

FINDINGS OF FACT

1. CHUN was for all times relevant employed by the City and County of Honolulu as a Utility Worker I and a member of bargaining unit ("Unit") 01.
2. On April 8, 2005, Lester Chang, Director of the Department of Parks and Recreation, notified CHUN that she was being discharged effective April 24, 2005.
3. On April 12, 2005 CHUN was notified by the Union of her right to file a grievance and by letter dated April 20, 2005, CHUN requested the Union to file a grievance on her behalf.
4. The Union filed a grievance on April 20, 2005, challenging the discharge action for various contractual violations.
5. The grievance was processed through the various steps of the grievance procedure and on March 24, 2006, the Union decided not to proceed further with the grievance. The Union sent a letter to CHUN on March 24, 2006 to her last known address advising her of the Union's decision not to pursue the grievance and also notified the employer that the Union decided not to proceed further with the grievance.
6. On or about July 27, 2006, UPW business agent Petrocelli Kesi ("Kesi") spoke with CHUN regarding the status of the grievance. Kesi informed CHUN that the Union had decided not to proceed further with her grievance.
7. CHUN knew or should have known that the Union was not proceeding with the arbitration of her grievance on or about March 24, 2006 or at the latest, on or about July 27, 2006.
8. CHUN filed the instant complaint on December 22, 2006.

CONCLUSIONS OF LAW

1. CHUN was at all relevant times an "employee" within the meaning of Hawaii Revised Statutes ("HRS") § 89-2 and a member of Unit 01.
2. The UPW is an "employee organization" and the "exclusive representative" of Unit 01 members within the meaning of HRS § 89-2.

3. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the complainant. See Yamane v. Pohlson, 111 Hawai'i 74, 81 137 P.3d 980, 987 (2006). Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. Id.
4. The applicable statutes and rules require that prohibited practice complaints be filed within 90 days of the alleged violation. The Board's Hawaii Administrative Rules ("HAR") § 12-42-42 provides in relevant part:
 - (a) A complaint that any public employer, public employee, or public 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 representatives within ninety days of the alleged violation. (emphasis added).
5. Additionally, HRS § 89-14 provides that "[a]ny 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[.]" In turn, HRS § 377-9, dealing with the prevention of unfair labor practices, clearly provides that, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." (HRS § 377-9(1)).
6. The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. This limitation is jurisdictional and provided by statute; accordingly, it may not be waived by either the Board or the parties. TriCounty Tel. Ass'n., Inc. v. Wyoming Public Service Comm'n., 910 P.2d 1359, 1361 (Wyo. 1996) (holding that, "As a creature of the legislature, an administrative agency has limited powers and can do no more than it is statutorily authorized to do"); see generally, HOH Corp. v. Motor Vehicle Industry Licensing Bd., Dept. of Commerce and Consumer Affairs, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) ("The law has long been clear that agencies may not nullify statutes").
7. The Board has construed the 90-day limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HPERB 186, 199 (1983). The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Instead, the period begins to run when "an aggrieved party knew or should have known that his statutory rights were violated." Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182,

1189 (8th Cir. 1978).

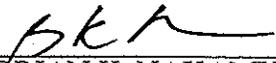
8. The Board concludes that CHUN's cause of action against the Union for breach of duty of fair representation for not pursuing her grievance to arbitration accrued when the Union notified her that it would not take her grievance to arbitration on or about March 24, 2006 or at the latest, on or about July 27, 2006. Accordingly, the Board concludes that CHUN's complaint is untimely as it was filed more than 90 days after her cause of action accrued and the Board lacks jurisdiction over the instant complaint.

ORDER

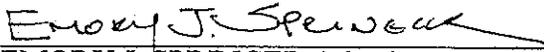
The Board hereby grants Respondent's Motion to Dismiss the instant prohibited practice Complaint.

DATED: Honolulu, Hawaii, January 19, 2007.

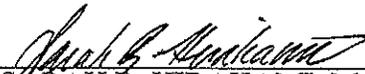
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