

On February 26, 2001, the Board convened the hearing on the motion to dismiss and/or for summary judgment. LUDLOFF did not appear at the hearing. Counsel for HGEA appeared before the Board and presented arguments on the instant motion. Based upon a thorough review of the record, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. LUDLOFF is an employee included in bargaining unit 03, non-supervisory employees in white-collar positions, as defined in Hawaii Revised Statutes (HRS) §§ 89-2 and 89-6.
2. The HGEA is the exclusive representative, as defined in HRS § 89-2 of employees in bargaining unit 03.
3. LUDLOFF alleges in her prohibited practice complaint filed on January 5, 2001 that the HGEA knows of her workers' compensation injury "due to discrimination by school administration," but has done nothing to correct the situation triggered by her reporting of missing computers in January of 1999.
4. At the prehearing conference held before the Board on January 31, 2001, LUDLOFF complained that her HGEA union agent Sanford Chun (Chun) has never responded to her attempts to contact him. LUDLOFF expected Chun to "prepare a case of 'retaliation against a whistleblower' for her against the Castle High School Administration" for reporting missing computers to the Attorney General's Office; get the employer to write a more specific rather than generic job description; and stop using the job descriptions to change her duties and assignments daily, ever since a February 1999 meeting attended by her and other Unit 03 members.
5. The HGEA in its Motion to Dismiss and/or for Summary Judgment contends that based on the Board's Rules of Practice and Procedure, Hawaii Administrative Rules (HAR) §12-42-42, LUDLOFF's complaint is untimely because it falls outside the 90-day statute of limitations.
6. In response to HGEA's Motion to Dismiss and/or for Summary Judgment, LUDLOFF sought to have her complaint continue or go forward because she now contends that Chun "never had intentions to assist" her and "was in actuality stalling;" and, based on telephone logs submitted she has continually tried to make contact with Chun up until November 21, 2000. LUDLOFF submitted redacted telephone logs purporting to show that contact with the HGEA occurred as late as November 21, 2000.

7. On February 26, 2001, the Board scheduled oral arguments to hear HGEA's motion to dismiss. LUDLOFF failed to appear for the 9:00 a.m. hearing and the Board proceeded to hear arguments from the HGEA.

DISCUSSION

The HGEA argues that according to LUDLOFF's representations, the date of last occurrence forming the basis of the complaint was February 1999, and, therefore, the complaint filed in January 2001 is untimely. LUDLOFF submitted to the Board telephone logs that purport to show that the last contact with the HGEA was November 21, 2000, and therefore, the complaint filed in January 2001 is timely.

Statute of Limitations

HRS § 377-9(1), made applicable to the Board by HRS § 89-14 in prohibited practice cases, provides as follows:

No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.

Similarly, HAR § 12-42-42(a) identifies the limitations period applicable to the filing of prohibited practices complaints under HRS § 89-13. It provides as follows:

Complaints that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, may be filed...within ninety days of the alleged violation.

The Board has construed the limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HPERB 186 (1983).

Based on a review of the declarations filed by HGEA's attorney Peter Trask, Esq. and LUDLOFF, and viewed in the light most favorable to the non-moving party, the Board finds that the gravamen of LUDLOFF's complaint against HGEA is failing to provide representation for her whistleblower case against her employer and not responding to her continued attempts to pursue this course of action since meeting in February of 1999.

Through telephone logs kept, LUDLOFF contends that she continued to contact Chun as recently as November 21, 2000 to ask "what's up w/my case?" This evidence is insufficient to support a finding that calls to Chun tolls the running of the 90-day statute of limitations period. Therefore, viewing the meeting in February of 1999 as the date of violation, we find that LUDLOFF's complaint is untimely.

Failure to State a Claim for Relief

Even assuming, arguendo, that LUDLOFF's call to Chun on November 21, 2000 is sufficient, the Board concludes, sua sponte, that LUDLOFF has failed to state a claim for relief under HRS Chapter 89.

HRS § 89-8(a) sets forth the union's duty of fair representation which provides in part as follows:

The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.

A union breaches its duty of fair representation when the exclusive representative's conduct towards its member is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

LUDLOFF's complaint is premised on the mistaken assumption that the union's duty of fair representation entitles her to legal services in preparing her whistleblower case against the employer. Such matters appear to arise under HRS § 378-62, et seq., Whistle blowers' Protection Act. The union's duty of fair representation, however, gives the exclusive representative the right to act for its members in the context of collective bargaining. The Board has previously held that the union's duty of fair representation extends to matters dealing with collective bargaining agreements and does not encompass the pursuit of claims arising under HRS Chapters 76 and 77. Oren J. Tsunezumi, Case Nos. CU-03-128a, CU-04-128b, Order No. 1460, Order Granting Respondents' Motion to Dismiss Complaint (5/9/97). In the Tsunezumi case, the Board found that the union was not obligated to represent a union member in his complaint before the Civil Service Commission. Similarly, in Decision No. 410, Sandra Pelosi, 6 HLRB ____ (2000), the Board held that the duty of fair representation did not encompass pursuit of a workers' compensation claim arising under HRS Chapter 386. Likewise in this case, the Board concludes that the Union's duty of fair representation does not extend to prosecuting whistleblowers' actions arising under HRS Chapter 378 and therefore, the Board concludes that LUDLOFF's complaint does not state a claim for relief colorable under HRS Chapter 89.

CONCLUSIONS OF LAW


1. Pursuant to HRS § 377-9(l) and HAR § 12-42-42(a), the Board has jurisdiction to hear prohibited practice complaints which are filed within 90 days of an alleged violation of HRS Chapter 89. Complainant fails to identify an alleged violation occurring within the 90-day period from the filing of the instant complaint on January 5, 2001. As a consequence, the Board lacks jurisdiction over this matter.
2. Complaints of "Retaliation Against a Whistleblower" are not within the jurisdiction of the Board, which is authorized to administer the provisions of HRS Chapter 89 (Collective Bargaining in Public Employment) and HRS Chapter 377 (Hawaii Employment Relations Act).
3. By alleging that the HGEA has failed to pursue a whistleblower case against her employer in breach of its duty of fair representation, Complainant fails to state a claim for relief actionable under HRS Chapter 89.

ORDER

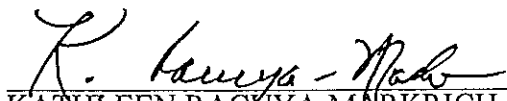
Accordingly it is hereby ordered that Respondent's Motion to Dismiss and/or for Summary Judgment is granted, and the instant case is dismissed.

DATED: Honolulu, Hawaii, March 13, 2001

HAWAII LABOR RELATIONS BOARD


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