

STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of

ERIN K. KUSUMOTO,

Complainant(s),

and

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO; and DEPARTMENT OF
EDUCATION, State of Hawai'i,

Respondent(s).

CASE NO(S). 20-CU-06-379
20-CE-06-940

ORDER NO. 3787

ORDER DENYING RESPONDENT
HGEA/AFSCME'S MOTION TO STRIKE
AND/OR DISMISS COMPLAINANT'S
ALLEGATION

**ORDER DENYING RESPONDENT HGEA/AFSCME'S
MOTION TO STRIKE AND/OR DISMISS COMPLAINANT'S ALLEGATION**

1. Introduction

Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) filed a motion to strike and/or dismiss (Motion to Strike) in this case, regarding Complainant ERIN K. KUSUMOTO's (Complainant or Kusumoto) allegation that HGEA failed to abide by the grievance procedure for bargaining unit 6 (BU 6).

In the Motion to Strike, among other things, HGEA argues that Kusumoto's prohibited practice complaint (Complaint) alleges that HGEA committed a breach of the duty of fair representation and does not allege that HGEA committed a prohibited practice by violating the BU 6 collective bargaining agreement (CBA). Further, HGEA argues that, based on Kusumoto's failure to allege that HGEA committed a prohibited practice under Hawai'i Revised Statutes (HRS) § 89-13(b)(5), Kusumoto should not be allowed to discuss or argue about grievance procedure discrepancies.

Kusumoto opposes the Motion to Strike and argues, among other things, that the Motion to Strike is untimely; that, the allegation that HGEA violated HRS § 89-13(b)(4) encompasses an allegation that HGEA violated HRS § 89-13(b)(5); that the Hawai'i Labor Relations Board (Board) should hear relevant evidence in the case because the Complaint alleges a ministerial

failure in the grievance process; and that, if the foregoing arguments are not accepted, the Board should grant Kusumoto permission to move for leave to amend.

Respondent DEPARTMENT OF EDUCATION, State of Hawai'i (DOE) did not oppose the Motion to Strike.

Based on the entire record, the Board makes the below findings of fact and conclusions of law and denies the Motion to Strike. However, the Board further recognizes that no alleged violation of HRS § 89-13(b)(5) has been pled, and, therefore, under the Complaint, the question of whether HGEA wilfully violated the collective bargaining agreement is not before the Board.

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

2. Findings of Fact

HGEA is the exclusive representativeⁱ for BU 6ⁱⁱ, and, while employed by DOEⁱⁱⁱ, Kusumoto was a public employee^{iv} and a member of BU 6. HGEA and the DOE are parties to the CBA which applies to all members of BU 6.

Kusumoto's Complaint includes the following allegations:

...Employee asserts that Union violated HRS Sections 89-8(a), 89-13(b)(4), when, as the exclusive representative of Employee, it failed to meet its duty of fair representation.

186. In Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1274 (9th Cir. 1983), the Court held that unintentional union conduct may constitute a breach of the duty of fair representation in situations where the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim.

187. Along with HGEA's decision to refuse to take Employee's case to arbitration being perfunctory and arbitrary, HGEA also failed to perform a ministerial act, which failure extinguished Employee's right to pursue arbitration other than through a hybrid complaint.

Kusumoto's Complaint does not include an alleged violation of HRS § 89-13(b)(5).

3. Conclusions of Law

The Board has exclusive original jurisdiction over prohibited practice complaints. Hawai'i Gov't Emples. Ass'n, AFSCME Local 152 v. Lingle, 124 Hawai'i 197, 202-05, 239 P.3d 1, 6-9 (2010). Within this jurisdiction, the Board must conduct proceedings and take actions with respect to the proceedings as the Board deems necessary and proper. Hawai'i Gov't Emples. Ass'n v. Casupang, 116 Hawai'i 73, 97-98, 170 P.3d 324, 348-49 (2007).

Preliminarily, the Board finds that the Motion to Strike, despite including the phrase “and/or dismiss” in its title, was not a motion to dismiss subject to the forty-eight-hour requirement of Hawai'i Administrative Rules (HAR) § 12-42-8(g)(3)(B). Although HAR § 12-42-8(g)(3)(B) does not define the term “motion to dismiss”, generally in legal practice the term refers to a dispositive motion brought to dismiss a pled claim or count. *See, e.g., Haw. Gov't Emples. Ass'n v. Kishimoto*, Board Case Nos. 20-CE-02-947a-f, Decision No. 503, at *3 (2021). In substance, the Motion to Strike does not resemble a motion to dismiss because it asks the Board to remove factual allegations from consideration, rather than to dismiss a pled claim. Therefore, the forty-eight-hour requirement does not apply.

The Board next turns to the issue of whether Kusumoto's HRS § 89-13(b)(4) claim can be used to argue that Kusumoto has also alleged a prohibited practice under HRS § 89-13(b)(5). The Board has consistently held that HRS § 89-13(b)(4) requires an allegation independent of HRS § 89-13; however, HRS § 89-13(b)(4) can be used to allege a breach of the duty of fair representation. *See Souza v. Honolulu Fire Dep't.*, Board Case Nos. CE-11-759, Order No. 2759, *13 (2011); *compare with Siu v. Haw. Gov't Emp. Ass'n*, Case No. CU-04-291, Decision No. 505, *11 (2021). Accordingly, the Board concludes that Kusumoto's complaint does not include an allegation of a prohibited practice under HRS § 89-13(b)(5).

However, even though Kusumoto does not allege that HGEA committed a prohibited practice by violating the CBA, Kusumoto alleges that HGEA acted arbitrarily by committing a procedural or ministerial error that breached the duty of fair representation. Therefore, the issue of whether HGEA committed a procedural error in handling Kusumoto's grievance—whether that procedural error was in the actual grievance procedure or not—is properly before the Board. Accordingly, the Board finds that, while the Board will not consider an unpled allegation of a prohibited practice under HRS § 89-13(b)(5), the Board will consider evidence relevant to the issue of whether HGEA committed a procedural error because that allegation has been properly pled.

4. Order

Based on the foregoing, the Board hereby DENIES the Motion to Strike. Should Kusumoto wish to amend her complaint, she may submit a motion for leave to amend in accordance with HAR § 12-42-8(g)(10). However, the Board will not consider a request for

leave to amend unless properly moved for and filed for the Board, giving HGEA and DOE the opportunity to respond to such motion.

DATED: Honolulu, Hawai'i, August 4, 2021.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

J N. MUSTO, Member

MIDORI K. HIRAI, Temporary Acting Member

Copies sent to:

Miles Miyamoto, Esq.
Peter Liholiho Trask, Esq.
Miriam Loui, Deputy Attorney General

ⁱ HRS § 89-2, Definitions defines the following:

“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.

ⁱⁱ HRS § 89-6 defines BU 6 as “Educational officers and other personnel of the department of education under the same pay schedule.”

ⁱⁱⁱ In this position, DOE is an employer within the meaning of HRS § 89-2 which defines the following:

“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.”

^{iv} HRS § 89-2 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)].