

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-01-100
CLIFFORD DePONTE, JR.,)	ORDER NO. 1105
Complainant,)	ORDER GRANTING RESPONDENT'S
and)	MOTION TO DISMISS
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO,)	
Respondent.)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

On March 28, 1994, Complainant CLIFFORD DePONTE, JR. (DePONTE), by and through his attorney, filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW).

DePONTE alleged that the UPW filed Civil No. 94-0037-01 on January 5, 1994, in an attempt to set aside a favorable decision of the State Civil Service Commission (Commission), which determined that DePONTE had been improperly demoted and ordered the Department of Transportation, State of Hawaii (Employer), to recognize DePONTE's permanent appointment and seniority, and to grant him back pay and restore his salary. DePONTE alleged that if the UPW is successful in its civil suit, DePONTE will, in effect, be demoted and lose his back pay and seniority, and have his employment contract with the Employer rescinded.

In addition, DePONTE alleged that the UPW wilfully, intentionally, and maliciously misstated facts and mischaracterized

his legitimate grievances against the Employer by maintaining that DePONTE's grievances were actually a UPW labor arbitration matter involving member Louis Souza (Souza), wherein there was an arbitration award in Souza's favor. DePONTE alleged that he repeatedly sought representation by the UPW and repeatedly advised the UPW of facts that demonstrated his claims were not adverse to the arbitration award in favor of Souza; however, DePONTE alleged that the UPW refused to represent him and persisted in taking positions adverse to him.

Therefore, DePONTE alleged that the UPW breached its duty to fairly represent him and failed to act in good faith with respect to his interests as both a union member and public employee, thereby wilfully and intentionally interfering with his employment contract with the Employer, in violation of §§ 89-13(b)(1), 89-13(b)(4), and 89-13(b)(5), Hawaii Revised Statutes (HRS).

On April 11, 1994, the UPW filed a motion to dismiss and/or for summary judgment with the Board. The UPW argued, inter alia, that the Board lacks jurisdiction over the instant dispute because DePONTE's complaint is time-barred.

On May 19, 1994, DePONTE filed a memorandum in opposition to the UPW's motion and an ex parte motion to set the hearing on the UPW's motion to dismiss and/or for summary judgment on Maui or, in the alternative, to limit arguments to the written pleadings filed in this case.

Also on May 19, 1994, the UPW filed a motion to strike DePONTE's memorandum in opposition to its motion to dismiss and/or

for summary judgment and a memorandum in opposition to DePONTE's motion to set the hearing on Maui or to limit arguments to the written pleadings.

On May 24, 1994, the Board held a hearing on the UPW's motion to dismiss and/or for summary judgment. At the hearing, the Board denied DePONTE's motion to set the hearing on Maui or to limit arguments to the written pleadings because the hearing was ultimately conducted via conference call. In addition, the Board denied the UPW's motion to strike DePONTE's memorandum in opposition to the UPW's motion to dismiss and/or for summary judgment.

Based upon a thorough review of the record, the Board makes the following findings.

Complainant DePONTE was at all times relevant an employee of the Employer and a member of bargaining unit 01.

Respondent UPW is the certified exclusive representative of employees of the Employer included in bargaining unit 01.

The instant complaint arose over the Employer's selection of an employee to fill the Building Maintenance Helper position, Position No. 05520 (the subject position) at the Kahului Airport.

On September 19, 1990, the Employer posted a vacancy notice for the subject position. On January 29, 1991, Souza filed a grievance with the Employer after learning that he was not selected for promotion to the subject position.

Subsequently, the Employer reopened the subject position, and on February 11, 1992, DePONTE submitted his application.

Thereafter, on February 21, 1991, DePONTE was selected to fill the subject position effective March 1, 1991.

On September 1, 1991, DePONTE's probationary period ended and he was granted a permanent appointment to the subject position.

By letter dated October 28, 1991, the Employer notified DePONTE that in light of Souza's grievance, "there is a possibility of being removed from your current position and returned to your former position."

On February 21, 1992, Arbitrator Stanley Ling issued a decision (the arbitration decision) awarding Souza his promotion to the subject position effective July 23, 1991, the date of the arbitration hearing.

On March 5, 1992, DePONTE's supervisor informed DePONTE that he would have to step down from the subject position because of the arbitration decision. In addition, by letter dated March 5, 1992, the Employer notified DePONTE that he would be returned to his former position of Groundskeeper I effective March 6, 1992.

On March 16, 1992, DePONTE's attorney wrote to UPW Director Gary Rodrigues (Rodrigues) requesting that the UPW file a grievance on behalf of DePONTE. On March 17, 1992, Rodrigues responded to DePONTE's request and indicated that the UPW would not file a grievance on DePONTE's behalf because: (1) promotions are governed by the Unit 01 collective bargaining agreement (Unit 01 agreement) and therefore the arbitration decision is final and binding; (2) DePONTE was demoted as the result of the arbitration decision and therefore his demotion is not grievable under Sections 15.01 and 15.02 of the Unit 01 agreement; and (3) DePONTE has a

right to file a grievance without the UPW's representation pursuant to Section 15.03 of the Unit 01 agreement.

By letter dated June 22, 1992, DePONTE, by and through his attorney, filed an appeal of a decision by the Director of the Department of Transportation dated June 9, 1992 with the Commission.

On August 22, 1992, Circuit Court Judge Richard Komo issued an order confirming the arbitration decision.

On May 12, 1993, the Commission heard DePONTE's appeal, and on September 29, 1993, the Commission issued a decision ordering the Employer to recognize DePONTE's permanent appointment as a Building Maintenance Helper, and award him appropriate compensation and back pay from March 6, 1992. In addition, the Commission ordered the Employer to credit DePONTE with the seniority he accrued while employed in the subject position from March 1, 1992 to March 5, 1992.

On October 29, 1993, the UPW filed a motion for reconsideration with the Commission challenging the Commission's jurisdiction over the subject matter. Thereafter, on November 5, 1993, DePONTE filed a memorandum in opposition to the UPW's motion for reconsideration. The Commission declined to act on the UPW's motion.

On January 5, 1994, the UPW filed an action in the Circuit Court of the First Circuit, State of Hawaii, in Civil No. 94-0037-01, which seeks, inter alia, a writ of prohibition against enforcement of the Commission's order granting DePONTE his promotion.

The UPW contends that the instant complaint is time-barred because DePONTE was obligated to file his complaint within 90 days of March 17, 1992, the date that Rodrigues wrote to DePONTE to inform him that the UPW would not file a grievance on his behalf. To the extent that DePONTE's complaint arises in connection with the UPW's challenge of the Commission's decision of September 29, 1993, the UPW contends that DePONTE's complaint is also untimely.

Section 89-14, HRS, provides in pertinent part:

§ 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

Section 377-9, HRS, provides in pertinent part:

§ 377-9 Prevention of unfair labor practices.

* * *

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

In addition, Administrative Rules § 12-42-42(a) provides in relevant part:

§ 12-42-42 Complaint. (a) A complaint that any . . . employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee . . . or their representatives within ninety days of the alleged violation.

The 90-day limitations period of § 377-9(1), HRS, is applicable to the instant case pursuant to § 89-14, HRS. Previously, the Board held that statutes of limitation are to be strictly construed and therefore dismissed a prohibited practice complaint which was filed one day beyond the limitations period.

Alvis W. Fitzgerald, 3 HPERB 186 (1983); Michael K. Iwai, 5 HLRB 330 (1993).

Based upon a review of the record in this case, the Board concludes that DePONTE's complaint was filed beyond the statutory 90-day limitations period and is therefore time-barred.

Specifically, the Board finds that DePONTE's cause of action to challenge the UPW's refusal to represent him accrued when he received Rodrigues' letter dated March 17, 1992, informing him that the UPW would not represent him. DePONTE's instant complaint was filed on March 28, 1994, more than two years after his cause of action accrued and well beyond the applicable limitations period.

Although DePONTE argues that the 90-day limitations period should run from January 5, 1994, when the UPW filed the lawsuit, the Board finds that the UPW's filing of the civil action is simply a restatement and reaffirmation of the UPW's March 17, 1992 position that it would not represent DePONTE. Accordingly, the Board lacks jurisdiction over this matter and hereby dismisses the instant prohibited practice complaint.

Assuming, arguendo, that DePONTE's complaint was not time-barred, dismissal of the case would be appropriate here because the evidence in the record does not support a finding that the UPW acted in an arbitrary or discriminatory manner or in bad faith so as to constitute a breach of duty under Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, 64 L.R.R.M. 2369 (1967).

In Vaca v. Sipes, the United States Supreme Court stated:

A breach of the statutory duty of fair representation occurs only when a union's

conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.

Id., 64 L.R.R.M. at 2376 (emphasis added).

In Decision No. 196, Caldeira, 3 HPERB 523 (1984), the Board discussed the duty of fair representation with respect to the grievance procedure and stated:

Implicit in the ruling of Vaca v. Sipes, supra, and its line of cases is the presumption that the union does not have to be involved at any step of the procedure if it opts out for reasons other than those arrived at in a manner that is arbitrary, discriminatory, or in bad faith.

Id. at 548.

While DePONTE argues that the UPW's position should be that the Employer now has two Building Maintenance Helpers and that a new position should be established for DePONTE, the UPW contends that its actions were intended to uphold the arbitration decision and enforce provisions of the Unit 01 agreement pertaining to promotions.

Based upon the facts of this case, the Board finds that the UPW's decision to attempt to enforce the arbitration decision by filing an action against the Commission rather than pursue DePONTE's recommended course of action cannot be characterized as arbitrary, discriminatory, or in bad faith.


ORDER

The Board hereby dismisses the instant prohibited practice complaint.

CLIFFORD DePONTE, JR. and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646,
AFL-CIO; CASE NO. CU-01-100
ORDER NO. 1105
ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

DATED: Honolulu, Hawaii, September 15, 1994.

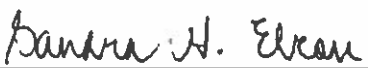
HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member



SANDRA H. EBESU, Board Member

Copies sent to:

Carolyn Burton, Esq.
Herbert R. Takahashi, Esq.
Joyce Najita, IRC