

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NOS.: CE-01-605a
	)	CU-10-605b
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO,	)	ORDER NO. 2366
)	
Complainant,	)	ORDER DENYING RESPONDENTS'
	)	MOTION TO DISMISS COMPLAINT
and	)	FILED SEPTEMBER 2, 2005, FILED
	)	ON FEBRUARY 8, 2006 AND
MARIE LADERTA, Director, Department	)	GRANTING UPW'S MOTION TO AMEND
of Human Resources Development, State of	)	COMPLAINT FILED ON MARCH 1,
Hawaii and VALERIE PACHECO, Personnel	)	2006
Program Administrator, Department of)	
Human Resources Development, State of)	
Hawaii,)	
)	
Respondents.)	

ORDER DENYING RESPONDENTS' MOTION TO DISMISS
COMPLAINT FILED SEPTEMBER 2, 2005 AND GRANTING
UPW'S MOTION TO AMEND COMPLAINT FILED ON MARCH 1, 2006

On February 28, 2006, Respondents MARIE LADERTA, Director, Department of Human Resources Development (DHRD), State of Hawaii and VALERIE PACHECO, Personnel Program Administrator, DHRD, State of Hawaii (collectively State), by and through their counsel, filed a Motion to Dismiss the instant complaint with the Hawaii Labor Relations Board (Board). The State contends that the instant complaint is time-barred because Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) incorrectly stated that it learned that Respondents were by-passing the Union and directly negotiating waivers of their contractual rights on or about June 23, 2005. The State alleges that Complainant's counsel was informed of settlement agreements for Michael Basham (Basham) and Elizabeth Baruz (Baruz) by letter dated December 15, 2004. Thus, the State contends that the Union knew or should have known of any alleged prohibited practice by that date and the complaint is barred by the 90-day statute of limitations provided by Hawaii Revised Statutes (HRS) § 377-9(1) and Hawaii Administrative Rules § 12-42-42(a).

Thereafter on February 10, 2006, Respondents filed a Supplement to its Motion to Dismiss with the Board.

On February 14, 2006, Complainant, by and through its counsel, filed a Memorandum in Opposition to Respondents' Motion to Dismiss Complaint Filed September 2, 2005. The UPW argued that the statute of limitations did not begin to run until June 23, 2005 when Respondents filed a motion to dismiss pending grievances in an arbitration before Paul Aoki. The UPW also argues that on July 18, 2005 Respondents refused to negotiate over the subject matter requested and continued to engage in their unilateral conduct on October 11, 2005 when Basham's Settlement was filed by the Labor and Industrial Relations Appeals Board. The UPW also argues that the Basham, Baruz and Wayne S. Salangsang (Salangsang) settlements constitute continuing violations.

Thereafter, Respondents filed a Reply to UPW's Memorandum in Opposition to Respondents' Motion to Dismiss Complaint Filed September 2, 2005 on February 16, 2006. The UPW, in turn, filed a Supplemental Memorandum on February 24, 2006.

On February 27, 2006, the Board conducted a hearing on Respondents' motion to dismiss the complaint. After reviewing the record and the arguments presented, the Board indicated it was inclined to deny the motion to dismiss. In its motion, the State moves to dismiss the instant complaint alleging violations of HRS §§ 89-13(a)(1), (5), and (7) on the grounds that the Union knew or should have known of the Baruz and Basham settlement agreements on or about December of 2004. Therefore, the State contends the entire complaint is time-barred by the applicable 90-day statute of limitations, and the Board lacks jurisdiction over the charges brought. The Board disagrees.

Complainant urges the Board to apply the continuing violation doctrine with respect to the waiver of collective bargaining rights incorporated into the Baruz, Basham and Salangsang settlement agreements to find the complaints timely. In addition, Complainant points to UPW State Director Dayton Nakanelua's (Nakanelua) July 5, 2005 "Request for Negotiations Over Waiver of Terms and Conditions of Employment of Unit 1 and 10 Employees" and the State's alleged July 18, 2005 refusal to negotiate as the date triggering the occurrence of a violation under HRS § 89-13(a)(5).

Although the Board rejects the application of the continuing violation doctrine to the facts before us, the State does not dispute that on June 23, 2005, it attempted to apply or enforce the waiver of grievance and reemployment rights provisions found in the Baruz and Basham settlement agreements to dismiss those grievants from an arbitration proceeding brought by Complainant on behalf of 14 grievants. Nakanelua states in a supporting declaration to the UPW's Supplemental Memorandum in Opposition to Respondents' Motion to Dismiss Filed February 8, 2006 that he first learned about the waiver of the grievance and reemployment rights when he received a copy of the foregoing motion on or after June 23, 2005. The Board therefore finds the Union knew or should have known of the alleged direct dealing with Baruz and Basham upon the filing of the Employer's motion to dismiss before Arbitrator Aoki. Since this occurred within the 90-day period prior to the filing of instant complaint on September 2, 2005, the Board concludes the Complainant's direct dealing

allegations arising under HRS §§ 89-13(a)(1) and (7) are timely. Moreover, we agree with the Complainant that the State's July 18, 2005 refusal to negotiate with UPW's State Director falls within the statutory time frame. Thus, the instant complaint as it alleges an HRS § 89-13(a)(5) failure or refusal to bargain in good faith is timely filed.

The UPW filed a Motion to Amend Complaint on March 1, 2006. The First Amended Complaint attached to the motion includes, inter alia, an allegation that on or about October 11, 2005, Respondents provided a copy of a settlement between Salangsang and the Department of Public Safety (PSD) which purported to waive the right of reemployment and the right to participate in arbitration initiated by the UPW.

On March 1, 2006, Respondents filed a Memorandum in Opposition to the UPW's Motion to Amend Complaint arguing that the First Amended Complaint is materially different from the prior Complaint which initiated these proceedings. Respondents allege that it is prejudiced by the filing of the UPW's Motion to Amend Complaint because the State had filed a Motion to Dismiss on statute of limitations grounds and prior to issuing a written order denying the motion pursuant to HRS § 89-5(e),¹ the Board has allowed the Union to amend the complaint to conform to the Board's reasoning that there was no statute of limitations violation.

HAR §12-42-43 provides that "[a]ny complaint may be amended in the discretion of the board at any time prior to the issuance of a final order thereon." In this instance, as the hearing on the merits has just commenced, the Board finds there is no prejudice to the State by the instant amendment. Rather than validating the Board's reasoning on the statute of limitations issue, the First Amended Prohibited Practice Complaint specifically refers to the Salangsang settlement which was addressed in prior arguments before the Board.

¹HRS § 89-5(e) states in part:

Any action taken by the board shall be by a simple majority of the members of the board. All decisions of the board shall be reduced to writing and shall state separately its findings of fact and conclusions. ...

First, the Board does not agree with the State that any decision by the Board, be it a ruling on a motion or objection, shall be reduced to writing. HRS § 89-14 provides, in part, that "[a]ny controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9...." HRS § 377-9(d), provides that, "[a]fter the final hearing, the board shall promptly make and file an order or decision, incorporating findings of fact upon all the issues involved in the controversy and the determination of the rights of the parties." Thus, the Board interprets the requirement for a written decision to apply to final decisions of the agency.

Accordingly, the Board hereby grants the UPW's Motion to Amend Complaint. Complainant shall forthwith file its First Amended Prohibited Practice Complaint with the Board. The Board will thereupon issue a Notice to Respondents of the First Amended Prohibited Practice Complaint and Respondents shall file a written answer to the amended complaint within ten days after service of the First Amended Prohibited Practice Complaint

DATED: Honolulu, Hawaii, March 7, 2006.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


EMORY J. SPRINGER, Member


KATHLEEN RACUYA-MARKRICH, Member

Copies sent to:

Herbert R. Takahashi, Esq.
Jeffrey A. Keating, Deputy Attorney General
Joyce Najita, IRC