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Case No. 22-CE-02-972

STATE OF HAWAI'I

HAWAI'I LABOR RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Complainant(s), and HAWAII HEALTH SYSTEMS CORPORATION, Respondent(s).	CASE NO(S). 22-CE-02-972 ORDER NO. 3917 ORDER DISMISSING CASE, SUA SPONTE, FOR LACK OF JURISDICTION

ORDER DISMISSING CASE, SUA SPONTE, FOR LACK OF JURISDICTION

1. Introduction and Statement of the Case

Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (Complainant, HGEA, or Union) filed a prohibited practice complaint (Complaint) with the Hawai'i Labor Relations Board (Board) alleging, among other things, that Respondent HAWAII HEALTH SYSTEMS CORPORATION (Respondent, HHSC, or Employer) committed prohibited practices under Hawai'i Revised Statutes (HRS) §§ 89-13(a)(1), (2), (3), (4), (5), (7), and (8).

This case arises from HHSC's discharge of a public employee (Employee), a bargaining unit 2 (BU 2) member. HGEA, the exclusive representative for BU 2, filed grievances contesting the Employee's discharge, and those grievances proceeded through the grievance process. The grievance process culminated in an arbitration decision reinstating the Employee to their position.

However, after the arbitrator issued their decision, HHSC informed HGEA that the Employee's position was eliminated during a reorganization. HGEA asserts that it did not know about the reorganization.

HHSC and HGEA returned to the arbitrator for a second phase of the arbitration, and the arbitrator issued a subsequent decision that placed the Employee in a different position that was in bargaining unit 3 (BU 3).

The Board held a prehearing conference on November 9, 2022, where HGEA clarified that the issue in this Complaint relates to the Employer's alleged failure to consult over the reorganization that led to the elimination of the Employee's BU 2 position. The Board further questioned the parties about the background of this case.

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

Because the Board considers the issue of jurisdiction *sua sponte*, or of its own accord, the Board will use the standards that it uses for Motions to Dismiss and will accept the allegations of the Complaint as true and construe them in the light most favorable to HGEA. *See*, *e.g.*, Haw. Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Governing Bd. Of Kanuikapono Charter Sch., Board Case No. 19-CE-03-928, Decision No. 513, at *12 (October 19, 2022) (https://labor.hawaii.gov/hlrb/files/2022/10/Decision-No.-513.pdf).

HHSC[1] employed the Employee[2] as a public employee and in that position, the Employee was a member of BU 2[3] until their discharge. HGEA is the exclusive representative[4] for BU 2 and BU 3.[5] HGEA and the respective employer groups[6] for BU 2 and BU 3 are parties to collective bargaining agreements (CBAs) for the relevant period.

HHSC discharged the Employee on or about July 26, 2018. HGEA filed timely grievances on the Employee's behalf contesting the discharge and asking for reinstatement as the primary remedy. HHSC denied the grievances at both Step 1 and Step 2, and HGEA filed a timely notice of intent to arbitrate.

The arbitrator held a hearing on the Employee's discharge over three days on October 14, 15, and 25, 2021. On or about January 4, 2022, the arbitrator issued a decision that reinstated the Employee to their position.

After the issuance of the decision, HHSC informed HGEA that the Employee's BU 2 position had been eliminated in a reorganization that occurred after HGEA filed the grievances.

The arbitrator held a further hearing on April 4, 2022. The arbitrator ruled that, because the Employee's BU 2 position was not available, the Employee would be placed in a BU 3 position.

The arbitrator did not consider the issue of consultation.

On or about July 26, 2022, HGEA received a response from HHSC stating that there was no obligation to consult with HGEA over the reorganization eliminating the Employee's BU 2 position.

3. Analysis and Conclusions of Law

The Board has original jurisdiction over prohibited practice complaints and, thus, over this case. Stucky v. Okabe, Board Case No. CU-05-303, Decision No. 508, at *6 (June 30, 2021) (https://labor.hawaii.gov/hlrb/files/2021/06/Decision-No.-508.pdf) *citing* to Haw. Gov't Emples. Ass'n v. Casupang, 116 Hawai'i 73, 97, 170 P.3d 324, 348 (2007).

However, the Board cannot do more than the law authorizes it to do. *See* Panganiban v. The Judiciary, Board Case No. 21-CE-03-957, Decision No. 501, at *2 (February 3, 2021) (https://labor.hawaii.gov/hlrb/files/2021/03/Decision-No.-501.pdf). Therefore, even if the parties do not raise the issue of a jurisdictional requirement, the Board, *sua sponte*, will do so. Id. If the Board does not have jurisdiction over a prohibited practice complaint, the Board cannot issue a judgment on the issue. Tamashiro v. Dep't of Hum. Serv., 112 Hawai'i 388, 398, 146 P.3d 103, 113 (2006).

3.1. Timeliness

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); Aio v. Hamada, 66 Haw. 401, 404 n. 3, 664 P.2d 727, 729 n. 3 (1983). The administrative rules governing the Board proceedings further include this ninety-day limitation. Hawai'i Administrative Rules (HAR) § 12-42-42(a).

The Board has construed the limitations period strictly and will not waive a defect of even a single day. 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/hlrb/files/2022/06/Decision-No.-511.pdf). This jurisdictional ninety-day limit begins when the complainant knew or should have known that their rights were being violated and is set by statute; neither the Board nor the parties may waive this requirement. Caspillo v. Dep't of Transp., Board Case Nos. 17-CE-01-899, 17-CU-01-355, Decision No. 509, at *6 (November 22, 2021) (https://labor.hawaii.gov/hlrb/files/2021/11/Decision-No.-509.pdf).

Even viewing this case in the light most favorable to HGEA, the Board must find that this complaint is untimely. To the extent that this case is about the issue of consultation over the reorganization at HHSC, HGEA knew or should have known that a reorganization occurred leading to the elimination of the Employee's position by the April 4, 2022[7] arbitration hearing

necessitated by HHSC informing HGEA of the elimination of the position. Therefore, the ninety-day period ended on July 5, 2022[8]—well before the October 20, 2022 filing date of the Complaint.

Therefore, the Board is compelled to dismiss all claims related to the issue of consultation over the reorganization due to untimeliness.

3.2. Arbitration Decision

Although HGEA asserted at the prehearing conference that the issue in the Complaint was limited to the issue of consultation, the Complaint contains references to altering the arbitration decision. Therefore, the Board addresses this issue here.

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). Among other things, issues of compliance with the grievance procedure is a matter that must be addressed by an arbitrator, not by the Board or a court. Bronster v. United Pub. Workers, Lcoal 646, 90 Hawai‘i 9, 16, 975 P.2d 766, 773 (1999). The scope and application of the underlying CBA are, therefore, questions that must be addressed by an arbitrator. Id.

Based on this policy and court 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.*, Haw. Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Ige, Board Case Nos. 21-CE-02-962a-h, Order No. 3827, at *2 (March 2, 2022) (https://labor.hawaii.gov/hlrb/files/2022/03/Order-No.-3827.pdf).

The Hawai‘i Supreme Court has found that HRS Chapter 658A, the Uniform Arbitration Act, applies to public sector CBAs. Haw. State Tchrs. Ass'n v. Univ. Lab. Sch., 132 Hawai‘i 426, 432, 322 P.3d 966, 972 (2014). Therefore, any attempt to confirm, vacate, modify, or correct an arbitrator's decision cannot be heard by this Board. *See* HRS §§ 658A-22, 23, 24, and 26. While nothing in the relevant CBAs requires HGEA to utilize HRS Chapter 658A, even if HGEA chooses not to utilize HRS Chapter 658A, this does not give the Board jurisdiction to hear such issues.

Accordingly, the Board must find that all issues related to issues with the arbitrator's decision are not within the Board's jurisdiction and must be dismissed.

4. Order

Based on the foregoing, the Board dismisses this case, *sua sponte*. This case is closed.

DATED: Honolulu, Hawai‘i, November 14, 2022.

HAWAIʻI LABOR RELATIONS BOARD
(dlir.laborboard@hawaii.gov)

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J.N. MUSTO, Member

Copies sent to:

Stacy Moniz, HGEA
Darin Leong, Esq.

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[1] In this capacity, HHSC is a public employer within the definition of HRS § 89-2, which defines employer or public employer as:

> "Employer" or "public employer" means…the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees…

[2] 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)].

[3] HRS § 89-6(a)(2) defines BU 2 as, "Supervisory 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(a)(3) defines BU 3 as, "Nonsupervisory employees in white collar positions."

[6] HRS § 89-6(d)(1) defines the employer groups for BU 2 and BU 3 as:

> For bargaining units…(2), [and] (3)…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[.]

[7] When questioned, HGEA asserted that it did not know the exact date when it learned of the reorganization. Because the Board will view the facts in the light most favorable to HGEA, the Board will use the date of the hearing where the parties held a hearing with the arbitrator to revise the arbitrator's decision that reinstated the employee because the employee's position no longer existed: April 4, 2022.

[8] The ninetieth day was July 3, 2022, which was a Sunday. July 4, 2022 was a holiday. Therefore, under HAR § 12-42-8(c), the last day of the ninety-day period was July 5, 2022.