiss, the issue is not whether plaintiff ultimately will prevail, but whether he is entitled to offer evidence to support his claim; the trial court may not grant a motion to dismiss for failure to state a claim unless it appears beyond a reasonable doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Rule 12(b)(6), 28 U.S.C.A., Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987).

Although a motion to dismiss for failure to state a claim should rarely be granted, a complaint may be dismissed when it appears beyond a reasonable doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Au v. Au, 63 Haw. 210, 263, 626 P.2d 173, 181 (1981).

Thus, the Board is presented with a situation where, if beyond a reasonable doubt, it appears that based on the deliberations of the various tribunals Complainant has appeared before, there are no further facts which could change the negative outcome Complainant received in the arbitration of his grievance, the motion to dismiss should be granted.

II. STATUTE OF LIMITATIONS

Complainant has broken down his work history with Kauai County into 12 different "episodes." See Proposed First Amended Prohibited Practice Complaint, filed on October 21, 1987, (incorporating by reference federal Amended Complaint), and Exhibit B,

list of 12 Episodes. Episodes 1 through 10 involved alleged wrongdoing by Defendant County to develop a negative work record and hostile work environment for the Plaintiff, to effect his eventual discharge. Episodes 3 through 10 also involved alleged wrongdoing by HGEA, in which the Plaintiff claims it conspired with the County by acquiescing in the scheme to effect his discharge by failing to represent him adequately and thereby facilitate the development of his negative work record and hostile work environment. Episode 11 involved incidents occurring during the pool closing in 1983 when the Plaintiff was ordered to do yardwork and janitorial work, which Plaintiff refused to do. Plaintiff was suspended and discharged and thereafter went through arbitration. Episode 12 involved the alleged wrongdoing of the County and HGEA to distort and misrepresent the record presented to the arbitrator to prevent the Plaintiff from having a fair hearing.

Sections 89-14 and 377-9, HRS, require that complaints be filed within 90 days of their occurrence. See also Administrative Rules § 12-42-42(a).

The complaint herein was filed on April 8, 1985. Thus, only acts or occurrences occurring since January 9, 1985 come within the Board's jurisdiction.

Complainant was hired in 1978 and worked for Kauai County until November 1, 1983. Complainant alleges that beginning in late 1978 or early 1979 (see federal Amended Complaint and Motion for Leave to File First Amended Complaint, Exhibit B) the conspiracy began with the developing conflict

between Isaac Hookano and Complainant, which continued through his discharge in late 1983 and culminated finally with the arbitration, which took place on September 27 and 28, 1984, with the decision issuing January 15, 1985. Kauai County argues that not even the arbitration decision comes within Board jurisdiction since the arbitration hearings occurred before the 90-day limit began, i.e., on September 27 and 28, 1984. Kauai County thus argues that all 12 episodes fall outside the Board's jurisdiction (see Kauai County's Memorandum of Points and Authorities, p. 10). The HGEA, however, argues that the first 11 episodes fall outside of the Board's jurisdiction. (Memorandum in Support of Motion to Dismiss First Amended Complaint or in the Alternative for Summary Judgment, p. 8)

Complainant filed the motion to amend his complaint on October 21, 1987. However, through the doctrine of "relation back," the 90-day period is measured from the date of the filing of the original complaint on April 8, 1985. However, even using the doctrine of relation back, Episodes 1 through 11 fall without the 90-day statute of limitations. The arbitration decision issued on January 15, 1985, however, comes within the 90-day limit, even though the arbitration hearings were held on September 27 and 28, 1984. Applying the 90-day limit, only the issuance of the arbitration decision on January 15, 1985 comes within the statute of limitations.

Complainant argues that the Union should have put before the arbitrator not merely the events of Episode 11 but the 10 preceding episodes as well going back to the beginning of

Claimant's employment. (See Memorandum of Claimant Re Issues of Statute of Limitations and Res Judicata, p. 11) Claimant argues that he is entitled to an order of the Board directing re-arbitration of the matter upon a full evidentiary record taking into account Episodes 1 through 10.

Complainant argues that the first amended complaint is timely because of the doctrine of relation back to the date of the original pleading. This argument is accurate insofar as it goes. The amended complaint itself is considered timely as it is deemed to be filed on the date of the original complaint, i.e., April 8, 1985. But the episodes brought up for Board consideration in the amended complaint occurring outside the 90-day statute of limitations as measured from the date of the original complaint are still considered to be outside the 90-day statute of limitations. Complainant argues that Episodes 1 through 10 "arose out of" Episode 11, i.e., his dismissal for insubordination in late 1983, and since they "arose out of" the insubordination charge and dismissal comprising Episode 11, they are not barred for consideration by the statute of limitations.

Under federal labor law, evidence of earlier events occurring before the statute of limitations runs, may be introduced to shed light on the true character of matters occurring within the limitations period, where occurrences within the limitations period in and of themselves may constitute prohibited practices as a substantive matter. International Association of Machinists v. NLRB, 362 U.S. 411, 416, 4 L.Ed.2d 832, 80 S.Ct. 822 (1960); NLRB v. Food Fair Stores, Inc., 307 F.2d 3 (3rd Cir. 1962). But where conduct occurring within the limitations period

can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice, evidence of the earlier unfair labor practice is inadmissible. International Association of Machinists v. NLRB, 362 U.S. 417, 422.

In deciding whether the complaint makes mere proper evidentiary use of events anterior to the limitational period or whether it improperly resurrects a defunct charge, the Board must keep in mind that the purpose of limitation is to prevent persons from being brought to book on stale charges and to promote industrial stability by allowing parties, after a reasonable time period, to assess with certainty their liability for past conduct. Independent violations of continuing obligations do not exist where illegality of conduct cannot be established without assessing events outside the limitational period. NLRB v. Auto Warehouses, Inc., 571 F.2d 860 (5th Cir. 1978). Evidence of antecedent events may be used as background, NLRB v. Ryder Tank Lines, Inc., 310 F.2d 233, 234 (4th Cir. 1962); NLRB v. Sharples Chemical, Inc., 209 F.2d 645, 653 (6th Cir. 1954), or to shed light on the true character of events occurring within the limitation period. General Motors Acceptance Corp. v. NLRB, 476 F.2d 850, 853 (1st Cir. 1973); International Union United Auto, Etc. v. NLRB, 124 App.D.C. 215, 363 F.2d 702, 706 (D.C. Cir. 1966), cert. den., 385 U.S. 973, 17 L.Ed.2d 436, 87 S.Ct. 510 (1966); NLRB v. Shawnee Industries, Inc., 333 F.2d 221, 224 (10th Cir. 1964); NLRB v. Fitzgerald Mills Corp., 313 F.2d 260, 264 (2nd Cir. 1963), cert. den., 375 U.S. 834, 11 L.Ed.2d 64, 84 S.Ct. 47 (1963).

However, in the present case, Complainant wishes to have Episodes 1 through 10, occurring outside the limitations period, considered as substantive evidence of a conspiracy. He does not wish to have the episodes considered as background or to shed light on Episodes 11 and 12. They themselves constitute the substance of the conspiracy which Complainant charges warrants re-arbitration. Episodes 1 through 10 may, therefore, be considered outside the limitations period and beyond the Board's jurisdiction on this basis. Thus, in the present case, it appears proper to prohibit consideration of Episodes 1 through 10 because, rather than constituting mere background facts indicating a conspiracy, or shedding light on the conspiracy, Episodes 1 through 10 constitute the conspiracy itself. The conspiracy cannot be established without incorporating, as actual substance of the charge, conduct occurring without the limitations period. To consider Episodes 1 through 10 to establish a conspiracy would improperly resurrect defunct charges or issues.

III. RES JUDICATA

In its motion to dismiss, Kauai County argues that the doctrines of res judicata and/or collateral estoppel bar Complainant from bringing this action because an arbitrator, this Board, the Kauai Circuit Court and the federal District Court have all rendered decisions on every legally actionable item which Complainant alleged in his original and amended complaints.

The doctrines of res judicata and collateral estoppel provide that the judgment of a court of competent jurisdiction is a bar to a new action in another court between the same parties

or their privies concerning the same subject matter. It precludes the relitigation, not only of the issues that were actually litigated in the first action, but also grounds of claim and defense which might have been litigated in the first action but were not litigated or decided. Santos v. State, 64 Haw. 648 (1982) [Kauai's Memorandum of Points and Authorities, p. 18].

Kauai County notes that the following actions have been filed:

1. A collective bargaining grievance which resulted in Arbitrator Ling's upholding the termination;

2. Filing of a civil rights action in federal District Court which incorporated the amended prohibited practice complaint filed herein. The federal District Court dismissed the action based on a consideration "all episodes cited by Complainant";

3. Unsuccessful challenge in the Kauai Circuit Court of the County of Kauai's motion to confirm the arbitrator's award; and

4. Unsuccessful request to the Kauai Circuit Court to reconsider its confirmation, or, to vacate the award.

In the Federal Order Granting Motion for Summary Judgment and to Dismiss, Judge Fong wrote "the court concludes that the Plaintiff has not presented any facts probative of a conspiracy between Defendant HGEA and Defendant County" (federal Order, p. 13, attached to Kauai's Memorandum of Points and Authorities as Exhibit D). Fong further stated: "The Defendants' motions for summary judgment against the Plaintiff's

Sections 1983 and 1985 [civil rights] claims against both the County and HGEA, Defendants, are granted. There being no further claims in the complaint for trial, the Plaintiff's case based on any of the 12 'episodes' is dismissed."

In the federal Order, Judge Fong gave the State court confirmation of the arbitration decision full faith and credit under 28 U.S.C. § 1738. Therefore, he accepted that the Complainant was discharged for just and proper cause. Thus, Episode 11, i.e., the discharge, could not be the basis for Complainant's civil rights claims against both defendants (federal Order, p. 5).

Fong then went on to examine Episodes 1 through 10 to see if they could substantiate claims of civil rights violations, Fong found, however, that the discharge was caused by the insubordination of Complainant in the face of a proper work order and not by any alleged wrongdoing of the defendants in Episodes 1 through 10 (federal Order, p. 6).

Fong then examined Episode 12, i.e., the arbitration, to see if it substantiated Complainant's civil rights claims. Fong found no evidence of a conspiracy. The failure to present a record of Episodes 1 through 10 proved no conspiracy, as Complainant's insubordination, and not Episodes 1 through 10, caused Complainant's dismissal (federal Order, p. 8). As the federal court was bound to accept the State court's confirmation of the arbitration decision, Fong found no deprivation of civil rights, and therefore no conspiracy. Fong found the standards for summary judgment met against the allegations of a conspiracy.

In regard to Episode 11, i.e., the discharge, the federal District Court held that it had to give full faith and credit to the Fifth Circuit's confirmation of Arbitrator Ling's award and, therefore, had to accept as given that Complainant was discharged for just and proper cause (federal Order, pp. 4-5).

The federal court did not, however, find that it had to give full faith and credit to the entire arbitrator's decision or confirmation by the Kauai Circuit Court. The court analyzed whether Complainant had provided sufficient facts regarding the alleged conspiracy between the County and HGEA during arbitration. In doing so, the court found that Complainant had failed to present the court with any direct or even "circumstantial evidence from which a fair-minded jury could draw inferences in his favor. Instead, the Complainant attempts to base his conspiracy allegations on essentially post hoc ergo propter hoc rationalization" (Exhibit D, p. 12). The federal District Court found unactionable every "episode" upon which Complainant based his claims for relief. The court thus granted the County's and HGEA's motion for summary judgment regarding Complainant's conspiracy claim.

Thus, the County argues that this finding of the federal District Court must be res judicata or collaterally estops any action by this Board because Claimant's challenge to actions which were supposedly violative of Chapter 89, HRS, were or should have been an essential part of his federal action. Kauai County argues that Complainant's arguments that State statutes requiring that he be fired only for good cause either (1) were

actually litigated in the federal action or (2) should have been litigated in his federal action. In either case, Kauai County argues, this Board must give the federal decision res judicata and/or collateral estoppel effect.

Kauai County further argues that this Board must also give res judicata and collateral estoppel effect to the Fifth Circuit's confirmation of and/or its refusal to reconsider the confirmation of Arbitrator Ling's award. Kauai County cites Santos v. State, supra, to the effect that the State court's confirmation of the arbitration decision constitutes an entry of judgment under HRS Section 658-12, which has a binding res judicata and collateral estoppel effect on other Hawaii courts.

Complainant argues that the Kauai County's confirming the arbitration award under Section 658-8, HRS, which was transformed into a judgment under Section 658-12, HRS, does not bar the Complainant's amended complaint under the doctrine of res judicata, because the union did not put into evidence before the arbitrator Episodes 1 through 10 so that they were not adjudicated on their merits (Memorandum of Claimant Re Issues of Statute of Limitations and Res Judicata, pp. 11-12).

The distinction between res judicata and claim preclusion on the one hand and collateral estoppel and issue preclusion on the other are distinguished in Marsland v. International Society for Krishna Consciousness, 66 Haw. 119, 124, 657 P.2d 1025 (1983). Claimant's Memorandum, p. 12.

Complainant claims that there is no claim preclusion arising from the arbitration decision since he could not have

litigated a prohibited practice charge in the arbitration. Claimant's Memorandum, p. 13. The union, Complainant argues, did not put into evidence Episodes 1 through 10 and defend him on the basis of a conspiracy allegation. The union is thus estopped from invoking the doctrine of res judicata so as to protect itself from its own misconduct, Complainant argues. Thus, Complainant argues the merger (bar) or claim decision branch of the res judicata doctrine, which covers all of litigant's claims (including not only those which were actually litigated but also those which "might have been" litigated) does not bar raising of issues related to Episodes 1 through 10.

Complainant also argues that collateral estoppel or issue preclusion does not apply. Collateral estoppel, Complainant points out, covers only issues which were actually litigated in the prior litigation. Complainant argues that the conspiracy claim now before the Board charging a long-standing conspiracy lasting five years consisting of 12 episodes was a different claim than was put before the arbitrator and was not determined by him. Thus, the arbitration, even as confirmed by Judge Hirano in a "judgment," does not have collateral estoppel (issue preclusion) effect; and Complainant is free to litigate the issues of Episodes 1 through 10 and Episode 12 before this Board. Claimant's Memorandum, p. 14.

Complainant further argues that there is no claim preclusion because Judge Hirano's judgment was not "on the merits" as is required by the doctrine of res judicata. Although the documentary evidence and Complainant's contention based on the 12

episodes were placed before Judge Hirano on the motion for reconsideration, Complainant states that Hirano gave "no consideration to this evidence or these contentions". Claimant's Memorandum, Note 2, p. 15. Complainant further argues that Hirano had no jurisdiction to decide the prohibited practice claim which was in turn based on the conspiracy claim. Complainant claims that inadequate representation was not considered because it was not asserted within ten days of the arbitration award. Claimant's Memorandum, Note 2, p. 15.

Complainant argues that there is no claim preclusion regarding the prohibited practice claim since it did not come into existence until after the arbitration decision, when it allegedly became apparent that the union had conspired in the arbitration to deprive Complainant of rights protected under Chapter 89.

Moreover, Complainant argues that Hirano's judgment confirming the arbitration award has no res judicata effect since it arose after Claimant filed his prohibited practice complaint before this Board. The litigation resulting in the State court judgment thus was not the first or prior litigation; it was the second and subsequent litigation commenced by the County. Thus, Hirano's judgment is not a prior judgment entitled to res judicata effect. Claimant's Memorandum, pp. 17-18.

Complainant also claims that Judge Fong's federal court decision has no res judicata effect, because it was not a decision "on the merits". Memorandum of Claimant Ronald Caldeira in Opposition to Motions to Dismiss or for Summary Judgment, p. 2.

This is so, Complainant argues, because Judge Fong, in the federal decision, granted summary judgment on the basis that he was obliged by the full faith and credit statute, 28 U.S.C. § 1738, to give res judicata and collateral estoppel effect to the Fifth Circuit Court's judgment confirming the arbitration award. Fong's decision thus was not on the merits, Complainant argues. He specifically held, Complainant claims, that he was precluded by legal doctrines from looking at the merits.

Complainant's reasoning is faulty in this regard. Fong states that the full faith and credit statute only requires him to accept that the discharge was proper. However, Fong in his decision reviews all 12 episodes formulated by Complainant and arrives at the conclusion that no conspiracy claim could be established on such proof.

HGEA argues that the prior Board Decision No. 196, Caldeira and Eduardo Malapit, Mayor of the County of Kauai, and Hawaii Government Employees Association, 3 HPERB 523 (1984), in which this Board held that HGEA did not violate Chapter 89 in its representation of Complainant regarding a 20-day disciplinary suspension over an incident involving allegations of a near-drowning, bars further litigation thereon through the doctrine of res judicata. As a final decision, the prior Board decision has res judicata effect precluding relitigation of the claim herein. This is Episode 8 in Complainant's chronology.

Rule 41(b), Federal Rules of Civil Procedure (FRCP), states "unless the court in its order for a 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." An adjudication on the merits is res judicata and operates to bar another action on the same cause between the same parties or privies. The label "with prejudice" signifies dismissal is adjudication on the merits and a bar to further litigation on the claim. Korvettes, Inc. v. Brous, 617 F.2d 1021, 1024 (3rd Cir. 1980). A dismissal which either specifically states that it is with prejudice or is silent on the issue constitutes a dismissal with prejudice. Hall v. Tower Land & Invest. Co., 512 F.2d 481, 482-483 (5th Cir. 1975). Unless they fall into exceptions specified in Rule 41(b), non-41(b) dismissals are with prejudice. Reinhart v. Locke, 454 F.2d 313, 314-315 (7th Cir. 1971).

An example of a dismissal for reasons "otherwise specified" is where dismissal is for failure to comply with a discovery order. Such is not a dismissal on merits as the court has otherwise specified grounds for dismissal. This is an example of a dismissal "not provided for in Rule 41" but which was for a specified reason not going to the merits of the claim; thus, it is a dismissal not on the merits. Lohman v. Gen. Am. Life Ins. Co., 478 F.2d 719, 721-723 (8th Cir. 1973), cert. den. 414 U.S. 857, 38 L.Ed.2d 107, 94 S.Ct. 162 (1973).

Since the full faith and credit doctrine requires that judgments entered in federal or State courts be given effect by other courts, dismissal of an action in federal court, which, by the operation of Rule 41(b) is an adjudication on the merits,

is res judicata in an action on the same claim in State court. Peros v. Ciade Nav Mar Netumar, 349 N.Y.S.2d 926, 927 (N.Y. Civ. Ct. 1973); Curry v. Educoa Preschool, Inc., 580 P.2d 222, 223 (Utah 1978).

Applying FRCP Rule 41(b) to the case at bar, it would appear that Judge Fong's decision was on the merits and, therefore, has res judicata effect. (That the FRCP applies herein is clear. Moore's Federal Practice ¶0.410[1] states: "When successive actions span jurisdictional lines, the full faith and credit statute requires that the extent of preclusion of the judgment is governed by the law of the jurisdiction that rendered it.") The decision did not specify that it was not an adjudication on the merits. Neither was the dismissal for lack of jurisdiction, improper venue, or failure to join a party such as would cause it to be not on the merits under Rule 41(b). Fong does not specify other grounds for dismissal which would prompt the conclusion that the dismissal was not an adjudication on the merits. While he does mention the full faith and credit clause in his decision, this is only the grounds for accepting the validity of Complainant's dismissal as determined in the arbitration, and is not the basis for the dismissal of the federal case as a whole. Citation of the full faith and credit clause is thus not a reason "otherwise specified" for dismissal which would make the dismissal an adjudication not on the merits. Fong, in fact, explicitly states "the court approaches the disposition of the defense's motion [for summary judgment] in terms of the alleged

12 'episodes.'" (Federal decision, p. 2.) This amounts to a declaration that the federal decision is, in fact, on the merits.

Thus, it appears that the Board is precluded through res judicata effect of the federal decision from considering Complainant's claims before the Board.

For a prior judgment to bar an action on the basis of res judicata, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits, and the same cause of action must be involved in both cases. Hall v. Tower Land & Invest. Co., supra, 512 F.2d at 483. These three criteria appear to be met, in regards to the federal proceeding: the federal district court exercised competent jurisdiction, the order issued amounts to a final judgment on the merits, and the same cause of action is involved in both the federal case and the complaint before the Board.

The standards for res judicata are alternately stated in Hall v. State of Hawaii, _____ Haw.App. _____ (No. 11992, May 26, 1988), a case with facts paralleling those herein. In Hall, the Hawaii Court of Appeals affirmed an order dismissing Hall's amended complaint. The amended complaint charged inter alia, that Hall's denial of admission to law school for the 1984 and 1985 admission years violated the U.S. and Hawaii Constitutions and federal and state statutory and common law. Hall had previously filed a U.S. District Court suit alleging unconstitutional and unlawful denial of admission in the 1984 admission year. This previous suit requested substantially the same relief

as that requested in the case in question. Defendant's motion for summary judgment in federal district court was granted. The Ninth Circuit affirmed the judgment. Thereafter, defendants in the case in question filed a Motion to Dismiss Or In the Alternative for Summary Judgment which was granted and Hall entered the appeal in question. Id. pp. 3-5. The Hawaii Court of Appeals denied the appeal.

In holding the first case precluded the second case, the Court discussed the principles of res judicata:

The principles governing the instant case are stated in Silver v. Queen's Hospital, 63 Haw. 430, 629 P.2d 1116 (1983), in which the supreme court affirmed a summary judgment against the plaintiff on the grounds that under the doctrine of res judicata a dismissal of the plaintiff's prior federal suit barred the state action.

The doctrine of res judicata essentially provides that "[t]he judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim or defense which might have been properly litigated in the first action but were not litigated or decided." Estate Bernice P. Bishop, 36 Haw. 403, 416 (1943). In the application of the doctrine, three basic questions must ordinarily be answered in the affirmative: (1) Was the issue decided in the prior action identical with the issue presented in the present action? (2) Was there a final judgment on the merits in the prior action? (3) Was the party against whom the doctrine is asserted a party or in privity with a party to the previous adjudication? Morneau v. Stark Enterprises Ltd., 56 Haw. 420, 424, 539 P.2d 472, 475 (1975).

An aspect of res judicata which is often determinative is collateral estoppel

"which precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim between the same parties or their privies. . . . [It] also precludes relitigation of facts or issue previously determined when it is raised defensively by one not a party in a prior suit against one who was a party in that suit and who himself raised and litigated the fact or issue. Ellis v. Crockett, 51 Haw. 45, 55-56, 451 P.2d 814, 822 (1969)." Id., 63 Haw. at 435-436, 629 P.2d at 1121 (footnote added).

The res judicata effect of a final federal court judgment applies to all state claims which could have been raised under pendent jurisdiction. A plaintiff cannot maintain a second action in state court on the same transaction in which he attempts to advance a state law theory earlier omitted in a federal action. Woods Exploration & Pro. Co. v. Aluminum Co. of Amer., 438 F.2d 1286 (5th Cir. 1971); cert. den. 404 U.S. 1047 (1972); McCann v. Whitney, [25 N.Y.S.2d 354 (Sup. Ct. 1941)]; Brady v. Trans World Airlines, Inc., 274 A.2d 146 (Del. Super. Ct. 1971), aff'd. 282 A.2d 620 (Del. 1971). Only where it is clear that a federal court would have refrained from exercising pendent jurisdiction over the state claims, such as where a jurisdictional bar operates, or where the federal court has exercised its discretion not to hear them, will those state claims not be barred in a subsequent state court suit. Pope v. City of Atlanta, 240 Ga. 177, 240 S.E.2d 241 (1977); aff'd on reh. 242 Ga. 331, 249 S.E.2d 16 (1978); cert. den. 440 U.S. 936 (1979). Id., 63 Haw. at 437-438, 629 P.2d at 1122-1123 [Footnote omitted]. Id., pp. 8-9.

The three criteria stated in Hall v. State, supra, are met herein: the issues are identical, there has been a final judgment on the merits, and the party against whom res judicata is asserted was a party in the previous proceeding.

In regard to the "same cause of action" requirement, it is to be noted that the amended complaint transfers in toto all

claims put before the federal District Court, in the form of the 12 episodes considered by Fong in his decision. Moore's Federal Practice states:

Generally, it has been held that the "cause of action," or "claim", as it is referred to in the Restatement (Second), is bound by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies. . .

The claim or cause of action is not bounded, then, by the source of the legal obligation, by the relief that is sought, or by the evidentiary facts. . .

The present trend is undoubtedly in the direction of requiring that a plaintiff present in one suit all the claims for relief that he may have arising out of the same transaction or occurrence. The Restatement (Second) defines a "claim" for res judicata purposes to include all rights of the plaintiff to remedies against the defendant arising out of the same transaction or "series of connected transactions". Moore's Federal Practice, ¶0.410[1], pp. 350, 354, 359-360. [Emphasis added.]

Thus, while Complainant advances a different theory before the Board, i.e., prohibited practices under Section 89-13, HRS, than that put before the federal district court, i.e., allegations of Federal Civil Rights violations, res judicata applies as the same transaction in the form of the alleged 12 episodes, is involved. The Hawaii Court of Appeals is in accord, as Hall v. State, supra, provides:

The supreme court found that the claims in Silver were the same in both the federal and the state case, the plaintiff having alleged in both cases that the defendants engaged in a conspiracy spanning ten years to unlawfully deprive him of his right to practice medicine. Additionally, the supreme court held that the fact that the state case included the state statutory claims not

included in the federal case did not relieve the plaintiff of the res judicata effect of the federal judgment. Both complaints were aimed at the same conspiracy and the state statutory claims were merely "alternate theories or claims arising from a single injury[,]" and should have been raised in a single action. Silver, 63 Haw. at 437, 629 P.2d at 1122. With Silver's holding in mind, we examine the claims and issues in this case. Hall v. State, supra, Civ. No. 86-1646, p. 9.

However, Complainant has a stronger case in arguing that the Kauai Circuit Court's confirmation of the arbitration award and the denial of the motion for consideration thereof have no res judicata effect. The prohibited practice in which Complainant claims a conspiracy was, in fact, not before the arbitrator. Neither were Episodes 1 through 10 before the arbitrator. However, it should be noted that at p. 16, ff, of the arbitration decision, the arbitrator notes that the prior disciplinary record of Complainant was placed into evidence and thus it must be presumed to have been considered in the decision.

Complainant also is correct in his argument that Hirano's judgment confirming the arbitration decision was issued subsequent to the filing of the prohibited practice complaint with this Board. However, though the judgment of the Kauai Circuit Court was issued subsequent to the filing before this Board, it was issued previous to this Board's final determination on the complaint filed with the Board. Thus, the Kauai Circuit Court's judgment is a prior determination in terms of a final adjudication. This issue, however, warrants no determination in light of the apparent res judicata effect of the federal decision.

The issues Complainant wishes to relitigate before the Board received a full hearing in federal court, precluding him from relitigating what are essentially the same issues before the Board, and subjecting Respondents to a further burdensome need for defense.

IV. CONCLUSION

The standard for a motion for summary judgment has been met, as all issues of fact were presented, addressed and passed on in federal court. Since matters outside the pleadings are considered herein, summary judgment rather than dismissal is appropriate. Hall v. State, supra, p. 7. This is appropriate even though Kauai County entered a Motion for Dismissal, as when matters outside the pleadings are considered, the motion to dismiss becomes one for summary judgment. Au v. Au, 63 Haw. 210, 212, 626 P.2d 173, 176, aff'd. on recon., 63 Haw. 263, 626 P.2d 181 (1981); Towse v. State, 64 Haw. 624, 628, 647 P.2d 696 (1982). Summary judgment is granted for both Respondents to the instant action.

DATED: Honolulu, Hawaii, November 1, 1988.

HAWAII LABOR RELATIONS BOARD


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Kauai and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME,
LOCAL 152, AFL-CIO
CASE NOS.: CE-03-97, CU-03-50
ORDER NO. 714
ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

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