

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-12-210
RICHARD GARCIA GONSALES II,)	ORDER NO. 2220
Complainant,)	AMENDED ORDER GRANTING
and)	RESPONDENTS' MOTIONS TO DISMISS
STATE OF HAWAII ORGANIZATION OF)	COMPLAINTS ¹
POLICE OFFICERS,)	
Respondent.)	

In the Matter of)	CASE NO. CE-12-520
RICHARD GARCIA GONSALES II,)	
Complainant,)	
and)	
JEREMY HARRIS, Mayor, City and County)	
of Honolulu and LEE DONOHUE, Police)	
Chief, Honolulu Police Department, City and)	
County of Honolulu,)	
Respondents.)	

AMENDED ORDER GRANTING
RESPONDENTS' MOTIONS TO DISMISS COMPLAINTS

On October 31, 2002, Complainant RICHARD GARCIA GONSALES II (Complainant or GONSALES), initially proceeding pro se, filed a complaint against the STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (Respondent Union or SHOPO) in Case No. CU-12-210 alleging the Union engaged in prohibited practices in violation of Hawaii Revised Statutes (HRS) § 89-13(b) by withdrawing his termination grievance without his knowledge. After receiving a pardon in 2002, GONSALES sought reinstatement of his employment, but learned that his grievance had been withdrawn and he had no recourse to reinstate his grievance.

¹Corrected errors in Order No. 2213, Order Granting Respondents' Motions to Dismiss Complaints, dated September 5, 2003 are in bold.

On November 4, 2002, Complainant, initially proceeding pro se, filed a complaint against JEREMY HARRIS (HARRIS), Mayor, City and County of Honolulu and LEE DONOHUE (DONOHUE), Police Chief, Honolulu Police Department (HPD), City and County of Honolulu (collectively Respondent Employer), in Case No. CE-12-520, alleging the Employer engaged in prohibited practices in violation of HRS § 89-13(a) for terminating his employment and for refusing to reinstate his employment after he received a pardon in 2002.

On November 14, 2002, Respondent Employer filed a Motion to Dismiss Complaint in Case No. CE-12-520 on the grounds the Board lacked jurisdiction based on the applicable statute of limitations.

By Order No. 2132, dated November 15, 2002, the Hawaii Labor Relations Board (Board) consolidated Case Nos. CU-12-210 and CE-12-520 for disposition.

By Order No. 2133, dated November 27, 2002, the Board granted Complainant's ex parte motion to postpone the prehearing conference scheduled for November 27, 2002; and rescheduled the Prehearing Conference and Hearing on the City's Motion to Dismiss Complaint, in order to allow GONSALES time to obtain an attorney.

On January 2, 2003, Respondent Union filed SHOPO's Motion to Dismiss the Complaint on the grounds the Board lacked jurisdiction based on the applicable statute of limitations. On January 3, 2003, Respondent Union filed a Supplemental Filing of Affidavit of Tenari Maafala and Affidavit of Wilhelm S. Cordes, Jr., in Support of Respondent SHOPO's Motion to Dismiss Complaint.

On January 6, 2003, the Board received: 1) a Notice of Appearance of Counsel for Complainant, 2) Complainant's Prehearing Statement, and 3) Complainant's Motion to Amend 12/14/02 Prohibited Practice Complaint in CE-12-520, and Complainant's Motion to Continue 1/9/03 Hearing on Respondents' Motion to Dismiss, and a Declaration of Mary A. Wilkowski, Esq. Complainant filed his First Amended Pretrial Statement on January 9, 2003. On January 10, 2003, the Board received Exhibit A (Revised) to Complainant's Motion to Amend 11/4/02 Prohibited Practice Complaint in CE-12-520, filed 1/6/03; and Complainant's Motion to Amend 11/31/02 [sic] Prohibited Practice Complaint in CU-12-210.

Respondent Employer filed its Memorandum in Opposition to Complainant's Motion to Amend 12/14/02 Prohibited Practice Complaint in CE-12-420 on January 14, 2003; and on January 17, 2003, Respondent Union filed its Motion to Join Respondent Employer's Memorandum in Opposition to Complainant's Motion to Amend 12/14/02 Prohibited Practice Complaint in CE-12-520, and Memorandum in Support of SHOPO's Motion to Join and Memorandum in Opposition to Complainant's Motion to Amend 11/31/02 Prohibited Practice Complaint in CU-12-210.

On January 21, 2003, Complainant filed a reply to Respondents' memoranda in opposition to Complainant's motion to amend the prohibited practice complaint in Case No. CE-12-420.

On January 23, 2003, the Board held oral arguments on Complainant's motions to amend, and after considering the arguments presented by the parties, granted Complainant leave to amend the prohibited practice complaints. The Board also granted Respondents an opportunity to file supplemental affidavits and memoranda in support of their motions to dismiss.

On January 27, 2003, the Board received a Supplemental Filing of Affidavit of Patrick Ah Loo and Affidavit of Nicole L. Cagaoan in Support of Respondent SHOPO's Motion to Dismiss Complaint. On February 5, 2003, Respondents HARRIS and DONOHUE filed their Second Supplemental Memorandum in Support of Motion to Dismiss Complaint.

On February 10, 2003, Complainant filed his Memorandum in Opposition to Respondents City and SHOPO's Motions to Dismiss Prohibited Practice Complaints, Declaration of Mary A. Wilkowski; Affidavit of Richard Garcia Gonsales II; and Affidavit of Richard Garcia Gonsales.

On February 12, 2003, the Board held oral arguments on Respondents' motions to dismiss. After considering the parties' arguments and evidence presented, the Board conferred and announced its inclination to deny Respondents' motions to dismiss until an evidentiary hearing could be held because there were genuine issues of material fact as to whether Complainant was given adequate notice that Respondent Union had withdrawn the termination grievance; and if not, whether the Respondent Union's withdrawal of the termination grievance breached the duty of fair representation to Complainant; and whether the Respondent Employer's refusal to reinstate the termination grievance violated the collective bargaining agreement.

Following the motions hearing on February 12, 2003, the Board held a prehearing conference, and the matter was scheduled for hearing on March 12, 2003.

On March 12, 2003, at the commencement of the hearing, Respondents orally moved for a dismissal of the complaints based on alleged defects resulting from Complainant's failure to properly file amended complaints, as granted by the Board on January 23, 2003. The Board denied Respondents' motions to dismiss; directed Complainant to file and serve amended complaints on Respondents to cure the defects; directed Respondents to file answers by the close of business on March 21, 2003 and continued the evidentiary hearing to April 9, 2003.

The Board conducted hearings on April 9, April 14, and April 23, 2003, at which time the parties were given the opportunity to present witnesses, evidence and to make argument. Post hearing briefs were filed with the Board on June 10, 2003.

Having considered the entire record, testimony, and arguments, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Complainant GONSALES became a commissioned police officer in January 1992, and was at all times relevant, a public employee within the meaning of HRS § 89-2, employed by the HPD, City and County of Honolulu, until his termination on or about April 1, 1999.
2. SHOPO is an employee organization and the exclusive representative within the meaning of HRS § 89-2, for public employees, including GONSALES, in Bargaining Unit (BU) 12).
3. HARRIS is the public employer within the meaning of HRS § 89-2, for public employees in BU 13 employed by the City and County of Honolulu.
4. DONOHUE is the HPD Police Chief and a designated representative of the Employer under HRS § 89-13(a).
5. The Respondents, at all times relevant, were parties to a BU 12 collective bargaining agreement (Contract).
6. On October 9, 1998, GONSALES was convicted of the misdemeanor offense of Abuse of Family and Household Member.² As a consequence of GONSALES' misdemeanor conviction for a crime of domestic violence, federal law³ prohibited him from possessing any firearm or ammunition.
7. On December 10, 1998, the Employer issued a Notice of Pending Termination and Predetermination Hearing based on the October 9, 1998 conviction of Count I, Abuse of Family and Household Member by the Family Court of the First Circuit. SHOPO Ex. 10.
8. On January 21, 1999, Wilhelm S. Cordes, Jr. (Cordes), then SHOPO Senior Business Agent, filed a Step 1 Grievance on behalf of GONSALES over a ten-day suspension for allegedly violating the HPD Standards of Conduct based on conduct related to the misdemeanor conviction. Employer Ex. B.

²State of Hawaii v. Richard Gonsales, Family Court-Criminal No. 98-2047.

³18 U.S.C. § 921, et seq., as amended, and referred to herein as the "Lautenberg Amendment."

9. On February 25, 1999, the Employer conducted a predetermination hearing to give GONSALES an opportunity to provide information before the Employer's final determination as to whether reasonable grounds warranted his dismissal. Cordes represented GONSALES at this hearing, and recommended that GONSALES be allowed to continue his employment pending the outcome of an appeal of the misdemeanor conviction.⁴

⁴Before the HPD Administrative Review Board, Cordes stated:

. . . . More often times, I have been before some of you in a grievance process appealing cases, of course, with less severe consequences as opposed to the termination which Officer Gonsales is being faced with. But there's never been a time, I believe, or an occasion such as this that I could not raise some issues which may contribute towards maintaining the continued employment of an individual. In this instance, Federal and State laws in relation to Abuse of Household Members convictions just about renders me literally strapped. Okay, and let me explain. Literally strapped from presenting any form of defense for the employee, okay. What this means simply is that there will be no review of the facts of the case. No need to delve into the parity of discipline being meted out between himself and other members of the Police force for civil incidents or for me to delve into procedurally improprieties in the case or in the matter of investigations. However, I come here before you to make some recommendations. This is to say that the Family Court of the First Circuit Court has taken precedence over this particular situation, all right. What I would [like] for this Board to consider is the fact that Officer Gonsales' conviction is being appealed to an intermediate higher court. There is no definite date, you know, which we could, you know, guarantee you when a decision would be forthcoming. Based on the average, I would give an estimated guess that a decision will be rendered within a year's time. I recommend that Officer Gonsales be maintained on the Police force and placed in a position where he can be utilized effectively considering the restrictions of his conviction. Of course if the conviction is overturned, we recommend that he be returned to full duty on the conditions that's set by the powers of this administration. If his conviction is sustained, then the matter of his discharge, short of any changes to State and Federal laws concerning the ownership and use of a firearm, becomes academic. In short what I'm saying is that if his conviction is not overturned, his termination from the Police Department would be a foregone conclusion. This recommendation comes in the aftermath of police officers who were convicted of household member offenses and having given pardons and/or are awaiting pardons from the Governor. And these people were maintained on the Police force and are still being maintained on the Police

10. By notice, dated March 18, 1999, DONOHUE informed GONSALES of his termination effective on or about April 1, 1999, for violating the HPD Standards of Conduct based on the October 9, 1998 misdemeanor conviction, a consequence of which, in accordance with the Lautenberg Amendment, disqualified him from service as a police officer because he could not carry or possess a firearm or ammunition. SHOPO Ex. 12.
11. On March 22, 1999, Cordes filed a second grievance on behalf of GONSALES, over GONSALES' notice of termination alleging, *inter alia*, violations of Article 4 (Discrimination), 12 (Police Officer's Protection - Administrative Investigation and Interrogations), and 13 (Discipline and Dismissal). As a remedy, the Union sought a rescission of the termination, and for GONSALES to be "returned to work, pending his appeal for the conviction of the abuse of a household member." Employer Ex. D. Because of the misdemeanor conviction, Cordes did not think that the grievances had merit, but filed the grievances for GONSALES, "[to protect his rights to grieve under [the] contract and in the event that his appeal was successful." Transcript "Tr." of hearing held on April 23, 2003 (Vol. IV), p. 596.
12. Cordes decided to hold the grievances in abeyance rather than proceed to schedule step meetings (Step 2 for the termination, Step 1 for the suspension) as provided in the contractual grievance procedure, while GONSALES appealed the misdemeanor conviction. On or about April 1, 1999, when GONSALES' termination took effect, he spoke with Cordes, and told him he would exhaust every avenue to get reinstated. Tr. of hearing held on April 9, 2003 (Vol. II), p. 39. Cordes asked GONSALES to let him know about the outcome of the appeal to the Intermediate Court of Appeals. GONSALES testified he had no further contact with Cordes, or the Union until after May 16, 2002. Tr. Vol. II, p. 41.
13. GONSALES appealed the October 9, 1998 misdemeanor conviction to the Intermediate Court of Appeals (ICA), without success. On November 16, 1999, GONSALES applied for a writ of certiorari to the Hawaii Supreme Court, which the Court denied on November 29, 1999. SHOPO Ex. 3. About nine months later, GONSALES decided to seek a governor's pardon. At no time, did GONSALES contact Cordes to let him know that he was unable to get his conviction overturned on appeal, and that he was petitioning for a governor's pardon. Tr. Vol. II, p. 91.

force. Moreover, more than a dozen police officers State-wide were kept on the force and placed in positions awaiting their fate from the Governor's Office, and I think we're talking about approximately the past two years. . . ." SHOPO Ex. 19.

14. GONSALES' residence address at 1567 Ohu Street, Apartment D, and telephone number have remained the same since before his termination to the present.
15. In early November 2000, approximately a year after the Supreme Court denied GONSALES' application for review, Cordes spoke by telephone with GONSALES because he needed to verify what he had heard from someone at HPD, i.e., that his appeals to the ICA and the Supreme Court had failed. Although Cordes was unable to recall the date he called GONSALES, or who made the phone call, the Board credits Cordes' testimony that he specifically "recalls talking on the phone with GONSALES."⁵
16. When GONSALES verified to Cordes that the appeals had failed, he also told Cordes that he was seeking a pardon from the governor. Whereupon, Cordes explained that he was withdrawing the grievances and that the "matter of the pardon would not be considered in a withdrawal of the grievance because the responsibilities that [Cordes] had and the Union had in terms of maintaining this case was met in its entirety." Once GONSALES' efforts to overturn the conviction through the courts had failed, Cordes felt the grievances had no merit under the Contract because HPD's application of the Lautenberg Amendment disqualified GONSALES from service.
17. By letter dated November 17, 2000, Cordes wrote to Sandra H. McFarlane, (McFarlane) Director, Department of Human Resources, City and County of Honolulu, to officially notify the Employer that the Union was withdrawing "without prejudice" the termination and suspension grievances and removing it

⁵See, Tr. dated April 14, 2003 (Vol. III), p. 517; Tr. Vol. IV, pp. 630-32. Cordes clearly remembers having this phone conversation, as shown through questioning by the Board Chair.

Q. You testified last week that you don't remember who called who, but you specifically recall talking on the phone with Mr. Gonsales?

A. That's correct.

Q. How come you specifically recall talking on the phone with Mr. Gonsales?

A. Because, Mr. Chairman, I would not rescind a grievance which is as serious as a termination without getting verification from the Grievant himself that, in fact, his appeal to have his conviction overturned had failed. I needed verification.

Q. Did you have the authority to withdraw the grievance without the consent of the Grievant?

A. Yes, I do.

Tr. Vol. IV, p. 621.

from the active files.⁶ SHOPO Ex. 8. The letter was signed by Cordes and a copy was mailed to GONSALES by Cordes' secretary Nicole Lee Cagaoan, whose initials "NLC" appear at the bottom of the letter next to Cordes' initials "WC." SHOPO Ex. 8. Ms. Cagaoan, who testified before the Board under her married name Nicole Riley, served as the secretary to all **SHOPO** business agents until she resigned August 31, 2002. As such, it was her job to final type the withdrawal letter for Cordes' signature, mail a copy to GONSALES, as well as provide copies to: Robert Thomas, SHOPO Business Manager and Cordes' supervisor, Pat Ah Loo (Ah Loo), HPD Labor Relations Specialist, and Norman Kato, SHOPO's General Counsel. The Board credits the testimony of Riley, that as indicated at the bottom of the letter, she mailed a copy of Cordes' November 17, 2000 letter to GONSALES at his residence address on file with SHOPO.

18. Ah Loo received a copy of the letter withdrawing the grievances (Tr. Vol. IV, p. 685), and consequently, purged the grievance files for the termination and suspension. Prior to receiving a copy of the withdrawal letter, Ah Loo was called by Cordes informing him that GONSALES' appeal to the Hawaii State Supreme Court was denied "[a]nd so he was going to withdraw the grievances." Tr. Vol. IV, p. 697.
19. On May 13, 2002, GONSALES was pardoned for the October 9, 1998 misdemeanor conviction "for all purposes, including the authority to apply for, receive, possess, or transport in commerce, a firearm," by Governor Benjamin J. Cayetano. Complainant Ex. A.
20. On May 17, 2002, after receiving a copy of the pardon, GONSALES called the Union and spoke with SHOPO business manager and Cordes'⁷ supervisor, Robert Thomas (Thomas), and "asked for his help to become reinstated as a police officer." GONSALES testified that he did not know his grievances had been withdrawn by Cordes when he called the Union. Nevertheless, the matter

⁶Cordes' letter to McFarlane, states in part:

This letter is to inform you that SHOPO will not be pursuing the above grievance further. Grievant is no longer with the Honolulu Police Department.

Please be advised that we are withdrawing the grievance without prejudice and will remove it from our active files.

SHOPO Ex. 8.

⁷Cordes retired on or about January 15, 2002. Tr. Vol. IV, p. 652.

of his termination grievance was not raised by GONSALES, nor specifically discussed with Thomas. As advised by Thomas, GONSALES called HPD Human Resources Division and spoke with a Lieutenant Karolyn Onaga "to seek guidance and assistance in restoring [his] employment with HPD." SHOPO Ex 1.

21. On or about June 17, 2002, GONSALES had a discouraging phone conversation with Lt. Onaga, who told him that despite the pardon he was not eligible for either reinstatement or reemployment. GONSALES then called SHOPO President Tenari Maafala (Maafala) on his cell phone to ask for his help in "reopening his case." Tr. Vol. III, p. 457.
22. On June 20, 2002, GONSALES, and his father, Richard G. Gonsales, met with SHOPO President Maafala to ask for help in getting reinstated as a police officer and "begged for assistance in finding out why HPD did not want to reinstate [him]." SHOPO Ex. 1. According to Maafala, he and GONSALES, "talked a little bit about his case, the fact that he was terminated and that he had filed a grievance with the Union and that he was there if I could help him reopen his case." Tr. Vol. III, pp. 460-61.
23. On August 7, 2002, SHOPO's attorney, Michael Wong (Wong) sent a letter to the Employer's Director of Human Resources Cheryl Okuma-Sepe (Okuma-Sepe) asking to reinstate GONSALES' grievances that had been withdrawn by Cordes on November 17, 2000. Wong also called GONSALES to inform him that he would be representing him, and that he had made a request to the City to reinstate the grievances.
24. By letter dated August 23, 2002, Okuma-Sepe denied SHOPO's request to reinstate the grievances filed for GONSALES, because "there was no agreement by the Employer to extend the time limits and the time periods to pursue the grievance have been exceeded. Therefore [there was] no basis to entertain the Union's request to reinstate the three grievances."⁸ SHOPO Ex. 20. GONSALES received a phone call from Wong informing him that Respondent Employer had denied the request to reinstate the grievances.
25. On October 31, 2002, GONSALES filed this prohibited practice complaint against the Respondent Union alleging, *inter alia*, that "Wilhelm Cordes withdrew my grievances without prejudice back in November 17, 2000 without

⁸As Director of Human Resources, Okuma-Sepe, advised that "due to Mr. Gonsales being pardoned by the Governor, it appears that he is eligible to reapply for employment with the Honolulu Police Department in the future." SHOPO Ex. 20. This corrects any misinformation Gonsales was given by HPD Officer Lt. Onaga, who led Gonsales to believe that he could not even reapply as a police recruit.

my knowledge as I had not received any correspondence or contacts by Mr. Cordes stating his intentions to withdraw my grievances.” The Board finds that based on the preponderance of evidence, GONSALES knew or should have known in November of 2002 in a phone conversation with Cordes, and on or about November 17, 2000, that the Union was withdrawing his grievances.

26. On November 4, 2002, GONSALES filed this prohibited practice complaint against the Respondent Employer alleging that his termination and the refusal to reinstate the grievances, as alleged in the First Amended Complaint, violated the Contract.

DISCUSSION

The issues for the Board are as follows: 1) whether Complainant received adequate notice that Respondent Union was withdrawing the termination grievance, and if yes, whether the complaints are time-barred by the statute of limitations; and if not, 2) whether Respondent Union’s withdrawal of the termination grievance breached the duty of fair representation in violation of HRS §§ 89-8(a) and 89-13(b)(4); and whether the Respondent Employer’s refusal to reinstate the termination grievance violated the collective bargaining agreement in violation of HRS § 89-13(a)(8).

The threshold issue is whether the Board has jurisdiction over the complaints or whether the complaints are barred by the applicable statute of limitations.

Hawaii Administrative Rules (HAR) § 12-42-42(a) identifies the limitations period applicable to the filing of prohibited practices complaints under HRS § 89-13.⁹ It 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... 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). 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

⁹The limitations period is also prescribed by statute. HRS § 89-14 requires controversies “concerning prohibited practices ... be submitted ... in the same manner and with the same effect as provided in section 377-9; ...” HRS § 377-9(1), in turn, provides that, “No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.”

rights were violated.” Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978).

Complainant contends that he first learned SHOPO had withdrawn his grievances on August 7, 2002, in a phone call from SHOPO’s attorney. In a prior written statement to the Board, dated October 31, 2002, Complainant states that “Wilhelm Cordes withdrew my grievances without prejudice back in November 17, 2000 without my knowledge as I had not received any correspondence or contacts by Mr. Cordes stating his intentions to withdraw my grievances.” SHOPO Ex. 15.

Respondents contend that GONSALES knew or should have known that the Union had withdrawn his grievances when the Union sent a notice of withdrawal, dated November 17, 2000, to the Employer with a copy to GONSALES. Therefore, Respondents argue the prohibited practice complaint filed against the Union on October 31, 2002 and against the Employer on November 4, 2002, are time-barred.

The Board credits the testimony of Union agent Cordes that he spoke with GONSALES by phone in November of 2000 to verify that his efforts to overturn the misdemeanor conviction were unsuccessful. In the same phone conversation, Cordes explained to GONSALES that he would be withdrawing the grievances. To follow up, Cordes sent a letter dated November 17, 2000 to the Employer officially withdrawing the termination and suspension grievances. Based on the notations at the bottom of the letter and supporting testimony from Cordes’ secretary, the Board can reasonably infer that a copy of the letter was mailed to GONSALES at his residence address.

The Board also credits the testimony of SHOPO President Maafala that GONSALES asked for his help to reopen his case when he called Maafala to meet in June of 2002, and at the meeting with Maafala on June 20, 2002. This shows GONSALES knew his grievances had been closed or withdrawn by Cordes, which is contrary to GONSALES’ claim that he first learned of the withdrawal from SHOPO’s attorney in a phone call on August 7, 2002.

Because the Governor’s pardon cleared GONSALES of the misdemeanor conviction, his ultimate goal was to be reinstated to his former position. But to be reinstated,¹⁰ GONSALES was required to exhaust his contractual remedies by moving forward on his termination grievance.¹¹ Accordingly, GONSALES’ breach of duty of fair representation claim

¹⁰The alternative to reinstatement is for GONSALES to reapply for a police officer recruit position, given the Governor’s pardon, which now enables him to carry a firearm and ammunition.

¹¹Essentially, GONSALES sought to have this Board adjudicate the substance of his termination grievance and provide reinstatement. In Hokama v. University of Hawaii, 92 Hawai’i 268, 990 P.2d 1150 (1999), the Hawaii Supreme Court held that the contractual grievance procedure was the exclusive forum for any claims arising from the collective bargaining agreement. As a result, GONSALES’

against the Union became actionable when he knew or should have known his grievances had been withdrawn. Similarly, the complaint against the Employer alleging a Contract violation over the termination became actionable at the same time, because the withdrawal of grievances foreclosed any further access to the grievance process.

The preponderance of evidence rebuts GONSALES' claim that he first learned SHOPO had withdrawn his grievances on August 7, 2002, and supports a finding that GONSALES, knew or should have known in November of 2000 in a phone conversation with Cordes, followed by Cordes' November 17, 2000 letter to the Employer that the Union was withdrawing GONSALES' grievances. Therefore, the Board concludes the complaint against the Union is barred by the applicable statute of limitations and must be dismissed for lack of jurisdiction. Further, the complaint against the Employer alleging a Contract violation based on GONSALES' termination, and Employer's August 23, 2002 refusal to reinstate the grievances is also time-barred and must be dismissed.

Accordingly, the Board lacks jurisdiction to determine whether the Union's withdrawal of the grievances is arbitrary, discriminatory or in bad faith, and in breach of the duty of fair representation embodied in HRS § 89-8(a). Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 17 L.Ed. 842 (1967).¹² In a hybrid case such as this, where the Complainant raises a breach of duty of fair representation claim against the Union and a contract violation claim against the Employer, the claims against the Employer and Union are "inextricably interdependent."¹³ In order to prevail against the Employer, Complainant would need to show

exclusive forum for attempting to remedy his termination grievance would be the grievance procedure contained in the Contract.

¹²And where a union's judgment is in question, complainant "may prevail only if the union's conduct was discriminatory or in bad faith." Moore v. Bechtel Power Corp., 840 F.2d 634, 636, 127 LRRM 3023 (9th Cir. 1988). A Union does not breach a duty of fair representation when it exercises its judgment in good faith not to pursue a grievance further, Stevens v. Moore Business Forms, Inc., 18 F.3d 1443, 1447, 145 LRRM 2668 (9th Cir. 1994) (Stevens), or by acting negligently, Patterson v. International Broth. of Teamsters, Local 959, 121 F.3d 1345, 1349, 156 LRRM 2008 (9th Cir. 1997). As explained in Stevens:

... A union's decision to pursue a grievance based on its merits or lack thereof is considered an exercise of its judgment. (Citations omitted.) "We have never held that a union has acted in an arbitrary manner where the challenged conduct involved the union's judgment as to how best to handle a grievance. To the contrary, we have held consistently that unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances." (Citations omitted). 18 F.3d at 1447.

¹³See DelCostello v. International Broth. of Teamsters, 462 U.S. 151, 164, 76 L.Ed.2d 476, 103 S.Ct. 2281 (1983) (DelCostello); United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 66-67,

not only that the termination violated the Contract, but also prove a breach of duty of fair representation. United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 66-67, 67 L.Ed.2d 732, 101 S.Ct. 1559, Stewart, J., concurring in judgment (1981). Consequently, the Board cannot reach Complainant's allegations of contract violations by the Employer for terminating Complainant and refusing to reinstate his grievance.¹⁴

CONCLUSION OF LAW

The preponderance of evidence supports a finding that Complainant knew or should have known, on or about November 17, 2000, that the Union had withdrawn his termination and suspension grievances pending with the Employer. We conclude the prohibited practice complaints filed on October 31, 2002 against the Union and filed on the November 4, 2002 against the Employer are time-barred under HRS § 377-9(1) and HAR § 12-42-42(a).

ORDER

Based on the foregoing, the Respondents' motions to dismiss the instant complaints for lack of jurisdiction are hereby granted, and the complaints are dismissed with prejudice.

67 L.Ed.2d 732, 101 S.Ct. 1559 (1981); Scott v. United Auto., 242 F.3d 837, 839 (8th Cir. 2001). In DeICostello, supra, the Court stated:

Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suite against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. (Footnote omitted.) "Yet the two claims are inextricably interdependent. 'To prevail against either the company or the Union, . . . [the employee] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union.'" (Citation omitted.) Id., at 165.

¹⁴A motion to dismiss is appropriate when complainant can prove no set of facts to support a claim for relief. Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

RICHARD GARCIA GONSALES II v. STATE OF HAWAII ORGANIZATION OF POLICE
OFFICERS

CASE NO. CU-12-210

RICHARD GARCIA GONSALES II v. JEREMY HARRIS, Mayor, City and County of Honolulu,
et al.

CASE NO. CE-12-520

ORDER NO. 2220

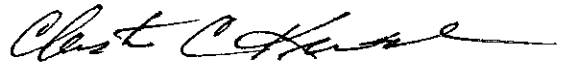
AMENDED ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS COMPLAINTS

DATED: Honolulu, Hawaii, October 1, 2003.

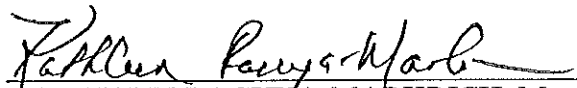
HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



CHESTER C. KUNITAKE, Member



KATHLEEN RACUYA-MARKRICH, Member

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