

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-03-203
LEWIS W. POE,)	ORDER NO. 2111
)	
Complainant,)	ORDER GRANTING, IN PART, AND
)	DENYING, IN PART, RESPONDENT'S
and)	MOTION TO DISMISS
)	
HAWAII GOVERNMENT EMPLOYEES)	
ASSOCIATION, AFSCME, LOCAL 152,)	
AFL-CIO,)	
)	
Respondent.)	

ORDER GRANTING, IN PART, AND
DENYING, IN PART, RESPONDENT'S MOTION TO DISMISS

On August 5, 2002, the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) moved to dismiss the prohibited practice complaint filed on July 9, 2002 by LEWIS W. POE (POE or Complainant), proceeding pro se, with the Hawaii Labor Relations Board (Board) on the grounds the complaint is time-barred by the applicable 90-day statute of limitations.

On August 8, 2002, Complainant filed POE's Memorandum-in-Opposition to HGEA's Motion to Dismiss.

On August 20, 2002, the Board held a hearing on Respondent's Motion to Dismiss on August 20, 2002 and afforded the parties a full and fair opportunity to present oral arguments.

After considering the written and oral arguments presented, the Board makes the following findings of fact, conclusions of law, and order granting, in part, and denying, in part, Respondent's Motion to Dismiss.

FINDINGS OF FACT

1. Complainant is a public employee within the meaning of Hawaii Revised Statutes (HRS) § 89-2 and a member of Bargaining Unit (BU) 03.

2. Respondent HGEA is an employee organization and the exclusive representative within the meaning of HRS § 89-2 for public employees in BU 03.
3. At all times relevant the HGEA and POE's employer, the State of Hawaii, Department of Transportation, have been parties to a BU 03 Collective Bargaining Agreement (Contract).
4. On July 9, 2002, Complainant filed a prohibited practice complaint against the Union alleging a breach of duty of fair representation in wilful violation of HRS §§ 89-13(b)(1), (4), and (5) over the Union's non-responsiveness to Complainant's January 5, 2001 and June 7, 2002 letters regarding the current status of four grievances which Complainant had asked Respondent to take to arbitration; and over the Respondent's failure to file a grievance at Step 1, and pursue a second grievance at Step 2 as requested in a letter dated February 11, 2001.
5. At a Prehearing Conference before the Board held August 1, 2002, Complainant identified two issues as follows:
 - a. Whether the HGEA breached its duty of fair representation by failing to timely respond to POE's letters of January 5, 2001 and June 7, 2002 requesting information on the status of four grievances that POE had asked the Union to proceed to arbitration under Step 4 of the Grievance Procedure of the BU 03 Contract.
 - b. Whether the HGEA breached its duty of fair representation by failing to pursue on Complainant's behalf a Step 2 grievance over a payroll computation error and by failing to timely file a grievance at Step 1 over the employer's alleged failure to comply with Article 11 and 3 of the BU 03 collective bargaining agreement, when POE asked the Union for representation by letter dated February 11, 2001.
6. Article 11 of the BU 03 Contract is the Grievance Procedure which states:
 - A. Any complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure. By mutual consent of the Employee or the Union and the Employer, any time limits

within each step may be extended. Any relevant information specifically identified by the Employee or the Union in the possession of the Employer needed by the Employee or the Union to investigate and process a grievance, shall be provided to them upon request within seven (7) working days. The grievance shall be presented to the appropriate supervisor within twenty (20) working days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) working days after the alleged violation first became known or should have become known to the Employee involved, except that in the case of an alleged payroll computational error, such allegation shall be presented to the department head or designee in writing within twenty (20) working days after the alleged error is discovered by the Employee, or the grievance may not be considered.

B. An individual Employee may present a grievance without intervention of the Union, up to and including Step 3, provided the Union has been afforded an opportunity to be present at the meeting(s) on the grievance. Any adjustment made shall not be inconsistent with the terms of this Agreement. By mutual consent of the Union and the Employer, any time limits within each step may be extended.

C. Informal Step. A grievance shall, whenever possible, be discussed informally between the Employee and the immediate supervisor within the twenty (20) working day limitation provided for in paragraph "A" above. The Employee may be assisted by a Union representative. If the immediate supervisor does not reply by seven (7) working days, the Employee or the Union may pursue the grievance to the next step.

The remainder of the grievance procedure contains Steps 1 through 4. If the grievance is not satisfactorily resolved at the informal step, at Step 1, or at Step 2, the Employee or the Union may submit a written statement of the grievance or may appeal the grievance in writing within seven (7) working days after receipt of the reply to the informal complaint or the employer's reply at Step 1 or Step 2. A meeting to discuss the grievance is required to be held within seven (7) working days after receipt of the grievance or appeal. Step 4 provides for Arbitration if the Union desires by serving "written notice on the Employer or designated representative of its desire to arbitrate within ten (10) working days after receipt of the reply at Step 3."

7. Complainant admits he knows how the grievance process works including the time limits and how to pursue a grievance on his own as set forth in the BU 03 Contract.
8. On June 7, 2002 Complainant wrote to Respondent, as a follow-up to his January 5, 2001 letter, requesting information on the current stage and status of four grievances which Complainant had pursued without Union assistance through Step 3 and subsequently received the Employer's denial of said grievances dated April 12, 2000, April 13, 2000, June 13, 2000 and October 6, 2000. Complainant concedes the substance of these four grievances are immaterial to his allegation against the Respondent over its failure to provide a status report or respond to his requests for information dated January 5, 2001 and June 7, 2002.
9. On February 11, 2001, Complainant wrote to Union's Deputy Executive Director Randy Perreira requesting representation for a "Step 2 grievance involving a payroll computational error resulting in underpayment of total Night Differential for the period from 12-16-00 through 12-31-00 in violation of Article 23, Article 30, . . .;" and requesting the HGEA "initiate a timely grievance on POE's behalf because of the Director of the Dept. of Transportation's failure to comply with the provisions of Article 11 and/or of Article 3 of the BU 03" Contract.¹

¹In his letter of February 11, 2001, Complainant writes, in part, as follows:

2. Assuming the DDOT received the original of Exhibit A [Poe's Step 2 grievance, dated Jan. 20, 2001] on January 23, 2001, the Employer/DDOT had until Thursday, February 1, 2001 to meet with the grievant (Poe) to discuss said Step 2 grievance in accordance with Article 11E. There was no such meeting at all, even as late as Friday, Feb. 9, 2001, because it has become common practice for the DDOT and/or the DDOT's designee to ignore at Step 2 the individual grievances filed by Poe. [There is at least one or more grievances pending at Step 2 whereby the DDOT and/or his designee have taken no action thereupon.] Thus, the violation of Articles 11 and/or 3 of the CBA.

I request that the HGEA initiate a Step 1 grievance on Poe's behalf because of the Employer's violation of the provisions of Article 11E and/or Article 3, including the violation of **HRS, Chapter 84, Standards of Conduct**, and the violation of DOT Departmental Staff Manual ("DSM"), Part 4, Personnel Management, **Chapter 12, Employee**

CONCLUSIONS OF LAW

1. HRS § 377-9(l), HRS, made applicable to the Board by HRS § 89-14, provides that no unfair labor practice complaints shall be considered unless filed within ninety days of its occurrence.²
2. 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 (8th Cir. 1978).
3. The specific instance before the Board of a prohibited practice for breach of duty of fair representation by the Union is the alleged failure to advise Complainant of the status of his four grievances as requested in his letters dated January 5, 2001 and June 7, 2002. To the extent the instant complaint filed on July 9, 2002 is based on the Union’s alleged inaction in responding to Complainant’s letters of January 5, 2001 and June 7, 2002, we conclude it falls within the 90-day period and is not time-barred.
4. The charge against the Union alleging a breach of duty of fair representation for failing to pursue a grievance at Step 2, initiated by Complainant on his

Relations, Section 4.12.03.1b and 4.12.03.9, etc. and/or the violation of the July 5, 1994 Memorandum which was issued by the former Director of the DOT, a Mr. Rex Johnson. See **Exhibit “DOT”**, attached hereto.

3. I request that the HGEA represent me (Poe) at an appropriate grievance level (see **Exhibit A**, attached hereto) by taking over Poe’s currently pending grievance at Step 2, involving an underpayment of Night Differential for the period from Dec. 16, 2000 through Dec. 31, 2000. See **Exhibit A**. [Emphasis in original.]

²Hawaii Administrative Rules (HAR) § 12-42-42 states:

(a) 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.

own, and failing to initiate another grievance at Step 1, as requested by letter dated February 11, 2001, falls well beyond the 90-day period from the filing of the instant complaint. Complainant concedes he is familiar with the grievance process and timelines and knew or should have known that the Union would have had to pursue the respective grievances at the appropriate step in February 2001 when any alleged violation occurred. Accordingly, allegations of the Union's breach of duty of fair representation arising from its conduct with respect to those grievances are time-barred and the Board is precluded from considering them in this complaint.

DATED: Honolulu, Hawaii, September 3, 2002.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member


KATHLEEN RACUYA-MARKRICH, Member

Copies sent to:

Lewis W. Poe
Peter Liholiho Trask, Esq.
Joyce Najita, IRC