

STATE OF HAWAI'I
HAWAI'I LABOR RELATIONS BOARD

In the Matter of

ANTHONY JONES,

Complainant(s),

and

JON HENRY LEE, Department of Education,
State of Hawai'i; SEAN TAJIMA,
Department of Education, State of Hawai'i;
and CHRISTINA KISHIMOTO,
Superintendent, Department of Education,
State of Hawai'i,

Respondent(s).

CASE NO(S). 21-CE-06-960

ORDER NO. 3781

ORDER GRANTING MOTION TO
DISMISS AND CLOSING CASE

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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 May 17, 2021, which he sought to amend on May 19, 2021¹. The First Amended Prohibited Practice Complaint (Amended Complaint), among other things, alleges that Respondents JON HENRY LEE, Department of Education, State of Hawai'i; SEAN TAJIMA, Department of Education, State of Hawai'i; and CHRISTINA KISHIMOTO, Superintendent, Department of Education, State of Hawai'i (Respondents) committed prohibited practices in violation of Hawai'i Revised Statutes (HRS) § 89-13 in relation to Mr. Jones' alleged constructive termination and eventual termination.

Respondents filed a Motion to Dismiss on May 27, 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.²

After review of the complete record, the Board GRANTS Respondents' 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. Jones³ alleges that Respondents, as agents of his Employer⁴, the Department of Education, State of Hawai'i (DOE), violated the bargaining unit 06⁵ (BU 06) collective bargaining agreement (CBA), resulting in Mr. Jones' exclusive representative⁶, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA) filing four grievances on Mr. Jones' behalf.

The first three grievances went through several hearings, and Respondents eventually terminated Mr. Jones. HGEA informed Mr. Jones that they would file a fourth grievance based

on his termination. Mr. Jones does not allege in the Amended Complaint that HGEA has declined to take any of these grievances to arbitration.

4. Analysis and Conclusions of Law

First, Mr. Jones has alleged violations of HRS §§ 89-13, 377-6, and 377-7. The Board must begin with dismissing all allegations of HRS § 377-6 and 377-7 because Respondents are not Employers under HRS Chapter 377 and, therefore, cannot commit unfair labor practices under that chapter. HRS § 377-1, Definitions, specifically states that, for the purposes of HRS Chapter 377:

“Employer” means a person who engages the services of an employee, and includes any person acting on behalf of an employer, **but shall not include the State or any political subdivision thereof**, or any labor organization or anyone acting on behalf of such organization other than when it is acting as an employer in fact.

(Emphasis added.)

Because Respondents cannot be employers under the definition used in HRS Chapter 377, they legally cannot be found to have committed unfair labor practices under that chapter. Therefore, the Board must dismiss all alleged violations of HRS §§ 377-6 and 7.

Respondents do, however, fall under the definition of “Employer” or “Public Employer” for HRS Chapter 89. *See*, endnote 4, *citing* HRS § 89-2. Accordingly, they can be charged with committing prohibited practices.

Turning to the alleged violations of HRS § 89-13, before the Board can hear or rule on these allegations, 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)

When considering an allegation that an employer has committed a prohibited practice by violating the relevant collective bargaining agreement, 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) and Poe v. Haw. Labor Rels. Bd., 105 Hawai‘i 97, 101, 94 P.3d 652, 656 (2004). *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>).

Based on the Amended Complaint, Mr. Jones has alleged that all of the grievances are currently proceeding through the grievance process.

Therefore, because Mr. Jones has not yet exhausted his contractual remedies, the Board does not have jurisdiction over this case at this time⁷ and must dismiss this case.

5. Order

Based on the above, the Board GRANTS Respondents' 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

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

EXCUSED
J N. MUSTO, Member

Copies sent to:

Anthony Jones, Self-Represented Litigant
Amanda Furman, Deputy Attorney General

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.

¹ Before the Board ruled on Mr. Jones' Motion for Leave to Amend, Mr. Jones moved to extend the process for a period of 45 days to allow him to seek counsel. The Motion to Dismiss is based on Mr. Jones' First Amended Prohibited Practice Complaint; accordingly, the Board will allow the First Amended Prohibited Practice Complaint to serve as the charging document in this case, based on Respondents' acknowledgement of the document as the charging document.

² 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. 3779, Setting Deadline to File Response to Motion to Dismiss.

³ 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)].

⁴ 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...

⁵ HRS § 89-6 defines BU 06 as, "Educational officers and other personnel of the department of education under the same pay schedule."

⁶ 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.

⁷ 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).

ANTHONY JONES v. JON HENRY LEE, et al.

CASE NO(S). 21-CE-06-96

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