STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Complainants, and BENJAMIN J. CAYETANO, Governor, State of Hawaii; LAWRENCE MIIKE, M.D., Director, Department of Health, State of Hawaii; and THOMAS DRISKILL, CEO, Hawaii Health Systems Corporation, Department of Health, State of Hawaii, Respondents.	CASE NOS.: CE-01-378a CE-03-378b CE-10-378c CE-13-378d ORDER NO. 2014 ORDER DENYING COMPLAINANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND DENYING RESPONDENTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

ORDER DENYING COMPLAINANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND DENYING RESPONDENTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

On November 24, 1997, Complainants UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION (collectively Complainants or Unions, UPW and HGEA, respectively) filed the instant prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondents BENJAMIN J. CAYETANO, Governor, State of Hawaii; LAWRENCE MIIKE, M.D., Director, Department of Health, State of Hawaii; and THOMAS DRISKILL, CEO, Hawaii Health Systems Corporation, Department of Health, State of Hawaii (collectively Respondents, CAYETANO, MIIKE, and HHSC, respectively.) In their complaints, Complainants allege that Respondents violated Hawaii Revised Statutes (HRS) §§ 89-13(a)(1), (5), (7), and (8) by unilaterally denying its bargaining unit members contractual seniority or "bumping" rights into HHSC positions.

On December 8, 1997, Respondents filed a motion for an extension to file an answer. The motion sought to extend the period during which an answer must be filed from December 8, 1997 to December 29, 1997. The motion asserted that the extension was necessary to permit the parties to confer and reach a possible settlement. On December 10, 1997, Complainants filed a Memorandum in Opposition to Respondents' Motion for an

Extension of Time to File an Answer. On that same day, the Board issued an order extending the period in which to file an answer to December 15, 1997.

On December 15, 1997, Respondents filed a Motion to Dismiss and/or for Summary Judgment. The motion seeks dismissal of the complaint because of the alleged failure of Complainants to file their complaints within the applicable limitations period.

On December 22, 1997, Complainants filed a Memorandum in Opposition to the Motion to Dismiss and/or for Summary Judgment. In addition, on December 22, 1997 Complainants also filed a Motion for Judgment on the Pleadings. The motion seeks judgment based upon the failure of Respondents to file an answer to the original complaint. This failure is argued to result in admissions, which, in effect, warrant default. On December 30, 1997, Respondents filed a Motion to Strike Complainants' Motion for Judgment on the Pleadings.

On January 28, 1998, the Board conducted an initial hearing on Respondents' Motion to Dismiss and/or for Summary Judgment and Complainants' Motion for Judgment on the Pleadings.

On January 30, 1998, the Board issued Board Order No. 1590, which, while addressing a different but related set of complaints (Case Nos. CE-03-357a-c), afforded interlocutory relief to the allegedly aggrieved Complainants in the instant action. The interlocutory order and related complaints were subsequently affected by an appeal currently before the Hawaii Supreme Court.

On September 1, 2000, the Board, whose composition had changed, conducted a status conference on the instant case and on October 24, 2000, a second hearing was held on the instant Motions for Judgment on the Pleadings and Dismissal and/or for Summary Judgment.

For the reasons stated below, both motions are denied.

FINDINGS OF FACT

1. The UPW is at all relevant times herein an employee organization within the meaning of HRS § 89-2.

2. The HGEA is at all relevant times herein an employee organization within the meaning of HRS § 89-2.

3. CAYETANO is the Governor of the State of Hawaii and is a public employer within the meaning of HRS § 89-2.

4. MIIKE was at all relevant times herein the Director of the Department of Health and was the representative of the Governor and as such a public employer within the meaning of HRS § 89-2.

5. The HHSC operates a separate personnel system within the State of Hawaii and is a representative of the Governor and as such a public employer within the meaning of HRS § 89-2.

6. The UPW at all relevant times herein is the exclusive bargaining representative of bargaining units 01 and 10 employees of the State of Hawaii including employees employed at Hale Hauoli Centers on all major islands.

7. The HGEA at all relevant times herein is the exclusive bargaining representative of various bargaining units of employees of the State of Hawaii including employees employed at Hale Hauoli Centers on all major islands.

8. At all relevant times herein the State of Hawaii and the UPW and HGEA have been parties to collective bargaining agreements which cover and extend to various bargaining units covering employees at Hale Hauoli Centers on the neighbor islands.

9. Employees at Hale Hauoli Centers on the neighbor islands have accrued competitive seniority rights and benefits as employees of a singular jurisdiction within the State of Hawaii since on or after 1974.

10. Lay-off provisions of the applicable collective bargaining agreements apply uniformly to the governmental jurisdiction in which the layoffs occur.

11. In 1996 the Legislature enacted Act 262 to authorize the establishment of the HHSC as a corporate wide personnel system.

12. Act 262, SLH 1996, requires the HHSC to comply with all provisions of HRS Chapters 76, 77, and 89.

13. On July 3, 1997, MIIKE sent a letter to the UPW and HGEA that employees of Hale Hauoli on Kauai would not have the right to be placed (i.e., bump) in HHSC positions. The letter provided in relevant part:

> While HHSC employees continue to retain their civil service status, they will no longer be considered DOH employees. Thus, actions related to reduction in force, placement of disabled employees, internal movements, including promotional opportunities, etc. will be restricted to the employee's respective

jurisdictions (HHSC or DOH/State). Immediately impacted, will be those employees with the Hale Hauoli Day Activity Center, Kauai, who are currently affected by a reduction in force because of the privatization of the program. Placement of these DOH employees in the HHSC will not be an option. Inter-jurisdictional movements will be administered in the same manner as is currently practiced between various jurisdictions.

14. On July 15 and July 17, 1997, the UPW and HGEA notified MIIKE that the Unions did not agree with the positions noted in his letter of July 3, 1997 and requested bargaining over what was happening in connection with employees of Hale Hauoli on Kauai.

15. On July 22, 1997, the acting senior corporate counsel for HHSC, Alice M. Hall responded by letter to the Unions' concerns. The letter provided in part:

> Chapter 89 remains applicable [to the HHSC personnel system] to the extent it does not conflict with Act 262 in allowing HHSC to negotiate separate bargaining agreements. (Section 22(c)).
>
> I regret any misunderstanding resulting from the DOH letter of July 3, 1997. We are looking forward to working with you to ensure the people of this state receive the best health care possible. If you have any questions please call me.

16. The Unions assert that upon receipt of the July 22, 1997 letter, they "understood it to mean that the Hawaii Health Systems Corporation was not proceeding with its plan at Hale Hauoli Center at Kauai to limit bumping rights of employees." Affidavit of Gary Rodrigues.

17. On and after September 30, 1997, bargaining unit members employed by the DOH at Hale Hauoli were displaced by privatization and not allowed to bump into HHSC.

18. On November 24, 1997, Complainants filed the instant complaint. The parties filed subsequent pleadings, as identified in the initial section of this order.

DISCUSSION

Both sides seek summary disposition of this complaint on largely procedural grounds. Complainants seek a judgment on the pleadings based on the failure of

Respondents to file an answer to the complaint.[1] Respondents seek dismissal based upon the alleged failure of Complainants to file the complaint within the applicable limitations period.

Motion for Judgment on the Pleadings

Respondents have never filed an answer to the Unions' complaint. Instead, on the day the answer was due, they elected to file a motion to dismiss the complaint. The Unions argue that pursuant to Hawaii Administrative Rules (HAR) § 12-42-45(g)[2] the failure to answer should be deemed to constitute an admission of the material facts alleged in the complaint and, in the absence of any material issues of fact, support a judgment on the pleadings in their favor.

Respondents argue that the period during which an answer is permissible has been extended pursuant to Hawaii Rules of Civil Procedure (HRCP) Rule 12(a)[3] so that a motion for judgment on the pleadings is premature, and accordingly should be stricken. They further argue that the Board practices are bound to comport with the Hawaii Rules of Civil Procedure (HRCP) pursuant to HRCP Rule 81(b)(12).[4] The threshold issue with regard to

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[1]Apparently in lieu of a memorandum in opposition to Complainants' motion for judgment on the pleadings, Respondents filed a motion to strike the motion for judgment on the pleadings. Because the Board can discern no practical distinction between either denying or striking the motion for judgment on the pleadings, the motion to strike will be considered as an opposition to the motion for judgment on the pleadings.

[2]HAR 12-42-45(g) provides:

> If the respondent fails to file an answer, such failure shall constitute an admission of material facts alleged in the complaint and a waiver of hearing.

[3] HRCP Rule 12(a) provides, in part:

> The service of a motion permitted under this rule alters these periods of time [to file an answer or reply] as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until after the trial on the merits, the responsive pleadings, the responsive pleading shall be served within 10 days after notice of the court's action;...

[4]HRCP Rule 81(b) provides in part:

> (b) *Other proceedings.* These rules apply to the following proceedings except insofar as and to the extent that they are inconsistent with specific statutes of the State or rules of court relating to such proceedings:
>
> * * *
>
> (12) Proceedings under: ... chapter 89 and 380, relating to collective bargaining and labor disputes....

the motion for judgment on the pleadings is therefore whether Respondents' filing of a motion to dismiss the complaint suspended their obligation to file a timely answer.

Respondents rely upon HRCP Rule 81 which provides that the HRCP applies to proceedings under HRS Chapters 89 and 380, relating to collective bargaining and labor disputes except insofar as and to the extent that they are inconsistent with specific statutes of the State or rules of court relating to such proceedings. HAR § 12-42-45(a) provides that "[a] respondent shall file an answer to the complaint within ten days after service of the complaint." Our rules further provide for exceptions to this deadline upon the granting of motion for particularization, HAR § 12-42-45(b),[5] or "[i]n extraordinary circumstances" as determined by the board, HAR §12-42-45(d). Our rules, however, are silent as to whether a respondent can elect to file a motion pleading a lack of subject matter jurisdiction in lieu of an answer and whether the time for filing an answer is therefore extended until the Board acts on the motion. This option is clearly permitted by HRCP 12(b).[6]

The Board has previously relied on the HRCP to assist in resolving ambiguities in its rules or procedures. See e.g., Hawaii Federation of College Teachers, Local 2003, 1 HPERB 428, applicability of HRCP Rule 30(a) requiring unusual circumstances to obtain leave to take depositions prior to the expiration of 30-day waiting period; United Public Workers, 5 HLRB 177 (1993), the Board considered respondent's motion to dismiss after the presentation of complainant's case as a motion filed under HRCP Rule 41(b); Order No. 1903, July 21, 2000, Hawaii Government Employees Association, HRCP Rule 6(b) "excusable neglect" standard utilized to interpret the "extraordinary circumstances" language of HAR § 12-42-45; and Order No. 1937, September 29, 2000, Luis Ballera, HRCP Rule 15(c) regarding relation back of amendments to pleadings when HAR is silent. In Hawaii Government Employees Association, supra, we applied the "excusable neglect" standard of HRCP Rule 6(b) to grant an extension to file an answer since "consequences

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[5]HAR § 12-42-45(b) provides, in part:

> Within five days after service of the complainant's particularization, the respondent shall file with the board the original and five copies of the answer, with certificate of service on all parties, unless the board directs otherwise.

[6]HRCP Rule 12(b) provides, in part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> (1) lack of jurisdiction over the subject matter;....

which flow from the failure to file an answer would potentially be both unduly harsh and punitive when a failure to timely file is the product of excusable neglect."

In this case, the Board finds that its rules are not inconsistent with the HRCP, and therefore, relying upon HRCP Rule 12, the Board concludes that Respondents' motion to dismiss the complaint for lack of jurisdiction filed in lieu of its answer extends the time for the filing of the answer until such time after the Board rules on the motion.

As the pleadings not having yet been concluded, the Complainant's Motion for Judgment on the Pleadings is denied.

Motion to Dismiss

Respondents' motion to dismiss and/or for summary judgment is based upon the alleged failure of Complainants to file their complaint within the applicable limitations period. They assert that notice that Hale Hauoli employees would not be afforded bumping rights within the HHSC system was provided on July 3, 1997 in the form of the MIIKE letter. They argue that this letter constituted the occurrence which began the running of the 90-day limitations period so that the filing of the complaint four months later fell outside of the period.

Complainants respond by asserting that the limitations period did not begin running until September 30, 1997, when bargaining unit members at Hale Hauoli were actually displaced by privatization, and that, in any event the July 3rd letter cannot be construed to begin the running of the period since the subsequent communication of July 22, 1997 led the Unions to believe that the initial notice had been withdrawn or modified.

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). The period begins to run when "an aggrieved party knew or should have known that his statutory rights were violated." Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978).

The parties have bombarded the Board with citations and supplemental case citations on the issue of whether notice of an intended act triggers the running of the limitations period. The Board concludes, however, that this question need not be reached in

the instant proceeding. Because even if in some cases notice may begin the running of the period, any such notice must be clear and unequivocal. Here, the employers' intent was far from clear.

On July 3, 1997, MIIKE sent a letter to the UPW and HGEA to notify them that employees of Hale Hauoli on Kauai would not have the right to be placed (i.e., bump) into HHSC positions. However, on July 22, 1997 the acting senior corporate counsel for HHSC, Alice M. Hall, responded by letter to the Unions' objections to the MIIKE letter. The Hall letter provided in part:

> Chapter 89 remains applicable [to the HHSC personnel system] to the extent it does not conflict with Act 262 in allowing HHSC to negotiate separate bargaining agreements. (Section 22(c)).
>
> **I regret any misunderstanding resulting from the DOH letter of July 3, 1997**. We are looking forward to working with you to ensure the people of this state receive the best health care possible. If you have any questions please call me." (emphasis added).

The Unions represent that the Hall letter led them to believe "that the Hawaii Health Systems Corporation was not proceeding with its plan at Hale Hauoli Center at Kauai to limit bumping rights of employees." Affidavit of Gary Rodrigues.

The Board finds that the Unions' interpretation of the Hall letter was reasonable so that MIIKE's expression of intent was far from the clear and unequivocal notice required to initiate the limitations period. The Hall letter expresses "regret" for any misunderstanding arising from the MIIKE letter. The letter does not identify or clarify any particular misunderstanding except to acknowledge that HHSC continued to remain subject to Chapter 89. Inasmuch as the Union members' bumping rights arose out of Chapter 89, it is reasonable to conclude that the HHSC was, by the letter, acknowledging the bumping rights.

Accordingly, the limitations period did not begin to run until September 30, 1997 when bargaining unit members were denied bumping rights within the HHSC. Since the instant complaint was filed within the 90-day period, the Respondents' motion to dismiss/and or for summary judgment based upon the limitations period is denied.

This is not to say that the case is not ripe for summary judgment. Respondents' motion addressed only the limitations issue and did not seek relief based upon the underlying substantive issue of whether bumping rights between the DOH and HHSC continued to exist after the passage of Act 262, SLH 1996. This appears to be a question of law so that disposition by summary judgment may be appropriate. However, because the parties did not

have an opportunity to brief or argue this issue, the Board will not broach it at this time. Instead, denial of Respondents' Motion to Dismiss and/or for Summary Judgment will be without prejudice and the Board will entertain a Motion for Summary Judgment on the underlying substantive issue.

CONCLUSIONS OF LAW

1. Respondents' filing of their motion to dismiss for lack of jurisdiction in lieu of their answer extends the time for the filing of an answer for ten days after service of the Board's order disposing of their motion to dismiss.

2. The instant complaint was timely filed within 90 days after the displacement of bargaining unit members on September 30, 1997.

ORDER

1. Complainants' Motion for Judgment on the Pleadings is denied.

2. Respondents' Motion to Dismiss and/or for Summary Judgment is denied without prejudice. Respondents shall file an Answer to the instant prohibited practice complaint within ten days from their receipt of this order.

DATED: Honolulu, Hawaii, June 6, 2001.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

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