

order

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. 90-1(CU)
)	
EUGENE M. VILLIATORA,)	ORDER NO. 802
)	
Complainant,)	ORDER GRANTING MOTION TO
)	DISMISS
and)	
)	
ILWU, LOCAL 142,)	
)	
Respondent.)	
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ORDER GRANTING MOTION TO DISMISS

The subject motion to dismiss was filed by Respondent INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142 (ILWU) on July 23, 1990. A hearing on said motion was held on August 15, 1990 before the full Board. At the hearing on the subject motion, counsel for Respondent essentially argued that the instant complaint is time-barred for failure to meet the 90-day statute of limitations set forth in Sections 377-9(1), 378-51, and 89-14, Hawaii Revised Statutes (HRS).

These statutes provide as follows:

§377-9 Prevention of unfair labor practices.

* * *

(1) No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.

§378-51 Action against labor organization, limitation. Any complaint, whether founded upon any contract obligation or for the recovery of damage or injury to persons or property, by an employee against a labor organization for its alleged failure to fairly represent the employee in an action against an employer shall be filed within ninety days after the cause of action accrues, and not thereafter.

Where the alleged failure to fairly represent an employee arises from a grievance, the cause of action shall be deemed to accrue when an employee receives actual notice that a labor organization either refuses or has ceased to represent the employee in a grievance against an employer. Where the alleged failure is related to negotiations or collective bargaining, the cause of action shall be deemed to accrue when the applicable collective bargaining agreement or amendment thereto is executed.

§89-14 Prevention of prohibited practices. Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9; provided that the board shall have exclusive original jurisdiction over such a controversy except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section 89-12(e) or (2) the judicial review of decisions or orders of the board in prohibited practice controversies in accordance with section 377-9 and chapter 91. All references in section 377-9 to "labor organization" shall include employee organization.

Pertinent facts in this case are as follows:

Complainant was a welder at Waialua Sugar Company (Employer) before he was terminated on December 24, 1986 for "excessive absences" and "unauthorized absences". Respondent Exhibit A.

Complainant pursued remedies offered by the applicable contractual grievance procedure through three steps. Thereafter, the Respondent's grievance committee convened to decide whether to take the case to arbitration. On October 5, 1987, Attorney Lowell Chun-Hoon issued a written decision to the grievance committee, attached to Respondent's Motion to Dismiss as Exhibit A, concluding, based on Complainant's disciplinary record, that the probability of prevailing at arbitration was very small as Employer could show good cause for terminating Complainant for repeated violation of house rules regarding unauthorized absences. Chun-Hoon accordingly recommended that the grievance not be arbitrated.

Complainant was informed on October 13, 1987 of the Union's decision not to proceed with the arbitration of his grievance. Respondent Exhibit B, p. 3.

At this point, Complainant resorted to internal union appeals of the decision not to arbitrate. On October 16, 1987, Complainant appealed to ILWU Regional Director, Thomas Trask, in accordance with Article XXI of the Constitution of Local 142. The Regional Director found that there was "no breach of

the local union's duty of fair representation". Respondent Exhibit B, pp. 3-4.

Complainant then appealed to the International President. On August 22, 1988, this appeal was denied for "not being timely". Respondent Exhibit B, p. 4.

Complainant then appealed to the International Executive Board. The Board recommended that the findings of the International President be upheld. Respondent Exhibit B, pp. 5-6.

Thereafter, in accordance with the International Constitution, Complainant appealed his case to the Coast arbitrator. Arbitrator Sam Kagel issued a written decision, dated December 22, 1989, in which he concluded that the appeal was denied for failure to establish a lack of fair representation in the Union's pursuit of his grievance and in its determination not to pursue the grievance to arbitration. Respondent Exhibit B, p. 8.

Counsel for Respondent averred at the Board hearing that the Kagel decision was sent to Complainant in December of 1989. Complainant did not contest this assertion.

It is clear as argued by counsel for Respondent that the 90-day statute of limitations was not met in the instant matter. Complainant filed the subject complaint on July 13, 1990. Under Section 377-9(1), HRS, the complaint must be filed within 90 days of the alleged unfair labor practice, and under Section 378-51, HRS, within 90 days after the cause of action

accrues. Further, under Section 378-51, HRS, where the alleged failure to fairly represent an employee arises from a grievance, the cause of action is deemed to accrue when the employee receives actual notice that the labor organization either refuses or has ceased to represent the employee in a grievance.

Respondent asserts that the date of accrual of the instant cause of action is October 13, 1987, the date Complainant was informed of the decision not to arbitrate his grievance. This is a date two years and nine months to the day prior to the filing of the instant complaint and well outside the statute of limitations.

Even viewing the facts most favorably to the Complainant and using the date of Complainant's receipt of the Kagel arbitration decision in late December of 1989 as the operative event, Complainant is still untimely. His complaint as filed in July of 1990 is more than six months after the issuance of the Kagel decision.

Complainant offered no counter arguments to Respondent's assertions regarding Complainant's failure to comply with the 90-day statute of limitations. His remarks conceded his failure to meet the statute of limitations and were substantially directed to the merits of the underlying grievance.

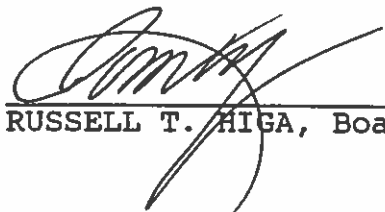
Based upon the foregoing, the Board dismisses the instant matter for failure to comply with the applicable statute of limitations.

DATED: Honolulu, Hawaii, September 20, 1990.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


GERALD K. MACHIDA, Board Member


RUSSELL T. HIGA, Board Member

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