

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

JOHN K. LOA,

Complainant,

and

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

Respondent.

CASE NO. CU-01-273

ORDER NO. 2609

ORDER GRANTING UPW'S MOTION
TO DISMISS FOR LACK OF
PROSECUTION

ORDER GRANTING UPW'S MOTION TO DISMISS FOR LACK OF PROSECUTION

On March 20, 2009, Complainant JOHN K. LOA (Complainant) filed prohibited practice complaint Case No. CU-01-273 (Complaint) against Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union). The Complaint alleges, inter alia, that Complainant was terminated, after being put on leave without pay, for alleged refusal to complete rehabilitation in accordance with Section 63.15 of the collective bargaining agreement; that Complainant did not refuse any treatment, and the UPW filed a grievance on his behalf with the Director of the City and County of Honolulu (City and County) Department of Environmental Services that his grievance was "put on the side" by the UPW; that when asked the UPW would say they were working on his case; that he never received a response for Step 2 of the grievance; that over a year later he received a letter from the UPW saying the UPW withdrew the grievance; that Complainant's calls and messages to UPW were not returned; and that Complainant's rights were violated while employed by the City and County yet the UPW did not defend him or his rights. Complainant alleged prohibited practices pursuant to Hawaii Revised Statutes (HRS) §§ 89-13(b) (1), (2), (3), (4), and (5).

On March 30, 2009, the UPW filed its Answer to the Complaint and also filed a Motion to Dismiss Complaint Filed on March 20, 2009 and for Summary Judgment (Motion to Dismiss and for Summary Judgment). The Motion to Dismiss and for Summary Judgment asserted that the Complaint should be dismissed for (1) lack of jurisdiction with respect to all claims arising more than 90 days from the date of the Complaint, and (2) failure to state a claim for relief regarding the UPW's decision to withdraw a grievance on or about December 22, 2008; additionally, the Motion to Dismiss and for Summary Judgment requested entry of summary judgment in the UPW's favor regarding the hybrid claim for breach of duty of fair representation and for violation of the collective bargaining agreement by the employer.

By notice dated April 1, 2009, the Board notified the parties that a prehearing conference would be held on April 14, 2009, at 9:00 a.m. in the Board's hearing room for the purpose of arriving at a settlement or clarification of the issues, identifying and exchanging witness and exhibit lists, and, to the extent possible, reaching an agreement on facts, matters, or procedures which would facilitate and expedite the hearing or adjudication of the issues presented. The parties were instructed to file a prehearing statement that addressed such matters with the Board two days prior to the prehearing. Notice was further provided that the Board would conduct a hearing on the Complaint on April 28, 2009, at 9:00 a.m. in the Board's hearing room.

Complainant did not file a response or opposition to the UPW's Motion to Dismiss and for Summary Judgment.

On April 9, 2009, the UPW filed a Motion to Dismiss for Lack of Prosecution, asserting that Complainant failed to file a timely response or opposition to the UPW's Motion to Dismiss and for Summary Judgment. Also on April 9, 2009, the UPW filed its Prehearing Statement.

On April 14, 2009, the Board held a prehearing conference in this matter. Complainant did not attend the prehearing conference. The Board attempted to contact Complainant by telephone but there was no answer; the Board left a recorded message that was not returned. At the prehearing conference, the Board scheduled oral argument on UPW's Motion to Dismiss and for Summary Judgment and Motion to Dismiss for Lack of Prosecution for April 28, 2009, at 11:00 a.m. in the Board's hearing room. Also on April 14, 2009, the Board sent notice to the parties of the scheduled oral arguments.

Complainant did not file a response or opposition to the UPW's Motion to Dismiss for Lack of Prosecution.

On April 28, 2009, at 11:00 a.m., the Board heard oral argument on the UPW's Motion to Dismiss and for Summary Judgment and Motion to Dismiss for Lack of Prosecution pursuant to HRS §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). Complainant did not appear at the hearing.

For the reasons discussed below, the Board grants the UPW's Motion to Dismiss for Lack of Prosecution, rendering the Motion to Dismiss and for Summary Judgment moot.

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, the Director of the City and County's Department of Environmental Services represented the interests of the Mayor of the City and County with respect to Complainant's allegations in the Complaint, and is therefore a public employer within the meaning of HRS § 89-2.²
3. The UPW and the City and County 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.
4. At all relevant times, Complainant was a public employee in the City and County's Department of Environmental Services.
5. On March 20, 2009, Complainant filed the instant Complaint against the UPW. The Complaint alleges, inter alia, that on June 13, 2007, there was a

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

predetermination hearing with representatives from the UPW; that a response was returned by the City and County stating Complainant was terminated, after being put on leave without pay, for alleged refusal to complete rehabilitation in accordance with Section 63.15 of the CBA; that Complainant did not refuse any treatment, and the UPW filed a grievance on his behalf with the Director of the City and County of Honolulu Environmental Services (City and County) on July 9, 2007, because Complainant was wrongfully discharged; that the UPW represented Complainant "to a small extent" and that the grievance went to Step 2 of the grievance procedure; that the grievance was "put on the side" by the UPW; that, when asked, the UPW would say they were working on Complainant's case; that Complainant never received a response for Step 2 of the grievance; that over a year later, by letter dated December 22, 2008, Complainant received a letter from the UPW saying the UPW withdrew the grievance; that Complainant repeatedly asked the UPW to send his grievance to an arbitrator; that Complainant's calls and messages to UPW were not returned; and that Complainant's rights were violated while employed by the City and County yet the UPW did not defend him or his rights. Complainant alleged prohibited practices pursuant to HRS §§ 89-13(b)(1), (2), (3), (4), and (5).

6. The Complaint further alleges that the drug testing provisions of the CBA were not followed and therefore he should not have been disciplined; that Complainant was not provided a reason by the UPW for withdrawing his grievance; that Complainant did not receive his rights as a union member; that Complainant did pay union dues; that on numerous occasions the UPW has been asked to do things [on behalf of the baseyard employees] but the UPW "never came through"; that Complainant tried to contact the UPW many times but was always told they were not available; and that numerous messages were left but no calls were returned.
7. On March 30, 2009, the UPW filed its Answer to the Complaint and also filed its Motion to Dismiss and for Summary Judgment. The Motion to Dismiss and for Summary Judgment asserted that the Complaint should be dismissed for (1) lack of jurisdiction with respect to all claims arising more than 90 days from the date of the Complaint, and (2) failure to state a claim for relief regarding the UPW's decision to withdraw a grievance on or about December 22, 2008; additionally, the Motion to Dismiss and for Summary Judgment requested entry of summary judgment in the UPW's favor regarding the hybrid claim for breach of duty of fair representation and for violation of the collective bargaining agreement by the employer. The certificate of service attached to the Motion to Dismiss and for Summary Judgment certifies that one copy of the document was served upon

Complainant by depositing in the U.S. Mail, postage pre-paid, on March 30, 2009.

8. By notice dated April 1, 2009, the Board notified the parties that a prehearing conference would be held on April 14, 2009, at 9:00 a.m. in the Board's hearing room for the purpose of arriving at a settlement or clarification of the issues, identifying and exchanging witness and exhibit lists, and, to the extent possible, reaching an agreement on facts, matters, or procedures which would facilitate and expedite the hearing or adjudication of the issues presented. The parties were instructed to file a prehearing statement that addressed such matters with the Board two days prior to the prehearing. Notice was further provided that the Board would conduct a hearing on the Complaint on April 28, 2009, at 9:00 a.m. in the Board's hearing room.
9. Complainant did not file a response or opposition to the UPW's Motion to Dismiss and for Summary Judgment.
10. On April 9, 2009, the UPW filed its Prehearing Statement. Also on April 9, 2009, the UPW filed a Motion to Dismiss for Lack of Prosecution, asserting that Complainant failed to file a timely response or opposition to the UPW's Motion to Dismiss and for Summary Judgment. The certificate of service attached to the Motion to Dismiss for Lack of Prosecution certifies that one copy of the document was served upon Complainant by depositing in the U.S. Mail, postage pre-paid, on April 9, 2009.
11. On April 14, 2009, the Board held a prehearing conference in this matter. Complainant did not attend the prehearing conference. The Board attempted to contact Complainant by telephone but there was no answer; the Board left a recorded message that was not returned. Counsel for UPW appeared at the prehearing conference.
12. At the prehearing conference, the Board scheduled oral argument on UPW's Motion to Dismiss and for Summary Judgment and Motion to Dismiss for Lack of Prosecution for April 28, 2009, at 11:00 a.m. in the Board's hearing room. Also on April 14, 2009, the Board sent notice to the parties of the scheduled oral arguments.
13. Complainant did not file a response or opposition to the UPW's Motion to Dismiss for Lack of Prosecution.
14. On April 28, 2009, at 11:00 a.m., the Board heard oral argument on the UPW's Motion to Dismiss and for Summary Judgment and Motion to

Dismiss for Lack of Prosecution pursuant to HRS §§ 89-5(i)(4) and (5), and HAR § 12-42-8(g)(3). Complainant did not appear at the hearing. Counsel for the UPW appeared at the hearing and presented oral argument.

15. The Board finds that Complainant has failed to prosecute his claim. Complainant did not file a response or opposition to either of the UPW's motions to dismiss; did not file a prehearing conference statement as directed by the Board; did not appear at the prehearing conference; did not return the Board's message left at his telephone number during the prehearing conference; did not contact the Board following the prehearing conference in any manner; did not appear at the oral argument on the motions to dismiss; and, in short, did not participate in any way in this proceeding other than filing the initial Complaint.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over prohibited practice complaints pursuant to HRS §§ 89-5³ and 89-14⁴.

³HRS § 89-5 provides in relevant part:

(i) In addition to the powers and functions provided in other sections of this chapter, the board shall:

* * *

- (5) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper[.]

⁴HRS § 89-14 provides:

Any 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; provided that the board shall have exclusive original jurisdiction over such a controversy except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section 89-12(e) or (2) the judicial review of decisions or orders of the board in prohibited practice controversies in accordance with section 377-9 and chapter 91. All references in section 377-9 to "labor organization" shall include employee organization.

2. The Complaint alleges prohibited practices pursuant to HRS §§ 89-13(b)(1), (2), (3), (4), and (5), which provides in relevant part:

It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
 - (2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;
 - (3) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;
 - (4) Refuse or fail to comply with any provision of this chapter; or
 - (5) Violate the terms of a collective bargaining agreement.
3. 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.
 4. 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)).
 5. Pursuant to HAR § 12-42-8(g)(3), governing motions before the Board:

- (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.

Accordingly, any answer or opposition to the UPW's motions to dismiss should have been filed and served on all parties within five days after service of the motion papers.

6. Pursuant to HAR § 12-42-47, governing prehearing conferences during prohibited practice complaint proceedings:

At least five days prior to the scheduled date for hearing, the board may hold a prehearing conference for the purpose of arriving at a settlement or clarification of the issues and, to the extent possible, an agreement on facts, matters, or procedures as may facilitate and expedite the hearing or adjudication of the issues.

7. The Board's rules do not specifically provide for dismissal for failure to prosecute a claim; however, historically, the Board has relied upon the Hawaii Rules of Civil Procedure (HRCPP) in resolving ambiguities in the Board's rules. See e.g., Hawaii Federation of College Teachers, Local 2003, 1 HPERB 428; United Public Workers, 5 HLRB 177; Hawaii Government Employees Association, Order No. 1903 (July 21, 2000). With respect to motion to dismiss for lack of prosecution, the Board has in the past looked to HRCPP Rule 41(b) for guidance (see Board Order No. 2128 (2002) in Flores and Department of Public Safety, et al., Case Nos. CE-10-514 and CU-10-207).

8. HRCPP Rule 41(b) provides in relevant part:

Involuntary dismissal: Effect thereof.

- (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against it.

* * *

- (3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operate as an adjudication upon the merits.
9. HRCP Rule 41(b) is analogous to Rule 41(b) of the Federal Rules of Civil Procedure, under which a trial court has the discretion to grant or deny a defendant's motion for dismissal for plaintiff's failure to prosecute. Ellis v. Harland Bartholomew and Associates, 1 Haw. App. 420, 426, 620 P.2d 744, 748 (1980).
 10. The Board exercises its discretion to dismiss the present Complaint for lack of prosecution. The Board finds that Complainant has failed to prosecute his claim. Complainant did not file a response or opposition to either of the UPW's motions to dismiss; did not file a prehearing conference statement as directed by the Board; did not appear at the prehearing conference; did not return the Board's message left at his telephone number during the prehearing conference; did not contact the Board following the prehearing conference in any manner; did not appear at the oral argument on the motions to dismiss; and, in short, did not participate in any way in this proceeding other than filing the initial Complaint.
 11. Because the Board grants the UPW's Motion to Dismiss for Lack of Prosecution, the Board does not reach the merits of the UPW's Motion to Dismiss and for Summary Judgment as that motion is rendered moot.
 12. A case is moot if it has lost its character as a present, live controversy of the kind that must exist if courts are to avoid advisory opinions on abstract propositions of law. Doe v. Doe, 116 Hawai'i 323, 326, 172 P.3d 1067, 1070 (2007) (quoting Kaho'ohanohano v. State, 114 Hawai'i 302, 332, 162 P.3d 696, 726 (2007)). The rule is one of the prudential rules of judicial self-governance founded in concern about the proper – and properly limited – role of the courts in a democratic society; the Hawaii Supreme Court has said the suit must remain alive throughout the course of litigation to the moment of final appellate disposition to escape the mootness bar. Id.

ORDER

For the reasons discussed above, the Board hereby grants the UPW's Motion to Dismiss for Lack of Prosecution, rendering the Motion to Dismiss and for Summary Judgment moot.

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DATED: Honolulu, Hawaii, May 5, 2009

HAWAII LABOR RELATIONS BOARD


EMORY J. SPRINGER, Member


SARAH R. HIRAKAMI, Member

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