

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of

RICHARD T. BILAN,

Complainant,

and

UNITED PUBLIC WORKERS, AFSCME,  
LOCAL 646, AFL-CIO,

Respondent.

CASE NO. CU-01-258

ORDER NO. 2459

ORDER GRANTING RESPONDENT  
UPW'S MOTION TO DISMISS  
AND/OR FOR SUMMARY  
JUDGMENT

ORDER GRANTING RESPONDENT UPW'S  
MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

On June 8, 2007, Complainant filed a prohibited practice complaint ("Complaint") against Respondent, alleging Respondent violated his rights; Respondent did not follow union procedures leading to an arbitration; Complainant was misrepresented by Respondent; and that Respondent denied Complainant's arbitration.

On June 14, 2007, Respondent filed its answer to the Complaint and filed a Motion to Dismiss and/or for Summary Judgment ("Motion"), asserting lack of jurisdiction, failure to state a claim for relief, and that there are no genuine issues of material fact in dispute and the union is entitled to judgment as a matter of law. Specifically, Respondent argues that the Complaint is untimely, the Complaint fails to contain the basic requirements for a claim of breach of duty of fair representation, and the Complaint fails to allege a violation of the collective bargaining agreement.

On July 3, 2007, the Board sent notice to the parties that the Board would conduct a hearing on Respondent's Motion on July 24, 2007, at 10:30 a.m.

On July 24, 2007, 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). Present at the hearing were Complainant, pro se, and Herbert R. Takahashi, Esq., for Respondent.

For the following reasons, the Board finds that the Complaint is untimely, and accordingly dismisses the Complaint. The Board need not and does not reach the remaining issues raised in the Motion.

### FINDINGS OF FACT

1. Respondent is an employee organization and the exclusive bargaining representative, within the meaning of HRS § 89-2, of employees included in bargaining unit 01.
2. Complainant was a dues-paying member of Respondent and included in bargaining unit 01.
3. The Complaint was filed on June 8, 2007.
4. The Complaint alleges that on March 7, 2007, Complainant visited Respondent and spoke to Irene Pu`uohau-Rodrigues regarding Complainant's arbitration. Ms. Pu`uohau-Rodrigues directed Complainant to Marty Fernandez who told him to call Dayton Nakanelua, State Director, regarding the arbitration. Complainant left a message for Mr. Nakanelua to call him back, but did not receive a response. On May 18, 2007, Complainant's wife called Respondent's attorney, Michael Wong, regarding Complainant's arbitration. Complainant's wife left a message to have Mr. Wong call Complainant back; Mr. Wong did not return the call.
5. By letter dated May 16, 2005, the City and County of Honolulu ("Employer") notified Complainant of his discharge.
6. On May 26, 2005, Respondent commenced an investigation of the grievance. On May 31, 2005, Respondent filed a grievance challenging Complainant's discharge.
7. The grievance was processed through various steps of the grievance procedure set forth in the Unit 01 collective bargaining agreement. Employer and Respondent mutually agreed to extend the time limits for Respondent to file a notice of intent to arbitrate until September 9, 2005.
8. On or about August 18, 2005, Respondent conducted a confidential review and assessment of the grievance.
9. On or about August 30, 2005, Employer submitted a settlement proposal in the grievance. Respondent presented the proposal to Complainant along

with a candid assessment of the merits of the grievance. Complainant rejected Employer's proposal and indicated that he would be pursuing his own legal action against Employer.

10. By letter dated September 8, 2005, Respondent notified Complainant that it would not be pursuing the grievance further.
11. On or about October 28, 2005, Complainant filed an action against Employer in the United States District Court, District of Hawaii ("District Court").
12. Following Respondent's notice that it would not be pursuing the grievance further, Complainant obtained private legal counsel and was represented by his private counsel in the District Court proceedings.
13. In the present case, Complainant was notified on September 8, 2005, that Respondent would not process Complainant's grievance to arbitration. The present Complaint, filed on June 8, 2007, is untimely.

#### 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. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter, "relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (Hawai'i App. 1995), *aff'd*, 80 Hawai'i 118, 905 P.2d 624 (1995).
3. The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id.

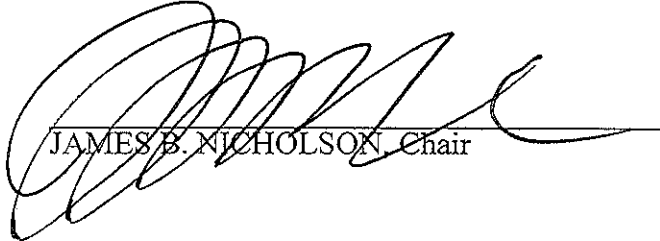
4. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. Id.
5. The applicable statutes and rules require that prohibited practice complaints be filed within 90 days of the alleged violation. HAR § 12-42-42 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).
6. 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).
7. 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. Tri County 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”).
8. The gravamen of the instant complaint is that the UPW breached its duty of fair representation or otherwise violated Complainant’s rights by refusing to arbitrate his grievance. Complainant was notified on or about September 8, 2005, that Respondent would not be pursuing the grievance any further. The present Complaint was filed on June 8, 2007. Accordingly, the Complaint is untimely.
9. Because the Board dismisses the present Complaint as untimely, the Board need not decide the remaining issues raised in the Motion.

ORDER

The Board hereby grants Respondent's Motion to Dismiss and/or for Summary Judgment in the instant prohibited practice Complaint.

DATED: Honolulu, Hawaii, July 25, 2007.

HAWAII LABOR RELATIONS BOARD

  
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JAMES B. NICHOLSON, Chair

  
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EMORY J. SPRINGER, Member

  
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SARAH R. HIRAKAMI, Member

Copies sent to:

Richard T. Bilan  
Herbert R. Takahashi, Esq.