

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NOS.:	CE-01-398
)		CU-01-144
KARL TIMOTHY KIMURA,)		
)	ORDER NO.	1702
Complainant,)		
)	ORDER GRANTING RESPONDENTS'	
and)	MOTIONS TO DISMISS AND/OR	
)	FOR SUMMARY JUDGMENT	
COUNTY OF KAUAI and UNITED)		
PUBLIC WORKERS, AFSCME,)		
LOCAL 646, AFL-CIO,)		
)		
Respondents.)		

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

On June 3, 1998 Complainant KARL TIMOTHY KIMURA (KIMURA) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) alleging that Respondent COUNTY OF KAUAI (County) wrongfully terminated him from employment on grounds that the County failed to follow drug testing procedures and further failed to provide Complainant with adequate due process. Complainant also alleges that Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) failed to adequately represent KIMURA when it refused to request arbitration of the employee-filed grievance contesting his termination.

On June 9, 1998, the UPW filed a motion to dismiss the instant complaint and/or in the alternative for summary judgment.

On June 29, 1998, the County filed a motion for summary judgment.

On July 24, 1998, the Board held a hearing on Respondents' respective motions by conference call. Counsel for Complainant and Respondent County were contacted by telephone, while counsel for Respondent UPW was physically present at the hearing in Honolulu, Hawaii. All parties were afforded a full opportunity to present arguments before the Board. After a thorough review of the record, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Complainant KIMURA was, at all times relevant, a Refuse Collection Crew Leader and employed by the Department of Public Works, County of Kauai. KIMURA's position was included in bargaining unit 01, as defined in § 89-2, Hawaii Revised Statutes (HRS).

Respondent UPW was, at all times relevant, the exclusive bargaining representative of employees in bargaining unit 01, as defined in § 89-2, HRS.

Respondent UPW and the County of Kauai, by and through its mayor, are parties to a collective bargaining agreement covering Unit 01 employees in the County.

On January 5, 1998, KIMURA received written notification from the County that it intended to terminate him from his employment with the County Department of Public Works.

On January 6, 1998, KIMURA contacted a Union representative, Gilbert Nobrega (Nobrega), about his pending termination. Thereafter, Nobrega contacted UPW State Director Gary Rodrigues (Rodrigues) regarding his investigation of KIMURA's case.

After reviewing KIMURA's position as a safety-sensitive position, his prior record and the verification of the medical review officer's determination that the adulteration of KIMURA's urine sample constituted a "refusal to test" under applicable standards, Nobrega and Rodrigues concluded that the County had just cause to terminate KIMURA. Nobrega was instructed to inform KIMURA of the decision not to file a grievance on KIMURA's behalf.

On January 13, 1998, Nobrega informed KIMURA that the Union would not file a grievance contesting his termination because the Union believed there was just cause for his dismissal.

On January 21, 1998, the County conducted a pre-determination hearing, at which time Complainant was provided with an opportunity to present mitigating evidence.

By letter dated January 23, 1998, from the County to KIMURA, Complainant was notified that he would be terminated at the close of business on February 4, 1998.

By letter dated February 4, 1998, from Joseph N. Kobayashi, Esq. (Kobayashi), counsel for Complainant, to the UPW, Kobayashi acknowledged that in a teleconference with someone at UPW, he was made aware that the Union would not be filing a grievance on behalf of KIMURA. Kobayashi requested, inter alia, a written response stating the Union's position.

On February 13, 1998, Kobayashi, on behalf of Complainant, filed a grievance with the County contesting his termination from employment.

By letter dated February 26, 1998, from Kobayashi to Rodrigues, Complainant's counsel again requested written notification from the Union that it would not be filing a grievance

on behalf of KIMURA. Kobayashi indicated that his office had filed a grievance on KIMURA's behalf and assumed that the UPW would not assist KIMURA in the grievance process due to its inaction.

By letter dated May 8, 1998, from Calvin Murashige, Esq. (Murashige) to Rodrigues, Murashige requested that Rodrigues request the County to arbitrate KIMURA's grievance. Murashige referenced an understanding with Kobayashi that the UPW would cooperate in seeking arbitration if the grievance procedure were proved unsuccessful.

By letter dated May 12, 1998, from Rodrigues to Murashige, Rodrigues stated that he had not previously authorized taking KIMURA's case to arbitration. Rodrigues further indicated that since the UPW decided not to grieve KIMURA's case, the Union would not approve of the submission of the case to arbitration.

DISCUSSION

Respondent UPW contends that on or about January 13, 1998, KIMURA received actual notification from Nobrega that the Union would not file a grievance to contest his termination. KIMURA's complaint was filed with the Board on June 3, 1998, more than 90 days after he received notification from the Union, therefore the Union contends that the instant complaint is untimely and the Board lacks jurisdiction over this matter.

Complainant contends that the Union's official notification to KIMURA that it would not take the case to grievance-arbitration at some point after a Step 3 grievance meeting was held on March 31, 1998, constitutes the Complainant's

true cause of action against the Union, thus bringing the matter well within the 90-day limitations period.

Respondent County contends that KIMURA's actual date of termination was February 4, 1998. The instant complaint was filed on June 3, 1998, more than 90 days after his termination date, therefore, the County contends that the instant complaint is likewise untimely and the Board lacks jurisdiction over this matter.

With respect to the County's argument, Complainant contends that the issuance of the County's step 3 decision on or about April 16, 1998, constitutes Complainant's true cause of action against the County, thus bringing the matter well within the 90-day limitations period.

Finally, both Respondents contend that the Complainant, in pleadings before the Board, failed to allege a single violation of § 89-13, HRS; therefore, both Respondents assert that the instant case must be dismissed on additional grounds of failure to state a claim for relief.

Section 377-9(1), HRS, made applicable to the Board by § 89-14, HRS, and Administrative Rules § 12-42-42(a) provides that no unfair labor practice complaints shall be considered unless filed within 90 days of its occurrence. The Board has previously held that statutes of limitations are to be strictly construed and therefore dismissed a prohibited practice complaint which was filed one day beyond the limitations period. Alvis Fitzgerald, 3 HPERB 186 (1983); Michael K. Iwai, 5 HLRB 132 (1993).

With respect to claims against the Union, based upon the record the Board finds that KIMURA's cause of action accrued on

January 13, 1998 when the Complainant received actual verbal notification that the Union would not be filing a grievance contesting his termination. KIMURA's complaint was filed on June 3, 1998, 44 days beyond the 90-day statute of limitations, which expired on April 20, 1998. Therefore, the Board lacks jurisdiction over those claims asserted against the Union.

Inasmuch as the statute of limitations precludes the Board from asserting jurisdiction over the instant case, the Board need not address all other matters, including the merits of Complainant's claims against the Union.

Respondent County contends that the Complainant failed to specifically allege violations of Chapter 89 or 377, HRS, in the instant complaint. In the absence of motions to particularize the complaint and after a fair reading of the instant complaint, together with Complainant's affidavit which was filed with the Board on July 7, 1998, KIMURA alleges that the County improperly terminated him from employment. Specifically, Complainant alleges that the County violated the discipline article of the contract and provisions of the Memorandum of Agreement pertaining to drug and alcohol testing, thereby constituting a prohibited practice in violation of Section 89-13(a)(8), HRS.

There is no dispute in the record herein that Complainant has exhausted the steps in the grievance procedure without the assistance of the Union. As decided, infra, Complainant's charge against the Union alleging a breach of the duty of fair representation for the alleged failure to pursue the grievance was dismissed for failure to comply with the applicable statute of limitations. As Complainant's remaining charges against the

County allege contractual violations, the Board will defer to the contractual grievance process. While, individual employees are entitled to file grievances, the right to request arbitration over a grievance alleging contractual violations is reserved exclusively to the Union. Where the Board lacks jurisdiction over claims against the Union arising from the same dispute with an Employer, the Board cannot compel the Union to request that a matter be arbitrated. The Board cannot compel an Employer to proceed to arbitration with a third party. Accordingly the Board hereby dismisses those claims asserted against the County.

CONCLUSIONS OF LAW

All complaints must be filed with the Board within 90 days of the alleged violation. The Board lacks jurisdiction over claims filed outside the 90-day limitations period.

In appropriate cases, the Board will defer claims against the employer alleging contract violations to the contractual grievance process. As the only claims Complainant raises against the County are violations of the contract and the Memorandum of Agreement pertaining to alcohol and drug testing, the Board will defer to the contractual grievance process.


Where the Board lacks jurisdiction over claims against the Union arising from the same dispute with an Employer, the Board cannot compel an Employer to proceed to arbitration with a third party.

ORDER

The instant prohibited practice complaint is hereby dismissed.

DATED: Honolulu, Hawaii, February 24, 1999

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member



CHESTER C. KUNITAKE, Board Member

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