Decision File

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of SHARON KOTAKA, Complainant, and HAWAII STATE TEACHERS ASSOCIATION, Respondent.	Case No. CU-05-19
In the Matter of SHARON KOTAKA, Complainant, and BOARD OF EDUCATION, STATE OF HAWAII, Respondent.	Case No. CE-05-37 Decision No. 86

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On June 13, 1977, petitioner Sharon Kotaka filed with the Board these prohibited practice charges against respondents Hawaii State Teachers Association (hereafter HSTA or Union) and the Board of Education (hereafter BOE or Employer).

After due notice, hearings in both cases were held on August 31 and September 1, 1977, in the Board's hearing room. All parties were present and afforded an opportunity to call and cross examine witnesses and submit exhibits. Following the submission of evidence as to the timeliness of the filing of the subject prohibited practice charges against both respondents, the Board recessed the hearing (Tr. 8/31/77

at 8 - 10, Tr. 9/1/77 at 31 - 33) The parties submitted written briefs on this timeliness issue on October 3, 1977. Oral arguments were heard on October 5, 1977.

Based on a full review of the record herein, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Petitioner Kotaka was a "public employee," as that term is defined in Subsection 89-2(7), Hawaii Revised Statutes (hereafter HRS), and was included in Unit 5 (teachers).

Respondent HSTA is the exclusive representative, as defined in Subsection 89-2(10), HRS, for all employees of Unit 5. Respondent BOE is the employer of the employees in Unit 5.

During the period 1972 - 1976, petitioner taught at Makaha Elementary School. On April 9, 1976, she received written notification from the school's principal, Harry Fujinaka, of his recommendation that her services with the Department of Education be terminated, effective August 31, 1976. On May 1, 1976, petitioner received notice of Leeward District Superintendent Liberato Viduya's concurrence with the principal's recommendation for termination. Thereafter, the union initiated a grievance on her behalf over the evaluation procedure used in arriving at the recommendation for termination.

Subsequently, after exploring various alternatives to termination, petitioner agreed to accept a proposal of a year's leave of absence, followed by her resignation. This agreement was embodied in the following July 1, 1976 letter to the Leeward District Superintendent, prepared by the union and signed by petitioner:

"I would like to request a Leave of Absence Without Pay for the period May 17, 1976 till August 31, 1977. Although Article XII, Leaves, Agreement between the State of Hawaii, Board of Education, and the Hawaii State Teachers Association provides for early return from leaves, I will not request an early return from this leave. Presently, I am submitting my resignation from the Department of Education which will be effective August 31, 1977.

I am writing this letter with clear understanding and full knowledge of any ramifications or consequences. Furthermore, I was not coerced or threatened in making these statements.

Your favorable consideration in granting my request would be appreciated."

On July 2, 1976, the agreement was finalized by a letter from the Leeward District Superintendent to petitioner, which stated:

"We received your letter of July 1, 1976.

We sent a request to Superintendent Charles Clark to withdraw our recommendation for your dismissal from the Department of Education and to recommend 'continued employment' for you. It is with the understanding: that you will be on leave of absence without pay during the period May 17, 1976 till August 31, 1977; that you will not request an early return from this leave nor request an extension of this leave; that your resignation from the Department of Education will be effective August 31, 1977. If any or all of the above conditions is/are not fulfilled, we would have no alternative but to re-activate our recommendation for your dismissal from the Department of Education."

The Superintendent of Education accepted the foregoing recommendation on July 14, 1976 and petitioner's grievance was withdrawn.

At the time that the agreement between the parties had been reached, petitioner believed that documents in her personnel files regarding the termination recommendation would be destroyed in two years, and that she could be rehired if she obtained training in special education. She testified that these factors, in conjunction with the pressure she was then under, finally resulted in her agreement to resign.

In August, 1976, after enrolling in special education courses at the University of Hawaii, petitioner spoke to the Deputy Superintendent of the Department of Education (hereafter DOE). He informed petitioner that her prior teaching record would have an effect on whether she would ever be rehired by the Department of Education. Petitioner also learned through the DOE's personnel division that adverse documents in her personnel files would not be destroyed.

Petitioner next sought the union's assistance in expunging the documents from her files. When her efforts to obtain union aid were unsuccessful, she consulted an attorney in August, 1976. In December, 1976, petitioner was advised to seek the assistance of another attorney. She thereupon retained her present counsel.

In January, 1977, petitioner's attorney attempted to reopen the matter by contacting the HSTA. During the ensuing months, the union maintained that there was no basis for such reopening; similarly, the employer refused to abrogate the July 2, 1976 settlement agreement.

On June 13, 1977, petitioner filed prohibited practice charges against the respondents herein, alleging that the union and the employer had misrepresented the effect of the July 2, 1976 agreement in order to persuade her to sign it, and that they had subsequently refused to set it aside.

CONCLUSIONS OF LAW

The Board's disposition of these prohibited practice charges turns on the procedural question of whether or not the complaints were filed in a timely manner pursuant to Subsection 377-9(1), HRS (as incorporated by Section 89-14, HRS) and

Rule 3.02(a), HPERB Rules and Regulations. These provisions state:

> Sec. 377-9. Prevention of unfair labor practices.
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> * * *
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> (1) No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.
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> 3.02 Complaint.
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> (a) WHO MAY FILE; TIME LIMITATION. A complaint that any public employer, public employee or employee organization has engaged in any prohibited act may be filed by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation.

Petitioner has contended that the respondents' actions in executing and later upholding the settlement agreement constitute violations of a continuing nature. However, based on the evidence as to when the events in the instant dispute occurred, the Board concludes that respondents' actions did not constitute continuing violations. Therefore, the prohibited practice charges were untimely filed.

It is clear that the primary basis for the prohibited practice charges arises from respondents' alleged misrepresentations that adverse documents concerning the recommended termination would be expunged from petitioner's personnel files within two years, and that petitioner might thereafter be reemployed in the field of special education. The latest date upon which such misrepresentations could have been made, in order to induce petitioner to sign the resignation agreement, was July 2, 1976. Thus, prohibited practice charges should have been filed by September 30, 1976, to satisfy the requirements of Subsection 377-9(1), HRS, and HPERB Rule 3.02(a). Even if the Board were to consider August, 1976--when

petitioner first "learned of" the alleged misrepresentations--as the time of the violations, prohibited practice charges would still have had to be filed in November, 1976, to meet the ninety-day limitations period.

With respect to the subsequent refusals of the BOE and the HSTA to rescind the settlement agreement, the Board finds that these actions, in and of themselves, do not constitute prohibited practices. In making this determination, this Board adopts the following principle enunciated in Local Lodge 1424 v. NLRB (Bryan Mfg. Co.), 362 U.S. 411, 80 S. Ct. 822, 4 L. Ed. 2d 832 (1960):

> It is doubtless true that §10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of §10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose §10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. 362 U.S. at 416-417 (Emphasis added).

In the Bryan case, the unfair labor practice charge arose from the enforcement and maintenance of a union shop contract, which was executed at a time that the union did not represent a majority of the employees. The Supreme

Court rejected the argument that the enforcement and maintenance of the contract constituted a "continuing violation," stating at 422-423:

> The applicability of these principles cannot be avoided here by invoking the doctrine of continuing violation. It may be conceded that the continued enforcement, as well as the execution, of this collective bargaining agreement constitutes an unfair labor practice, and that these are two logically separate violations, independent in the sense that they can be described in discrete terms. Nevertheless, the vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed, but unlawfully administered. As the dissenting Board members in this case recognized, in dealing with an agreement claimed to be void by reason of the union's lack of majority status at the time of its execution,
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> . . . 'the circumstances which cause the agreement to be invalid existed only at the point in time in the past when the agreement was executed and are not thereafter repeated. For this reason, therefore, the continuing invalidity of the agreement is directly related to and is based solely on its initial invalidity, and has no continuing independent basis.' 119 NLRB, at 516.
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> In any real sense, then, the complaint in this case is "based upon" the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing violation solely by reason of circumstances existing only at the date of execution. To justify reliance on those circumstances on the ground that the maintenance in effect of the agreement is a continuing violation is to support a lifting of the limitations bar by a characterization which becomes apt only when that bar has already been lifted. Put another way, if the §10(b) proviso is to be given effect, the enforcement, as distinguished from the execution, of such an agreement as this constitutes a suable unfair labor practice only for six months following the making of the agreement. [Footnote omitted] (Emphasis added).

See also PLRB v. Rizzo, 344 A. 2d 744, 90 LRRM 2518 (1975).

In the instant case, the alleged misrepresentations, if they occurred, occurred in July, 1976, when the settlement agreement was signed and accepted. Any invalidity

of that agreement is based solely on events which occurred at that time. Thus, the BOE and the HSTA's present refusals to rescind the agreement do not, under the facts presented to the Board, constitute continuing violations.

ORDER

In view of the foregoing, the Board finds that the respective prohibited practice charges against respondents HSTA and BOE were not timely filed within the ninety-day limitations period. The subject charges are therefore dismissed.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada, Chairman

James K. Clark, Board Member

John E. Milligan, Board Member

Dated: January 10, 1978

Honolulu, Hawaii