

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

ANAISE M. LIVAI,

Complainant,

and

EARL HATADA, Union Agent, Hawaii
Government Employees Association,
Hawaii Division and HAWAII
GOVERNMENT EMPLOYEES
ASSOCIATION.

Respondents.

CASE NO. CU-13-308

ORDER NO. 2828

ORDER GRANTING
RESPONDENTS' MOTION TO
DISMISS PROHIBITED PRACTICE
COMPLAINT FILED SEPTEMBER
29, 2011 OR FOR SUMMARY
JUDGMENT

ORDER GRANTING RESPONDENTS' MOTION TO
DISMISS PROHIBITED PRACTICE COMPLAINT FILED
SEPTEMBER 29, 2011 OR FOR SUMMARY JUDGMENT

BACKGROUND

On September 29, 2011, ANAISE M. LIVAI ("Complainant" or "Livai"), *pro se*, filed a Prohibited Practice Complaint ("Complaint") against EARL HATADA ("Hatada"), Union Agent, Hawaii Government Employees Association, Hawaii Division and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION ("HGEA") (collectively "Respondents") with the Hawaii Labor Relations Board ("Board"). Complainant alleged, *inter alia*, that she was injured at work on January 5, 2011 during her probationary period which was extended by Hilo Medical Center ("Employer") from March 6, 2011 to June 5, 2011; that she requested a further extension of her probationary period because she had not been released from her doctor's care; that on May 13, 2011, she received a letter from her employer stating that her probationary appointment would be terminated on June 5, 2011 because she had not been evaluated due to her absences; that on May 13, 2011 and

May 16, 2011, Complainant contacted an HGEA representative who told her that HGEA would not represent her because she was on probation and advised her to file an internal complaint; that she met with the Director of Human Resources ("HR") on June 2, 2011 who asked Complainant to consider resigning from her position and Complainant declined; that on July 1, 2011, Complainant again requested representation from HGEA and the HGEA representative informed Complainant that HGEA would not provide her with any assistance. Complainant contacted a labor attorney for advice and filed the instant Complaint. Complainant contends that HGEA failed to timely or appropriately represent her interests when she was wrongfully terminated and breached its duty of fair representation provided in Hawaii Revised Statutes ("HRS") § 89-8(a) and violated HRS § 89-13(b)(4).

On November 4, 2011, Respondents filed their Motion to Dismiss Prohibited Practice Complaint filed September 29, 2011 or for Summary Judgment asserting: (a) the Board lacks jurisdiction over claims arising more than ninety (90) days prior to the date of the Complaint; (b) Complainant failed to plead sufficient facts to show Respondents breached their duty of fair representation; and (c) the Complaint is moot. Respondents argue that the Complaint was filed on September 29, 2011 and any allegation before July 2, 2011 is outside the ninety (90) days statute of limitations and beyond the Board's jurisdiction. Regarding Respondents' assertions that Complainant failed to plead sufficient facts to show Respondents breached their duty of fair representation and that the Complaint is moot, Respondents argue, *inter alia*, that HGEA acted in good faith and remedied Complainant's situation when Kevin Mulligan ("Mulligan"), Field Services Officer, HGEA, intervened in the matter on August 1, 2011 and as a result of Mr. Mulligan's actions, Employer rescinded its May 12, 2011 termination of Complainant's initial probationary appointment; reinstated Complainant; and restored her benefits. Employer's remedies included (1) Complainant's benefits during the period of June 5, 2011 to present would remain unaffected and necessary adjustments would be made to reflect an authorized leave of absence, (2) Complainant's Initial Probationary Period would be extended until the end of the year, and (3) if Complainant had not returned to her usual and customary duties, Employer would extend her initial probationary period on a month to month basis.

On November 9, 2011, Complainant filed "Complainants (sic) Response to the Respondents Motion to Dismiss" and asserted numerous facts that included, *inter alia*, Mulligan's August 1, 2011 intervention and Employer's rescission of Complainant's termination of Initial Probationary Appointment memorialized in a letter dated August 11, 2011.

On November 14, 2011, the Board held a hearing on Respondents' Motion to Dismiss Prohibited Practice Complaint filed September 29, 2011 or for Summary Judgment in accordance with HRS § 89-5(i)(4) and (5), and Hawaii Administrative Rules

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("HAR") § 12-42-8(g)(3). Complainant appeared via telephone on her own behalf, and Debra A. Kagawa, Esquire, appeared on behalf of Respondents. After hearing arguments and deliberating on the arguments presented, the Board took the matter under advisement.

On November 16, 2011, Complainant filed her "Supplemental Memorandum to the Respondents Motion to Dismiss" stating, *inter alia*, that Respondents failed to pursue Complainant's claims of discrimination against the Employer in good faith and honesty, and that their decision and treatment of Complainant's case was arbitrary.

After careful consideration of the arguments, record and filings in this case, the Board makes the following findings of fact, conclusions of law, and decision and order granting Respondents' Motion to Dismiss Prohibited Practice Complaint filed September 29, 2011 or for Summary Judgment.

STANDARD OF REVIEW

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. When considering a motion to dismiss pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(1), however, the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits 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 § 350, at 213 (1990)).

FINDINGS OF FACT

The Board makes the following Findings of Fact. If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

1. At all times relevant, Complainant ANAISE M. LIVAI, was or is a public employee¹ on Initial Probationary Appointment and a member of bargaining unit ("BU") 13².
2. At all times relevant, Hawaii Health Systems Corporation dba Hilo Medical Center was or is a public employer.³
3. At all times relevant, Respondent HGEA is an employee organization and the exclusive representative⁴ as defined in HRS § 89-2, of employees in BU 13.

¹ HRS § 89-2 provides in part:

"Employee" or "public employee" means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section [89-6(f)].

² HRS § 89-6(a) provides in part:

a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

* * *

(13) Professional and scientific employees, who cannot be included in any of the other bargaining units.

³ HRS § 323F-2(a) provides in part:

(a) There is established the Hawaii health systems corporation, which shall be a public body corporate and politic and an instrumentality and agency of the State. The corporation shall be placed within the department of health for the administrative purposes specified in section 26-35(a)(6) only.

⁴ HRS § 89-2 provides in part:

"Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii public employees health fund, and other terms and conditions of employment of public employees.

4. At all times relevant, Respondent Hatada was or is a union agent of HGEA.
5. On May 12, 2011, Complainant received a certified letter from her Employer stating in part that:

You have been continuously absent from work during your initial probation since January 6, 2011. In a letter dated February 2, 2011, Hilo Medical Center extended your initial probationary period from 3/6/11 through 6/5/11 due to your supervisor's inability to rate your performance because of your ongoing absence.

Subsequently, you have remained out and your supervisor has not been able to evaluate your performance. Accordingly, the Employer will not be extending your initial probationary period and is hereby terminating your initial probationary appointment. Your last day of work will be, June 5, 2011.

6. On May 13, 2011 and May 16, 2011, Complainant called Hatada who told her it was his understanding that he would not be able to assist her with the termination action because she was a probationary employee. Hatada also told Complainant to file an internal complaint with Employer.
7. On May 17, 2011, Complainant's worker's compensation attorney, Nelson H. Kinoshita, ("Kinoshita"), advised Complainant, *inter alia*, that she must file a complaint for unlawful discharge or termination with the department of labor within thirty (30) days after her discharge or termination. Kinoshita stated further that "If you are alleging you were discharged because you suffered a work injury which is compensable under chapter 386 (worker's compensation), the complaint must be filed before the expiration of thirty (30) days after the date you are able to return to work."
8. On June 6, 2011, Complainant sent a letter to Mark Winters, Information Technology, Hilo Medical Center appealing for assistance to investigate Complainant's termination and stating in part, "I contacted the HGEA representative on May 13, 2011 as well as on May 16, 2011 to see what can

"Exclusive representative" means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

be done about this situation. He stated that there really was nothing that could be done about this, because I was only on probation.”

9. On June 13, 2011, Holly Ka`akimaka, (“Ka`akimaka”), Director, HR, East Hawaii Region, HHSC informed Complainant by letter that Employer had provided a copy of her June 6, 2011 letter to HGEA and would afford HGEA the opportunity to be present at the Step 1 grievance meeting. Ka`akimaka recommended Complainant contact certain persons to schedule a Step 1 grievance meeting and that if Ms. Ka`akimaka did not hear from Complainant to schedule the Step 1 meeting by June 21, 2011, Employer would assume that Complainant was no longer pursuing this matter and would consider the grievance closed.
10. Between June 13 and June 20, 2011, Complainant informed Hatada of the grievance meeting, and Hatada restated to Complainant that HGEA would not be able to assist her with her termination action and he would not be able to represent her at the meeting.
11. On June 20, 2011, Complainant met with Ka`akimaka without representation from Respondents.
12. On July 1, 2011, Complainant sent a letter to Hatada stating, *inter alia*, that “I called you on 05/13/2011 and then later on 05/16/2011 after receiving a certified termination letter from Hilo Medical Center on May 12, 2011 to find out how to deal with the issues of being terminated while out on a work related injury and under a doctor’s care. This is covered in both certified letters mentioned above. It is briefly mentioned that you were not able to do anything for me and that I should contact the employer.”
13. On July 6, 2011, Hatada sent a certified letter to Complainant restating what he told her on May 13 and May 16, 2011: that as an initial probationary employee, employer could terminate her employment during her initial probationary period; HGEA would not be providing her with any assistance in this case; and she could file an Internal Administrative Complaint with Employer.
14. On August 1, 2011, HGEA Field Services Officer Mulligan intervened in the matter and contacted Employer. As a result of Mulligan’s intervention, Employer rescinded its May 12, 2011 termination of Complainant’s Initial Probationary Appointment.
15. On August 11, 2011, Employer sent Complainant a letter informing her that the May 12, 2011 termination decision was rescinded; her benefits during the period of June 5, 2011 to present would remain unaffected; Employer

would make the necessary adjustments to reflect an authorized leave of absence; her Initial Probationary Period would be extended until the end of the year; and if she had not returned to her usual and customary duties, Employer would extend her probationary period on a month to month basis.

16. The Board finds that Complainant knew or should have known that Respondents denied her request for representation regarding her termination as early as May 13 or May 16, 2011. Between June 13 and June 20, 2011, Hatada reaffirmed his decision to Complainant when he told her that he would not represent her in her June 20, 2011 Step 1 grievance meeting and, as such, no HGEA representative attended the meeting.
17. Complainant further acknowledged HGEA's decision not to represent her, as stated in her June 6, 2011 letter to Winters and again in her July 1, 2011 letter to Hatada.
18. The Board finds that Hatada's denial of representation occurred on or about May 16, 2011⁵ at which time Complainant knew or should have known that HGEA would not represent her in challenging her termination; that her cause of action against Respondents accrued at that time; and that Livai's Complaint filed on September 29, 2011 was filed more than 90 days after the cause of action accrued and is untimely.

CONCLUSIONS OF LAW

The Board makes the following Conclusions of Law. If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

1. With respect to the powers of the Board, HRS § 89-5(i) provides in part:

In addition to the powers and functions provided in other sections of this chapter, the board shall:

* * *

⁵ In viewing the facts in the light most favorable to the non-moving party, the Board considered whether the Complaint would be timely if the Board found the date of Complainant's cause of action occurred on June 20, 2011. The Board found that a June 20, 2011 cause of action date was also outside of the Board's ninety (90) day statute of limitations.

- (3) Resolve controversies under this chapter;
- (4) Conduct proceedings on complaints of prohibited practices by employers, and employee organizations and take such actions with respect thereto as it deems necessary and proper;

* * *

(10) Execute all of its responsibilities in a timely manner so as to facilitate and expedite the resolution of issues before it.

2. HRS § 89-8 provides in pertinent part as follows:

(a) The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership. Any other provision herein to the contrary notwithstanding, whenever two or more employee organizations which have been duly certified by the board as the exclusive representatives of employees in bargaining units merge, combine, or amalgamate or enter into an agreement for common administration or operation of their affairs, all rights and duties of such employee organizations as exclusive representatives of employees in such units shall inure to and shall be discharged by the organization resulting from such merger, combination, amalgamation, or agreement, either alone or with such employee organizations. Election by the employees in the unit involved, and certification by the board of such resulting employee organization shall not be required. . . .

3. HRS § 89-13(b) provides in pertinent part as follows:

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

* * *

(4) Refuse or fail to comply with any provision of this chapter; . . .

4. HRS § 89-14 provides as follows:

Any 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; provided that the board shall have exclusive original jurisdiction over such a controversy except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section 89-12(e) or (2) the judicial review of decisions or orders of the board in prohibited practice controversies in accordance with section 377-9 and chapter 91. All references in section 377-9 to "labor organization" shall include employee organization.

5. 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, which deals 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)).
6. Similarly, the Board's Administrative Rules, HAR § 12-42-42 provides, in relevant part:
 - (a) A complaint that any public employer, public employee, or employee 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).
7. Failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear a complaint. This time limitation is statutory and may not be waived by either the Board or the parties. See, Tri County 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."

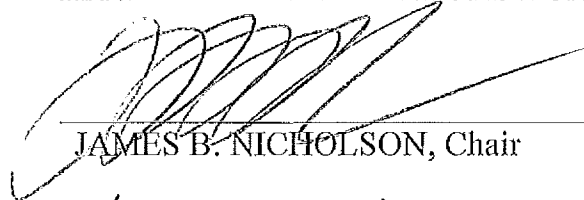
8. The Board has construed the ninety-day limitation period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HPERB 186, 199 (1983). The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Instead, the period begins to run when "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)
9. In the instant case, the ninety (90) day period for filing a complaint began on or about May 16, 2011, and in reviewing the Complaint and pleadings filed by Complainant in the light most favorable to Complainant for the purpose of Respondent's Motion to Dismiss, the Board concludes that Livai's Complaint was untimely filed on September 29, 2011 and exceeds the Board's ninety (90) day filing period.

ORDER

For the reasons discussed above, the Board hereby grants Respondents' Motion to Dismiss Prohibited Practice Complaint Filed on September 29, 2011 or for Summary Judgment. Accordingly, Livai's September 29, 2011 Complaint is dismissed.

DATED: Honolulu, Hawaii, January 11, 2012.

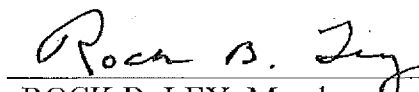
HAWAII LABOR RELATIONS BOARD



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