

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

STEPHANIE C. STUCKY,

Complainant,

and

WILFRED OKABE, President, Hawaii State Teachers Association; WILBERT HOLCK, Deputy Executive Director, Hawaii State Teachers Association; ERIC NAGAMINE, Maui UniServ, Hawaii State Teachers Association; DAVID FORREST, Oahu UniServ, Hawaii State Teachers Association; and HAWAII STATE TEACHERS ASSOCIATION (HSTA),

Respondents.

CASE NO. CU-05-303

ORDER NO. 2835

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, FILED ON AUGUST 1, 2011; AND NOTICE OF THIRD PREHEARING/SETTLEMENT CONFERENCE

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS'
MOTION FOR SUMMARY JUDGMENT FILED ON AUGUST 1, 2011;
AND NOTICE OF THIRD PREHEARING/SETTLEMENT CONFERENCE

On April 7, 2011, Complainant STEPHANIE C. STUCKY (Complainant), *pro se*, filed a prohibited practice complaint (Complaint) against Respondents WILFRED OKABE (Okabe), President, Hawaii State Teachers Association; WILBERT HOLCK (Holck), Deputy Executive Director, Hawaii State Teachers Association; ERIC NAGAMINE (Nagamine), Maui UniServ, Hawaii State Teachers Association; DAVID FORREST (Forrest), Oahu UniServ, Hawaii State Teachers Association; and HAWAII STATE TEACHERS ASSOCIATION (HSTA) (collectively, Respondents) with the Hawaii Labor Relations Board (Board). Complainant alleges that HSTA breached its duty of fair representation by acting in bad faith in the implementation of Article V of the Unit 05 collective bargaining agreement (CBA) and internal process guidelines for the submission of grievances through to arbitration; and by refusing to represent Complainant in filing a motion to vacate the Arbitrator's Decision and Award dated January 12, 2011, per Hawaii Revised Statutes (HRS) § 658A-9; and, therefore, committed prohibited practices as defined in HRS § 89-13(b)(3), (4), and (5).

On April 14, 2011, Respondents filed a Motion to Dismiss Complaint, asserting the Complaint should be dismissed for (1) lack of subject matter jurisdiction, and (2) failure to state a claim for relief.

On April 25, 2011, Complainant filed Complainant's Affirmation in Opposition to Respondent's Motion to Dismiss Complaint, asserting that the Complaint alleges Respondents have engaged in or are engaging in a prohibited practice violation or violations within the meaning of HRS §§ 89-13(b)(3), (4), and (5), and 89-14.

On May 26, 2011, the Board held a hearing on Respondents' Motion to Dismiss Complaint, in accordance with HRS § 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3), with Complainant appearing via telephone.

On July 22, 2011, the Board issued Order No. 2807 that granted in part and denied in part Respondents' Motion to Dismiss Complaint filed on April 14, 2011. The Board granted Respondents' Motion to Dismiss as to Respondents' alleged violation of HRS § 89-13(b)(3) for refusal to participate in good faith in the mediation and arbitration procedures set forth in HRS § 89-11. The Board denied Respondent's Motion to Dismiss with respect to Respondents' alleged violations of the terms of the collective bargaining agreement, by failing to adhere to the timelines in Article V of the CBA and internal process guidelines for the submission of grievances and alleged breach of duty of fair representation in violation of HRS § 89-13(b)(4) and (5).

On August 1, 2011, Respondents filed a Motion for Summary Judgment.

On August 5, 2011, the Board issued a Notice of Hearing on Respondents' Motion for Summary Judgment, Filed on August 1, 2011, notifying the parties that the Board had scheduled a hearing for August 23, 2011 at 10:30 a.m.

On August 23, 2011, the Board held a hearing on Respondents' Motion for Summary Judgment, Filed on August 1, 2011, in accordance with HRS § 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3), with Complainant appearing via telephone.

After careful consideration of the arguments, record, and filings in this case, the Board makes the following findings of fact, conclusions of law, and decision and order granting in part and denying in part Respondents' Motion for Summary Judgment, filed on August 1, 2011.

FINDINGS OF FACT

The Board makes the following Findings of Fact. If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

1. At all relevant times, Complainant was a teacher and a public employee within the meaning of HRS § 89-2¹ and a member of bargaining unit (BU) 05² and HSTA.
2. At all relevant times, Respondent HSTA was an employee organization³ and the exclusive bargaining representative of employees included in BU 05 as defined in HRS § 89-2.
3. At all relevant times, Respondent Okabe was the President of HSTA.
4. At all relevant times, Respondent Holck was the Deputy Executive Director of HSTA.
5. At all relevant times, Respondent Nagamine was the Maui UniServ Director of HSTA.

¹ HRS § 89-2 provides as follows:

“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)].

² Pursuant to HRS § 89-6(a), governing appropriate bargaining units, BU 05 consists of “[t]eachers 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[.]”

³ HRS § 89-2, as amended, provides in relevant part:

“Employee organization” means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund and other terms and conditions of employment of public employees.

6. At all relevant times, Respondent Forrest was the Oahu UniServ Director of HSTA.
7. HSTA and the Department of Education, State of Hawaii (DOE) have been parties to at least 15 successive CBAs. In the present case, the relevant grievance procedure is contained in the CBA effective from July 1, 2007 to June 30, 2009.
8. Arbitrator Frank Yap, Jr. (Arbitrator Yap) was selected to be the arbitrator to hear Complainant's evaluation grievance under the June 1, 2006 Professional Evaluation Program for Teachers (PEP-T) and her May 12, 2009 termination grievances. Arbitrator Yap issued an Arbitrator's Decision and Award, dated January 12, 2011 (arbitrator's award).
9. On January 18, 2011, via telephone call to Complainant, Nagamine informed her of the arbitrator's award and that HSTA did not prevail. When Complainant requested a copy of the arbitrator's award, Nagamine told her that he could not release a copy until he received permission from Holck. Complainant requested information regarding her options, and Nagamine answered that he was under the impression the arbitration award was final and binding and knew of no other options. Complainant voiced her concern about not being able to view or obtain a copy of the arbitrator's award in a timely manner.
10. On January 18, 2011, from 3:00 p.m. – 5:00 p.m., Complainant was given the opportunity to review the arbitrator's award.
11. On January 22, 2011, Complainant received a copy of the arbitrator's award.
12. On January 27, 2011, via e-mail to Complainant, Holck stated that he would wait for Nagamine and Forrest to return from training to discuss the merits of the case and whether HSTA would seek to vacate the arbitrator's award.
13. On February 1, 2011, via e-mail to Nagamine, Forrest, and Holck, Complainant requested "HSTA file a notice of appeal within the deadlines according to Arbitration Rules."
14. On February 8, 2011, via e-mail to Nagamine, Complainant sent portions of HLRB Decision No. 420 which states in part:

. . . It is also in the member's interest to understand the award,

and have communicated the reasons why the award will not be contested . . .

15. On February 5, 7, 9, 12, and 17, 2011, via e-mails to HSTA, Complainant raised questions or concerns about the arbitrator's award. Complainant received no response from HSTA.
16. On February 12, 2011, Complainant submitted a completed Application for Legal Services Program form to HSTA regarding the arbitrator's award, requesting, "legal assistance from HSTA/NEA for legal fees in vacating Judgment to the circuit court for a trial de novo".
17. On February 14, 2011, via e-mail to Complainant, Holck acknowledged receipt of her request for legal services, and stated that he asked Nagamine and Forrest for their opinions about the statutory standards for vacating an award and to have legal counsel to review the arbitration decision. Holck also stated that if legal counsel found there were grounds to vacate the award, legal counsel would file a motion with the court and represent HSTA in the matter.
18. On March 7, 2011, Holck notified Complainant by letter that he was denying her request for legal services to pursue a motion to vacate Arbitrator Yap's Decision and Award (see Finding of Fact No. 18) because Nagamine and Forrest had stated that HSTA did not have a basis to file a motion to vacate the award. Holck stated further that HSTA's legal counsel (Herbert Takahashi) concurred with Nagamine and Forrest.
19. On March 11, 2011, Complainant sent an e-mail to Nagamine, Forrest, and Holck, and stated, *inter alia*, that a) she was deeply disappointed by their indication that there was no basis to file a motion to vacate, despite Complainant's rebuttals and concerns through several e-mails and her requests to "get together" to review the decision for purposes of determining whether there was any basis to vacate the award in circuit court; b) it would have been in her best interest as a grievant to understand the award and for HSTA to have communicated HSTA's reasons why the award would not be contested prior to receiving the March 7, 2011 letter denying her request for the HSTA/NEA Legal Services Program; c) she felt "abandoned" by HSTA; d) she requested information from them on several occasions regarding her legal options and advice available to her, all without response; and e) she felt she was ignored and that HSTA felt no further responsibility to represent her since the arbitrator's decision. Complainant specifically requested information regarding her "rights of any

legal services Appeals procedures available” to her at that time.

20. On March 13, 2011, Complainant sent a completed “Application for Legal Services Program for the HSTA/DUSHANE Legal Appeal Services Program designed specifically for members who feel that they have been denied or curtailed legal support by local NEA affiliate HSTA.” (Application) Complainant also requested the opportunity to present her case before a three-member panel.
21. Complainant periodically expressed her concerns and questions to HSTA via e-mails, both prior to and after her March 13, 2011 letter.
22. By letter dated March 15, 2011, HSTA acknowledged receipt of Complainant’s Application for Legal Services Program dated March 13, 2011.
23. On March 30, 2011, HSTA notified Complainant by letter that HSTA was convening a three-member panel to hear her request on March 31, 2011, and that Complainant could appear via video conference from HSTA’s Maui office.
24. On March 31, 2011, a three-member panel heard the HSTA/DUSHANE Legal Services Appeal of Complainant, with Complainant appearing via video conference.
25. On April 2, 2011, via e-mail, HSTA provided a copy to Complainant of the three-member panel’s March 31, 2011 decision denying Complainant’s appeal, the panel having determined that “there is no basis upon which to grant your appeal for legal services. No reasons were presented refuting the statutory requirements . . . for vacating an arbitration award[.]” The decision also notified Complainant of her right to appeal the panel’s decision with the NEA Office of Legal Services Programs.
26. On April 7, 2011, Complainant filed the instant Complaint. The Complaint alleges that HSTA breached its duty of fair representation by acting in bad faith in the implementation of Article V of the Unit 05 CBA and internal process guidelines for the submission of grievances through to arbitration per the CBA; and by not representing Complainant in filing a motion to vacate the Arbitrator’s Decision and Award, as per HRS § 658A-9, and therefore, committed prohibited practice violations as defined in HRS § 89-13(b)(3), (4), and (5).

27. On April 14, 2011, Respondents filed a Motion to Dismiss Complaint.
28. On May 26, 2011, the Board held a hearing on Respondents' Motion to Dismiss Complaint, in accordance with HRS § 89-5(i)(4) and (5) and HAR § 12-42-8(g)(3), with Complainant appearing via telephone.
29. On July 22, 2011, the Board issued Order No. 2807, granting in part and denying in part Respondents' Motion to Dismiss Complaint filed on April 14, 2011. The Board granted Respondents' Motion to Dismiss as to Respondents' alleged violation of HRS § 89-13(b)(3) for refusal to participate in good faith in the mediation and arbitration procedures set forth in HRS § 89-11. The Board denied Respondents' Motion to Dismiss with respect to Respondents' alleged violations of the terms of the collective bargaining agreement by failing to adhere to the timelines in Article V of the CBA and internal process guidelines for the submission of grievances and alleged breach of the duty of fair representation in violation of HRS § 89-13(b)(4) and (5). The Board also denied Respondents' Motion to Dismiss with respect to Respondents' alleged violation of HRS § 89-13(b)(4) regarding HSTA's duty of fair representation; the Board found that this duty extends to the decision to seek judicial review; and the Board found that Complainant had stated a claim for relief for a breach of duty of fair representation.
30. On August 1, 2011, Respondents filed a Motion for Summary Judgment on all remaining claims in light of Order No. 2807, dated July 22, 2011. Respondents submitted that there are no genuine issues of material fact in dispute, and they are entitled to judgment as a matter of law on claims relating to HRS § 89-13(b)(4), and (5). Respondents stated that there are two claims remaining, i.e., whether HSTA failed to comply with the timelines in Article V of the CBA and whether HSTA breached its duty of fair representation regarding its decision not to seek judicial review of the arbitrator's award.
31. Respondents argue that the issue whether HSTA failed to comply with the timelines in Article V of the CBA and violated HRS § 89-13(b)(5) is barred by Complainant's failure to file a prohibited practice complaint within ninety days from when Complainant knew or should have known a violation occurred and is therefore outside of the Board's jurisdiction. Respondents also point to Complainant's statement in the Complaint that the alleged violation occurred in 2009, which is outside the ninety-day statute of limitation and, therefore, the Board lacks jurisdiction over the claim.

32. Respondents argue that the allegation that HSTA failed to comply with its internal process guidelines for the submission of grievance and alleged breach of duty of fair representation in violation of HRS § 89-13(b)(4) should be dismissed based on Holck’s affidavit (Holck Aff. ¶ 11) which states, *inter alia*, that HSTA has a practice and procedure for review of arbitration awards to determine whether a motion should be filed in the circuit court pursuant to HRS Chapter 658A to confirm, modify, correct, or vacate the award; that the procedure consists of a review of the Uniserv Directors who submit a recommendation to the deputy director and a review by legal counsel for an assessment; that HSTA followed its established practice and procedure in the case of Complainant Stucky; that based on the Uniserv Directors’ recommendation a decision was made not to file a motion to vacate; and on “March 17, 2011”, Holck notified Complainant of HSTA’s decision.⁴
33. On August 8, 2011, Complainant filed a Memorandum in Opposition to Respondent’s [sic] Motion for Summary Judgment followed by “Ammended [sic] Memorandum in Opposition to Respondent’s [sic] Motion for Summary Judgment.
34. On August 23, 2011, the Board held a hearing on Respondents’ Motion for Summary Judgment and took the matter under advisement.
35. Based upon a review of the record and consideration of the arguments presented, the Board finds that:
 - (a) Complainant’s allegation that HSTA violated HRS§ 89-13(b)(5) by failing to follow strict guidelines in Article V of the CBA was untimely filed because the cause of action accrued in 2009 and the Complaint was filed in 2011, and therefore, this alleged violation is clearly outside of the ninety-day statute of limitation, and the Board lacks jurisdiction to hear this issue; and
 - (b) The facts presented are in dispute as to whether HSTA followed its practice and procedure to review the arbitrator’s award and whether HSTA breached its duty of fair representation regarding its decision not to seek judicial review of said award, as evidenced, *inter alia*, by:
 - (i) Finding of Fact No. 9: On January 18, 2011,

⁴ Holck’s letter to Complainant informing her of HSTA’s decision is dated March 7, 2011. Complainant’s ¶ 17,

Complainant stated that Nagamine informed her that he was under the impression the arbitration decision was final and binding, and he knew of no other options.

(ii) Finding of Fact No. 32: Holck stated that HSTA has a practice and procedure to review an arbitration award and HSTA followed this practice and procedure in this matter. Holck Aff. ¶ 11.

(iii) Finding of Fact No. 12: On January 27, 2011, Holck informed Complainant he would wait for Nagamine and Forrest to return from training to discuss whether HSTA would seek to vacate the award.

(iv) Finding of Fact No. 16: On February 12, 2011, Complainant filed an Application for Legal Services Program for “legal fees in vacating Judgment to the circuit court . . .” regarding the arbitration award.

(v) Finding of Fact No. 18: On March 7, 2011, Holck notified Complainant that he was denying her request for legal fees because he had spoken to Nagamine and Forrest, and they indicated that HSTA did not have a basis to vacate the award with HSTA’s legal counsel concurring.

- (c) It is not clear from the evidence presented when or how HSTA informed Complainant of HSTA’s established practice and procedure to review an arbitrator’s award, and when or whether HSTA complied with its practice and procedure to review Arbitrator Yap’s Decision and Award, or whether the review of Arbitrator Yap’s Decision and Award was generated by Complainant’s Application for Legal Services Program.

Therefore, there is a genuine issue of material fact in dispute as to whether HSTA adhered to its practice and procedure of reviewing the arbitrator’s award to determine whether to file a motion to vacate the award. Moreover, material issues of fact remain as to whether Respondents breached their duty of fair representation by failing to follow HSTA’s internal procedures that constitute an HRS § 89-13(b)(4) violation.

CONCLUSIONS OF LAW

The Board makes the following Conclusions of Law. If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

1. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter, "relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawaii 118, 905 P.2d 624.
2. The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id.
3. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. Id.
4. The remaining issues in the Complaint concern alleged prohibited practices as defined in HRS § 89-13(b), which provides in relevant part:

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

* * *

- (4) Refuse or fail to comply with any provision of this chapter; or
 - (5) Violate the terms of a collective bargaining agreement.
5. HRS § 89-14 provides as follows:

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; provided that the board shall have exclusive original jurisdiction over such a controversy except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section 89-12(e) or (2) the judicial review of decisions or orders of the board in prohibited practice controversies in accordance with section 377-9 and chapter 91. All references in section 377-9 to "labor organization" shall include employee organization.

6. The applicable statutes and rules require that prohibited practice complaints be filed within ninety days of the alleged violation. 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, which deals 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(l)).
7. Similarly, the Board's Administrative Rules, HAR § 12-42-42 provides, in relevant part:
 - (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 representatives within ninety days of the alleged violation. (emphasis added).
8. Failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear a complaint. This limitation is jurisdictional and provided by statute; accordingly, it may not be waived by either the Board or the parties. See, 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) holding, "The law has long been clear that agencies may not nullify statutes."
9. The Board has construed the ninety-day limitation 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)

10. Respondents contend, *inter alia*, that their Motion for Summary Judgment should be granted because the Complaint is time-barred by the ninety-day statute of limitations under HRS § 377-9(1), and Complainant’s allegation that Respondents “failed to follow strict guidelines in the collective bargaining agreement Article V” is time-barred since the cause of action accrued in 2009.⁵
11. Respondents further contend that the decision not to file a motion to vacate the arbitration award did not constitute a breach of the duty of fair representation. Respondents affirm their established practice and procedure for review of arbitration decisions and awards to determine whether court action should be pursued, and Respondent Holck stated that HSTA followed its established practice and procedure. Holck Aff. ¶ 11.
12. Respondents contend that the Motion for Summary Judgment should be granted because there is no evidence of either a violation of the collective bargaining agreement or a breach of the duty of fair representation in connection with the decision not to file a motion to vacate the arbitrator’s award.
13. In Order No. 2807, the Board concluded, *inter alia*, that HSTA’s duty of fair representation extends to the decision to review an arbitration award pursuant to HRS Chapter 658A, and that Complainant states a claim for relief for a breach of duty of fair representation.
14. Whether HSTA breached that duty by failing to follow its internal process guidelines to determine whether to appeal an arbitration award is a matter for further argument or proof. Presently, there are genuine issues of material fact or insufficient facts to determine whether HSTA followed its internal procedures in this case and whether HSTA breached its duty of fair representation.
15. Therefore, the Board renders the following ruling:
 - (a) The Board grants in part Respondents’ motion for summary judgment

⁵ This issue is before the Board in Case No. CU-05-283.

on the issue of whether Respondents failed to adhere to the timelines in Article V of the CBA on the basis that Complainant's allegation was filed untimely since the cause of action occurred in 2009 and the Complaint was filed in 2011, and therefore the alleged violation occurred outside the ninety-day statute of limitation. Accordingly, Complainant's allegations of an HRS § 89-13(b)(5) violation are dismissed.

(b) The Board denies in part Respondents' motion for summary judgment on the issues of whether HSTA breached its duty of fair representation by failing to execute its established practice and procedure for review of an arbitration decision and award and whether HSTA's actions constitute an HRS § 89-13(b)(4) violation.

ORDER

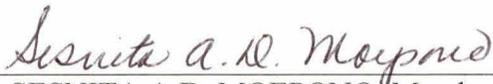
For the reasons discussed above, the Board grants in part and denies in part Respondent's Motion for Summary Judgment filed on August 1, 2011.

NOTICE OF THIRD PREHEARING/SETTLEMENT CONFERENCE

NOTICE IS HEREBY GIVEN that the Board will conduct a second prehearing/settlement conference by conference call in this matter on **April 2, 2012 at 10:00 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii, to establish deadlines and schedule the hearing on the merits. Complainant shall telephone the Board at 984-2400 6-8615 and Respondents' counsel shall appear in the Board's hearing room, at the designated time.

DATED: Honolulu, Hawaii, March 15, 2012.

HAWAII LABOR RELATIONS BOARD



SESNITA A.D. MOEPONO, Member



ROCK B. LEY, Member

Copies sent to:
Stephanie C. Stucky
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