

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of) JESUS S. PEREZ,))) Complainant,))) and)) JOHN WAIHEE, Governor, State of) Hawaii; DEPARTMENT OF TRANS-) PORTATION, State of Hawaii and) UNITED PUBLIC WORKERS, AFSCME,) LOCAL 646, AFL-CIO,))) Respondents.) _____)	CASE NOS.: CE-01-159 CU-01-77 ORDER NO. 866 ORDER GRANTING RESPONDENTS' MOTION TO DISMISS
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ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

On June 26, 1991, Complainant JESUS S. PEREZ (PEREZ) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondents JOHN WAIHEE, Governor, State of Hawaii; DEPARTMENT OF TRANSPORTATION, State of Hawaii (STATE) and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or UNION).

In his complaint, PEREZ contends that Respondent STATE violated Section 89-13, Hawaii Revised Statutes (HRS), by denying him a promotion to a General Maintenance Supervisor position because of his alleged excessive sick leave record, and by using an inconsistent selection process when it promoted another employee who allegedly had an excessive sick leave record. PEREZ further alleged that Respondent UPW violated Section 89-13, HRS, by refusing to represent him as a member of bargaining unit 1.

On July 19, 1991, Respondent UPW filed a Motion to Dismiss with the Board. In its motion, the UPW argued that the complaint filed by PEREZ should be dismissed for lack of jurisdiction since the prohibited practice charge is untimely and because PEREZ failed to state a claim for relief. The motion is based on the Board's Administrative Rules Section 12-42-42 and HRS Sections 89-14 and 377-9 which establish a 90-day statute of limitations.

On August 9, 1991, Respondent STATE joined in the UPW's motion to dismiss.

A hearing was held on the subject motion to dismiss on August 19, 1991.

At the hearing on the Motion to Dismiss, the following facts were agreed to by the parties:

Complainant JESUS S. PEREZ is an Equipment Operator II employed by the DEPARTMENT OF TRANSPORTATION, State of Hawaii, assigned to the Hilo International Airport. PEREZ is and was, at all times relevant herein, a member of bargaining unit 1 as it is defined in Subsection 89-6(a), HRS.

Respondent STATE is the public employer, as defined in Section 89-2, HRS, of members of bargaining unit 1.

Respondent UPW is the exclusive representative, as defined in Section 89-2, HRS, of bargaining unit 1.

On or about December 21, 1990, the Complainant applied for an airport General Maintenance Supervisor position in bargaining unit 2.

On March 18, 1991, Mr. Owen Miyamoto, Airports Administrator, notified the Complainant that he had been denied the General Maintenance Supervisor position. Transcript (Tr.) p. 3.

On March 25, 1991, the Complainant contacted Ann Delos Santos, a UPW business agent, to inquire about filing a grievance over his denial for promotion to the Unit 2 position. Delos Santos informed the Complainant that the UNION would not file a grievance to challenge a promotion to a Unit 2 position because of a previous adverse arbitration award issued in Frank Pavao, Jr., dated June 9, 1977. In Pavao, the Arbitrator denied the arbitrability of the Unit 1 employee's promotional grievance for a Unit 2 position. Tr. pp. 3-4.

On June 26, 1991, the Complainant filed the instant prohibited practice complaint with the Board against the UNION and the STATE.

Respondents UPW and STATE argued, at the hearing on the Motion to Dismiss, that the 90-day statute of limitations applicable to cases brought under Chapter 89, HRS, began to run on March 25, 1991, the date on which the UNION informed the Complainant that a grievance would not be filed to challenge the denial of his promotion to the Unit 2 position. Respondents argued that March 25, 1991 is the date of the adverse action and Complainant had 90 days from that date to file a complaint with the Board. Since PEREZ filed his complaint on June 26, 1991, his cases should be dismissed because the 90-day statute of limitations had expired.

In addition, Respondent UPW argued that the Complainant's grievance was not processed because of a uniform practice which applied to all Unit 1 employees. The UNION maintained that it was respecting the Arbitrator's decision which found grievances concerning promotions between bargaining units to be non-arbitrable. Since the 1977 decision, the UNION's practice has been consistently applied to all Unit 1 employees. UPW further argued that the Complainant is not being singled out, and the UNION's refusal to prosecute such a grievance applies uniformly to all unit members; therefore, the complaint against the UNION should be dismissed for failure to state a breach of duty of fair representation claim. Tr. pp. 7-8. Counsel cites NLRB v. Local 229 International Brotherhood of Teamsters, 782 F.2d 46, 51, (1986) and Lemon v. NLRB, 902 F.2d 810, 815 (1990), where the courts stated that there is no breach of duty of fair representation when a union acts in a uniform and consistent manner, in accordance with a policy affecting the majority as well as the minority. Tr. p. 6. The UNION contended that the practice of refusing to file promotional grievances for its members does not constitute a breach of duty because it is based on an arbitration award and applies to the majority as well as the minority in the bargaining unit.

The Complainant, who represented himself at the hearing, argued that he should not have been denied the promotion on the basis of his sick leave record. He argued that the injury he

sustained which caused him to take sick leave from 1987 to 1988 was, in fact, work-related.

The Complainant also stated that after his grievance had been turned down by the UNION, he was referred to the Hilo office of the Hawaii Civil Rights Commission where he processed a claim on May 23, 1991. Approximately one week later, the Commission notified the Complainant that they could do nothing for him and referred the Complainant to the Board. Tr. p. 11. The Complainant argued that the reason for his failure to meet the Board's 90-day statute of limitations was that he was pursuing his claim with the Commission.

Complainant charges that Respondent STATE generally violated Section 89-13, HRS, by improperly denying him a promotion from a Unit 1 position to a Unit 2 position because of his excessive use of sick leave. The Complainant also charged that the Employer used an inconsistent selection process when it promoted another employee who had an excessive sick leave record.

Section 89-13, HRS, reads in pertinent part:

Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

* * *

(8) Violate the terms of a collective bargaining agreement.

Complainant alleges that Respondent UPW generally violated Section 89-13, HRS, by improperly refusing to file a

grievance on Complainant's behalf challenging the STATE's actions. Section 89-13, HRS, reads in pertinent part:

Prohibited practices; evidence of bad faith.

* * *

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

* * *

(4) Refuse or fail to comply with any provision of this chapter;. . .

Section 377-9(1), HRS, made applicable to the Board by Section 89-14, HRS, provides that no unfair labor practice complaints shall be considered unless filed within ninety days of its occurrence. The Board has previously held that statutes of limitation are to be strictly construed and therefore dismissed a prohibited practice complaint which was filed one day beyond the limitations period. Fitzgerald, 3 HPERB 186 (1983).

An examination of the record leads the Board to conclude that the Complainant failed to comply with the applicable statute of limitations for the filing of prohibited practice complaints before the Board. Complainant confirmed that he received notice of the UNION's refusal to file a grievance challenging his denial for promotion to a Unit 2 position on March 25, 1991. Tr. p. 12. Following the UNION's denial, the Complainant filed a claim with the Hilo office of the Hawaii Civil Rights Commission on May 23, 1991. The Commission notified the Complainant that they could not help him and referred him to

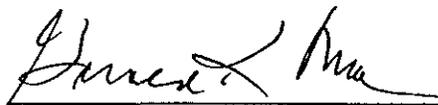
the Board. The Complainant did not file his complaint with the Board until June 26, 1991. Based upon the foregoing, the Board is compelled to conclude that the 90-day statute of limitations expired before the Complainant filed the instant cases with the Board.

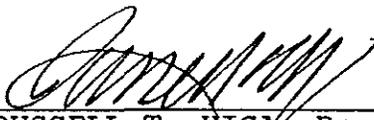
As the Board lacks jurisdiction over the instant complaints because of the noncompliance with the statute, the Board hereby dismisses these cases.

DATED: Honolulu, Hawaii, March 10, 1992.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


GERALD K. MACHIDA, Board Member


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