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Case No. 18-CU-05-360, 18-CE-05-911

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

SANDRA J. ROBERTS,

Complainant,

and

LYLE T. LEONARD, Deputy Attorney General, Dept. of the Attorney General; AMELIA A. JENKINS, Interim Associate Dean for Academic Affairs University of Hawaii, College of Education; MARY JO NOON, Special Education Department Chair, University of Hawaii, College of Education; SEAN ARAI, State of Hawaii DOE, Personnel Development Branch; and ANDREA ESHELMAN, Hawaii State Teachers Association,

Respondents.

CASE NOS.

18-CU-05-360, 18-CE-05-911

DECISION NO. 493

FINDINGS OF FACT;
CONCLUSIONS OF LAW; AND
ORDER

FINDINGS OF FACT; CONCLUSIONS OF LAW; AND ORDER

I. PROCEDURAL BACKGROUND

On February 9, 2018, Complainant SANDRA J. ROBERTS, (Complainant), Self-Represented Litigant (SRL), filed a prohibited practice complaint (Complaint) with the Hawaii Labor Relations Board (Board) against Respondents LYLE T. LEONARD, Deputy Attorney General, Department of the Attorney General (Leonard); AMELIA A. JENKINS, Interim Associate Dean for Academic Affairs, University of Hawaii, College of Education (Jenkins); MARY JO NOONAN (incorrectly identified as Mary Jo Noon), Chairperson, Special Education Department, Special Education Department, University of Hawaii (UH), College of Education (Noonan); SEAN ARAI, State of Hawaii Department of Education (DOE), Personnel Development Branch (Arai); and ANDREA ESHELMAN, Hawaii State Teachers Association (HSTA) (Eshelman and collectively Respondents).

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Complainant alleges that Leonard has violated Hawaii Revised Statutes (HRS) 89-13(a)(1) and (4) and HRS 89-13(b)(1), in his capacity as agent of the State of Hawaii Department of Education.

Complainant alleges that Jenkins, and Noonan have violated HRS 89-13(a)(1) and (4) and HRS 89-13(b)(1), in their capacity as agents of the University of Hawaii at Manoa.

Complainant alleges that Arai has violated HRS 89-13(a)(1) and (4) and HRS 89-13(b)(1), in his capacity as agent of the State of Hawaii Department of Education.

Complainant alleges that Eshelman, Deputy Executive Director, HSTA has violated HRS 89-13(a)(1) and (4) and HRS 89-13(b)(1), in her capacity as agent of the HSTA.

On February 28, 2018, the Board held a Prehearing/Settlement Conference (Prehearing Conference) pursuant to Hawaii Administrative Rules (HAR) § 12-42-47 for the purposes of arriving at a settlement or clarification of the issues and, to the extent possible, an agreement on the facts, matters, or procedures as may facilitate and expedite the hearing or adjudication of the issues. All Respondents, through their respective legal counsels were in attendance and Complainant participated via telephonic conference call.

During the Prehearing Conference Complainant informed the Board that she was not well and unable to attend and participate in the Prehearing Conference. Furthermore, Complainant stated that she did not file Complainant's Prehearing Statement. In short, the Complainant was not ready to proceed with the Prehearing Conference. The Board accepted the representations of Complainant and postponed the Prehearing Conference to another date with the understanding that the Complainant could file her Prehearing Statement no later than March 8, 2018 and certify that the same has been served upon the Respondents. All parties agreed to waive the requirements of § 377-9(b), HRS and § 12-42-46(b), HAR, mandating that the hearing on the Complaint "be held no less than ten and nor more than forty days after the filing of the Complaint or amendment thereof."

The Board inquired of Respondents as to suitable dates for the rescheduled Prehearing Conference and for the rescheduled Hearing on the Merits (HOM) and associated deadlines and hearings for matters therein. As such, the Board decided to hold another Prehearing Settlement/Conference on March 12, 2018 at 9:00 a.m., and reschedule the HOM to April 6, 2018 at 10:00 a.m., and the deadlines and hearings dates for Dispositive Motions, Response to Dispositive Motions, Exchange of Witness List, Exchange of Exhibits List, and Exchange and Filing of Proposed Exhibits, in its Pretrial Order and Amended Notices/Notice: (1) Amendment Notice Regarding Protection of Social Security Number And Personal Information; (2) Notice of Second Prehearing Conference; (3) Amended Notice of Hearing On Dispositive Motions; (4) Amended Notice of Hearing On the Merits; and (5) Amended Schedule of Hearings, Conferences, and Deadlines, Order No. 3324, filed March 5, 2018. The Complainant did file Complainant Sandra J. Roberts Prehearing Statement on March 7, 2018.

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On March 12, 2018, the Board conducted its Second Prehearing/Settlement Conference. Respondents through their respective counsel, who were in attendance. Complainant was in attendance as an SRL. The Board spent considerable time with Complainant to ascertain the employment history of the Complainant with the Respondents and confirm the relief that Complainant was seeking from the Board. Allowance was made for the Complainant as an SRL to pose questions to both the Board and Respondents. Complainant stated that she was in a full-time equivalent position with the Department of Education, State of Hawaii, and a bargaining unit 5 member (Unit 5) during the 1999-2000 school year. Since 2000, Complainant has not been employed by a public employer in a full-time equivalent position; and therefore, has not been a bargaining unit member. Complainant, further stated, that she was not employed by a public employer at the time that she filed the prohibited practice complaint on February 9, 2018 and to the present.

Having considered the entire record in these proceedings, the Board makes the following findings of fact, conclusions of law, and order dismissing the instant Complaint and closing the case.

Any conclusion of law improperly designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

FINDINGS OF FACT

COMPLAINANT was “a substitute teacher in 1999” and became a “full-time substitute teacher” from 1999 through 2000.

COMPLAINANT ended her employment with the Department of Education in November 2011.

COMPLAINANT’s alleged violation(s) against RESPONDENTS occurred between August 17, 1999 and November 2011.

COMPLAINANT was not an “employee” or “public employee” of the Department of Education, State of Hawaii during the relevant period of the complainant’s allegations under HRS 89-13 (a)(1) and (4).

COMPLAINANT was not an “employee” or “public employee” of the University of Hawaii, Manoa, during the relevant period of the complainant’s allegations under HRS 89-13(1)(a) and (4).

COMPLAINANT was not a member of Bargaining Unit Five (Unit 5), HRS. 89-6(5) during the relevant period of the complainant’s allegations under HRS 89-13(1)(a) and (4).

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III. CONCLUSIONS OF LAW

Complainant alleges that the HSTA and/or the Department of Education, College of Education, University of Hawaii at Manoa (“Respondents”) have refused to provide her with her entire personnel record and has failed to provide copies of all documents related to the resolution of five grievances filed during the 1991-2000 School Year.

Additionally, Complainant alleges that the Respondents, the Department of Education and the College of Education, University of Hawaii at Manoa, have violated the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. Section 1232g; 34 CRF Part 99 (FERPA) by releasing Complainant’s complete academic record to Respondent, Department of Education, State of Hawaii, without subpoena and without permission of Complainant, in October 2016.

These allegations provide the basis for her Complaint filed against the Respondents, on February 9, 2018.

Complainant has expressed, in relevant part, her prayer for relief in the following descriptions found within Complainant Sandra J. Roberts Prehearing Statement, filed March 7, 2018:

Although Complainant is not presently employed by the Department of Education, Complainant seeks to view her entire personnel record and seeks copies of all documents related to the resolution of five grievances filed during the 1999-2000 School Year.

The remedy that Complainant seeks is review of all documents in Complainant’s personnel File, copies of relevant documents, plus copies of all document related to grievances filed.

As mentioned in the complaint, Complainant seeks personnel and academic records in their entirety from the State of Hawaii Department of Education, and University of Hawaii at Manoa.

The remedy that Complainant seeks is review of all documents in Complainant’s “Entire College of Education Student Record” and obtain copies of selected documents.

The remedy that Complaint seeks is receipt of copies of all documents in possession of Respondent ANDREA [ESHELMAN] and Respondent HAWAII STATE TEACHERS ASSOCIATION related to grievances filed and arbitrations conducted – if any.

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The threshold issue is whether COMPLAINANT has standing to bring this prohibited practice complaint to the Board. “If a party is found to lack standing, the [Board] is without subject matter jurisdiction to determine the action.” Haw. Ventures, LLC v. Otaka, Inc., 114 Hawai’i. 438, 505, 164 P.3d 696, 763 (2007).

“Standing is concerned with whether the parties have the right to bring suit” Pele Defense Fund v. Puna Geothermal Venture, 77 Hawaii 64, 67, 881 P.2d 1210, 1213 (1994).

The Hawaii Supreme Court has held that even where the parties did not consider the question of standing, the Court has a duty, *sua sponte*, to determine whether the plaintiff (complainant) had standing to prosecute the complaint because “a [complainant] without standing is not entitled to invoke a court’s jurisdiction.” Akinaka v. Disciplinary Board of the Hawaii Supreme Court, 91 Hawaii 51, 55, 979 P.2d 1077, 1081; State v. Armitage, 132 Hawa’i. 36, 55, 319 P.3d 1044, 1063 (2014).

Where there is no subject matter jurisdiction, the Board does not have any discretion on this matter. Herman Family Revocable Trust v. Teddy Bear, 254 F.3d 802, 807 (9th Cir. 2001); Parks v. Watkins, 2013 U.S. Dist. LEXIS 14243, at *9 (D. Haw. 2013).

HRS 89-2 provides in relevant part:

“Employer” or “public employer” means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in life of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

HRS Section 89-2 provides:

(5) “Employee” or “public employee” means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section 89-6 (f).

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HRS Section 89-6(a) (5) provides in relevant part:

“(a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit: . . .

(5) Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent. . . “

HRS Section 89-6(f) provides in relevant part:

“The following individuals shall not be included in any appropriate bargaining unit or be entitled to coverage under this chapter:

. . . (f)(6) – Part-time employee working less than twenty hours per week, except part-time employees including in Unit (5), (emphasis provided).

In the instant case, Complainant has admitted that she was working as a “substitute teacher” in the Department of Education, State of Hawaii in 1999 and then as a “full-time substitute teacher” in 2000. She also admitted that her last employment with the Department of Education, State of Hawaii, was in November 2011. The Complaint allegations occurred between August 17, 1999 and November 2011. As a substitute teacher, Complainant could not have been and is not within Unit 5 because substitute teachers are paid on a per diem basis. Complainant was excluded from coverage under HRS Chapter 89 not an “employee” or “public employee”, as defined in HRS § 89-2(5), at the time of these alleged violations. Hawaii State Teachers Ass’n, NEA v. Bd. of Educ., Case No. DR-05-39, Decision No. 142, 2 HPERB 607, 628 (1981). However, even assuming as stated at the Second Prehearing Conference, she was in a full-time equivalent position and a Unit 5 member during the 1999-2000 school year and that some of the allegations alleged in the Complaint occurred during this school year, as discussed more fully below, Complainant was not an “employee” or “public employee” during the 90-day limitations period.

The [complainant] bears the burden of establishing that he or she has standing. Smith v. Maui County Bd. of Variance & Appeals, 2008 Haw. LEXIS 121, at *4 (Haw. Sup. Ct. 2008). Based on the above, Complainant does not meet the requirements as an employee under HRS §§ 89-2 and 89-6(a)(5); and therefore, the Complainant has lacks standing to file a prohibited practice complaint under chapter 89, HRS. Based on Complainant’s lack of standing and although the respondents did not raise Complainant’s lack of standing, the Board is required to dismiss this matter, *sua sponte*.

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Further, even if Complainant had the requisite standing, the Complaint would still be dismissed for untimeliness.

HRS §377-9(1) states, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." This 90-day requirement is made applicable to Chapter 89 prohibited practice complaints by HRS §89-14." In addition, HAR § 12-42-42(a) states:

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...within ninety days of the alleged violation.

The Board has long held that this ninety (90) day statute of limitations is a jurisdictional requirement which the Board has no authority to waive. Accordingly, the failure to file a complaint within 90 days of its occurrence divests the Board of jurisdiction to hear the complaint. Nakamoto v. Department of Defense, Board Case No. CE-01-802, Order No. 2010, at *15 (May 1, 2013) (Nakamoto Order).

The Board has construed the 90-day limitation period strictly and will not waive a defect of even a single day. Fitzgerald v. Ariyoshi, Board Case No. CE-10-75, Decision No. 175, 3 HPERB 186, 199 (1983) (*citing* Thurston v. Bishop, 7 Haw. 421 (1888) and Wong Min v. City and County of Honolulu, 33 Haw. 373, *reh. den.*; [sic] 33 Haw. 409 (1935)); Nakamoto Order, at *15; Valeho-Novikoff v. Okabe, Board Case No. CU-05-302, Order No. 3024, at *10 (October 6, 2014).

Moreover, the beginning of the limitations period does not depend upon actual knowledge of a wrongful act. The applicable period begins to run when "an aggrieved party knew or should have known that his statutory rights were violated." United Public Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443, 6 HLRB 319, 330 (2003) (*citing* Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978)).

Finally, "The lack of jurisdiction over the subject matter cannot be waived by the parties. If the parties do not raise the issue, [the Board] *sua sponte* will, for unless jurisdiction of the [Board] over the subject matter exists, any judgment rendered is invalid." Tamashiro v. Dep't of Human Servs., 112 Hawaii 388, 398, 146 P.3d 103, 113 (2006) (*citing* Chun v. Employees' Ret. Sys. Of the State of Hawaii, 73 Haw. 9, 14, 828 P.2d 260, 263 (1992)).

The instant complaint was filed on February 9, 2018. Accordingly, the 90-day limitation period began to run on November 12, 2017 and ended on February 9, 2018. None of the allegations of the Complaint occurred within this period. All the violations alleged in the Complaint occurred within the period from August 17, 1999 and November 2011 when the

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Complainant knew or should have known of the alleged violations. Accordingly, because all of these allegations are untimely, the Board would also be required to dismiss *sua sponte* the Complaint based on lack of jurisdiction for untimeliness.

ORDER

For the reasons given above, the Board hereby orders that the prohibited practice complaint be dismissed. This case is closed.

DATED: Honolulu, Hawaii, April 4, 2018.

HAWAII LABOR RELATIONS BOARD



MARCUS R. OSHIRO, Chair




SESNITA A.D. MOEPONO, Member


J.N. MUSTO, Member

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