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STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

ROWENA INABA,

Complainant,

and

RONALD IBARRA, Administrative Judge, Circuit Court of the Third Circuit, State of Hawaii; LESTER OSHIRO, Chief Administrator, Circuit Court of the Third Circuit, State of Hawaii; WESLEY SUWA, Deputy Administrator, Circuit Court of the Third Circuit, State of Hawaii; DAWN WEST, Administrator, Circuit Court of the Third Circuit, State of Hawaii; RODNEY MAEDA, Deputy Administrator, Circuit Court of the Third Circuit, State of Hawaii; and LINDALANI MOCKCHEW, Supervisor, Circuit Court of the Third Circuit, State of Hawaii,

Respondents.

CASE NO. CE-03-691

ORDER NO. 2587

ORDER DENYING COMPLAINANT'S REQUEST FOR CONTINUANCE AND GRANTING RESPONDENTS' MOTION TO DISMISS

ORDER DENYING COMPLAINANT'S REQUEST FOR CONTINUANCE AND GRANTING RESPONDENTS' MOTION TO DISMISS

On September 26, 2008, Complainant ROWENA INABA (Complainant) filed a prohibited practice complaint (Complaint) against Respondents RONALD IBARRA (Ibarra), Administrative Judge, Circuit Court of the Third Circuit, State of Hawaii; LESTER OSHIRO (Oshiro), Chief Administrator, Circuit Court of the Third Circuit, State of Hawaii; WESLEY SUWA (Suwa), Deputy Administrator, Circuit Court of the Third Circuit, State of Hawaii; DAWN WEST (West), Administrator, Circuit Court of the Third Circuit, State of Hawaii; RODNEY MAEDA (Maeda), Deputy Administrator, Circuit Court of the Third Circuit, State of Hawaii; and LINDALANI MOCKCHEW (Mockchew), Supervisor, Circuit Court of the Third Circuit, State of Hawaii (collectively Respondents).

The Complaint alleges continuous harassment of Complainant and creating a hostile environment; specifically, the Complaint alleges, inter alia, that Complainant

“filed a complaint and the harassment has never stopped”; and that management “is constantly looking for thing to write [Complainant] up for daily and they constantly harass [Complainant] with threats of reprimands, suspension and termination.” The Complaint alleges favoritism, and that another employee displays anger and will not do work yet is a favorite of management who is not written up, and another employee displays anger and frustration and speaks in a tone that is unprofessional, yet nothing is done. The Complaint further alleges that investigators were coerced to rule in favor of another employee following an incident for which Complainant received a three-day suspension; that another employee was advised to file a complaint against Complainant; that Complainant was given a written reprimand for her statement of an incident involving another employee; that in a scary incident, another employee was speeding in the parking lot and could have hit Complainant; that management wants to get Complainant fired; and that in the most recent incident, Complainant is accused of giving confidential information, which is false, and that the information Complainant sought is part of a judgment and available on the internet, and now Complainant is being threatened with termination. The details of Complainant’s allegations are contained in the Complaint.

On or about October 15, 2008, the Board notified the parties that a prehearing/settlement conference was scheduled in this case for October 29, 2008, and the hearing in this case was scheduled for November 18, 2008. On October 16, 2008, Respondents filed a Motion to Dismiss the Complaint based upon “Complainant’s failure to file a timely complaint and the failure to exhaust contractual remedies.” On or about October 21, 2008, Complainant requested a continuance; Respondents had no objection to the continuance. Pursuant to Complainant’s request, the Board continued the prehearing/settlement conference to December 10, 2008. On October 27, 2008, Complainant filed her response to Respondents’ Motion to Dismiss. At the December 10, 2008, prehearing/settlement conference, Complainant asked for a continuance of the hearing on Respondents’ Motion to Dismiss to give her time to seek counsel. Pursuant to Complainant’s request, the Board rescheduled the hearing on Respondents’ Motion to Dismiss to January 21, 2009. On January 20, 2009, the Board received a request from Volunteer Legal Services to continue the hearing on Respondent’s Motion to Dismiss to give them time to find a voluntary attorney to represent Complainant. On January 21, 2009, the Board heard arguments on the Motion to Dismiss, and took under advisement Complainant’s request to further continue proceedings in this case.

For the reasons discussed below, the Board denies Complainant’s request for further continuance, and grants Respondents’ Motion to Dismiss.

FINDINGS OF FACT

1. At all times relevant to the Complaint, Complainant was or is employed as a clerk at the Circuit Court of the Third Circuit, State of Hawaii, and is a public employee¹ and a member of bargaining unit 03.²
2. At all times relevant to the Complaint, Respondent Ibarra was or is the Administrative Judge, Circuit Court of the Third Circuit, State of Hawaii; Respondent Oshiro was or is the Chief Administrator, Circuit Court of the Third Circuit, State of Hawaii; Respondent Suwa was or is the Deputy Administrator, Circuit Court of the Third Circuit, State of Hawaii; Respondent West was or is the Administrator, Circuit Court of the Third Circuit, State of Hawaii; Respondent Maeda was or is the Deputy Administrator, Circuit Court of the Third Circuit, State of Hawaii; and Respondent Mockchew was or is a Supervisor, Circuit Court of the Third Circuit, State of Hawaii.
3. At all times relevant to the Complaint, Respondents were or are representatives of the public employer within the meaning of Hawaii Revised Statutes (HRS) § 89-2.³

¹Pursuant to Hawaii Revised Statutes (HRS) § 89-2, "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)" (§ 89-6 governs appropriate bargaining units).

²HRS § 89-6(a) provides in relevant part:

All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

* * *

(3) Nonsupervisory employees in white collar positions[.]

³HRS § 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. On September 26, 2008, Complainant filed her Complaint against Respondents with the Board.
5. The Complaint alleges continuous harassment of Complainant and creating a hostile environment; specifically, the Complaint alleges, *inter alia*, that Complainant “filed a complaint and the harassment has never stopped”; and that management “is constantly looking for things to write [Complainant] up for daily and they constantly harass [Complainant] with threats of reprimands, suspension and termination.” The Complaint alleges favoritism, and that another employee displays anger and will not do work and yet is a favorite of management who is not written up, and another employee displays anger and frustration and speaks in a tone that is unprofessional, yet nothing is done. The Complaint further alleges that investigators were coerced to rule in favor of another employee following an incident for which Complainant received a three-day suspension; that another employee was advised to file a complaint against Complainant; that Complainant was given a written reprimand for her statement of an incident involving another employee; that in a scary incident, another employee was speeding in the parking lot and could have hit Complainant; that management wants to get Complainant fired; and that in the most recent incident, Complainant is accused of giving confidential information, which is false, and that the information Complainant sought is part of a judgment and available on the internet, and now Complainant is being threatened with termination. The details of Complainant’s allegations are contained in the Complaint.
6. On October 13, 2008, Respondents filed their answer to the Complaint.
7. On or about October 15, 2008, the Board notified the parties that a prehearing/settlement conference was scheduled in this case for October 29, 2008, and the hearing in this case was scheduled for November 18, 2008.
8. On October 16, 2008, Respondents filed a Motion to Dismiss the Complaint based upon “Complainant’s failure to file a timely complaint and the failure to exhaust contractual remedies.”
9. On October 17, 2009, Respondents filed their PreHearing Statement and a Supplement to Motion to Dismiss Prohibited Practice Complaint.
10. On or about October 21, 2008, Complainant requested a continuance of these proceedings; Respondents had no objection to the continuance. Pursuant to Complainant’s request, the Board continued the prehearing/settlement conference to December 10, 2008.

11. On October 27, 2008, Complainant filed her response to Respondents' Motion to Dismiss.
12. On December 8, 2009, Complainant filed her Pre-Trial Statement.
13. At the December 12, 2008, prehearing/settlement conference, Complainant asked for continuance of the hearing on Respondents' Motion to Dismiss to give her time to seek counsel. Pursuant to Complainant's request, the Board rescheduled the hearing on Respondents' Motion to Dismiss to January 21, 2009.
14. On January 20, 2009, the Board received a request from Volunteer Legal Services to continue the hearing on Respondent's Motion to Dismiss to give them time to find a voluntary attorney to represent Complainant.
15. On January 21, 2009, the Board heard arguments on the Motion to Dismiss pursuant to HRS § 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3), and took under advisement Complainant's request to further continue proceedings in this case.
16. On January 21, 2009, Complainant filed Supplemental Information regarding the Complaint before the Board.
17. On January 22, 2009, Respondents filed their Second Supplement to Motion to Dismiss Prohibited Practice Complaint.
18. On January 26, 2009, Complainant filed her Response to Second Supplemental Motion to Dismiss.
19. The Complaint alleges incidents that occurred in 2006 (written reprimand for being unprofessional, where Respondent Suwa "went into a rage and started yelling" as he read the reasons for the reprimand); in 2007 (oral reprimand from Respondent West for stating facts of what occurred in the incident involving the apple pie and Complainant having to do work for another employee); in February of 2008 (another employee blocked Complainant's access to her desk, and management, without consulting Complainant, moved the desks so that the other employee sat behind Complainant instead of in front of her; Complainant received a three-day suspension for alleged inappropriate behavior violating the Judiciary's Violence in the Workplace Policy); in March of 2008 (where Respondent Mokchew wrote up Complainant for not being nice to her); and on May 8, 2008 (Complainant received a written reprimand from Respondent Suwa for behaving inappropriately to Respondent Mockchew). These allegations

do not fall within the Board's ninety-day statute of limitations and are not timely filed.

20. The Complaint also alleges that on June 30, 2008, another employee was speeding in the parking lot and could have hit Complainant, putting Complainant in fear; and, that Complainant is accused of giving confidential information, which is false, that the information Complainant sought is part of a judgment and available on the internet, that now Complainant is being threatened with termination, and that Complainant received a letter from Respondent Maeda on September 23, 2008, regarding this incident. These allegations fall within the ninety-day statute of limitations for bringing a prohibited practice complaint.
21. The Unit 03 collective bargaining agreement contains a grievance procedure culminating in final and binding arbitration.
22. On August 29, 2007, Complainant's union filed a grievance on her behalf regarding the oral reprimand; on December 12, 2007, the union issued a notice to arbitrate the grievance; and, on September 8, 2008, the grievance was withdrawn.
23. On June 5, 2008, the union filed a grievance on Complainant's behalf regarding the written reprimand for alleged inappropriate behavior toward her supervisor; the grievance progressed through the grievance procedure; and, by letter dated January 16, 2009, the union supplied the employer with Notice of Intent to Arbitrate the grievance.
24. On June 3, 2008, the union filed a grievance on Complainant's behalf regarding the three-day suspension for alleged inappropriate behavior violating the Judiciary's Violence in the Workplace Policy; the grievance progressed through the grievance procedure; and, by letter dated January 16, 2009, the union supplied the employer with Notice of Intent to Arbitrate the grievance.
25. The Board finds that Complainant's allegations that occurred more than ninety days prior to September 26, 2009, are time-barred. To the extent that the grievances involving a written reprimand and a three-day suspension are still pending, the Board finds that Grievant has not alleged the union breached its duty of fair representation in its handling of these grievances, and Complainant has not exhausted her contractual remedies.
26. With respect to Complainant's timely allegations that on June 30, 2008, another employee was speeding in the parking lot and could have hit Complainant, putting Complainant in fear, the Board finds, viewing the

evidence in the light most favorable to Complainant, that Complainant fails to state a claim for relief of a prohibited practice for a statutory violation of HRS Chapter 89 or a contractual claim which would be subject to the grievance procedure.

27. With respect to Complainant's timely allegations that Complainant is accused of giving confidential information, which is false, that the information Complainant sought is part of a judgment and available on the internet, that now Complainant is being threatened with termination, and that Complainant received a letter from Respondent Maeda on September 23, 2008, regarding this incident that placed Complainant on leave pending the investigation, the Board finds, viewing the evidence in the light most favorable to Complainant, that Complainant fails to state a claim for relief of a prohibited practice for a statutory violation of HRS Chapter 89 or a contractual claim which was subject to the grievance procedure. It also appears that the issue is not ripe for adjudication as no adverse action has been taken against Complainant based upon the investigation being conducted.
28. The Board further finds that Complainant has not sufficiently alleged a claim upon which relief can be granted for retaliation for engaging in protected activity pursuant to HRS § 89-13(a).
29. The Board finds that it provided Complainant with sufficient time to attempt to find an attorney, and in its discretion denies Complainant's request for further continuance.

CONCLUSIONS OF LAW AND DISCUSSION

1. The Board has jurisdiction over the instant 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. However, when considering a motion to dismiss [pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(1)] the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavit and

testimony, to resolve factual disputes concerning the existence of jurisdiction. Id. (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).

4. During the course of considering a motion to dismiss, if matters outside the pleadings are presented to and not excluded by the Board, the Board may treat the motion as one for summary judgment and dispose of it accordingly, giving all parties reasonable opportunity to present all material made pertinent to such motion. See Hawaii Rules of Civil Procedure (HRCP) Rule 12(b); Sierra Club v. Dept. of Transportation, 115 Hawai'i 299, 312-13, 167 P.3d 292, 305-306 (2007).
5. 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 (Haw. App. 1995), *aff'd* 80 Hawai'i 118, 905 P.2d 624.
6. 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.
7. 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.
8. A prohibited practice complaint must be filed within ninety days of the alleged violation. HAR § 12-42-42(a); HRS §§ 89-14 and 377-9(1).
9. Pursuant to HRS § 89-14, "[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(b) provides in relevant part that the board "shall fix a time for the hearing on the complaint, which shall be not less than ten nor more than forty days after the filing of the complaint or amendment thereof[.]"
10. 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").

11. Accordingly, to the extent Complainant asserts allegations that occurred more than ninety days prior to September 26, 2008, such allegations are untimely and the Board hereby dismisses those allegations; however, the Complaint also contains timely allegations, and accordingly, the Board does not dismiss the entire Complaint based upon the timeliness argument.
12. With respect to Complainant's claim of retaliation, favoritism, and violence in the workplace, HRS § 89-13(a) provides (emphasis added):

It shall be a prohibited practice for a public employer or its designated representative 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 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.

13. Complainant did not specify which of the foregoing provisions were allegedly violated by Respondents' actions. Viewing the facts in the record in a light most favorable to Complainant, the Board concludes that Inaba failed to establish that her rights protected by HRS Chapter 89 were interfered with or that she was discharged or otherwise discriminated against because of activity that is protected under HRS Chapter 89. Complainant filed grievances (or the union did so on her behalf), and made complaints to management, but there is no assertion of facts to show Complainant was discriminated against, or other employees shown favoritism, because Complainant has informed, joined, or chose to be represented by the union. Finally, Inaba complains of alleged workplace violence which does not fall within the Board's jurisdiction absent a showing that it is encompassed within the purview of HRS Chapter 89.
14. With respect to the pending grievances and matters that may be grieved pursuant to the collective bargaining agreement, remedies provided by the collective bargaining agreement should be pursued prior to bringing a prohibited practice complaint. The Hawaii Supreme Court, as well as this Board, has used federal precedent to guide its interpretation of state public employment law. Hokama v. University of Hawai'i, 92 Hawai'i 268, 272 n. 5, 990 P.2d 1150, 1154 n. 5 (1999). Based upon federal precedent, the Hawaii Supreme Court has held that it is "well-settled that an employee must

exhaust any grievance . . . procedures provided under a collective bargaining agreement before bringing a court action pursuant to the agreement.” Id., at 272, 990 P.2d at 1154. The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process, allowing parties to develop their own uniform mechanism of dispute resolution. It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means. Id. See, also, HSTA v. Department of Education, 1 HPERB 253, 261 (1972) (Case No. CE-05-41; Decision No. 22) (the Board has discretion to require the parties to utilize the contractual arbitration procedure); Poe v. Cayetano, 6 HLRB 55, 56 (1999) (Case No. CE-03-283; Decision No. 402) (the complainant must exhaust available contractual remedies prior to bringing a prohibited practice complaint against the employer alleging a violation of the collective bargaining agreement).

15. With respect to Complainant’s request for further continuance, a trial body’s decision to grant or deny a motion to continue is reviewed on appeal for abuse of discretion. Onaka v. Onaka, 112 Hawai’I 374, 378, 146 P.3d 89, 93 (2006). Here, on or about October 15, 2008, the Board notified the parties that a pre-hearing/settlement conference was scheduled in this case for October 29, 2008, and the hearing in this case was scheduled for November 18, 2008. On or about October 21, 2008, Complainant requested a continuance, and pursuant to Complainant’s request, the Board continued the prehearing/settlement conference to December 10, 2008. At the December 10, 2008, prehearing/settlement conference, Complainant asked for a continuance of the hearing on Respondents’ Motion to Dismiss to give her time to seek counsel. Pursuant to Complainant’s request, the Board rescheduled the hearing on Respondents’ Motion to Dismiss to January 21, 2009. On January 20, 2009, the day before the hearing on the Motion to Dismiss, the Board received a request from Volunteer Legal Services to continue the hearing to give them time to find a voluntary attorney to represent Complainant. Based upon the previous and continuances granted by the Board, and the lateness of the request for further continuance on January 20, 2009, the Board exercises its discretion and denies the request for further continuance.⁴

ORDER

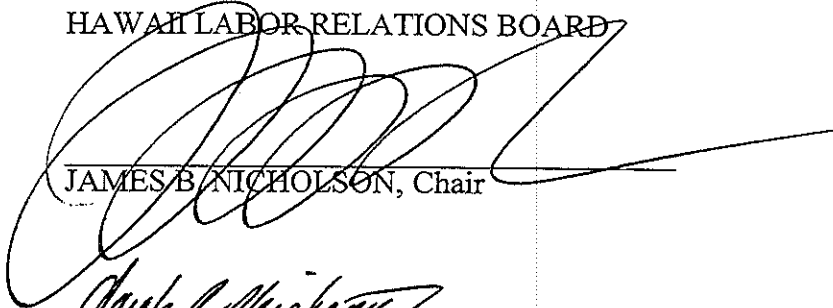
For the reasons discussed above, the Board denies Complainant’s request to further continue proceedings in this case, and grants Respondents’ Motion to Dismiss.

⁴The Board notes that ordinarily, the Board “shall fix a time for the hearing on the complaint, which shall be not less than ten nor more than forty days after the filing of the complaint or amendment thereof[.]” See, HRS § 377-9(b).

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RESPONDENTS' MOTION TO DISMISS

DATED: Honolulu, Hawaii, February 11, 2009.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SARAH R. HIRAKAMI, Member

Copies sent to:

Rowena Inaba
Jeffrey A. Keating, Deputy Attorney General