STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LUIS Q. BALLERA, Complainant, and DEL MONTE FRESH PRODUCE HAWAII, INC. and INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 142, AFL-CIO, Respondents.	CASE NOS.: 00-1(CE) 00-6(CU) ORDER NO. 1937 ORDER DENYING RESPONDENT ILWU'S MOTION TO DISMISS FOR WANT OF JURISDICTION; NOTICE OF PREHEARING CONFERENCE AND HEARING

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MOTION TO DISMISS FOR WANT OF JURISDICTION;
NOTICE OF PREHEARING CONFERENCE AND HEARING

On September 1, 2000, Respondent INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 142, AFL-CIO (ILWU or Union) filed a Motion to Dismiss for Want of Jurisdiction in the above-captioned matter. The Union asserts that the Hawaii Labor Relations Board (Board) lacks jurisdiction over Complainant LOUIS Q. BALLERA's (BALLERA or Complainant) unfair labor practices complaint against the union because it was filed after the expiration of the 90-day limitations period identified in Hawaii Revised Statutes (HRS) §377-9(l).

On August 7, 2000, Respondent DEL MONTE FRESH PRODUCE HAWAII, INC. (DEL MONTE) filed a statement of no opposition to the Union's motion to dismiss. On August 14, 2000, BALLERA filed a memorandum in opposition. And on August 14, 2000, the Union filed a reply to the memorandum in opposition.

On September 15, 2000, the Board conducted a hearing on the Union's motion to dismiss. All parties were afforded a full and fair opportunity to present arguments and evidence on the foregoing motion. On that same day, the Union filed a supplemental submission to address issues raised for the first time at the hearing.

After reviewing the record of this case, the Board hereby denies the Union's motion to dismiss.

FINDINGS OF FACT

1. On or about April 14, 1999, Complainant was terminated from his employment with DEL MONTE.

2. Between April 26, 1999 and July 14, 1999, the Union, on behalf of Complainant, filed step 2 and 3 grievances as well as a notice of intent to arbitrate pursuant to the collective bargaining agreement then in effect.

3. On or about November 10, 1999, the Union local notified Complainant that it would not submit his grievance to arbitration. Complainant subsequently appealed the decision not to arbitrate his termination with the Union's International vice-president pursuant to Article XXII of the Constitution and Bylaws of the local.

4. On January 10, 2000, the Union's International notified Complainant that it had denied his appeal.

5. On February 8, 2000, Complainant, proceeding pro se, filed the instant complaint against DEL MONTE alleging violations of identified sections of the collective bargaining agreement and HRS §§ 377-6 and 8, Unfair Labor Practices. The complaint, under its statement of allegations also referenced "attached copies with enclosures the [sic] Appeal for Grievance No. KPL-99-011, denied by both ILWU Local 142 and ILWU International, Hawaii Division, which are self explanatory." The referenced document contained a detailed account of BALLERA's allegations that the Union failed to adequately investigate or defend him regarding his discharge.

6. On February 22, 2000, DEL MONTE filed a motion for summary judgment on Complainant's Unfair Labor Practices complaint.

7. On February 28, Complainant, pro se, filed a letter opposing the dismissal of his complaint.

8. On March 13, 2000, Complainant filed a motion for leave to amend the instant complaint to "add ILWU Local 142." The motion for leave to amend alleged "1. Failure to investigate; 2. Failure to Arbitrate; and 3. Abandonment" on the part of the Union. Complainant again attached a copy of his appeal of the Union's decision not to arbitrate. A copy of the motion was indicated to have been sent to the Union.

9. DEL MONTE filed a memorandum in opposition to the motion on April 10, 2000.

10. On or about April 4, 2000, the Board issued a "Notice of Rescheduled Hearing on Respondent's Motion for Summary Judgment and Hearing on Motion to Amend Complaint." A copy of the notice was sent to the Union.

11. On April 18, 2000, the Board conducted a hearing on DEL MONTE's motion for summary judgment and Complainant's motion to amend. At the hearing, Complainant was, for the first time, represented by counsel.

12. On June 16, 2000, the Board issued Order No. 1884 denying the motion for summary judgment and granting Complainant's motion to amend. The order directed Complainant to "file the original and four copies of the Amended Unfair Labor Practice Complaint forthwith."

13. On August 25, 2000, Complainant filed a First Amended Complaint alleging, inter alia, a breach of the Union's duty of fair representation in its investigation of Complainant's grievance against DEL MONTE and subsequent reversal of its decision to arbitrate.

DISCUSSION

The Union argues that Complainant's amended complaint, filed on August 25, 2000, was not within the statutory limitations period identified in HRS § 377-9(l)[1] so that the Board lacks jurisdiction over the complaint. It asserts that the triggering "occurrence" of the period was the November 9, 1999 Notice of Decision not to Arbitrate so that the limitations period expired on February 7, 2000, one day before the filing of BALLERA's initial complaint. In the alternative, it argues that even if the relevant "occurrence" was the January 10, 2000 Denial of Appeal, the Complainant's filing of his amended complaint naming the Union 133 days later (even excluding the time spent during the Board's consideration of Complainant's motion to amend his complaint) clearly fell outside the prescribed limitations period.

BALLERA contends that the applicable occurrence was the January 10, 2000 Denial of Appeal and that his Motion for Leave to File Amended Complaint 63 days later tolled the limitations period.

The Board concurs with the position argued by BALLERA and further concludes that even if the filing of the motion for leave to amend did not finally toll the statute of limitations, the regrettably tardy amended complaint related back to the filing of the original complaint so that, as a matter of law, the filing against the Union occurred within the limitations period.

Statutes of Limitation

Statutes of limitation require "the timely notice of claims by way of formal pleadings. This in turn precludes stale claims where the other party must gather evidence after time has dissipated memories, documents and real evidence. (citations omitted)." Mauian Hotel v. Maui Pineapple Co., 52 Haw. 563, 565, 481 P.2d 310 (1971). They are a "personal defense and a person may waive the benefits of such statutes." Id. at 569.

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[1]HRS § 377-9(l) provides: "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence."

The Hawaii Supreme Court in Salavea v. City and County of Honolulu, 55 Haw. 216, 220, 517 P.2d 51 (1973), has provided the following guidance regarding the interpretation and application of such statutes:

> ...[I]n seeking assistance from the general rules of statutory interpretation, we note that all such guidelines are, almost without exceptions, characterized by disfavor over overly technical constructions of statute that would make effective use of the court system needlessly complex rather than simple, or unreasonably inaccessible rather than available to all who seek redress of wrongs. In consonance with these basic fundaments of our judicial system, the courts of Hawaii have consistently resolved ambiguities in statutes of limitations with an approach reflecting liberality designed so far as to give plaintiff-litigants the maximum free access to our courts still consistent with the controlling statutory provision and with the legislative intent that is reflected in its enactment. Yoshizaki v. Hilo Hospital, 50 Haw. 150, 433 P.2d 220 (1967); Oakley v. State, 54 Haw. 210, 505 P.2d 1182 (1973); Azada v. Carson, 252 F.Supp. 988 (D. Haw. 1966); Albert v. Dietz, 283 F.Supp. 854 (D. Haw. 1968).

The Board's analysis will proceed pursuant to this guidance.

Occurrence

The Union asserts that the limitations period was initiated by the local's November 9, 1999 Notice of Decision not to Arbitrate, rather than the International's January 10, 2000 Denial of Appeal and Notice.

The Board need not resolve this issue because the Union, by the terms of its own Constitution and Bylaws tolled any applicable limitations period during consideration of the appeal by the International. Paragraph 22.02.2 of Article XXII of the Constitution and Bylaws of ILWU, Local 142, the Article pursuant to which BALLERA's appeal was taken, provides as follows:

> 22.03. It shall be the duty of any member or person to whom the Local owes a duty of fair representation who feels aggrieved by any action, or decision to the Local to exhaust their appeal rights provided by this Article prior to any appeal or action in any civil court or governmental agency for redress.

The Constitution of the Union purports to forbid the filing of the instant complaint during the period during which the appeal to the International is pending. Thus, by its own terms, the applicable limitations period was tolled during the pendency of the appeal. The limitations period thus began running on January 10, 2000 and was not exhausted prior to the filing of Complainant's initial complaint.

Tolling

Applying the test articulated in Mauian Hotel, supra, the Board concludes that the filing of Complainant's Motion for Leave to Amend Complaint on the 63rd day of the limitations period tolled the statute of limitations. The motion was a "timely notice of claims by way of formal pleadings." The motion articulated and identified BALLERA's claims against the Union, and identified the factual allegations and circumstances from which those claims arose. The Union was thus clearly placed on notice by way of a formal pleading prior to the expiration of the limitations period.

The Union, however, argues that even if the Motion for leave to Amend tolled the limitations period, it did so only for the period during which the Motion was being considered so that the period continued to run upon the Board's disposition of the Motion on June 16, 2000.

A literal application of the statute would appear to support this argument. HRS § 377-9(l) provides that no "complaints" shall be considered unless "filed" within 90 days of the occurrence. The statute thus appears to require the "filing" of a "complaint." The "Motion for Leave to Amend Complaint" is on its face not a "complaint." It only sought leave to amend the complaint without itself incorporating any such amendment. Thus the Board's granting of the Motion for Leave to Amend, left the complaint itself intact. Inasmuch as the statutorily referenced pleading did not at that time conform, neither the motion nor order arguably could not have conclusively tolled the statute of limitations. Thus upon granting of the Motion and directing Complainant to file his amended complaint "forthwith," the clock arguably again started running and 27 days remained to avoid the exhaustion of the limitations period.

BALLERA, through counsel Ms. Mary Wilkowski, filed the amended complaint on August 25, 2000, 70 days after the issuance of the Board's order and 163 days (excluding the period during which the Motion For Leave to Amend was considered) after the occurrence. Counsel attributed the delay in filing to an "alarming lapse of good judgment" related to her inability to obtain Complainant's files from his interpreter.[2] Whatever the reason, the limitations period would have lapsed before the filing of the amendment absent the amendment relating back to the time of the filing of the initial complaint.

[2]Counsel urges the Board to conclude that the delay was "not contemptuous." Inasmuch as the Board ordered that the amended complaint be filed "forthwith," the 70-day delay might reasonably be interpreted as a wilful ignoring of a Board Order. But, no such conclusion will be reached at this time inasmuch as Respondents do not appear to have been prejudiced by the delay. If, however, Complainant or counsel's conduct in the further course of these proceedings contribute to the delaying or confusion of the disposition of this matter, the Board will, sua sponte, initiate appropriate proceedings pursuant to HAR § 12-42-8(g)(9) for contemptuous conduct.

Relation Back

Complainant's amended complaint was permitted pursuant to HAR § 12-41-10.[3] The rule is silent on whether or when amendments will relate back to the time of the filing of the original pleading and is thus ambiguous in this regard.

HRS § 1-16 provides that, "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another." Hawaii Administrative Rules (HAR) § 12-42-8(g)(10)(C) provides such guidance and compels the conclusion that the allegations in Complainant's amended complaint relate back to the filing of the original complaint thereby comporting with the statute of limitations.

Our applicable regulation on the same subject matter is HAR § 12-42-8(g)(10),[4] the Board's administrative rule applicable to the amendment of documents in public sector prohibited practices proceedings under HRS Chapter 89. It is not strictly applicable here inasmuch as the instant complaint involves a private sector complaint under Chapter 377. However, inasmuch as it regulates the same subject matter, the amending of documents in actions before the Board, it will be looked to for guidance and applied in interpreting the effect of the amended complaint in the instant case.

HAR § 12-42-8(g)(10)(C) provides that, "If amended, the document shall be effective as of the date of the original filing, if it relates to the same proceeding." Applying this provision to resolve the ambiguity in HAR § 12-41-10, the Board concludes that BALLERA's amended complaint will relate back to the date of the original filing, and therefore comport with the statute of limitations, if "it relates to the same proceeding."

BALLERA's amended complaint clearly relates to the same proceeding. Literally, an amended complaint necessarily relates to the same proceeding – the proceeding initiated by the original complaint. The proceeding initiated by the original complaint was filed by Complainant to redress unfair labor practices associated with his termination – the amended complaint seeks redress for one such alleged practice. That the proceeding encompassed claims against the Union is evidenced by the fact that the initial complaint incorporated the same statement of the facts that support the subsequent amendment. Additionally, proof with respect to Complainant's claim against the employer would necessarily incorporate his claims against the Union.[5]

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[3]HAR § 12-41-10 provides: "Amendments. Any party may amend pleadings prior to the hearing, at the hearing, or at any time prior to the issuance of an order based thereon, upon motion, with the consent of the board."

[4]Hawaii Rules of Civil Procedure (HRCP) Rule 15(c) might also be looked to for guidance. It provides for relation back when a "claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading...." An analysis pursuant to this provision would yield the same outcome as that set forth below.

[5] "Whether the employee sues both the labor union and the employer or only one of those entities, he must prove the same two facts to recover money damages: that the employer's

Accordingly, we conclude that the Complainant's First Amended Complaint related back to the time of the filing of his original complaint so that the applicable statute of limitations was not exceeded. The ILWU's Motion to Dismiss is therefore denied.

NOTICE OF PREHEARING CONFERENCE AND HEARING

NOTICE IS HEREBY GIVEN that the Board, pursuant to HRS § 377-9, will conduct a prehearing conference on the above-entitled prohibited practice complaint on October 12, 2000 at 9:30 a.m., in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The purpose of the prehearing conference is to arrive at a settlement or clarification of issues, to identify and exchange witness and exhibit lists, if any, and to the extent possible, reach an agreement on facts, matters or procedures which will facilitate and expedite the hearing or adjudication of the issues presented. The parties shall file a Prehearing Statement which addresses the foregoing matters with the Board two days prior to the prehearing conference.

YOU ARE ALSO NOTIFIED that the Board will conduct a hearing, pursuant to HRS § 377-9 on the instant complaint on October 26, 2000 at 9:30 a.m., in the above-mentioned hearing room. The purpose of the hearing is to receive evidence and arguments on whether Respondents committed prohibited practices as alleged by the Complainant. The hearing may continue from day to day until completed.

The parties shall submit to the Board four copies of all exhibits identified and offered into the record. Additional copies for opposing counsel shall also be provided.

All parties have the right to appear in person and to be represented by counsel or other representative.

Auxiliary aids and services are available upon request, call Mrs. Kato at (808) 586-8610, (808) 586-8847 (TTY), or 1 (888) 569-6859 (TTY neighbor islands). A request for reasonable accommodations should be made no later than ten working days prior to the needed accommodation.

DATED: Honolulu, Hawaii, September 29, 2000.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chairperson

action violated the terms of the collective-bargaining agreement and that the union breached its duty of fair representation." Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 564, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990).

CHESTER C. KUNITAKE, Board Member

KATHLEEN RACUYA-MARKRICH, Board Member

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