STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of MORRIS E. APANA and THOMAS J. LENCHANKO, Complainants, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; DEAN MAKIMOTO, Union Agent, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO; KEVIN NAKATA, Union Agent, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO; LEIOMALAMA DESHA, Union Agent, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO; and SANFORD CHUN, Union Agent, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, Respondents.	CASE NOS.: CU-02-236a CU-04-236b ORDER NO. 2345 ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

On May 23, 2005, Respondents moved to dismiss the claims found actionable by Board Order No. 2326,[1] as time-barred by the applicable statute of limitations in Hawaii Administrative Rules (HAR) §12-42-42(a).

On June 1, 2005, the Board conducted a hearing on Respondents' Motion to Dismiss. The parties were represented by counsel and were allowed full opportunity to present argument to the Board. After careful consideration and a thorough review of the record in the case, the Board makes the following findings of fact, conclusions of law, and order.

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[1]Board Exhibit (Ex.) 17, Order Granting, in Part, Respondents' Motion to Dismiss and Denying Cross Motions for Summary Judgment.

FINDINGS OF FACT

1. At all times relevant, MORRIS APANA (APANA or Complainant) was a public employee, as defined in Hawaii Revised Statutes (HRS) § 89-2, employed by the City and County of Honolulu (City or Employer), Department of Facility Maintenance since August 24, 1974 in the Division of Road Maintenance, and a member of bargaining unit (BU) 02.

2. At all times relevant, THOMAS LENCHANKO (LENCHANKO or Complainant) was a public employee, as defined in HRS § 89-2, employed by the City Department of Facility Maintenance, Division of Road Maintenance since August 1995, and a member of BU 04.

3. Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, LOCAL 152, AFL-CIO (HGEA) is the exclusive representative within the meaning of HRS § 89-2 of supervisory employees in blue-collar positions in BU 02 and supervisory employees in white-collar positions in BU 04. Respondents DEAN MAKIMOTO (MAKIMOTO), KEVIN NAKATA (NAKATA), LEIOMALAMA DESHA (DESHA), and SANFORD CHUN (CHUN), in their capacity as HGEA union agents are representatives of HGEA, within the meaning of HRS § 89-13(b).

4. As the exclusive representative for the employees in BUs 02 and 04, the HGEA has negotiated and is a party to respective BU 02 and 04 collective bargaining agreements (Contracts), which contain a grievance procedure culminating in final and binding arbitration. The respective grievance procedure requires that a "grievance be presented to the appropriate supervisor within twenty (20) working days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) working days after the alleged violation first became known or should have become known to the Employee involved . . . or the grievance may not be considered."[2]

5. On January 19, 2005,Complainants filed the instant prohibited practice complaint charging a breach of duty of fair representation against the HGEA and Union Agents MAKIMOTO, NAKATA, DESHA and CHUN (collectively

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[2]Complainants' Ex. 2, BU 2 Contract Addendum, July 1, 2003 - June 30, 2005; Ex. 3, BU 04 Contract Agreement, July 1, 1997-June 30, 1999, and Ex. 4, BU 04 Contract Addendum July 1, 2003 - June 30, 2005.

Respondents or Union) for failing to file timely grievances in wilful violation of HRS §§ 89-13(b)(1), (4) and (5).[3]

6. On or about January 2001, Complainants were notified of the City's plan to end their supervisory duties over refuse operations at Waianae baseyard, for which they were compensated overtime pay by the Refuse Division, City Department of Environmental Services. Complainants knew that the City's plan to remove their supervisory duties over refuse operations and eliminate their overtime pay would take effect on July 1, 2001. Between January to July 27, 2001, Complainants asked HGEA Union Agent MAKIMOTO to challenge through the contractual grievance process the City's plans to eliminate a portion of their supervisory duties over the refuse operations. MAKIMOTO informed Complainants that the City's plans to reorganize was within management's rights, and he denied Complainants' request to file grievances. As of July 27, 2001, no grievance over the removal of Complainants' supervisory refuse collection duties had been filed by MAKIMOTO within the 20 working day time frame set forth in the contractual grievance procedure.[4]

7. On or about July 27, 2001, Complainants knew that under the BU 02 and BU 04 collective bargaining agreements, they had a right to file grievances on their own without the assistance of the Union as is their right under their

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[3]Board Ex. 1; HRS §§ 89-13(b) provides in part as follows:

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

(1) Interfere, restrain, coerce any employee in the exercise of any right guaranteed under this chapter;

* * *

(4) Refuse or fail to comply with any provision of this chapter; or

(5) Violate the terms of a collective bargaining agreement.

[4]By Board Order No. 2326, the Board dismissed Complainants' breach of duty of fair representation claims against the HGEA based on MAKIMOTO's refusal to file grievances challenging the City's removal of their supervisory duties over refuse operations at the Waianae baseyard by July 27, 2001, because the claims were barred by the 90-day statute of limitations set forth in HAR § 12-42-42(a).

respective Contracts and HRS § 89-8(b).[5] However, instead of filing individual grievances on their own, Complainants met with MAKIMOTO's supervisor, DESHA, on or about August 15, 2001.[6]

8. When Complainants met with DESHA on or about August 15, 2001, they knew they had passed the 20-day time period for filing their individual

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[5]HRS § 89-8(b) provides as follows:

> (b) An individual employee may present a grievance at any time to the employee's employer and have the grievance heard without intervention of an employee organization; provided that the exclusive representative is afforded the opportunity to be present at such conferences and that any adjustment made shall not be inconsistent with the terms of an agreement then in effect between the employer and the exclusive representative.

[6]See Testimony of Thomas Lenchanko, Transcript of Proceedings (Tr.) dated May 20, 2005, pp. 79-80, Complainant Lenchanko testified as follows:

> Q. [By Mr. Takahashi] Okay. And you knew the timeline on your right to file a grievance would pass on July 27, '01 correct?
> A. Correct.
> Q. And you did absolutely nothing in your own best interest to file and pursue a grievance after the Union business agent told you he's not going to do it for you, correct?
> A. Correct. . . .
> Q. By the time you made any contact with Ms. Desha, you knew that you had the right to file a grievance, no grievance had been filed on time, and that there was a waiver of the time limits, correct?
> A. Correct. Tr. p. 82
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> * * *
>
> Q. You knew before your meeting with Ms. Desha that the time limitations to file a grievance on the July 1 change had passed?
> A. That's correct.
> Q. You knew that regardless of what she did, the contract required you to file a grievance within 20 days, and that had long passed and was gone?
> A. That's correct. Tr. p. 88.

See also, Testimony of Morris Apana, Tr. p. 176.

grievances.[7] Nevertheless, Complainants met with DESHA to find out, "[i]f [they] had any other options, being that [they] had already passed the 20-day deadline."[8]

9. Complainants' purpose in meeting with DESHA, was to explore other options and find out whether there was anything else they could do since the time had passed for filing a grievance. DESHA listened to Complainants' concerns over changes the City was making to their refuse collection supervisory duties as well as complaints about MAKIMOTO, with whom they stopped dealing. DESHA was professional during her meetings with Complainants, and she let Complainants know that she would look into the matter. DESHA denied misleading Complainants with statements that there was no need to be concerned about missing the 20-day grievance time limit because the Union was still investigating the matter and the employer's violation was continuing in nature. The Board credits DESHA's testimony.[9]

10. Based on the admissions that Complainants knew of their right to file a grievance on their own, and also knew the time had passed for filing a grievance when they met with DESHA on or about August 15, 2004, the Board finds that Complainants were not misled by DESHA into thinking there were no time limits for filing a grievance nor would it pose a problem.[10]

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[7]Complainant APANA testified as follows:

Q. If you don't know at the time – you knew at the time you met with Ms. Desha that there were timelines and you had missed it.
A. Yes.
Q. How did you learn that?
A. From the contract.
Q. How did you determine that?
A. Reading the contract. Tr. p. 178.

[8]Tr. p. 91.

[9]Tr. pp. 256-57.

[10]Indeed, Complainant APANA admitted that as far as he was concerned, DESHA did nothing improper from the time they met with her in August of 2001. She was responsive and timely. Tr. p. 191. For example, in September of 2001, following the meeting with DESHA, she assigned NAKATA to meet with City officials over their plans to change the refuse operations relating to Complainants supervisory duties. At one point, the City discussed rescheduling Complainants' starting and ending times for work. NAKATA informed the City officials that changes would need to be submitted in writing to the Union for consultation.

11. On or about May 13, 2002, MAKIMOTO filed a Step 1 grievance on behalf of Complainants over the City's reassigning Saturday and holiday overtime work in the Refuse Division to supervise the refuse collection operations at the Waianae baseyard to a bargaining unit 01 employee. Until July 1, 2001, Complainants had been performing the overtime work as provided for and consistent with their position descriptions as assistant road division superintendent and Waianae road division superintendent. The City denied the grievance at Step 1, and the HGEA filed a Step 2 grievance for Complainants. At Step 2, the HGEA and the City made good faith efforts to settle the grievances that included a compensation offer for the loss of overtime work, which Complainants rejected. As a result, the City's Director and Chief Engineer Larry Leopardi denied the Step 2 grievance. At Step 3, Director of Human Resources Cheryl K. Okuma-Sepe disputed the arbitrability due to the untimely filing of the grievance, and denied the grievance. The grievance proceeded to arbitration in accordance with the contractual grievance procedures.[11]

12. On September 30, 2004, Arbitrator Gail Kang (Arbitrator) returned the HGEA's grievances without decision or recommendation finding the grievances were untimely filed, and therefore not arbitrable. The Arbitrator rejected the HGEA's arguments that the alleged violations were continuing wrongs and that the grievances failed to meet the time requirements because Complainants had actual knowledge that the City's plan to eliminate their overtime responsibilities at the Refuse Division would take effect on July 1, 2001.

13. On or about October 21, 2004, MAKIMOTO transmitted a copy of Arbitrator Kang's decision to Complainants. Twenty-nine days later, Complainants filed the instant prohibited practice complaint based on MAKIMOTO's initial refusal to file a grievance on their behalf within twenty days from July 1, 2001 when the City's removal of their overtime work assignment with the Refuse Division took effect.

DISCUSSION

The gravamen of the Complainants' prohibited practice complaint is that Respondents allegedly breached their duty of fair representation when MAKIMOTO initially failed to file grievances over the City's decision to end their overtime work supervising refuse operations at the Waianae baseyard, effective July 1, 2001 within the time frame set by the contractual grievance procedure .

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[11]See Complainants' Exhibits (Ex.) 12-23. See also, Tr. pp. 182-84.

By Board Order No. 2326, issued May 16, 2005, the Board dismissed, in part, the claims against the HGEA for breach of the duty of fair representation to Complainants because the claims were barred by the 90-day statute of limitations set forth in HAR § 12-42-42(a).

HAR § 12-42-42(a) identifies the limitations period applicable to the filing of prohibited practice complaints pursuant to HRS § 89-13, as follows:

> 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 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 sections 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 Board has construed the 90-day limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HPERB 186, 199 (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).

In Board Order No. 2326, the Board found timely the claim that "Complainants knew they were misled by DESHA's statements regarding the timeliness of the grievance when they received the arbitrator's adverse decision on or about October 21, 2004." Therefore, the Board concluded it had jurisdiction to "determine whether DESHA's allegedly misleading statements that led to the late filings of Complainants' grievances were deliberate or wilful and made in bad faith as Complainants contend to constitute a breach of duty of fair representation."

On May 20, 2005, the Board conducted an evidentiary hearing on that issue. Complainants and DESHA testified before the Board. Complainants admitted they knew the time to file individual grievances had passed well before the meeting with HGEA's Union agent DESHA on or about August 15, 2004. Complainants' admissions prompted Respondents to move for dismissal of the claims found actionable in Board Order No. 2326.

Respondents argue that Complainants knew their grievances were untimely when they met with DESHA on or about August 15, 2001. Respondents contend that Complainants' admissions are contrary to the Board's ruling in Board Order No. 2326, that

Complainants' receipt of Arbitrator Kang's decision on or about October 21, 2004, is when Complainants' knew that DESHA wilfully misled them in August of 2001 into believing that missing the 20-day time period set for filing grievances would not be a problem. Respondents also contend the Board mistakenly assumed DESHA "made any 'misleading statement' to toll the statute of limitations under chapter 89."[12] Therefore, Respondents contend the Board erred when it issued Board Order No. 2326, denying in part, the Respondents' motion for summary judgment, and concluding it had jurisdiction to determine whether DESHA's allegedly misleading statements that led to the late filings of Complainants' grievances were deliberate or wilful and made in bad faith as Complainants contend to constitute a breach of duty of fair representation. The Board agrees.

In Board Order No. 2326, the Board drew all inferences in light of the non-moving Complainants to conclude "that there were material issues of fact in dispute as to whether the Union's handling of Complainants grievances, i.e., DESHA's allegedly misleading statement were arbitrary, discriminatory or made in bad faith."[13]

At the hearing before the Board on May 20, 2004, the preponderance of evidence showed that DESHA did not mislead Complainants. Complainants' purpose in meeting with DESHA was to explore other options and find out whether there was anything else they could do since the time had passed for filing a grievance. DESHA listened to Complainants' concerns over changes the City was making to their refuse collection supervisory duties as well as complaints about MAKIMOTO, with whom they had stopped dealing. DESHA was professional during her meetings with Complainants, and she let Complainants know that she would look into the matter. DESHA denied misleading Complainants with statements that there was no need to be concerned about missing the 20-day grievance time limit because the Union was still investigating the matter and the employer's violation was continuing in nature. The Board credits DESHA's testimony.

In the instant complaint, Complainants knew when they met with DESHA on or about August 15, 2001, that the time had passed for filing grievances over the City's July 1, 2001 removal of their overtime work supervising the refuse operations at the Waianae baseyard. DESHA did not mislead them into thinking otherwise. Accordingly, there are no other viable breach of duty of fair representation claims resulting from Arbitrator Kang's returning without a decision the May 13, 2001 grievances as non-arbitrable.

If anything, the finding of non-arbitrability over the grievances filed on May 13, 2002, rekindled Complainants' underlying complaints against MAKIMOTO for his initial refusal to file Complainants' grievance over the change in supervisory duties by the

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[12]See Board Ex. 18, Respondents' Motion to Dismiss filed on May 23, 2005.

[13]Board Ex. 12, Board Order No. 2326, p. 11.

July 27, 2001 deadline. Those claims were dismissed as untimely in Board Order No. 2326, as follows:

> In the instant complaint, the Board concludes that Complainants alleged violations for breach of duty of fair representation based on MAKIMOTO's failure to file grievances by July 27, 2001 challenging the City's removal of supervisory duties over refuse collection, would have been actionable, if brought before the Board within 90 days of July 27, 2001. Having failed to file the complaint against their Union, on or about October 24, 2001, the alleged violation against the Respondents is time-barred by the applicable statute of limitations. Accordingly the Board lacks jurisdiction over the breach of duty of fair representation claim arising out of MAKIMOTO's alleged failure to file a grievance challenging the City's removal of supervisory duties.

CONCLUSION OF LAW

The Board concludes that Complainants' claims of alleged violations of the breach of duty of fair representation are barred by the 90-day statute of limitations set forth in HAR § 12-42-42(a). Accordingly, the Board lacks jurisdiction over instant complaint.

ORDER

Based on the foregoing, the Board hereby grants Respondents' motion to dismiss the instant complaint for lack of jurisdiction.

DATED: Honolulu, Hawaii, August 25, 2005.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

KATHLEEN RACUYA-MARKRICH, Member

MORRIS E. APANA and THOMAS J. LENCHANKO and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, et al.
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