STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of CITY AND COUNTY OF HONOLULU and JEREMY HARRIS, Mayor, City and County of Honolulu, Complainants, and STATE OF HAWAII; BENJAMIN J. CAYETANO, Governor, State of Hawaii; and UNITED PUBLIC WORKERS, LOCAL 646, AFSCME, AFL-CIO, Respondents.	CASE NOS.: CE-01-471 CE-10-472 CU-01-181 CU-10-182 ORDER NO. 2018 ORDER GRANTING RESPONDENT UPW'S MOTION TO DISMISS

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On May 18, 2001, Complainants CITY AND COUNTY OF HONOLULU and JEREMY HARRIS, Mayor, City and County of Honolulu (collectively Complainants, City or Harris) filed the instant prohibited practice complaint with the Hawaii Labor Relations Board (Board) against the STATE OF HAWAII, BENJAMIN J. CAYETANO, Governor, State of Hawaii (collectively State), and the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Union or UPW) (collectively Respondents). Complainants allege that the Respondents failed to bargain in good faith, interfered with employee rights, and violated the terms of Hawaii Revised Statutes (HRS) Chapter 89 when they negotiated a wage package that included provisions for a deferred compensation plan for bargaining unit members in the bargaining unit (BU) 01 and 10 collective bargaining agreements.

On June 12, 2001, the UPW filed the instant Motion to Dismiss and/or for Summary Judgment which was supported by the State in its Responsive Memorandum filed on June 19, 2001. On that same day, Complainants filed a Memorandum in Opposition to UPW's Motion to Dismiss and/or for Summary Judgment. On June 20, 2001, the UPW filed a Reply Brief and the next day, Complainants filed a Reply Brief to the State's Responsive Memorandum. Thereafter, on June 22, 2001 the State filed a Motion to Amend Answer with the Board.

In addition, on June 22, 2001, the Board conducted a hearing on Respondents' Motion to Dismiss and/or for Summary Judgment. All parties were presented a full and fair

opportunity to be heard. Based upon a thorough review of the record and consideration of the arguments presented, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

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

2. JEREMY HARRIS is the mayor of the City and County of Honolulu, and at all relevant times herein was a public employer within the meaning of HRS § 89-2.

3. BENJAMIN J. CAYETANO is the Governor of the State of Hawaii and at all relevant times herein was a public employer within the meaning of HRS § 89-2.

4. On October 20, 1971, the UPW was certified as the exclusive bargaining representative for blue-collar nonsupervisory employees in Unit 01.

5. On February 11, 1972, the UPW was certified as the exclusive bargaining agent for institutional, health, and correctional employees in Unit 10.

6. Currently, there are approximately 9,317 Unit 01 employees and 2,687 Unit 10 employees.

7. Historically, negotiations for Unit 01 and Unit 10 employees have been conducted on a multi-employer basis under HRS § 89-6(b). The public employers consist of the governor of the State who has four votes and the mayors of the four counties who each have one vote. A resolution of issues in negotiations with the multi-employer group requires five votes.

8. Since 1972 the UPW has successfully negotiated thirteen collective bargaining agreements covering Unit 01 and Unit 10 employees with the multi-employer group.

9. On December 26, 2000 the UPW and the public employers negotiated a collective bargaining agreement for the period July 1, 1999 to June 30, 2003 which includes a provision for a "deferred compensation plan" sponsored by the UPW. The relevant history of negotiations indicates the intent of the parties was to provide all bargaining Unit 1 and Unit 10 employees an increase in wages of approximately 3%, a portion of which would be paid through a

deferred compensation plan, in exchange for a reduction in two other forms of deferred wages or compensation for new hires, i.e., sick leave and vacation.[1]

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[1]The Tentative Agreement provides:

Section 61. BENEFIT PLANS.

61.01 CHAPTER 87, HRS. Add title.

61.01 a. EFFECTIVE DATE. Add title.

61.01 a. and 61.01 b. Add titles to 1. - 6.

1. MEDICAL PLAN.
2. ADULT DENTAL PLAN.
3. PRESCRIPTION DRUG PLAN.
4. VISION CARE PLAN.
5. CHILDREN DENTAL PLAN.
6. GROUP LIFE INSURANCE PLAN.

61.01 b. EFFECTIVE DATE.

Effective July 1, 1998:

2. Sixty percent (60%) plus two dollars ($2.00) of the monthly premium of the adult dental plan sponsored by the Hawaii Public Employees Health Fund or the Union for each Employee or for each Employee with a spouse enrolled in the adult dental plan. The retroactive amount for each Employee shall be based on two dollars ($2.00) for each month of work of the Employee from July 1, 1998 to June 30, 1999 and shall be transmitted to a DEFERRED COMPENSATION PLAN sponsored by the Union and credited to each Employee.

3. Sixty percent (60%) plus five dollars ($5.00) of the monthly premium for the prescription drug plan sponsored by the Hawaii Public Employees Health Fund or the Union for each Employee or for each Employee with a dependent enrolled in the prescription drug plan. The retroactive amount for each Employee shall be based on five dollars ($5.00) for each month of work of the Employee from July 1, 1998 to June 30, 1999 shall be transmitted to a DEFERRED COMPENSATION PLAN sponsored by the Union and credited to each Employee.

5. One hundred percent (100%) of the monthly premium of the children's dental plan sponsored by the Hawaii Public Employees Health Fund or the Union for each child of an Employee who has not attained the age of nineteen (19) and who is enrolled in the children's dental plan provided that in the event the monthly premium of the plan sponsored by the Union exceeds the monthly premium of the plan sponsored by the Hawaii Public Employees Health Fund the amount ported to the plan sponsored by the Union shall not exceed the monthly premium of the plan sponsored by the Hawaii Public Employees Health Fund.

10. On December 26, 2000, a draft of the tentative agreements (which reflected the foregoing resolution) was accepted and agreed to by and between the chief negotiators on both sides.

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6. One hundred percent (100%) of the monthly premium for the group life insurance plan sponsored by the Hawaii Public Employees Health Fund or the Union for each Employee enrolled in the group life insurance plan provided that in the event the monthly premium of the plan sponsored by the Union exceeds the monthly premium of the plan sponsored by the Hawaii Public Employees Health Fund the amount ported to the plan sponsored by the Union shall not exceed the monthly premium of the plan sponsored by the Hawaii Public Employees Health Fund.

61.02 DEFINITIONS AND FORMULA Add title.

61.03 LEGAL PLAN DEFERRED COMPENSATION PLAN.

61.03 a. Effective July 1, 1998 January 1, 2001 to June 30, 2001 the Employer shall pay seven dollars ($7.00) of the monthly premium for each Employee of the Legal Plan sponsored by the Union to the DEFERRED COMPENSATION PLAN sponsored by the Union. Thereafter the Employer shall pay as provided in Section 61.03 b.

61.03 b. Effective July 1, 2001 the Employer shall pay eighty four dollars ($84.00) annually for each Employee to the DEFERRED COMPENSATION PLAN sponsored by the Union. ($7.00 per month x 12 months = $84.00).

61.03 c. Effective July 2, 2001 the Employer shall pay one hundred thirty two dollars ($132.00) for the period July 2, 2001 to June 30, 2002 for each Employee to the DEFERRED COMPENSATION PLAN sponsored by the Union. ($11.00 per month x 12 months = $132.00).

61.03 d. Effective July 1, 2002 the Employer shall pay one hundred fifty six ($156.00) for each Employee to the DEFERRED COMPENSATION PLAN sponsored by the Union. ($13 per month x 12 months = $156.00).

Notation: 1. The DEFERRED COMPENSATION PLAN shall conform with the IRS requirements.

2. Section 61.03 a. and Section 61.03 b. shall not be a cost item subject to approval by the legislative bodies because no change was made to the seven dollars ($7.00) previously designated for the Legal Plan that was approved by the legislative bodies in 1999 for the July 1, 1995 to June 30, 1999 Unit 1 Agreement. Section 61.03 a. and Section 61.03 b. changes the designation from the Legal Plan to the DEFERRED COMPENSATION PLAN.

11. On January 30, 2001, the final draft of the tentative agreements were reviewed with representatives of the governor and the mayors of all counties.

12. On February 7, 2001, the State's Chief Negotiator Davis Yogi (Yogi) notified the other employers, including the City, via memorandum, that he signed the tentative agreements at issue.

13. On or around February 8, 2001, the City received a letter from the City's retained counsel for this complaint, expressing "concerns" regarding the deferred compensation plans contained in the Units 01 and 10 agreements. The expressed concerns included those that are the basis of this prohibited practice complaint.

14. On or around February 8, 2001, the City's Acting Director of Human Resources urged the State to defer the signing of the tentative agreement because of its concerns over the legality of the deferred compensation plan provision. The letter attached the abovementioned letter from counsel and included a chronology of the raising of the City's concerns:

> The matter involving Section 61.03 [deferred compensation plan] is of concern because of the legal implications. Our concerns on this matter were expressed on January 26th in a teleconference call with the counties, yourself and your legal counsel; as well as at the Employer Caucus on January 29th and at the meeting with the UPW on January 30th. In addition, at the January 29th meeting, it was stated that the matter involving Section 61.03 would be deferred pending legal review....

15. On or around March 30, 2001, the State, via Yogi, replied to the concerns regarding negotiations over the deferred compensation plan which had been relayed by the City. In his letter, the Chief Negotiator said that "there is no question in my mind that this matter (deferred compensation) is negotiable...." Yogi further expressed his disappointment in the City's position on the matter:

> Please be informed that I am very disappointed in the City's position particularly after you and I discussed this matter. The City has benefited (sic) from the tentative agreements which averted a potential strike by the UPW. Your letter is a broadside attack of the UPW agreement and undermines the good faith in which the agreement was reached.

16. On May 18, 2001, the City filed the instant prohibited practice complaint.

17. On June 12, 2001, the City received copies of the Deferred Compensation Plan and Trust Agreements establishing the plan.

DISCUSSION

In its complaint the City alleges that the State and UPW violated HRS §§ 89-13(a)(1), (5), (6), and (7) and 89-13(b)(1), (2), (3), and (4), respectively.[2] The City thus charges that the State and the UPW somehow interfered with employee rights, refused to bargain and participate in good faith in mediation, fact-finding and arbitration, and failed to comply with the provisions of Chapter 89.

The gravamen of alleged prohibited practices are the negotiations over wages that specifically include deferred compensation provisions in the Units 01 and 10 contracts. The City claims that the contract terms constitute "retirement benefits" prohibited from negotiations by HRS § 89-9(d):

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[2]HRS § 89-13 provides in part:

§ 89-13 Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

* * *

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

(6) Refuse to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in section 89-11;

(7) Refuse or fail to comply with any provision of this chapter;

* * *

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;

(3) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in section 89-11;

(4) Refuse or fail to comply with any provision of this chapter; ...

> (d) Excluded from the subjects of negotiations are matters of classification and reclassification, benefits of but not contributions to the Hawaii public employees health fund, retirement benefits except as provided in section 88-8(h), and the salary ranges now provided by law;.... [emphasis added.]

In the instant Motion to Dismiss and/or for Summary Judgment, the UPW argues that the City's complaint must be dismissed because it is not timely filed, fails to join indispensable parties, is not justiciable for lack of standing, and fails to state a claim upon which relief can be granted. The State concurs with the UPW in arguing that the complaint is untimely and the City lacks standing to pursue this claim. Respondents contend that summary judgment should be ordered in their favor.

We conclude that the complaints must be dismissed for lack of jurisdiction due to the failure of Complainants to timely file their complaint.

Limitations Period

Hawaii Administrative Rules (HAR) § 12-42-42(a) identifies the limitations period applicable to the filing of prohibited practice complaints under HRS § 89-13.[3] It provides as follows:

> A complaint that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, 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 HPERB186 (1983). The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Instead, 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, 99 LRRM 2743 (8th Cir. 1978) (Emphasis added).

In the context of the comparable federal limitations period for complaints brought before the National Labor Relations Board, the purpose of the limitations period has

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[3]The limitations period is also prescribed by statute. HRS § 89-14 requires controversies concerning prohibited practices "be submitted ...in the same manner and with the same effect as provided in section 377-9;...." HRS § 377-9(l) in turn provides that, "[n]o complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence."

been described in N.L.R.B. v. Triple C Maintenance, Inc., 219 F.3d 1147, 1157, 164 LRRM 2785 (10th Cir. 2000) as follows:

> The overriding purpose of the six-month statute of limitations is "to stabilize existing [collective] bargaining relationships" by preventing lawsuits long after an unfair labor practice has occurred. Bryan Mfg., 362 U.S. at 419, 80 S.Ct. 822; see also, Auciello, 517 U.S. at 785, 116 S.Ct. 1754 ("The object of the ...Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees.") Specifically, § 10(b) was enacted "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.'" Bryan Mfg., 362 U.S. at 419, 80 S.Ct. 822 (citation omitted).

The Board concludes that these identified purposes apply to the limitations period identified in our applicable rule and statutes.

The instant complaint was filed on May 18, 2001. Accordingly, for the Board to exercise jurisdiction over the complaints, the complained of "occurrences" must have happened after February 17, 2001, or the City must have only known or should have known of them after that date. Respondents argue that since the tentative agreement embodying the deferred compensation provision was reached on December 26, 2000 and the City not only participated in negotiations leading to that agreement, but throughout January 2001 repeatedly questioned the legality of the provision, it knew or should have known of the allegedly offending provision well before February 4, 2001.

The City defends its inaction by arguing that it learned of the terms of the plan only on June 12, 2001 so that the limitations period should begin running from that date. They further argue that the violations are "continuing violations" so that the limitations period has not yet expired.

HRS § 89-9(d) excludes retirement benefits from the subject of negotiations. Any violation resulting in a prohibited practice must have therefore occurred in the course of negotiations. Negotiations on the subject contracts were concluded on December 26, 2000. The complained of occurrence must therefore have been on or prior to that date. There is no question that the May 18, 2001 complaints was filed well beyond the 90-day limitations period.

The City argues that the limitations period begins to run on or about June 12, 2001 when for the first time it received copies of the Deferred Compensation Plan and Trust

Agreements establishing the plan. This argument strains credulity. It suggests that the City did not know or could not have known of the alleged violation until that date. In fact, the City's own communications detail numerous previous occasions when they raised concerns apparently identical to those of the complaints:

> The matter involving Section 61.03 [deferred compensation plan] is of concern because of the legal implications. Our concerns on this matter were expressed on January 26th in a teleconference call with the counties, yourself and your legal counsel; as well as at the Employer Caucus on January 29th and at the meeting with the UPW on January 30th. In addition, at the January 29th meeting, it was stated that the matter involving Section 61.03 would be deferred pending legal review....

Exhibit B to State of Hawaii's Responsive Memorandum to UPW's Motion to Dismiss and/or for Summary Judgment. Each identified instance falls well outside of the limitations period and evidences the City's knowledge of the alleged violations. We therefore cannot conclude that the City knew or should have known of the occurrence only on or after June 12, 2001.

The City further argues that the limitations period does not prevent the exercise of our jurisdiction due to the applicability of the doctrine of continuing violation. The law is clear, however, that for an allegedly illegal provision of a collective bargaining agreement to extend the statute of limitations for the initiation of actions arising from negotiation or ratification, there must be some attempt at enforcement. Carrier Air Conditioning Co. v. N.L.R.B., 547 F.2d 1178,1186, 93 LRRM 3028 (2nd Cir. 1976) ("a union may 'reaffirm' an agreement, and thus, in effect, 're-enter' into it, by seeking to enforce it, at least when the enforcement effort itself appears to have a secondary objective"); Los Angeles Mailers Union No. 9, Intern. Typographical Union, AFL-CIO v. N.L.R.B., 311 F.2d 121, 123, (D.C. Cir. 1962) ("To seek to give it life is in substance to seek to have it agreed to, which is no different in substance from seeking to have it entered into."); Honolulu Star Bulletin, 123 NLRB 395, fn 2, 43 LRRM 1449 (1959) (that section does not preclude an unfair labor practice finding based upon the maintenance of a contract containing illegal terms, as such maintenance is a continuing violation of the Act every day the parties continue the unlawful arrangement in effect). Cf., Local Lodge No. 1424 v. N.L.R.B., 362 U.S. 411, 422, 80 S.Ct. 822, 4 L.Ed.2d 832 (1960) ("It may be conceded that the continued enforcement, as well as the execution of this collective bargaining agreement constitutes an unfair labor practice, and that these are two logically separate violations, independent in the sense that they can be described in discrete terms.")

The City has not argued or suggested that the Union or State enforce or maintain the allegedly offending contract provision. Rather, the instant complaint expressly

seeks relief because of prospective and prophylactic concerns.[4] Accordingly, no continuing violation can be found.

The Board must therefore conclude that the complaint was not timely filed and the Board lacks jurisdiction over the claims presented. The Respondent's Motion to Dismiss is therefore granted and the complaint is hereby dismissed.[5] [6]

CONCLUSIONS OF LAW

1. The City knew or should have known of the relevant facts giving rise to its complaint at least as early as December 26, 2000 and at the latest, on or about February 8, 2001. Thus, the instant complaint filed on May 18, 2001 was filed beyond the statute of limitations.

2. The Board lacks jurisdiction over the complaint which is untimely.

ORDER

The complaint is hereby dismissed.

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[4]The instant Prohibited Practice Complaint states in part:

> The Complainants are therefore filing this complaint as a precaution, to obtain an appropriate determination from the Hawaii Labor Relations Board before the expenditure of any public funds on subjects that may relate to excluded subjects of bargaining.

[5]Having concluded that the Board has no jurisdiction over the complaints, the Board need not reach the questions of standing, see, County of Hawaii, Order No. 1022, March 14, 1994, in Case No. CU-01-95, or address the ultimate question of the legality of the deferred compensation provisions. See, James Takushi, 1 HPERB 586 (1975).

Although the Board fully appreciates the desire of the City to have the issue of the deferred compensation provisions definitively addressed, the City's choice to accuse the Union and State of wilfully violating employee rights, abrogating their duties, and violating Chapter 89 deprives us of any jurisdiction over the complaint. Our addressing of the merits would therefore be meaningless and either infer or excuse culpability in a jurisdictional vacuum.

[6]In view of the Board's ruling, the Board declines to rule on Respondent State's Motion to Amend Answer filed on June 22, 2001.

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DATED: Honolulu, Hawaii, July 5, 2001.

HAWAII LABOR RELATIONS BOARD

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CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

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