

STATE OF HAWAI‘I
HAWAI‘I LABOR RELATIONS BOARD

In the Matter of

JOSEPH H. CAMPOS II, Ph.D.,

Complainant,

and

UNIVERSITY OF HAWAI‘I BOARD OF
REGENTS; LEE PUTNAM, Chair, Board
of Regents,

Respondents.

CASE NO. 18-CE-07-922

ORDER NO. 3454

ORDER GRANTING IN PART
RESPONDENT UNIVERSITY OF
HAWAI‘I BOARD OF REGENTS AND
LEE PUTNAM’S MOTION TO
DISMISS PROHIBITED PRACTICE
COMPLAINT

ORDER GRANTING IN PART RESPONDENT
UNIVERSITY OF HAWAI‘I BOARD OF REGENTS AND
LEE PUTNAM’S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT

I. BACKGROUND AND FINDINGS OF FACTS

A. PROCEDURAL HISTORY

On October 26, 2018, Complainant JOSEPH H. CAMPOS, II, Ph.D., self-represented litigant (SRL) (Complainant or Campos) filed a Prohibited Practice Complaint (Complaint) with the Hawai‘i Labor Relations Board (Board), alleging violations of Hawai‘i Revised Statutes (HRS) §§ 89-13(a)(1), (4), (7), and (8) by Respondents UNIVERSITY OF HAWAI‘I BOARD OF REGENTS and LEE PUTNAM, Chair, Board of Regents (collectively, Respondents) (Campos II).

On October 29, 2018, the Board issued Board Order No. 3413 PRETRIAL ORDER AND NOTICES; (1) NOTICE OF RESPONDENT(S) OF PROHIBITED PRACTICE COMPLAINT; (2) NOTICE REGARDING PROTECTION OF SOCIAL SECURITY NUMBERS AND PERSONAL INFORMATION; (3) NOTICE OF PREHEARING CONFERENCE; (4) NOTICE OF PRETRIAL CONFERENCE; (5) NOTICE OF HEARING ON THE MERITS; AND (6) SCHEDULE OF HEARINGS, CONFERENCES, AND DEADLINES (Order No. 3413). Order

No. 3413, among other things, scheduled a Pre-Trial Conference on November 28, 2018 (Conference) and scheduled a Hearing on the Merits for December 5, 2018 (HOM).

On November 8, 2018, the Respondents filed RESPONDENTS UNIVERSITY OF HAWAI'I BOARD OF REGENTS and LEE PUTNAM'S ANSWER TO PROHIBITED PRACTICE COMPLAINT.

On November 21, 2018, Respondents filed RESPONDENTS UNIVERSITY OF HAWAI'I BOARD OF REGENTS and LEE PUTNAM'S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT (Motion to Dismiss).

On November 28, 2018, the Board held the Conference. Campos appeared on behalf of himself and Elisabeth A. K. Contrades, Esq. appeared for Respondents.

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 cancel the HOM previously scheduled for December 5, 2018 by Order No. 3413. Additionally, the Board set a hearing on the Respondent's Motion to Dismiss for December 5, 2018.

On November 28, 2018, Campos filed REBUTTAL TO RESPONDENT UNIVERSITY OF HAWAII'S MOTION TO DISMISS.

On December 5, 2018, the Board held a hearing and received oral arguments on the Motion to Dismiss. Campos appeared on behalf of himself, and Elisabeth A.K. Contrades, Esq. appeared for Respondents.

On December 7, 2018, Complainant filed a RESPONSE TO HLRB BOARD MEMBERS' QUESTION DURING THE HEARING ON DESPOSITIVE MOTIONS (sic), which discussed the requirement of exhaustion for claims brought under HRS § 89-13(a)(8).

After careful consideration of the record and the arguments presented, the Board hereby makes the following findings of fact and conclusion of law and order. 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 termination on July 1, 2018, Campos was an "employee" or "public employee", as defined in HRS § 89-2 of the University of Hawai'i (UH) and a member of Bargaining Unit 7 (Unit 7) (faculty of UH and the community college system), as provided in HRS § 89-6(a)(7).

The University of Hawai'i Board of Regents (BOR) is the "employer" or "public employer", as defined in HRS § 89-2 for Unit 7.

The University of Hawai'i Professional Assembly (UHPA) is the "exclusive representative", as defined in HRS § 89-2, for Unit 7. The BOR and UHPA entered into a Collective Bargaining Agreement for Bargaining Unit 7 (CBA). The CBA was in effect throughout the duration of this matter.

Article XXIV of the CBA, in relevant part, provides the following procedure for filing a grievance:

"C. PROCEDURES

2. Formal Grievance Procedure.

The Employer and the Union may, by mutual agreement, waive any or all of the steps and proceed directly to Step 3.

- a. **Step 1.** A grievance shall be filed with the Chancellor or the respective designee (herein all referred to as Chancellor). The Chancellor shall schedule a grievance meeting with the grievant and/or the grievant's designated representative within fifteen (15) calendar days after receipt of the grievance and shall issue a decision in writing to the grievant within fifteen (15) calendar days after the close of the meeting.
- b. **Step 2.** If the response at Step 1 does not resolve the grievance, the grievant may appeal the Step 1 response by filing an appeal with the President of the University or the President's designee within fifteen (15) calendar days after receipt of the Step 1 response. Such appeal shall be in writing and shall specify the reason why the Step 1 decision is unsatisfactory. The President need not consider any grievance in Step 2 which encompasses different alleged violations or charges than those presented in Step 1. The President or the President's designee shall schedule a grievance meeting with the grievant and/or the grievant's designated representative within fifteen (15) calendar days after receipt of the appeal or grievance is filed and shall render a response in writing to the grievant within twenty (20) calendar days after the close of the meeting.
- c. **Step 3. Arbitration.** If the grievance has not been settled at Step 2, then within thirty (30) calendar days after the receipt of the written decision of the President or the President's designee, the Union may request arbitration by giving written notice to that effect, in person or by registered or certified mail, directed to the President or the

President's designee. Representatives of the parties shall attempt to select an Arbitrator immediately thereafter..."

On April 30, 2018, Campos filed a grievance against the UH by a letter to David Lassner, Ph.D., President and Interim Chancellor of the University of Hawai'i at Mānoa (Lassner). Campos's letter cited alleged violations of CBA Articles II, III, IV, X, XIV, and XX.

On June 8, 2018, Campos filed a prohibited practice complaint with the Board, alleging actions of BOR and Lee Putnam, Chair of the BOR were in violation of HRS §§ 89-13(a)(1), (4), (7) and (8) (Case No. 18-CE-07-917) (Campos I).ⁱ

On June 27, 2018, Kristeen Hanselman, the Executive Director of UHPA (Hanselman), sent Lassner a request to extend the deadline to request arbitration, stating: "At this time there is a pending Prohibited Practice Charge which, in part, deals with the grievance procedures and employer response. UHPA believes it is prudent to await the outcomes of the pending [prohibited practice complaint] previous to engaging in its deliberations on proceeding to arbitration."

On June 28, 2018, UH granted UHPA's request for an extension of time in which to request arbitration.

On August 31, 2018, UHPA again wrote to UH, asking for another extension of the deadline to request arbitration.

On October 2, 2018, Hanselman informed Campos that the request for arbitration was being held in abeyance until the Board rendered a decision in Campos I.

On October 26, 2018, Campos filed the instant Complaint with the Board, again alleging the BOR and Lee Putnam, Chair of the BOR were in violation of HRS § 89-13(a)(1), (4), (7), and (8).

On November 21, 2018, Respondents filed a Motion to Dismiss in this case (Campos II), arguing lack of jurisdiction and/or failure to state a claim upon which relief can be granted.

At the December 5, 2018 hearing on the Respondent's Motion to Dismiss, Campos and Respondents UH agreed that the CBA grievance process was still ongoing as the parties awaited a decision from UHPA regarding arbitration.

II. STANDARD OF REVIEW

The Board adheres to the legal standards set forth by the Hawai'i appellate courts for motions to dismiss under the Hawai'i Rules of Civil Procedure (HRCP) Rule 12(b).

A motion to dismiss for lack of subject matter jurisdiction pursuant to HRCF Rule 12(b)(1) is based on the contents of the complaint, the allegations of which 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. *Yamane v. Pohlson*, 111 Hawaii 74, 81, (2006) (*citing* *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).

III. CONCLUSIONS OF LAW

In the Motion to Dismiss, Respondents assert that the Complaint should be dismissed because the Board lacks subject matter jurisdiction due to the Complainant’s failure to exhaust the contractual remedies.

The contractual remedies available to the Complainant are based on the relevant CBA for Unit 7. HRS §89-10.8(a) requires that, “A public employee 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[.]”

“[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).

In *Poe v. Hawai‘i Labor Relations Board*, 105 Hawai‘i 97, 100-01, 94 P.3d 652, 655-56 (2004), decided by the Hawai‘i Supreme Court, Poe argued that the circuit court should not have affirmed the decision of the 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 to the requirements do exist; for example, when pursuing the contractual remedy would be futile. *Id.* at 102, 94 P.3d at 657.

Based on the record in this case, there is no dispute that the Complainant began the formal grievance process pursuant to the CBA, and that the union has not declined to advance the grievance through Step 3 arbitration, rather it is holding its decision in abeyance until this Board issues a decision on the prohibited practice complaint in Campos I. Therefore, the grievance process has not been exhausted.

Additionally, there has been no showing that pursuing arbitration would be futile, and therefore, there is no showing that such an exception to the exhaustion requirement exists in this case. Accordingly, the Complainant has failed to exhaust the contractual remedies available under the CBA, and thus the Board does not have subject matter jurisdiction over this case.

ORDER

For all the reasons set forth above, the Board:

1. Grants Respondents' Motion to Dismiss in Part due to lack of subject matter jurisdiction; and
2. Dismisses the remaining claims in the Respondents' Motion to Dismiss as moot.

This case is hereby dismissed and closed.

DATED: Honolulu, Hawai'i, February 1, 2019.

HAWAI'I LABOR RELATIONS BOARD



MARCUS R. OSHIRO, Chair

A handwritten signature in black ink, reading "Sesnita A.D. Moepono".

SESNITA A.D. MOEPONO, Member

A handwritten signature in black ink, reading "J.N. Musto".

J N. MUSTO, Member

Copies sent to:

Joseph H. Campos, SRL

Elisabeth A.K. Contrades, Esq.

ⁱ The Board consolidated Case No. 18-CE-07-917 with a companion complaint against the University of Hawaii Professional Assembly (Case No. 18-CU-07-362), which collectively are referred to as "Campos I". On or about November 14, 2018, the Board orally granted the University's motion to dismiss Campos I. A final written order was issued on January 30, 2019.