

STATE OF HAWAI‘I
HAWAI‘I LABOR RELATIONS BOARD

In the Matter of

PATRICK ISHIDA,

Complainant(s),

and

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO; and AMERICAN
FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES,

Respondent(s).

CASE NO(S). 22-CU-01-387

ORDER NO. 3876

ORDER GRANTING, IN PART, AND
DENYING, IN PART, RESPONDENTS’
MOTION TO DISMISS OR IN THE
ALTERNATIVE FOR SUMMARY
JUDGMENT

**ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENTS’
MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

1. Introduction and Statement of the Case

Complainant PATRICK ISHIDA (Complainant or Mr. Ishida) filed a prohibited practice complaint (Complaint) with the Hawai‘i Labor Relations Board (Board) alleging, among other things, that Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) and Respondent AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME) breached the duty of fair representation owed to Mr. Ishida as a bargaining unit 01 (BU 1) member.

Mr. Ishida alleges, among other things, that UPW and AFSCME “interfered and restrained Complainant from processing his termination grievance.”

UPW and AFSCME filed a Motion to Dismiss, or in the Alternative, for Summary Judgment (MTD/MSJ) alleging, among other things, that the Complaint fails to state a claim upon which relief can be granted, fails to properly plead counts, and is untimely; that UPW did not breach its duty of fair representation owed to Mr. Ishida; and that AFSCME is not a proper party to this matter.

Mr. Ishida opposed the MTD/MSJ arguing, among other things, that the Complaint meets the pleading requirements of a prohibited practice complaint and is timely, that UPW did breach its duty of fair representation owed to Mr. Ishida, and that AFSCME, by taking control of UPW, is a proper Respondent.

The Board heard oral arguments and, based on the record, the pleadings, and the oral arguments, orally dismissed AFSCME because it is not a proper Respondent; denied the MTD/MSJ on timeliness grounds; and informed the parties that the Board would issue a written order addressing these issues and the other issues raised in the MTD/MSJ.

Accordingly, the Board issues this order. 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 and Allegations Accepted as True

2.1. Findings of Fact

The Department of Parks and Recreation, County of Kaua‘i (DPR or Employer)¹ employed the Complainant² until Mr. Ishida’s discharge. In his position with DPR, Mr. Ishida was a member of BU 1.³ UPW is BU 1’s exclusive representative.⁴

UPW and the relevant employer group⁵ for BU 1 are parties to a collective bargaining agreement (CBA) for the bargaining unit.

2.2. Other Allegations Accepted as True

The Board accepts the allegations of the complaint as true for the purposes of considering the MTD/MSJ and construes them in the light most favorable to Mr. Ishida. Haw. Gov’t Emp. Ass’n, AFSCME, Local 152, AFL-CIO v. Kishimoto, Board Case Nos. 20-CE-02-947a-f, Decision No. 503, at *2 (April 9, 2021) (<https://labor.hawaii.gov/hlrp/files/2021/05/Decision-No.-503.pdf>) *citing* Tupola v. Univ. of Haw. Prof’l Assembly, Board Case Nos. CU-07-330; CE-07-847, Order No. 3054, at *18 (February 25, 2015) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3054.pdf>) (Tupola).

Accordingly, to consider the MTD/MSJ, the Board accepts the following as true:

1. UPW is an affiliate of AFSCME, and they are two separate labor organizations.
2. AFSCME took control of UPW in May 2020.
3. By letter dated May 3, 2021, the Employer notified Mr. Ishida of its intent to terminate his employment.

4. The Employer discharged Mr. Ishida, effective May 17, 2021.
5. UPW filed a Step 1 grievance, dated June 2, 2021, to challenge Mr. Ishida's discharge.
6. A Step 1 Meeting was held on July 16, 2021.
7. By letter dated July 30, 2021, UPW informed the Employer that it would proceed to Step 2 of the grievance procedure.
8. By letter dated August 2, 2021, the Employer denied the Step 1 grievance.
9. A Step 2 meeting was held on August 12, 2021.
10. By letter dated August 23, 2021, the Employer denied the Step 2 grievance.
11. Mr. Ishida requested that UPW take his grievance to arbitration.
12. By letter dated October 1, 2021, UPW declined to take Mr. Ishida's grievance to arbitration (UPW Grievance Withdrawal).
13. Mr. Ishida did not receive the UPW Grievance Withdrawal until it was emailed to him on November 22, 2021.

3. Discussion and Conclusions of Law

3.1. Subject Matter Jurisdiction

The Board uses the contents of the Complaint as the basis to consider the MTD/MSJ's arguments regarding lack of subject matter jurisdiction, and the Board must accept the factual allegations in the Complaint as true and view those allegations in the light most favorable to Mr. Ishida. *See Cooper v. Dep't of Tax.*, Board Case Nos. 22-CE-03-967, 22-CE-03-391, Order No. 3873 at *5 (July 18, 2022) (<https://labor.hawaii.gov/hlrp/files/2022/07/Order-No.-3873.pdf>) (*Cooper II*). The Board does not have to accept conclusory allegations about the legal effect of the events alleged in the complaint. *Id.* If the Board finds it appears beyond a doubt that Mr. Ishida can prove no set of facts that would support the claim and entitle him to relief, the Board may dismiss the claim. *Haw. State Teachers Ass'n v. Abercrombie*, 126 Hawai'i 13, 19 265 P.3d 482, 488 (App. 2011).

As the Complainant, Mr. Ishida must establish that jurisdiction exists. *Cooper II*, Order No. 3873, at *5. The Board may review evidence, including affidavits and testimony, to resolve factual disputes about whether the Board has jurisdiction to hear the case. *Casumpang v. ILWU, Local 142*, 94 Hawai'i 330, 337, 13 P.3d 1235, 1242 (2000); *Right to Know Comm. v. City Council, City and Cnty. of Honolulu*, 117 Hawai'i 1, 7, 175 P.3d 111, 117 (App. 2007).

3.1.1. Failure to State a Claim; Failure to Properly Plead

The Board addresses two of the issues raised by the MTD/MSJ at once as they relate to one another, namely the allegations that the Complaint fails to state a claim and is not properly pleaded. The Board rejects these arguments.

As a preliminary matter, the Board uses the traditional “notice pleading” standard used by the Hawai‘i Supreme Court (HSC) to enhance citizen access to the Board and to justice. *See Campos v. Univ. of Haw. Prof'l Assembly*, Board Case No. 19-CU-07-374, Decision No. 511, at *5-6 (June 28, 2022) (<https://labor.hawaii.gov/hlrp/files/2022/06/Decision-No.-511.pdf>).

The Board construes pleadings liberally and requires only that Mr. Ishida provide a short and plain statement of the claim to provide UPW and AFSCME with notice of the complaint and the relevant grounds. *See Parker v. Dep't of Pub. Safety, State of Hawai'i*, Board Case Nos. 18-CU-10-370, 19-CE-10-923 Decision No. 502, at *54 (March 23, 2021) (<https://labor.hawaii.gov/hlrp/files/2021/03/Decision-No.-502.pdf>). The Board does not require that Mr. Ishida plead legal theories with precision, and the pleading of evidence, facts, or law is not dispositive. *Id.*

In his Complaint, Mr. Ishida includes relevant letters between himself and the Employer, including the letter setting forth his discharge. Mr. Ishida further includes documents related to his grievance, authored by both UPW and Mr. Ishida. The ways in which Mr. Ishida believes the Employer violated the CBA are abundantly clear from the Complaint.

Accordingly, the Board finds that the Complaint is more than sufficient to provide UPW with notice of his claim and the facts surrounding the claim. Therefore, the Board denies the MTD/MSJ on these issues.

3.1.2. “Indispensable Party”

The Board next rejects the argument that the Employer—either DPR or the Mayor of the County of Kaua‘i—must be joined to this case.

Preliminarily, the Board notes that it is not bound by the Hawai‘i Rules of Civil Procedure (HRCP), and, therefore, HRCP Rules 12(b)(7) and 19(b) do not apply to proceedings before the Board. *See Los Banos v. Haw. Lab. Rel. Bd.*, No. CAAP-17-0000476 (App. Nov. 22, 2019) (mem.) at *30 (“HRCP Rule 81(b)(12) does not make the HRCP applicable to proceedings before the Board.”).

Moving on to the relevant arguments made in the MTD/MSJ, the Board notes that no one disputes that DPR is the relevant Employer for Mr. Ishida’s claims. However, this case does not require the Employer’s presence.

While the alleged breach of the duty of fair representation implicates the Employer due to the “hybrid case” established by the HSC, the law is clear that an employee may, if they choose, bring a claim against only the Union and not the Employer. Poe v. Haw. Lab. Rels. Bd., 105 Hawai‘i 97, 102, 94 P.3d 652, 657 (2004) (Poe II) (“The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.”) While choosing to pursue a claim against one, rather than both, of the actors, does not change the two-pronged case that the employee must prove, the law permits the employee to make that decision. Id.

Despite UPW and AFSCME’s claims that “it is *impossible*” (emphasis in original) for Mr. Ishida to demonstrate that the Employer violated the CBA, the Board disagrees. Mr. Ishida has presented argument in his Complaint that the Employer violated the CBA. While Mr. Ishida must prove this claim to succeed in the hybrid case, there is no evidence that he cannot demonstrate or prove this issue.

The Employer could submit a petition to intervene in this matter. *See* Hawai‘i Administrative Rules (HAR) § 12-42-8(g)(14). The Employer could also claim an interest in this case. *See* HAR § 12-42-42(d). It has done neither.

Because the law explicitly allows Mr. Ishida to bring a claim against only UPW, the Board finds that the Employer cannot be considered an “indispensable party” and denies the MTD/MSJ on this count.

3.1.3. Timeliness

Based on the requirement in HRS § 377-9, the Board can only hear complaints filed within ninety days of the action that gave rise to the alleged prohibited practice. HRS § 377-9(1); Aio v. Hamada, 66 Haw. 401, 404 n.3, 664 P.2d 727, 729 n.3 (1983). The Board’s administrative rules also include this ninety-day limit. HAR § 12-42-42(a).

The Board construes the limitations period strictly and, because the period is set by law, the Board cannot waive a defect of even a single day. Cooper, Order No. 3873, at *6. The limitations period begins when UPW notified Mr. Ishida that it was not going to take his grievance to arbitration. Awana v. Honolulu Police Dep’t, Board Case Nos. 22-CE-12-965, 22-CU-12-388, Order No. 3842, at *4 (April 22, 2022) (<https://labor.hawaii.gov/hlrp/files/2022/04/Order-No.-3842.pdf>).

Mr. Ishida filed the instant complaint on February 18, 2022. Therefore, the limitations period began on November 20, 2021.

Although the UPW Grievance Withdrawal is dated October 1, 2021, Mr. Ishida asserts that he did not receive the document until it was emailed to him on November 22, 2021. UPW has provided no evidence to counter this assertion.

Without any evidence such as proof of delivery of the UPW Grievance Withdrawal, while considering the MTD/MSJ the Board is compelled to accept Mr. Ishida's assertion that he did not receive the UPW Grievance Withdrawal until November 22, 2021. Following a "simple point-to-the-point analysis," Mr. Ishida had until February 21, 2022⁶ to file his Complaint.

Therefore, the Board finds that the Complaint is timely and denies the MTD/MSJ on this claim.

3.2. Summary Judgment

When considering a motion for summary judgment, the Board must review the evidence in the light most favorable to the party opposing the motion; in this case, Mr. Ishida. *Id.* The Board can grant summary judgment only if the record shows there is no genuine issue of material fact and UPW and AFSCME are entitled to judgment as a matter of law, and the Board must resolve any doubt about whether to grant the motion in favor of Mr. Ishida. *Id.*

Mr. Ishida's claims comprise a "hybrid case," as defined by the HSC in *Poe II*, 105 Hawai'i at 102, 94 P.3d at 657. The claim that the Employer violated the terms of the CBA and the claim that UPW and/or AFSCME breached its duty of fair representation are "inextricably independent." *Id.* This means that Mr. Ishida must prove both parts to succeed in a hybrid case. *Id.*, see also *Guzman*, Decision No. 512, at *7 (July 8, 2022) (<https://labor.hawaii.gov/hlrp/files/2022/07/Decision-No.-512.pdf>).

3.2.1. Improper Party

There is no genuine issue of material fact regarding which labor organization represents BU 1. In 1971, the Board's predecessor certified UPW as the exclusive representative for BU 1. See *UPW v. State of Hawai'i*, Board Case No. R-01-4, Decision No. 3 (October 20, 1971) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-3.pdf>). UPW has remained the exclusive representative for BU 1 since then and is "responsible for representing the interests of" BU 1 employees. See HRS § 89-8.

The duty of fair representation refers to the duty that the exclusive representative owes to a member of its collective bargaining unit. See *Poe II*, 105 Hawai'i at 104, 94 P.3d at 659. Therefore, because AFSCME is not the exclusive representative for BU 1, it has no duty of fair representation owed to Mr. Ishida. If AFSCME has no duty of fair representation owed to Mr. Ishida, there is no way for AFSCME to breach such a duty.

Accordingly, the Board grants summary judgment as to the case against AFSCME and dismisses AFSCME from all further proceedings.

3.2.2. UPW's Duty of Fair Representation

Upon review of the arguments and pleadings, the Board finds that genuine issues of material fact exist regarding the claim that UPW breached its duty of fair representation; therefore, summary judgment cannot be granted.

Mr. Ishida argues, among other things, that UPW acted perfunctorily in the processing of his grievance; discriminated against Mr. Ishida because he was an employee of the County of Kaua'i; and acted in bad faith in deciding not to take Mr. Ishida's grievance to arbitration. UPW denies these allegations.

The Board finds that there are genuine issues of material fact regarding these allegations. Therefore, summary judgment is not appropriate to determine whether UPW breached its duty of fair representation, and the Board denies the MTD/MSJ on that count.

4. Order

Based on the above, the Board grants summary judgment on the issue of AFSCME's participation in this case and denies the MTD/MSJ on all other counts. Accordingly, as all claims against AFSCME have been dismissed, AFSCME is dismissed from any future proceedings in this case.

DATED: Honolulu, Hawai'i, July 26, 2022.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEONO, Member

J N. MUSTO, Member

Copies sent to:

Gary Rodrigues, Representative for Complainant
Jonathan Spiker, Esq.

¹ In this capacity, DPR is a public employer within the definition of HRS § 89-2, which 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...

² In this capacity, Mr. Ishida was a public employee within the definition of HRS § 89-2, which 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)].

³ HRS § 89-6(a)(1) defines BU 1 as, “Nonsupervisory employees in blue collar positions.”

⁴ HRS § 89-2 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 HRS § 89-6(d)(1) defines the employer group for BU 1 as:

(1) For bargaining units (1)...the governor shall have six votes and the mayors, the chief justice, and the Hawaii health systems corporation board shall each have one vote if they have employees in the bargaining unit[.]

⁶ The ninetieth day, February 20, 2022, was President’s Day, which is a holiday. *See* HRS § 89-1. Under HAR § 12-42-8(c), the limitations period, “runs until the end of the next day which is not a Saturday, a Sunday, or a holiday.” Therefore, the last day of the limitations period was February 21, 2022.