

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

BRAD K. BENNETT "KALEO",

Complainant,

and

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO,

Respondent.

CASE NO(S). 18-CU-06-369

DECISION NO. 496

FINDINGS OF FACT; CONCLUSIONS OF
LAW; DECISION AND ORDER

FINDINGS OF FACT; CONCLUSIONS OF LAW; DECISION AND ORDER

I. INTRODUCTION

On November 1, 2018, Complainant filed the instant Prohibited Practice Complaint (Complaint), alleging that Respondent breached its duty of fair representation and violated Hawai'i Revised Statutes (HRS) §§ 89-13(b)(1)-(5) and § 89-8(a)'.

On December 12, 2018, the Hawai'i Labor Relations Board (Board) conducted a hearing on Union Respondent's Motion to Dismiss Prohibited Practice Complaint Filed on November 1, 2018 and/or for Summary Judgment (MTD), filed by Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (Respondent or HGEA) on November 13, 2018 and on Complainant's Application to Conduct Discovery, filed by Complainant BRAD K. BENNETT (Complainant or Bennett) on November 15, 2018.

After hearing oral arguments on the MTD, the Board raised the issue of Complainant's standing to bring the Complaint. The Board directed the parties to file simultaneous briefs on the issue of Complainant's standing.

On December 19, 2018, both Complainant and HGEA filed briefs regarding Complainant's standing to bring the Complaint.

Having considered the entire record in these proceedings, the Board makes the following Findings of Fact, Conclusions of Law, and Decision and Order dismissing the instant Complaint and closing the case due to Complainant's lack of standing.

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

II. BACKGROUND AND FINDINGS OF FACT

A. PROCEDURAL BACKGROUND

On November 1, 2018, Complainant filed the instant Complaint, alleging that Respondent breached its duty of fair representation and violated Hawai'i Revised Statutes (HRS) §§ 89-13(b)(1)-(5) and § 89-8(a)ⁱⁱ. On November 2, 2018, the Board notified HGEA of receipt of the Complaint and scheduled various dates and deadlines. HGEA filed its answer on November 13, 2018, setting forth eight defenses to the Complaint.

On November 13, 2018, HGEA filed the MTD, as stated above.

Complainant filed Complainant's Application to Conduct Discovery (Application for Discovery) on November 15, 2018.

On November 16, 2018, the Board held a Pre-Hearing Conference (Conference). 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) 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 cancel the HOM as previously scheduled by the Board.

The parties requested that the Board waive HAR § 12-42-8(g)(3)(C)(iii), requiring that "Answering affidavits, if any...shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise." The Board granted the request and set the deadline for Complainant's response to the MTD (MTD Response) for November 28, 2018.

The parties further requested that the Board allow Respondent to file a reply to Complainant's response to the MTD. The Board granted this further request and set the deadline for the reply (MTD Reply) for December 7, 2018.

The Board set a hearing on the MTD and the Application for Discovery for December 12, 2018 (MTD Hearing).

On November 23, 2018, Respondent filed Union Respondent's Memorandum in Opposition to Complainant's Application to Conduct Discovery Filed November 15, 2018.

In accordance with the deadlines set by the Board, the Complainant filed the MTD Response on November 28, 2018, and the Respondent filed its MTD Reply on December 7, 2018.

As stated above, on December 12, 2018, the Board held the MTD Hearing and the Board raised the issue of Complainant's standing to bring the Complaint. As required by the Board, the parties submitted simultaneous briefs on the issue of standing on December 19, 2018.

B. FINDINGS OF FACT

1. Parties and Background

At all relevant times, HGEA served as an employee organizationⁱⁱⁱ as defined in HRS § 89-2 and the exclusive representative^{iv} for bargaining unit 6 (Unit 6). HRS § 89-6(a)(6) defines Unit 6 as "Educational officers and other personnel of the department of education under the same pay schedule."

As the exclusive representative for Unit 6, HGEA entered into a collective bargaining agreement for Unit 6 (CBA) with the State of Hawai'i, Department of Education (DOE or Employer), effective July 1, 2013 through June 30, 2017, which was in effect for all relevant times in the instant case.

From 2000 to 2015, the DOE employed Complainant as a DOE educational officer. During that period, Complainant gained tenure as a DOE educational officer. Unit 6 includes Complainant's DOE educational officer position that he held from 2000 to 2015, and, while in that position, Complainant fell under the definition of "employee" or "public employee" found in HRS § 89-2^v. During this period, Complainant paid union dues or an equivalent amount to HGEA.

In July 2015, the DOE promoted Complainant to position number 64819 as a Complex Area Superintendent (CAS) for the Hilo-Waiakea Complex Area, and Complainant remained in that position until the DOE terminated him on July 10, 2018.

Unit 6 excludes position number 64819.

After July 2015, while in position number 64819, Complainant did not pay union dues or an equivalent amount to HGEA.

After July 2015, including during the relevant period, Complainant did not qualify as an "employee" or "public employee" as defined in HRS § 89-2.

2. Termination and Post-Termination

On June 29, 2018, DOE Superintendent Dr. Christina M. Kishimoto (Kishimoto) sent a letter to Complainant (Termination Letter). In the Termination Letter, DOE terminated Complainant as of close of business July 10, 2018. Kishimoto further notified Complainant in the Termination Letter that his internal Departmental appeal rights may include School Code Procedure #5512.

DOE's decision to terminate Complainant arose from a May 21, 2018 Investigation Report (Report) by the Investigations Section of the Human Resources that recommended termination, as well as from statements and responses made during a June 15, 2018 post-investigation meeting with Kishimoto and Deputy Superintendent Phyllis Unebasami (Unebasami).

The Report and the post-investigation meeting discussed Complainant's alleged misconduct in violation of the DOE Code of Conduct, Board of Education (BOE) Policy 201-1 (Ethics and Code of Conduct), BOE Policy E-201 (High Performing Employees), and BOE Policy 305-2 (Safe Workplace). The Report also stated that the Investigations Section made substantiated findings and found sufficient evidence to find that Complainant's requirement that he approve all matters going out from the complex area resulted in inappropriately limiting or delaying support and/or services to schools and other offices.

On July 18, 2018, Complainant's counsel, Anthony "T.J." Quan (Quan) sent an email to HGEA stating, "I'm kindly following up from our telephone conversation this past Friday (7/13). Please let me know if we can talk with anyone from HGEA regarding Unit 6 agreement issues pertaining to our client, Mr. Bennett."

On July 24, 2018, Quan sent an email to HGEA stating:

Following up from our communications last week regarding Mr. Bennett and the HGEA Unit 6 Agreement. I would really appreciate it if you could get back to me at your earliest opportunity given that we believe we are facing some time-sensitive deadlines.

Mr. Bennett's termination with the DOE as a complex area superintendent was effective 7/10/18. Thus, if HGEA elects to help Mr. Bennett, we understand that under the Unit 6 Agreement, the HGEA would have twenty (20) working days from 7/10/18 to file a grievance on behalf of Mr. Bennett, as a tenured DOE employee entitled to return rights under Article 12 of the Unit 6 Agreement. By our calculations, the twenty (20) working days falls **on 8/7/18.**

We look forward to discussing these issues further with you and your colleagues soon.

On July 27, 2018, HGEA Union Agent Joy Bulosan, sent Quan a letter stating:

This is in response to your recent email regarding your client, Mr. Brad Bennett and the unit 6 collective bargaining agreement, specifically, your client's rights under Article 12-Tenure of the contract.

Based on our understanding that Mr. Bennett was a tenured educational officer prior to taking an appointed position with the DOE, under Article 12- Tenure of the unit 6 agreement, he has the right to apply to be returned to a position within the bargaining unit. However, his return isn't automatic or required. The intent of this provision was to ensure that if an educational officer was placed into the unit after serving in an appointive position, only tenured educational officers would be entitled to be considered for such placement.

So, Mr. Bennett does have the right to apply to be returned to a unit 6 position in which he has tenure and/or qualifies, but that return or placement is not mandatory.

On July 31, 2018, Complainant's counsel Margery S. Bronster (Bronster) sent a letter to the Executive Director of HGEA Randy Perreira (Perreira), stating, among other things, that the letter "serves as Mr. Bennett's formal request to the HGEA to grieve the DOE's recent decision to terminate Mr. Bennett's eighteen (18) year employment with the State and further, disregard his tenure/return rights under Article 12(F) of the HGEA Unit 6 Contract."

On August 7, 2018, Perreira sent a letter in response to Bronster's July 31, 2018 letter, acknowledging the request to HGEA to grieve Bennett's termination and the Department of Education's decision regarding his tenure return rights. The letter informed Bronster, among other things that Bennett had no grievance rights under the CBA, stating:

As stated in your letter, Mr. Bennett was at the time of his termination serving in an exempt and appointed position as Complex Area Superintendent (CAS) for the Hilo-Waiakea Complex. In that capacity, Mr. Bennett was not in a covered position in the bargaining unit; in fact, during his tenure as a CAS he was a managerial employee not subject the Unit 06 CBA. As such, Mr. Bennett does not have the right to grieve under the CBA. Any attempt to contest the termination action must be done under the department's internal complaint process as the appointed position he was

serving in is not subject to collective bargaining and not in the bargaining unit.

We are unable to grieve for the remedy Mr. Bennett is seeking.

On November 1, 2018, Bennett filed the instant Complaint against HGEA for a breach of the duty of fair representation for declining to file a grievance against the employer to challenge his termination and enforce his alleged tenure/return rights.

III. DISCUSSION AND CONCLUSIONS OF LAW

Complainant alleges that HGEA has refused to file a grievance on his behalf in violation of HRS §§ 89-13(b)(1)-(5) and 89-8(a), as well as the duty of fair representation.

The Board first considers the issue of whether Complainant has standing to bring the instant prohibited practice complaint to the Board. The complainant bears the burden of establishing that he has standing. County of Kauai v. Baptiste, 115 Hawai'i 15, 26, 165 P.3d 916, 927 (2007).

“Standing is concerned with whether the parties have the right to bring suit.” Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 67, 881 P.2d 1210, 1213 (1994). The Board “may consider standing even when not raised by the parties.” Tax Foundation of Hawaii vs. State, 144 Hawai'i 175, 192, 439 P.3d 127, 144 (2019) (Tax Foundation). Accordingly, the Board will consider the standing issue under two different analyses.

A. LEGISLATIVE STANDING REQUIREMENTS

The Hawai'i Supreme Court has stated:

[S]tanding is a prudential concern regarding whether the party seeking a forum has alleged a sufficient personal stake in the outcome of a controversy as to justify the exercise of the court's remedial powers on the party's behalf...standing is a prudential consideration regarding the proper—and properly limited—role of courts in a democratic society and is not an issue of subject matter jurisdiction...Standing requirements may be tempered, or even prescribed, by legislative declarations of policy. Therefore, standing requirements can differ based on legislative enactments.

Tax Foundation, *Id.* at 188, 439 P.3d at 140.

In the instant case, the DOE terminated Complainant from position number 64819. In Decision No. 2, Hawaii State Educational Officers Association (HSEOA) and Hawaii Government Employees Association (AFSCME/HGEA) and Department of Education, State of Hawaii, Board Case No. R-06-2, 1 HPERB 3, 4 (1971), the Board specifically listed position number 64819 as a position excluded from Unit 6. HRS Chapter 89 does not extend coverage to individuals serving in excluded positions^{vi}. Because Complainant served in an excluded position as a CAS, during the relevant period, he did not qualify as an “employee” or “public employee” under HRS § 89-2, and thus HRS Chapter 89 did not and does not cover him.

Accordingly, Complainant does not meet the standing requirements that the legislature put forth for controversies arising under HRS Chapter 89, as he was not an “employee” as defined under HRS § 89-2 and a designated member of bargaining unit 6 as provided in 89-6(a)(6); therefore, he lacks the standing to file a prohibited practice complaint under HRS Chapter 89. Based on Complainant’s lack of standing, and although Respondent did not raise Complainant’s lack of standing, the Board dismisses this matter, *sua sponte*.

B. AKINAKA ANALYSIS

The Board further notes that when the Complaint was initially filed, the Board traditionally used the three-part injury-in-fact test adopted in Akinaka v. Disciplinary Board, 91 Hawai‘i 51, 979 P.2d 1077 (1999) (*overruled in part by Tax Foundation*) (*Akinaka*). However, even under the *Akinaka* analysis, the Board finds that Complainant does not have standing to bring this Complaint.

Under the *Akinaka* analysis, the [Board] must consider the issue of standing *sua sponte* because a [complainant] without standing is not entitled to invoke the [Board’s] jurisdiction. State v. Armitage, 132 Hawai‘i 36, 55, 319 P.3d 1044 (2014). The lack of jurisdiction over the subject matter can never be waived by the parties. If the parties fail to raise the issue, the Board *sua sponte* will. Chun v. Emp. Retirement System, 73 Haw. 9, 14, 828 P.2d 260, 263 (1992) (*citing In Re Application of Rice*, 68 Haw. 334, 713 P.2d 426 (1986)).

The three-part injury-in-fact test known as the *Akinaka* test, looks at if the complainant has the requisite personal stake required for the Board to adjudicate the case. This three-part test looks at:

- (1) has the plaintiff suffered an actual or threatened injury as a result of the defendant's wrongful conduct; (2) is the injury fairly traceable to the defendant's actions; and (3) would a favorable decision likely provide relief for plaintiff's injury.

Akinaka, 91 Hawai‘i at 55, 979 P.2d at 1081. All three prongs of the *Akinaka* test must be met to prove standing. *Akinaka*, 91 Hawai‘i at 55, 979 P.2d at 1081.

With respect to the first prong of the test, the Complainant must show an actual, direct, distinct injury to himself, and it cannot be an abstract, conjectural, or hypothetical injury. Hanabusa v. Lingle, 119 Hawai'i 341, 347, 198 P.3d 604, 610 (2008); Akinaka, 91 Hawai'i at 55, 979 P.2d at 1081.

Here, Complainant has alleged that HGEA breached the duty of fair representation because it declined to file a grievance against the employer on his behalf. Further, he argues that he suffered a "judicially cognizable injury" by being foreclosed by the HGEA from returning to the State civil service as a gainfully employed, tenured employee with the DOE.

Even assuming for the sake of argument that Complainant was covered by HRS Chapter 89 and the relevant CBA as a bargaining unit member, the Board finds that his allegations do not show any actual injury to the Complainant.

The plain language of the CBA in Article 15 – Grievance Procedure states in relevant part:

A. The term "grievance" as used in this Agreement shall mean a complaint filed by a bargaining unit educational officer covered hereunder or on an educational officer's behalf by the Union alleging a violation concerning the interpretation or application of a specific provision of this Agreement occurring after its effective date...

B. An individual educational officer may present a grievance to the immediate supervisor and have the grievance heard without intervention of the Union, provided that the Union has been afforded an opportunity to be present at the conference(s) on the grievance...

(Emphasis added.)

The plain language of the CBA states that an individual educational officer may file a grievance on their own without HGEA's participation. Therefore, HGEA's decision not to participate in any grievance filed by Complainant did not foreclose Complainant from filing his own grievance. As such, Complainant's attempt to return to State civil service suffered no injury from HGEA's refusal, and any injury is solely hypothetical in nature.

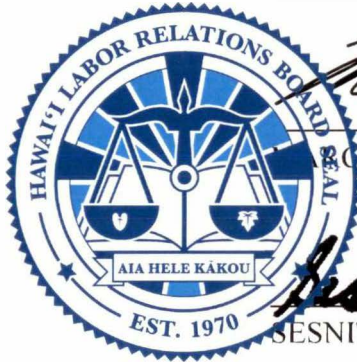
As Complainant cannot meet the first prong of the Akinaka test, he does not have standing to file this Complaint.

ORDER

For the reasons given above, the Board hereby orders that the prohibited practice complaint is dismissed. This case is closed.

DATED: Honolulu, Hawai'i, _____ February 6, 2020 _____

HAWAII LABOR RELATIONS BOARD



Marius R. Oshiro

MARIUS R. OSHIRO, Chair

Sesnita A. D. Moepono

SESNITA A.D. MOEPONO, Member

J.N. Musto

J.N. MUSTO, Member

Copies sent to:

Anthony "T. J." Quan, Esq.

Margery S. Bronster, Esq.

Ted H.S. Hong, Esq.

¹ In paragraph 19 of the Complaint, Complainant alleges a violation of "Haw. Rev. Stat. §§ 89-13(b)(1-5) and HRS 89(a)(8)." (Emphasis added) In paragraph A, the prayer for relief, Complainant requests an order that Respondent violated "HRS Sections 89-13(b)(1-5) and 89-8(a)" (Emphasis added). Because HRS Chapter 89 does not include a section "89(a)(8)", the Board accepts that the Complaint contains a typographical error and that Complainant alleges violations of HRS §§ 89-13(b)(1-5) and § 89-8(a).

ⁱⁱ In paragraph 19 of the Complaint, Complainant alleges a violation of "Haw. Rev. Stat. §§ 89-13(b)(1-5) and HRS 89(a)(8)." (Emphasis added) In paragraph A, the prayer for relief, Complainant requests an order that Respondent violated "HRS Sections 89-13(b)(1-5) and 89-8(a)" (Emphasis added). Because HRS Chapter 89 does not include a section "89(a)(8)", the Board accepts that the Complaint contains a typographical error and that Complainant alleges violations of HRS §§ 89-13(b)(1-5) and § 89-8(a).

ⁱⁱⁱ HRS § 89-2 Definitions defines "employee organization" as:

"Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund, and other terms and conditions of employment of public employees.

^{iv} HRS § 89-2 Definitions defines "exclusive representative" as:

"Exclusive representative" means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate

bargaining unit without discrimination and without regard to employee organization membership.

^v HRS § 89-2 Definitions defines “employee” or “public employee” as:

“Employee” or “public employee” means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section [89-6(f)].

^{vi} HRS § 89-6(f) states in relevant part:

The following individuals shall not be included in any appropriate bargaining unit or be entitled to coverage under this chapter:

(3) Top-level managerial and administrative personnel...

(5) Individuals concerned with confidential matters affecting employee-employer relations...