

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-10-243
DEPARTMENT OF PUBLIC SAFETY, State of Hawaii,)	ORDER NO. 2380
Complainant,)	ORDER GRANTING UPW'S MOTION TO DISMISS
and)	
UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,)	
Respondent.)	

ORDER GRANTING UPW'S MOTION TO DISMISS

On December 8, 2005, Complainant DEPARTMENT OF PUBLIC SAFETY, State of Hawaii (PSD or State) filed a prohibited practice complaint against Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) with the Hawaii Labor Relations Board (Board). The PSD alleged that on or about August 3, 2004, the Union filed a grievance against the State contending that PSD was not free to assign Adult Corrections Officers (ACOs) to warden select posts and that assignments to warden select posts must be made on the basis of seniority. The PSD further alleged that Gary Rodrigues (Rodrigues), former UPW State Director, agreed to the warden select posts in 1999 and further agreed that the warden could select the person to serve in the warden select posts. Since that time, PSD has been assigning employees to warden select posts. The PSD contends that the Union never previously challenged the right of PSD to assign employees to warden select posts until the grievance was filed in 2004. PSD representatives thereafter informed the present UPW State Director, Dayton Nakanelua (Nakanelua) of the agreement reached with Rodrigues and Nakanelua indicated he would not follow the agreement.

Thereafter, on or about December 7, 2005, the Union's attorney during the arbitration proceeding confirmed that PSD was not free to assign ACOs to warden select posts and that the assignments must be made on the basis of seniority. The Union's attorney also confirmed that the Union was repudiating PSD's agreement with Rodrigues. PSD thus contends in this complaint that the Union wilfully violated Hawaii Revised Statutes (HRS) § 89-13(b)(4) by refusing to comply with HRS § 89-9(d) which provides that PSD's right to assign employees in positions is non-negotiable. The PSD further contends that the Union wilfully violated HRS § 89-13(b)(2) by refusing to bargain collectively in good faith with the

employer by repudiating the Rodrigues' agreement to permit the wardens to assign employees to the posts.

On December 20, 2005, Respondent UPW filed a motion to dismiss the instant complaint with the Board. The UPW argued that the complaint was untimely; that the Board lacked subject matter jurisdiction over the complaint since Complainant entered into an agreement to arbitrate the matter, and the Complainant failed to exhaust its administrative remedies under HRS § 89-10.8.

On December 22, 2005, Complainant filed a Memorandum in Opposition to UPW's Motion to Dismiss and on December 23, 2005, the UPW filed its Reply Brief in Support of UPW's Motion to Dismiss. Complainant thereafter filed a Supplement to its Memorandum on January 9, 2006.

On January 9, 2006, the Board conducted a hearing on the instant motion. The parties were given full opportunity to present evidence and arguments to the Board. Based upon a review of the record and consideration of the arguments presented, the Board hereby issues the following findings of fact, conclusions of law, and order dismissing the instant complaint.

FINDINGS OF FACT

1. PSD for all relevant times represents the "employer," within the meaning of HRS § 89-2, in dealing with public employees in bargaining unit 10 (Unit 10).
2. The UPW is an "employee organization" and the "exclusive representative" within the meaning of HRS § 89-2 and represents the members of Unit 10 for the purposes of collective bargaining.
3. On and after January 1, 1973 to the present, the UPW has negotiated approximately 14 successive collective bargaining agreements covering Unit 10 employees. The Unit 10 collective bargaining agreement contains a grievance procedure culminating in final and binding arbitration.
4. On August 3, 2004, the UPW filed a class action grievance under the Unit 10 collective bargaining agreement regarding the manner in which PSD filled warden select posts. UPW's Motion to Dismiss, Exhibit (Ex.) 1. As the grievance was not resolved at Step 1 of the grievance procedure, the Union indicated its intent to proceed to arbitration by letter dated September 14, 2004 to Kathleen Watanabe, then Director, Department of Human Resources Development. Id., Ex. 3. On March 14, 2005 the parties selected Paul Aoki, Esq. to arbitrate the dispute. Id., Ex. 4.

5. On April 22, 2005, the arbitrator convened a conference where PSD Personnel Officer Roy Yamamoto (Yamamoto) disclosed that former UPW State Director Gary Rodrigues orally agreed that warden select posts would not be subject to the employee bidding process for choice of work days, days off, shifts, and posts based on seniority under Section 61.04.a.6 of the Unit 10 agreement. Id., Affidavit of Herbert R. Takahashi. Yamamoto considered the oral agreement to be binding even without a written memorandum. Id.
6. On May 10, 2005, the Union informed the Employer through Walter Harrington that the Union reviewed Yamamoto's disclosure and the Union's position was that all posts are subject to employee choice based on seniority. Id.
7. The gravamen of PSD's instant complaint is that the Union repudiated an oral agreement entered into by the former State Director to have the warden assign employees to the warden select posts and further violated HRS § 89-9(d) by interfering with PSD's right to assign its employees.
8. Based on the record, the PSD knew or should have known about any alleged violations of Chapter 89 on or about August 3, 2004 when the UPW filed its class action grievance since the Union challenged the Employer's right to assign ACOs to the warden select posts. Thus, the instant complaint filed on December 8, 2005 was filed more than 90 days after the alleged violations occurred and is time-barred.

CONCLUSIONS OF LAW

1. 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.

2. 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(1), in turn, provides that, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence."

3. 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).
4. The Board majority concludes based upon the record that PSD knew or should have known of UPW's alleged repudiation of the Rodrigues agreement if not in 2004 as a result of the grievance filed but certainly in periods subsequent thereto in exchanges between the parties in the arbitration proceedings. The Board majority believes that Union was unequivocal in its position that it rejected the right of the warden to create appointments and fill them without regard to the Unit 10 contract. Thus, the Board majority concludes the instant complaint filed on December 8, 2005 is barred by the 90-day statute of limitations set forth in HAR § 12-42-42(a). Accordingly, the Board lacks jurisdiction over the instant complaint.

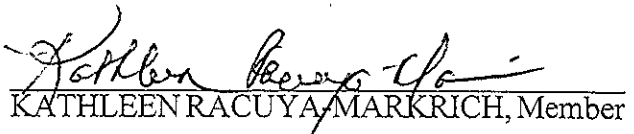
ORDER

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

DATED: Honolulu, Hawaii, June 30, 2006

HAWAII LABOR RELATIONS BOARD


EMORY J. SPRINGER, Member


KATHLEEN RACUYA MARKRICH, Member

DISSENTING OPINION

I dissent from the foregoing decision by the majority of the Board because I believe the record taken as a whole raises reasonable doubt as to the Complainant's knowledge of the Union's position. If the grievance could be read to complain only of the failure to consult or reach mutual agreement, there would be a different burden on

Complainant. The Board majority, however, finds that notice to the parties triggers the limitations period and that the parties knew or should have known about the Union's position regarding the warden's right to assign employees in his or her discretion by the filing of its grievance.



BRIAN K. NAKAMURA, Chair

Copies sent to:

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