STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of EDMUND SEMETARA, Complainant, and CHUCK ALLEN, Department of Parks and Recreation, City and County of Honolulu; MIKE KELLY, Department of Parks and Recreation, City and County of Honolulu; WILLIAM BALFOUR, Department of Parks and Recreation, City and County of Honolulu; SANDRA McFARLANE, Department of Human Resources, City and County of Honolulu; GARY RODRIGUES, United Public Workers; EDWARD SIAOSI, United Public Workers; and PETER TRASK in his fiduciary capacity as Attorney for United Public Workers, Respondents.	CASE NOS.: CE-01-490 CU-01-197 ORDER NO. 2089 ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS AMENDED COMPLAINT

ORDER GRANTING RESPONDENTS'
MOTIONS TO DISMISS AMENDED COMPLAINT

On January 3, 2002, Complainant EDMUND SEMETARA (SEMETARA) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) alleging Respondents CHUCK ALLEN (ALLEN) and MIKE KELLY (KELLY), Department of Parks and Recreation, City and County of Honolulu, inter alia, harassed and intimidated SEMETARA by yelling at him and verbally threatening him with suspension and termination without progressive discipline or any written complaint.

On January 17, 2002 Respondents ALLEN and KELLY filed Respondents' Motion to Dismiss Complaint with the Board.

On February 7, 2002, the Board convened a hearing on the motion to dismiss. At the hearing SEMETARA, appeared pro se and represented that he was in the process of retaining counsel. The Board thereupon continued the proceedings to allow SEMETARA to seek counsel.

On March 22, 2002, SEMETARA, by and through his attorney, filed an Amended Complaint with the Board. SEMETARA added WILLIAM BALFOUR

(BALFOUR), Department of Parks and Recreation, City and County of Honolulu and SANDRA McFARLANE (McFARLANE), Department of Human Resources, City and County of Honolulu[1] and GARY RODRIGUES (RODRIGUES), United Public Workers, EDWARD SIAOSI (SIAOSI), United Public Workers, and PETER TRASK (TRASK), in his fiduciary capacity as Attorney for the United Public Workers (collectively UPW or Union) as Respondents. SEMETARA alleged that he was disciplined and later dismissed from employment with Department of Parks and Recreation, City and County of Honolulu on September 21, 2000 for alleged sick leave abuse. SEMETARA further alleged that the City and County of Honolulu refused to submit the matter to arbitration on October 10, 2000 and the Union withdrew its arbitration request on July 10, 2001 without apparent cause or timely notice. SEMETARA contended that Respondents violated Chapter 89 and the Hawaii Constitution by not administering the grievance process through arbitration in bad faith. SEMETARA further alleged that the Union and its fiduciaries failed to afford him the duty of fair representation.

On April 5, 2002, the UPW filed a Motion to Dismiss Amended Complaint with the Board. The UPW argued that 1) the Board lacks subject matter jurisdiction over the complaint, 2) the complaint is untimely, and 3) the complaint fails to state a claim for relief.

On April 8, 2002, the Employer filed Respondents' Motion to Dismiss Complaint with the Board. The Employer argued that 1) ALLEN and KELLY should be dismissed because Complainant failed to make any specific allegations against them in the amended complaint, 2) it did not deny SEMETARA any right or privilege under the Unit 01 Agreement and therefore did not violate Hawaii Revised Statutes (HRS) § 89-2, and 3) the allegations in the Amended Complaint are untimely.

On April 23, 2002, the Board held a hearing on the respective Respondents' motions to dismiss the complaint. The parties were represented by counsel and afforded full opportunity to present evidence and arguments to the Board.

Based upon the consideration of the record and the arguments presented and for the reasons stated below, the Board hereby grants Respondents' Motions to Dismiss.

FINDINGS OF FACT

1. SEMETARA is a former employee, as defined in HRS § 89-2, of the Department of Parks and Recreation, City and County of Honolulu who was included in bargaining unit 01.

---

[1]ALLEN, KELLY, BALFOUR, and McFARLANE are collectively referred to as Employer.

2. ALLEN and KELLY were former supervisors of SEMETARA while he was employed by the Department of Parks and Recreation, City and County of Honolulu.

3. BALFOUR is the Director of the Department of Parks and Recreation, City and County of Honolulu, and a representative of the public employer as defined in HRS § 89-2.

4. McFARLANE was for all times relevant the Director of the Department of Human Resources, City and County of Honolulu, and a representative of the public employer as defined in HRS § 89-2.

5. RODRIGUES is the State Director of the UPW; SIAOSI is a UPW business agent; and TRASK is an attorney who was hired to represent the UPW in SEMETARA's arbitration cases. RODRIGUES, SIAOSI, and TRASK represent the United Public Workers, AFSCME, Local 646, AFL-CIO which is an employee organization and the exclusive representative, as defined in HRS § 89-2, of employees included in bargaining unit 01.

6. The City and County of Honolulu and the UPW are parties to a collective bargaining agreement for Unit 01 covering the period from July 1, 1999 to June 30, 2003 (Contract).

7. The Contract provides for the resolution of complaints alleging the violation, misinterpretation, or misapplication of the Contract through the grievance procedure which consist of several steps and culminates in arbitration. The Contract provides that only the Union can request arbitration of the grievance.

8. SEMETARA was disciplined for alleged sick leave abuse and the UPW filed two grievances regarding his suspension and subsequent termination. The UPW filed respective requests for arbitration and TRASK was retained by the UPW to handle the cases before the arbitrator.

9. By letter dated July 10, 2001, TRASK withdrew the cases from arbitration pursuant to a telephone discussion with RODRIGUES.

10. Sometime after July 10, 2001, SEMETARA called TRASK by telephone to inquire as to the status of his grievances. TRASK told SEMETARA that the grievances had been withdrawn and that he should contact the UPW.

11. On August 3, 2001, SEMETARA spoke to SIAOSI by telephone who confirmed that his grievances were dropped and would not be arbitrated.

12. On January 3, 2002, SEMETARA, proceeding pro se, filed the instant prohibited practice complaint against his employer (which he later amended on March 22, 2002 to add additional representatives of the employer and a prohibited practice charge against his Union for breaching its duty of fair representation).[2] The complaint, as amended, was filed more than 90 days after SIAOSI confirmed to SEMETARA for reasons not explained that the Union withdrew his grievances from arbitration.

DISCUSSION

The respective Respondents contend that the instant complaint, as amended, is untimely. The complaint was filed more than 90 days from the alleged date of violation.

Statute of Limitations

HRS § 377-9(l), 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, Hawaii Administrative Rules (HAR) § 12-42-42(a) 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 by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation.

---

[2]HAR § 12-42-8(g)(10) relates to the amendment of documents and provides:

> (C) If amended, the document shall be effective as of the date of the original filing, if it relates to the same proceeding.

Thus, while SEMETARA amended the instant complaint by adding the UPW representatives as additional respondents was filed on March 22, 2002, under the foregoing rule, the Board treats the complaint as relating back to the initial filing date of January 3, 2002. Even using the January date, the complaint, as amended, is untimely.

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.")[3] Like other statutes of limitations it has long been established in Hawaii that such provisions "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(l) 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.")

The record is clear that the instant complaint, as amended, is untimely. SEMETARA was informed twice that the Union withdrew the grievances from arbitration. It is undisputed that sometime after July 10, 2001, SEMETARA called TRASK by telephone to inquire as to the status of his grievances. TRASK told SEMETARA that the grievances had been withdrawn and that he should contact the UPW. On August 3, 2001, SEMETARA

---

[3]Statutory 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).

spoke to SIAOSI by telephone who confirmed that the grievances were dropped and the UPW would not be proceeding to arbitration on the grievances. On January 3, 2002, SEMETARA filed the instant complaint, which he amended on March 22, 2002.

SEMETARA contends that he was never notified in writing or otherwise, or given any reasons by the Union explaining why the grievances were withdrawn from arbitration after an arbitrator had been selected for his grievances. While this allegation raises a legitimate concern about the Union's obligation to inform its members of their rights under the contract and exercise the initiative to respond to its members, the Board is precluded from reaching that issue. In this case only the union has the right to arbitrate a grievance, and its decision not to, or in this case, withdrawing the grievances from arbitration, may give rise to a breach of duty of fair representation charge under HRS §§ 89-8(a), 89-13(b)(4) and (5). However, we cannot ignore the fact that the instant complaint was filed more than 90 days after SEMETARA knew or should have known that the grievances were withdrawn.

In the same way with respect to the City and County of Honolulu, SEMETARA alleged that ALLEN and KELLY harassed and discriminated against him and that his employer refused to submit the matter to arbitration on October 10, 2000. These events are likewise clearly barred by the applicable 90-day statute of limitations.

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 ninety days of an alleged violation of HRS Chapter 89.

2. The instant complaint, as amended, was filed beyond the applicable limitations period and the Board lacks jurisdiction to hear this complaint.

ORDER

The Board hereby grants the respective Respondents' Motions to Dismiss the Complaint, as amended. The instant case is therefore dismissed.

DATED: Honolulu, Hawaii, May 29, 2002.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member[4]

Copies sent to:

William Tagupa, Esq.
Herbert R. Takahashi, Esq.
Duane W.H. Pang, Deputy Corporation Counsel
Joyce Najita, IRC

[4]Recused.