

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of
EDWARD K. LANI,

Complainant,

and

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

Respondents.

CASE NOS.: CU-01-285
CE-01-738

ORDER NO. 2690

ORDER GRANTING UPW'S MOTION
TO DISMISS COMPLAINT
AND/OR FOR SUMMARY
JUDGMENT, FILED ON
DECEMBER 2, 2009 AND DOT'S
MOTION TO DISMISS
COMPLAINT FILED
NOVEMBER 23, 2009, FILED ON
DECEMBER 3, 2009

ORDER GRANTING UPW'S MOTION TO DISMISS
COMPLAINT AND/OR FOR SUMMARY JUDGMENT
FILED ON DECEMBER 2, 2009 AND DOT'S MOTION TO DISMISS
COMPLAINT FILED NOVEMBER 23, 2009, FILED ON DECEMBER 3, 2009

On November 23, 2009, Complainant EDWARD K. LANI (Lani), *pro se*, filed a Prohibited Practice Complaint (Complaint) with the Hawaii Labor Relations Board (Board) against the above-named Respondents. Lani alleged, *inter alia*, that the Respondent DEPARTMENT OF TRANSPORTATION, Maui District, State of Hawaii (DOT) improperly dismissed his sexual harassment complaint against an acting supervisor; that the supervisor unlawfully retaliated against him for filing the complaint resulting in a ten-day suspension for allegedly consuming alcohol while working; that Respondent UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO (UPW) filed a grievance on his behalf but the UPW sought to settle the grievance by accepting a reduction in the discipline; and that the UPW failed to provide appropriate representation to him.

On December 2, 2009, the UPW filed a Motion to Dismiss Complaint and/or for Summary Judgment with the Board. The UPW contends that the Board lacks jurisdiction over this Complaint and the Complainant fails to state a claim for relief.

On December 3, 2009, the DOT filed a Motion to Dismiss Prohibited Practice Complaint Filed November 23, 2009. The DOT contends that Complainant failed to file a timely complaint, failed to exhaust contractual remedies, and that the Complaint fails to state a valid claim.

On December 8, 2009, the Board issued a notice scheduling a prehearing/settlement conference by conference call in this matter on January 6, 2010 and a hearing on the motions to dismiss on January 21, 2010.

On December 18, 2009, the UPW filed a Motion to Dismiss for Lack of Prosecution with the Board.

On December 29, 2009, the UPW filed a Prehearing Statement with the Board. On January 4, 2010, the DOT filed a Prehearing Statement and on January 5, 2010, Lani filed a Pre-Hearing Statement with the Board.

The Board conducted a prehearing/settlement conference by conference call on January 6, 2010. Lani participated in the conference by telephone and counsel for the respective Respondents appeared in the Board's hearing room.

On January 21, 2010, the Board conducted a hearing on the foregoing motions by conference call. Lani participated in the hearing by telephone and counsel for respective Respondents appeared in the Board's hearing room. Based upon a review of the record and consideration of the arguments made, the Board makes the following findings of fact, conclusions of law and order granting Respondents' respective motions to dismiss the Complaint.

In the instant Complaint, Complainant Lani alleges that the DOT improperly dismissed his sexual harassment complaint against an acting supervisor and that the supervisor unlawfully retaliated against him for filing the harassment complaint by taking disciplinary action against him. Lani alleges that he was suspended for ten days for allegedly consuming alcohol while working without cause. As against the UPW, Lani alleges that the Union filed a grievance on his behalf but settled the grievance by accepting a reduction in the discipline. Lani contends that the UPW failed to represent him fairly.

In its Motion to Dismiss and/or for Summary Judgment, Respondent UPW contends that the Board lacks jurisdiction over the Complaint because it was untimely filed and fails to state a claim for relief. The UPW alleges that on March 19, 2009, Complainant was suspended for ten working days for drinking beer at work on or about December 5, 2008. The UPW alleges that it filed a grievance on April 9, 2009 and conducted an investigation with reports of three eye witness accounts indicating that Lani was drinking beer at the baseyard. The UPW alleges that during the grievance procedure, the DOT offered to reduce the suspension period from ten to five days. The UPW alleges that on June 25, 2009, the UPW, by its State Director Dayton Nakanelua (Nakanelua), notified the employer and Lani that it would accept the remedy provided in the employer's Step 2 response based upon its analysis of the merits of the grievance and the likelihood of prevailing in arbitration.

The UPW contends that the Complaint is time-barred because Nakanelua notified Lani that the Union was not proceeding further with the grievance on or about June 25, 2009. As the instant Complaint was filed on November 23, 2009, the Complaint is barred by the Board's 90-day statute of limitations.

The DOT contends that the instant Complaint should also be dismissed because it is untimely; that Complainant failed to exhaust contractual remedies, and the Complaint fails to state a valid claim. The DOT alleges that Lani's sexual harassment claim arising in December 2008 resulted in a "settled suspension from April 2009." The DOT also argues that the Board lacks jurisdiction over matters of employment discrimination and that Lani's allegation that he was retaliated against by Lani's supervisor for filing a sexual harassment complaint is outside of the Board's jurisdiction.

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 (8th Cir. 1978).

Based upon a review of the record, the Board makes the following findings of fact. Lani filed a sexual harassment complaint against his acting supervisor on or about December 8, 2008 regarding an incident which occurred on December 3, 2008. On December 12, 2008, Lani's acting supervisor filed an Employee Incident Report for events occurring on December 5, 2008, alleging Lani threatened him; Lani drank from a can of beer on the lunch table at the baseyard; Lani left the baseyard without permission after being told that he could not consume alcohol during work time on the premises; and Lani failed to submit a leave application. Based upon an investigation conducted by the Attorney General's Office on the complaints, on or about March 19, 2009, the DOT suspended Lani for 10 days for drinking from a can of beer at the baseyard based on the investigation conducted by the Attorney General's Office. The UPW filed a grievance with the DOT challenging Lani's suspension. During the grievance procedure, the DOT denied the grievance at Steps 1 and 2, but offered to reduce the 10-day suspension to five days at each step. On June 25, 2009, after receiving the DOT's response at Step 2, the UPW accepted the five-day reduction in the 10-day suspension to resolve the grievance. The UPW State Director notified Lani that the UPW accepted the remedy on June 25, 2009. In an email dated August 3, 2009 Lahela Aiwohi (Aiwohi), UPW business agent, advised Lani's wife, Kimberly, that the UPW would not permit the review of the testimony and transcripts of the grievance proceedings. The instant Complaint was filed on November 23, 2009, more than 90 days after the foregoing events.

The Board finds based on the record that Complainant knew or should have known that his claim against UPW for failing to fairly represent him in the grievance proceedings arose on or about June 25, 2009 when the UPW notified Lani that it accepted the 5-day reduction in penalty and had settled the grievance. While Lani continued to contact the UPW challenging its decision to settle the grievance, the Board finds that UPW conclusively notified Lani of its decision to resolve the grievance on or about June 25, 2009. Thus, the instant Complaint against the UPW was filed more than 90 days after the cause of action arose and is time-barred.

In this case, Lani alleges a hybrid claim where complainant must establish both (1) a breach of the duty of fair representation by the Union and (2) a breach of the collective bargaining agreement by the employer. Poe v. Hawaii Labor Relations Board, 105 Hawai'i 97, 102, 94 P.3d 652, 657 (2004). Because the claims are inextricably

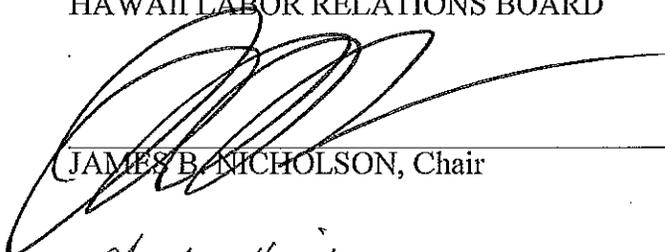
interdependent¹ and the claim against the UPW is time-barred, Lani cannot prove that the UPW breached its duty of fair representation. Accordingly, the case against the DOT must also be dismissed.

ORDER

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

DATED: Honolulu, Hawaii, February 18, 2010

HAWAII LABOR RELATIONS BOARD



(JAMES B. NICHOLSON, Chair



SARAH R. HIRAKAMI, Member

¹In *DelCostello v. Int.'l Bhd. of Teamsters*, 462 U.S. 151, 164 (1983), the Court held that to prevail against the union (or employer) plaintiff must establish proof that the union breached its duty of fair representation and that the action of the employer was contrary to the collective bargaining agreement.

Thus, an employee who is prevented from exhausting the remedies provided by the collective bargaining agreement may, nevertheless, bring an action against his or her employer. Under federal precedent, such an action consists of two separate claims: (1) a claim against the employer alleging a breach of the collective bargaining agreement and (2) a claim against the union for breach of the duty of fair representation. *DelCostello*, 462 U.S. at 164, 103 S.Ct. 2281.

[T]he two claims are inextricably interdependent. To prevail against either the company or the Union, employee-plaintiffs must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.

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