



of Hawaii Civil Service Commission (Commission) as his prayer for relief. Complainant contends that he incurred costs of \$7,301.61 because of the HGEA's failure or refusal to file a grievance on his behalf or to represent him before the Commission.

On October 21, 1996, the Board conducted a prehearing conference in this matter.

On October 22, 1996, Respondents, by and through their attorney, filed a motion to dismiss the instant complaint with the Board. Thereafter, on October 24, 1996, Respondents filed an amended motion to dismiss the complaint. The Union contends that the complaint should be dismissed because it was filed beyond the applicable 90-day limitations period. On November 11, 1996, Respondents filed a second motion to dismiss the complaint contending that the instant complaint failed to state a claim upon which relief can be granted because § 89-13(b)(3), HRS, was not applicable to the facts before the Board.

On October 31, 1996 and November 8, 1996, Complainant filed memoranda in opposition to Respondents' respective motions.

On February 18, 1997, the Board held a hearing on the motions to dismiss the complaint. Complainant appeared before the Board pro se and the Union was represented by counsel. Both parties had full opportunity to present evidence and arguments to the Board.

Based upon a thorough review of the record, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

OREN J. TSUNEZUMI was, at all times relevant, a Customer Service Representative II, employed by the Department of Water Supply, County of Hawaii. TSUNEZUMI was, at all times relevant, a member of bargaining unit 03 and an employee within the meaning of § 89-2, HRS.

The HGEA is the exclusive representative, as defined in § 89-2, HRS, of the employees of bargaining units 03 and 04.

GARY YOSHIYAMA was, at all times relevant, the Hawaii Division Chief of the HGEA.

SHARON T. MORRIS (MORRIS) was, at all times relevant, a Union Agent for the HGEA.

On or about February 9, 1996, TSUNEZUMI applied for the position of Assistant Customer Service Supervisor which is included in Unit 04.

On May 23, 1996, TSUNEZUMI's supervisor, Richard Tsunoda informed TSUNEZUMI that he was not selected for promotion. On May 25, 1996, TSUNEZUMI received written notification of his nonselection.

On May 29, 1996, TSUNEZUMI met with MORRIS regarding challenging his nonselection. MORRIS indicated that the only thing that the Union could do was investigate the matter. TSUNEZUMI submitted his reasons for filing a grievance and MORRIS requested additional documents. On May 31, 1996, TSUNEZUMI delivered the requested materials to MORRIS.

On June 7, 1996, TSUNEZUMI met with MORRIS and discussed the minimum qualifications for the position. MORRIS informed

TSUNEZUMI that the denial of his promotion could not be grieved under the collective bargaining agreement. TSUNEZUMI indicated that he wanted to file an appeal to the Commission to challenge the minimum qualifications for the Supervisor position. MORRIS informed TSUNEZUMI that an appeal should be filed with the Commission. According to TSUNEZUMI, MORRIS did not offer to assist him in filing the Commission appeal. MORRIS, however, states in her affidavit attached to the HGEA's amended motion to dismiss prohibited practice complaint, that she offered to assist him in the preparation of his appeal to challenge the denial of promotion. MORRIS indicated that June 14, 1996 was the deadline to file the appeal.

On June 12, 1996, TSUNEZUMI filed his appeal to the Commission, believing that June 12, 1996 was the deadline for the appeal.

According to MORRIS, she began preparing a draft of the appeal on June 14, 1996 but learned that TSUNEZUMI had already filed an appeal to the Commission. When MORRIS discovered that TSUNEZUMI had filed his Commission appeal, she called him to remind him that the HGEA would not be responsible for filing or processing such appeal.

According to TSUNEZUMI, MORRIS told him on June 21, 1996 that HGEA was not obligated to represent him in a grievance which left him one day to file his grievance. Also on that date TSUNEZUMI's wife, Stephanie, called MORRIS to request a written statement as to why HGEA would not represent him. On June 24, 1996, Mrs. TSUNEZUMI made a written request to HGEA to

provide a written statement of reasons why the Union would not represent him.

By letter dated June 24, 1996, MORRIS informed TSUNEZUMI, inter alia, that she would not file a grievance on his nonselection as there was no violation of the Unit 03 collective bargaining agreement because the position sought was not within Unit 03. MORRIS also indicated that an appeal to the Commission was appropriate to resolve his concerns and since TSUNEZUMI was already representing himself before the Commission, no further action was required of the Union.

On September 17, 1996, the Commission denied TSUNEZUMI's appeal. TSUNEZUMI incurred fees and costs of \$7,301.61.

#### DISCUSSION

Respondents contend that the instant complaint should be dismissed because the complaint was filed beyond the 90-day statute of limitations. Respondents contend that MORRIS informed TSUNEZUMI that the HGEA would not file a grievance on his behalf on June 7, 1996. Further, Respondents argue that even using June 14, 1996 as the date of notice from MORRIS, TSUNEZUMI's complaint is still untimely. Thus, the Union argues that TSUNEZUMI's complaint is late and is now time-barred.

Complainant contends that MORRIS notified him on June 21, 1996 that the Union would not assist him in filing a grievance or an appeal to the Commission. Complainant requested MORRIS to set forth the reasons for nonrepresentation in writing and TSUNEZUMI received a letter dated June 24, 1996 from MORRIS confirming the reasons why the Union would not represent him.

Based upon the evidence in the record, the Board finds that there is a conflict in the evidence as to when TSUNEZUMI was informed that the Union would not assist him. The Board finds based on the facts presented, that MORRIS met with TSUNEZUMI initially on May 29, 1996 and after reviewing the materials submitted by TSUNEZUMI on May 31, 1996, MORRIS told TSUNEZUMI on June 7, 1996 that she would not file a grievance on his behalf because the matter was not grievable as the instant promotion involved the movement between two bargaining units. MORRIS and TSUNEZUMI then discussed the filing of an appeal with the Commission and TSUNEZUMI sought HGEA's assistance in filing the appeal. MORRIS indicated that an appeal should be filed by June 14, 1996<sup>1</sup> and MORRIS began to draft an appeal on that date until she learned that TSUNEZUMI had filed his own appeal on June 12, 1996. Once MORRIS learned that TSUNEZUMI had filed his appeal on his own, MORRIS ceased her efforts to assist him. MORRIS contacted TSUNEZUMI and told him that the HGEA would not assist him in his appeal and the Union's reasons therefor. MORRIS provided written reasons to TSUNEZUMI by letter dated June 24, 1996.

MORRIS states that she called TSUNEZUMI on June 14, 1996 to confirm that the HGEA would not represent him before the Commission. TSUNEZUMI contends that MORRIS informed him by telephone on June 21, 1996 that the Union would not help him. As the Union's motion to dismiss the instant complaint relies upon

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<sup>1</sup>According to § 76-48, HRS, appeals to the Commission must be filed within twenty days after notice of the action has been sent to the person. Here, TSUNEZUMI received the written notice of his non-selection on May 25, 1996, and the deadline for filing his appeal was June 14, 1996, twenty days later.

affidavits and matters outside of the pleadings, the motion is in the nature of a motion for summary judgment and the Board must view the evidence in the light most favorable to the nonmoving party. As such, the Board finds that June 21, 1996 is the date which TSUNEZUMI received notice from the HGEA that the Union would not represent him before the Commission. Thus, the instant complaint is timely as it was filed within 90 days of June 21, 1996 and the Board has jurisdiction over this complaint.

In its motion to dismiss complaint, the HGEA further contends that Complainant fails to state a claim for which relief can be granted. Here, Complainant alleged in his complaint that the Union violated § 89-13(b)(3), HRS, by failing to pursue his complaint to grievance or an appeal to the Commission. Complainant relies upon the statutory section which provides that it is a prohibited practice for an exclusive representative to refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in § 89-11, HRS. The Board finds that those provisions of § 89-11, HRS, refer to impasses in negotiations and interest arbitrations as opposed to grievance arbitrations.

Complainant argues in his memorandum in opposition to Respondent's motion to dismiss filed on November 8, 1996 that the complaint was amended at the prehearing conference held on October 21, 1996. In reviewing the record of the prehearing conference, the Board finds that Complainant amended his claim as to the date on which Complainant claimed MORRIS contacted him to inform him that the HGEA would not assist him. Complainant did not

specifically amend his complaint as to the statutory sections allegedly violated by the Union. Thus, Complainant's claims of § 89-13(b)(3), HRS, violations are dismissed for failure to state a claim for relief.

The Board however, recognizes that at the prehearing conference as well as the hearing on the motion to dismiss, the Board clearly stated that one of the issues in this case was whether the Union breached its duty of fair representation to the Complainant when it failed or refused to file a grievance or Commission appeal on his behalf. Thus, the complaint raises a claim of a breach of the Union's duty of fair representation under § 89-8(a), HRS and § 89-13(b)(4), HRS, for failure to pursue the instant claims to grievance or before the Commission.

In this regard, however, the Board finds that MORRIS properly represented to TSUNEZUMI that his challenge on the nonselection was not grievable because the promotion entailed movement between two bargaining units. The Board notes that this is in keeping with prior arbitral authority. In the arbitration of Frank Pavao, Jr. (June 9, 1977), Arbitrator Stanley Ling found that a grievance arising from a promotion between bargaining units 01 and 02 was nonarbitrable.

Complainant's primary contention here is that the HGEA was obligated to represent him before the Commission. While it appears from the facts here that MORRIS indicated that she was willing to assist TSUNEZUMI in filing his Commission appeal, there is no evidence of any representation that the Union would represent TSUNEZUMI in that appeal. Moreover, the Board notes that the

Union's duty of fair representation recognized in Chapter 89, HRS, extends to matters dealing with collective bargaining and the rights created by the respective collective bargaining agreements and does not encompass the pursuit of claims arising under Chapters 76 and 77, HRS. Thus, the Board concludes that Complainant fails to state a claim for breach of the duty of fair representation where the union has no duty to assist the employee because the claims arise outside of the ambit of Chapter 89, HRS.

#### CONCLUSIONS OF LAW

Section 377-9(1), HRS, made applicable to the Board by § 89-14, HRS, provides that prohibited practice complaints must be filed with the Board within 90 days of the occurrence of the actionable event. Viewing the evidence in the light most favorable to Complainant, the Board finds that the complaint was filed within the applicable limitations period and therefore the Board has jurisdiction over this complaint pursuant to §§ 89-5 and 89-14, HRS.

Complainant failed to state a claim for relief under § 89-13(b)(3), HRS, because the cited statutory section refers to interest arbitration procedures as opposed to the contractual grievance procedure which is at issue here.

Complainant failed to state a claim for relief against the Union in alleging a violation of the Union's duty of fair representation for failure to pursue the grievance as the Union properly refused to grieve the nonselection since the matter is nonarbitrable.

Complainant failed to state a claim for relief against the Union seeking reimbursement for fees and costs incurred before the Commission where the Union was not obligated to pursue the appeal on Complainant's behalf as such claims arise under Chapter 76, HRS, which are outside of the Board's jurisdiction and beyond the scope of the Union's duty of fair representation.

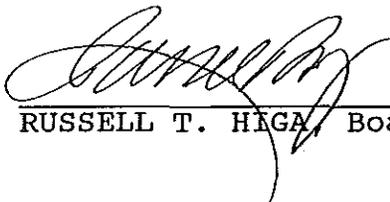
ORDER

The instant prohibited practice complaint is hereby dismissed.

DATED: Honolulu, Hawaii, May 9, 1997.

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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