

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-08-119
)	
RICHARD C. K. YOUNG,)	ORDER NO. 724
)	
Complainant,)	ORDER GRANTING MOTION TO
)	DISMISS
and)	
)	
BOARD OF REGENTS, University)	
of Hawaii,)	
)	
Respondent.)	

ORDER GRANTING MOTION TO DISMISS

On October 28, 1988, the BOARD OF REGENTS of the University of Hawaii [hereinafter referred to as BOR] filed a Motion to Dismiss, accompanied by a memorandum in support of Motion to Dismiss and exhibits. Complainant's counsel filed a memorandum in opposition to Respondent's Motion to Dismiss on November 7, 1988. A hearing on said motion was held by the Board on November 16, 1988.

Counsel for the BOR advanced two arguments supporting the Motion to Dismiss:

1. Failure to meet the applicable statute of limitations governing prohibited practices filed with the Board; and
2. Failure to exhaust administrative remedies prior to the filing of the prohibited practice complaint.

As to the argument regarding the statute of limitations, the BOR noted that under Hawaii's statutes and the Board's Administrative Rules, a prohibited practice complaint must be filed within 90 days of the alleged violation. Herein, the alleged violations are improper notice and improper cause for termination. The notice of termination was received by the Complainant on September 29, 1986, more than two years before the prohibited practice complaint was filed on October 5, 1988. The BOR thus argues that this complaint is clearly time-barred.

As to the second argument, the BOR notes that the applicable collective bargaining agreement contains a grievance procedure which the Complainant was bound to follow in regard to the instant controversy. Under Winslow v. State, 2 Haw.App. 50, 625 P.2d 1046 (1981) and Santos v. State, 64 Haw. 648, 646 P.2d 962 (1982), prior administrative remedies must be exhausted before a complaint is filed. In this case the Complainant had 20 days under the collective bargaining agreement to file a grievance, but instead he chose to file a wrongful discharge claim at the Disability Compensation Division (DCD) of the State Department of Labor and Industrial Relations. It was only on August 9, 1988, almost two years after the alleged violation, that a letter was written to the BOR in an attempt to resurrect his rights under the collective bargaining agreement.

The BOR thus argues that the complaint should be dismissed. Transcript [hereinafter referred to as Tr.] 11/16/88, pp. 4-6.

In response to the first argument of the BOR, Complainant argues that the statute of limitations has not been violated since the 90-day limit is measured from the date of the violation and not from the date of discharge. In the instant case the violation is alleged to be the denial of the meeting contained in the letter dated September 13, 1988, from Joyce S. Tsunoda, Chancellor for the Community Colleges, to Ronald Fujiwara, counsel for Complainant. BOR exhibit C attached to Motion to Dismiss. This denial, Complainant argues, amounts to a violation of the collective bargaining agreement and sets the date from which the statute of limitations should be applied. The September 25, 1986 letter from Peggy S. Hong, Director of Personnel for the Community Colleges, to Complainant, stating "formal notice of our intention to terminate your employment on October 10, 1986 or in ten working days from the date of this letter", is mere notice of intent to terminate and not actual notice, Complainant argues. Complainant argues that he never got actual notice of termination and only found the September 25, 1986 letter from Hong in his files in mid-July of 1988.

Complainant further argues that his workers' compensation claims contributed to misunderstandings in the instant matter. He noted that in the August 16, 1988 workers' compensation hearing the "real reasons" for his dismissal were revealed, such as "resistance to authority", failure to follow instructions, and a lack of collegiality. On August 9, 1988, counsel for Complainant wrote a letter to Evelyn Nowaki,

counsel for the BOR, making demand for a meeting with the President of the University of Hawaii or his designee pursuant to Article 16 of the Unit 8 agreement. BOR exhibit B.

As to the BOR's second argument regarding exhaustion of remedies, Complainant argues that exhaustion was attempted through the letter of August 9, 1988 requesting a meeting with the employer.

As a more general matter, Complainant argues that it is not clear what notice of termination the BOR relies on in arguing its motion to dismiss. Complainant contends the September 25, 1988 letter is only notice of "intent" to dismiss. Factual questions thus are in dispute, Complainant argues, and the motion to dismiss should be denied. Tr. 11/16/88, pp. 6-16.

In response, the BOR notes that the denial of the meeting requested in the letter of August 9, 1988 was more than two years after the termination. Such a denial cannot revive Complainant's case, the BOR argues. Moreover, the BOR argues the termination letter issued September 25, 1986 is a standard termination letter stating Complainant's pre-termination and post-termination rights for a hearing under applicable case law. The BOR contends Complainant essentially did nothing to preserve his rights under the collective bargaining law. He went to the DCD and filed a wrongful discharge claim, the BOR notes, and thus his argument that he did not know of the impending termination is not valid. Under the applicable policy of strict construction of statutes of limitation, the

BOR argues that the instant complaint should be deemed to be time-barred. Tr. 11/16/88, pp. 16-20.

It was further noted that Complainant seems to have been aware of the letter giving notice of termination since he called Kubo to ask why he was being terminated when he was still under the doctor's care. Tr. 11/16/88, pp. 20-21; Tr. 12/7/88, pp. 87-93. T. J. Lane, Complainant's former attorney, also testified to receiving a phone call from Complainant upon Complainant's receipt of the letter. Tr. 12/7/88, pp. 11-12, 23. The BOR presented further evidence and testimony describing various personnel actions executed in contemplation of termination in the case herein. Tr. 12/7/88, pp. 62-87.

From the extensive testimony of Lane and of Frank Kubo, Personnel Officer for the Community Colleges, it is clear that the onus for failing to file a grievance immediately upon notice of the impending termination lies with Complainant and his counsel, and that the BOR and its agents did nothing to induce Complainant to delay filing a complaint, nor made any representations that a waiver of applicable deadlines for filing a complaint was in the offing. Testimony indicated that Complainant did not file a grievance because of the decision to take up the matter of his termination in the disability compensation context. Tr. 12/7/88, pp. 14-21, 28-30, 36-40, 45-50.

Lane testified that upon first calling Kubo about the termination letter, he requested postponement of the meeting

on the issue of termination, given the pending workers' compensation hearing. Kubo was alleged to say the matter was out of his hands. Tr. 12/7/88, pp. 13-14. Kubo testified that Lane, in the phone call, just asked for the employment records of Complainant, and that in the second call of October 31, 1986, Lane requested the rehiring of Complainant. Kubo testified he answered that such a request should be in writing and that written request was never received. Tr. 12/7/88, pp. 88-92. The evidence does not indicate, by a preponderance, whether the proposed meeting regarding termination was in fact discussed. The Board must therefore base its decision on the fact that no written request was made by Complainant's attorney at the time to either reschedule or postpone the meeting, and concludes that Complainant waived the opportunity to meet.

The Board finds that the letter of September 25, 1986 from Peggy S. Hong to Complainant constitutes formal notice of termination, and not mere notice of intent to terminate, as Complainant argues. The first line of the letter states "this is a formal notice of our intent to terminate your employment on October 10, 1986 or in ten working days from the date of this letter."

The letter further provides an opportunity for Complainant to meet with community college personnel at a given place and time or to call Kubo by a specific date. The letter finally notes Complainant's rights to process a grievance under the collective bargaining agreement. Given the formal nature of the letter, the Board concludes that the most reasonable and

equitable date from which to measure the alleged violation herein is the date Complainant received said letter. The BOR included in its exhibits the return receipt of the Hong letter to Young signed by Complainant and dated September 29, 1986. Complainant argues that he did not receive or did not become aware of his termination until mid-July 1988. Yet testimony indicates that phone calls were made to Kubo in the period immediately following the date of the posting of the Hong letter, and that a wrongful discharge complaint was filed at the DCD at the time of the termination. Tr. 12/7/88, p. 31. In such circumstances, the Board concludes that by a preponderance of the evidence it is reasonable to find that receipt of the letter from Hong to Complainant was effective on or about September 29, 1986.

Given that the Board finds that formal notice of termination was effected by the BOR, and moreover that such formal notice was received by Complainant, the statute of limitations began to run September 29, 1986 and that Complainant had 90 days from that date in which to file a prohibited practice charge. No complaint having been filed within that period, the Board concludes that the BOR's Motion to Dismiss based on statute of limitations should be granted.

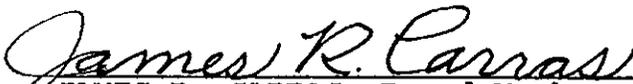
The Board also finds that Complainant failed to exhaust administrative remedies as argued by the BOR. Given the finding that formal notice was made in a timely manner, the duty to exhaust administrative remedies applied. Complainant took no steps to file a grievance in the instant matter until

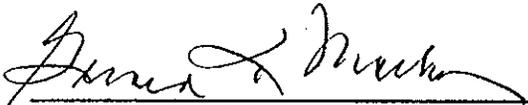
the demand for a meeting in the letter of August 9, 1988. Neither did Complainant's attorney at the time attempt to meet with BOR representatives immediately following the posting of the termination letter. Tr. 12/7/88, pp. 132-34. Such demand is not timely under the contract which requires that a request for a meeting be made within 20 days of the alleged violation. The Board further concludes that Complainant failed to establish that the provisions of the collective bargaining agreement were applicable to him two years after he was terminated. The failure to exhaust administrative remedies is further grounds for granting of the motion to dismiss herein.

Accordingly, the Motion to Dismiss is hereby granted and this case is dismissed with prejudice.

DATED: Honolulu, Hawaii, April 6, 1989.

HAWAII LABOR RELATIONS BOARD


JAMES R. CARRAS, Board Member


GERALD K. MACHIDA, Board Member

Copies sent to:

Ronald Fujiwara, Esq.
Evelyn Nowaki, BOR
Joyce Najita, IRC