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STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

JOSEPH KUA, JR.,

Complainant,

v.

BERNARD CARVALHO, JR., Mayor, County of Kauai; EDMOND RENAUD, Deputy County Engineer, Department of Public Works, County of Kauai; CRYSTAL FUJIKAWA, Personnel Officer, Department of Public Works, County of Kauai; RYAN NISHIKAWA, Chief, Field Operations and Maintenance, Department of Public Works, County of Kauai; KEN MORIKAWA, Overseer, Department of Public Works, County of Kauai; PATRICK SHIMAMOTO, Kapaa District Road Overseer, Department of Public Works, County of Kauai; PATRICK LABUGUEN, Kapaa Construction Supervisor, Department of Public Works, County of Kauai; ROBERT CREMER, Kapaa Construction Supervisor, Department of Public Works, County of Kauai; HENRY KUPIHEA, Bushwacker Operator, Department of Public Works, County of Kauai; MALCOLM FERNANDEZ, Director, Department of Personnel Services, County of Kauai; THOMAS TAKATSUKI, Deputy Director, Department of Personnel Services, County of Kauai; DAYTON NAKANELUA, State Director, United Public Workers, AFSCME, Local 646, AFL-CIO; UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO; LEILANI MINDORO, Kauai Division Director, United Public Workers, AFSCME, Local 646, AFL-CIO; and TRINA HORNER, Business Agent, Kauai Division, United Public Workers, AFSCME, Local 646, AFL-CIO,

Respondents.

CASE NOS: CE-01-732

CU-01-281

ORDER NO. 2793

ORDER GRANTING RESPONDENTS'
MOTIONS TO DISMISS COMPLAINT

ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS COMPLAINT

On October 9, 2009, Complainant JOSEPH KUA, JR., *pro se*, (Complainant or Kua) filed a prohibited practice complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). Complainant alleged that, *inter alia*, that Respondents committed prohibited practices for failure of due process and collusion citing Hawaii Revised Statutes (HRS) § 89-13(a)(1) - (8) and 89-13(b)(1) - (5), and attached a letter dated July 17, 2009 entitled, Failure of Due Process & Collusion. The foregoing letter addressed "To All Concern," alleging documents were given to the Department of Personnel on May 21, 2009 at the second step of the grievance procedure and no response was given, except by DAYTON M. NAKANELUA, State Director.

On October 19, 2009, County of Kauai Respondents filed a Motion for Particularization of the Complaint which was granted in Order No. 2655, dated October 22, 2009. The Board agreed with the Kauai Respondents that the Complaint failed to specifically allege how each Respondent violated HRS § 89-13 and failed to provide a complete statement of facts supporting the Complaint. The Board ordered Complainant to file a particularized statement of his Complaint identifying the specific actions which each Kauai Respondent took which violated the specific subsection of HRS § 89-13. The order stated that the Particularization must include a complete statement of the facts supporting the Complaint, including specific facts as to names, dates, times, and places involved in the acts alleged to be improper. The Board further ordered the Particularization to be filed within five days of the order, i.e., October 26, 2009.

On October 20, 2009, Respondents UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, DAYTON NAKANELUA (Nakanelua), LEILANI MINDORO (Mindoro), and TRINA HORNER (Horner) filed a Motion to Dismiss and/or for Summary Judgment (Motion to Dismiss) with the Board for lack of jurisdiction and failure to state a claim for relief. Respondent County of Kauai filed a Joinder in the UPW's motion to dismiss on October 26, 2009.

On November 2, 2009, Complainant filed a Response to Motion for Particularization of the Complaint, including a 142-page attachment with the Board.

On November 13, 2009, the UPW filed a Motion to Dismiss for Lack of Prosecution with the Board. The UPW contended that any response to the UPW's Motion to Dismiss was due on or about October 30, 2009 and the Complainant failed to timely respond to the UPW's motion.

On November 19, 2009, the Kauai Respondents filed a Joinder in Co-Respondents' Motion to Dismiss for Lack of Prosecution.

The Board conducted a hearing on the UPW's Motion to Dismiss on November 30, 2009 by conference call. Based upon the record and the arguments presented, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. Kua was for all relevant times, employed by the Department of Public Works, County of Kauai, and an employee within the meaning of HRS § 89-2. Kua was a member of bargaining unit 01 and represented by the UPW.
2. BERNARD CARVALHO, JR. (Carvalho), Mayor, County of Kauai, was for all relevant times, the employer of County of Kauai employees as provided in HRS § 89-2. The DEPARTMENT OF PUBLIC WORKS, County of Kauai; EDMOND RENAUD, Deputy County Engineer, Department of Public Works, County of Kauai; CRYSTAL FUJIKAWA, Personnel Officer, Department of Public Works, County of Kauai; RYAN NISHIKAWA, Chief, Field Operations and Maintenance, Department of Public Works, County of Kauai; MALCOLM FERNANDEZ (Fernandez), Director, Department of Personnel Services, County of Kauai; and THOMAS TAKATSUKI, Deputy Director, Department of Personnel Services, County of Kauai were for all relevant times, representatives of the Mayor, County of Kauai, or who act in his interest in dealing with employees of the County of Kauai in the Department of Public Works and are therefore employers within the meaning of HRS § 89-2. KEN MORIKAWA, Overseer, Department of Public Works, County of Kauai; PATRICK SHIMAMOTO, Kapaa District Road Overseer, Department of Public Works, County of Kauai; PATRICK LABUGUEN, Kapaa Construction Supervisor, Department of Public Works, County of Kauai; ROBERT CREMER, Kapaa Construction Supervisor, Department of Public Works, County of Kauai; and HENRY KUPIHEA, Bushwacker Operator, Department of Public Works, County of Kauai were for all relevant times, employees of the Department of Public Works, County of Kauai. (The foregoing are collectively referred to as Kauai Respondents.)
3. The UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) is an employee organization and the exclusive representative, within the meaning of HRS § 89-2, certified by the Board to represent the interests of employees included in bargaining unit 01. UPW State Director Nakanelua; Kauai Division Director Mindoro and Kauai Division Business Agent Horner are agents who represent the interests of the UPW.

4. The County of Kauai and the UPW are parties to a collective bargaining agreement (CBA) for bargaining unit 01 employees. The CBA contains a grievance procedure to resolve disputes involving the interpretation, application, or violation of the terms of the CBA.
5. On or about December 30, 2008, the UPW filed a Step 1 class grievance with Donald Fujimoto, County Engineer, Department of Public Works (Fujimoto) involving workplace safety and/or workplace violence issues regarding alleged harassment in the Kapaa Baseyard Roads Division. The grievance states in part:

This grievance is filed on behalf of all affected BU01 employees, employed with the COK, DPW, Kapaa Baseyard, Roads Division, because the Employer, failed to recognize conditions and behavior that may lead to or increase the risk of risk of violence, therefore failing to provide a workplace free from violence.

On 12/20/08, individual(s) in the Kapaa Baseyard Roads Division have made the Union aware, that the Employer has not addressed any workplace safety and/or workplace violence issues regarding alleged harassments. The Union, on numerous occasions dating back to 06/18/08, addressed these issues with the Employer, so that the Employer could act beforehand to address and encourage employees to observe applicable safety rules and regulations and support efforts to provide a violence free workplace.

* * *

B. REMEDY SOUGHT:

The Employer shall provide a workplace free from violence by providing safety and health training that includes recognition of conditions and behavior that may lead to or increase the risk of violence and the means and methods to prevent or reduce that risk to Employees and supervisors during work hours.

All other appropriate relief as deemed by the Arbitrator.

6. By letter dated February 24, 2009 to UPW Business Agent Horner, Fujimoto indicated they investigated a June 18, 2008 incident and would take administrative measures to ensure that the behavior would not happen again. Fujimoto indicated that the department would continue to provide safety and health training relative to workplace violence for the employees and supervisors to encourage them to refrain from such activity and to report any activity in an effort to resolve the grievance.
7. By letter dated April 3, 2009, Fujimoto sent a follow up letter to Horner, stating that subsequent to his previous response, Mayor Carvalho wanted to meet with Complainant, Henry Kupihea, Ryan Nishikawa, Patrick Shimamoto, Robert Cremer, Patrick Labuguen, Ed Renaud, Crystal Fujikawa and Horner to bring closure to Kua's complaint, bring about a reconciliation between Kua and Kupihea and a resolution of the grievance. The meeting occurred on or about March 18, 2009. Fujimoto stated his belief that the Department sufficiently met the remedy sought by the Union.
8. By letter dated April 12, 2009, Kua wrote to the County of Kauai and the UPW alleging a failure of due process and collusion. Kua states, *inter alia*, that he was misrepresented by Horner; that he was not informed of the March 18, 2009 meeting although he states that Horner called him on March 13, 2009 regarding the meeting and came to his second job at Wal-Mart to ask if he was attending the meeting, but that he did not receive a letter regarding the meeting; and accused the County and the UPW of violating his UPW rights, constitutional rights, civil rights and the Code of Ethics because he did not attend the meeting and did not consent to the closure of the issues.
9. By letter dated April 13, 2009, Horner informed Fernandez, Director, Personnel Department, that the UPW wanted to proceed to Step 2 of the grievance procedure because the Step 1 response was unsatisfactory and did not serve to resolve the grievance.
10. In an Inter Office Memorandum dated May 7, 2009, Mindoro, UPW Kauai Division Director, informed Nakanelua about the background to Kua's April 12, 2009 letter alleging misrepresentation by UPW. Mindoro explained that there was an alleged workplace violence incident that occurred between two Unit 01 employees at the Kapaa baseyard on or about June 10, 2008; that Horner had filed a class grievance on December 30, 2008 after learning that the Employer had not been addressing the safety and workplace violence issues; that Complainant wrote to the Mayor who spoke individually with Complainant and others and then scheduled a meeting with all BU 01 workers, supervisors and administrative staff; Complainant felt he was not properly notified of the meeting although the

UPW business agent telephoned him twice and asked if he was attending when she ran into him at his second job at Wal-Mart; Complainant did not attend the meeting; pursuant to the grievance filed, the employer required the management staff to attend training for workplace violence, conflict resolution, etc., and committed to continuing education for supervisors to assure a safe and productive work environment; that the Mayor would hold the supervisors responsible for providing a workplace free of violence; that since Complainant was not satisfied, the UPW filed a Step 2 appeal; and that Complainant's accusations of collusion and Horner's alleged failure to represent Complainant were unsubstantiated.

11. By letter dated May 28, 2009, Nakanelua wrote to Complainant that the issues he raised were addressed promptly within the scope of the Union's duty of fair representation and that his allegations of collusion had no factual basis and were libelous. Nakanelua informed Complainant that he was considering filing a civil lawsuit against him.
12. By letter dated July 1, 2009 regarding Class Grievance TH-08-17, Fernandez stated that the Employer had met the remedy sought by the Union because the Employer ensured that appropriate administrative measures would be taken in order that the complained of behavior did not happen again and that the employees had the right to work in a safe and secure environment free from violence or the threat of violence. Fernandez recommended that the Union, Employer and employees of the baseyard meet at least once a month to address concerns/problems/issues/etc., to foster better working relations.
13. By Memorandum dated July 28, 2009, Horner recommended that the UPW file the grievance¹ as the Employer provided a full remedy.
14. By letter dated August 7, 2009, Nakanelua wrote to Fernandez indicating that the UPW accepted the remedy provided in the Employer's Step 2 letter dated July 1, 2009 and considered the grievance resolved.
15. On October 9, 2009, Complainant filed this Complaint against the above-named Respondents with the Board alleging, *inter alia*, that Respondents committed prohibited practices for failure of due process and collusion.
16. The UPW contends that the Complaint is untimely because Complainant wrote to Nakanelua and the County on or about April 14, 2009 complaining of a failure of due process and collusion, violation of UPW rights, Code of

¹From the context of the sentence, the Board finds Horner's recommendation to "file the grievance" to mean "not to pursue" the grievance as the Employer had provided a full remedy.

ethics, Constitutional and Civil rights because he was not properly notified of the March 18, 2009 meeting and Nakanelua responded to Complainant by letter dated May 28, 2009, well outside the Board's ninety-day statute of limitations. Alternatively, the UPW contends that the Complainant fails to state a claim for relief against the UPW because an alleged breach of duty of fair representation cannot be brought against union officers; because the Union's decision to resolve the grievance does not give rise to a claim for breach of the duty of fair representation, and the Complaint failed to allege a violation of the Unit 01 collective bargaining agreement.

CONCLUSIONS OF LAW

1. 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. 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. See Yamane v. Pohlson, 111 Hawai'i 74, 81 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).
2. 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)).
3. HRS § 89-14, provides that any controversy concerning prohibited practices may be submitted to the Board in the same manner and with the same effect as provided in HRS § 377-9, and the Board shall have exclusive original jurisdiction over such a controversy.
4. HRS § 377-9(l) states that no complaint "shall be considered unless filed within ninety days of its occurrence." Hawaii Administrative Rule § 12-42-42 provides that a complaint for prohibited practices may be filed by a public employee "within ninety days of the alleged violation."
5. The ninety-day statute of limitations is a jurisdictional requirement which the Board has no authority to waive. 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”).

6. The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. 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).

7. Based upon a review of the Complaint and the record in this case, the Board finds that the claims presented are untimely since the Complaint was not filed within ninety days of the date Complainant knew or should have known of the alleged prohibited practices by Union and the Employer. In his Complaint, Complainant cites HRS § 89-13(a)(1) - (8) and (b)(1) - (5) and “See attached Failure of Due Process & Collusion...& letter to Mayor Bernard Carvalho”. The attached July 17, 2009 letter “To All Concern” (sic) with the subject line “Failure of Due Process & Collusion” starts with “You were all inform (sic) of this subject in April 14-16, 2009.” Complainant states in the letter that only Nakanelua responded to Complainant’s concerns and stated that he was considering civil litigation against Complainant. Complainant stated that documents were given to Thomas Takastuki on May 21, 2009 at a second step grievance meeting; it had been over a month, and he was considering filing suit against all named individuals. Complainant asked that a response be given within seven days or he would file all of the documents in Court.

The Board finds that by letter dated April 12, 2009, Complainant previously complained of the “failure of due process and collusion” to the County of Kauai and the UPW claiming that he did not receive a letter informing him of the meeting held on March 18, 2009 at 9:30 a.m. Complainant however admits that Horner called him on Friday March 13, 2009 at 11:45 a.m. informing him that Personnel Officer Crystal Fujikawa called her saying the Mayor wanted a meeting and that Fujikawa sent out letters. Complainant further admits that Horner came to Wal-Mart and asked if he was attending the meeting. According to Horner, Complainant indicated he had a doctor’s appointment to attend. Complainant nevertheless complains that not receiving a written notice was not professional or business like; that he was being treated unfairly in the Code of Ethics; and that he did not consent to the closure and to hold the meeting. Complainant contended that Mayor

Carvalho, Ryan Nishikawa, Patrick Shimamoto, Patrick Labuguen, Robert Cremer, Horner, Crystal Fujikawa, Edmond P.K. Renaud, Henry Kupihea, Kauai County as a whole and the UPW were acting collusively.

8. The Board finds that Complainant's failure of due process and collusion claims arise from the meeting which was held on March 18, 2009 which he had actual notice of. As such, the Board concludes that Complainant knew or should have known about any claims arising from the March 18, 2009 meeting shortly thereafter or at the latest, April 12, 2009 when he sent a letter threatening suit to the County of Kauai and the UPW. These events occurred more than ninety days prior to the filing of the instant Complaint on October 9, 2009 and are time-barred. While Complainant attached the letter titled, Failure of Due Process and Collusion, dated July 17, 2009 to the Complaint, the letter refers to previously informing the recipients of the subject earlier on April 14-16, 2009; reiterates his previous claims of Failure of Due Process & Collusion; and threatens suit against Mayor Carvalho, Ryan Nishikawa, Patrick Shimamoto, Patrick Labuguen, Robert Cremer, Crystal Fujikawa, Edmond P.K. Renaud, Henry Kupihea, Dayton Nakanelua, Leilani Mindoro and Trina Horner. These are not new claims but arise from the meeting held on March 18, 2009 regarding the alleged workplace violence incident from July 2008. The Board therefore concludes that it lacks jurisdiction over the instant Complaint because it is untimely filed.
9. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. [This court] must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory. For this reason, in reviewing [a] circuit court's order dismissing [a] complaint ... [this court's] consideration is strictly limited to the allegations of the complaint, and [this court] must deem those allegations to be true. In re Estate of Rogers, 103 Hawai'i 275, 280-81, 81 P.3d 1190, 1195-96 (2003).
10. Alternatively, assuming *arguendo*, the Complaint is timely, in reviewing the allegations of the Complaint in the light most favorable to the Complainant, the Board concludes that Complainant nevertheless fails to state a claim for relief. First, Complainant alleges a failure of due process because he did not receive a letter noticing the March 18, 2009 meeting with Mayor Carvalho and others. Complainant, however, fails to cite the basis for his contention that there is a duty or requirement for the employer or the Union to notice the meeting in writing and that a failure to do so constitutes a due process violation which in turn constitutes a prohibited practice. Second, Complainant merely accuses the Respondents of collusion but does not

provide a basis for the claim or a basis for finding a prohibited practice. Accordingly, the Board concludes that the Complaint fails to state a claim for relief.

ORDER

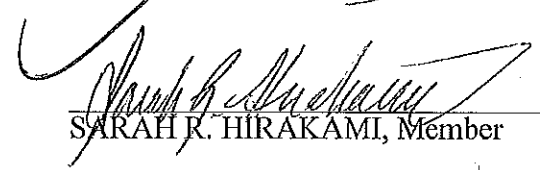
The Board hereby grants the Respondents' motions to dismiss the instant Complaint.

DATED: Honolulu, Hawaii, May 25, 2011.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SARAH R. HIRAKAMI, Member

Copies sent to:

Joseph Kua, Jr.
Mauna Kea Trask, Deputy County Attorney
Herbert R. Takahashi, Esq.