

FINDINGS OF FACT

1. Complainant, an Adult Correctional Officer with the Department of Public Safety, State of Hawaii, is a public employee within the meaning of Hawaii Revised Statutes (HRS) § 89-2, and a member of Bargaining Unit (BU)10.
2. The UPW is the exclusive representative of institutional, health and correctional workers in BU 10, including Complainant. SANTIAGO, is a UPW business agent and UPW's designated agent within the meaning of HRS § 89-13(b).
3. The UPW and State of Hawaii, at all times relevant, have been parties to a collective bargaining agreement (Contract) covering BU 10 members, which contains a grievance procedure in Section 15.
4. On April 2, 2002, Complainant's employer posted a notice to all sergeants of a change of watch schedule on April 10, 2002 to begin on April 14, 2002. As a result of the notice, Complainant contacted SANTIAGO on May 31, 2002 requesting that a grievance be filed on his behalf for denial of compensation for not complying with the schedule posting provisions of the BU 10 Contract.
5. By memorandum dated June 12, 2002 from SANTIAGO to Complainant, the UPW denied Complainant's request of May 31, 2002 to file a grievance on his behalf over the employer's decision to redo the post/shift selection for April 14, 2002 to July 6, 2002. Complainant believed that under the BU 10 Contract section 26.02c he was entitled to compensation since the Final Work Schedule was posted four days before the change of watch, instead of four weeks in advance as called for under the BU 10 Contract. SANTIAGO also advised Complainant of his right to file a grievance on his own and provided a copy of the grievance form.¹

¹The complete text of SANTIAGO'S to/from memorandum to Complainant states:

On May 31, 2002, you requested that the UPW file a grievance on your behalf. Based on a review of the entire matter, including but not limited to, the applicable provisions of the Unit 10 Agreement and the evidence presented, you were advised at that time that the Union had decided not to file a grievance. You were also advised of your right to pursue the matter on your own through the Grievance Procedure, to which you requested that the Union mail you a grievance form.

6. On December 9, 2002, Complainant filed the instant complaint alleging that the UPW was engaging in a prohibited practice in violation of HRS §§ 89-13(a)(8) and 89-13(b)(5) by violating the collective bargaining agreement.
7. By Order No. 2140, issued December 20, 2002, the Board granted Respondents' Motion for Particularization and directed Complainant to file a particularization setting forth specific facts as to when and in what manner the UPW is alleged to have violated the Contract and specifying the sections of the agreement violated. In addition, Complainant was directed to define the "vagueness doctrine" alleged in the complaint and set forth specific facts as to when and in what manner the UPW violated the doctrine.
8. On December 23, 2002, in response to the Board's Order No. 2140, Complainant filed an Amended Complaint setting forth in chronological order his repeated requests to SANTIAGO to file a grievance on his behalf beginning on May 31, 2002 when SANTIAGO informed Complainant that only sergeants with a post change were entitled to compensation. According to SANTIAGO, since his post did not change he was not entitled to compensation and therefore the Union would not file a grievance on his behalf.
9. On December 24, 2002, Respondents filed an Answer to Complaint, as well as Respondent UPW's Motion to Dismiss.
10. On January 6, 2003, Complainant filed a Second Amended Complaint that included a Statement of the Case, Argument, and Standard of Review, which

On June 3, 2002, we discussed the matter for a second time. You were again advised of your right to pursue a grievance on your own as provided in Section 15A.03 a. of the Supplemental Agreement to the Unit 10 Agreement. A copy of the Supplemental Agreement Section 15, Unit 1 and Unit 10 between the State of Hawaii and UPW, dated February 11, 2002, and a copy of a grievance form were mailed to you on June 3, 2002.

You are being advised for the third time that if you wish to pursue the matter, you must complete the grievance form and submit it to the Employer pursuant to the Supplemental Agreement Section 15, Unit 1 and Unit 10 between the State of Hawaii and UPW, dated February 11, 2002.

Do not submit the grievance to the UPW for processing on your behalf since it is your responsibility as provided in the Agreement.

Complainant intended as a response in opposition to Respondent UPW's Motion to Dismiss.

DISCUSSION

The gravamen of Complainant's prohibited practice charge is that the UPW abused its discretion in breach of the duty of fair representation when SANTIAGO failed to file a grievance on his behalf after he first sought its assistance on or about May 31, 2002 and subsequently on June 3, 2002. Complainant asserts that UPW's denial to file a grievance violates the grievance procedure in Section 15 of the BU 10 Contract to constitute a prohibited practice under HRS § 89-13(b)(5), and also constitutes a breach of the UPW's duty of fair representation.

The UPW submits that the instant complaint is barred by the statute of limitations, under HRS § 377-9(1)² made applicable to the Board under HRS § 89-14³ and incorporated in the Board's rules of practice and procedure in Hawaii Administrative Rules (HAR) § 12-42-42(a).⁴ The Board agrees.

The instant complaint was filed on December 9, 2002. As such, the alleged prohibited practice must fall within the 90-day period before December 9, 2002, or after September 10, 2002. It is a well-established practice of the Board to strictly construe the 90-day statute of limitations period under HRS § 377-9(1), and dismiss complaints even when they are one day late. Alvis W. Fitzgerald, 3 HPERB 186, 198-99 (1983). The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Instead,

²HRS § 377-9(1) states:

(1) No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of the occurrence.

³HRS § 89-14 states, in part:

Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9;

⁴HAR §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.

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.).

Complainant’s first request to SANTIAGO to file a grievance on his behalf occurred on May 31, 2002. SANTIAGO at that time informed Complainant of the Union’s decision not to file a grievance and advised Complainant of his right to file a grievance on his own.⁵ Subsequent requests were made by Complainant on June 3, 2002 and by written memorandum to SANTIAGO on June 6, 2002.

By memorandum dated June 12, 2002 from SANTIAGO to Complainant, the UPW denied Complainant’s May 31, 2002 request and the two subsequent requests made by Complainant to file a grievance on his behalf over the employer’s decision to redo the post/shift selection for April 14, 2002 to July 6, 2002. Complainant believed that under the BU 10 Contract section 26.02c he was entitled to compensation since the Final Work Schedule was posted four days before the change of watch, instead of four weeks in advance as called for under the BU 10 Contract. SANTIAGO advised Complainant of his right to file a grievance on his own and provided a copy of the grievance form.

Based on the fact that SANTIAGO’s May 31, 2002 and subsequent June 12, 2002 denials of Complainant’s request to file a grievance over the employer’s decision to redo the post/shift selection in alleged violation of the schedule posting provisions of the Contract occurred well before September 10, 2002, the Board concludes that the instant complaint is untimely.⁶ Therefore, this Board lacks jurisdiction to consider the instant complaint.

The Board need not address the other grounds for dismissal raised by Respondents.

⁵Section 15 of the grievance procedure provides, “an employee may process a grievance and have the grievance heard without representation by the Union,” at each step except for proceeding to arbitration. Providing for an employee to file a grievance on his/her own is wholly consistent with HRS § 89-8(b), which provides in part, that “An individual employee may present a grievance at any time to the employee’s employer and have the grievance heard without intervention of an employee organization. . . .” Accordingly, Complainant’s contention that the Union’s advice to file a grievance on his own constitutes a prohibited practice is without merit.

⁶Based on the record before the Board, the Board finds that Complainant knew or should have known that the UPW would not file a grievance on his behalf on May 31, 2002 and at the latest, on or about June 12, 2002.

CONCLUSION OF LAW

The Board lacks jurisdiction over the instant complaint filed more than 90 days after the UPW's May 31, 2002 and June 12, 2002 denials of Complainant's requests to file a grievance on his behalf over the employer's April 2, 2002 decision to redo the post/shift selection.

ORDER

The Respondent UPW's Motion to Dismiss is granted and the instant complaint is hereby dismissed with prejudice.

DATED: Honolulu, Hawaii, January 29, 2003.

HAWAII LABOR RELATIONS BOARD


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