

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-10-80
)	
JOHN A. UENO,)	ORDER NO. 895
)	
Complainant,)	ORDER GRANTING RESPONDENT'S
)	MOTION TO DISMISS
and)	
)	
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO,)	
)	
Respondent.)	
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ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

On December 19, 1991, Complainant JOHN A. UENO (UENO) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union).

UENO alleges, inter alia, that UPW committed the following prohibited practices and violated Section 89-13, Hawaii Revised Statutes (HRS), by its publication of an article in the September/October 1991 edition of the Malama Pono entitled, "UPW Wins Due Process Arbitration".

1. UENO alleges that UPW misinformed its members by stating in the article that ". . . UPW will always fight for the rights and benefits of members," and ". . . UPW will always lead the battle to protect a member's due process right", thereby violating Section 89-3, HRS;

2. UPW interfered, restrained and coerced Complainant in his rights as guaranteed under Chapter 89, HRS;

3. UPW breached its duty of fair representation by not treating its members equally; and

4. Obstructed the grievance process by refusing to provide UENO with adequate assistance in his grievance against the Employer (State).

On December 24, 1991, the Board issued a Notice to Respondent of the subject Prohibited Practice Complaint by mailing a copy of the complaint to UPW by certified mail with return receipt requested. On December 26, 1991, the complaint was received by Akiona, a clerical employee of UPW. Transcript (Tr.) p. 11.

On January 14, 1992, UPW's counsel, Herbert R. Takahashi, Esq., filed an Answer to Prohibited Practice Complaint and Certificate of Service with the Board.

On January 21, 1992, UENO filed a written statement with the Board averring that UPW's answer to his complaint was untimely filed and such failure should constitute an admission of the material facts alleged in the complaint and a waiver of a hearing.

On February 6, 1992, UPW filed a Motion to Dismiss with the Board. UPW contends that the charge filed by UENO should be dismissed for: (1) lack of jurisdiction since the prohibited practice charge is untimely, and (2) for failure to state a claim upon which relief can be granted. The motion is based on the Board's Administrative Rules Section 12-42-42 and Sections 89-14 and 377-9, HRS, which establish a 90-day statute of limitations.

On February 13, 1992, Complainant UENO filed a document entitled Complainant's Motion to Dismiss with the Board. UENO's

motion argues, inter alia, that UPW's answer to the prohibited practice complaint was untimely and such failure constituted an admission of the material facts alleged in the complaint and a waiver of a hearing.

On February 18, 1992, UPW filed Respondent's Memorandum in Opposition to Motion to Strike Respondent's Answer together with a supporting affidavit of Gary W. Rodrigues, State Director of UPW. The memorandum submits that UPW's answer was filed on a timely basis, and even if it was untimely, this Board has no jurisdiction to act on the complaint.

A hearing was held on the subject motions to dismiss on February 19, 1992.

At the hearing on the motions to dismiss, Respondent UPW argued that the subject prohibited practice complaint stemmed from UENO's previous complaint filed with the Board in Case No. CU-10-68. UENO was promoted to Adult Corrections Officer (ACO) IV in 1988 and the promotion was rescinded in 1989 pursuant to a grievance settlement between the UPW and the State. UENO appealed his apparent "demotion" to ACO III to the State Civil Service Commission which initially restored him to the ACO IV position, and after reconsideration, sustained the rescission of the promotion. Thereafter, UENO filed a complaint with this Board in Case No. CU-10-68. The Board, however, dismissed UENO's complaint in Board Order No. 804 issued on October 4, 1990 for failure to comply with the applicable statute of limitations. UPW believes that the only relief UENO seeks is to be restored to the ACO IV position and contends that UENO's complaint is time-barred because he is

attempting to relitigate the previous matter. UPW also argued that UENO fails to state a claim for relief because he can prove no facts which support a prohibited practice charge against the UPW State Director.

Complainant appeared pro se at the hearing on this matter. UENO argued that the Malama Pono article published in September/October 1991 is fraudulent. According to UENO, he became angry after reading Rodrigues' statement, "The UPW will always fight for the rights and benefits of members," and "UPW will always lead the battle to protect a member's due process right." UENO claims that UPW never supported him in his appeal before the Commission. Instead, UENO argued that his due process rights were violated because UPW and the State interfered with his civil service remedies. Accordingly, UENO concluded that UPW did not fight for his rights and Rodrigues' statements were fraudulent and a gross misinterpretation of the actual facts. Transcript (Tr.) pp. 26-32.

UENO also stated that he received UPW's answer on January 15, 1992, more than ten days after the Notice to Respondent of Prohibited Practice Complaint was issued by the Board on December 24, 1991. Tr. p. 11. In accordance with Administrative Rules Section 12-42-45, UENO argued, the UPW's failure to file an answer should constitute an admission of the material facts and a waiver of a hearing.

Respondent UPW argued that the complaint was not received or reviewed by Rodrigues until January 14, 1992. According to his affidavit, Rodrigues is the only Union official who is authorized

to accept service of process for the Union in legal proceedings. Rodrigues' affidavit indicates that he was not present in the State until on or about January 14, 1992, when he first received the Notice. He immediately faxed a copy of the complaint to UPW's counsel. Counsel contends that actual service of the complaint was therefore not consummated until January 14, 1992. The answer to the complaint was filed with the Board on the same date, and accordingly, UPW's counsel concludes that the answer was timely filed.

The first issue presented is whether the Board has jurisdiction over the prohibited practice complaint. UPW contends that the complaint is time-barred because UENO seeks to relitigate the rescission of his promotion. As to the allegations raised by UENO regarding the UPW's alleged failure to represent him before the Commission in 1989 and 1990, the Board holds that those allegations have been litigated and are barred by the principles of res judicata.

However, the Board has jurisdiction to consider whether Rodrigues' statements constitute a prohibited practice as an interference or restraint of UENO's rights guaranteed under Chapter 89, HRS, and whether the UPW breached its duty of fair representation by not treating its members equally. The Board is empowered by Chapter 89, HRS, to resolve disputes concerning prohibited practices allegedly committed by employee organizations and to take such actions as it deems necessary and proper. We hold that our jurisdiction extends to UENO's allegations which are not precluded by the previous Board adjudication.

With regard to UENO's motion to dismiss, UENO argued that he received UPW's answer on January 15, 1992, more than ten days after service of the complaint. The Board's Administrative Rules Section 12-42-45 provides:

(g) If the respondent fails to file an answer, such failure shall constitute an admission of the material facts alleged in the complaint and a waiver of hearing.

In accordance with the foregoing section, UENO contends that he is entitled to receive a judgment in his favor.

UPW's counsel argues that the Rules do not specify how service of process is to be made upon a labor organization. Counsel indicates that Administrative Rules Section 12-42-42(b) provides that the Board shall serve a copy of the complaint upon the person charged. Counsel argues that the Rules do not state whether service by mailing to the last known address of the Union or whether actual service on the Chief Executive Officer will be required. Counsel relies on Tropic Builders, Ltd. v. Naval Ammunition Depot of Lualualei Quarters, Inc., 48 Haw. 306, 402 P.2d 440 (1965), for the proposition that service of process must be demonstrated by proof of delivery of a return of service and proof that the complaint was actually forwarded to a duly authorized representative of the organization.

Section 377-9(b), HRS, provides, in part:

The board shall serve a copy of the complaint upon the person charged, hereinafter referred to as the respondent. . . . Service may be by delivery to the person, or by mail or by telegram. . . .

The record indicates that a copy of the complaint was received through the mail by a clerical employee of UPW on December 26, 1991. Tr., p. 11. Although the UPW alludes that service was somehow deficient, the Board finds that service of the complaint in this case was proper under applicable statutes. Notwithstanding the foregoing finding, however, even if UPW's answer was untimely, no material prejudice resulted to Complainant's substantial rights from the delay in filing the answer. The fact that the answer was filed approximately two and one-half weeks after the complaint was served is immaterial and results in no detriment to Complainant because, as discussed, infra, the complaint fails to state a claim for relief.

The direct quotation attributable to Rodrigues reads as follows:

"The UPW will always fight for the rights and benefits of members," said UPW State Director Gary W. Rodrigues. This arbitration award is a solid foundation that confirms members' rights to be informed and have Union representation at meetings that may lead to disciplinary action. UPW will always lead the battle to protect a member's due process right," continued the State Director.

This statement appeared in the discussion of a successful arbitration award dealing with the Employer's responsibility to inform Union members of their right to have Union representation during meetings which may result in disciplinary action.

At the hearing, UENO argued passionately and extensively about his past experience with UPW with regard to his failed promotion and the UPW's perceived bad treatment which allegedly

violated his due process rights. Based upon his personal perception of UPW, UENO concluded that Rodrigues' statement was fraudulent and a gross misrepresentation of the actual facts, and therefore, constituted a violation of law. Tr. pp. 36-38. UENO admitted that his situation did not arise in a factual pattern where he was denied representation in a disciplinary setting.

The Board will not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the [Complainant] can prove no set of facts in support of his claim which would entitle him to relief." Bishop Est. Trust v. Castle & Cooke, 45 Haw. 409, 414 (1962) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

The Board finds that Rodrigues' statement was made within the realm of his personal views and was primarily rhetorical in nature. As the head of UPW, it is not unreasonable for Rodrigues to convey his views on what was characterized as a major victory for the Union to the membership. Even if Rodrigues was "puffing" his views in the newsletter article, there was no resulting curtailment or interference with employee rights or union activity. Absent evidence to the contrary, the Board assumes that readers are aware of the political nature of the comments, and Rodrigues' statements, however colorful and self-serving, did not interfere with any employee rights guaranteed by Chapter 89, HRS.

For the reasons detailed above, the Board grants Respondent UPW's Motion to Dismiss.

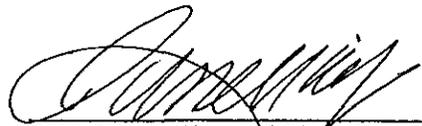
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DATED: Honolulu, Hawaii, August 13, 1992.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


GERALD K. MACHIDA, Board Member


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