

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-10-620
)	
UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,)	ORDER NO. 2381
)	
Complainant,)	ORDER GRANTING RESPONDENTS' MOTION TO DISMISS
)	
and)	
)	
JAMES PROPOTNICK, Acting Director, Department of Public Safety, State of Hawaii and MARIE LADERTA, Director, Department of Human Resources Development, State of Hawaii,)	
)	
Respondents.)	

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

On May 30, 2006, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a prohibited practice complaint against JAMES PROPOTNICK, Acting Director, Department of Public Safety, State of Hawaii and MARIE LADERTA (LADERTA), Director, Department of Human Resources Development, State of Hawaii (PSD or State) with the Hawaii Labor Relations Board (Board). The UPW alleged that on May 23, 2006, Robert Mielke (Mielke), a long time UPW steward at the Halawa Correctional Facility (HCF), was informed by his supervisors that union stewards were prohibited from participating in the collective bargaining process during regular hours without loss of regular salary and wages by Respondents. The UPW contends that the Respondents thereby committed prohibited practices by a) interfering, restraining, and coercing employees in the exercise of their rights guaranteed in Chapter 89; b) discriminating against an employee in terms and conditions of employment to discourage membership and participation; c) refusing to bargain collectively in good faith with the exclusive bargaining agent by unilaterally changing the terms of Section 5.03 and other provisions of the Unit 10 agreement contrary to Section 1.05; refusing and failing to comply with the provisions of Hawaii Revised Statutes (HRS) §§ 89-3, 89-8(c) and 89-9(a); and violating the terms of the Unit 10 agreement, including but not limited to Sections 1 and 5 in violation of HRS §§ 89-13(a)(1), (3), (5), (7) and (8).

Thereafter on June 6, 2006, Respondents filed a Motion to Dismiss the instant complaint contending that the instant complaint was time-barred and the Complainant failed to exhaust available contractual remedies.

On June 8, 2006, Complainant filed a Memorandum in Opposition to Respondents' Motion to Dismiss Filed on June 5, 2006. On June 13, 2006, Respondents filed a Reply to UPW's Memorandum in Opposition to Motion to Dismiss. Respondents also filed Supplemental Exhibits to the Motion to Dismiss on June 15, 2006 and June 20, 2006, respectively.

On June 28, 2006, the Board conducted a hearing on Respondents' Motion to Dismiss. 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. JAMES PROPOTNICK was for all relevant times, the Acting Director of the Department of Public Safety, State of Hawaii representing the "employer," within the meaning of HRS § 89-2, in dealing with public employees in bargaining unit 10 (Unit 10).
2. MARIE LADERTA was for all relevant times, the Director, Department of Human Resources Development, State of Hawaii representing the "employer," within the meaning of HRS § 89-2, in dealing with public employees in Unit 10.
3. 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.
4. 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.
5. Robert Mielke was for all relevant times the chief Union steward at the HCF. Declaration of Robert Mielke, attached to the UPW's Memorandum in Opposition to Respondents' Motion to Dismiss Filed on June 5, 2006, filed on June 8, 2006. Mielke attended arbitration hearings in connection with the Gordon Leslie promotion grievance, UPW Case LK-05-26 before Arbitrator

David Hagino during regular work hours without the loss of regular salary and wages on March 13 and 15, 2006, and April 3, 2006. Id. On May 17, 2006, the parties scheduled a further meeting and arbitration hearing for May 23, 2006. Id. Before the hearing, Mielke was informed by Clayton Frank (Frank), the warden at HCF, that he would be required to take three hours of vacation time to attend the arbitration. Id. Frank stated he received a directive from DHRD informing him that union shop stewards were not to be paid to attend arbitration hearings. Id.

6. On October 19, 2005, the UPW filed class grievances on behalf of Units 01 and 10 employees on the Employer's refusal to "permit Stewards time off with pay to attend arbitration hearings to discuss and/or resolve grievances." Respondents' Motion to Dismiss, filed on June 5, 1006, Exhibit (Ex.) A. The grievances were denied as untimely by LADERTA by letter dated November 3, 2005. Id., Ex. B.
7. The UPW requested arbitration of the grievances by letters dated November 21, 2005. Id., Exhibit C. The parties thereafter requested a list of arbitrators from the Board by letter dated April 28, 2006 (Id., Ex. D) and the Board provided a list of arbitrators, by letter dated May 4, 2006. Id., Ex. E.
8. The gravamen of UPW's instant complaint is that the Employer violated HRS §§ 89-13(a)(1), (3), (5), (7), and (8) by denying shop stewards time off from work with pay to attend arbitration hearings. This is the same issue raised by the grievances filed by the UPW against the Employer on or about October 19, 2005.
9. Based on the record, the UPW knew or should have known about the alleged violations of the Unit 10 contract and Chapter 89 on or about October 19, 2005 when it filed class grievances on behalf of affected Unit 01 and 10 employees complaining of the Employer's refusal to permit stewards time off with pay to attend arbitration hearings and to resolve grievances. Thus, the instant complaint filed on May 30, 2006 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 that UPW knew or should have known about the alleged statutory and contractual violations on or about October 19, 2005 when it filed grievances on behalf of affected Unit 01 and 10 employees based on the Employer’s refusal to permit shop stewards time off with pay to attend arbitration hearings. Thus, the Board majority concludes the instant complaint filed on May 30, 2006 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, in part, from the foregoing decision by the majority of the Board because I believe the alleged violations of HRS §§ 89-13(a)(1) interference and (a)(3) discrimination are timely as to Mielke. In addition, I believe there are material issues of fact as to the existence of a DHRD Policy regarding the denial of time off with pay to shop stewards to attend arbitration hearings and whether any such policy was communicated to the Union. Thus, I would not dismiss the HRS § 89-13(a)(5) refusal to bargain in good faith charge by the Union. I would, however, dismiss the HRS § 89-13(a)(8) alleged violations of the Unit 10 agreement because of the arbitration proceedings on the identical issues.



BRIAN K. NAKAMURA, Chair

Copies sent to:

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