

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)

ROBERT SOMERA,)

Complainant,)

and)

HALAWA CORRECTIONAL FACILITY,)
Department of Public Safety,)
State of Hawaii,)

Respondent.)

CASE NO. CE-01-372

ORDER NO. 1580

ORDER GRANTING RESPONDENTS'
MOTION TO DISMISS AND/OR
FOR SUMMARY JUDGMENT

In the Matter of)

ROBERT SOMERA,)

Complainant,)

and)

DEPARTMENT OF PUBLIC SAFETY,)
State of Hawaii and NATHALIE)
KODAMA, Fiscal Services Officer,)
Department of Public Safety,)
State of Hawaii,)

Respondents.)

CASE NO. CE-01-373

In the Matter of)

ROBERT SOMERA,)

Complainant,)

and)

UNITED PUBLIC WORKERS, AFSCME,)
LOCAL 646, AFL-CIO,)

Respondent.)

CASE NO. CU-01-136

ORDER GRANTING RESPONDENTS' MOTION
TO DISMISS AND/OR FOR SUMMARY JUDGMENT

On December 8, 1997, Respondent HALAWA CORRECTIONAL FACILITY, Department of Public Safety, State of Hawaii (HALAWA or Employer), by and through its attorneys, filed a motion to dismiss and/or for summary judgment in Case No. CE-01-372. Complainant ROBERT SOMERA (SOMERA) alleges in the instant complaint that the Employer failed to take any action against certain Adult Corrections Officers (ACOs) who SOMERA accused of lying and providing false statements which resulted in his two suspensions.

Respondent HALAWA alleges that Complainant is a Cook III at HALAWA and a member of Unit 01 which is represented by the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union). By letter dated March 18, 1997, HALAWA placed SOMERA on leave without pay for 30 days in accordance with Section 11A of the Unit 01 collective bargaining agreement (contract) pending investigation of charges against him. Although HALAWA notified SOMERA that he could file a grievance pursuant to the contract if he felt that the action was improper, Complainant or his Union failed to file a timely grievance concerning the leave of absence. HALAWA also contends that even if the Union failed to fairly represent him, SOMERA could have filed a grievance concerning the allegations on his own. HALAWA therefore contends that SOMERA thus failed to exhaust his contractual remedies and the Board lacks jurisdiction over his claim.

In addition, HALAWA contends that the instant complaint is time-barred because the complaint was filed more than 90 days after the alleged prohibited practice occurred. HALAWA contends

that the alleged prohibited practice occurred on or about March 18, 1997 when notice was given to SOMERA that he would be placed on leave without pay. As such, Complainant should have filed a complaint with the Board by June 16, 1997. Since Complainant filed the instant complaint on November 4, 1997, HALAWA contends that the complaint violates the statute of limitations.

Also on December 8, 1997, Respondents DEPARTMENT OF PUBLIC SAFETY, State of Hawaii (PSD) and NATHALIE KODAMA, Food Services Manager, Department of Public Safety, State of Hawaii (KODAMA), by and through their counsel, filed a motion to dismiss and/or for summary judgment in Case No. CE-01-373 with the Board. SOMERA alleged in that complaint that Respondent KODAMA discriminated against him when she refused to schedule him for part-time, temporary work at Oahu Community Correctional Center (OCCC) during his ten-day suspension from PSD on November 22, 1996, which was effective December 1-12, 1996.

Respondents allege that Complainant was hired as a temporary, part-time driver for PSD's Correctional Industries Program on or about February 11, 1996 to deliver meals to the Waimano Home facility. Respondents further allege that Complainant works substantially less than 20 hours per week and PSD or Correctional Industries has the authority to terminate his services on a daily basis. In addition, Respondents allege that by letter dated February 3, 1997, Ellena M. Young, Division Administrator, Corrections Program Services, informed SOMERA that in view of the rescission of his ten-day suspension, she was willing to schedule him for more hours of work to make up the time that he was not scheduled during the December 1-12, 1996 suspension. Respondents'

counsel represented that SOMERA did not accept Young's offer for additional work.

Respondents contend that as a temporary exempt employee, SOMERA is not an "employee" under Chapter 89, Hawaii Revised Statutes (HRS) and is excluded from the coverage of Chapter 89, HRS. Thus, Respondents contend that the Board lacks jurisdiction over SOMERA's complaint in Case No. CE-01-373. In addition, Respondents contend that SOMERA complains of KODAMA's actions which occurred in December 1-12, 1996 and thus, the complaint is time-barred.

On December 16, 1997, the Board conducted a hearing on Respondents' respective motions to dismiss and/or for summary judgment. Also on that date, SOMERA filed responses to Respondents' motions with the Board. SOMERA alleged that he tried to exhaust his administrative and Union remedies. SOMERA also alleged that he believed that violations were committed by the UPW and PSD. SOMERA contended that it would be unjust for the Board to dismiss his complaints and contended that he was suspended for ten days based upon hearsay, placed on leave without pay for 30 days based on false statements and was not permitted to work at OCCC although another employee was permitted to work.

Based upon a review of the record and the arguments presented, the Board finds that HALAWA reduced SOMERA's ten-day suspension to an oral reprimand in January 1997. SOMERA sought to file a grievance against certain ACOs and was advised by the Union that it would not pursue his claims in January 1997. Order No. 1579, January 16, 1998. The Board takes notice that it previously dismissed SOMERA's complaint against the UPW concerning

SOMERA's suspension of December 1996 in Case No. CU-01-136 in these consolidated proceedings because the complaint was filed beyond the applicable 90-day statute of limitations. Id.

Similarly, the Board finds that on March 19, 1997 SOMERA was placed on leave without pay pending the investigation of charges for 30 days. SOMERA failed to file a grievance challenging the imposition of the leave without pay. SOMERA was eventually given backpay and there is no evidence in the record to support a finding that any disciplinary action resulted from the investigation. Thus, while SOMERA claims to have been suspended for 30 days, the evidence in the record supports a finding that he received the backpay for the leave period and was not further disciplined.

On November 4, 1997, SOMERA filed the complaint in Case No. CE-01-372 concerning the Employer's failure to act on his accusations against the ACOs for providing false statements. The Board finds the complaint was filed well after the Board's 90-day statute of limitations had run. Accordingly, the Board hereby dismisses SOMERA's complaint against HALAWA in Case No. CE-01-372 because it is time-barred. Carl H. Ledward, 2 HPERB 539, 546-47 (1980); Alvis W. Fitzgerald, 3 HPERB 186, 197-99 (1983); and Buddy H. Kimura, 4 HLRB 543, 550-51 (1988).


With respect to Case No. CE-01-373, the Board grants Respondents' motion to dismiss SOMERA's complaint because he lacks standing to bring a complaint before the Board challenging Respondent KODAMA's failure to schedule him for work at his "meals on wheels" job. The evidence in the record is undisputed that SOMERA is a part-time temporary worker who works less than 20 hours

per week for Correctional Industries. Section 89-6(d), HRS, provides that "No . . . part-time employee working less than twenty hours per week . . . shall be included in any appropriate bargaining unit or entitled to coverage under this chapter." Thus, SOMERA, in his capacity as the "meals on wheels" driver is excluded from collective bargaining. As such, the Board lacks jurisdiction over his complaint. In addition, SOMERA complains that KODAMA failed to schedule him for work in December 1996 and again, the Board finds that his complaint was filed beyond the applicable statute of limitations.

Accordingly, based upon the foregoing, the Board hereby grants Respondents' motions to dismiss and/or for summary judgment.

DATED: Honolulu, Hawaii, January 20, 1998.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member


CHESTER C. KUNITAKE, Board Member

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