

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

ANTHONY R.K. HO,

Complainant,

and

DEPARTMENT OF ACCOUNTING AND
GENERAL SERVICES, State of Hawaii;
RUSS SAITO, State Comptroller,
Department of Accounting and General
Services, State of Hawaii; GLENN OKADA,
District Engineer, Big Island, Department of
Accounting and General Services, State of
Hawaii; and CHESTER TOMONO, Hilo
Baseyard Foreman, Department of
Accounting and General Services, State of
Hawaii,

Respondents.

CASE NO. CE-01-682

ORDER NO. 2547

ORDER GRANTING RESPONDENTS'
MOTION TO DISMISS, FILED ON
JULY 31, 2008

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On July 22, 2008, Complainant ANTHONY R.K. HO (HO), pro se, filed a Prohibited Practice Complaint (Complaint) against the DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES, State of Hawaii; RUSS SAITO (SAITO), State Comptroller, Department of Accounting and General Services, State of Hawaii; GLENN OKADA (OKADA), District Engineer, Big Island, Department of Accounting and General Services, State of Hawaii; and CHESTER TOMONO (TOMONO), Hilo Baseyard Foreman, Department of Accounting and General Services, State of Hawaii (collectively Employer or Respondents) with the Hawaii Labor Relations Board (Board). HO alleged the following: 2003 to present. Allegations consist of workplace violence/mistreatment of the men, not addressing the problems or doing a proper investigation, forging accident reports, continuous harassment, retaliation, disparate treatment, slander, no hazard assessment on the job, stealing, gambling, child porn, covering up all of above by management.

On July 31, 2008, Respondents filed a Motion to Dismiss with the Board contending that the Complainant failed to state sufficient facts upon which relief may be granted; Complainant failed to identify the statutes which were allegedly violated; the

allegations of the complaint were untimely; Complainant failed to state a claim for relief; and failed to exhaust contractual remedies.

On August 27, 2008, the Board conducted a prehearing/settlement conference in this matter and a hearing on Respondents' motion to dismiss complaint by conference call. The Board noted that Complainant did not file a prehearing/settlement conference statement or a response to Respondents' motion to dismiss with the Board. The Board permitted HO to orally respond to Respondents' motion to dismiss complaint. Based upon a consideration of the record and the arguments made, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. HO is an employee, within the meaning of Hawaii Revised Statutes (HRS) § 89-2,¹ of the Department of Accounting and General Services, State of Hawaii and works in the Hilo baseyard. HO is a member of bargaining Unit 01.
2. Respondents are or were, at all times relevant to these proceedings, representatives of the public employer within the meaning of HRS § 89-2.²
3. In their motion to dismiss, Respondents contend that the Complaint fails to state sufficient facts to allege a prohibited practice; fails to identify the statutory sections violated; alleges facts that are time-barred; fails to state a claim for relief; and the Board lacks jurisdiction over claims which are subject to the grievance procedure.

¹HRS § 89-2 provides in relevant part:

“Employee” or “public employee” means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section 89-6(g).

²HRS § 89-2 provides in relevant part:

“Employer” or “public employer” means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees.

4. In his Complaint, HO alleged: [that from] 2003 to present. Allegations consist of workplace violence/mistreatment of the men, not addressing the problems or doing a proper investigation, forging accident reports, continuous harassment, retaliation, disparate treatment, slander, no hazard assessment on the job, stealing, gambling, child porn, covering up all of above by management.
5. At the hearing held on August 27, 2008, the Board provided HO with the opportunity to elaborate on the allegations in this complaint and to specify any dates or details of any incidents which would bring the matters within the Board's jurisdiction.
6. In his argument to the Board, HO alleged there have been workplace violence incidents against him; forged accident reports; continued harassment since 2003; child pornography, mistreatment; health and safety issues regarding asbestos and lead exposure; an investigation at the baseyard by the Attorney General's Office; and expressed frustration because of his working conditions. HO mentioned, without additional detail, that he would "dfr"³ his union and that he felt he was being retaliated against because of his grievances.
7. The Board finds that the Complaint did not identify any specific incident which occurred within the 90 days prior to the filing of the instant complaint which would give rise to the commission of a prohibited practice under HRS § 89-13.⁴ In his argument to the Board, HO did not provide any

³The Board construes HO's reference to "dfr" to mean that he would file a complaint alleging a breach of the "duty of fair representation" by the union.

⁴HRS § 89-13, Prohibited practices; evidence of bad faith.

(a) It shall be a prohibited practice for a public employer or its designated representatives wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
- (2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;
- (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;
- (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any

factual details supporting the allegations in his Complaint but referred to being retaliated against because of his grievances and the possibility of his filing a “dfr” case against the union. While these allegations may form the basis of a prohibited practice, they are not part of the instant Complaint and HO did not provide any specific details underlying his conclusory statements to the Board.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint pursuant to HRS §§ 89-5 and 89-14.
2. 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. 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. See Yamane v. Pohlson, 111 Hawai'i 74, 81 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).
3. HRS § 377-9(1), made applicable to the Board by HRS § 89-14, provides: No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence. Similarly, Hawaii Administrative Rules (HAR) § 12-42-42(a) provides: A complaint that any

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- information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;
- (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
 - (6) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;
 - (7) Refuse or fail to comply with any provision of this chapter;
 - (8) Violate the terms of a collective bargaining agreement;
 - (9) Replace any nonessential employee for participating in a labor dispute; or
 - (10) Give employment preference to an individual employed during a labor dispute and whose employment termination date occurs after the end of the dispute, over an employee who exercised the right to join, assist, or engage in lawful collective bargaining or mutual aid or protection through the labor organization involved in the dispute.

public employer, public employee, or employee 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.

4. HAR § 12-42-42(b) provides:

A prohibited practice complaint shall be prepared on a form furnished by the board. The original and five copies shall be filed with the board, and the board shall serve a copy of the complaint upon the person charged.

5. The Board's Prohibited Practice Complaint form provides, in part:

5. Allegations

The Complainant alleges that the above-named respondent(s) has (have) engaged in or is (are) engaging in a prohibited practice or practices within the meaning of the Hawaii Revised Statutes, Section 89-13. (Specify in detail the particular alleged violation, including the subsection or subsections of the Hawaii Revised Statutes, Section 89-13, alleged to have been violated, together with a complete statement of the facts supporting the complaint, including specific facts as to names, dates, times, and places involved in the acts alleged to be improper.)

6. In reviewing the instant complaint, and construing the allegations in the light most favorable to Complainant, the Board concludes that it appears beyond doubt that HO cannot prove any set of facts which would entitle him to relief for violations of HRS § 89-13 for workplace violence incidents, continuous harassment, disparate treatment, slander, no hazard assessment on the job, stealing, gambling, child porn, forging accident reports, health and safety issues, and coverups by management. The Board's prohibited practice jurisdiction is limited to the provisions of HRS § 89-13. See footnote 3. Thus, the Board concludes HO failed to state a claim for relief that these incidents could give rise to prohibited practices under HRS § 89-13 and fall within the Board's statutory 90-day time frame. HRS § 377-9(1). Accordingly, the Board hereby dismisses the Complaint.
 7. In his statements to the Board, HO alleged that he was retaliated against because of his grievances and he might "def" the union. These allegations, if supported in a timely, sufficiently detailed complaint, could state a claim for relief under HRS §§ 89-13(a) or (b). However, the Board refrains from

addressing the sufficiency of these claims as they were not specifically raised in the Complaint and therefore not subject to the instant motion to dismiss.

ORDER

For the foregoing reasons, the Board grants Respondents' motion to dismiss the Complaint, filed on July 31, 2008.

DATED: Honolulu, Hawaii, September 5, 2008.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair

EMORY J. SPRINGER
EMORY J. SPRINGER, Member



SARAH R. HIRAKAMI, Member

Copies sent to:

Anthony R.K. Ho
Claire W.S. Chinn, Deputy Attorney General.