STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DAVID RITA, Complainant, and PETER T. YOUNG, Chairperson, Board of Department of Land and Natural Resources, State of Hawaii; DAN QUEEN, Administrator of State Parks, Department of Land and Natural Resources, State of Hawaii; PETER L. TRASK, Administrator, United Public Workers, AFSCME, Local 646, AFL-CIO; and LAURIE SANTIAGO, United Public Workers, AFSCME, Local 646, AFL-CIO, Respondents.	CASE NOS.: CE-01-535 CU-01-221 ORDER NO. 2221 ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS AND/OR FOR SUMMARY JUDGMENT

ORDER GRANTING RESPONDENTS' MOTIONS
TO DISMISS AND/OR FOR SUMMARY JUDGMENT

On June 12, 2003, Complainant DAVID RITA (RITA), proceeding pro se, filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board). RITA alleges that Respondents PETER L. TRASK (TRASK), Administrator, United Public Workers, AFSCME, Local 646, AFL-CIO (UPW) and LAURIE SANTIAGO (SANTIAGO), UPW (hereafter collectively Union) breached their duty of fair representation regarding a grievance filed on his behalf. RITA also alleged that Respondents PETER T. YOUNG (YOUNG), Chairperson, Department of Land and Natural Resources (DLNR), State of Hawaii and DAN QUEEN (QUEEN), Administrator of State Parks, DLNR, State of Hawaii (hereafter collectively Employer) failed to maintain accurate seniority lists for temporary assignments and violated the overtime provisions of the Unit 01 collective bargaining agreement, thereby violating the provisions of Hawaii Revised Statutes (HRS) Chapter 89.

On June 19, 2003, the Union Respondents filed Union Respondents' Motion to Dismiss And/or for Summary Judgment with the Board. The UPW contends that the instant complaint should be dismissed because of: (1) lack of jurisdiction, (2) failure to state a claim for relief, and (3) lack of a justiciable controversy.

On July 7, 2003, the Employer filed Employer's Motion to Dismiss Prohibited Practice Complaint or in the Alternative for Summary Judgment. The Employer contends that

Complainant fails to state a claim upon which relief can be granted; the Complaint is untimely; and Complainant is bound by the grievance procedure in his collective bargaining agreement which he has failed to exhaust, and accordingly is barred from bringing this action before the Board.

On July 31, 2003, the Board held a hearing on the motions. The parties were afforded full opportunity to make arguments before the Board. After a thorough review of the record in this case the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. Complainant RITA is a Tractor Operator at Fort Ruger and an employee included in Unit 01, blue collar nonsupervisory employees, as defined under HRS § 89-2.

2. TRASK and SANTIAGO are agents of the UPW which is an employee organization and the exclusive representative, as defined in HRS § 89-2, of employees of Unit 01.

3. With respect to RITA, YOUNG and QUEEN are representatives of the public employer, as defined in HRS § 89-2.

4. The Employer and the UPW are parties to a Unit 01 contract covering blue collar nonsupervisory employees, in effect from July 1, 1999 to June 30, 2003 (Contract), that provides for overtime, temporary assignments, and includes a grievance procedure which culminates in final and binding arbitration.

5. On January 8, 2003 the UPW filed two class action grievances against the DLNR for failing to assign overtime in a fair and equitable manner, and for failing to maintain a proper seniority list from which temporary assignments could be made in accordance with baseyard seniority. RITA was one of the employees for whom the class action grievances were filed.

6. Also, on January 8, 2003, the UPW requested information from the Employer as part of its investigation of the grievances under Section 15.09 of the Contract.

7. On February 6, 2003, the Employer requested an extension of time to convene the Step 1 meeting on the grievance which was held on February 25, 2003.

8. RITA disagreed with statements allegedly made by SANTIAGO at the February 25, 2003 meeting.

9. The Employer provided partial responses to the UPW's information request on March 14 and 15, 2003.

10. By letter dated May 27, 2003 attached to the instant complaint, Venetia K. Carpenter-Asui, Esq. (Carpenter-Asui) wrote to YOUNG and TRASK regarding her representation of Complainant. Carpenter-Asui states:

> The UPW breached its duty of fair representation to Mr. Rita when it: (1) failed to pursue Mr. Rita's meritorious grievance to step three (3); (2) UPW Santiago stated to Mr. Rita, "if you don't like it you should find another job;" (3) UPW Santiago stated to Mr. Rita, "I don't serve the members, I serve the contract;" (4) UPW Santiago stated to Mr. Rita, "sometime things are unfair in life and you just have to learn to deal with it;" (5) UPW Santiago stated to Mr. Rita, "sometimes some things are not fair, and you just have to live with it;" (6) UPW Santiago stated to Mr. Rita, "I interpret the contract, until you are in my position, I can do what I want;" (7) UPW Santiago stated to Mr. Rita, "be quiet, management can do what they want including moving baseyard to baseyard; (8) UPW Santiago stated to UPW B.A. Sharene Moriwaki "I'm going to take control of this meeting because this room is cold and I have other things to do;" (9) UPW Santiago stated to Mr. Rita, "things might sound unfair but that's just too bad;" and others.

11. The Employer has not issued any decision on the grievances and both remain pending.

12. Once the Employer's decision is rendered, the UPW has 30 days from receipt of the decision to pursue arbitration.

13. RITA filed the prohibited practice complaint on his belief that both grievance cases had been settled on terms which he disagreed with and withdrawn.

DISCUSSION

Complainant contends that the Employer violated provisions of the contract by failing to maintain accurate seniority lists for temporary assignments and by assigning overtime unfairly. RITA further claims that the Union breached its duty of fair representation by withdrawing or otherwise unsatisfactorily resolving the grievances based on SANTIAGO's statements at a meeting held on February 25, 2003.

The Union and Employer contend that the instant complaints are untimely because they stem from SANTIAGO's statements allegedly made at a February 25, 2003 meeting. See Finding of Fact # 10. As the instant complaints were filed on June 12, 2003, Respondents contend that the complaints were filed more than 90 days after the date of the alleged Union violations and are therefore time-barred.

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.[1] The rule 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 rights were violated." Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978).

Based on the undisputed facts in the record, the Board finds that SANTIAGO's statements were made at a meeting held on February 25, 2003, more than 90 days prior to the filing of the instant charges. Accordingly, the Board concludes that it lacks jurisdiction to determine whether SANTIAGO's statements constitute a breach of the duty of fair representation and therefore dismisses those allegations.

As to Complainant's remaining allegation against the Union that its withdrawal of the grievances constitutes a breach of duty of fair representation, the Board finds based on the preponderance of evidence that the grievances have not been withdrawn and are still pending before the Employer. Respondent Union contends that even assuming the allegations in the instant complaint are true, Complainant fails to properly state a breach of duty of fair representation claim upon which relief can be granted, and, therefore dismissal is required. See, Hawaii Rules of Civil Procedure (HRCP) Rule 12(b)(6).

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[1]The 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(l), in turn, provides that, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence."

The duty of fair representation embodied in HRS § 89-8(a) is twofold. First, the exclusive representative is mandated "to act for and negotiate agreements covering all employees in the unit." Second, the exclusive representative must "be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership."

The burden of proof is on the complainant-employee to show by a preponderance of evidence that: 1) the decision not to proceed to arbitration was arbitrary, discriminatory or in bad faith. Sheldon S. Varney, 5 HLRB 508 (1995). See also, Vaca v. Sipes, 386 U.S. 171, 190-191, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). "[A] union's conduct is 'arbitrary' if it is 'without rational basis,' . . . or is egregious, unfair and unrelated to legitimate union interests.'" Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir. 1985). Simple negligence or mere errors in judgment will not suffice to make out a claim for a breach of the duty of fair representation. Farmer v. ARA Services., Inc., 660 F.2d 1096, 108 LRRM 2145 (6th Cir. 1981); Whitten v. Anchor Motor Freight, Inc., 521 F.2d 1335, 1341, 90 LRRM 2161 (6th Cir. 1975).

"The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff if entitled to legal relief even if everything alleged in the complaint is true." Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993). Such a dismissal is generally disfavored but warranted "if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts entitling a plaintiff to relief." Bertelmann v. Taas Associates, 69 Haw. 95, 99, 735 P.2d 930 (1987). While the allegations in the complaint are deemed true, the court is not required to accept conclusory allegations on the legal effect of the events alleged. Marsland v. Pang, 5 Haw.App. 463, 474, 701 P.2d 175 (1985).

The Board's consideration of matters outside the pleadings requires the motion to be treated as one for summary judgment. See, HRCP Rule 12(b)(6); Hall v. State, 7 Haw.App. 274, 756 P.2d 1048 (1988) (When matters outside the pleadings are considered order of dismissal reviewed as one granting summary judgment.) Accordingly, the controlling inquiry is whether there is no genuine issue of material fact and the case can be decided solely as a matter of law. Kajiya v. Dept. of Water Supply, 2 Haw.App. 221, 629 P.2d 635 (1981).

Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact in dispute and, therefore it is entitled to judgment as a matter of law. State of Hawaii Organization of Police Officers (SHOPO) v. Society of Professional Journalists - University of Hawaii Chapter, 83 Hawaii 387, 389, 927 P.2d 386 (1996). A fact is material if proof of that fact would have the effect of establishing or refuting the essential elements of a cause of action or defense asserted by the parties. Konno v. County of Hawaii, 85 Hawaii 61, 937 P.2d 397 (1997).

Under subsection (c) of Rule 56, HRCP, once the movant satisfies the initial burden of showing the absence of a genuine issue of material fact, the burden then shifts to the opponent to come forward with specific facts showing that there remains a genuine issue for trial. Arimizu v. Financial Sec. Ins. Co., 5 Haw.App. 106, 679 P.2d 627 (1984).

In reviewing the record, however, Complainant does not set forth by way of answering affidavits[2] any "specific facts showing that there is a genuine issue for trial." Rule 56(e), HRCP.[3] A party opposing a motion for summary judgment has an obligation to file a response by affidavits or otherwise, setting forth the specific facts showing that there is a genuine issue for trial. Brodie v. Hawaii Automotive Retail Gasoline Dealers Ass'n., Inc., 2 Haw.App. 316, 631 P.2d 600 (1981), rev'd on other grounds, 65 Haw. 598, 655 P.2d 863 (1982). Facts alleged by unverified statements in a memorandum in opposition to a motion for summary judgment are not properly before the court on the motion. Freitas v. City and County of Honolulu, 58 Haw. 587, 574 P.2d 529 (1978). Unverified statements of fact in counsel's memorandum or representations made in oral argument cannot be considered in determining a motion for summary judgment. Au v. Au, 63 Haw. 210, 626 P.2d 173 (1981), motion for partial reconsideration denied, 63 Haw. 263, 626 P.2d 173 (1981).

Hence, absent specific facts to support Complainant's allegations that the grievances were withdrawn by the UPW to rebut SANTIAGO's statements that the grievances are still pending with the Employer, the Board concludes there are no genuine issues of material fact in dispute as to the status of the grievances. The Board further agrees with the UPW that RITA's complaint is premature and does not present a justiciable controversy because the events which he complains of have not occurred. Accordingly, the Board dismisses the remaining allegations of the instant complaint against the UPW.

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."[4] In order to

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[2]Under the Board's rules of practice and procedure, answering affidavits, if any, shall be served on all parties, in accordance with Hawaii Administrative Rules § 12-42-8(g)(3)(C)(iii).

[3]Rule 56(e), HRCP, provides, in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

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

prevail against the Employer, Complainant needs to show not only that the Employer violated the collective bargaining agreement, but also prove a breach of duty of fair representation. As the Board dismissed RITA's breach of duty of fair representation claims, supra, RITA is barred from pursuing his contract claims against the Employer. In this respect, Complainant further failed to exhaust his contractual remedies because the record reflects that the UPW's grievances are still pending with the Employer. Thus, the Board concludes that Complainant can prove no set of facts which would entitle him to relief and his complaint against the Employer is dismissed for failure to state a claim for relief.

CONCLUSIONS OF LAW

1. The Board lacks jurisdiction over prohibited practice complaints filed more than 90 days after the occurrence of the alleged violations.

2. The Board lacks jurisdiction over the alleged prohibited practices against the UPW arising from statements made by SANTIAGO at a meeting more than 90 days prior to the filing of the instant complaint.

3. Summary judgment is appropriate where the moving party demonstrates there are no genuine issues of material fact in dispute and, therefore is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting the essential elements of a cause of action or defense asserted by the parties.

4. As a moving party, the UPW met its burden in showing that it is entitled to judgment as a matter of law because Complainant failed to show by way of answering affidavits any specific facts showing that there is a genuine issue for trial. Absent specific facts to support Complainant's claim that the subject grievances have been withdrawn, the Board finds no genuine issue of material fact in dispute.

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 suit 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.'" (Citations omitted.) Id., at 165.

5. Dismissal for failure to state a claim for relief is warranted if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts entitling the plaintiff to relief.

6. The Board concludes that Complainant failed to state a claim for relief because it appears beyond a reasonable doubt that the plaintiff can prove no set of facts entitling him to relief.

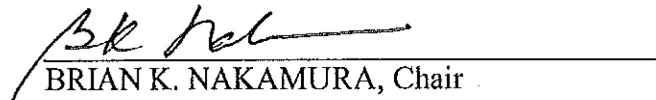
7. In order to prevail against the Employer, Complainant would need to show not only that the Employer violated the collective bargaining agreement, but also prove a breach of duty of fair representation. As the Board dismissed RITA's breach of duty of fair representation claims, RITA is barred from pursuing his contract claims against the Employer. In this respect, Complainant further failed to exhaust his contractual remedies because the record reflects that the UPW's grievances are still pending with the Employer.

ORDER

Based upon the foregoing, the Board hereby dismisses the instant complaint.

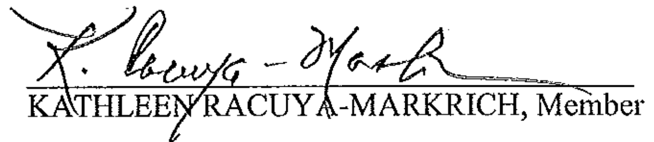
DATED: Honolulu, Hawaii, October 22, 2003.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member



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