

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

CARMAEL KAMEALOHA STAGNER,

Complainant,

and

ROBERT DOI, Field Agent, Hawaii
Government Employees Association,
AFSCME, Local 152, AFL-CIO; JARNETT
LONO, Field Agent, Hawaii Government
Employees Association, AFSCME, Local
152, AFL-CIO; and HAWAII
GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO,

Respondents.

CASE NO. CU-13-296

ORDER NO. 2796

ORDER DISMISSING FIRST
AMENDED PROHIBITED PRACTICE
COMPLAINT

ORDER DISMISSING FIRST
AMENDED PROHIBITED PRACTICE COMPLAINT

On August 13, 2010, Complainant CARMAEL KAMEALOHA STAGNER (Stagner or Complainant) filed a Prohibited Practice Complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). Complainant alleged, *inter alia*, that on October 22, 2007, the Department of Public Safety (PSD) terminated her from her Clinical Supervisor, Substance Abuse Specialist V position, due to her marital status; on December 5, 2007, Respondent ROBERT DOI, Field Agent, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (Doi) met with PSD in a disciplinary hearing without Complainant and made agreements, including agreeing to have Stagner withdraw her civil rights complaint in exchange for her reinstatement into her position, without Stagner's approval; Stagner returned to work on February 5, 2008; on March 15, 2010, Doi called Stagner and said that something "bad" would happen if she did not withdraw her civil rights complaint; PSD hand-delivered a termination letter and scheduled a pre-discharge hearing for May 12, 2010; Stagner requested representation from Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, Local 152, AFL-CIO (HGEA or Union) Field Agent JARNETT LONO (Lono) who informed Stagner that she would be unable to represent her if she had a private lawyer; Stagner appeared at the pre-discharge hearing on May 12, 2010 and stated that she would not make any statements since she wasn't being represented; Lono did not appear at the pre-discharge hearing; PSD would not permit

Stagner's private attorney to represent her at the pre-discharge hearing; and thereafter PSD wrongfully terminated her.

On August 31, 2010, Respondents filed a Pre-Hearing Settlement Conference Statement and a Motion to Dismiss Prohibited Practice Complaint Filed on August 13, 2010 (Motion to Dismiss) with the Board. In its Motion to Dismiss, the HGEA alleged, *inter alia*, that Complainant was terminated on October 22, 2007; Doi filed a grievance on Complainant's behalf on October 24, 2007; a Step 1 grievance meeting occurred on December 5, 2007 with Eric Nitta (Nitta), PSD Personnel Management Specialist, Doi, and Complainant; by letter dated January 29, 2008, PSD Director Clayton Frank (Frank) confirmed with Complainant that her October 22, 2007 termination had been rescinded, that she was reinstated to her position; that the period between October 23, 2007 to February 4, 2008 would be reflected as a suspension and that she was to return to work on February 5, 2008; by letter dated May 7, 2009, Frank reminded Complainant that her reinstatement had been predicated on the withdrawal of her grievance and withdrawal of a civil rights complaint relating to the discharge and requested a copy of the withdrawal of her civil rights complaint; by letter dated April 29, 2010, Frank informed Complainant that she was being discharged effective May 17, 2010 from her position because she failed to comply with the conditions of reinstatement; Complainant was also advised of a pre-discharge meeting on May 12, 2010; on May 11, 2010, Complainant informed Lono by telephone that she had retained the services of Daphnee Barbee, Esq., (Barbee or Barbee-Wooten) to represent Complainant at the pre-discharge meeting on May 12, 2010 which Complainant confirmed that day by a fax to Lono; Lono confirmed the understanding by letter dated May 12, 2010; that Respondents believe Complainant was discharged on May 17, 2010; that Complainant did not file a grievance challenging the May 17, 2010 discharge, and on August 13, 2010, Complainant filed the instant Complaint.

The HGEA contended in its Motion to Dismiss that if Complainant's claims involved the failure of the HGEA to obtain Complainant's permission to settle her October 22, 2007 discharge grievance, Complainant's claims are untimely since Complainant was made aware that the withdrawal of the civil rights claim was a condition of the settlement on or about May 7, 2009 when Frank wrote to remind Complainant of the condition to withdraw her civil rights claim. The HGEA argued that Complainant had 90 days from the receipt of the May 7, 2009 letter to file a complaint to undo any alleged agreement but Complainant did not act on it and continued her employment with PSD. The HGEA further argued that if the Complaint was based on the theory that HGEA refused to represent Complainant in the May 12, 2010 pre-discharge meeting before PSD Hearing Officer Frank Lopez (Lopez) and failed to file a grievance on Complainant's behalf, such failure was a result of Complainant's decision to retain legal counsel to represent her in the proceedings. The HGEA also contended that pursuant to HRS § 89-3, employees have the right to form, join or assist any employee organization and to refrain from such activities and pursuant to HRS § 89-8(b), an individual employee may present a grievance at any time to the employee's employer and have the grievance heard without

intervention of an employee organization. Thus, HGEA argues that Complainant elected to proceed without Union representation in both the pre-discharge meeting and any subsequent discharge action and the HGEA did not breach its duty of fair representation to Complainant. The HGEA further contends that the Complaint failed to state a claim for relief since the Complaint did not allege specific violations of HRS § 89-13(b) and failed to request appropriate relief.

On September 7, 2010, Complainant, by and through her counsel, filed a Pre-hearing Settlement Conference Statement with the Board.

On September 8, 2010, Complainant, by and through her counsel, filed a Memorandum in Opposition Respondent's (sic) Motion to Dismiss Prohibitive (sic) Practice Complaint Filed on August 13, 2010. Complainant argued, *inter alia*, that the Complaint was timely since the pre-termination hearing was on May 12, 2010 when the Union representative knew that Complainant's private counsel would not be at the hearing and the Union representative also did not appear and that Complainant filed her unfair labor practice on August 3, 2010; that the Union was bound by the contract to appear on Complainant's behalf at the pre-termination hearing; Complainant contacted Lono by telephone on May 11, 2010 requesting that Lono be present at the hearing; and further requested leave to amend her Complaint if it was deficient. Complainant stated in a Declaration dated September 7, 2010, *inter alia*, that at no time did she agree to withdraw her civil rights complaint in order to be reinstated as a Substance Abuse Counselor; that she did not attend a meeting on December 5, 2007 with Doi and Nitta as there was a storm and all State personnel were told not to report to work; she filed a civil rights complaint at PSD on January 8, 2008; to her knowledge, no action was taken on the PSD civil rights complaint; she filed a complaint with the Hawaii Civil Rights Commission on April 28, 2008 (sic); when Doi called her on March 15, 2010, she felt it was a threat and filed a police report; that she called HGEA and asked if there was anything in HGEA's file which reflected an agreement between HGEA and PSD regarding her civil rights complaints and she was told there was nothing in the files; that her attorney attempted to continue the May 12, 2010 pre-termination hearing but the hearing officer refused to continue the hearing; that she attended the hearing and again requested a continuance but was denied; Complainant believes HGEA violated unfair practices because the Union did not represent her at the pre-termination hearing, falsely stated that she agreed to withdraw her civil rights complaint and by intimidating her with threats to forego her civil rights to file discrimination complaints against her employer, thereby violating HRS § 89-13(b)(1)-(5) and Article 17(J)(2) of the Union contract.

The Board conducted a prehearing/settlement conference on September 9, 2010 and scheduled a hearing on Respondents' Motion to Dismiss on October 4, 2010 at 1:30 p.m.

On September 15, 2010, Complainant, by and through her attorney, filed a Motion to Amend Unfair Labor Practices Complaint (Motion to Amend) and stated in a

Declaration, dated September 14, 2010, *inter alia*, that she drafted the Complaint without benefit of an attorney; that she hired counsel on September 3, 2010, to represent her in the unfair labor practices complaint; and that she requests to amend the Complaint to include the statutory basis for the Complaint and relief requested.

On September 20, 2010, Respondents, by and through their counsel, filed a Memorandum in Opposition to Complainants' (sic) Motion to Amend Unfair Labor Practices Complaint Filed August 13, 2010. Respondents contended that Complainant's Declaration was inconsistent with facts suggesting Complainant was represented by counsel prior to September 3, 2010, as Respondent Lono was informed that Complainant was represented by Ms. Barbee on or about May 11, 2010; the Complaint, dated August 3, 2010 but filed on August 13, 2010, indicates that Complainant's principal representative is "Daphne Barbee-Wooten, Esq."; and correspondence between Ms. Barbee and PSD Hearings Officer Frank Lopez, dated May 11, 2010 confirms Ms. Barbee's activity as Ms. Stagner's attorney prior to May 11, 2010. Respondents argued that considered together, these facts undermine Complainant's representation that she was without counsel when she drafted the Complaint. In addition, Respondents contended they would be prejudiced by permitting Complainant to amend her Complaint as Respondents have already answered the Complaint, filed their Prehearing Settlement Conference Statement and Motion to Dismiss, as well as allow Complainant to make claims which would otherwise be outside the statute of limitations.

Pursuant to Hawaii Administrative Rules (HAR) § 12-42-43, the Board granted Complainant's Motion to Amend Complaint in Order No. 2739 issued on September 27, 2010.

On September 29, 2010, Complainant filed her First Amended Complaint with the Board. Complainant alleged, *inter alia*, that she was terminated in December 2007 and was represented by Doi in a grievance; Complainant was reinstated by PSD on February 5, 2008; in March 2010, she received an irate phone call from Doi who informed her that "something bad would happen to her if she did not withdraw her civil rights complaint" against PSD; Lono was unable to find any settlement agreement in Complainant's files which conditioned her reinstatement upon the withdrawal of her civil rights complaint; on May 5, 2010, Complainant received a letter from PSD indicating she would be terminated because she did not withdraw her civil rights complaint against PSD; Complainant hired Ms. Barbee for Complainant's civil rights complaint who requested that the pre-termination hearing be continued so that Ms. Barbee could be present; on May 10, 2010, PSD Hearings Officer Lopez wrote to Complainant and HGEA stating only the union was the exclusive representative for the pre-termination hearing; on May 11, 2010, Complainant called Lono and requested she be present at the May 12, 2010 pre-termination hearing; on May 12, 2010, Complainant was present at the pre-termination hearing without any Union representative; on May 18, 2010, Complainant received a letter from HGEA and Lono that they would not represent her in the pre-termination hearing; and that HGEA, in fact, did not represent Complainant in the pre-

termination hearing and did not file a grievance on her behalf. Complainant contended that Respondents' failure to represent Complainant in the pretermination hearing led to her subsequent termination and violated HRS §§ 89-8(a) and 89-13(b)(4) and Respondents breached their duty of fair representation.

On October 6, 2010, Respondents filed their Answer to the First Amended Complaint Filed on September 29, 2010 and a Motion to Dismiss and/or for Summary Judgment of Complainant's First Amended Complaint Filed on September 29, 2010. Respondents argued, that Complainant filed a First Amended Complaint on September 29, 2010, alleging that the HGEA did not represent Complainant at the May 12, 2010 meeting which led to her termination which violated HRS §§ 89-13(b)(1)-(5) and 89-8. The HGEA contended, *inter alia*, that Complainant elected to proceed without Union representation and the HGEA withdrew its representation of Complainant. Thereafter, the HGEA argued it was incumbent upon the employee to file her own grievance to challenge her discharge which was effective May 17, 2010 and the HGEA cannot be found to have breached its duty of fair representation to Complainant.

On October 18, 2010, Complainant filed a Memorandum in Opposition to Respondent's Motion to Dismiss and/or for Summary Judgment of Complainant's First Amended Complaint Filed September 29, 2010 with the Board. Complainant disputes facts presented by Respondent, i.e., that Complainant did not attend a meeting with Doi and Nitta on December 5, 2007, that she could not have agreed to withdraw her Hawaii Civil Rights Complaint because she filed it after she was reinstated, and that Frank's May 7, 2009 letter states that Respondent HGEA agreed that Complainant would rescind her civil rights complaint evidencing that HGEA and Doi engaged in unfair labor practices by misrepresenting Complainant's position regarding her civil rights complaint. Complainant states in a Declaration, dated October 18, 2008, that she did not knowingly waive her rights to Union representation at the pre-termination hearing and to file a grievance. Complainant alleges that Respondents mistakenly believe that once Complainant hired a private lawyer for her civil rights claim that they could refuse to represent Complainant and contends that the Respondents violated Complainant's right and duty of fair representation by not representing her in the pre-discharge hearing, by misrepresenting her position in an alleged "agreement" with the employer to withdraw her civil rights complaint, and by not filing a grievance on her behalf.

The Board held a hearing on the Respondents' Motion to Dismiss on November 22, 2010 and provided the parties with the opportunity to present evidence and argument to the Board. After hearing arguments, at the close of the hearing, the Board requested further briefing on the issue of the timeliness of the Complaint and set deadlines for the submission of briefs.

On December 14, 2010, the Complainant filed a Supplemental Memorandum Regarding Timeliness and on January 6, 2011, Respondents filed a Supplemental Memorandum in Support of Motion to Dismiss and/or for Summary

Judgment of Complainant's First Amended Prohibited Practice Complaint and Prohibited Practice Complaint (sic) with the Board. On January 18, 2011, Complainant filed a Reply to Respondent's Supplemental Motion to Dismiss First Amended Complaint and Complaint (sic).

In her Supplemental Memorandum Regarding Timeliness filed on December 14, 2010, Complainant alleges that on May 14, 2010, Complainant received a letter from Lono stating the Union would not represent her in a pre-termination hearing on May 12, 2010 and she filed her Complaint against Respondents on August 13, 2010. As May 14, 2010 was a Friday, Complainant contends that the time period should begin to run on May 15, 2010 and her filing on August 13, 2010 is within the 90-day deadline. Complainant also argues that she mailed the Complaint to the Board on August 3, 2010 and was received by the Board on August 4, 2010. Complainant argues that the date of mailing a document should be used as the date of filing pursuant to Si-Nor, Inc. v. DLIR, 120 Hawai'i 135, 202 P.2d 596 (2008) (Si-Nor). In Complainant's case, after mailing the Complaint to the Board, Complainant was called by a clerk from the Board who stated that an additional notary stamp was required and that Complainant obtained the stamp and returned it on August 13, 2010. Complainant picked up the Complaint from the Board on August 5, 2010 and returned it on August 13, 2010. Complainant argues that the August 4, 2010 receipt date should be used, but even if the file-stamp date of August 13, 2010 is used, it is still within 90 days of May 15, 2010.

On January 6, 2011, Respondents filed a Supplemental Memorandum in Support of Motion to Dismiss and/or for Summary Judgment with the Board. Respondents argued that the Complaint alleged that Doi met with PSD representatives on December 5, 2007 and made agreements without Complainant's approval that resolved the pending grievance challenging her termination of October 22, 2007. Respondents assert that in her First Amended Complaint, Complainant charged that Respondents did not represent her at the May 12, 2010 pre-discharge/termination meeting and did not follow-up on any grievance on her behalf. Respondents allege that on May 11, 2010, Lono and Complainant had a telephone discussion and Complainant confirmed in a fax to Lono that Complainant had retained legal counsel who would represent Complainant in the case. Respondents contend that the Complaint filed on August 13, 2010 is untimely as Complainant knew on May 11, 2010 that the HGEA would not represent her since Complainant had retained her own counsel for the pre-discharge meeting. Respondents also contend that Complainant misreads Board Rule § 12-42-42(a) because Complainant argues that she received notice that HGEA would not represent her on May 14, 2010 when in fact she knew on May 11, 2010 that Lono would not represent Complainant and that Complainant admitted in her Complaint that Lono was not present at the pre-discharge meeting on May 12, 2010. Respondents also contend that the Board should not consider Complainant's August 4, 2010 mailing as the filing date because the Complaint failed to contain the proper notaries and after retrieving the Complaint and obtaining the proper notaries, Complainant did not file the corrected Complaint until August 13, 2010, eight days later.

On January 18, 2011, Complainant filed a Reply to Respondent's Supplemental Motion to Dismiss First Amended Complaint and Complaint with the Board. Complainant contends, *inter alia*, that she was not aware that HGEA would not represent her until May 14, 2010. In addition, Complainant contends that the Board should have accepted her Complaint on August 5, 2010 and should not have rejected the Complaint for improper form citing Doe v. Doe, 98 Hawai'i 144, 44 P.3d 1085 (2002).

Based on a review of the record and the arguments presented, the Board makes the following findings of fact, conclusions of law, and order dismissing the instant First Amended Prohibited Practice Complaint.

The Board finds, adjudges, orders and decrees as follows:

FINDINGS OF FACT

1. For all relevant times, Complainant was employed by the PSD as a Substance Abuse Specialist V and an employee within the meaning of HRS § 89-2 and included in bargaining unit 13.
2. For all relevant times, the HGEA was an employee organization and the exclusive representative, within the meaning of HRS § 89-2, certified by the Board to represent the interests of employees in bargaining unit 13. Doi and Lono were for all relevant times HGEA field agents and represented the interests of the HGEA.
3. The HGEA and the State of Hawaii are parties to collective bargaining agreement for Unit 13 setting forth a grievance procedure to resolve violations or misapplications of the collective bargaining agreement.
4. Complainant was discharged on October 22, 2007 and Doi filed a grievance on Complainant's behalf challenging the termination on October 27, 2007.
5. On December 5, 2007, Doi met with PSD in a grievance meeting and, viewing the facts in the light most favorable to Complainant, without Complainant present.
6. On January 8, 2008, Complainant filed a complaint with the PSD civil rights compliance office.
7. By letter dated January 29, 2008, Frank wrote to Doi regarding a grievance filed by Complainant addressing her discharge due to engaging in an unprofessional and intimate relationship with an inmate/parolee that created a serious security situation and for not being forthright about her involvement. Frank agreed to rescind the discharge action and treat the

period from the date of discharge until reinstatement to be a suspension and it was agreed that the civil rights complaint would be withdrawn and the issue closed. As such, the grievance was closed.

8. By letter dated January 29, 2008, Frank wrote to Complainant advising that, in accordance with the Step 1 decision, her discharge was rescinded and she would be reinstated effective February 5, 2008, and the period of October 23, 2007 through February 4, 2008 would be treated as a suspension.
9. On February 5, 2008, Complainant was reinstated to her position at PSD.
10. On April 18, 2008, Complainant filed a complaint with the Hawaii Civil Rights Commission (HCRC).
11. By letter dated May 7, 2009, Frank reminded Complainant that Complainant's reinstatement had been predicated on the withdrawal of her grievance and the withdrawal of a civil rights complaint relating to the discharge and requested a copy of the withdrawal of her civil rights complaint.
12. On or about March 15, 2010, Doi called Complainant and said that something "bad" would happen if she did not withdraw her civil rights complaint.
13. By letter dated April 29, 2010, Frank notified Complainant that she would be discharged effective May 17, 2010, for failing to comply with a condition of her reinstatement effective October 23, 2007. The April 29, 2010 letter includes a chronology of events, including: that on May 7, 2009, PSD sent Complainant a letter advising that the PSD and the HGEA had agreed to reinstate Complainant and rescind a previous discharge in lieu of closing the grievance and withdrawing her civil rights complaint related to the discharge; that PSD had not yet received the notice of withdrawal and to provide the requested withdrawal; that on March 15, 2010, Doi advised her that she needed to provide a response by March 19, 2010 since he had to provide a response by March 22, 2010; that she filed a police report after talking to Doi; and on April 19, 2010, the HGEA advised PSD that Complainant refused to withdraw the civil rights complaint. Frank also stated that Complainant had the opportunity to contest the discharge before Departmental Hearing Officer Lopez on May 12, 2010 and that it was her responsibility to contact the Union. Frank also stated that if she felt the action was without just and proper cause, she had the right to process a grievance in accordance with the Unit 13 collective bargaining agreement.

14. On or about May 8, 2010, Complainant's counsel Ms. Barbee wrote to Lopez indicating that Ms. Barbee was hired as Complainant's attorney and that Ms. Barbee had requested a continuance of the May 12, 2010 to May 13, 2010 but that Lopez had refused. Ms. Barbee requested he reconsider.
15. On May 11, 2010, Complainant spoke with Lono by telephone and indicated that Complainant was being represented by Ms. Barbee in the pre-discharge meeting and in the event she was discharged. As such, Lono advised that the HGEA would no longer be representing Complainant and her case would be closed.
16. By fax, dated May 11, 2010, Complainant wrote to Lono regarding the PSD pre-discharge hearing on May 12, 2010, documenting their telephone conversation of May 11, 2010 at 9:30 a.m. and that Complainant had informed Lono that Complainant retained legal representation in the matter; that Lono informed Complainant that Lono would be unable to represent her at the pre-discharge hearing scheduled on May 12, 2010; that Ms. Barbee shall represent Complainant in the case; and to forward all pertinent documentation.
17. Complainant attended the pre-discharge meeting on May 12, 2010 without legal or Union representation. At the meeting, Complainant requested a continuance from Lopez which was denied and Complainant chose not to make any statements on her behalf.
18. By letter dated May 12, 2010, Lono wrote to Complainant regarding Legal Representation by Daphnee Barbee, Esq Pre-Discharge Meeting Scheduled May 12, 2010 at 8:30 a.m., confirming in writing the Union's receipt of Complainant's letter dated May 11, 2010 memorializing their May 11, 2010, telephone conversation; that Complainant stated that she had retained legal counsel of Ms. Barbee to represent Complainant in the matter of the Pre-Discharge meeting and that the Union understood that Ms. Barbee would also provide legal representation if Complainant was discharged from PSD subsequent to the meeting; that Complainant was advised that since Complainant retained her own legal counsel, the HGEA would no longer represent Complainant in regards to the Pre-discharge meeting or any subsequent termination; and that if the information was not accurate to please notify her no later than May 14, 2010.
19. Complainant received Lono's May 12, 2010 letter on May 14, 2010.¹

¹Initially, Complainant stated in her First Amended Complaint that on May 18, 2010 that she received a letter from HGEA and Lono that they would not represent her in the pre-

20. Complainant was terminated on May 17, 2010. No grievance was filed challenging Complainant's termination.
21. Complainant mailed her Complaint to the Board for filing and the Board received the Complaint on August 4, 2010. Upon receipt, the Board's staff noted that the Notary Seal on the Prohibited Practice Complaint form submitted by Complainant was incomplete and Complainant was telephoned and advised to cure the defect. Complainant retrieved the Complaint on August 5, 2010 and returned the corrected Complaint form and filed the Complaint with the Board on August 13, 2010.
22. The Board finds based on the foregoing, that Complainant knew or should have known that the HGEA was not representing her in the pre-discharge hearing of May 12, 2010 and subsequent termination on May 11, 2010 when Complainant advised Lono that Complainant would be represented by her legal counsel, Ms. Barbee, and Lono stated that the HGEA would no longer represent Complainant. Complainant clearly confirmed this understanding in her fax to Lono on May 11, 2010. At the latest, Complainant knew or should have known Lono would not represent her during the pre-discharge hearing when Lono did not appear at the hearing on May 12, 2010. The Board finds that the filing date of August 13, 2010 is more than 90 days from May 11 or 12, 2010. Even if the Board were to use the May 14, 2010 date proposed by the Complainant when she received Lono's May 12, 2010 letter, the Complaint is still untimely because August 13, 2010 is more than 90 days after May 14, 2010.
23. With respect to Complainant's allegation that the HGEA entered into an agreement with PSD to withdraw Complainant's civil rights complaint as a condition of reinstatement in 2008, it seems clear that since only complaint pending at the time of her reinstatement was the January 8, 2008 complaint filed with PSD's compliance office, the Board finds that the PSD complaint was the subject of the agreement, not the complaint filed with HCRC in April 2008. The Board further finds that Complainant knew or should have known about the agreement when Frank wrote to her on or about May 7, 2009, thus the Complaint filed on August 13, 2010 is more than 90 days from the date she Complainant was aware of any violation.

CONCLUSIONS OF LAW

1. 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

termination hearing.

as provided in HRS § 377-9, and the Board shall have exclusive original jurisdiction over such a controversy.

2. HRS § 377-9(1) 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.”
3. The ninety (90)-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”).
4. 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).
5. Having reviewed the allegations of the complaint in the light most favorable to the Complainant, the Board finds that the claims presented are untimely since they were not filed within 90 days of the date Complainant knew or should have known of the alleged prohibited practices by the Union, i.e., the failure to represent her at the pre-discharge meeting. According to Complainant, she learned that HGEA would not represent her in the pre-discharge hearing when she received Lono’s letter on May 14, 2010. However, the Board finds that the Complainant should have known on May 11, 2010 that the HGEA would not represent her at the May 12, 2010 meeting when Complainant advised Lono that Complainant had retained legal counsel who would represent her and confirmed this fact in a fax on the same date. The Board further finds that at the latest, Complainant knew or should have known that the HGEA would not represent her for the pre-discharge hearing on May 12, 2010 when HGEA did not appear at the hearing. As such, the instant Complaint, filed more than 90 days from the alleged violations is untimely. Even using the May 14, 2010 date proposed by Complainant as the date she became aware that the HGEA would not represent her, the ninetieth day after May 14, 2010 is August 12,

2010 and the instant Complaint filed on August 13, 2010 was filed more than 90 days after May 14, 2010 and is untimely.

6. Complainant initially complained that she was unaware of any agreement to withdraw her civil rights complaint as a condition of the resolution of her 2007 grievance until Doi called her on or about March 15, 2010 and told her something "bad" would happen if Complainant did not withdraw her civil rights complaint. However, a year earlier, on May 7, 2009, Frank informed Complainant of an agreement to withdraw her civil rights complaint as a condition of her reinstatement and although Complainant contends that she was not aware of or party to an agreement, the Board finds that Complainant knew or should have known, on or about May 7, 2009, of the agreement in alleged violation of her rights. Thus, with respect to the allegation that Respondents violated their duty of fair representation because the Union agreed to have Complainant withdraw her civil rights complaint to resolve Complainant's initial discharge grievance, the Board finds that Complainant knew or should have known about the alleged agreement on or about May 7, 2009 and the filing of the instant Complaint on August 13, 2010 is untimely.
7. The Board concludes that the cases cited by Complainant are not controlling or persuasive. Complainant argues that the holding in the Si-Nor case is persuasive and that the mailing date of the Complaint is controlling here rather than the filing date of the Complaint. That case however, involved a contest of a citation issued by the Hawaii Occupational Safety and Health division where the Board found the contest was timely because it was timely mailed. However, the Board applied the applicable administrative rules in that case which provides that the Notice of Contest and refers to the mailing date.²

²Hawaii Administrative Rules § 12-51-19, concerning Employer contests of citation, proposed penalty or both, provides as follows:

Any employer to whom a citation and notice of proposed penalty has been issued may petition the director for review of the citation and notice pursuant to the rules of the appeals board within twenty days of the receipt by the employer of the notice of proposed penalty. Each notice of contest shall specify whether it is regarding the citation, the proposed penalty, or both. This petition shall be an original, and shall be served on the director and must be postmarked, or if not mailed, received by the director within twenty calendar days of the receipt by the employer of the citation and notice of proposed penalty. If not mailed, the date of receipt by the director shall be the date stamped on the contest by the director. The department will forward a copy of the petition to the appeals board. A de novo hearing shall be held by the appeals board. Copies of each contest petition shall be posted where they shall be readily observed by all

The Board's rules for filing depend on the actual filing of the Complaint with the Board and in this case, the Complaint was not filed upon receipt because the Notary Seal was defective.

Complainant also contends that the date of receipt by the Board should be controlling rather than the filing date of the Complaint. Complainant cites an unpublished opinion in Grindling v. State, 2010 W.L. 4814368 (Hawai'i App.), where there was a conflict between the July 7, 2010 file-stamped date of an notice of appeal and the district court clerk's June 3, 2010 stamped date of receipt for the notice of appeal. The Intermediate Court of Appeals held that the date on which the district court received the document prevailed over the subsequent file-stamped date which was eventually put on the document and found the appeal to be timely. In that case, however, the court cited Hawaii Rules of Appellate Procedure Rule 4(b), which states:

Rule 4 - Appeals, When Taken.

(b) Appeals in criminal cases.

(1) Time and place of filing. In a criminal case, the notice of appeal shall be filed in the circuit, district, or family court within 30 days after the entry of the judgment or order appealed from. The notice of appeal shall be filed with the clerk of the court from which the appeal is taken. If a notice of appeal is mistakenly filed with the appellate clerk, the appellate clerk shall note on it the date of receipt and shall transmit the notice to the clerk of the court appealed from. The date of the receipt by the appellate clerk shall be deemed to be the date the notice of appeal was filed with the clerk of the court.

Thus, pursuant to the foregoing rule, the court deemed the filing date to be the date of filing with the clerk.

Complainant also cites Doe v. Doe, 98 Hawai'i 144, 44 P.3d 1085 (2002) for the proposition, "Any other rule to the contrary notwithstanding, the clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules. After reviewing the foregoing case, the Board concludes that cited holding of the case is part of the Hawaii Family Court Rules 5(e) which defines filing with the court and states in part:

[t]he filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the

affected employees. [Emphasis added.]

clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Any other rule to the contrary notwithstanding, the clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules.

As the Board does not have rules similar to those relied upon in the foregoing cases, the Board does not find the case citations to be persuasive or applicable here.

8. HRS § 377-9(b) refers to the Prevention of unfair labor practices and is applicable to the prohibited practice proceedings pursuant to HRS § 89-14 and provides in part:

(b) Any party in interest may file with the board a written complaint, on a form provided by the board, charging any person with having engaged in any specific unfair labor practice. ...

HAR § 42-42-42(b) provides as follows:

(b) A prohibited practice complaint shall be prepared on a form furnished by the board. The original and five copies shall be filed with the board, and the board shall serve a copy of the complaint upon the person charged.

The Board's Prohibited Practice Complaint form requires a notary seal and there is no rule providing for the filing of defective pleadings.

9. Accordingly, the Board concludes that the First Amended Prohibited Practice Complaint is untimely and the Board lacks jurisdiction over the Complaint.

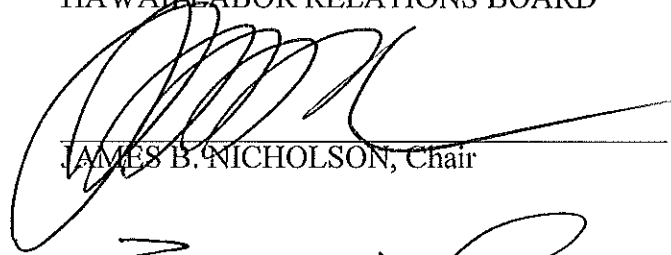
ORDER

The First Amended Prohibited Practice Complaint is hereby dismissed.

CARMAEL KAMEALOHA STAGNER v. ROBERT DOI, Field Agent, Hawaii Government
Employees Association, AFSCME, Local 152, AFL-CIO; et al.
CASE NO. CU-13-296
ORDER NO. 2796
ORDER DISMISSING FIRST AMENDED PROHIBITED PRACTICE COMPLAINT

Dated: Honolulu, Hawaii, June 28, 2011

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



NORMAN K. KATO II, Member

Copies sent to:

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Peter Liholiho Trask, Esq.