

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of
BARRY CORREA,

Complainant,

and

CURTIS ZANE, Business Agent, Oahu
Division, United Public Workers, AFSCME,
Local 646, AFL-CIO; DAVID HAGINO, ESQ.;
and UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO,

Respondents.

CASE NO. CU-01-223

ORDER NO. 2248

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

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TO DISMISS AND/OR FOR SUMMARY JUDGMENT

On October 27, 2003, BARRY CORREA (CORREA), proceeding *pro se*, filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondents CURTIS ZANE (ZANE), Business Agent, Oahu Division, United Public Workers, AFSCME, Local 646, AFL-CIO; DAVID HAGINO, ESQ. (HAGINO) and the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union).

CORREA alleges that on or about November 16, 2001, the UPW filed a grievance contesting CORREA's 30-day suspension and on July 24, 2002, he was informed that the grievance would proceed to arbitration. CORREA alleges thereafter the grievance was settled without his knowledge and contends that Respondents thereby breached their duty of fair representation in violation of Hawaii Revised Statutes (HRS) § 89-13.

At the prehearing conference held on November 28, 2003, the Board set December 10, 2003 as the deadline for Respondent's dispositive motions, December 17, 2003 as the deadline for CORREA to file a responsive affidavit opposing any motions; and scheduled oral arguments for December 19, 2003. CORREA filed a prehearing statement on December 3, 2003.

On December 10, 2003, Respondent HAGINO moved for dismissal as a party to the complaint on the grounds that he is not a public employer, public employee or an employee organization, within the meaning of Hawaii Administrative Rules (HAR) § 12-42-42.

Also on December 10, 2003, Respondent UPW filed Respondent UPW's Motion to Dismiss or for Summary Judgment on the grounds that: (1) the Board lacks jurisdiction over claims barred by the applicable statute of limitations; and (2) the complaint fails to state a claim for relief against the Union under HRS § 89-13(b) for allegedly breaching its duty of fair representation.

CORREA did not file a Responsive Affidavit on or about December 17, 2003, but agreed to the taking of his deposition on December 5, 2003, pursuant to a subpoena duces tecum issued on November 28, 2003.

On December 19, 2003, the Board convened a hearing on Respondents HAGINO and UPW's motions. CORREA proceeded pro se. The UPW was represented by counsel.¹ HAGINO appeared and represented himself. The parties were allowed full opportunity to present argument to the Board. After a thorough review of the record in the case, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. CORREA is employed as a Cesspool Equipment Operator I by the Division of Collection System Maintenance, Department of Environmental Services, City and County of Honolulu (Employer) and is a public employee, as defined in HRS § 89-2, and included in bargaining unit (BU) 01.
2. The UPW is an employee organization and the exclusive representative, as defined in HRS § 89-2, of employees in BU 01. ZANE, at all times relevant, was a representative of UPW in his capacity as UPW's Business Agent.
3. HAGINO is an attorney engaged in the private practice of law, who was hired to represent the UPW in the arbitration of CORREA's grievance on or about July 24, 2002. HAGINO is neither an employee organization, or exclusive representative, nor a representative of UPW within the meaning of HRS § 89-2.
4. On November 16, 2001, UPW Business Agent ZANE filed a Step 1 grievance on behalf of CORREA for a 30-day suspension for "falsifying work records and wilful neglect in performing assigned duties on October 10, 2001" as a cesspool pumping equipment operator based on customer complaints that their cesspools

¹At the prehearing conference, UPW's counsel initially represented UPW Business Agent ZANE, as a named party subject to obtaining authority from ZANE, who was no longer a business agent employed by UPW. For the record, UPW's counsel was unable to obtain authority to represent ZANE, who apparently was not served with the complaint and consequently, neither appeared nor participated in any proceedings before the Board.

had not been serviced. Following the Employer's denial of CORREA's grievance both at Steps 1² and 2,³ and in accordance with the BU 01 Contract, the UPW informed CORREA of its intent to proceed to arbitration by letter dated July 24, 2002.

5. On October 14, 2002 before Arbitrator Kerry Komatsubara, the Employer and UPW, represented by their respective counsel, stipulated to resolve the grievance by reducing CORREA's 30-day suspension to 20 days.
6. On October 17, 2002 ZANE called CORREA to inform him that the Employer made an offer to settle the grievance. CORREA "was not happy but wanted to put it all behind [him]. So [he] agreed to the offer."⁴
7. On or about October 22, 2002, CORREA had a "change of heart" about the settlement and wanted to fight his suspension before an arbitrator. He left a phone message for ZANE to withdraw the verbal agreement, so that he can have a chance at arbitration.
8. On October 24, 2002, CORREA and ZANE discussed withdrawing his verbal agreement to settle, and proceeding to arbitration. According to CORREA, ZANE responded by saying "no way. A verbal agreement is a verbal agreement."⁵ CORREA was also told that the "paper work is in motion." ZANE continued to argue about the merits of his grievance. CORREA questioned ZANE as to why he was now doubting him, and told him, "You know what? I feel like you failing to represent me. I feel like turning you in. Last year you were with me. Now you're not with me." According to CORREA, ZANE ended the phone conversation by saying, "You know what/ I'm not gonna go back and forth, argue. You know what? I'll put your case back into arbitration. I'll call you."⁶ CORREA felt that ZANE "carried an attitude" with him, but indicated that he would submit a letter about his withdrawal. Tr. at Ex. H.

²The record includes the Employer's Step 1 denial of CORREA's suspension grievance dated December 7, 2001.

³The record includes the Employer's Step 2 denial of CORREA's grievance dated December 31, 2001.

⁴See Exhibit ("Ex.") M attached to UPW's Motion to Dismiss.

⁵Deposition Transcript of Barry Correa, dated December 5, 2003 (Tr.), p. 24.

⁶Id., p. 25.

9. In a memorandum dated October 24, 2002, ZANE wrote to Gary Rodrigues, who at all times relevant, was the UPW Executive Director, informing him of his conversation with CORREA as follows:

On 10-24-02 I received another call from Barry Correa, the Grieving Party in the above mentioned case. He claims that he has had a change of heart and wants the Union to pursue his case. I explained to him that when he made the verbal agreement to accept the reduced suspension via Settlement Agreement the Arbitration was cancelled at that point. He still voiced that he wanted to pursue the case. Please advise. Thank you for your attention regarding this matter.⁷

10. On October 24, 2002, CORREA called the Board seeking advice about whether he could withdraw a verbal agreement to settle his grievance and instead have the Union proceed to arbitration. Following the advice he received, CORREA wrote a "To Whom it May Concern Letter" dated October 24, 2002 requesting that his verbal agreement to settle his grievance with the employer be withdrawn. Tr. at Ex. I. CORREA did not send this letter either to the Union or Employer because he believed that ZANE was going to submit his grievance to arbitration.⁸ Nevertheless, CORREA admits knowing that ZANE could not promise to proceed to arbitration. Tr. at p. 36. Thereafter, CORREA called ZANE once a month and left messages, but ZANE did not call him back.
11. On December 26, 2002, Arbitrator Komatsubara issued a final Arbitration Decision and Award resolving CORREA's suspension grievance.
12. After learning that he had ten days of back pay pending since his case settled, CORREA sought the assistance of his new business agent, whom he claims was not helpful, and on his own was able to receive the back pay for the ten day reduction off his 30- day suspension.
13. On October 27, 2003, CORREA filed this prohibited practice complaint against the Respondents UPW, ZANE, and HAGINO alleging, inter alia, that the Union breached its duty of fair representation by not proceeding to arbitration but instead settling his 30-day suspension grievance.

⁷Exhibit J, Respondent United Public Workers' Motion to Dismiss Prohibited Practice Complaint.

⁸Tr. p. 30.

DISCUSSION

The gravamen of the instant complaint is that the UPW allegedly breached its duty of fair representation⁹ to CORREA by not proceeding to arbitration, but instead settling his 30-day suspension grievance. CORREA contends that after his talk with ZANE on October 24, 2002, he believed that his case was proceeding to arbitration until he finally contacted HAGINO around September or October of 2003 in an attempt to locate his file. CORREA contends he did not learn that the arbitration had been resolved until he started making phone calls to the Union and subsequently learned that ZANE no longer was employed as a business agent. Subsequently, after learning that he had ten days of back pay pending since his case settled, he sought the assistance of his new business agent, whom he claims was not helpful, and on his own was able to receive the back pay for the ten day reduction off his 30-day suspension.

The Union moves to dismiss this complaint because it is time-barred by the applicable statute of limitations and fails to state a claim for which relief can be granted. The Union contends CORREA knew or should have known on October 24, 2002 that the Union would not proceed to arbitration after he had agreed to settle the grievance. Alternatively, the Union contends there are no genuine issues of material fact in dispute that the settlement of CORREA's 30-day suspension, was not 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) (Vaca).

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 Hawai'i Organization of Police Officers (SHOPO) v. Society of Professional Journalists - University of Hawai'i Chapter, 83 Hawai'i 387, 389, 927 P.2d 386 (1996) (SHOPO). 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 Hawai'i, 85 Hawai'i 61, 937 P.2d 397 (1997) (Konno). In addition, [t]he evidence must be viewed in the light most favorable to the non-moving party." State ex rel. Bronson v. Yoshina, 84 Hawai'i 179, 186, 932 P.2d 316 (1997). The court must view all the evidence and inferences drawn therefrom in the light most favorable to the party opposing the motion. State Farm Mut. Auto Ins. Co. v. Murata, 88 Hawai'i 284, 287-88, 965 P.2d 1284 (1998). 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. 211, 629 P.2d 635 (1981).

⁹The 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."

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 § 89-13.¹⁰ 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 rights were violated.” Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978).

Accordingly, the threshold issue for the Board is whether there is a genuine issue of material fact in dispute regarding when CORREA knew or should have known that the Union was in breach of its duty of fair representation to him over the handling of his suspension grievance and the decision to settle his case, rather than proceeding to arbitration.

On October 17, 2002, however unhappy or reluctant CORREA was, he agreed to a ten-day reduction of his 30-day suspension to settle his grievance before Arbitrator Komatsubara. A few days later, on or about October 22, 2002, CORREA had a “change of heart” about the settlement and wanted to contest his suspension before an arbitrator. One week after agreeing to settle his grievance, he called UPW business agent ZANE. On October 24, 2002, CORREA and ZANE argued over the merits of his grievance. CORREA accused ZANE of “failing to represent” him. In response to CORREA telling ZANE he wanted to withdraw his agreement to settle the grievance, ZANE first told him “no way, a verbal agreement is a verbal agreement.” However, by the end of the conversation, according to CORREA, ZANE told him he would submit a letter about his withdrawal.

CORREA then contacted this Board seeking advice about whether he could withdraw a verbal agreement to settle his grievance and instead have the Union proceed to arbitration. Following the advice he received, CORREA wrote a “To Whom it May Concern Letter” dated October 24, 2002 requesting that his verbal agreement to settle his grievance

¹⁰The 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.”

with the employer be withdrawn. Tr. at Ex. I. CORREA did not send this letter to either the Union or Employer because he believed that ZANE was going to submit his grievance to arbitration. The Board is not persuaded by this explanation, since in his deposition testimony CORREA admits knowing that ZANE could not promise to proceed to arbitration. Tr. p. 36. And, ZANE's memorandum of his phone conversation with CORREA, confirms that he "explained to him that when he made the verbal agreement to accept the reduced suspension via Settlement Agreement the Arbitration was cancelled at that point."

Viewing the record in the light most favorable to CORREA as the non-moving party, the Board concludes that on October 24, 2002, CORREA knew or should have known that the Union's conduct gave rise to an alleged breach of the duty of fair representation. Therefore, the instant complaint is barred by the applicable statute of limitations. Accordingly, the Board lacks jurisdiction to determine whether the Union's handling of CORREA's grievance as resolved in a final Arbitration Decision and Award on December 26, 2002, is arbitrary, discriminatory or in bad faith and in breach of the duty of fair representation embodied in HRS § 89-8(a). Vaca, supra.

Failure to State of Claim

Lastly, HAGINO moves for dismissal on the grounds that he is neither an employee organization, or exclusive representative, nor a representative of UPW within the meaning of HRS § 89-2. Accordingly, HAGINO argues that he should be dismissed in the instant complaint for failure to state a claim.

"The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true." Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993). A dismissal is clearly warranted under Rule 12(b)(6) Hawaii Rules of Civil Procedure, if the claim is clearly without merit due to "an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Rosa v. CWJ Contractors, Ltd., 4 Haw.App. 210, 215, 664 P.2d 745 (1983) (internal quotes and citation omitted).

HAGINO is an attorney engaged in the private practice of law, who was hired to represent the UPW in the arbitration of CORREA's grievance on or about July 24, 2002. On December 26, 2002, Arbitration Komatsubara issued a final Arbitration Decision and Award resolving CORREA's suspension grievance. After reviewing the record and viewing the facts in the light most favorable to CORREA, it appears beyond a reasonable doubt that he can prove no set of facts entitling him to relief against HAGINO. Therefore, the Board dismisses the complaint against HAGINO.

CONCLUSIONS OF LAW

1. Viewing the record in the light most favorable to CORREA as the non-moving party, the Board concludes that on October 24, 2002, CORREA knew or should have known that the Union's conduct gave rise to a breach of the duty of fair representation claim. Therefore, the Board concludes the instant complaint filed on October 27, 2003, is barred by the applicable 90-day statute of limitations period. Accordingly, the Board does not have jurisdiction over the instant complaint.

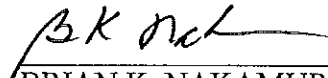
2. After reviewing the record and viewing the facts in the light most favorable to CORREA, the Board concludes that CORREA can prove no set of facts entitling him to relief against HAGINO.

ORDER

The Board hereby dismisses the instant complaint against the UNION and HAGINO.

DATED: Honolulu, Hawaii _____ May 3, 2004 _____.

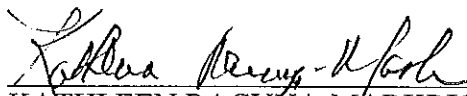
HAWAII LABOR RELATIONS BOARD



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