

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NOS.: CE-10-303
	)	CU-10-123
BERT J.K. SAM FONG,	)	
	)	ORDER NO. 1445
Complainant,	)	
	)	ORDER GRANTING, IN PART, AND
and	)	DENYING, IN PART, RESPONDENT
	)	UPW'S MOTION TO DISMISS
GEORGE IRANON, Director,	)	AND/OR FOR SUMMARY JUDGMENT;
Department of Public Safety,	)	NOTICE OF HEARING
State of Hawaii and UNITED	)	
PUBLIC WORKERS, AFSCME,	)	
LOCAL 646, AFL-CIO,	)	
	)	
Respondents.	)	

ORDER GRANTING, IN PART, AND DENYING,  
IN PART, RESPONDENT UPW'S MOTION TO DISMISS  
AND/OR FOR SUMMARY JUDGMENT; NOTICE OF HEARING

On April 29, 1996, Complainant BERT J.K. SAM FONG (SAM FONG) filed a prohibited practice complaint against Respondents GEORGE IRANON, Director, Department of Public Safety, State of Hawaii (IRANON or Employer) and the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Union) with the Hawaii Labor Relations Board (Board). Complainant alleges that Respondent Employer violated § 89-13(8) [sic], Hawaii Revised Statutes (HRS), by improperly imposing two one-day suspensions on Complainant in violation of the Unit 10 collective bargaining agreement (Agreement). Complainant also alleges that Respondent Union violated § 1.02, Recognition, of the Unit 10 Agreement and § 89-13(8) [sic], HRS, when the Union failed to file grievances on the suspensions on SAM FONG's behalf.

On May 2, 1996, the Union filed a motion to dismiss the complaint and/or for summary judgment with the Board. With regard to the motion to dismiss, the Union alleges that SAM FONG failed to timely respond to the UPW's letter, dated February 16, 1995, asking SAM FONG if he wished to file formal grievances on the suspensions. Thereafter, the time to file grievances lapsed and on April 12, 1995, UPW business agent Edward Espiritu informed SAM FONG that he failed to act in a timely manner. As the instant complaint was filed on April 29, 1996 well outside of the 90-day limitations period provided in § 377-9(1), HRS, the UPW contends that the Board lacks jurisdiction over these claims. Moreover, the Union contends the complaint fails to state a claim for relief as to SAM FONG's allegations of violations of § 1.02 of the Unit 10 Agreement and § 89-13(8) [sic], HRS, by the Union.

With regard to the motion for summary judgment, the Union contends that there are no genuine issues of material fact in dispute and that the Union is entitled to summary judgment as a matter of law. The UPW contends that SAM FONG failed to respond to the Union's letters informing him of the time limits within which to grieve his suspensions. Thus, the UPW contends that the Union did not act in an arbitrary or discriminatory manner and as a matter of law, the Board should conclude that the UPW did not breach its duty of fair representation.

On July 9, 1996, Complainant, by and through his attorney, filed a memorandum in opposition to the Union's motion. Complainant states in an affidavit attached to the memorandum that he personally informed Espiritu that he wanted to file grievances

regarding the disciplinary actions after receiving the form letters from the Union. SAM FONG further states that he also informed the Union representative present at his pre-disciplinary hearing that he wanted to contest the charges. Complainant contends that he first learned that the Union failed to file the grievances on February 20, 1996. He alleges that he then filed this complaint with the Board on April 29, 1996. In addition, SAM FONG alleges that he believes the Board has jurisdiction over this complaint under § 889-13(b) [sic], HRS, because the Union failed to file the grievances against his Employer.

On July 9, 1996, the Board held a hearing on the motion by conference call. At that time, Complainant, by and through his counsel, made an oral motion to amend his complaint to allege violations of §§ 89-13(b)(1) and (5), HRS, by the Union. The Board did not grant the motion and Complainant's counsel indicated that he would review the complaint and consider whether amendments should be filed with his client. No further motions to amend the complaint have been filed with the Board.

Based upon a thorough review of the record and the arguments presented, the Board agrees with the Union that SAM FONG fails to state a claim for relief under § 89-13(8) [sic], HRS, as there is no such section in the statute applicable to the commission of prohibited practices by employee organizations. In addition, the Board dismisses the allegations that the Union violated the provisions of § 1.02 of the Unit 10 Agreement because that section is not applicable to the facts before the Board. Section 1.02 of the Agreement provides as follows:

The Employer and the Union recognize the rights and obligations of the parties to negotiate wages, hours, and other terms and conditions of employment and to administer this Agreement on behalf of covered employees, and that such administration shall apply equally to all employees in the bargaining unit without regard to membership or nonmembership in the Union.

The Board finds that there are no facts alleged herein which give rise to a cause of action against the Union based upon discrimination on the basis of Union membership. Moreover, the Board agrees with the Union that the provisions of the Agreement are one-sided as they represent the obligations of the Employer to the employee and the Union. Thus, the grievance procedure of the Agreement provides redress for contractual violations by the Employer. Accordingly, the allegations of the instant complaint relating to violations of the Unit 10 Agreement by the Union are hereby dismissed.

In his memorandum in opposition to UPW's motion to dismiss, Complainant alleges that the Board has jurisdiction over the complaint because of § 889-13(b) [sic], HRS. As the Board recognizes that Complainant contends that the Union breached its duty of fair representation by its failure to pursue Complainant's grievances, the Board will permit Complainant to amend his complaint to cite the appropriate statutory sections. Complainant shall file an Amended Complaint against the Union with the Board within ten days from the receipt of this order. If Complainant fails to file the Amended Complaint, the Board will dismiss the instant complaint as against the Union.

With respect to the UPW's motion to dismiss the complaint based upon the 90-day statute of limitations, the Board finds that there is a factual dispute as to whether and when SAM FONG informed Espiritu of his desire to file any grievances on his behalf. In addition, the Board finds a factual dispute as to when SAM FONG knew or should have known that the grievances were not filed. Based upon the record, the Board is unable to resolve the conflict in the evidence on the basis of the affidavits submitted as it appears to depend upon the credibility of the witnesses. Thus, the Board will deny the UPW's motion to dismiss and/or for summary judgment, in part, without prejudice, until after a hearing to resolve the disputed facts referenced above.

YOU ARE HEREBY NOTIFIED that the hearing on this matter will be held on May 14, 1997 at 9:00 a.m. in the David Trask Building, Hawaii Government Employees Association, 2145 Kaohu Street, Room 207, Wailuku, Hawaii 96793.

DATED: Honolulu, Hawaii, April 17, 1997.

HAWAII LABOR RELATIONS BOARD

  
BERT M. TOMASU, Chairperson

  
RUSSELL T. HIGA, Board Member

  
CHESTER C. KUNITAKE, Board Member

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