



## FINDINGS OF FACT

1. MARQUES is a Laborer Working Supervisor and employed by the Department of Public Works, Hanapepe Transfer Station, County of Kauai. Consequently, MARQUES is an employee within the meaning of Hawaii Revised Statutes (HRS) § 89-2. MARQUES is also a member of bargaining unit 01 (Unit 01) and represented for collective bargaining purposes by the UPW.
2. KAUAI COUNTY is a public employer within the meaning of HRS § 89-2
3. The UPW is an employee organization and the exclusive representative, within the meaning of HRS § 89-2, of employees of KAUAI COUNTY included in Unit 01.
4. On or about August 27, 2004, MARQUES was informed that he was not selected for promotion to Equipment Operator II.
5. On September 22, 2004, the UPW filed a Step 1 grievance contesting MARQUES' nonselection based upon his seniority.
6. By letter dated October 20, 2004, the Employer denied the grievance.
7. By letter dated October 26, 2004, the Union filed the grievance at Step 2.
8. By letter dated March 14, 2005, the Employer denied the grievance at Step 2, in part, because MARQUES did not meet the requirements for the Equipment Operator position. Specifically, the Employer found that MARQUES did not meet the requirement that he must be certified by the Equipment Operator Trainer to operate a truck with a dumpster of 6 cubic yards and over but less than 12 cubic yards and at least one more equipment representative of the class. Although, MARQUES was trained on the Payloader, he did not successfully pass the training. As a result, the Employer found MARQUES was not a qualified applicant for the position.
9. By letters dated April 29, 2005, the Union, by its State Director, notified MARQUES and the Employer's representative that it would not pursue MARQUES' grievance.
10. The Board finds that July 28, 2005 is the 90th day after April 29, 2005. MARQUES filed the instant complaint on September 2, 2005, 36 days after the statute of limitations ran in this case.

## DISCUSSION

The UPW contends that based on the allegations of the complaint and the evidence in the record, the Board lacks jurisdiction over the instant complaint because it is time-barred. The UPW alleges that MARQUES was notified on or about April 29, 2005 that the Union was not proceeding with the grievance. Accordingly, since MARQUES filed his complaint on September 2, 2005, the instant complaint exceeded the 90-day statute of limitations by approximately 34 days. At the hearing on this matter, the UPW objected to KAUAI COUNTY's joinder in its motion to dismiss. In response, KAUAI COUNTY's counsel argued that its joining the Union's motion to dismiss was for efficiency. MARQUES argued that he was the senior employee and should have received the promotion to Equipment Operator II.

HRS § 377-9(l), made applicable to the Board by HRS § 89-14, provides:

No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.

The Board's rule, Hawaii Administrative Rules § 12-42-42(a), similarly identifies the limitations period applicable to the filing of prohibited practice complaints under HRS § 89-13, and provides 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 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 Board stated as follows:

Applicable statutes and rules require that complaints be filed within 90 days of the occurrence of the alleged prohibited practice. See Sections 89-14 and 377-9(l), HRS and Administrative Rules Section 12-42-42. (footnotes omitted.)

The alleged prohibited practice of Respondent ARIYOSHI occurred July 20, 1981, the effective date of Complainant's dismissal. C. Ex. 1, letter of dismissal. Ninety days measured from July 20, 1981 falls on October 18, 1981. As the latter date fell on a Sunday, Complainant had, under Administrative Rules Subsection 12-42-8(c) (footnote omitted), until the next day, October 19, to file, but filed instead on

October 20. Despite the fact that Complainant missed the deadline by only one day, the Board cannot waive the defect on the basis of substantial compliance, as it is clear that statutes of limitations are to be strictly construed. *Thurston v. Bishop*, 7 Haw. 421 (1888); *Wong Min v. City and County of Honolulu*, 33 Haw. 373, reh. den., 33 Haw. 409 (1935). [Emphasis added.]

3 HPERB at 197-98.

Based on the record, the Board concludes that MARQUES filed his complaint with the Board more than 90 days after he was notified that the UPW had decided not to pursue the grievance on or about April 29, 2005. At that time, MARQUES knew or should have known that his cause of action arose against the UPW for its refusal to assist him in challenging his nonselection. MARQUES had until July 28, 2005 to file his complaint but he filed the instant complaint on September 2, 2005, 36 days after the statute of limitations ran. Accordingly, MARQUES' complaint against the Union for an alleged breach of the duty of fair representation for failing to pursue his grievance is untimely and time-barred. Moreover, as MARQUES cannot succeed on a breach of duty of fair representation claim against the Union because the claim is time-barred, the Board must also dismiss his claim against his Employer for allegedly violating the contract by not promoting him because the claims are "inextricably interdependent." See, *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164, 76 L.Ed. 476, 103 S.Ct. 2281 (1983).

#### 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 instant complaint was filed more than 90 days after the Union notified Complainant that it would not proceed with his grievance. Thus, MARQUES' complaint against the Union for failing to fairly represent him is time-barred and the Board lacks jurisdiction over this complaint.
3. As MARQUES' contractual claim against KAUAI COUNTY for failure to promote him is interdependent on his claim against the Union for breach of the duty of fair representation, that claim is also dismissed.

#### ORDER

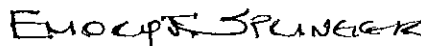
The Board hereby dismisses the instant complaint.

JOHN MARQUES v. COUNTY OF KAUAI, et al.  
CASE NOS: CE-01-604a, CU-01-241b  
ORDER NO. 2348  
ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS

DATED: Honolulu, Hawaii, November 14, 2005

HAWAII LABOR RELATIONS BOARD

  
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KATHLEEN RACUYA-MARKRICH, Member

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