

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

TEDDY S. LLANA,

Complainant,

and

OAHU COMMUNITY CORRECTIONAL
CENTER, Department of Public Safety, State
of Hawaii; IRENE RODRIGUES, Business
Agent, Hawaii Government Employees
Association, AFSCME, Local 152, AFL-CIO;
and HAWAII GOVERNMENT
EMPLOYEES ASSOCIATION, AFSCME,
LOCAL 152, AFL-CIO,

Respondents.

CASE NOS.: CE-02-692
CU-02-269

ORDER NO. 2608

ORDER GRANTING RESPONDENTS'
MOTIONS TO DISMISS COMPLAINT

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On September 30, 2008, Complainant TEDDY S. LLANA (Llana or Complainant), pro se, filed a Prohibited Practice Complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). Complainant alleged, inter alia, that he has been harassed, discriminated against and retaliated against by his supervisor and has been improperly denied temporary assignment pay. Complainant contends that Respondents violated Hawaii Revised Statutes (HRS) §§ 89-13(a)(4), (5), and (8) and (b)(1), (2), and (5).

On October 10, 2008, Respondent OAHU COMMUNITY CORRECTIONAL CENTER, Department of Public Safety, State of Hawaii (OCCC), filed a Motion to Dismiss Prohibited Practice Complaint Filed September 30, 2008 with the Board. Respondent OCCC contends that the most recent allegation in the Complaint regarding OCCC concerns a Memorandum, dated June 6, 2008 to Complainant from Nolan P. Espinda regarding a May 27, 2008 Workplace Complaint. Respondent OCCC contends that the instant Complaint was filed more than 90 days after the June 6, 2008 memorandum and is therefore time-barred by the Board's statute of limitations. Respondent OCCC also contends that Complainant alleges that he was improperly denied temporary assignment which is subject to the applicable collective bargaining agreement grievance procedure. OCCC alleges that on November 28, 2006, Respondent

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, Local 646, AFL-CIO (HGEA) filed a grievance on behalf of Llana regarding temporary assignment and the grievance is still pending. OCCC contends that Complainant failed to exhaust his contractual remedies and accordingly, the Complaint should be dismissed.

On October 16, 2008, Respondent OCCC filed a Supplement to Motion to Dismiss Prohibited Practice Complaint Filed September 30, 2008 with the Board. Respondent OCCC submitted supplemental letters and documents regarding Complainant's complaints filed with the Equal Employment Opportunity Commission and the Hawaii Civil Rights Commission.

On October 23, 2008, Respondent HGEA filed a Motion to Dismiss Prohibited Practice Complaint Filed September 30, 2008 and/or for Summary Judgment. The HGEA alleges that the most recent allegation in the Complaint involving Respondent HGEA occurred in May 2008 when Respondent IRENE RODRIGUES (Rodrigues) wrote to Complainant who submitted a request to review possible violations of temporary assignments allegedly owed from October 2006, February 2007, April 2007, and May 2007. Rodrigues explained that the time limit to file a grievance was 20 working days from the date of the incident and the incidents in question spanned two years prior to May 8, 2008. Rodrigues also explained the union's role is to enforce terms and conditions of the Unit 02 collective bargaining agreement and asked, inter alia, if there were any more recent events and provided Complainant with a Fact Sheet to complete in the event of an alleged violation. The HGEA contended that the Complaint is untimely; Complainant lacked standing to maintain the HRS § 89-13(b)(2) allegations against the union; and Complainant failed to exhaust his administrative remedies.

On October 27, 2008, the Board held a prehearing/settlement conference in this matter.

On October 28, 2008, Complainant filed a response to Respondents' arguments. Complainant contended, inter alia, that the employer, by Herman Ferreira, did not award temporary assignment pay and violated the agreement.

The Board heard arguments on the respective motions to dismiss on November 6, 2008 and took the matter under advisement.

On December 2, 2008, Respondent OCCC State of Hawaii filed a Mediation Status Report with the Board.

On January 2, 2009, Complainant filed a negative progress report with the Board.

On January 12, 2009, the Board convened a status conference in this matter. Respective Respondents' counsels were present and Complainant failed to

appear at the designated time.¹ The Board indicated that as it appeared that the underlying issues were not resolved, the Board would rule on the pending motions before the Board.

Based upon a careful review of the record, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. Complainant is a Janitor Supervisor I employed by the OCCC, Department of Public Safety, State of Hawaii and a public employee within the meaning of HRS § 89-2.² Complainant is included in bargaining unit 02 as defined in HRS § 89-6.³
2. The OCCC was, for all relevant times, an agency of the State of Hawaii and represented the interests of the public employer with respect to employees of the agency within the meaning of HRS § 89-2.⁴

¹Due to an error as to the time of the status conference, Complainant appeared in the Board's offices on January 12, 2009 after the status conference had been adjourned.

²HRS § 89-2 provides in 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).

³HRS § 89-6(a) provides in part:

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

(2) Supervisory employees in blue collar positions;

⁴HRS § 89-2 provides in 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 the interest in dealing with public employees.

3. The HGEA is an employee organization and the exclusive representative within the meaning of HRS § 89-2⁵ for employees included in Unit 02. Rodrigues is an HGEA Union agent and represents the interests of the Union.
4. The HGEA and the public employers are parties to a collective bargaining agreement covering Unit 02 employees, effective July 1, 2007, through June 30, 2009.
5. By letter dated May 8, 2008, Rodrigues acknowledged receipt of Complainant's request to review possible violations of temporary assignments from October 2006 and other complaints to other State and Federal agencies. Rodrigues indicated that the timeline within which to file a grievance is twenty (20) working days from the date of the incident and inquired whether there were any recent incidents upon which to file a grievance.
6. By letter dated June 6, 2008, Nolan P. Espinda (Espinda), Warden at OCCC, responded to Complainant's May 27, 2008 Workplace Complaint stating, *inter alia*, that he had reviewed his requests for Temporary Assignment premium pay for a total of 157 hours during 10/2/06, 2/07,

In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

⁵HRS § 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.

* * *

“Exclusive representative” means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

4/07 and 5/07 and determined that he wasn't assigned to the Janitor II Supervisor or directed to perform duties regularly assigned to the Janitor Supervisor II and therefore the claim was denied. In addition, Espinda noted that a 5/12/08 letter written to Lori Takao contained several violent references that were unacceptable.

7. The HGEA did not receive a copy of the June 6, 2008 memorandum denying temporary assignment to Complainant.
8. The most recent reference to his employer's actions in the Complaint is a Memorandum dated June 6, 2008, from Espinda to Llana, responding to a May 27, 2008 Workplace Complaint and Cease and Desist Order. The instant Complaint was filed on September 30, 2008, more than 90 days after a cause of action against OCCC, if any, accrued.

CONCLUSIONS OF LAW

1. The applicable statutes and rules require that prohibited practice complaints be filed within 90 days of the alleged violation. 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(I)).
2. Similarly, the Board's Administrative Rules, 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. 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”).

4. The Board has construed the 90-day limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HPERB 186, 199 (1983). The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Instead, the period begins to run when “an aggrieved party knew or should have known that his statutory rights were violated.” Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978).
5. As the Complaint in this matter was filed on September 30, 2008, claims which arose prior to 90 days of the filing of the complaint, or July 2, 2008, are barred by the Board’s statute of limitations. Based on a review of the record presented, the Board find the most recent incident involving Respondent OCCC was Espinda’s memorandum dated June 6, 2008. The Board also finds the most recent incident involving Respondent HGEA was Rodrigues’ May 8, 2008 letter to Complainant. Based on the foregoing, the Board concludes the instant Complaint against Respondents OCCC and HGEA is barred by the applicable time limitations and the Board lacks jurisdiction over this Complaint.

ORDER

The instant Complaint is untimely and is hereby dismissed.

DATED: Honolulu, Hawaii, May 4, 2009

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member

Copies sent to:
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