

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of

DOMINIQUE THANH NGUYEN,

Complainant,

and

KIM UYEHARA, Director, Human  
Resources, John A. Burns School of  
Medicine, University of Hawaii, State of  
Hawaii,

Respondent.

CASE NO. CE-08-700

ORDER NO. 2667

ORDER GRANTING DISMISSAL OF  
COMPLAINT

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On February 11, 2009, Complainant DOMINIQUE THANH NGUYEN (Complainant or NGUYEN), pro se, filed a Prohibited Practice Complaint (Complaint) against the above named Respondent, with the Hawaii Labor Relations Board (Board). Complainant alleged, inter alia, that he was wrongfully terminated by the University on November 5, 2008. NGUYEN alleges that he was told that he was being terminated because of poor performance. NGUYEN contends that he was terminated without proper cause and in retaliation for his fiancee's discrimination complaint with the "UH EEO's office at Manoa" against his Director.

At the prehearing/settlement conference held on March 18, 2009, Complainant requested a continuance of the hearing on the merits scheduled on March 31, 2009, at 9:00 a.m. in order to retain legal counsel.

By Order No. 2597, dated March 19, 2009, the Board, inter alia, granted Complainant's request to continue hearing, set deadlines to file any motions, and scheduled a hearing on any motions or the merits of the Complaint on May 20, 2009.

On May 1, 2009, Respondent filed a Motion to Dismiss Prohibited Practices (sic) Complaint (Motion to Dismiss) on the basis that Complainant failed to provide sufficient facts to support his prohibited practice claim and failed to establish a violation of Hawaii Revised Statutes (HRS) § 89-13. Respondent argued that Complainant failed to state a claim upon which relief could be granted; Complainant failed to exhaust his

contractual remedy; and to the extent that Complainant alleged a basis for prohibited practices not subject to the grievance process, the Complaint was untimely.

At the hearing on Respondent's Motion to Dismiss on May 20, 2009, Complainant's counsel requested a continuance because he had been recently retained, had not yet reviewed the file and was unable to consult with Complainant's union representative. The Board granted the request to continue the hearing on Respondent's Motion to Dismiss over Respondent's objections, and scheduled the motion to be heard on June 3, 2009. The Board also set May 28, 2009, as the deadline to file any response to Respondent's Motion to Dismiss. See Order No. 2611, Order Granting Complainant's Request to Continue Hearing on Respondent's Motion to Dismiss Prohibited Practices (sic) Complaint.

Prior to the hearing on June 3, 2009, Complainant's counsel telephoned the Board representing that the case would be withdrawn. Accordingly, the hearing on Respondent's Motion to Dismiss was cancelled.

As nothing further was filed in this case, on October 13, 2009, the Board scheduled a hearing on Respondent's Motion to Dismiss on October 26, 2009 in a Notice of Rescheduled Hearing on Respondent's Motion to Dismiss.

On October 26, 2009, the Board convened the hearing on Respondent's Motion to Dismiss. Christine Tamashiro, Esq., appeared for Respondent and neither Complainant nor his attorney of record, Greg Nishioka, Esq., made an appearance at the hearing. No pleadings on behalf of Complainant were submitted in opposition to the instant Motion to Dismiss. The Board noted that the notice of the hearing held on October 2, 2009 was given to Complainant, Complainant's attorney, Greg Nishioka, Esq., and Respondent's attorney, Ruth Tsujimura, Esq. Prior to the hearing, several attempts were made via telephone and email to contact Complainant's attorney. Respondent's counsel presented oral argument in support of the Motion to Dismiss. At the close of the hearing, based on a review of the record and the arguments presented, the Board indicated that it would grant Respondent's Motion to Dismiss and instructed Respondent to submit a proposed order to the Board.

On November 4, 2009, Respondent filed a Proposed Order Granting Respondent's Motion to Dismiss Prohibited Practice Complaint, Filed on May 1, 2009.

Based on the foregoing, the Board issues the following findings of fact, conclusions of law, and order dismissing the Complaint.

Respondent contends that the Board lacks jurisdiction over the Complaint because it was untimely filed more than 90 days after Complainant's termination by the University of Hawaii.

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(l)).

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).

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”).

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 (8<sup>th</sup> Cir. 1978).

Based upon a review of the record, the Board finds that the instant Complaint was filed on February 11, 2009, more than 90 days after Complainant’s termination on November 5, 2008. Based on the foregoing authorities, the Board concludes the instant Complaint against Respondent is barred by the applicable time limitations and the Board lacks jurisdiction over this Complaint.

Alternatively, the Board concludes that dismissal of the Complaint is warranted for Complainant’s failure to prosecute his case.

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 (HRCP) 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 HRCP 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); Order No. 2609, (2009) in John K. Loa v. United Public Workers, Case No. CU-01-273.)

HRCP 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.

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).

In this case, the Board finds that Complainant has failed to prosecute his claim. Complainant did not file a prehearing conference statement; did not file a response or opposition to Respondent's Motion to Dismiss; and did not appear at the oral argument on the Motion to Dismiss. Accordingly, the Board exercises its discretion to dismiss the present Complaint for lack of prosecution.

#### ORDER

For the reasons discussed above, the Board hereby grants Respondent's Motion to Dismiss for lack of jurisdiction, and in the alternative, for lack of prosecution.


DOMINIQUE THANH NGUYEN v. KIM UYEHARA  
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DATED: Honolulu, Hawaii, December 7, 2009.

HAWAII LABOR RELATIONS BOARD



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JAMES B. NICHOLSON, Chair



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SARAH R. HIRAKAMI, Member

Copies sent to:

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Greg Nishioka, Esq.  
Ruth I. Tsujimura, Esq.

