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**Transaction ID 66775496**  
**Case No. 21-CU-06-386**

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

ANTHONY JONES,

Complainant(s),

and

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

Respondent(s).

CASE NO(S). 21-CU-06-386

ORDER NO. 3780

ORDER GRANTING MOTION TO  
DISMISS AND CLOSING CASE

**ORDER GRANTING MOTION TO DISMISS AND CLOSING CASE**

**1. Introduction and Statement of the Case**

Complainant ANTHONY JONES (Mr. Jones) filed a prohibited practice complaint with the Hawai'i Labor Relations Board (Board) on April 20, 2021, which he amended on April 28, 2021<sup>1</sup>. The First Amended Prohibited Practice Complaint (Amended Complaint), among other things, alleges that Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) committed prohibited practices in violation of Hawai'i Revised Statutes (HRS) § 89-13.

HGEA filed a Motion to Dismiss on June 22, 2021 which, among other things, alleges that the Board lacks jurisdiction to rule on this case because Mr. Jones has failed to exhaust his administrative remedies.

Mr. Jones did not respond to the Motion to Dismiss.<sup>2</sup>

After review of the complete record, the Board GRANTS HGEA's Motion to Dismiss, finding that the Board lacks jurisdiction over this case because Mr. Jones has not yet exhausted his contractual remedies. Accordingly, the Board cannot hear or rule on this case until after Mr. Jones exhausts such remedies, and the Board must dismiss this case.

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.

## **2. Legal Standard for Motion to Dismiss**

The contents of the complaint serve as the basis for motions to dismiss for lack of subject matter jurisdiction. The Board must accept the allegations of the complaint as true and view those allegations in the light most favorable to the complainant. However, the Board is not required to accept conclusory allegations on the legal effect of the events alleged in the complaint. Paysek v. Sandvold, 127 Hawai‘i 390, 402-03, 279 P.3d 55, 67-68 (App. 2012) (citing Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985)). The Board may only dismiss a claim if it appears beyond a doubt that the complainant can prove no set of facts that would support the claim and entitle the complainant to relief. Hawaii State Teachers Ass’n v. Abercrombie, 126 Hawai‘i 13, 19, 265 P.3d 482, 488 (App. 2011).

The party seeking to invoke jurisdiction of the court on appeal has the burden of establishing that jurisdiction exists. Melendras v. Maricopa County, 815 F.3d 645, 649 (9th Cir. 2016) (citing Data Disc., Inc v. Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1285 (1977)). The Board may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction while considering a motion to dismiss for lack of subject matter jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawaii 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawai‘i 1, 7, 175 P.3d 111, 117 (App. 2007).

## **3. Relevant Factual Allegations**

As stated above, the Board must accept the allegations of the complaint as true when considering motions to dismiss. In the Amended Complaint, Mr. Jones<sup>3</sup> alleges that his Employer<sup>4</sup>, the Department of Education, State of Hawai‘i (DOE), violated the bargaining unit 06<sup>5</sup> (BU 06) collective bargaining agreement (CBA), and HGEA, his exclusive representative<sup>6</sup>, filed three grievances based on those alleged violations of the CBA. Those three grievances went through a Step 2 hearing, and Mr. Jones requested that HGEA advance those grievances to an arbitration hearing. HGEA has not refused to proceed to arbitration on those three grievances<sup>7</sup>.

Additionally, HGEA began preparing a Step 1 grievance on Mr. Jones’ behalf on April 27, 2021, contesting Mr. Jones’ termination.

#### 4. Analysis and Conclusions of Law

Before the Board can hear or rule on a case, it must determine that it has the jurisdiction or right to issue a valid judgment. Tamashiro v. Dep't of Human Servs., 112 Hawai'i 388, 398, 146 P.3d 103, 113 (2006). Lack of subject matter jurisdiction can never be waived by any party at any time. Koga Eng'g & Constr., Inc. v. State, 122 Hawai'i 60, 84, 222 P.3d 979, 1003 (2010)

The Hawai'i Supreme Court (Court) has established that a union owes its members a duty of fair representation when an employee alleges that their employer violated the relevant collective bargaining agreement, and that the issues of a union breaching its duty of fair representation and the employer violating the collective bargaining agreement are viewed together in a "hybrid case." Poe v. Haw. Labor Rels. Bd., 105 Hawai'i 97, 101-102, 94 P.3d 652, 656-57 (2004) (Poe II).

The Court further noted in Poe II that the claims of an employer violating the collective bargaining agreement and a union breaching the duty of fair representation are "inextricably interdependent." Poe II, 105 Hawai'i at 102, 94 P.3d at 657. Because these two claims rely on each other to that extent, when an employee makes the claim of either an employer's violation of the collective bargaining agreement or a union's breach of the duty of fair representation, that employee must prove both sides of the hybrid case. Id. at 102, 94 P.3d at 657.

The Board has consistently held that a complainant must first exhaust contractual remedies unless attempting to exhaust would be futile, based on the Court's reasoning in Poe v. Haw. Labor Rels. Bd., 97 Hawai'i 528, 531 40 P.3d 930, 933 (2002) (Poe I) and Poe II, 105 Hawai'i at 101, 94 P.3d at 656. *See, e.g., University of Hawaii Professional Assembly v. Board of Regents*, Case No. CE-07-804, Board Order No. 2939 (August 22, 2013) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-2939.pdf>).

This case involves an alleged duty of fair representation by HGEA, which means that Mr. Jones must prove both the alleged breach of the duty of fair representation by HGEA and the alleged violation of the collective bargaining agreement by DOE. However, in the Amended Complaint, Mr. Jones admits that all four of the grievances are currently proceeding through the grievance process, albeit not as quickly as he would like.

Mr. Jones has not alleged that pursuing the contractual remedies would be futile and, according to the Motion to Dismiss, the first three grievances are currently proceeding to arbitration. Accordingly, there is no exception to the exhaustion doctrine that would apply here.

Therefore, because Mr. Jones has not yet exhausted his contractual remedies, the Board does not have jurisdiction over this case at this time<sup>8</sup> and must dismiss this case.

**5. Order**

Based on the above, the Board GRANTS HGEA’s Motion to Dismiss and dismisses the Amended Complaint in its entirety. This case is closed.

DATED: Honolulu, Hawai‘i, \_\_\_\_\_ July 16, 2021 \_\_\_\_\_.



HAWAI‘I LABOR RELATIONS BOARD

*Manu O. Oshiro*  
\_\_\_\_\_  
MANU O. OSHIRO, Chair

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

EXCUSED

\_\_\_\_\_  
J N. MUSTO, Member

Copies sent to:

Anthony Jones, Self-Represented Litigant  
Keani Alapa, Esq.

**NOTICE OF RIGHT TO APPEAL**

Any person aggrieved by the Board’s decision who wishes to have the Board’s decision judicially reviewed must institute proceedings in the appropriate circuit court within thirty days after service of this Final Order, in accordance with HRS § 91-14.

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<sup>1</sup> The Board interpreted Mr. Jones’ filing of his First Amended Prohibited Practice Complaint as a Motion for Leave to Amend, which the Board granted on May 10, 2021.

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<sup>2</sup> In addition to not responding to the Motion to Dismiss within the five days provided for in Hawai'i Administrative Rules (HAR) § 12-42-8(g)(3)(C)(iii) (“Answering affidavits, if any...shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise.”), Mr. Jones did not respond to the Motion to Dismiss after the Board issued Order No. 3778, Setting Deadline to File Response to Motion to Dismiss.

<sup>3</sup> Mr. Jones, until his termination, was an “employee” or “public employee” within the definition of HRS § 89-2, which defines in relevant part:

“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)].

<sup>4</sup> HRS § 89-2 defines “Employer” or “Public Employer” as:

“Employer” or “public employer” means the governor in the case of the State...the board of education in the case of the department of education...and any individual who represents one of these employers or acts in their interest in dealing with public employees...

<sup>5</sup> HRS § 89-6 defines BU 06 as, “Educational officers and other personnel of the department of education under the same pay schedule.”

<sup>6</sup> 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.

<sup>7</sup> The Motion to Dismiss provides additional information that Mr. Jones has been informed that those three grievances are currently proceeding to arbitration.

<sup>8</sup> The Board further notes that, if these grievances do proceed to arbitration, regardless of the outcome of such arbitration, the Board cannot overturn or alter an arbitration award, as such actions are governed by HRS Chapter 658A. Further, if the Board were to overturn an arbitration award, it would be “acting in a manner completely contrary to the spirit, intent and basic purpose of Chapter 89, HRS, and the mission of this Board.” Fasi and HGEA et al, Board Case No. DR-02-30, Decision No. 107, \*6 (April 19, 1979) (<https://labor.hawaii.gov/hlr/files/2018/12/Decision-No-107.pdf>) (citations omitted).

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