

STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of

RALPH R. FUKUMOTO,

Complainant(s),

and

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

Respondent(s).

CASE NO(S). 22-CE-14-966
22-CU-14-389

ORDER NO. 3890

ORDER GRANTING, IN PART, AND
DENYING, IN PART, RESPONDENTS'
DISPOSITIVE MOTIONS

**ORDER GRANTING, IN PART, AND
DENYING, IN PART, RESPONDENTS' DISPOSITIVE MOTIONS**

1. Introduction and Statement of the Case; Issues

Complainant RALPH R. FUKUMOTO (Complainant or Mr. Fukumoto) filed a prohibited practice complaint (Complaint) with the Hawai'i Labor Relations Board (Board) alleging that Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) committed prohibited practices when it settled two grievances filed on Mr. Fukumoto's behalf over his objections.

HGEA filed a Motion to Dismiss the Complaint, which became moot when Mr. Fukumoto filed his First Amended Prohibited Practice Complaint (First Amended Complaint).

HGEA filed a Motion to Dismiss Mr. Fukumoto's First Amended Complaint (HGEA MTD). Because the First Amended Complaint contained a typographical error, the Board permitted Mr. Fukumoto to amend the First Amended Complaint and applied the HGEA MTD to Mr. Fukumoto's Second Amended Prohibited Practice Complaint (Second Amended Complaint).

The Second Amended Complaint added Respondent DEPARTMENT OF PUBLIC SAFETY, State of Hawai'i (PSD or Employer, and collectively with HGEA, Respondents) as a Respondent, alleging that PSD committed prohibited practices by wilfully violating the

bargaining unit 14 (BU 14) collective bargaining agreement (CBA) as alleged in the grievances settled by PSD and HGEA.

PSD filed a Motion to Dismiss, or in the Alternative, for Summary Judgment (PSD MTD/MSJ, and collectively with the HGEA MTD, the Dispositive Motions).

Mr. Fukumoto opposed both the HGEA MTD and the PSD MTD/MSJ.

The Board heard oral argument on the Dispositive Motions. After considering the oral arguments, pleadings, and record, the Board issued an oral ruling granting, in part, and denying, in part, each of the dispositive motions. The Board stated that it would issue a written order prior to the beginning of the hearing on the merits (HOM) to allow the parties to better understand which issues remained “live” for discussion at the HOM. The Board does so in this Order.

Based on the Dispositive Motions, the issues addressed in this Order are:

1. Whether the Second Amended Complaint meets the pleading standards required by the Board; that is, whether the Second Amended Complaint contains enough information to provide the Respondents with notice of Mr. Fukumoto’s claims;
2. Whether Mr. Fukumoto has the right or “standing” to bring claims of alleged violations of Hawai‘i Revised Statutes (HRS) §§ 89-13(a)(6) and (b)(3) given that he is a public employee, not a public employer, or an exclusive representative;
3. Whether Mr. Fukumoto is required to exhaust, and if he has exhausted, his contractual remedies regarding the allegations about overtime and a voluntary demotion; and whether those allegations are timely;
4. Whether the Board has jurisdiction over the alleged HRS Chapter 89 violations, given that Mr. Fukumoto has filed a civil complaint allegedly related to the same factual issues raised in this case; and
5. Whether there are no genuine issues of material fact and the Respondents are entitled to judgment as a matter of law based on the current record in this case.

Any conclusions of law incorrectly designated as findings of fact are conclusions of law; any findings of fact incorrectly designated as conclusions of law are findings of fact.

2. Background; Findings of Fact; and Allegations Accepted as True

When considering the Dispositive Motions, the Board accepts the factual allegations in the Second Amended Complaint as true and views them in the light most favorable to Mr. Fukumoto. 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)).

Mr. Fukumoto¹ is employed by PSD² and a member of BU 14³. HGEA is the exclusive representative⁴ for BU 14. HGEA and the employer group⁵ for BU 14 are parties to the BU 14 CBA for this bargaining unit.

In or about October of 2019, HGEA filed a grievance #H-EL-19-01 (2019 Grievance) on Mr. Fukumoto's behalf, alleging, among other things, that Mr. Fukumoto was being harassed and retaliated against, and that PSD failed to provide a harassment and discrimination free workplace. The 2019 Grievance alleged violations of several articles of the BU 14 CBA.

After PSD denied the 2019 Grievance, HGEA informed PSD that it intended to take the 2019 Grievance to arbitration.

In or about December of 2019 and January, March, April, and July of 2020, Mr. Fukumoto was not offered overtime shifts that he believed should have been offered.

In or about April of 2020, Mr. Fukumoto applied for a voluntary demotion, but his application was not processed.

In or about October of 2020, PSD disciplined Mr. Fukumoto. HGEA filed a grievance (2020 Grievance, and collectively with the 2019 Grievance, Grievances) on Mr. Fukumoto's behalf alleging, among other things, that PSD did not have just cause for the discipline.

Throughout 2021, Mr. Fukumoto met with, called, and emailed HGEA to discuss his Grievances. However, Mr. Fukumoto had difficulty reaching the HGEA official handling his Grievances, Stacy Moniz, HGEA Advocacy Chief (Mr. Moniz). Eventually, Mr. Fukumoto was informed that an arbitrator had withdrawn from the case.

In or about January of 2022, Mr. Moniz informed Mr. Fukumoto that both the 2019 Grievance and the 2020 Grievance were pending.

On or about February 2, 2022, Mr. Moniz sent Mr. Fukumoto an email stating that PSD made an oral settlement offer that would, among other things, reduce the discipline challenged in the 2020 Grievance and require the withdrawal of the 2019 Grievance. Mr. Fukumoto rejected the offer and told Mr. Moniz that he did not want to consolidate his Grievances.

On or about February 16, 2022, Mr. Moniz emailed Mr. Fukumoto another offer from PSD that would, among other things, further reduce the discipline challenged in the 2020

Grievance and require the withdrawal of the 2019 Grievance. Mr. Moniz also asked Mr. Fukumoto what remedy he wanted from the 2019 Grievance.

Mr. Fukumoto called Mr. Moniz and rejected the new offer, questioned why he needed to define a remedy, referred to the remedies in the original notice to arbitrate, and informed Mr. Moniz that he felt he was entitled to the OT he was not offered in 2019 and 2020.

On or about March 7, 2022, Mr. Moniz emailed Mr. Fukumoto another offer from PSD that would, among other things, further reduce the discipline challenged in the 2020 Grievance and require the withdrawal of the 2019 Grievance. Mr. Moniz expressed that HGEA believed the offer was reasonable, recommended that the offer be accepted, and informed Mr. Fukumoto that they had until March 11, 2022 to respond to the offer.

Mr. Fukumoto informed Mr. Moniz that he would not accept any offer to settle the 2020 Grievance that involved withdrawing the 2019 Grievance. Mr. Fukumoto rejected the offer.

Mr. Moniz conducted a review of Mr. Fukumoto's grievances and, by Memorandum dated March 10, 2022, informed HGEA Deputy Executive Director Debra Kagawa-Yogi that Mr. Moniz's opinion was that the 2020 Grievance should be settled with or without Mr. Fukumoto's consent and that the 2019 Grievance should be withdrawn from arbitration. Mr. Moniz also provided his opinion that the 2019 Grievance involved more "internal issues and Employer's rights" than violations of the BU 14 CBA and that Mr. Fukumoto's civil lawsuit against PSD was the better opportunity to obtain a suitable remedy.

Mr. Fukumoto tried to set up a meeting with HGEA to discuss Mr. Moniz's handling of the cases. He did not receive a response.

On or about April 6, 2022, Mr. Moniz sent Mr. Fukumoto an email that included a letter informing Mr. Fukumoto that HGEA accepted the final offer from PSD over Mr. Fukumoto's objections, and that HGEA was withdrawing the 2019 Grievance from arbitration.

By Memorandum dated April 13, 2022, Mr. Moniz informed HGEA Executive Director Randy Perreira (Mr. Perreira) that Mr. Fukumoto did not want to drop the 2019 Grievance but did agree to the reduced discipline for the 2020 Grievance. Therefore, Mr. Moniz recommended that HGEA execute the settlement agreement without Mr. Fukumoto's signature.

3. Analysis and Conclusions of Law

3.1. Legal Standards for Motions to Dismiss

The Board considers the arguments raised in the Dispositive Motions based on the Second Amended Complaint, and the Board must accept the factual allegations in the Second

Amended Complaint as true and must view those allegations in the light most favorable to Mr. Fukumoto. See Kapesi v. Dep't of Public Safety, Board Case Nos. 17-CE-10-908, 17-CU-10-359, Decision No. 509, at *8 (March 2, 2022) (<https://labor.hawaii.gov/hlrp/files/2022/03/Decision-No.-510.pdf>). The law does not require the Board to accept legal conclusions contained in the Second Amended Complaint. Id.

As the Complainant, Mr. Fukumoto must establish that the Board has jurisdiction—the right to hear and rule on—this case. Id., Decision No. 509, at *9. The Board may review evidence including affidavits and testimony to resolve disputes about the existence of jurisdiction. Id., citing 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).

3.2. Failure to State a Claim; Pleading Requirements

The Board has previously laid out that it follows the Hawai'i Supreme Court's (HSC) lead regarding pleading requirements. 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>) (Campos II).

To briefly summarize the Board's position, in Bank of Am., N.A. v. Reyes-Toledo, 143 Hawai'i 249, 428 P.3d 761 (2018) (Reyes-Toledo), the HSC explicitly rejected the Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) pleading standard.

Instead, the Hawai'i state courts seek to “provide[] citizen access to the courts and to justice” by using the traditional “notice pleading” standard. Reyes-Toledo, 143 Hawai'i at 252, 428 P.3d at 764.

The Board follows the HSC's lead and construes pleadings liberally. Campos II, Decision No. 511, at *6. Therefore, the Board is concerned only with whether the Second Amended Complaint contains a short and plain statement of Mr. Fukumoto's claims to provide the Respondents with fair notice of the claims and the relevant grounds. See Parker v. Dep't of Pub. Safety, Board Case No. 19-CE-10-923, Decision No. 502, at *54 (March 23, 2021) (Parker) (<https://labor.hawaii.gov/hlrp/files/2021/03/Decision-No.-502.pdf>).

The Second Amended Complaint contains one page of legal arguments, including citations to the sections of HRS § 89-13 that Mr. Fukumoto believes lay out the prohibited practices that he alleges that the Respondents committed. The Second Amended Complaint goes on to lay out four pages of facts that Mr. Fukumoto believes supports his legal arguments.

These five pages more than constitute a “short and plain statement” giving Respondents fair notice of the claims and the grounds. Therefore, the Board finds that the Second Amended

Complaint meets the notice pleading standard and dismisses the arguments that the Second Amended Complaint fails to state a claim upon which relief can be granted.

3.3. Standing

When the Board considers whether Mr. Fukumoto has standing to bring certain claims, the Board is looking at whether Mr. Fukumoto has the right to bring those claims. Kapesi v. Dep't of Pub. Safety, Board Case Nos. 17-CU-10-908; 17-CU-10-359, Decision No. 510, at *10 (March 2, 2022) (<https://labor.hawaii.gov/hlrp/files/2022/03/Decision-No.-510.pdf>) (Kapesi) *citing to Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 67, 881 P.2d 1210, 1213 (1994).

Standing requirements can be set by the Legislature in statute or by legislative declarations of policy. Kapesi, Decision No. 510, at *10 (*citing Tax Foundation of Hawaii v. State*, 144 Hawai'i 175, 188, 439 P.3d 127, 140 (2019) (Tax Foundation)). Therefore, based on the language in the statute, the requirements for standing may differ. Id.

Under HRS §§ 89-13(a)(5) and (6) and HRS §§ 89-13(b)(2) and (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;

Mr. Fukumoto is a public employee within the definition of HRS § 89-2; therefore, he generally has standing to file a prohibited practice complaint. *See* HRS §§ 89-14; 377-9. However, this does not mean he has standing to proceed on all claims.

The plain language of HRS §§ 89-13(a)(6) and (b)(3) refer to mediation and arbitration procedures set forth in HRS § 89-11. HRS § 89-11 deals with “Resolution of disputes; impasses.” This section lays out what a public employer and an exclusive representative may and must do if they reach an impasse while negotiating the terms of an initial or renewed agreement. The “arbitration” procedures referred to in HRS §§ 89-13(a)(6) and (b)(3), therefore, are about negotiation impasses. Only those parties involved in the negotiations of an agreement—namely the public employer and the exclusive representative—may bring claims of prohibited practices under HRS §§ 89-13(a)(6) and (b)(3).

Mr. Fukumoto alleges that his grievances should have proceeded to arbitration. However, even if they proceeded to arbitration, it would be a grievance arbitration, rather than an impasse arbitration. Grievance arbitrations are not covered under HRS §§ 89-13(a)(6) and (b)(3).

Therefore, Mr. Fukumoto 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.

3.4. Timeliness; Exhaustion

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) (Aio). The Board’s administrative rules also include this ninety-day limit. HAR § 12-42-42(a).

The Board construes the limitations period strictly and cannot waive a defect of even a single day because the period is set by law. Campos v. Univ. of Haw. Prof’l Assembly, Board Case No. 19-CU-07-374, Decision No. 511, at *8 (June 28, 2022) (<https://labor.hawaii.gov/hlrp/files/2022/06/Decision-No.-511.pdf>) (Campos II). The limitations period begins when Mr. Fukumoto knew or when he should have known that his rights were being violated. Id.

The overtime and voluntary demotion issues raised by Mr. Fukumoto occurred in 2019 and 2020, well outside of the 90-day period set by HRS § 377-9. Therefore, they are untimely on their face, and the Board must dismiss the claims.

Further, the Board has consistently held that it does not have jurisdiction over complaints alleging violations of HRS § 89-13(a)(8) until after the complainant exhausts their contractual remedies, unless attempting to exhaust those remedies would be futile. *See Kapesi*, at *11 The Board rests this position on the HSC’s decisions in Poe v. Haw. Lab. Rels. Bd., 97 Hawai‘i 528, 531, 40 P.3d 930, 933 (2002) (Poe) and Poe v. Haw. Lab. Rels. Bd., 105 Hawai‘i 97, 101, 94 P.3d 652, 656 (2004) (Poe II). Kapesi, Decision No. 510, at *11.

Mr. Fukumoto has not alleged that he filed grievances regarding the overtime he believes he should have been offered or regarding the voluntary demotion. Therefore, he has not exhausted his administrative remedies on these issues, which further deprives the Board of the right to hear claims that these actions violated the CBA.

3.5. Civil Complaint

Although Mr. Fukumoto has filed a civil complaint, the Board has primary jurisdiction over prohibited practice cases. *See Haw. Gov't Emples. Ass'n, AFSCME Local 152 v. Lingle*, 124 Hawai'i 197, 204, 239 P.3d 1, 8 (2010). Therefore, the question of whether the facts in this case lead to a finding that Respondents committed prohibited practices is one that must be ruled on by the Board.

HGEA believes and has asserted that, "HGEA has determined that the claims [raised in the civil complaint] do not involve violations of the contract." However, this assertion is HGEA's belief, not a legal finding by a court.

While the Board does not have jurisdiction to determine claims related to workplace harassment, the Board does have jurisdiction to determine whether the Employer violated the CBA. That is the issue before the Board, and that is the issue the Board will address.

3.6. Motions for Summary Judgment

Summary judgment is appropriate only when the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law; the Board must review the evidence in the light most favorable to the party opposing the motion for summary judgment; and the Board must resolve any doubt about whether or not such a motion should be granted in favor of the non-moving party.

Campos II, Decision No. 511, at *9.

Upon review of the record, the Board finds that there are disputes about material facts in this case, including but not limited to issues about the motives of the parties. Therefore, the Board will deny PSD's Motion for Summary Judgment.

4. Order

Accordingly, based on the above, the Board GRANTS, in part, and DENIES, in part, both Dispositive Motions. The Board dismisses the claims of prohibited practices under HRS §§ 89-13(a)(6) and (b)(3) for lack of standing and dismisses all allegations related to overtime and the voluntary demotion based on untimeliness and failure to exhaust.

Therefore, the following are the only issues remaining before the Board:

- Whether PSD committed a prohibited practice by wilfully violating the BU 14 CBA as laid out in the Grievances; and
- Whether HGEA committed a prohibited practice by breaching the duty of fair representation owed to Mr. Fukumoto in the processing and handling of Mr. Fukumoto’s grievance.

DATED: Honolulu, Hawai‘i, _____ September 9, 2022 _____.

HAWAI‘I LABOR RELATIONS BOARD
(dhir.laborboard@hawaii.gov)

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPOONO, Member

J N. MUSTO, Member

Copies sent to:

Ralph Fukumoto, Self-Represented Litigant
Keani Alapa, Esq.
James Halvorson, Deputy Attorney General

¹ Under the definition in HRS § 89-2, based on this employment, Mr. Fukumoto is a public employee. 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)].

² Under the definition in HRS § 89-2, based on this employment, PSD is a public employer. HRS § 89-2 defines “employer” or “public employer” as:

“Employer” or “public employer” means...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...

³ HRS § 89-6 was amended after Mr. Fukumoto’s initial grievance was filed. The Board cites to the version of the statute in effect when the first grievance was filed. HRS § 89-6(14) (Supp. ****) defines BU 14 as “State law enforcement officers and state and county ocean safety and water safety officers.”

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) (Supp. ****) defines the employer group for BU 14 as:

- (1) For bargaining units...14, 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 particular bargaining unit;