

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

CHRISTOPHER K. MA'ELE,

Complainant,

and

DEPARTMENT OF PUBLIC SAFETY,
State of Hawaii and UNITED PUBLIC
WORKERS, AFSCME, LOCAL 646, AFL-
CIO,

Respondents.

CASE NOS.: CE-10-740
CU-10-286

ORDER NO. 2681

ORDER GRANTING RESPONDENT
STATE OF HAWAII, DEPARTMENT
OF PUBLIC SAFETY'S MOTION TO
DISMISS, FILED ON DECEMBER 17,
2009 AND UPW'S MOTION TO
DISMISS COMPLAINT, FILED ON
DECEMBER 18, 2009

ORDER GRANTING RESPONDENT STATE OF HAWAII, DEPARTMENT
OF PUBLIC SAFETY'S MOTION TO DISMISS, FILED ON DECEMBER 17, 2009
AND UPW'S MOTION TO DISMISS COMPLAINT, FILED ON DECEMBER 18, 2009

On December 7, 2009, Complainant CHRISTOPHER K. MA'ELE (Ma'ele), pro se, filed a Prohibited Practice Complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). Ma'ele alleges, inter alia, that on or about April 1, 2008, his physician prescribed medical marijuana for use during non-work hours as part of his treatment plan to manage the pain resulting from a disability; on or about May 1, 2008, he submitted his physician's written request to the Department of Public Safety's Narcotic Enforcement Division for approval to use medical marijuana at home; on or about May 31, 2008, he received authorization to use medical marijuana through May 31, 2009; on or about June 17, 2009, he was informed that he failed his "UA" test and the use of medical marijuana as treatment for pain associated with his disability was not an acceptable reason; he was suspended without pay for 20 days and could not return to work until he consulted with a counselor; and he was later informed that he would be subject to UAs for the next five years and would face progressive discipline up to and including termination if he failed future tests.

On December 17, 2009, Respondent DEPARTMENT OF PUBLIC SAFETY, State of Hawaii (PSD) filed a Motion to Dismiss with the Board contending that a complaint before the Board must be filed within 90 days of the claim arising. PSD alleges that Ma'ele was informed that he would be suspended on June 17, 2009 and in fact, he was suspended commencing June 19, 2009. PSD contends that the Complaint should be dismissed because the claims arose more than 90 days prior to the filing of the Complaint and are therefore untimely and do not fall within the Board's jurisdiction.

On December 18, 2009, Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) filed a Motion to Dismiss Complaint with the Board for lack of jurisdiction and failure to state a claim for relief. The UPW contends that Ma`ele complains that placing him on unpaid leave of absence sets unequal terms and conditions of employment for someone who is disabled; and the Complaint should be dismissed because it does not allege any violation of the Unit 10 collective bargaining agreement and does not allege any wrongdoing by the Union.

On December 29, 2009, the Board scheduled a prehearing/settlement conference on the Complaint on January 11, 2010 and a hearing on the motions to dismiss the Complaint on January 19, 2010.

On January 4, 2010, the Board rescheduled the hearing on the motions to dismiss the Complaint to January 20, 2010.

On January 6, 2010, the UPW filed a Motion to Dismiss for Lack of Prosecution with the Board. The UPW contended that Ma`ele failed to file a response to the UPW's Motion to Dismiss Complaint within the time frame set under applicable Board rules, i.e., December 30, 2009, and the Complaint should be dismissed.

Also on January 6, 2010, the UPW and PSD filed their respective Prehearing Statements. On January 8, 2010, Ma`ele filed a Prehearing Statement with the Board.

On January 11, 2010, Complainant, pro se, and counsels for the UPW and PSD appeared at the prehearing conference.

On January 20, 2010, the Board conducted a hearing on the motions to dismiss the Complaint. At the hearing, Complainant requested a continuance of the hearing in order to seek legal counsel to represent him. PSD objected to the continuance arguing that legal assistance could not cure the jurisdictional defect caused by the untimely filing of the Complaint. The UPW also objected to the continuance because Ma`ele did not raise the issue previously during the prehearing/settlement conference and argued that the UPW would be prejudiced by a continuance.

Based upon a thorough review of the record in this case and consideration of the arguments of the parties, the Board makes the following findings of fact, conclusions of law and order granting Respondents' respective motions to dismiss the Complaint.

Respondents contend that the Board lacks jurisdiction over the Complaint because it was untimely filed more than 90 days after Complainant's suspension with respect to PSD and more than 90 days after any cause of action accrued against the Union

for a breach of duty of fair representation in not pursuing a grievance on Complainant's behalf.

The applicable statutes and rules require that prohibited practice complaints be filed within 90 days of the alleged violation. Hawaii Revised Statutes (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 (8th Cir. 1978).

Based upon a review of the record, the Board finds that with respect to Complainant's cause of action against PSD, Complainant was suspended for 20 days commencing on June 19, 2009 which is more than 90 days prior to the filing of the Complaint on December 7, 2009. With respect to Complainant's cause of action against the Union, according to the Complainant's Prehearing Statement, filed on January 8, 2010, “[o]n August 12, 2009, Loyna Kamakeeaina, Business Agent Supervisor (BAS) of

UPW inform[ed] and confirm[ed] to Christopher K. Maele that UPW will not assist in his grievance.” The Board therefore finds that Complainant knew or should have known that his claim against UPW arose on August 12, 2009 when the Union denied its assistance in his grievance. Based on the foregoing authorities, the Board concludes the instant Complaint against Respondents is barred by the applicable time limitations and the Board lacks jurisdiction over this Complaint.¹

ORDER

For the reasons discussed above, the Board hereby grants Respondents’ motions to dismiss the Complaint for lack of jurisdiction.

DATED: Honolulu, Hawaii, January 26, 2010.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SARAH R. HIRAKAMI, Member

Copies sent to:

Christopher K. Ma`ele
Richard R. Thomason, Deputy Attorney General
Herbert R. Takahashi, Esq.

¹Given that the Board’s lack of jurisdiction was clearly evident from the record, the Board denied Complainant’s motion to continue the hearing to seek legal representation as it would not cure the jurisdictional defect in this Complaint.