

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

SHELLFORD CANTAN,

Complainant,

and

DEPARTMENT OF ENVIRONMENTAL
MANAGEMENT, Solid Waste Division,
County of Hawaii; MARGARET ALMADA,
Personnel Management Specialist;
Department of Environmental Management,
County of Hawaii; BOBBY GONSALVES,
Solid Waste Superintendent, Solid Waste
Division, Department of Environmental
Management, County of Hawaii; MICHAEL
DWORSKY, Solid Waste Division Chief,
Solid Waste Division, Department of
Environmental Management, County of
Hawaii; MICHAEL DENIZ, Solid Waste
Supervisor, Kona Baseyard, Solid Waste
Division, Department of Environmental
Management, County of Hawaii; BOBBY
JEAN LEITHEAD TODD, Deputy Director,
Department of Environmental Management,
County of Hawaii; and LONO TYSON,
Director, Department of Environmental
Management, County of Hawaii,

Respondents.

CASE NOS.: CE-01-698
CU-01-272

ORDER NO. 2599

ORDER DISMISSING PROHIBITED
PRACTICE COMPLAINTS

In the Matter of

SHELLFORD CANTAN,

Complainant,

and

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO; and JUNE
RABAGO, Division Director, United Public
Workers, AFSCME, Local 646, AFL-CIO,

Respondents.

ORDER DISMISSING PROHIBITED PRACTICE COMPLAINTS

On January 20, 2009, Complainant SHELLFORD CANTAN (Complainant) filed prohibited practice complaint Case No. CE-01-698 against Respondents DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, Solid Waste Division, County of Hawaii; MARGARET ALMADA, Personnel Management Specialist; Department of Environmental Management, County of Hawaii; BOBBY GONSALVES, Solid Waste Superintendent, Solid Waste Division, Department of Environmental Management, County of Hawaii; MICHAEL DWORSKY, Solid Waste Division Chief, Solid Waste Division, Department of Environmental Management, County of Hawaii; MICHAEL DENIZ, Solid Waste Supervisor, Kona Baseyard, Solid Waste Division, Department of Environmental Management, County of Hawaii; BOBBY JEAN LEITHEAD TODD, Deputy Director, Department of Environmental Management, County of Hawaii; and LONO TYSON, Director, Department of Environmental Management, County of Hawaii (collectively County Respondents). Also on January 20, 2009, Complainant filed prohibited practice complaint Case No. CU-01-272 against Respondents UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, and JUNE RABAGO, Division Director, United Public Workers, AFSCME, Local 646, AFL-CIO (collectively Union Respondents). The Board, sua sponte, consolidated the prohibited practice complaints.

On January 27, 2009, Union Respondents filed their Answer and a Motion to Dismiss Complaint Filed on January 20, 2009 (Motion to Dismiss). On February 2, 2009, County Respondents filed their Answer and a Substantive Joinder to UPW's Motion to Dismiss Complaint Filed January 20, 2009, Filed on January 27, 2009.

On February 6, 2009, Union Respondents filed a Motion to Dismiss for Lack of Prosecution.

On March 2, 2009, pursuant to Hawaii Revised Statutes (HRS) §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3), the Board held a hearing on Union Respondents' Motion to Dismiss; County Respondents' Substantive Joinder to the Motion to Dismiss; and Union Respondents' Motion to Dismiss for Lack of Prosecution. At the hearing, Complainant appeared via telephone.

For the reasons discussed below, the Board dismisses the consolidated prohibited practice complaints as untimely.

FINDINGS OF FACT

1. At all relevant times, the UPW was or is an employee organization¹ and the exclusive bargaining representative, within the meaning of HRS § 89-2, of employees included in bargaining unit (Unit or BU) 01, composed of nonsupervisory employees in blue collar positions. See HRS § 89-6(1).
2. At all relevant times, Respondent June Rabago was or is a Division Director for the UPW, and its designated agent.
3. At all relevant times, County Respondents represent the interests of the Mayor of the County of Hawaii with respect to Complainant, and are therefore a public employer within the meaning of HRS § 89-2.²

¹HRS § 89-2 provides in relevant part:

“Employee organization” means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

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

4. The UPW and the County of Hawaii are parties to a Unit 01 collective bargaining agreement (CBA) which for all relevant times includes a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of the collective bargaining agreement.
5. Complainant is a public employee in the Solid Waste Division of the Department of Environmental Management, County of Hawaii.
6. On or about May 20, 2008, the Department of Environmental Management (Department) notified Complainant of a disciplinary suspension of forty hours for engaging in a verbal confrontation with his supervisor, contributing to the deterioration of employee morale, scavenging, and insubordination. Complainant was to serve the suspension from June 3, 2008, to June 6, 2008.
7. On May 23, 2008, a revised memorandum to Complainant was issued by the Department.
8. The UPW intervened on Complainant's behalf and initially sought to informally resolve the matter pursuant to the grievance provision contained in the CBA.
9. On June 4, 2008, the Department held a meeting with Complainant and Respondent Rabago to discuss the results of an investigation concerning activities at the Solid Waste Baseyard in Kona. The Department notified the UPW that it would not alter its decision to suspend Complainant for forty hours.
10. On June 12, 2008, the UPW filed a formal grievance on Complainant's behalf at Step 1 of the grievance procedure contained in the CBA. Also on June 12, 2008, the UPW submitted a request for information pursuant to the grievance procedure contained in the CBA.
11. On June 17, 2008, the Department informed Complainant he failed to comply with the suspension and instead came to work from June 3, 2008, to June 6, 2008, and that Complainant was to now serve the suspension from June 23, 2008, to June 26, 2008.

corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees.

12. On June 30, 2008, the Department provided a response to the UPW's June 12, 2008, request for information. The response included a 77-page confidential private investigator's report.
13. A Step 1 grievance meeting was held between the Department, the UPW, and Complainant on July 25, 2008.
14. Although a copy of the 77-page confidential report was not provided to Complainant, he was notified that the UPW received the report and was allowed to review the report prior to the Step 1 grievance meeting that was held on July 25, 2008. Complainant also reviewed the report after the Step 1 meeting.
15. The Department denied the Step 1 grievance on August 11, 2008.
16. On August 19, 2008, the UPW submitted the grievance to Step 2.
17. By letter dated September 10, 2008, the Department of Human Resources, County of Hawaii, rendered a decision at Step 2 that reduced the disciplinary suspension from forty hours to twenty hours.
18. On September 12, 2008, Complainant attempted to talk to the UPW's State Director concerning his grievance, but received no response.
19. On October 13, 2008,³ the Union decided to accept the remedy provided in the Step 2 letter dated September 10, 2008, and considered the grievance resolved. Complainant and the employer were notified in writing of the UPW's decision by letter dated October 13, 2008, and post-marked October 14, 2008.
20. The UPW considered the reduction in the disciplinary suspension by half to be a fair resolution of the grievance.
21. Complainant attempted to appeal the UPW's decision internally to the State Director of UPW. Complainant did not receive a response to this internal appeal until he received a letter from the UPW that was post-marked December 1, 2008.

³Pursuant to section 15.16 of the grievance procedure contained in the CBA, "[i]n the event the grievance is not resolved in Step 2, and the Union desires to submit the grievance to arbitration, the Union shall notify the Employer within thirty (30) calendar days after receipt of the Step 2 decision.

22. Complainant asserts that while he went to the grievance meetings with his UPW representative, he was "hammered" at the meetings with hearsay accusations and no dates were given to him. Complainant also filed a harassment complaint and a violence in the workplace complaint over his treatment at work, but the complaints didn't go anywhere; he went to a meeting with his union steward, but nothing was resolved. Additionally, Complainant was not given counseling or a written reprimand as progressive steps prior to the suspension. Complainant also asserts that the investigation was biased; that other people were scavenging and nothing happened to them; and that Complainant scavenged on his own time, not work time.
23. On January 20, 2009, Complainant filed prohibited practice complaint Case No. CE-01-698 against County Respondents, alleging, *inter alia*, that Complainant filed a workplace violence complaint; has been harassed at work; was denied an investigation report; and was suspended.
24. On January 20, 2009, Complainant filed prohibited practice complaint Case No. CU-01-272 against Union Respondents, alleging, *inter alia*, that Complainant requested but was denied an investigation report during a July 25, 2007, meeting.
25. The Board, *sua sponte*, consolidated the prohibited practice complaints.
26. On January 27, 2009, Union Respondents filed their Answer to the prohibited practice complaint and Motion to Dismiss. The Motion to Dismiss asserted (1) lack of jurisdiction due to untimely filing under HRS § 377-9(1); (2) failure to state a claim for relief; and (3) lack of a justiciable controversy or mootness.
27. On February 2, 2009, County Respondents filed their Answer to the prohibited practice complaint and a Substantive Joinder to UPW's Motion to Dismiss.
28. On February 6, 2009, Union Respondents filed a Motion to Dismiss for Lack of Prosecution, asserting that a response from Complainant to Union Respondents' Motion to Dismiss was due on February 5, 2009, but Complainant failed to file a timely response or opposition.
29. On February 17, 2009, the Board held a Prehearing/Settlement Conference in this matter. Union Respondents' counsel appeared in the Board's hearing room and Complainant and County Respondents' counsel appeared at the conference via telephone.

30. On March 2, 2009, pursuant to HRS §§ 89-5(i)(4) and (5), and HAR § 12-42-8(g)(3), the Board held a hearing on Union Respondents' Motion to Dismiss; County Respondents' Substantive Joinder to the Motion to Dismiss; and Union Respondents' Motion to Dismiss for Lack of Prosecution. At the hearing, Complainant and County Respondents appeared via telephone. Union Respondents' counsel appeared in the Board's hearing room.
31. The Board finds that the Complaint should not be dismissed for lack of prosecution. Although Complainant did not file a written response to the Motion to Dismiss or the County Respondents' Joinder in the Motion to Dismiss, Complainant did attend the Prehearing/Settlement Conference via telephone on February 17, 2009, and attended and presented argument via telephone at the Board's hearing on the Motion to Dismiss held on March 2, 2009.
32. The Board finds that the prohibited practice complaints against the Union Respondents and the County Respondents are untimely. All relevant acts occurred beyond the ninety-day statute of limitations for bringing a prohibited practice complaint. At the latest, Complainant's claims accrued following the UPW's October 13, 2008, letter informing Complainant that it accepted the employer's Step 2 decision and considered the grievance closed. Although Complainant attempted to internally appeal the UPW's decision, for which he received a written response post-marked December 1, 2008, such an internal appeal does not stay or stop the accrual of Complainant's claims. The Board finds that Complainant knew or should have known of the prohibited practices complained of on or around October 14, 2008. The prohibited practice complaints were not filed until January 20, 2009, which is 98 days later, and are therefore 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. 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)).

3. 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).

5. 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).
6. 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”).
7. In the present case, the prohibited practice complaints against the Union Respondents and the County Respondents are untimely. All relevant acts occurred beyond the ninety-day statute of limitations for bringing a prohibited practice complaint. At the latest, Complainant’s claims accrued following the UPW’s October 13, 2008, letter informing Complainant that it accepted the employer’s Step 2 decision and considered the grievance closed. Although Complainant attempted to internally appeal the UPW’s decision, for which he received a written response post-marked

December 1, 2008, such an internal appeal does not stay or ^{ant}stop the accrual of Complainant's claims. The Board finds that Complainant knew or should have known of the prohibited practices complained of on or around October 14, 2008. The prohibited practice complaints were not filed until January 20, 2009, which is 98 days later, and are therefore untimely.

8. Because the Board dismisses the consolidated prohibited practice complaints as untimely, the Board need not decide the remaining issues raised in the Motion to Dismiss.
9. With respect to the Motion to Dismiss for Lack of Prosecution, HAR § 12-42-8(g)(3), governing motions before the Board, provides in relevant part:
 - (iii) Answering affidavits, if any, shall be served on all parties and the original and five copies, with certificate of service on all parties shall be filed with the [B]oard within five days after service of the motion papers, unless the [B]oard directs otherwise.
10. A nonmoving party need not affirmatively oppose a dispositive motion in writing where the moving party has failed to meet its burden, because the motion will only be granted by the Board if appropriate. Here, Complainant's failure to file opposing affidavits may constitute an admission of the facts attested to in the Motion to Dismiss, but those facts must nevertheless establish that the moving party is entitled to dismissal of the Complaint. For example, Justice Simeon Acoba stated in a concurring opinion in GECC Financial Corp. v. Jaffarian, 79 Hawai'i 516, 525, 904 P.2d 530, 539 (App. 1995).

A party opposing summary judgment cannot rest on its pleadings if the moving party has satisfied its obligation of showing there is no genuine issue of material fact and it is entitled to a judgment as a matter of law. Miller v. Manuel, 9 Haw. App. 56, 65, 828 P.2d 286, 292 (1991). In a practical sense, the movant's burden amounts to establishing a prima facie case for relief. 10A C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure: Civil* § 2727, at 143 (2d ed. 1983). However, in situations where the moving party has failed to meet its burden, or its papers indicate that a genuine issue exists, the nonmoving party does not have to present affidavits or evidence countering the motion. *Id.* at 138-42.

Thus, the nonmoving party does not have to respond to a summary judgment motion if the movant fails to meet its burden because the motion will only be granted by the court "if appropriate[.]" Hawai'i Rules of Civil Procedure Rule 56(e).

See also, Arakaki v. SCD-Olanani Corp., 110 Hawai'i 1, 6, 129 P.3d 504, 509 (2006). (Absent a local rule to the contrary, a party need not affirmatively oppose a motion for summary judgment that fails to show *prima facie* (1) that the undisputed facts foreclose genuine issues as to any material facts, and (2) that the moving party is entitled to judgment as a matter of law).

12. In the present case, the Board dismisses the prohibited practice complaints because the Motion to Dismiss established that the complaints are untimely; however, the Board does not dismiss the complaints merely because the Complainant failed to file opposing affidavits.
13. Furthermore, Complainant appeared via telephone at the Prehearing/Settlement Conference on February 17, 2009, and appeared and presented oral argument via telephone at the hearing on the Motion to Dismiss on March 2, 2009. The Board concludes that under the facts of this case, dismissal for lack of prosecution is not warranted.

ORDER

For the reasons discussed above, the Board hereby dismisses the instant Prohibited Practice Complaints.

DATED: Honolulu, Hawaii, March 24, 2009

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member

SHELLFORD CANTAN v. UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, et al
CASE NO. CU-01-272
SHELLFORD CANTAN v. DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,
SOLID WASTE DIVISION, COUNTY OF HAWAII, et al.
CASE NO. CE-01-698
ORDER NO. 2599
ORDER DISMISSING PROHIBITED PRACTICE COMPLAINTS


SARAH R. HIRAKAMI, Member

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