



employer, the EAST-WEST CENTER (EWC or Employer). AHMED alleged that the Union thereby violated §§ 377-4, 377-5(a), 377-6(6), 377-7(1), (2), (3), and (8), Hawaii Revised Statutes (HRS).

Thereafter, on January 30, 1995, Complainant AHMED filed an unfair labor practice complaint with the Board in Case No. 95-1(CE), against OSWALD K. STENDER, Chairman, Board of Governors, EWC, and the EWC with the Board. AHMED alleged, inter alia, that the Employer took disciplinary action against him without cause. AHMED alleged that the Employer (1) gave him an unfair and unequal workload; (2) evaluated his performance in a biased manner; (3) harassed him over the specifics of his annual work plan; and (4) denied him academic freedom. In addition, AHMED alleged that on November 30, 1994, the Employer, through its agent, Dr. Terry Rambo (Rambo), gave Complainant a "less than satisfactory" performance evaluation. In addition, AHMED alleged that because he has been directed to complete a book manuscript by June 30, 1995, his unfair and unequal workload initiated by Vice President Bruce Koppel on January 24, 1994 continues in force. AHMED contended that the Employer thus violated Article 10 of the collective bargaining agreement between the EWC and AFSCME (contract), thereby violating § 377-6(6), HRS.

On January 31, 1995, Respondent Union filed a motion to dismiss the complaint on the grounds that Complainant failed to exhaust his contractual remedies and the entire complaint is barred by the statute of limitations. Alternatively, the Union argued that the Complainant failed to state a cause of action. AFSCME contended that Complainant failed to timely notify the Union of the

alleged violations by the Employer and accordingly, the Union could not file timely grievances. Further, the Union contended that the Board lacks jurisdiction over Complainant's claims relating to discrimination.

On February 3, 1995, Complainant filed a letter requesting that the Board postpone the hearing on the Union's motion to dismiss scheduled on February 6, 1995. By Order No. 1149, dated February 8, 1995, the Board granted Complainant's request for the postponement of the hearing.

On February 8, 1995, Complainant filed a motion to amend his unfair labor practice complaint against the Union to include an additional allegation that on January 19, 1995, the Union failed to grieve his 1994 performance evaluation. By Order No. 1185, dated May 4, 1995, the Board granted Complainant's motion to amend his unfair labor practice complaint against the Union and consolidated both cases for hearing.

On February 9, 1995, Respondent EWC filed an application to extend the time to answer the complaint. By Order No. 1151, dated February 10, 1995, the Board granted Respondent EWC's application to extend the time to file an answer.

On February 16, 1995, Complainant filed another request to postpone the hearing on the Union's motion to dismiss. By Order No. 1156, dated February 28, 1995, the Board granted Complainant's second request to postpone the hearing.

On May 22, 1995, AHMED filed a memorandum in opposition to the Union's motion to dismiss complaint with the Board.

On June 23, 1995, Respondent Union filed a motion to dismiss the amended complaint supported by a memorandum. Also, on June 23, 1995, Respondent Employer filed a motion to dismiss the complaint and the amended complaint. The Employer contended that the complaint should be dismissed because AHMED failed to exhaust his contractual remedies. The Employer also contended that Complainant's work plan claims were barred by the applicable statute of limitations. In addition, the Employer contended that the Complainant's allegations do not constitute a proper grievance under the contract. Further, the Employer argued that the instant complaint is an attempt to have his discrimination claims heard in another forum and therefore the complaint should be dismissed. Lastly, the Employer contends that Complainant's claims of unfair treatment are not cognizable claims under Hawaii law.

On June 27, 1995, Respondent Employer filed a motion for leave to file supplemental pleading. By Order No. 1209, dated June 30, 1995, the Board granted the EWC's motion.

On July 3, 1995, Complainant filed memoranda in opposition to the motions to dismiss the complaints.

On July 5, 1995, Respondent Employer filed a supplemental memorandum which addressed the impact of Complainant's withdrawal of a complaint before the Hawaii Civil Rights Commission.

On July 12, 1995, the Board held a hearing on the motions to dismiss. All parties were afforded the opportunity to present witnesses, exhibits, and argument. After a thorough review of the record, the Board makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Complainant AHMED is an employee as defined in § 377-1(3), HRS, of the EWC.

AHMED is included in a collective bargaining unit comprised of employees at the EWC, who are represented by Respondent AFSCME.

AFSCME is a representative as defined under § 377-5(a), HRS.

Respondents OSWALD K. STENDER, Chairman of the Board of Governors, EWC, and the EWC represent an employer as defined in § 377-1(2), HRS.

By memorandum, dated January 24, 1994, EWC Vice President Bruce Koppel informed AHMED that he was being reassigned to the Program on Environment. This memorandum triggered AHMED's claims of discrimination, unfair treatment and harassment.

By letter, dated March 30, 1994, AHMED complained of unfair treatment to Elizabeth Clancey (Clancey), AFSCME business agent. AHMED complained about his reassignment to the Program on Environment; office shifting; work plan; and work output requirements. AHMED requested that the Union take the matters up with management to rescind the unfair requirements.

By letter, dated August 16, 1994, Clancey indicated to AHMED that his complaints would be investigated and a letter would be sent to Vice President Koppel. Clancey further stated that the investigation was preliminary to filing a grievance and once a response was made by the Employer, the Union would determine if there was a basis to file a grievance.

Koppel responded to the Union by letter dated September 2, 1994. Thereafter, AHMED submitted his rebuttal to Koppel's September 2, 1994, letter to Clancey.

By letter dated October 17, 1994, Clancey informed AHMED that the Union would not file grievances on his behalf against the EWC alleging discrimination and unfair treatment. Clancey's letter refers to AHMED's request, dated August 3, 1994, for the Union to file a grievance on his behalf. Clancey's letter addresses AHMED's request to rescind his 1994 workplan; AHMED's 1992 and 1993 performance evaluations; the alleged bias on the part of the person performing his job evaluation; geographical restrictions on AHMED's publications; and office assignment.

Thereafter, AHMED received a performance evaluation, dated November 30, 1994, from his supervisor Rambo, director of the EWC Program on Environment. AHMED received an overall performance evaluation rating of "satisfactory" which was followed by:

To continue in the future to receive a satisfactory evaluation, Dr. Ahmed needs to meet the performance standards outlined under Categories 1 and 2 above. Unless he meets these standards, he is at risk of receiving an overall unsatisfactory rating in his next evaluation.

AHMED requested Clancey to file a grievance against the EWC management pursuant to Article 14 of the contract relating to his 1994 performance evaluation. AHMED indicated in his request that on December 1, 1994, he had requested Rambo to reconsider the performance evaluation and on December 5, 1994, Rambo rejected AHMED's request for reconsideration.

By letter dated January 19, 1995, Clancey informed AHMED that AFSCME would not file a grievance contesting the performance evaluation he received on November 30, 1994. Clancey further informed AHMED that he could file a grievance on his own so long as the Union was afforded the opportunity to be present at the conference on the grievance. Clancey requested an extension of the grievance filing deadline from December 29, 1993 to January 31, 1995.

By letter dated January 27, 1995, AHMED filed a grievance with his supervisor against the EWC management with regard to his 1994 performance evaluation. That letter indicates that AHMED's deadline for filing a grievance on his performance evaluation was extended to January 31, 1995.

By letter dated February 3, 1995, A. Terry Rambo acknowledged receipt of AHMED's grievance. Rambo further stated that after consultation with the Center's management, it was decided that the Employer would not proceed to the merits of his complaint as the matter was not grievable because AHMED received an overall "satisfactory" rating.

Article 10 of the contract provides for Performance Evaluation and provides in part:

I. Grievances

Any grievance from a less than satisfactory evaluation shall be processed in accordance with Article 14, Grievance Procedure.

The ninety (90) day period immediately preceding the complaint filed against AFSCME commenced on September 24, 1994.

The ninety (90) day period immediately preceding the complaint filed against EWC commenced on November 1, 1994.

#### DISCUSSION

Both Respondents AFSCME and Employer contend that the instant complaints should be dismissed because they were filed beyond the applicable statute of limitations. Section 377-9(1), HRS, provides that:

No complaint of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.

In previous cases, the Board has strictly construed the applicable ninety (90) day statute of limitations. B. Theresa Petramala, 5 HLRB 172 (1993); Michael K. Iwai, 5 HLRB 132 (1993); Buddy Kimura, 4 HLRB 543 (1988); Alvis W. Fitzgerald, 3 HPERB 186 (1983); and Rodney Ledward, 2 HPERB 539 (1980). Thus, the Board has dismissed a complaint which was filed one day past the filing deadline. Michael K. Iwai, supra, at 134.

Complainant filed the instant complaint against the Union on December 23, 1994. With respect to the Union then, the ninety (90) day limitations period encompasses the period from September 24, 1994 to the filing of the complaint. AHMED contends that on October 17, 1994, AFSCME refused to file grievances on his claims. Under these facts, the Board has jurisdiction to consider the Union's refusal to process AHMED's grievances as reflected in its letter, dated October 17, 1994 because it falls within the Board's jurisdictional time frame. In addition, the Union's refusal to grieve AHMED's 1994 performance evaluation also falls within the applicable time frame. Any claims against the Union

arising prior to September 24, 1994 are beyond the applications limitations period and are hereby dismissed.

With respect to the claims against the Employer, AHMED filed his unfair labor practice complaint on January 30, 1995. Thus, the Board's jurisdictional time frame only encompasses events occurring on or after November 1, 1994. In this respect, the only claim against the Employer arising within that time frame relates to AHMED's 1994 job performance evaluation. AFSCME contends that AHMED's amended complaint was filed more than ninety (90) days subsequent to AFSCME's January 19, 1995 refusal to grieve the performance evaluation. However, the Board finds that AHMED received the performance evaluation within ninety (90) days of the filing of the original complaint against the Employer and the amended pleading relates back to the date of the original pursuant to § 12-42-8(g)(10), therefore, the Board will not dismiss the allegation contained in the amended complaint.

Thus, the Board concludes that Complainant's allegations of discriminatory treatment by the Employer arising from Koppel's January 24, 1994 memorandum are well beyond the ninety (90) day period immediately preceding the filing of the complaint against the EWC and are outside the Board's jurisdiction. Those claims against the Employer are hereby dismissed.

In addition, the Board dismisses AHMED's claims against the Respondent Employer for unfair treatment arising from Koppel's January 24, 1994 memorandum because Complainant failed to exhaust his contractual remedies by pursuing a grievance against the Employer. Article 14 of the applicable contract provides, in part:

A. Any complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure. . . .

B. An individual Employee may present a grievance to her/his immediate supervisor and have the grievance heard without intervention of the Union, provided the Union has been afforded any opportunity to be present at the conference(s) on this grievance. . . .

\* \* \*

D. Step 1. If the grievant is not satisfied with the result of the informal conference, s/he or the Union may submit a written statement of the informal complaint to the unit executive; or if the immediate supervisor does not reply to the informal complaint within seven (7) working days, the unit executive or her/his designee within fourteen (14) working days from the initial submission of the informal complaint; or, if the grievance was not discussed informally between the Employee and the immediate supervisor, the Employee or the Union may submit a written statement of the grievance to the unit executive or her/his designee within the twenty (20) working day limitation provided for in paragraph A. above. . . .

F. Step 2. If the grievance is not satisfactorily resolved at Step 1, the grievant or the Union may appeal the grievance in writing to the President or the President's designee (hereinafter "Employer" within seven (7) working days after receipt of the answer at Step 1. Within seven (7) working days after the receipt of the appeal, the Employer and the Union shall meet in an attempt to resolve the grievance. . . . The Employer or the Employer's designee shall reply in writing to the Union within seven (7) working days after the meeting.

Respondent Employer contends that under the foregoing contract provisions the Complainant may process his or her own grievance up to arbitration if the individual employee chose to do so. Thus, the lack of Union involvement or the Union's refusal to

initially process an employee's grievance does not bar individual employees from using the grievance process. The Employer also argues that even assuming that the relevant time period to file a grievance was tolled while the Union considered whether to file a grievance, AHMED should have filed a grievance against the allegedly unfair work plan and unfair treatment within twenty days after receiving the Union's October 17, 1994 letter informing him that the Union would not pursue a grievance. Since AHMED failed to file a grievance at that time, his claims against the Employer should properly be dismissed. The Board agrees with the Employer's reasoning and hereby dismisses the allegations of AHMED's complaint against the Employer relating to his work plan and other working conditions imposed by the January 1994 memorandum.

Although the Union also contends that the instant complaint should be dismissed because of AHMED's failure to exhaust contractual remedies, the Board finds that this defense is not available to the Union. In Ronald Caldeira, 3 HPERB 523 (1984), the Board found that the doctrine of the exhaustion of remedies refers to the need of the employee to utilize the grievance procedure before maintaining an action against the employer. Thus, by logical implication, the doctrine does not apply to actions against the union for a case charging a breach of duty of fair representation. Cf., Buddy Kimura, 4 HLRB 105 (1986).

Based upon the foregoing, the Board finds that it has jurisdiction over the breach of duty claim against AFSCME for its refusal to process grievances evidenced by its letter of October 17, 1994 and its refusal to process the grievance arising

from the 1994 performance evaluation. With respect to the Union's refusal to file a grievance regarding the allegedly unfair treatment and working conditions, any corresponding claim against the Employer is dismissed for lack of jurisdiction. Thus, even if Complainant succeeds in establishing that AFSCME wilfully breached its duty of fair representation, the Board is unable to reinstate the grievance with the Employer. Any Board remedy would be limited in nature.

Also remaining for disposition is AHMED's complaint alleging that AFSCME breached its duty of fair representation by refusing to grieve his 1994 performance evaluation. The Board will conduct a hearing limited to the issue of whether the evaluation was satisfactory or less than satisfactory. If the Board finds that the evaluation was less than satisfactory and therefore grievable, the Board will determine whether AFSCME breached its duty of fair representation when it failed to file a grievance on behalf of AHMED and whether the Employer violated the relevant contract provisions by refusing to process the grievance. Conversely, if the Board finds that the evaluation was satisfactory, the Board will not contravene the contractual provision which expressly precludes the filing of grievances on that specific subject matter.

#### CONCLUSIONS OF LAW

The Board lacks jurisdiction to hear claims which occurred more than ninety (90) days prior to the filing of the unfair labor practice complaints against AFSCME and EWC. Thus, the claims against the Union arising prior to September 24, 1994 and

claims against the Employer arising from the January 24, 1994 memorandum are time-barred.

Complainant must exhaust his contractual remedies prior to filing his complaint against the Employer based upon a breach of the contract with the Board. Complainant failed to file a grievance against the Employer for claims of unfair treatment arising from a January 24, 1994 memorandum. The Board does not have jurisdiction over such claims.

#### ORDER

In accordance with the foregoing findings of fact and conclusions of law, the motions to dismiss the unfair labor practice complaints against Respondents AFSCME and EWC and granted, in part and denied, in part.

YOU ARE HEREBY NOTIFIED that the Board, pursuant to § 377-9, HRS, will conduct a second prehearing conference on the above-entitled unfair labor practice complaints on July 15, 1996 at 10:00 a.m. in the Board's hearings room, Room 203, 550 Halekauwila Street, Honolulu, Hawaii. The purpose of the prehearing conference is to arrive at a settlement or clarification of the issues, to identify and exchange witness and exhibit lists, if any, and to the extent possible, reach an agreement on facts, matters or procedures which will facilitate and expedite the hearing or adjudication of the issues presented. The parties shall file a Prehearing Statement which addresses the foregoing matters with the Board two days prior to the prehearing conference.

YOU ARE ALSO NOTIFIED that the Board will conduct a hearing, pursuant to § 377-9, HRS, and Administrative Rules

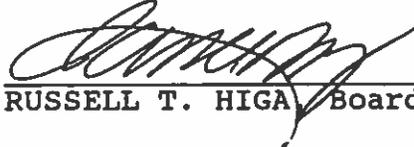
§ 12-41-19 on the instant complaints on July 23, 1996 at 9:00 a.m. in the above-mentioned hearings room. The purpose of the hearing is to receive evidence and arguments on whether Respondents committed unfair labor practices as alleged by the Complainant. The hearing may continue from day to day until completed.

The parties shall submit four copies of all exhibits identified and introduced into the record to the Board. Additional copies for opposing counsel shall also be provided.

DATED: Honolulu, Hawaii, June 28, 1996.

HAWAII LABOR RELATIONS BOARD

  
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BERT M. TOMASU, Chairperson

  
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RUSSELL T. HIGA, Board Member

  
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