

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-01-436
RYAN CLARENCE DOMINGO,)	ORDER NO. 1817
Complainant,)	ORDER GRANTING RESPONDENT'S
and)	MOTION TO DISMISS COMPLAINT
DEPARTMENT OF FACILITY AND MAIN-)	
TENANCE, Division of Road Main-)	
tenance, City and County of)	
Honolulu,)	
Respondent.)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS COMPLAINT

On September 28, 1999, RYAN CLARENCE DOMINGO (DOMINGO) filed a prohibited practice complaint against the DEPARTMENT OF FACILITY AND MAINTENANCE, Division of Road Maintenance, City and County of Honolulu (CITY) with the Hawaii Labor Relations Board (Board). Complainant alleged that he was terminated for not responding to his substance abuse counselor. Complainant contends that he attempted to contact his counselor but was told that she was going to be unavailable for four days.

On October 20, 1999, Respondent filed a motion to dismiss the instant complaint with the Board. The CITY contends that the Board lacks jurisdiction over the instant complaint because the complaint is untimely. In addition, the CITY contends that the complaint is barred by the principles of res judicata and collateral estoppel because of the Board's prior ruling in Decision

No. 398, in Case No. CE-01-397, United Public Workers, AFSCME, LOCAL 646, AFL-CIO, 5 HLRB ____ (1999).

On October 28, 1999, Complainant filed a memorandum in opposition to Respondent's motion with the Board.

Pursuant to notice, the Board conducted a hearing on the instant motion on October 28, 1999. All parties had full opportunity to present evidence and argument to the Board. Based upon a thorough review of the record and the arguments presented in this case, the Board hereby makes the following findings of fact and conclusions of law and grants the CITY's motion to dismiss the instant complaint.

FINDINGS OF FACT

DOMINGO was for all times relevant an employee of the CITY. DOMINGO was an employee within the meaning of § 89-2, Hawaii Revised Statutes (HRS), and included in Unit 01.

The CITY was for all times relevant a public employer, within the meaning of § 89-2, HRS.

The United Public Workers, AFSCME, Local 646 (UPW or Union) was for all times relevant the exclusive representative, as defined in § 89-2, HRS, of the employees of the CITY who are included in Unit 01.

DOMINGO was employed by the CITY for approximately ten years. At some point during his employment, DOMINGO was found to have violated the CITY's substance abuse policy. As a result, he was ordered to complete a substance abuse treatment program. DOMINGO alleges that he was compliant with the instructions of his substance abuse counselor for over one year and three months. In

March 1997, his counselor found that he had been noncompliant in February and recommended that he attend a 190-day program with the Salvation Army. DOMINGO refused to attend the program. DOMINGO claims that no one from the CITY contacted him between March and September 1997. Thereafter, DOMINGO was found to have violated the substance abuse policy and on or about September 30, 1997, DOMINGO was terminated. On October 2, 1997, the Union filed a Step 3 grievance with the employer contesting DOMINGO's termination. DOMINGO contends that he was compliant with federal regulations governing substance abuse procedures by drivers of commercial vehicles in 1997, and thus should not have been terminated.

DISCUSSION

In its motion, the CITY contends that the Board lacks jurisdiction over this complaint because it was filed well beyond the Board's 90-day statute of limitations. In addition, the CITY contends that the complaint is barred by the doctrines of res judicata and collateral estoppel because of the Board's decision in United Public Workers, AFSCME, LOCAL 646, AFL-CIO, supra. In that case, the UPW filed a prohibited practice complaint against Jeremy Harris, Mayor of the City and County of Honolulu and other officials of the City and County of Honolulu alleging that they unilaterally implemented disciplinary penalties against employees who tested positive for drugs and alcohol. DOMINGO's termination was one of the actions alleged to have violated an interim drug disciplinary agreement. In Decision No. 398, the Board ultimately held that DOMINGO was in a group of employees who were deemed by the City to be noncompliant with the drug testing policies. The

Board ruled that it lacked jurisdiction over the allegedly noncompliant employees since the complaint in that case, filed on May 29, 1998, was filed more than 90 days after their termination. The CITY contends that the Union was in privity with DOMINGO and represented him in Case No. CE-01-397 with respect to his termination. Thus, the CITY contends that the instant complaint is barred.

Section 377-9(1), HRS, made applicable to these proceedings by § 89-14, HRS, provides that a prohibited practice complaint must be filed with the Board within 90 days from the occurrence of the prohibited practice. In this case, DOMINGO claims that he was improperly terminated by the CITY on or about September 30, 1997. While it appears that the Union filed a grievance challenging DOMINGO's termination on or about October 2, 1997, there is no evidence of the disposition of that matter.

DOMINGO filed the instant complaint with the Board on September 28, 1999, well beyond the 90 days permitted by the applicable statute. DOMINGO claims that he sought legal advice during the two years which elapsed between the time he was terminated and the time he filed the instant complaint and was misled as to the statute of limitations. The Board, however, cannot waive its jurisdictional time limits and therefore finds that the complaint is untimely. Carl H. Ledward, 2 HPERB 539, 546-47 (1980); Alvis W. Fitzgerald, 3 HPERB 186, 197-99 (1983); Buddy H. Kimura; 4 HLRB 543, 550-51 (1988).

Given the Board's finding that it lacks jurisdiction over the instant complaint, the Board need not address the CITY's arguments regarding res judicata and collateral estoppel.

CONCLUSION OF LAW

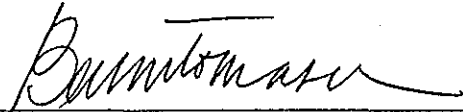
The Board lacks jurisdiction over complaints filed more than 90 days after the alleged occurrence of a prohibited practice. Here, DOMINGO was terminated on or about September 30, 1997 and there are no further allegations of wrongdoing by the CITY after that time. The Board, thus lacks jurisdiction over this complaint.

ORDER

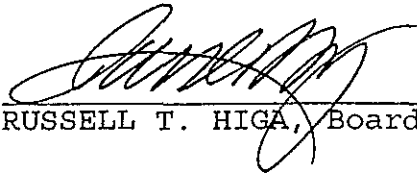
The Board hereby dismisses the instant complaint.

DATED: Honolulu, Hawaii, November 24, 1999.

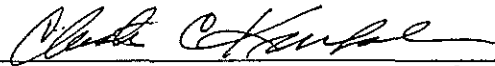
HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member



CHESTER C. KUNITAKE, Board Member

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