



**EFiled: Apr 22 2022 12:05PM HAST
Transaction ID 67501687
Case No. 22-CE-12-965, 22-CU-12-388**

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

PAUL AWANA,

Complainant(s),

and

HONOLULU POLICE DEPARTMENT, City
and County of Honolulu; and STATE OF
HAWAII ORGANIZATION OF POLICE
OFFICERS,

Respondent(s).

CASE NO(S). 22-CE-12-965
22-CU-12-388

ORDER NO. 3842

ORDER DISMISSING CASE

ORDER DISMISSING CASE

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1. Introduction

After Respondent STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (Union or SHOPO) filed several class grievances, Complainant PAUL AWANA (Complainant or Cpl. Awana) filed a prohibited practice complaint (Complaint) with the Hawai'i Labor Relations Board (Board) alleging that SHOPO and Respondent HONOLULU POLICE DEPARTMENT (Employer or HPD) committed prohibited practices.

The Board's ability to hear complaints, as defined by law, has procedural requirements, and if those procedural requirements are not met, the Board cannot hear the complaint.

The Board held a prehearing conference on April 18, 2022. The Board indicated that certain information from that prehearing conference would be issued in a written order, which the Board does in this order.

At the prehearing conference, the Board also received additional information from Cpl. Awana and SHOPO regarding this case. According to SHOPO, the Union sent Cpl. Awana a letter dated November 10, 2021 which informed Cpl. Awana that SHOPO did not intend to proceed to arbitration on Grievance 2020-038. Cpl. Awana acknowledged receipt of the letter and agreed that the letter was dated November 10, 2021.

Based on the information received, the Board finds that Cpl. Awana's allegations related to Grievance 2020-038, relating to HPD allegedly secretly selecting an employee without proper notice of a newly created position, are untimely because the Complaint was not filed within 90-days of November 10, 2021. Further, all issues related to Grievances 2020-048 and 2021-017 are not properly before the Board because those grievances are in the arbitration process.

The Board further finds that, as an employee, Cpl. Awana does not have standing to bring allegations of prohibited practices under Hawai'i Revised Statutes (HRS) §§ 89-13(a)(6) and (b)(3) because those rights belong to the union and employer, not to individual employees.

Accordingly, the Board does not have jurisdiction over this Complaint and dismisses the case. All issues related to Grievances 2020-048 and 2021-017 are dismissed without prejudice, meaning that Cpl. Awana has the right to file a new prohibited practice case related to those two grievances if those grievances are not resolved through the arbitration process.

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. Background and Findings of Fact

Cpl. Awana, a public employee¹, works for HPD, his Employer², and, based on his position, is a member of bargaining unit 12³ (BU 12). SHOPO represents BU 12 as its exclusive representative⁴, and BU 12 is covered by a collective bargaining agreement (CBA) between SHOPO and the relevant employer group, of which the City and County of Honolulu is a part.

On November 10, 2021, SHOPO informed Cpl. Awana that it would not take Grievance 2020-038 to arbitration.

Cpl. Awana is a member of the class of grievants for Grievances 2020-048 and 2021-017. SHOPO has notified HPD of its intent to arbitrate these two grievances.

3. Analysis and Conclusions of Law

3.1. Overview of the Board's Processes

3.1.1. General Information on the Board; Burden of Proof

The Board is a quasi-judicial agency, which means that it functions like a court. Therefore, when the Board receives a complaint, the complaint generally goes through full court-like proceedings, including a hearing on the merits (HOM) where witnesses are called and evidence is presented.

In prohibited practice cases, the party that filed the complaint, also known as the “complainant”, has the burden of proving that it is more likely than not that the responding parties, also known as the “respondents”, committed prohibited practices. The complainant must prove this case against the respondents by presenting evidence in the form of exhibits and witnesses in the HOM.

3.1.2. The Hearing on the Merits; Witnesses and Exhibits

The Board must hold the HOM within 40 days of when the complaint was filed unless the parties choose to waive this requirement. *See* HRS § 377-9(b) and Hawai‘i Administrative Rules (HAR) § 12-42-46(b).

All parties are responsible for calling their own witnesses for direct examination during the HOM. If a witness is not willing to appear voluntarily, then the party seeking to call that witness can request a subpoena from the Board to order the witness to appear. This subpoena must then be served on the witness by an individual who is not the named complainant.

Because the complainant must present their case first, they must call their own witnesses. Even if a witness is listed by a respondent, that is no guarantee that the respondent will call that

witness. Therefore, the complainant must ensure that all witnesses are either willing to appear voluntarily or that the witnesses are properly served with a subpoena.

All subpoenaed witnesses must be paid as laid out in HRS § 607-12.

The complainant must also present exhibits, which are documents or other pieces of evidence. Any proposed exhibits must be submitted to the Board as required by the Board's Pretrial Order. There are specific requirements for how those exhibits must be submitted to the Board.

When proposed exhibits are submitted, the parties can agree to enter those proposed exhibits into the official record without objection. If the parties can do so, it helps to make the proceedings more efficient.

If the parties do not agree to enter proposed exhibits into evidence, then they must be introduced during the HOM. After they are introduced, a party may "move" to have the exhibit entered into the official record. The Board will rule on whether or not the exhibit will be entered into the official record based on, among other things, whether the other parties object to the exhibit being entered into the official record.

The Board will only consider the exhibits entered into the official record when making our decision in this case. Therefore, any proposed exhibits that are not in the official record cannot impact the Board's decision.

3.2. The Complaint Was Not Filed Within 90-Days of SHOPO Notifying Cpl. Awana that the Union Was Not Going to Arbitrate Grievance 2020-038

3.2.1. Legal Standards

The Board has a limited jurisdiction or right to hear cases, and the Board cannot do more than the law authorizes it to do. *See* Scruton v. Department of Public Safety, State of Hawaii, Case No. CE-13-862, Order No. 3131 at *6 (December 17, 2015) (<https://labor.hawaii.gov/hlr/files/2019/01/HLRB-Order-3131.pdf>). If the Board does not have jurisdiction over a complaint, the Board cannot issue a judgment on the issue. Tamashiro v. Department of Human Services, 112 Hawai'i 388, 398, 146 P.3d 103, 113 (2006). Therefore, even if the parties do not raise a jurisdictional issue, the Board, *sua sponte*, or on its own, will raise the issue. *Id.*

The Board's jurisdiction has been defined by both statute and the courts. *See*, HRS §§ 89-14, 377-9; Aio v. Hamada, 66 Haw. 401, 404 n. 3, 664 P.2d 727, 729 n. 3 (1983) (Aio).

HRS § 377-9 sets forth a requirement that the Board can only hear complaints filed within ninety days of the action that the alleged prohibited practice is based on. HRS § 377-9(l);

Id. at 505 n. 3, 664 P.2d at 729 n. 3. The administrative rules governing the Board proceedings further include this ninety-day limitation. HAR § 12-42-42(a).

The Board has construed the limitations period strictly and will not waive a defect of even a single day. Fitzgerald v. Ariyoshi, Board Case Nos. CE-10-175; CU-10-43, Decision No. 175, at *21-22 (July 29, 1983) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-175.pdf>). This 90-day limitation is jurisdictional and set out in statute, which means that neither the Board nor the parties can waive this requirement. Hikalea v. Department of Environmental Services, City and County of Honolulu, Case No. CE-01-808, Order No. 3023 at *6 (October 3, 2014) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3023.pdf>). Further, the ninety-day period begins when the complainant knew or should have known that his rights were being violated. United Pub. Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443A, at *4 (June 30, 2006) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-443.pdf>).

3.2.2. The 90-day period for issues related to grievances begins when the Union notifies the grievant that the Union is not going to proceed to arbitration.

The 90-day period for issues related to Grievance 2020-038 began when SHOPO notified Cpl. Awana that it was not going to take Grievance 2020-038 to arbitration on November 10, 2021. This notification triggered the start of the 90-day period. Gillespie v. State of Hawaii Org. of Police Officers, Board Case No. CU-12-83, Order No. 931, at *6 (March 15, 1993) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-931.pdf>). The final day to file a complaint regarding SHOPO's handling of Grievance 2020-038 therefore, was February 8, 2022.

The Complaint was filed on March 30, 2022.

Even reviewing the Complaint in the light most favorable to Cpl. Awana, all issues and claims related to Grievance 2020-038 are untimely, and the Board cannot hear these issues and claims as a matter of law. The Board dismisses these issues and claims for untimeliness.

3.3. Only the Employer and the Union May Allege Prohibited Practices Under HRS §§ 89-13(a)(6) and (b)(3)

3.3.1. Legal Standards

Parties can only bring claims if they have “standing” or the right to do so. Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai‘i 64, 67, 881 P.2d 1210, 1213 (1994). To determine legislative standing, the Hawai‘i Supreme Court (HSC) has noted that standing requirements may be created or directed by legislative declarations of policy. Tax Foundation of Hawaii vs. State, 144 Hawai‘i 175, 188, 439 P.3d 127, 140 (2019) (Tax Foundation). Thus, legislative standing requirements may differ based on statutory language. Id.

Under HRS §§ 89-13(a)(6) and (b)(3):

(a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

(6) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;

(b) It shall be a prohibited practice for...an employee organization or its designated agent wilfully to:

(3) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;

3.3.2. Because the mediation and arbitration procedures set forth in HRS § 89-11 relate to impasses in negotiations, individual employees do not have the right to allege prohibited practices under HRS §§ 89-13(a)(6) and (b)(3).

As discussed above, Cpl. Awana is a public employee within the definition of HRS § 89-2, generally giving him the legislative standing to file a prohibited practice complaint. *See* HRS §§ 89-14, 377-9.

However, the plain language of HRS §§ 89-13(a)(6) and (b)(3) lays out which parties are attached to these claims. HRS §§ 89-13(a)(6) and (b)(3) relate to the mediation and arbitration procedures in HRS § 89-11, “Resolution of disputes; impasses.” This section sets out the rights and responsibilities of public employers and exclusive representatives during impasse proceedings. It does not give rights or responsibilities to individual employees such as Cpl. Awana.

Therefore, Cpl. Awana has no legislative standing to bring prohibited practice complaints under HRS §§ 89-13(a)(6) and (b)(3), and the Board must dismiss those claims. *See, e.g., LePere v. United Pub. Wrks., AFSCME, Local 646*, Board Case No. CU-10-94, Order No. 976, at *5 (October 15, 1993) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-976.pdf>); *Fong v. Sakai*, Board Case No. CE-10-503, Order No. 2113, at *8-9 (September 12, 2002) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-2113.pdf>).

3.4. Issues Relating to Grievances 2020-048 and 2021-017 are in an Arbitrator's Jurisdiction, Not the Board's

3.4.1. Administrative remedies must be exhausted before the Board can consider cases related to grievances.

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. Lab. Rels. Bd., 97 Hawai'i 528, 531, 40 P.3d 930, 933 (2002) (Poe) and Poe v. Haw. Labor Rels. Bd., 105 Hawai'i 97, 101, 94 P.3d 652, 656 (2004) (Poe II). *See, e.g., Univ. of Haw. Prof'l Assembly v. Bd. of Regents*, Board Case No. CE-07-804, Order No. 2939 (August 22, 2013) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-2939.pdf>).

The HSC has found that:

...a public employee pursuing an individual grievance exhausts his or her administrative remedies when the employee completes 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, 97 Hawai'i at 531, 40 P.3d at 933.

Because the Board cannot provide final and binding resolutions about the interpretation or application of a CBA, complainants must go through as much of the grievance procedure as they are allowed to under the CBA before filing a prohibited practice complaint.⁵ Poe, 97 Hawai'i at 536, 40 P.3d at 938; *see also Poe II*, 105 Hawai'i at 102, 94 P.3d at 657.

As noted above, as Grievances 2020-048 and 2021-017 are currently awaiting arbitration, claims related to these grievances have not yet fully exhausted the grievance process. Although SHOPO represented to the Board that no arbitrator has been selected for these grievances, SHOPO has issued a notice expressing its intent to arbitrate these grievances. Based on the issuance of this notice, the Board would expect that an arbitrator will be selected for these grievances and arbitration proceedings will begin.

3.4.2. The Board defers to the arbitrator's jurisdiction and does not overturn arbitration decisions.

Hawai'i has a long-held policy of encouraging arbitration as a means of settling disputes. *See e.g., Mars Constr. v. Tropical Enterprises*, 51 Haw. 322, 334, 460 P.2d 317, 318-19 (1969).

Based on this policy and the Court’s rulings, the Board has consistently held that after a notice of intent to arbitrate has been sent, the Board defers to the arbitrator’s jurisdiction. *See, e.g., United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Kishimoto*, Board Case No. 17-CE-01-902, Order No. 3529, at *4-5 (June 25, 2019) (<https://labor.hawaii.gov/hlrp/files/2021/05/HLRB-Order-No.-3529.pdf>) (noting that the Board has declined to entertain issues deferrable to arbitration to comply with the strong public policy favoring arbitration).

Under HRS Chapter 89, the grievance procedure must be used in “any dispute concerning the interpretation or application of a written agreement” between a public employer and an exclusive representative. HRS [§ 89-10.8](a). Therefore, when a grievance goes to an arbitrator, that arbitrator must determine whether the employer violated the relevant CBA or other written agreement between the parties.

Because that determination is in the arbitrator’s jurisdiction, not the Board’s, the Board will not overturn, modify, or correct any arbitrator’s decision.⁶ *See Stucky v. Okabe*, Board Case No. CU-05-303, Decision No. 508, at *3-4 (June 30, 2021) (*Stucky*) (<https://labor.hawaii.gov/hlrp/files/2021/06/Decision-No.-508.pdf>). Therefore, if an arbitrator issues a decision, the Board will not “second-guess” the arbitrator as to an alleged breach of the collective bargaining agreement.

However, after an arbitrator issues their factual findings as to an alleged breach of the collective bargaining agreement, when appropriate, the Board may entertain prohibited practice complaints alleging other prohibited practices that arise under the same factual circumstances, including but not limited to complaints alleging violations of HRS § 89-13(a)(4)⁷. Accordingly, the Complainant has the right to file a subsequent prohibited practice complaint after the grievance proceedings have concluded if he feels it is necessary.⁸

For these reasons, the Board defers to the arbitrator’s jurisdiction in this case because Grievances 2020-048 and 2021-017 are pending and dismisses all related claims.

4. Order

For the reasons discussed above, the Board finds that the Complaint was untimely filed as to issues arising from Grievance 2020-038; that Cpl. Awana does not have standing to bring allegations of prohibited practices under HRS §§ 89-13(a)(6) and (b)(3); and that issues related to Grievances 2020-048 and 2021-017 are currently in an arbitrator’s jurisdiction, meaning that administrative remedies have not yet been exhausted. Accordingly, the Board lacks jurisdiction over this case and dismisses it. This case is closed.

DATED: Honolulu, Hawai'i, _____ April 22, 2022 _____.

HAWAI'I LABOR RELATIONS BOARD



Marcus R. Oshiro
MARCUS R. OSHIRO, Chair

Sesnita A. D. Moepono
SESNITA A.D. MOEPOONO, Member

N. Musto
N. MUSTO, Member

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¹ 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)].

² HRS § 89-2 Definitions defines “employer” or “public employer” as:

“Employer” or “public employer” means...the respective mayors in the case of the counties...and any individual who represents one of these employers or acts in their interest in dealing with public employees...

³ HRS § 89-6 Appropriate bargaining units defines BU 12 as “Police officers...”

⁴ 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.

⁵ This doctrine of exhaustion is not absolute. Kellberg v. Yuen, 131 Hawai'i 513, 319 P.3d 432, 450 (2014). If exhausting administrative remedies would be futile, it is not required. Poe, 97 Hawai'i at 536, 40 P.3d at 938.

⁶ The Board has noted that a union's duty of fair representation in HRS Chapter 89 cases may extend into an arbitration proceeding under certain circumstances. Stucky, Decision No. 508, at *6-7.

⁷ HRS § 89-13(a)(4) sets out that it is a prohibited practice for a public employer wilfully to “Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization...”

⁸ The relevant 90-day period would begin when Cpl. Awana knows or should know of the arbitration decision, which would signify the exhaustion of those administrative remedies.