

STATE OF HAWAII

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	CASE NO. CE-10-75
)	
ALVIS W. FITZGERALD,)	DECISION NO. 175
)	
Complainant,)	
)	
and)	
)	
GEORGE R. ARIYOSHI, Governor)	
of the State of Hawaii,)	
)	
Respondent.)	

In the Matter of)	CASE NO. CU-10-43
)	
ALVIS W. FITZGERALD,)	
)	
Complainant,)	
)	
and)	
)	
UNITED PUBLIC WORKERS,)	
LOCAL 646, AFSCME, AFL-CIO,)	
)	
Respondent.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 20, 1981, Complainant ALVIS W. FITZGERALD, a former Adult Corrections Officer and member of Bargaining Unit 10 at the Oahu Community Correctional Center [hereinafter referred to as OCCC] filed prohibited practice complaints against his former employer, GEORGE R. ARIYOSHI, Governor of the State of Hawaii [hereinafter referred to as ARIYOSHI], and the exclusive representative of Unit 10 employees, the UNITED PUBLIC WORKERS, LOCAL 646, AFSCME, AFL-CIO [hereinafter referred to as UPW].

Complainant alleges he was improperly dismissed from OCCC and also alleges that the UPW inadequately

represented him at a disciplinary hearing prior to his dismissal.

The complaint against Respondent ARIYOSHI reads as follows:

Complaint. . . .I was fired from Hawaii State Prison because of an injury I received on duty and under medication.

On October 20, 1978 while working at Hawaii State Prison I was injured by a falling ladder while on my way to my assigned post. The injury was a lower back strain. On January 20, 1980 a hearing was conducted and determined that I did sustained [sic] an injury on the job. For the next three years I was under doctor's care. On April 18, 1981 while on sick leave I was called to work because of manpower shortage and on the following morning at approx. 6:30 AM I was written up for sleeping on duty and terminated three months later July 20, 1981. Board Ex. 2.

The complaint against Respondent UPW reads as follows:

Complaint. . . .Misrepresentation by UPW 10 [sic] on June 25, 1981.

On June 25, 1981 there was a hearing to determine whether [sic] I was guilty or innocent of the charge for which I was terminated. Present at the hearing was Antone Olim Administrator, Joe Chang Sgt, Ed Shimoda, Mr. Akiyama union steward and I Alvis Fitzgerald. At the hearing Mr. Akiyama had very little words to say in my behalf and I Didn't [sic] feel represented at all. Board Ex. 1.

A motion to dismiss for failing to comply with the statute of limitations regarding filing of prohibited practice charges was made by Respondent UPW at hearing on July 8, 1982, before Complainant presented his case. Respondent ARIYOSHI joined in this motion. Tr. 11/4/82, p. 153. This motion was denied since facts elicited at

subsequent hearings might indicate that the complaints were not time-barred. Tr. 7/8/82, p. 4.

On October 28, 1981, Respondent ARIYOSHI filed a Motion for Particularization. Board Ex. 5. This motion was granted by Order No. 433, dated November 12, 1981, which directed Complainant to file a particularization setting forth 1) the provisions of Section 89-13, Hawaii Revised Statutes [hereinafter referred to as HRS], which had allegedly been violated, and 2) facts regarding which collective bargaining contract remedies had been pursued by Complainant. In accordance with applicable Administrative Rules, the particularization was due no later than the fifth working day after service of the order. Board Ex. 7.

On November 18, 1981, the Board, by Order No. 434, consolidated the prohibited practice complaints against Respondents ARIYOSHI and UPW as the complaints involved substantially the same parties and issues. Board Ex. 7.

At hearing on December 3, 1981, Complainant requested and was granted an extension of time within which to file his particularization, as he had yet been unable to find a lawyer.

At a prehearing conference on February 25, 1982, the Board decided, with the consent of the parties, that the previously granted Motion for Particularization would be held in abeyance until Complainant had had an opportunity to present his case in a hearing on the merits. It was decided that after such presentation, the Board would address Respondent ARIYOSHI's Motion for Particularization.

Hearings were held in the instant matter on September 15, October 4, October 12, October 27, and November 4, 1982.

Upon a full review of the record in this case, the Board makes the following findings of facts, conclusions of law and order.

FINDINGS OF FACT

Complainant ALVIS FITZGERALD was at all times relevant herein, employed at the OCCC from 1975 until his dismissal, effective July 20, 1981. Tr. 9/15/82, p. 11. At the time of his dismissal Complainant was an Adult Corrections Officer [hereinafter referred to as ACO] III and included in bargaining unit 10 as defined in Subsection 89-6(a), HRS.

Respondent GEORGE R. ARIYOSHI, Governor of the State of Hawaii, is the public employer, as defined in Subsection 89-2(9), HRS, of employees at OCCC in bargaining unit 10.

Respondent UPW is and was, at all times relevant, the exclusive representative, as defined in Subsection 89-2(10), HRS, of employees in bargaining unit 10.

By letter from Franklin Y. K. Sunn, Director of Social Services and Housing, dated July 7, 1981, Complainant was notified that he would be terminated from his position at OCCC, effective July 20, 1981. The letter states that Complainant was sleeping in his car away from his assigned post at 6:30 a.m. on April 17, 1981, after reporting to work about four and one-half hours late. The letter further states that although it was established at the disciplinary hearing held at OCCC on June 25, 1981 that Complainant was on medication which made him sleepy at the time of the incident, he failed to notify his supervisor, Damien Kuamoo,

of his use of the medication prior to reporting to work. Due to the "misconduct" of sleeping on the job, which the letter notes was his second such infraction, Complainant was suspended from July 6 to July 20, 1981 pending dismissal. Complainant [hereinafter referred to as C.] Ex. 1.

Complainant explained that in October 1978 he had fallen off a ladder at work, thereby injuring his back. He has been under a doctor's care since. Tr. 9/15/82, p. 12. As a result, Complainant has been taking a painkiller called Flexeril, which a certificate from Complainant's physician states tends to make him sleepy. State [hereinafter referred to as St.] Ex. 4.

Complainant stated that prior to the day he allegedly fell asleep, April 17, 1981,¹ he had been on sick leave for about three days due to his back injury. However, due to a staffing shortage at the Keehi Annex of OCCC, his supervisor, George Flores called him and asked him to report to work. Tr. 9/15/82, p. 16. He received the call about 11:00 p.m., April 16, and reported to work at 3:30 a.m., April 17. Tr. 9/15/82, pp. 13-15, 37-38. Complainant admittedly reported to work because he wanted to help out, and because he considered Flores a "great guy" and did not want to turn him down. Tr. 9/15/82, p. 56. Complainant testified that he took two tablets of Flexeril about midnight, before reporting to work, and two more after

¹Throughout the hearings, confusion arose as to whether the incident in question occurred on April 17 or 18, 1981. The evidence as discussed clearly indicates that April 17 is the proper date. Tr. 10/4/82, pp. 20, 66.

arriving at the prison about 3:20 a.m. Tr. 9/15/82, pp. 15, 20. Upon arriving, Complainant entered the parking lot, and then went into the administration building where he was assigned to Post No. 6 by his supervisor, Flores. Because it was raining, Complainant parked his car near the "E" building, along Dillingham Boulevard, on the grassy area outside the perimeter fence, and sat in his car. Complainant stated he was told by his supervisor to sit in his car since there is no guard shack at the post to which he was assigned. Tr. 9/15/82, pp. 16-17.

Complainant remained in his car until 6:30 a.m. when he was awakened by ACO Drake. Another ACO, R. J. Vistart, and Lieutenant Oscar Ignacio, were also present when Complainant was found sleeping. The watch terminated at 7:00 a.m. Tr. 9/15/82, pp. 21, 40.

In the immediately following workdays, Complainant carried on a normal work schedule. In late May 1981, Complainant alleges he was informally told by Ignacio that he was going to be fired. Tr. 9/15/82, p. 23; Tr. 10/4/82, pp. 39-40. At that point Complainant did not consult with his supervisor or higher administration officials as he felt it would be "fruitless." He felt the word that he would be fired originated with the administrator of the OCCC, Antone Olim. Further, he did not consult his union representative. Tr. 9/15/82, p. 24.

Complainant also alleges that shortly after he was told by Ignacio that he was going to be fired, and about a month before the hearing, he submitted a letter of resignation to Franklin Sunn (St. Ex. 5), but the letter was returned to him, unaccepted. The resignation was expressly

rejected in the letter of termination. C. Ex. 1; Tr. 9/15/82, p. 50.

On June 25, 1981, a hearing was held by the OCCC administration to investigate the charges against Complainant. Others present at the hearing were Antone Olim, Ed Shimoda and Joe Chang from the administration and UPW business agent, Alvin Akiyama.

About ten minutes before the hearing, Complainant alleged, he talked to Akiyama and got the impression that he "really didn't want to have a lot to say." Tr. 9/15/82, p. 27.

Complainant further alleges that at the June 25 hearing he wanted to refute the allegations in the letter of termination that he was found asleep away from his post, but that Olim would not let his supervisor come in to participate in the hearing and explain the incident in question, and that his union representative "didn't have anything to say" on his behalf and did not "steer [him] in the right direction." Tr. 9/10/82, pp. 30-31. Thus, the meeting lasted about ten minutes. Tr. 9/15/82, pp. 31-34.

Complainant alleges that his union representative knew of his resignation attempt but did not raise the subject at the hearing. Tr. 9/15/82, pp. 35-37. The union representative, Complainant alleges, was familiar with his case, including the impending dismissal and resignation attempt, due to talks they had had previous to the meeting. Tr. 9/15/82, pp. 47, 50-52, 58.

Upon receiving the letter of termination, Complainant did not contact his union because he felt that since the union representative did nothing to assist him at

the hearing, it would be futile to seek help from the union. Tr. 9/15/82, pp. 45, 59-60. No grievance was filed pursuant to the contract.

Complainant admitted receiving previous written reprimands for offenses, including sleeping on the job. However, Complainant alleged that bias was a factor in the disciplinary action instituted by the then-administrator (i.e., "administrative supervisee" - Tr. 10/4/82, p. 45) at Keehi Annex, Oscar Ignacio. Tr. 9/15/82, pp. 38-39; Tr. 10/4/82, pp. 37-38. Complainant further suggested that this bias reached to the then-administrator of OCCC, Antone Olim, who, Complainant alleged, had a close personal relationship with Ignacio. Tr. 10/4/82, pp. 38-39, 90.

Alvin Akiyama, the UPW business agent who handled Complainant's case, gave a version of his role in the case departing significantly from Complainant's testimony.

Akiyama stated that Complainant never contacted him about the incident in question but that a "few days" before the June 25 hearing he was contacted by the UPW shop steward named "Jervis." Tr. 10/4/82, p. 6. As a result, Akiyama went to OCCC before the hearing to talk to Complainant. Complainant, Akiyama stated, only told him that on the day in question his supervisor had asked him to report to work, that he was only "dozing off as opposed to sleeping," and that his dozing off was due to the medication he was taking. Tr. 10/4/82, p. 8. At the hearing Akiyama stated he made a "passionate plea" that Complainant's falling asleep was due to the drugs he was taking at his doctor's direction and that his supervisor had asked him to report to work. Akiyama denied that Complainant had told him George

Flores was the supervisor on the night in question and that Flores had told him to stay in his car because it was a rainy night. Akiyama, therefore, did not raise those two points at the hearing nor did he inquire as to the name of the supervisor involved. Tr. 10/4/82, pp. 10-16, 21, 25. Akiyama further stated that minutes before the hearing he clarified with Complainant that the basis for his defense would be Complainant's being on medication. Tr. 10/4/82, p. 15. Thus, Akiyama had told Complainant previously to obtain doctor's verification of his use of the medication. Tr. 10/4/82, pp. 20-21.

Akiyama acknowledged that Complainant mentioned he was thinking of resigning, but never at any point discussed the letter of resignation which Complainant submitted after the hearing. Tr. 10/4/82, pp. 18-19, 25.

Akiyama stated that he was never contacted by Complainant at any time after the June 25 hearing, even after the employer sent the union a copy of Complainant's letter of termination. Tr. 10/4/82, pp. 17-18. Akiyama stated that he made an "honest attempt" to communicate with Complainant by phone and through writing subsequent to the termination letter to find out whether Complainant wanted to contest it but never received a reply. Tr. 10/4/82, pp. 29-31.

Complainant disputed Akiyama's claim that Complainant did not tell him his supervisor's name before or at the hearing. Tr. 10/4/82, p. 13.

However, Olim also denied that Complainant requested that his supervisor be called into the meeting and denied that Complainant raised the argument in the hearing

that he had been assigned to his car by his supervisor. Tr. 10/4/82, pp. 84, 88, 98.

Olim further testified that upon receiving the resignation letter, he transmitted it to the Corrections Division, Department of Social Services and Housing, with a recommendation that Complainant be suspended and then terminated. St. Ex. 1. Olim stated that the resignation offer was not accepted because of Complainant's previous record, which included discipline for sleeping, and a poor attendance record. Tr. 10/4/82, pp. 84-85, 96-97.

Complainant introduced three witnesses to support his allegation of disparate treatment. ACO III Joe Dupont testified that he knew of other ACOs caught sleeping more than once who were still working at OCCC. Tr. 11/27/82, p. 10. ACO IV Tui Isaia said the administrators unfairly fired some people for sleeping while only suspending others. Tr. 11/27/82, p. 44. Former ACO Isaac Veal testified that other ACOs caught sleeping were only suspended for up to two weeks. Tr. 11/4/82, p. 7.

ACO George Flores corroborated Complainant's testimony in all essential respects. He testified that on the day in question he was an ACO III and temporarily assigned as supervisor of the midnight watch at the Keehi Annex. Tr. 9/15/82, p. 71; Tr. 10/4/82, p. 7. At about 11:00 p.m. on April 16, he phoned Complainant and asked Complainant to do him a favor and report to work even though he was on sick leave and taking medication. When Complainant told Flores that he was on medication that made him sleepy, he said, "I don't care, come in anyway. If anything happens, I'll take the responsibility." Tr. 9/15/82, p. 74.

Flores wanted Complainant to "fill a gap" in the wall of security, and even though Complainant was on medication, his presence at the post would deter prisoners thinking of escaping. Tr. 9/15/82, p. 81. This was necessary because of the high inmate population at the time and because "the weather had been very bad that night." Tr. 9/15/82, p. 72; Tr. 10/12/82, p. 18. Flores further testified that because of the bad weather, he directed Complainant upon his arrival, to use his car as his assigned post, and to park outside the perimeter fence on the mauka-ewa corner of the facility. Tr. 9/15/82, pp. 72-73. That post has a "home-made" tower which leaks and on rainy nights Flores customarily assigned guards at that post to sit in either a State vehicle or their own car. Tr. 9/15/82, pp. 80-81.

Before leaving the prison sometime after 7:00 a.m. on April 17, 1981, Ignacio told Flores that he, Sergeant Drake, and Vistart caught Complainant sleeping. Flores stated that "prior to that, they didn't know that I did make a check and Mr. Fitzgerald was up." Tr. 9/15/82, pp. 75-76.

On reexamination, Flores stated that not only did Ignacio tell him that Complainant was caught sleeping, but at the time of the sleeping incident, Ignacio also called Flores from the office to the fence area to show Complainant asleep in his car about 25 feet away outside the fence. Vistart was called from an adjacent post to wake Complainant. Tr. 10/12/82, pp. 24-28, 54-55. Flores stayed within the fenced area, however, turned around and went back to the office after seeing Complainant, whom he maintained, appeared to be awake. Tr. 10/12/82, p. 28.

Flores was "pretty sure" that when Ignacio called him out to the fence he told Ignacio that he had called

Complainant to work while on medication and that he told Complainant he would "take responsibility." Tr. 10/12/82, p. 35. Flores stated he told Ignacio that he had assigned Complainant to that post, told him to stay in his car and that he was on medication, but Ignacio "didn't give a damn," and did not listen to him. Ignacio told him not to make a report, which he should have done as watch supervisor. On reexamination, after it was submitted that Flores either was not present or not on official duty Flores stated that Ignacio told him not to make a report because he was not the official supervisor. Tr. 9/15/82, pp. 76-77, 81; Tr. 10/4/82, pp. 60-62, 67-70, 73-75; Tr. 10/12/82, pp. 30-31, 53-54, 60.

At another point in his testimony, Flores said he did not say anything when summoned to the fence, because, "There was nothing to say at that time when I went up to the fence, because Fitz was up." Tr. 10/12/82, p. 55.

At the time of the alleged misconduct, the Annex was supervised by Lieutenant Oscar Ignacio who was directly responsible to OCCC Administrator Olim. Ignacio refuted Complainant's and Flores' testimony. He testified that he arrived at OCCC between 6:30 a.m. and 7:00 a.m. on the day in question and made a facility inspection. At that time he, along with Sergeant Drake, saw Complainant sleeping in his car. He then directed Vistart to wake Complainant. He did not know what post Complainant was assigned to. Tr. 10/4/82, pp. 33-35.

Ignacio stated Complainant never told him that Flores had instructed Complainant to sit in his car, and that he never saw Flores or talked to him about Complain-

ant's assignment that night. The only time he talked to Flores about the incident was about a week before Ignacio testified before the Board at which time Flores made only a vague accusation about being "set-up." Tr. 10/4/82, p. 62.

Ignacio also disputed Complainant's claim that he was assigned to his own car as his post by Flores, on the basis that Damien Kuamoo, not Flores, was the "ACO in charge" on the day in question. St. Ex. 10, p. 3; Tr. 10/4/82, pp. 36-37; Tr. 11/4/82, p. 24. Ignacio maintained Flores was not present on the day in question. Tr. 10/4/82, pp. 64, 67-69.

Vistart's testimony was in accord with Ignacio's. He was assigned to the post next to Complainant's when he saw Ignacio and Drake standing in front of Complainant's car, inside the fence. They called Vistart over and had him wake Complainant. Vistart went to the passenger side of the car, where Complainant was sleeping and called his name to wake him. St. Ex. 12; Tr. 10/27/82, pp. 56-57. He said Flores was not with Ignacio and Drake when this occurred. Tr. 10/27/82, p. 60. He did concede, however, that from Post 6, his post that night, people coming from the administration building would be blocked from view by the dorm buildings, until they were "at the corner to where I've spotted them." Tr. 10/27/82, p. 77.

Respondent ARIYOSHI alleged that ACO Damien Kuamoo was the official supervisor for the watch in question rather than Flores. Kuamoo maintained he witnessed Drake and Ignacio check on Complainant, then returned to the administration building to tell Flores to check on his men. Tr. 11/4/82, pp. 40-41. The three then went outside and returned after some period. Tr. 11/4/82, pp. 40-42, 48.

ACOs in charge are designated as such by Ignacio and Fred Ragasa, the acting correctional care administrator. Tr. 10/4/82, p. 48; Tr. 11/4/82, p. 97. A temporary assignment must be made for an ACO III to so function. Tr. 11/27/82, p. 29. Such temporary assignments to supervisor are made on the basis of competence and seniority. Tr. 11/4/82, pp. 100-01. Final approval is given by Ragasa. Tr. 11/4/82, p. 101.

The ACO in charge is identified for each shift in the "daily movement log" book. St. Ex. 8; Tr. 10/4/82, pp. 48-49. The ACO in charge, as supervisor of the shift, is responsible for assuring that each of the three shifts is filled. Tr. 10/4/82, pp. 46-47. ACO shift assignments are made beforehand. When ACOs report for their assigned shifts, their names and time of entry are recorded in an "entry log book" by the ACO in charge. St. Ex. 9; Tr. 10/4/82, pp. 47-49; Tr. 11/4/82, p. 111.

The Department of Personnel Services Notification of Temporary Assignment, dated July 6, 1981, indicates that on April 17, 1981 Kuamoo was temporarily assigned to the position of ACO IV from ACO III. St. Ex. 11; Tr. 10/4/82, p. 57; Tr. 11/4/82, p. 26. Further, daily personnel attendance reports and the Annex "daily movement log" and "entry log" also indicate Kuamoo was in charge and that Flores was on his day off on the day in question. St. Ex. 9, p. 2; Tr. 10/4/82, pp. 53, 56.

The "daily movement log" also has the notation on the date in question, "Lorenzo - STN BY FOR Fitz call be late," which according to Ignacio, means that ACO Lorenzo was to remain at the post until FITZGERALD, who called

saying he would be late, arrived. St. Ex. 8, p. 3; Tr. 10/4/82, pp. 50-52. The "entry log" also has a notation for Lorenzo, "STN BY FOR FITZ," which meant, according to Ignacio, that Lorenzo would be on duty until relieved by FITZGERALD. St. Ex. 9, p. 2; Tr. 10/4/82, p. 53.

Kuamoo stated he wrote the relevant entries (Tr. 11/4/82, p. 23), but that the actual message from Complainant was received by someone else. Tr. 11/4/82, p. 73.

Despite the introduction of log book entries showing Complainant called in saying he would be late, Flores maintained that he called Complainant to come in to work and maintained that Complainant was sick when he was called. Tr. 10/12/82, pp. 43-47.

Department of Social Services and Housing attendance reports further indicate that Complainant worked a full shift from April 10 through 15, had a day off on April 16 and worked 3½ hours of a regularly scheduled shift on April 17. St. Ex. 6; Tr. 10/4/82, pp. 57-59. This contradicts Complainant's claim that he was sick for three days prior to the day in question.

Complainant did not dispute the records showing he worked prior to the day in question, but did dispute the argument regarding Flores being on duty and in charge at the time in question. Complainant stated, and Ignacio conceded, that even on his days off Flores worked overtime "practically every day" within OCCC but outside the Annex. Tr. 10/4/82, pp. 63, 70. See also, testimony of Joe Dupont. Tr. 11/27/82, p. 24. Olim also stated that Flores worked overtime in the "main unit." Tr. 10/4/82, p. 98. Flores, when reexamined, confirmed this, saying he worked as often

as he could, and sometimes seven days a week, on the day watch at the main building. Tr. 10/12/82, p. 14. He was not compensated for this work but did it because he "cared," and because the staff was shorthanded. Tr. 10/12/82, p. 12.

Joe Dupont gave his opinion, however, that Flores would not go in on the first watch (11:00 p.m.-7:00 a.m.) unless he was being paid. Tr. 11/27/82, p. 40. Vistart's testimony was in accord. Tr. 10/27/82, p. 69. Kuamoo, however, said Flores came in on his own without pay. Tr. 11/4/82, p. 29.

Complainant further asserted that Flores was held in such esteem by other ACOs that even if another ACO was in charge and Flores was present, Flores' authority would be accepted and his orders followed. Tr. 10/4/82, pp. 99-100. Accord, testimony of Joe Dupont (Tr. 11/27/82, pp. 19, 30) and R. J. Vistart (Tr. 10/27/82, pp. 70, 74-75). Flores stated that any time he was off from work, Kuamoo would be temporarily assigned as ACO in charge. Tr. 10/12/82, pp. 39-40. Flores said that even on nights when he was not supervising, he would give his replacement directions because he "knew what he was doing" and was respected by other ACOs. Tr. 10/12/82, pp. 15, 33-34. He did this with no official assignment to duty. Tr. 10/12/82, p. 19. He thus called Complainant in on the day in question under these circumstances. Tr. 10/12/82, p. 20.

Flores maintained that Kuamoo knew he had called Complainant in to work (Tr. 10/12/82, pp. 34, 40), and that Kuamoo knew Complainant was on medication. Tr. 10/12/82, p. 37. Kuamoo stated Flores did tell him that he had called Complainant (Tr. 11/4/82, pp. 44, 87), but that Flores did

not say Complainant was coming off of sick leave. Tr. 11/4/82, p. 87. Kuamoo stated that, on the day in question, even though he was the supervisor in charge he relinquished his supervisor capacity to Flores freely. Tr. 11/4/82, pp. 29-30. Kuamoo further testified that he was present when Complainant arrived and was instructed by Flores to take his vehicle to his post. Tr. 11/4/82, pp. 30-33.

It was denied by Olim that Flores could have the capacity to direct Complainant if he was off-duty and another ACO was in charge. Tr. 10/4/82, pp. 98-99. Accord, testimony of Joe Dupont. Tr. 11/27/82, p. 21. Fred Ragasa stated it was impossible to work voluntarily without pay. Tr. 11/4/82, p. 107. Also, he did not think Flores would work for free. Tr. 11/4/82, p. 108. It would "not be in keeping" with security measures for a volunteer to assume supervisory duties given the fact that there was a temporarily assigned watch supervisor. Tr. 11/4/82, p. 109. He also stated that an ACO III, who while on duty acted in a supervisory capacity, would not retain such capacity while off duty. Tr. 11/4/82, p. 135.

Vistart said at one point that both Kuamoo and Flores were present that day, though he did not recall which was acting as supervisor. Tr. 10/27/82, pp. 62-63. At another point he said he could not remember seeing Flores at all on that date, though he could not definitely recall. Tr. 10/27/82, pp. 69-70.

Kuamoo maintained that Flores was present on the shift in question. Tr. 11/4/82, pp. 28, 36-37. Kuamoo also stated that Flores would call in extra guards to work if he felt that he needed reinforcement, in spite of the administration's objections. Tr. 11/4/82, p. 71.

Fred Ragasa stated that during the period in question he repeatedly had to remind Ignacio not to permit unauthorized post assignments; i.e., more than four guards per watch. If Ignacio, as Annex administrator, could justify the excess assignments, Ragasa would approve it. If not, Ragasa would not approve the overtime pay after-the-fact. Tr. 11/3/82, pp. 102-05. He discussed this matter with Flores also, many times. Tr. 11/4/82, pp. 106-07. He conceded, however, that there were few times when he disapproved such overtime pay. Tr. 11/4/82, p. 115. He also conceded that he did not check with Kuamoo as to why, on the night in question, six guards were used instead of four. Tr. 11/4/82, p. 122.

Ignacio stated that a policy prohibiting the parking of cars on the grass perimeter of OCCC and the use of cars as posts was promulgated and in effect at the time in question by the OCCC Administrator, Antone Olim. Tr. 10/4/82, pp. 35, 67. Olim's testimony was in accord. He implied that the termination based on Complainant's being in his car was valid because Complainant was not in an assigned gun post and because of a standing written order prohibiting the taking of cars to posts. St. Ex. 14; Tr. 10/4/82, pp. 87-88; Tr. 11/4/82, pp. 97-98. Ragasa stated he also issued such a memo subsequent to one issued by Olim because of continuous abuse by ACOs. St. Ex. 14; Tr. 11/4/82, pp. 97-98. The policy does not allow for exceptions in rainy weather. Tr. 11/4/82, p. 100. Flores said he was aware of this but "took responsibility" because it was raining. Tr. 10/12/82, p. 37.

ACO Joe Dupont testified that guards do use cars as their posts, though this "depends on the weather." Tr. 11/27/82, pp. 7, 16. He was unaware of any policy against using cars as posts. Tr. 11/27/82, p. 16.

ACO Tui Isaia said an order against using cars as posts was once issued but that it was disregarded. Tr. 11/27/82, pp. 46-48.

Vistart said Olim put out such a memorandum, but implied that Flores "overruled" or "ignored" it with Ignacio's consent. Tr. 10/27/82, p. 61. He testified that cars were used as posts in bad weather. Tr. 10/27/82, p. 56. At times when Vistart acted as supervisor he also ignored the policy, with Ignacio's and Drake's knowledge. Tr. 10/27/82, pp. 61-62.

Kuamoo was unaware of any such written policy. He said that cars were used as posts "every day." Tr. 11/4/82, pp. 54, 78.

The State disputed Flores' claim that it was raining on the night in question, introducing United States Weather Service data showing no rainfall for April 16 and 17 with a trace of rainfall on April 18, 1981, as measured at the Honolulu International Airport. St. Ex. 13; Tr. 10/12/82, pp. 18-19. ACO Vistart also testified that it did not rain on the night in question. Tr. 10/27/82, p. 75. Kuamoo also did not recall any rain. Tr. 11/4/82, p. 31.

CONCLUSIONS OF LAW

Complainant's case raises numerous and serious questions as to the propriety of the conduct of the parties involved herein. Of concern are questions regarding the lax

administration of OCCC, especially the Keehi Annex, as raised by Complainant's case, and the possibility that Complainant was a victim of administrative breakdowns at that facility. Complainant's case, including Flores' supporting testimony, because of inconsistencies with submitted documentation, however, also raises questions as to Complainant's and Flores' accuracy or truthfulness in presenting their case.

Despite the serious substantive questions presented herein, the Board is constrained to dismiss Complainant's charges against both Respondents ARIYOSHI and UPW on the basis that the period prescribed by statute within which Complainant had to file his charges with the Board lapsed before his charges were in fact filed.

Applicable statutes and rules require that complaints be filed within 90 days of the occurrence of the alleged prohibited practice. See Sections 89-14 and 377-9 (1), HRS and Administrative Rules Section 12-42-42.²

The alleged prohibited practice of Respondent ARIYOSHI occurred July 20, 1981, the effective date of Complainant's dismissal. C. Ex. 1, letter of dismissal.

²Applicable provisions of the Hawaii Revised Statutes provide:

Sec. 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. All references in section 377-9 to "board" shall include the Hawaii public employment relations board and "labor organization" shall include employee organization.

Ninety days measured from July 20, 1981 falls on October 18, 1981. As the latter date fell on a Sunday, Complainant had, under Administrative Rules Subsection 12-42-8(c),³ until the next day, October 19, to file, but filed instead on October 20. Despite the fact that Complainant missed the deadline by only one day, the Board cannot waive the defect on the basis of substantial compliance, as it is clear that

Footnote 2 continued

* * *

Sec. 377-9(1) No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.

Administrative Rules Subsection 12-42-42(a) provides:

Complaint. (a) A complaint that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee, employee organization, public employer, or any party in interest or their representative within ninety days of the alleged violation.

³Administrative Rules Subsection 12-42-8(c) provides as follows:

(c) In computing any period of time prescribed or allowed by these rules or by order of the board, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation. As used in this section, "holiday" shall mean any day designated as such pursuant to section 8-1, HRS. [Emphasis added.]

statutes of limitation are to be strictly construed.

Thurston v. Bishop, 7 Haw. 421 (1888); Wong Min v. City and County of Honolulu, 33 Haw. 373 reh. den.; 33 Haw. 409 (1935).

The alleged prohibited practice of Respondent UPW occurred on June 25, 1981, the date of the investigatory meeting at OCCC at which union representative Akiyama allegedly failed to provide adequate representation to Complainant. Ninety days measured from June 25, 1981 falls on September 23, 1981, well before the date of Complainant's filing on October 20, 1981. Even using Complainant's date of dismissal as the operative date for limitations purposes, as discussed above that date is also beyond the applicable limitations period. Moreover, no facts emerged at hearing indicating that acts subsequent to those from which the filing period is being measured herein occurred which could be construed as extending the filing period.

ORDER

Respondent ARIYOSHI's motion for particularization is denied.

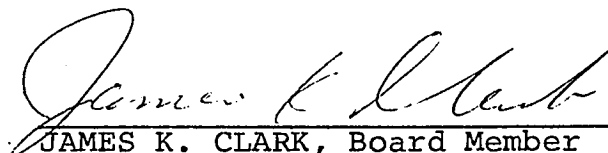
Pursuant to motion by the Respondents, the complaints against Respondent ARIYOSHI and Respondent UPW are dismissed for failure to comply with the applicable statute of limitations.

DATED: Honolulu, Hawaii, July 29, 1983.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD



MACK H. HAMADA, Chairperson



JAMES K. CLARK, Board Member

Concurring Opinion

While agreeing with the majority decision dismissing the complaints on the basis of a failure to meet the statute of limitations, I feel compelled to register my opinion on certain points which, I feel, should not pass without comment.

I feel that the penalty of dismissal is too severe. Complainant had earned a considerable amount of seniority and was, it can be safely stated, a competent ACO for the most part. The loss of a job, it goes without saying, is a serious loss, and one that will remain on Complainant's employment record. Given the testimony, admittedly spotty and unsubstantiated, that other similar cases were not treated so severely as the present one, it is hard to justify in my mind the severity of the penalty.

Under these circumstances, the refusal to accept the resignation offer of Complainant is hard to justify, and makes me seriously question whether the OCCC administration had a good faith intention to handle Complainant's case in an even-handed manner. The alleged instructions to Flores to not make a report on Complainant's infraction and the aforementioned alleged inconsistent treatment raises questions in my mind as to whether Complainant was treated fairly by the OCCC administration. It is clear to me that by customary practice, Flores had come to act as supervisor even when he was not officially so designated. It is therefore a real possibility that, if he was acting as such an unofficial supervisor on the night in question, Complainant was following instructions that both the OCCC administration and the ACO staff had come to regard as valid

orders. While still mindful of inconsistencies in the stories of both Complainant and Flores, I feel that the OCCC administration had permitted shoddy practices to prevail in the personnel administration at the Keehi Annex and that Complainant had, to some considerable extent, become a victim of a selective correction of such shoddy practices.

Finally, I believe that the UPW's representation of Complainant was characterized by a pronounced lack of vigor, though not amounting to a prohibited practice. The half-hearted representation and follow-through in Complainant's case did him a worse disservice than if the UPW had not represented Complainant at all.

DATED: Honolulu, Hawaii, July 29, 1983.


JAMES R. CARRAS, Board Member

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