STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of ALBERT G. MONIZ, Complainant, and TED SAKAI, Director, Department of Public Safety, State of Hawaii, Respondent.	CASE NO. CE-10-501 ORDER NO. 2102 ORDER GRANTING RESPONDENT'S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT

ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT

On May 28, 2002, ALBERT G. MONIZ (MONIZ) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondent TED SAKAI (SAKAI or Employer), Director, Department of Public Safety (PSD), State of Hawaii. MONIZ alleged that PSD failed to bargain with the union regarding the implementation of Hawaii Administrative Rules (HAR) § 14-14-14 in violation of Hawaii Revised Statutes (HRS) § 89-13(a)(5). MONIZ also alleged that PSD failed to provide or changed the written reasons for his termination; terminated him without just and proper cause; and failed to investigate or discipline MONIZ in accordance with Section 37 of the applicable collective bargaining agreement in violation of HRS § 89-13(a)(8). MONIZ alleged further that he filed a grievance in accordance with HRS § 89-8(b) on April 16, 2001 before the grievance was deemed denied on May 20, 2002.

On June 19, 2002, Respondent filed Respondent's Motion to Dismiss Prohibited Practice Complaint with the Board contending (1) the complaint is untimely; (2) Complainant lacks standing to bring the Complaint; (3) the Board lacks jurisdiction over HAR § 14-14-14(b); (4) the complaint is barred by the doctrines of res judicata/collateral estoppel; (5) the complaint fails to join an indispensable party; and (6) Respondent is not obligated beyond that which is provided for in HRS § 89-8(b).

On June 26, 2002, MONIZ filed a Memorandum in Opposition to Respondent's Motion to Dismiss Prohibited Practice Complaint Filed on June 19, 2002 and the Respondent filed a Reply Memorandum with the Board on July 1, 2002.

On July 5, 2002, the Board conducted a hearing on the Motion to Dismiss. The parties were provided full opportunity to present arguments on the Motion. Based on a thorough review of the record and the arguments presented, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. MONIZ was employed by PSD as an Adult Corrections Officer (ACO) from December 5, 1985 to December 8, 1998. MONIZ was formerly an employee within the meaning of HRS § 89-2 and included in bargaining unit 10.

2. SAKAI is the Director of PSD and a representative of a public employer as defined in HRS § 89-2.

3. The United Public Workers, AFSCME, Local 646, AFL-CIO (UPW or Union) is an employee organization and the exclusive representative, within the meaning of HRS § 89-2, of bargaining unit 10.

4. The UPW and the public employers are parties to a collective bargaining agreement for Unit 10 which includes a grievance procedure culminating in final and binding arbitration.

5. On September 20, 1998, Complainant stopped reporting to work.

6. On or about October 26, 1998, a PSD warden directed Complainant to clarify his employment intentions with PSD by November 13, 1998.

7. After meeting with Dr. Dana Zichitella on or about November 16, 1998, Complainant was cleared to return to work without restriction.

8. On December 3, 1998, PSD notified MONIZ that he was being terminated in accordance with HAR § 14-14-14(a)(2) for failing to notify his supervisor of his status and failing to respond to the warden's October 26, 1998 letter directing Complainant to clarify his employment intentions.

9. PSD held a pre-termination hearing on December 16, 1998, at which MONIZ was represented by his Union which argued inter alia, that HAR § 14-14-14 was invalid because it was not bargained over and that Complainant had complied with the October 26, 1998 letter.

10. On March 2, 1999, PSD notified MONIZ that the termination was upheld.

11. On March 15, 1999, the Union filed a Step 1 grievance under the Unit 10 collective bargaining agreement raising the same arguments raised during the pre-termination hearing. The Union also alleged that the Employer violated Section 11 of the applicable collective bargaining agreement by failing to have just and proper cause to terminate MONIZ.

12. On April 22, 1999, the Union filed a Step 2 grievance, which was denied by the Director of the Department of Human Resources Development on May 13, 1999.

13. By letter dated August 30, 1999, the Union notified MONIZ that it had decided not to pursue arbitration.

14. The UPW filed a class grievance in 1995 on the PSD's use of HAR § 14-14-14 to terminate employees which was taken to arbitration but withdrawn.

15. After completing the contractual grievance procedure in 1999, MONIZ filed another grievance with SAKAI pursuant to HRS § 89-8(b) on April 16, 2001. MONIZ raised the same issues that were covered by his grievance filed in 1999 and the UPW class grievance filed in 1995.

16. Receiving no response from SAKAI, MONIZ deemed his grievance to be denied on May 20, 2002, and filed the instant prohibited practice complaint with the Board on May 28, 2002.

DISCUSSION

Respondent Employer contends that MONIZ's prohibited practice complaint is untimely because it was filed well beyond the Board's 90-day statute of limitations. Respondent contends that MONIZ was notified that he was being terminated on December 3, 1998 and the Union filed a grievance on Complainant's behalf on March 15, 1999. After completing Step 2, the Union notified Complainant by letter dated August 30, 1999 that it would not pursue the matter to arbitration. The Employer contends that the 90-day statute of limitations for filing a prohibited practice complaint on these issues began to run at the latest from August 30, 1999 and thus, the complaint must be dismissed for lack of jurisdiction. Respondent also contends that the complaint is barred by res judicata or collateral estoppel because the Complainant's termination was already litigated in the contractual grievance process. The Employer contends that Complainant has already had two

bites[1] at the apple and is barred from relitigating his termination in the present complaint by attempting to pursue a grievance under HRS § 89-8(b).

MONIZ relies on HRS § 89-8(b) contending that the statute places no limitations on his right to pursue a grievance and permits the filing of a grievance by an individual employee "at any time." MONIZ contends that the instant complaint is timely because it was filed within 90 days of May 20, 2002 when MONIZ deemed his April 16, 2001 grievance filed with SAKAI to have been denied. MONIZ also contends that the grievance is not identical to the Union-filed grievance because his present grievance alleges PSD's failure to investigate and/or discipline MONIZ in accordance with Section 37.17 of the collective bargaining agreement.

HRS § 89-8(b) provides as follows:

> An individual employee may present a grievance at any time to the employee's employer and have the grievance heard without the intervention of an employee organization; provided that the exclusive representative is afforded the opportunity to be present at such conferences and that any adjustment made shall not be inconsistent with the terms of an agreement then in effect between the employer and the exclusive representative. ...(Emphasis added.)

We find that the cited provision sets forth the employee's right to pursue a grievance with the employer on his/her own behalf without union representation, provided that the exclusive representative has the right to be present at any conferences and any adjustment is consistent with the collective bargaining agreement. The statute does not create another cause of action or a right to file a grievance with the Employer outside of the procedure afforded by the collective bargaining agreement. The grievance must be filed in accordance with the contractual procedure subject to its time limitations. The foregoing statute does not afford an employee the right to file a grievance beyond the 18-day time limitations[2] set forth in the contractual grievance procedure. Thus, Complainant's broad

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[1]Respondent argues that the Union grieved the issue of the unilateral implementation of HAR § 14-14-14 in a class grievance and that Complainant is bound, along with the Union and other bargaining unit members, with the outcome of that grievance. In addition, Respondent argues that Complainant had the opportunity to present his arguments regarding his termination during the 1999 Union-filed grievance.

[2]**Section 15.11 Step 1 Grievance**, provides in part:

> The grievance shall be filed with the department head in writing as follows:

reading of the statute is contrary to the applicable case law which recognizes the contractual grievance procedure to be the exclusive avenue to resolve grievances alleging violations of the collective bargaining agreement.

In Santos v. State Dept. of Transp., Kauai Div., 64 Haw. 648, 655, 646 P.2d 962, 967 (1982), the Hawaii Supreme Court recognized the National Labor Relations policy favoring alternative dispute settlement mechanisms. In addition, the United States Supreme Court in Clayton v. International Union, United Auto., Aerospace, and Agr. Implement Workers of America, 451 U.S. 679, 686, 101 S.Ct. 2088, 2094, 68 L.Ed.2d 538 (1981) stated, "Congress had expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant," and approved of the ability granted by contractual grievance procedures for employer and union to "establish an uniform and exclusive method for orderly settlement of employee grievances." The Hawaii Supreme Court further recognized in Hokama v. University of Hawaii, 92 Hawai`i 268, 272-73, 990 P.2d 1150 (1999) that the contractual grievance procedure was the exclusive forum for any claims arising from the interpretation and application of the terms of a collective bargaining agreement. The Court stated:

> HRS § 89-11(a) (1993 & Supp.1998) provides: "A public employer shall have the power to enter into written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in a final binding decision, *to be invoked in the event of any dispute concerning the interpretation or application of a written agreement.*" (Emphasis added.) The plain language of the statute indicates that the grievance procedure shall serve as the exclusive vehicle for resolving disputes regarding the terms of the collective bargaining agreement.

The Court in Hokama, supra, recognized that the collective bargaining agreement provided that the grievance procedure "shall" apply if informal negotiations fail, thereby allowing no other alternative forums. The Court relied upon Winslow v. State, 2 Haw.App. 50, 55, 625 P.2d 1046, 1050 (1981) which held that the agreement controls "where the terms of public employment are covered by a collective bargaining agreement pursuant to Chapter 89 and the agreement includes a grievance procedure to dispose of employee grievances against the public employer."[3]

15.11 a. Within eighteen (18) calendar days after the occurrence of the alleged violation.

[3]Similarly, Section 15 of the applicable Unit 10 collective bargaining agreement sets forth the grievance procedure and provides, in part:

15.01 PROCESS.

Moreover, HRS § 89-11(a) does not afford an employee the right to file a complaint with the Board to review what essentially is a grievance.

HRS § 89-11(a) provides:

> A public employer shall have the power to enter into a written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. In the absence of such a procedure either party may submit the dispute to the board for a final and binding decision. ...

In this case, it is undisputed that the Unit 10 collective bargaining agreement contains a grievance procedure to resolve disputes concerning the interpretation or application of the agreement and which culminates in a final and binding decision. Under HRS § 89-11(a), the Board lacks jurisdiction over the instant complaint which is, in essence, a grievance over Complainant's termination, i.e., raising violations of the collective bargaining agreement and HRS § 89-13(a)(8). Under these facts, Complainant already pursued his grievance through the contractual process with the assistance of his Union in 1999 and attempted to resurrect the same grievance challenging his termination with the Employer under HRS § 89-8(b) in 2001 and with this Board in 2002.[4] To allow the instant complaint to proceed would in essence give MONIZ another bite at the apple.

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.

> A grievance which arises out of alleged Employer violation, misinterpretation, or misapplication of this Agreement, its attachments, exhibits, and appendices shall be resolved as provided in Section 15. (Emphasis added.)

[4]Notwithstanding Complainant's claim that the grievance underlying the instant complaint is not identical to the Union-filed grievance, the Board finds that claims are identical since the PSD's failure to investigate and/or discipline MONIZ in accordance with the collective bargaining agreement is encompassed within the Union's claim that MONIZ's termination was not for just and proper cause.

Similarly, HAR § 12-42-42(a) identifies the limitations period applicable to the filing of prohibited practice 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). In this case, MONIZ was terminated on or about March 2, 1999 and after proceeding through the grievance procedure, the Union informed MONIZ that the grievance would not be arbitrated on or about August 30, 1999. As this complaint was untimely filed on May 28, 2002, the Board dismisses the instant complaint for lack of jurisdiction.

CONCLUSIONS OF LAW

1. Where the terms of public employment are covered by a collective bargaining agreement pursuant to Chapter 89 and the agreement includes a grievance procedure to dispose of employee grievances against the public employer, the contractual grievance procedure is the exclusive forum for any claims arising from the interpretation and application of the terms of a collective bargaining agreement. HRS § 89-8(b) does not permit an employee to file a grievance outside of the contractual grievance procedure.

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

ORDER

Accordingly it is hereby ordered that Respondent's Motion to Dismiss Prohibited Practice Complaint is granted and the instant case is dismissed.

DATED: Honolulu, Hawaii, July 31, 2002.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

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