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NE v

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of
RICHARD S. DANCIL,
Complainant,

and

KULA HOSPITAL, Hawaii Health Systems
Corporation and UNITED PUBLIC
WORKERS, LOCAL 646, AFSCME, AFL-
CIO,

Respondents.

CASE NOS.: CE-01-770
CU-01-298

ORDER NO. 2788

ORDER GRANTING RESPONDENTS'
MOTIONS TO DISMISS COMPLAINT

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On October 20, 2010, Complainant RICHARD S. DANCIL (Dancil), *pro se*, filed a Prohibited Practice Complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). Dancil alleges, *inter alia*, that he was terminated without just cause and his union agent did not properly represent him. Dancil contends that Respondents violated Hawaii Revised Statutes (HRS) §§ 89-13(6), (7)(sic), and (8); 89-10.8(3)(c) (sic) and 76-41(4) and (6) (sic).

On October 28, 2010, Respondent KULA HOSPITAL, Hawaii Health Systems Corporation (Employer) filed a Motion to Dismiss Complaint for lack of jurisdiction with the Board. The Employer contends that the complaint is filed more than ninety days after any alleged prohibited practice and is untimely.

On October 28, 2010, Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) filed a Motion to Dismiss and/or for Summary Judgment with the Board. The UPW contends that the complaint should be dismissed for lack of jurisdiction, failure to state a claim for relief, and failure to exhaust contractual remedies.

On November 10, 2010, Respondent UPW filed a Motion to Dismiss for Lack of Jurisdiction with the Board contending that the instant Complaint should be dismissed because Dancil failed to file a timely opposition to UPW's Motion to Dismiss and/or for Summary Judgment.

On November 17, 2010, Complainant filed an Opposition and Memorandum to Respondents' Motion to Dismiss and/or for Summary Judgment; Declaration of Richard S. Dancil; Prehearing Statement; Certificate of Service with the Board.

The Board scheduled a hearing on the motions on November 29, 2010 which was continued to December 16, 2010 pursuant to Complainant's request to seek legal counsel to represent him and without objection from opposing counsel. The Board continued the December 16, 2010 hearing pursuant to Complainant's Motion for Continuance of Motion Hearing in order to retain counsel over the objection of the UPW.

On February 15, 2011, the Board conducted a hearing on the foregoing motions by telephone conference. Complainant was represented by counsel who participated by telephone and counsel for the Employer and the UPW appeared in the Board's hearing room. The parties had full opportunity to present evidence and argument to the Board. 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 alleges, *inter alia*, that the charges against him were false; that the investigation of the allegations was inadequate; that theft and insubordination charges against him were unsubstantiated; he suffered severe medical conditions and was incapacitated and unable to recover and file a grievance until now; that there was a pattern of abuse by the Employer; and the UPW did not provide him with adequate representation.

In its Motion to Dismiss, the Employer contends that the Complainant was terminated on June 15, 2010; that the Complainant's allegations center on the lack of due process and inadequate investigation that preceded the termination; using the termination date and the most recent violation, Complainant had ninety days or until September 13, 2010 to file his complaint; and that Complainant filed his complaint on October 20, 2010, more than ninety days after any possible alleged violation.

The UPW contends in its Motion to Dismiss and/or for Summary Judgment that Dancil had been assisted by the UPW's business agent in prior grievances and at the pretermination hearing; that by letter dated June 10, 2010, the Employer upheld its decision to terminate effective June 15, 2010 and gave Dancil the option of resigning; that Dancil contacted the UPW business agent on June 14, 2010 and was advised that if he resigned it would take away his right to file a grievance and he informed the business agent that he would be resigning; Dancil had no further contact with the UPW's business agent after June 14, 2010 until September 17, 2010, when Complainant wrote to the UPW State Director complaining of the UPW's representation; and by letter dated October 5, 2010, the UPW State Director informed Dancil that after investigation, he found that the

UPW properly represented him; that the Board lacks jurisdiction over Dancil's discharge because this complaint was not filed within ninety days and is time-barred; the complaint fails to state a hybrid claim for relief; and that Dancil failed to file his own grievance and exhaust the grievance procedure.

The applicable statutes and rules require that prohibited practice complaints be filed within ninety 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. See, 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) holding, "The law has long been clear that agencies may not nullify statutes."

The Board has construed the ninety-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. Dancil was, for all relevant times, a building maintenance helper at the Kula Hospital and a member of bargaining unit 01. The UPW is the exclusive representative of

bargaining unit 01. By letter dated June 10, 2010, the Employer notified Complainant that he would be terminated effective June 15, 2010 but was given the option of resigning before the close of business on June 15, 2010. On June 14, 2010, Complainant advised his UPW business agent that he would resign. Complainant was terminated effective June 15, 2010. The contractual grievance procedure in Article 15.11 a.1. of the Unit 01 collective bargaining agreement provides that a grievance challenging a discharge must be filed within 18 days of the discharge. Neither the UPW nor Complainant filed a grievance on the discharge. By letter dated September 17, 2010, Complainant contacted the UPW's State Director complaining about the Union's representation. By letter dated October 5, 2010, the UPW State Director informed Dancil that after investigation, he found that the UPW properly represented him. Complainant filed the instant Complaint with the Board on October 20, 2010, more than ninety days after his discharge.

The Board finds based on the record that Complainant knew or should have known that his claims against the Employer for an improper investigation and discharge accrued on or about June 15, 2010 when he was terminated. The instant Complaint against the Employer filed more than ninety days after June 15, 2010 is time-barred and is hereby dismissed.

The Board also finds based on the record that UPW's business agent discussed the ramifications of resignation with Complainant and Complainant told her on June 14, 2010, one day prior to the effective date of his discharge, that he intended to resign. Complainant did not contact the UPW to advise of his termination or ask the UPW to file a grievance on Complainant's discharge. In addition, Complainant failed to file a grievance on his own behalf from the termination in accordance with Article 15.03 a. which provides, "An Employee may process a grievance and have the grievance heard without representation by the Union except as provided in Section 15.18."

In this case, Complainant 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). Earlier, in Poe v. Hawaii Labor Relations Bd., 97 Hawai'i 528, 40 P.3d 930 (2002), the court stated:

In labor relations law, the general rule is that an employee is required to exhaust contractual remedies before bringing suit. See Hokama, 92 Hawai'i at 272, 900 P.2d at 1154, Santos, 64 Haw. at 655, 646 P.2d at 967; Marshall v. University of Hawai'i, 9 Haw. App. 21, 30, 821 P.2d 937, 943 (1991); Winslow, 2 Haw. App. at 55, 625 P.2d at 1050. Thus, individuals who sue their employers for breach of a collective

bargaining agreement must first attempt exhaustion of remedies under that agreement.

97 Hawai'i at 536, 40 P.3d at 938.

Because the claims are inextricably interdependent¹ and Complainant failed to exhaust his contractual remedies and failed to file a timely complaint against the Employer, Complainant cannot prove that the UPW breached its duty of fair representation. Accordingly, the case against the UPW must also be dismissed.

ORDER

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

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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DATED: Honolulu, Hawaii, April 26, 2011

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SARAH R. HIRAKAMI, Member



NORMAN K. KATO II, Member

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