

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-01-134
)	
MICHAEL L. LAST,)	ORDER NO. 1731
)	
Complainant,)	ORDER GRANTING RESPONDENTS'
)	MOTION TO DISMISS COMPLAINT
and)	
)	
GARY W. RODRIGUES and UNITED)	
PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO,)	
)	
Respondents.)	

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS COMPLAINT

On September 9, 1997, MICHAEL L. LAST (LAST) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) alleging that Respondents GARY W. RODRIGUES (RODRIGUES) and the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) (collectively UNION) violated § 15.06 of the Unit 01 collective bargaining agreement (contract) because the Union filed a grievance prior to the date of alleged violation. LAST alleged that the UNION thereby violated § 89-13(b)(5), Hawaii Revised Statutes (HRS). LAST requests that the Board dismiss the grievance, require UPW to publish a formal apology to Complainant, pay for expenses incurred in defense of the grievance, and pay for harm done to Complainant's reputation and good will.

On September 15, 1997, the UNION filed a Motion to Dismiss Complaint with the Board. The UNION contends that the

complaint should be dismissed for lack of jurisdiction because the complaint is untimely, fails to state a claim for relief, and because Complainant lacks standing to bring the instant complaint.

On October 1, 1997, LAST filed a Motion to Dismiss the Motion to Dismiss the Complaint with the Board. LAST alleges in an unsworn statement that he became aware of UPW's grievance on or after August 18, 1997 when he received a copy of the grievance in documents filed by Respondents' counsel in another case before the Board. LAST claims that he was unaware of the violation alleged in the grievance until January 15, 1997 and was never given a copy of the grievance until August 1997. Moreover, LAST claims that as an employee, he has the right to bring violations by a party to the Board.

On October 29, 1997, LAST filed a Motion for Immediate Judgment Against Respondent in Complainant's Favor with the Board. LAST contends that he is entitled to judgment against Respondents because Respondents' counsel failed to comply with Administrative Rules § 12-42-8 by knowingly signing a document containing false information to discredit LAST.

On November 18, 1997, the Board held a hearing on the motions. The parties were afforded full opportunity to present evidence and argument to the Board.

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

FINDINGS OF FACT

LAST was for all times relevant, a member of bargaining unit 01 and an employee, as defined in § 89-2, HRS.

The UPW is the exclusive representative, as defined in § 89-2, HRS, of employees included in bargaining unit 01.

The UPW and the public employers are parties to the contract. Section 15.06 of the contract provides as follows:

Class grievances and grievances relating to a dismissal action taken against a regular employee may be filed at the lowest step which has the authority to resolve such grievances as determined by mutual agreement. If the lowest step is other than Step 1, the grievance shall be filed within the time limits prescribed in Section 15.11.

Section 15.11 of the contract provides:

The grievance shall be presented to the division head or his designee in writing within fourteen (14) working days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within fourteen (14) working days after the alleged violation first became known or should have become known to the employee involved; except that in the case of an alleged payroll computational error, such allegation shall be presented to the division head or his designee in writing within fourteen (14) working days after the alleged error is discovered by the employee.

On December 19, 1996, the UNION filed a class grievance at Step 3 alleging violations of §§ 1.02, 1.05, and 26.02d of the contract. According to the grievance, on December 10, 1996, Michael Ben, Personnel Director, County of Hawaii (Ben), submitted a proposal to UPW to agree, pursuant to § 26.11 of the contract, not to pay Assistant Wastewater Treatment Plant Operator LAST at

overtime rates for hours worked on Christmas and Good Friday. On December 13, 1996, RODRIGUES declined Ben's proposal. Thereafter, on December 18, 1996, the Hawaii Tribune-Herald printed an article indicating that Mayor Yamashiro informed LAST that he would be paid straight time for working on Christmas pursuant to his request. The UPW alleged that the employer unilaterally waived the overtime compensation for LAST for hours of work performed on Christmas and Good Friday and thereby violated the above-mentioned sections of the contract. The UPW requested, inter alia, that the employer comply with § 26.02d and compensate all employees for all overtime work performed on all holidays as set forth in § 35.01 and not unilaterally amend the Unit 01 contract.

DISCUSSION

The UNION contends that the instant complaint should be dismissed because: (1) the complaint is untimely as it was filed beyond the 90-day time period for filing complaints; (2) LAST fails to state a claim upon which relief may be granted; and (3) LAST lacks the requisite standing necessary to file a complaint.

The UNION relies upon LAST's allegation in his complaint that he was "unaware that the alleged violation occurred until January 15, 1997." However, in his Motion to Dismiss Respondents' Motion to Dismiss Complaint filed on October 1, 1997, LAST alleges that he "first became aware of the alleged grievance by Respondent on or after August 18, 1997." LAST alleges that he was aware of the violation alleged in the grievance on January 15, 1997 when he received his complete paycheck but he was unaware of the UNION's filing of a grievance until Respondents provided him a copy as a

submission in another case. LAST contends that the UNION must show that it furnished him a copy of the grievance when it was filed.

Section 377-9(1), HRS, which is applicable to the Board pursuant to § 89-14, HRS, provides that no unfair labor practices complaints can be considered by the Board unless filed within 90 days of the alleged occurrence. In his complaint, LAST contends that the UNION's premature filing of a grievance violates the contract and constitutes a prohibited practice. According to LAST, he became aware of the filing of the grievance on or after August 18, 1997. As LAST filed the instant complaint on September 9, 1997, the Board finds that the filing of the complaint is timely.

The UPW also argues that the instant complaint should be dismissed because it fails to state a claim for relief. Here, LAST contends that the UPW violated § 15.06 of the contract by prematurely filing a grievance thereby violating § 89-13(b)(5), HRS. In Touchette v. Ganai, 92 Hawai'i 293, 922 P.2d 347 (1996), the Court discussed the standard of review regarding a dismissal of a complaint for failure to state a claim. The Court stated:

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. (Cites omitted.) We must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations therein could warrant relief under any alternative theory. (Cite omitted.) For this reason, in reviewing [a] circuit court's order dismissing [a] complaint . . . our consideration is strictly limited to the allegations of the complaint, and we must deem those allegations to be true. (Cites omitted.)

After reviewing the allegations of LAST's complaint which for the purposes of the instant motion, the Board deems to be true, the Board finds that it is beyond doubt that LAST cannot prove any set of facts in support of his claim which would entitle him to relief. LAST charges that the UPW violated the contract by prematurely filing a grievance. We agree with the UPW that there is nothing in the contract to preclude this. While filing a grievance prematurely may give rise to a defense by the employer that the issue is not ripe and therefore not arbitrable, this does not violate the contract. Thus, even if LAST proved the facts alleged in the complaint, he could not establish that the UNION violated § 89-13(b)(5), HRS. In addition, under the facts of this case, Ben had requested that RODRIGUES amend the contract to accommodate LAST and RODRIGUES refused. The UPW learned from a news article on or about December 18, 1996 that the employer intended to grant LAST's request. The UPW filed a grievance on the following day. Given the fact that the employer had previously discussed the matter with the Union and the Union refused to permit the deviation from the contract, the Board finds that it was not unreasonable for UPW to file the grievance at that time.

Thus, the Board concludes that LAST fails to state a claim for relief in the instant complaint and hereby grants the UNION's motion to dismiss the instant complaint. In view of the foregoing, the Board declines to address the arguments in LAST's Motion for Immediate Judgment.

CONCLUSIONS OF LAW

The Board has jurisdiction over the instant prohibited practice complaint under §§ 89-5(b)(4) and 89-14, HRS.

The Board finds that LAST can prove no set of facts in support of his claim which would entitle him to relief in this case. Thus, the Board concludes that the complaint fails to state a claim for relief and hereby dismisses the complaint.

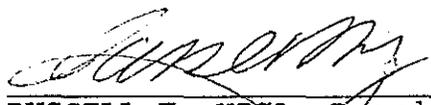
ORDER

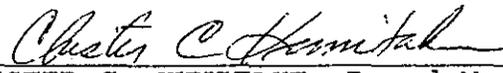
The complaint is hereby dismissed.

DATED: Honolulu, Hawaii, June 10, 1999.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member


CHESTER C. KUNITAKE, Board Member

Copies sent to:

Michael L. Last
Herbert R. Takahashi, Esq.
Joyce Najita, IRC