

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

RICHARD KEALOHA CONDON,

Complainant,

and

TED SAKAI, Director, Department of Public
Safety, State of Hawaii and DAVIS YOGI,
Director, Department of Human Resources and
Development, State of Hawaii,

Respondents.

CASE NO. CE-10-489

ORDER NO. 2077

ORDER GRANTING RESPONDENT
UNIONS' MOTIONS TO DISMISS
COMPLAINTS AND GRANTING
RESPONDENT STATE'S MOTION
FOR SUMMARY JUDGMENT

In the Matter of

RICHARD K. CONDON,

Complainant,

and

DIANN BERNDT, United Public Workers,
AFSCME, Local 646, AFL-CIO and UNITED
PUBLIC WORKERS, AFSCME, LOCAL 646,
AFL-CIO,

Respondents.

CASE NO. CU-10-191

In the Matter of

RICHARD K. CONDON,

Complainant,

and

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO,

Respondent.

CASE NO. CU-03-192

ORDER GRANTING RESPONDENT UNIONS'
MOTIONS TO DISMISS COMPLAINTS AND GRANTING
RESPONDENT STATE'S MOTION FOR SUMMARY JUDGMENT

On December 7, 2001, RICHARD KEALOHA CONDON (CONDON) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) in Case No. CE-10-489. CONDON alleged that TED SAKAI (SAKAI), Director, Department of Public Safety (PSD), State of Hawaii and DAVIS YOGI (YOGI), Director, Department of Human Resources Development (DHRD), State of Hawaii (collectively State) committed a prohibited practice in violation of Hawaii Revised Statutes (HRS) § 89-13(a)(8) when they failed or refused to respond to a grievance filed by CONDON contesting the denial of a Social Service Assistant (SSA) V position at Laumaka, Oahu Community Correctional Center. CONDON contends that the State violated § 15 of the Unit 10 collective bargaining agreement (contract) by refusing to process his grievance and by YOGI's delegating the hearing of Step 2 appeals to PSD.

The State filed its answer to the complaint on December 19, 2001. On January 4, 2002, CONDON filed a Motion for Admission of Material Facts/Waiver of Hearing with the Board. CONDON contended that the State failed to properly serve an answer on him.

On January 11, 2002, the State filed a Motion to Dismiss with the Board claiming that the issues in the complaint were moot because SAKAI issued a response to CONDON's grievances by letter dated January 8, 2002. The State also filed a Motion to Dismiss or in the Alternative for the Grant of Summary Judgment with the Board contending that Complainant failed to exhaust his contractual remedies; the complaint was untimely; Complainant failed to join the union as a party; and Complainant lacked standing to bring this complaint.

The Board conducted a hearing on the State's motions on January 18, 2002. The State was represented by counsel and Complainant appeared pro se. After hearing arguments on the motions, the Board denied CONDON's Motion for Admission of Material Facts/Waiver of Hearing as the motion was premised on a misspelling of CONDON's name in the Certificate of Service to the State's Answer filed with the Board. As CONDON had been properly served with the State's Answer he was not prejudiced by any alleged misspelling. The Board indicated that it was inclined to grant the State's motion because of CONDON's failure to join indispensable parties and requested the State to submit a proposed order for the Board's consideration.

Later that day, CONDON filed a complaint against DIANN BERNDT (BERNDT) and the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (collectively UPW) with the Board in Case No. CU-10-191. CONDON alleged that the

UPW refused to respond to his requests for assistance and thereby violated HRS §§ 89-13(b)(2), (3), (4), and (5).

Also, on January 18, 2002, CONDON filed a complaint against the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) in Case No. CU-03-192. CONDON alleged that the HGEA refused to represent him claiming that the UPW is responsible to represent his interests. CONDON complained that the HGEA violated HRS §§ 89-13(b)(2), (3), (4), and (5).

The HGEA and the UPW (collectively Unions) filed motions to dismiss CONDON's complaints on January 25, 2002 and February 1, 2002, respectively. The HGEA and the UPW argued that CONDON's complaints were untimely because they were filed more than 90 days after any claim against the Unions arose.

In Order No. 2057, dated February 4, 2002, the Board reserved its ruling on the State's Motion to Dismiss or in the Alternative for the Grant of Summary Judgment filed on January 11, 2002 and consolidated the above cases for disposition because the issues were interrelated. The Board scheduled a hearing on the Unions' motions to dismiss the complaints.

On February 11, 2002, CONDON filed a Motion for Admission of Material Facts/Waiver of Hearing with the Board in Case No. CU-10-191. CONDON contended that the UPW failed to provide him with an answer. On February 11, 2002, UPW's counsel filed a First Amended Certificate of Service with the Board indicating that a copy of UPW's Answer to Complaint was served to "Richard K. Condon" on February 1, 2002 but in view of CONDON's motion, UPW's counsel mailed another copy of the Answer to "Richard Kealoha Condon."

The Board conducted a hearing on the instant motions on February 21, 2002. The State, the HGEA and the UPW were represented by their respective counsel and Complainant appeared pro se. The parties were afforded full opportunity to present evidence and argument to the Board.

After a thorough review of the record and consideration of the arguments made, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. CONDON is an employee, as defined in HRS § 89-2, of PSD. CONDON is presently an SSA V at the Intake Service Center and included in bargaining unit 03.

2. SAKAI is the Director of PSD, State of Hawaii and was for all relevant times, representative of the public employer as defined in HRS § 89-2.
3. YOGI is the Director of DHRD, State of Hawaii and was for all relevant times, representative of the public employer as defined in HRS § 89-2.
4. The UPW is an employee organization and the exclusive representative, as defined in HRS § 89-2, of bargaining unit 10. BERNDT is a UPW business agent and is deemed to represent the interests of the UPW.
5. The HGEA is an employee organization and the exclusive representative, as defined in HRS § 89-2, of bargaining unit 03.
6. On August 6, 1984, CONDON was an Adult Correctional Officer (ACO) IV with PSD. The position of ACO is included in bargaining unit 10.
7. On or about January 3, 2000, CONDON received, what he claimed to be, an on-the-job injury which prevented him from performing ACO duties.
8. CONDON was placed in the Return to Work Priority Program (RTWPP) because of his injury.
9. CONDON applied for an SSA IV or V position at the Oahu Intake Service Center, closing date October 16, 2000, but was considered unqualified by PSD.
10. On or about February 13, 2001, CONDON filed an appeal to the Civil Service Commission (Commission) challenging PSD's determination that he was unqualified. The Commission determined that he was qualified for the SSA V position and on June 6, 2001, PSD sent a letter to CONDON's treating physician to inquire whether the position was a suitable placement for CONDON.
11. Under the RTWPP, if an applicant is medically cleared for a position, the applicant must take the offered job.
12. On or about July 10, 2001, CONDON filed a written application for the SSA V position at the Intake Service Center Division, Oahu Intake Service Center. CONDON's placement in the position was considered an involuntary demotion and was effective on July 23, 2001. Under the RTWPP, CONDON's base pay was no less than that of his prior position.

13. The SSA V position is included in bargaining unit 03 and CONDON's seniority rights under the Unit 10 contract were not transferable to the SSA position. After July 23, 2001, CONDON was not covered by the Unit 10 contract.
14. Thereafter, CONDON claimed that he initially sought an SSA position at Laumaka.
15. On August 15, 2001, CONDON spoke with UPW business agent BERNDT and requested UPW's assistance to pursue a grievance on his behalf. BERNDT told CONDON that since he was no longer a member of the UPW she could not assist him. Moreover, based on a prior arbitration decision, the UPW did not pursue grievances for UPW members seeking positions outside of the bargaining unit.
16. By letter dated August 15, 2001, CONDON filed a grievance with SAKAI contending that on or about July 2000 he applied for a Laumaka SSA position but was deemed to be unqualified by PSD. CONDON contended that PSD violated Sections 5.2, 5.3, 6.0 and 6.1 of the DHRD Recruitment and Examination Division's First Consideration Policy. CONDON requested to be placed in the SSA V position at Laumaka and also requested that the time limitations under the union contract be adhered to in order to avoid further injury to his hand.
17. When CONDON filed his grievance with PSD he was not included in Unit 10 and the position he sought was included in Unit 03.
18. By memorandum dated August 21, 2001, CONDON notified "UPW Ms. Burnt (sic) and HGEA Mr. Goo" that he had filed a grievance and had also requested a Prohibited Practice Complaint form from the Board. CONDON stated:

...If the grievance cannot be resolved at the Step #2 level a PPC will be filed on both HGEA and UPW. I will let the board determine who is responsible for my representation.

It would save us a lot of time and money if you could work this out between yourselves.

This is a very simple grievance; it would not take up a lot of time.

19. By letter dated November 16, 2001, CONDON submitted his grievance alleging violations of §§ 15.03 and 15.06 of the Unit 10 contract to YOGI. CONDON indicated he was proceeding to Step 2 of the grievance procedure because "PSD refuses to address Step #1" in accordance with "UPW BU 10 section 15.06." CONDON indicated that efforts in an EEOC mediation were at an impasse and that he did not agree to extend any time limitations because of "damage to his health."
20. By letter dated November 20, 2001, YOGI informed CONDON that all Step 2 appeals had been delegated to PSD.
21. CONDON objected to YOGI's delegation of Step 2 appeals to PSD by letter dated November 26, 2001 citing PSD's failure to respond to CONDON's grievance at Step 1.
22. By letter dated January 8, 2002, SAKAI denied CONDON's grievance filed on August 15, 2001 with PSD at Step 1 and on November 16, 2001 with DHRD at Step 2. SAKAI stated that PSD did not improperly apply the First Consideration Policy when PSD filled vacancies for the SSA position at Laumaka. SAKAI explained that since CONDON was in the RTWPP and applied for Position No. 51756, SSA IV or V at Oahu Intake Service Center, and was considered unqualified, the position was held pending the outcome of his appeal before the Commission. When the Commission ruled that CONDON was qualified for the position, the position description was sent to CONDON's treating physician who determined that he was a suitable candidate for the position. Thus, CONDON was placed in that position on July 23, 2001. SAKAI also apologized for the late response.
23. CONDON filed the instant complaints against the Unions on January 18, 2002, more than 90 days after the Unions refused to file a grievance on his behalf on or about August 21, 2001.

DISCUSSION

CONDON contends that the Unions failed to represent him in his grievance charging that the State improperly refused to place him in an SSA position at Laumaka. In their respective motions, the Unions argue that CONDON's complaint is time-barred because CONDON knew or should have known on or about August 15, 2002 that the Unions would not represent him. The facts are undisputed that BERNDT notified CONDON on or about August 15, 2001 that the UPW would not represent him in a grievance outside of the bargaining unit. Thereafter, CONDON confirmed to BERNDT and HGEA on or about August 21, 2001 that neither union would represent him. CONDON filed the instant

complaints against the UPW and the HGEA on January 18, 2002 well beyond the 90-day statute of limitations provided by HRS § 377-9(1) and Hawaii Administrative Rules (HAR) § 12-42-42(a).

HRS § 377-9(1) made applicable to prohibited practice complaints by HRS § 89-14 provides:

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

HAR § 12-42-42(a) similarly states:

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 by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation.

The requirement that all complaints for prohibited practices be filed within 90 days of their occurrence is a jurisdictional requirement established by the Legislature. HRS § 377-9(1), HRS; Thomas v. Commonwealth of Pennsylvania Labor Relations Board, 85 Pa.Cmwlth 567, 483 A.2d 1016 (Pa.Cmwlth 1984) (failure to comply with the statute of limitations for unfair labor practices goes to the subject matter jurisdiction of the labor relations board).

Compliance with time deadlines and other similar statutory provisions which are established for jurisdictional reasons are mandatory. Kissell v. Labor and Indus. Relations Appeal Bd., 57 Haw. 37, 38, 549 P.2d 470, 471 (1976) (30-day time deadline for appeal in Revised Laws of Hawaii § 97-96 is “mandatory”); 3 Sutherland Stat. Const. § 57.19 (5th Ed), Time Provisions; at p. 49 (“When a Statute directs things to be done by a private person within a specific time, and makes his rights dependent on proper performance, unless the failure to perform in time may injure the public or individuals, the statute is mandatory.”)¹ Like other statutes of limitations it has long been established in Hawaii that such provisions

¹Statutory provisions establishing time requirements have been construed to be “mandatory” by our Supreme Court. Town v. Land Use Commission, 55 Haw. 538, 524 P.2d 84 (1974) (90-day requirement for decision by land use commission on a boundary change petition is mandatory); Hawaii Corp. v. Kim, 53 Haw. 659, 500 P.2d 1165 (1972) (where the language of the statute is plain and unambiguous that a specific time provision must be met, it is mandatory and may not be waived); and Territory v. Fasi, 40 Haw. 478 (1954) (20-day deadline for filing candidate’s sworn statement of expenditures following election is mandatory).

“are to be strictly construed.” Thurston v. Bishop, 7 Haw. 421, 433 (1888) (“Statutes of limitations are to be strictly construed by courts of justice.”); Wong Nin v. City and County of Honolulu, 33 Haw. 379, reh. denied, 33 Haw. 409 (1935) (the bar of the statute of limitations extinguishes the right).

Consistent with the foregoing principles the Board has strictly construed the 90-day statute of limitations under HRS § 377-9(1) and dismissed complaints even when they are one day late. Alvis W. Fitzgerald, 3 HPERB 186, 198-99 (1983) (“Despite the fact that Complainant missed the deadline by only one day, the Board cannot waive the defect on the basis of substantial compliance, as it is clear that statutes of limitations are to be strictly construed.”); Michael K. Iwai, 5 HLRB 132, 134 (1993) (“Similar to the Fitzgerald case, this case was filed one day after the limitations period ran.”); B. Theresa Petramala, 5 HLRB 172, 175 (1993) (“At the outset, the Board dismisses Complainant allegations of prohibited practices which are outside the applicable ninety-days statute of limitations.”)

Based on the foregoing, the Board concludes that CONDON’s complaints against the UPW and the HGEA were filed beyond the applicable 90-day statute of limitations and therefore the Board lacks jurisdiction over them. Accordingly, the Board dismisses the complaints against the Unions.

With respect to the State, CONDON alleges in his complaint that the State violated § 15 of the Unit 10 contract by refusing to process his grievance and by YOGI’s delegating the hearing of Step 2 appeals to PSD. It is undisputed that CONDON’s appointment to the SSA V position was effective July 23, 2001. Therefore, at the time CONDON filed his grievance with SAKAI at Step 1 of the grievance procedure on or about August 15, 2001 and with YOGI at Step 2 on or about November 16, 2001, he was no longer a member of Unit 10 and not entitled to coverage of the Unit 10 contract. Moreover, the gravamen of CONDON’s grievance was his nonappointment to the SSA V position at Laumaka which is a Unit 03 position which is not subject to the Unit 10 grievance procedure. The Board thus concludes that CONDON fails to state a claim for which relief can be granted because he has no enforceable rights under the Unit 10 contract.

The Board notes that the State responded to CONDON’s grievance during the pendency of this complaint and denied the grievance at Steps 1 and 2. While SAKAI was late in responding to CONDON’s grievance, it is undisputed the grievance alleged violations of the Unit 10 contract which CONDON was not entitled to assert.

Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact in dispute and it is entitled to judgment as a matter of law. State of Hawai‘i Organization of Police Officers v. Society of Professional Journalists - University of Hawai‘i Chapter, 83 Hawai‘i 378, 389, 927 P.2d 386, 397 (1996); Price v. Obayashi Hawaii Corp., 81 Hawai‘i 171, 177, 914 P.2d 1364, 1370 (1996). A fact is material

if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. Konno v. County of Hawai'i, 85 Hawai'i 61, 70, 937 P.2d 397, 406 (1997); Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982). The evidence must be viewed in the light most favorable to the non-moving party (State ex rel. Bronster v. Yoshina, 84 Hawai'i 179, 186, 932 P.2d. 316, 323 (1997) citing Maguire v. Hilton Hotels Corp., 79 Hawai'i 110, 112, 899 P.2d 393, 395 (1995)) and the inferences must be drawn in the light most favorable to the party opposing the motion (State Farm Mut. Auto Ins. Co. v. Murata, 88 Hawai'i 284, 287-88, 965 P.2d 1284, 1287-88 (1998); Maguire, at 112, 899 P.2d at 395).

Accordingly, the Board finds there is no genuine issue of material fact presented and grants summary judgment in favor of the State.

CONCLUSIONS OF LAW


1. The Board lacks jurisdiction over complaints filed more than 90 days after the occurrence of the alleged prohibited practice. Under the facts of this case, the Board lacks jurisdiction over CONDON's complaints against the Unions because he knew or should have known that the Unions would not represent him in August 2001. Thus, his complaints against the Unions filed on January 18, 2002 are time-barred.
2. CONDON fails to state a claim for relief against the State because he alleges in his grievance filed on August 15, 2001 that the State violated the provisions of the Unit 10 agreement when he ceased being a member of Unit 10 on or about July 23, 2001. There being no genuine issues of material fact in dispute, the State is entitled to judgment as a matter of law.

ORDER

The Board hereby grants the Unions' motions to dismiss the instant complaints and grants summary judgment in favor of the State.

DATED: Honolulu, Hawaii, April 11, 2002

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair

RICHARD KEALOHA CONDON v. TED SAKAI, et al.
CASE NO. CE-10-489
RICHARD K. CONDON v. DIANN BERNDT, et al.
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RICHARD K. CONDON v. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME,
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CHESTER C. KUNITAKE, Member



KATHLEEN KACUYA-MARKRICH, Member

Copies sent to:

Richard Kealoha Condon
Edward John Mulligan, Deputy Attorney General
Peter Liholiho Trask, Esq.
Herbert R. Takahashi, Esq.
Joyce Najita, IRC