

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)
ERNEST W. VILLANUEVA,)
Complainant,)
and)
UNITED PUBLIC WORKERS, AFSCME,)
LOCAL 646, AFL-CIO,)
Respondent.)

CASE NO. CU-01-229
ORDER NO. 2251
ORDER GRANTING RESPONDENTS'
MOTION TO DISMISS

In the Matter of)
ERNEST W. VILLANUEVA,)
Complainant,)
and)
HONOLULU POLICE DEPARTMENT,)
City and County of Honolulu,)
Respondent.)

CASE NO. CE-01-556

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

Respondents HONOLULU POLICE DEPARTMENT, City and County of Honolulu (HPD or Employer) on March 29, 2004, and the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) (collectively Respondents) on March 25, 2004, moved to dismiss the prohibited practice complaints filed on March 18, 2004 by Complainant ERNEST W. VILLANUEVA (Complainant or VILLANUEVA), in the above-captioned consolidated cases with the Hawaii Labor Relations Board (Board), on the grounds the complaints are barred by the statute of limitations set forth in Hawaii Revised Statutes (HRS) § 377-9 and § 89-14.

In Case No. CE-01-556, VILLANUEVA alleges that HPD, *inter alia*, denied him due process and improperly terminated him for allegedly participating in a "food scandal." In Case No. CU-01-229, VILLANUEVA alleges that the UPW violated the bargaining agreement, refused to bargain in good faith and refused to participate in good faith in the mediation, fact-

finding and arbitration procedure in violation of HRS §§ 89-13(b)(2) and (3), and further alleges that the UPW failed to properly represent him in his termination grievance.

VILLANUEVA did not file a timely answering affidavit in accordance with Hawaii Administrative Rules (HAR) § 12-42-8(g)(3)(C)(iii), opposing Respondents' motions to dismiss.

At the prehearing conference held by the Board on April 15, 2004, the Board scheduled a hearing on Respondents' motions to dismiss on April 27, 2004.

On April 27, 2004, the Board convened a hearing on Respondents HPD and UPW's motions. VILLANUEVA proceeded pro se. The UPW and HPD were represented by counsel. The parties were allowed full opportunity to present arguments to the Board. After a thorough review of the complaint and record in the case, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. On September 26, 2002, VILLANUEVA received a ten-day notice of dismissal from his position as a cellblock food service worker effective on October 6, 2002, by his employer—the HPD, pursuant to Section 11.01a of the Bargaining Unit (BU) 01 collective bargaining agreement (Contract).¹
2. On October 16, 2002, the UPW filed a Step 1 grievance on behalf of VILLANUEVA over his disciplinary termination, which the HPD denied on November 12, 2002.²
3. On November 15, 2002, the UPW filed a Step 2 grievance on behalf of VILLANUEVA over his disciplinary termination, which was denied by Cheryl K. Okuma-Sepe, Director of Human Resources, City and County of Honolulu, on November 27, 2002. On November 29, 2003, VILLANEUVA received a copy of the City's Step 2 response denying the termination grievance.³

¹Prohibited Practice Complaints and Ex. 1, UPW's Motion to Dismiss.

²Id., and Ex. 2, UPW's Motion to Dismiss.

³Id.

4. On December 21, 2002, VILLANUEVA received a letter dated December 19, 2002, from Peter L. Trask (Trask), then UPW administrator notifying him that the UPW would not pursue the grievance over his termination.⁴
5. On January 8, 2003, VILLANUEVA received a second letter dated January 6, 2003 from Trask informing him that his Union would not pursue the grievance over his termination based on the belief that the UPW could not prevail on the merits of the case.⁵
6. On March 18, 2004, VILLANUEVA filed the instant prohibited practice complaints against the HPD over his termination on October 6, 2002 as a cellblock food service worker for allegedly participating in a "Food Scandal;" and against the UPW for its handling of his termination grievance and refusal to pursue the grievance beyond Step 2.

DISCUSSION

Respondent UPW contends that even assuming the allegations in the instant complaint are true, the Board lacks jurisdiction on the grounds that: (1) the complaint is untimely and (2) the complaint fails to state a claim for relief under HRS §§ 89-13(b)(2) and (3). Respondent HPD also contends that the Board lacks jurisdiction on the grounds that the instant complaint is barred by the applicable statute of limitations. The Board agrees.

Statute of Limitations

HAR § 12-42-42(a) provides the limitations period applicable to the filing of prohibited practices complaints under HRS § 89-13, 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 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.

⁴Id., and Ex. 3, UPW's Motion to Dismiss.

⁵Id.

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).

VILLANUEVA does not dispute the facts regarding notification by the UPW that it would not pursue his grievance; and receipt of notice of his Employer's denial of his termination grievance at Steps 1 and 2. Indeed, VILLANUEVA explains that the instant complaint was filed at this time because at the end of 2002 and beginning 2003, it was a very stressful period. During that time, he was coping with the loss of his job and the main source of income for his family; loss of his rental home, and the pending trial involving the HPD Food Scandal.

On March 18, 2004, VILLANUEVA filed the instant prohibited practice complaints against the HPD over his termination on October 6, 2002 as a cellblock food service worker for allegedly participating in a "Food Scandal;" and against the UPW for its handling of his termination grievance and refusal to pursue the grievance beyond Step 2. On November 29, 2002, VILLANUEVA received a copy of the City's Step 2 response denying the termination grievance. Thereafter, on January 8, 2003, VILLANUEVA received the second of two notices from the UPW informing him that it would not pursue his termination grievance because it believed the UPW could not prevail on the merits of his case.

Based on the record, the Board concludes that Complainant's claims, as alleged, in the instant complaint against his Employer and Union over his termination grievance, were triggered upon his receipt on January 8, 2003 of the UPW's second notice that it would not pursue his termination grievance beyond the Employer's Step 2 response. Consequently, VILLANUEVA's complaint is barred by the applicable statute of limitations.

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."⁶ In order to

⁶See *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:

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

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 VILLANUEVA failed to prevail on his breach of duty of fair representation claim against the Union, he is likewise barred from pursuing his contract claims against the Employer before the Board. 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 complaints filed more than 90 days after the cause of action accrues.
2. The Board lacks jurisdiction over the instant prohibited practice complaints filed on March 18, 2004 against the Respondents based on the applicable 90-day statute of limitations period.
3. 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 against the Union. As the Board dismissed Complainant's breach of duty of fair representation claims against the Union, the Board similarly dismisses claims against the Employer for unjust discipline for failure to state a claim for which relief can be granted.

ORDER


The Board hereby dismisses the instant complaints against the Union and Employer.

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.

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DATED: Honolulu, Hawaii _____ May 14, 2004 _____.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



CHESTER C. KUNITAKE, Member



KATHLEEN RACUYA-MARKRICH, Member

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