STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of MICHAEL PAUL MASUTANI, Complainant, and HAWAII FIREFIGHTERS ASSOCIATION, LOCAL 1463, IAFF, AFL-CIO, Respondent.	CASE NO. CU-11-230 ORDER NO. 2335 ORDER GRANTING RESPONDENT'S MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED ON APRIL 19, 2004

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
PROHIBITED PRACTICE COMPLAINT FILED ON APRIL 19, 2004

On May 13, 2004, Respondent HAWAII FIRE FIGHTERS ASSOCIATION, LOCAL 1463, IAFF, AFL-CIO (HFFA or Union) moved to dismiss the prohibited practice complaint filed by Complainant MICHAEL PAUL MASUTANI (Complainant or MASUTANI), proceeding pro se, alleging a breach of duty of fair representation in wilful violation of Hawaii Revised Statutes (HRS) §§ 89-8(a) and 89-13(a)(4).

On May 21, 2004, Complainant filed his response in opposition to HFFA's Motion to Dismiss Prohibited Practice Complaint, within the time deadlines set by Hawaii Administrative Rules (HAR) § 12-42-8(g)(3)(C)(iii).

On May 26, 2004, Respondent filed a reply memorandum.

The Hawaii Labor Relations Board (Board) conducted oral arguments on HFFA's motion to dismiss on June 3, 2004, after which the Board took the matter under advisement.

After considering the Respondent's motion, affidavits, exhibits, and the memoranda presented by both parties, the Board makes the following findings of fact, conclusions of law, and order granting Respondent's motion to dismiss the prohibited practice complaint.

FINDINGS OF FACT

1. At all times relevant, Complainant was a public employee within the meaning of HRS § 89-2, in a Fire Fighter I position employed by the Honolulu Fire Department, City and County of Honolulu (HFD or Employer) and as such a member of Bargaining Unit (BU)11.

2. At all times relevant, Respondent was the exclusive representative within the meaning of HRS § 89-2, for fire fighters in BU 11.

3. On April 19, 2004, Complainant filed the instant prohibited practice complaint alleging the HFFA breached its duty of fair representation by failing to challenge personnel actions taken by his employer that included: "letters discussing my termination" placed in his employment file about which he notified the Union representative on January 20, 2004; employer notification on or about February 20, 2004 that he failed a fitness-for-duty evaluation which he was ordered to take on November 5, 2003 disqualifying him from work; and employer notification on March 15, 2004 of his termination. Complainant alleges that because the Union failed to properly represent him he was left with having to choose between a termination or resignation.[1] Complainant blames his Union's inaction for the fact that Complainant's

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[1]See Prohibited Practice Complaint filed April 19, 2004; and Transcript of Proceedings dated June 3, 2004 (Tr.), p. 5, where Complainant articulated the gravamen of his complaint as follows:

> . . .although actions had taken place prior to the 90-day limit, the result of those actions forced me to either terminate or resign. I had no option. No option was offered me to retain employment with the Honolulu Fire Department. I sat down with Chief Leonardi and Thomas Vendetta of the city's workers' comp., and I was given the ultimatum to accept their one-time only offer for settlement, which included some substantial monies, or be terminated. That was the predicament or the position I was forced into, and I allege that it was my own union that failed to represent me fairly, properly, that brought me to this position.
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> I did come to choose to settle and accept the monetary offer 'cause the alternative meant possibly years of litigation against the union and my employer, and it was a substantial amount of money. I was planning to retire anyway within five years. So I discussed it with my wife, and she said it was just better to accept the settlement.

employer offered no option that would allow him to continue in his position as a fire fighter.

4. By letter dated October 16, 2003, HFFA Business Manager Guy T. Tajiri (Tajiri) wrote to HFD Chief Attilio K. Leonardi (Leonardi), asking that Complainant's scheduled fitness for duty evaluation be cancelled.[2]

5. By letter dated October 24, 2003, HFD Assistant Chief Alvin K. Tomita wrote to Complainant to confirm his decision to "decline the opportunity to work a light duty, 40-hour assignment from October 27, 2003;" as well as notifying him that he was "still required to attend your two (fitness-for-duty) appointments with Dr. Farkas on November 5 and 12, 2003."[3]

6. By letter dated January 8, 2004, Acting Fire Chief John Clark notified Complainant that he was being placed on leave with pay, effective immediately, pending a review of the findings and recommendations from his fitness-for-duty evaluation.[4]

7. On January 21, 2004, Complainant advised the HFFA about letters he found in his personnel file and by February 5, 2004, Complainant asked the HFFA to obtain written acknowledgment from the employer confirming the removal of the letters. On February 6, 2004, HFFA initiated contact with employer representative Dean Matsukawa for confirmation of the removal of the letters allegedly placed "illegally" in Complainant's personnel file. According to Tajiri the matter was resolved.

8. By letter dated February 20, 2004, Fire Chief Leonardi notified Complainant that the City's designated physician determined that he did not meet the medical requirements to perform the essential functions of a Fire Fighter I. Pursuant to the Rules of the Director of Human Resources § 9-4(d), Complainant was offered an opportunity to participate in a job search.[5]

9. By letter dated March 15, 2004, Fire Chief Leonardi, notified Complainant of HFD's "plan to terminate your employment . . . since it was determined that

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[2]See Exhibit (Ex.) 1, attached to HFFA's Motion to Dismiss Prohibited Practice Complaint filed on April 19, 2004.

[3]Id., Ex. 2.

[4]Id., Ex. 3.

[5]Id., Ex. 4.

you are no longer qualified to remain employed as a Fire Fighter I." A pre-determination meeting was scheduled for March 22, 2004 at 8:30 a.m., and Complainant was informed of his "right to union representation" at the meeting, which he was responsible for arranging.[6]

10. Complainant failed to attend the pre-determination meeting scheduled on March 22, 2004 because he was not informed of the meeting by his Union until 10:00 a.m.

11. By letter dated March 25, 2004, Tajiri wrote to Complainant, stating as follows:

> This is a follow-up to Mr. Roger Goodell's previous conversation with you regarding the Honolulu Fire Department's plan to terminate your employment since it was determined that you are no longer qualified to remain employed as a Fire Fighter I. It is our understanding that you did not attend the pre-determination meeting that was scheduled for Monday, March 22, at 8:30 a.m. in the Fire Chief's Office.
>
> At this point, we would like to request that you provide us in writing exactly how you would like the union to proceed on your medical disqualification and pending termination. Please provide us with your response as soon as possible so we can determine the best plan of action to address your concerns.[7]

12. By letter dated March 31, 2004, Complainant wrote to Tajiri to informing him that the Union's failure to seek any remedy against the employer was due to "gross negligence and questionable intent by the union."

13. Complainant entered into settlement discussions with his employer, without the involvement of the Union.[8] Under the terms of the settlement agreement of Complainant's workers compensation claim and "any action against the department or the city for anything that they had done," Complainant agreed

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[6]Id., Ex. 6.

[7]Id., Ex. 7.

[8]Tr., p. 14.

to resign from his job, rather than be terminated as the employer had planned because of the failure of his fitness-for-duty evaluation.[9]

14. On April 19, 2004 MASUTANI filed the instant handwritten complaint which read in its entirety:

> On January 20, 2004 I notified my representative from my union that letters discussing my termination had been placed in my employment file illegally. He refused to accept my complaint to him. My representative's name is Rodger Goodell.
>
> On or about February 2004, my employer notified me that I had failed a fitness-for-duty evaluation and therefore not qualified to continue in their employ. My union representative failed to take any action when I requested the union to challenge the evaluation.
>
> On March 15, 2004 my employer notified me of my termination. My union again denied me legal representation.

Complainant added:

> On November 5, 2003 I reported as ordered by my employer for a fitness for duty evaluation. They also ordered me to sign a legal form my attorney had advised me not to sign. The business agent of HFFA advised me to sign the document against the advise of the HFFA's own attorney. The signing of the form and the evaluation resulted in termination proceedings to be taken against me. The HFFA's business agent is Guy Tajiri.

DISCUSSION

MASUTANI contends that the HFFA breached its duty of fair representation by refusing to assist him when the employer allegedly illegally placed derogatory documents in his personnel file and later terminated him for failing his fitness-for-duty evaluation. MASUTANI claims that the Union failed to assist him by challenging the employer's actions on his behalf.

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[9]Tr., pp. 17-18.

At the hearing the parties stipulated that MASUTANI had recently entered into an agreement with his former employer, the City and County of Honolulu, in settlement of all claims against the City. By its terms, MASUTANI agreed to resign in lieu of termination.

In the instant motion, the HFFA moves to dismiss the instant complaint because the issues are outside the applicable statute of limitations or otherwise moot.

Statute of Limitations

In order for a complaint before the Board to be timely it must be filed "within ninety days of the alleged violation." HRS § 377-9 made applicable to the Board by HRS § 89-14 provides that no complaints of any specific unfair labor practice shall be considered unless filed within 90 days of its occurrence. Accordingly, HAR § 12-42-42(a) provides that:

> Complaints that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, 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 HLRB 186 (1983). The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Instead, the limitations period beings to run when "an aggrieved part knew or should have known that his statutory rights were violated." Metromedia, Inc. v. KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978).

The Union correctly argues that the November 5, 2003 incident where MASUTANI was allegedly advised to sign some forms and take the fitness-for-duty evaluation falls outside the 90-day limitations period so that any alleged violations occurring on that date must be dismissed as untimely. The Board agrees and accordingly dismisses MASUTANI's claims based on the November 5, 2003 events.

Mootness

MASUTANI also alleges that the Union breached its duty of fair representation when the HFFA representative refused to accept his complaint regarding letters in his personnel file which discussed his termination. Contrary to MASUTANI's allegations, Tajiri stated that the HFFA took action to remove the documents from his file through informal communications with the employer's representative, Dean Matsukawa, and the matter was resolved.

The mootness doctrine is properly invoked where "events" have so affected the relationship between the parties that the two conditions for justiciability relevant on appeal

– adverse interest and effective remedy have been compromised. In Re Application of Thomas, 73 Haw. 223, 226 (1992). Thus, at this stage of the proceedings the case has lost its character as a present, live controversy. Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 734 P.2d 161 (1987). In Wong v. Board of Regents, University of Hawaii, 62 Haw. 391, 616 P.2d 201 (1980), the Court dismissed the action on grounds of mootness, stating:

> The mootness doctrine is said to encompass the circumstances that destroy the justiciability of a suit previously suitable for determination. Put another way, the suit must remain alive throughout the course of the litigation to the moment of final appellate disposition. Its chief purpose is to assure that the adversary system, once set in operation remains properly fueled. The doctrine seems appropriate where events subsequent to the judgment of the trial court have so affected the relations between the parties that the two conditions for justiciability relevant on appeal – adverse interest and effective remedy – have been compromised.

Id., at 394. See also, State v. Rogan, 91 Hawai`i 405, 984 P.2d 1231 (1999); State v. Fukusaku, 85 Hawai`i 462, 946 P.2d 32 (1997); AIG Hawaii Ins. Co. v. Bateman, 82 Hawai`i 453, 923 P.2d 395 (1996).

The exception to the mootness doctrine does not apply here because it cannot be said that the questions involved "affect the public interest and are capable of repetition yet evading review." Okada Trucking Co., Ltd. v. Bd. of Water Supply, 99 Hawai`i 191, 196-98, 53 P.3d 799, 804-06 (2002) (citations and internal quotation marks omitted). See also, McCabe Hamilton & Renny Co., Ltd. v. Chung, 98 Hawai`i 107, 120-21, 43 P.3d 244, 257-58 (App. 2002).

With respect to MASUTANI's allegations regarding the removal of documents from his personnel file, the Board finds that according to Tajiri the matter was acted upon by the HFFA and the matter resolved. Accordingly, inasmuch as there is no adverse interest remaining or effective remedy available, the Board concludes the issue is moot and grants the HFFA's motion to dismiss the claim. See also, Life of the Land v. Burns, 59 Haw. 244, 250, 580 P.2d 405, 409 (1978); Territory v. Aldridge, 35 Haw. 565, 568 (1940).

Failure to State a Claim for Relief

In the same way, the Union contends that MASUTANI's settlement with the City mooted any remaining breach of duty of fair representation claims against the Union for failing to represent him in challenging his termination. The Board must agree. Based on the facts in the record, MASUTANI was never terminated and accepted the City's settlement

offer to resign in lieu of termination, relinquishing any and all claims against the City. Thus, all of MASUTANI's claims against the City were resolved and there is no remaining arguable contract claim for unjust termination against the employer.

MASUTANI contends that his settlement did not moot his claim against the Union since his settlement was with the City alone and that his claim against the Union for violation of their duty of fair representation could yield additional monetary relief. At hearing the Union argued that even if the claim is not mooted by Complainant's settlement, the complaint must be dismissed 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), HRCP, 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 of 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). 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).

Based upon the settlement of the claims against the City, the Board concludes that MASUTANI can prove no set of facts which would entitle him to relief on a breach of duty claim against the Union based upon unjust termination. Accordingly, the Board dismisses the complaint against the Union for failure to state a claim for relief.

CONCLUSIONS OF LAW

1. The Board lacks jurisdiction over complaints filed more that 90 days after the cause of action accrues.

2. The Board lacks jurisdiction over Complainant's allegations of the Union's breach of duty of fair representation arising from events occurring on or about November 5, 2003 because they are time-barred.

3. The mootness doctrine is properly invoked where "events" have so affected the relationship between the parties that the two conditions for justiciability relevant on appeal – adverse interest and effective remedy have been compromised.

4. The Board concludes that Complainant's allegations of the Union's breach of duty of fair representation arising from the removal of documents from his personnel file are moot as the evidence in the record supports a finding that the Respondent assisted him in the removal of the documents and the issue was resolved.

5. As the claims against the employer are precluded or mooted by the settlement agreement, the Board similarly dismisses claims against the Union for breach of duty of fair representation for failure to state a claim for which relief can be granted.

ORDER

For the foregoing reasons, the Board hereby dismisses the instant prohibited practice complaint.

DATED: Honolulu, Hawaii, MAY 26, 2005.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

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