STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of ESERA FONOTI-ULUFALE, Complainant, and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Respondent.	CASE NO. CU-01-251 ORDER NO. 2388 ORDER GRANTING RESPONDENT'S MOTION TO DISMISS COMPLAINT

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS COMPLAINT

On July 21, 2006, Complainant filed an unfair labor practice complaint ("Complaint") against Respondent, alleging bias, discrimination, that the union had been unfair in representing him, and that the union took the shop steward's side rather than his. The Complaint alleged that on March 4, 2006, the union steward swore at Complainant and questioned his working status; that the City and County of Honolulu had not done anything about his report of harassment by the union steward despite a policy of zero tolerance for harassment; and that on July 17, 2006, he was to report to the Pearl City yard without sufficient notice or reason.

On July 28, 2006, Respondent filed its answer to the Complaint and filed a Motion to Dismiss the Complaint ("Motion") for lack of jurisdiction, failure to state a claim for relief, and failure to exhaust contractual remedies. Complainant did not file a response to Respondent's Motion.

On July 31, 2006, the Board sent notice to the parties that the Board would conduct a hearing on Respondent's Motion on August 15, 2006, at 11:30 a.m. in the Board's hearing room.

On August 15, 2006, the Board held a hearing on Respondent's Motion pursuant to Hawaii Revised Statutes ("HRS") §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules ("HAR") § 12-42-8(g)(3). Although the hearing was noticed for 11:30 a.m., the Board waited until 11:40 a.m. to commence the hearing, as Complainant failed to appear. The Board also attempted to contact the Complainant via telephone, but

was unable to contact him. Thereupon, the Board heard argument from Respondent's counsel.

After careful consideration of the record and argument presented, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The Complaint was filed on July 21, 2006.

2. The Complaint alleges that on March 4, 2006, the union steward swore at Complainant and questioned his working status; that the City and County had not done anything about his report of harassment by the union steward despite a policy of zero tolerance for harassment; and that on July 17, 2006, he was to report to the Pearl City yard without sufficient notice or reason.

3. Respondent's Motion was filed on July 28, 2006. According to the Certificate of Service attached to the Motion, the Motion was mailed to Complainant at the address listed in the Complaint.

4. On July 31, 2006, the Board mailed its Notice of Hearing on UPW's Motion to Dismiss, Filed on July 28, 2006 to Complainant at the address listed in the Complaint, by certified mail. The Board takes notice of its files which includes a Return Receipt indicating that Complainant received the hearing notice on August 10, 2006.

5. There is no evidence or allegation that Complainant pursued any contractual remedy regarding his harassment report, or his reporting to the Pearl City yard without adequate notice or reason, or that he requested Respondent to pursue the matters.

CONCLUSIONS OF LAW

1. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the complainant. See Yamane v. Pohlson, 111 Hawai`i 74, 81 137 P.3d 980, 987 (2006). Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. Id.

2. The applicable statutes and rules require that prohibited practice complaints be filed within 90 days of the alleged violation. The Board's HAR § 12-42-42 provides in relevant part:

> (a) A complaint that any public employer, public employee, or public organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation. (emphasis added).

3. Additionally, HRS § 89-14 provides 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[.]" In turn, HRS § 377-9, dealing with the prevention of unfair labor practices, clearly provides that, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." (HRS § 377-9(l)).

4. The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. This limitation is jurisdictional and provided by statute; accordingly, it may not be waived by either the Board or the parties. TriCounty Tel. Ass'n., Inc. v. Wyoming Public Service Comm'n., 910 P.2d 1359, 1361 (Wyo. 1996) (holding that, "As a creature of the legislature, an administrative agency has limited powers and can do no more than it is statutorily authorized to do"); see generally, HOH Corp. v. Motor Vehicle Industry Licensing Bd., Dept. of Commerce and Consumer Affairs, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) ("The law has long been clear that agencies may not nullify statutes").

5. Accordingly, with respect to the portion of the Complaint involving actions of the union steward on March 4, 2006, the Complaint is untimely.

6. Federal precedent has been used to guide the interpretation of state public employment law. See Poe v. Hawai`i Labor Relations Board, 105 Hawai`i 97, 101, 94 P.3d 652, 656 (2004) (citing Hokama v. University of Hawai`i, 92 Hawaii 268, 272 n.5, 990 P.2d 1150, 1154 n.5 (1999)).

7. A "hybrid § 301" suit under the federal Labor Management Relations Act comprises two causes of action: suit against the employer for a breach of collective bargaining agreement, and suit against the union for breach of its duty of fair representation. See DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 164 (1983).

8. As a general rule, members of a collective bargaining unit must first exhaust contractual grievance procedures before bringing an action for breach of the collective bargaining agreement. This requirement applies with equal force to claims brought against a union for breach of the duty of fair representation. Carr v. Pacific Maritime Ass'n., 904 F.2d 1313, 1317 (9th Cir. 1990).

9. The remaining allegations in the present Complaint appear to comprise a "hybrid" action involving the City and County's failure to act on Complainant's report of harassment by the union steward despite a policy of zero tolerance for harassment and Complainant's having to report to the Pearl City yard without sufficient notice or reason, and presumably Respondent's breach of duty of fair representation for not assisting in or pursuing Complainant's disputes with the City and County. However, there is no evidence or allegation that Complainant pursued a grievance on those matters, or requested Respondent's assistance.[1] Accordingly, Complainant has failed to exhaust contractual remedies.

10. Even assuming, arguendo, that the Complaint is not intended to allege a hybrid action, Complainant nevertheless fails to state a claim upon which relief can be granted.

11. Complainant has failed to allege any facts or conduct by Respondent to support a claim of an unfair labor practice or breach of duty of fair representation against Respondent. Allegations in a complaint alleging a breach of a union's duty of fair representation must contain more than conclusory statements alleging improper representation; supporting facts showing discriminatory conduct must be stated. See Williams v. General Foods Corp., 492 F.2d 399, 405 (7th Cir. 1974). The present Complaint fails to allege facts sufficient to support a breach of duty claim against Respondent.

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[1]HRS § 89-8(b) provides:

> 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.

ORDER

The Board hereby grants Respondent's Motion to Dismiss the instant prohibited practice Complaint.

DATED: Honolulu, Hawaii, August 16, 2006.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

EMORY J. SPRINGER, Member

SARAH R. HIRAKAMI, Member

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