

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

BERNARD J. WILSON,

Complainant,

and

NEIL ABERCROMBIE, Governor, State of Hawaii; FREDERICK D. PABLO, Director, Department of Taxation, State of Hawaii; and DAVID LOUIE, Attorney General, Department of the Attorney General, State of Hawaii,

Respondents.

CASE NO. CE-13-792

ORDER NO. 2838

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED ON JANUARY 4, 2012, FILED ON JANUARY 11, 2012

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TO DISMISS PROHIBITED PRACTICE COMPLAINT
FILED ON JANUARY 4, 2012, FILED ON JANUARY 11, 2012

On January 4, 2012, Complainant BERNARD J. WILSON (Complainant or Wilson), *pro se*, filed a Prohibited Practice Complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). Complainant alleged, *inter alia*, that on November 14, 2005, the Deputy Director of the Department of Taxation (DoTax), State of Hawaii referred a computer misuse infraction to the Attorney General; on February 17, 2006, Complainant entered into a Settlement Agreement with DoTax and his union, which ended an administrative inquiry without any determination of guilt; pursuant to the Settlement Agreement, the DoTax Director advised the Attorney General that the issue had been resolved and no further disciplinary action would be taken against Complainant; on August 9, 2007, the Attorney General obtained a criminal indictment against Complainant; and on October 25, 2011, the First Circuit Court dismissed the indictment as a *de minimis* infraction pursuant to Hawaii Revised Statutes (HRS) § 702-236. Complainant contends that the Circuit Court's dismissal of the indictment exposed a breach of the Settlement Agreement and that the Respondents thereby violated HRS § 89-10.8 and committed prohibited practices in violation of HRS § 89-13(a)(1), (4), (6), and (7).

On January 11, 2012, Respondents filed a Motion to Dismiss Prohibited Practice Complaint Filed on January 4, 2012 (Motion to Dismiss) with the Board contending, *inter alia*, that the Complainant is not an employee as defined by HRS

§ 89-2; (2) the Complaint is time-barred by the 90-day statute of limitations; 3) Respondents did not violate the Settlement Agreement, dated February 17, 2006; and 4) the Settlement Agreement, dated February 18, 2006, specifically provides a release as to any claims against State employees and therefore Complainant is precluded from filing the instant Complaint.

Wilson filed a Memorandum in Opposition to Respondents' Motion to Dismiss Prohibited Practice Complaint, Filed January 11, 2012 contending, *inter alia*, that Respondents' contention that Complainant is not an "employee of the State" is a parsing exercise; that the Complaint is not barred by the 90-day statute of limitations because Complainant's cause of action accrued on October 25, 2011 when the Circuit Court judge dismissed the criminal indictment; that the Board should apply a six-year statute of limitations or equitably toll the limitations period because Respondents misled Complainant throughout the legal proceedings; that the Governor is the employer for State employees under HRS § 89-2 and the Settlement Agreement was binding on the Attorney General; and that the Settlement Agreement was breached by the State of Hawaii Executive branch and thus the Agreement is null and void. Wilson also contends that the DoTax Personnel Officer's Declaration stating that she investigated allegations of sexual harassment made against Wilson represents a new violation of the confidentiality of the Settlement Agreement.

On February 8 and 9, 2012, Complainant submitted additional exhibits to the Board.

On February 16, 2012, the Board conducted a hearing on Respondents' Motion to Dismiss. All parties had full opportunity to present evidence and argument to the Board. Based upon a review of the motion and the arguments made, the Board makes the following findings of fact, conclusions of law, and order dismissing the Complaint.

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. Wilson is a former employee of the Department of Taxation, State of Hawaii. Wilson was a Research Statistician IV and a member of bargaining unit 13 which is represented by the Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA or Union).
2. Respondent NEIL ABERCROMBIE is the Governor of the State of Hawaii.

3. Respondent FREDERICK D. PABLO is the Director of DoTax, State of Hawaii.
4. Respondent DAVID LOUIE is the Attorney General, Department of the Attorney General, State of Hawaii.
5. Complainant alleges in his Complaint as follows:

On November 14, 2005, Department of Taxation Deputy Director Sandra Yahiro referred an alleged Complainant "computer misuse" infraction to the Attorney General, during an ongoing administrative investigation into the same matter. On February 17, 2006, the Complainant entered into a Settlement Agreement with the State of Hawaii Department of Taxation and his union, the HGEA, legally ending the inquiry, without any determination of guilt. As stipulated in the Agreement, a letter was sent by Department of Taxation Director Kurt Kawafuchi to the Attorney General, advising that the issue had been resolved and that no "further disciplinary action" would be taken against the Complainant. Nevertheless, the Attorney General obtained a Grand Jury criminal "unauthorized computer access" indictment against the Complainant on August 9, 2007. On October 25, 2011, First Circuit Court Judge Virginia L. Crandall dismissed the indictment pursuant to HRS § 702-238, De Minimis Infraction.

The Complainant submits that the Circuit Court's October 25, 2011 dismissal repudiates the Department of Taxation's original "unauthorized computer access" disciplinary proceedings. It was this formal legal decision that exposed and recognized the actions of the State of Hawaii Executive Branch as a breach of the duly negotiated Settlement Contract.

6. Wilson was the subject of administrative investigations by DoTax related to charges of sexual harassment and unauthorized access of tax records. The Union filed a grievance on behalf of Wilson, dated November 18, 2005, alleging violations of Articles 3, 8, and 17 of the Unit 13 collective bargaining agreement in effect between the Employer and the Union dated July 1, 2005-June 30, 2007.

7. On February 17, 2006, DoTax (Employer) and the HGEA, on behalf of Wilson (or Grievant), entered into a Settlement Agreement which states in pertinent part:

WHEREAS, the UNION filed a grievance on behalf of the GRIEVANT dated November 18, 2005, alleging violations of Articles 3, 8, and 17 of the Unit 13 collective bargaining agreement in effect between the EMPLOYER and the UNION dated July 1, 2005 through June 30, 2007.

WHEREAS, the parties hereto desire to effect a full and final compromise and settlement of any and all matters, claims, and causes of action arising out of the subject grievance and have fashioned a mutually acceptable agreement to resolve this grievance and

NOW, THEREFORE, the parties hereto mutually agree as follows:

1. The GRIEVANT, shall resign from the State of Hawaii Department of Taxation, effective January 3, 2006.
2. The GRIEVANT, shall resign from the State of Hawaii Office of the Auditor, effective close of business February 17, 2006.
3. The GRIEVANT, will release any claims, including future claims, he might possess, against the Department of Taxation, the Department of Taxation's employees, any other State agency, any individual, agent, or attorney arising out of his employment with the department.
4. The GRIEVANT, will waive the assertion of any rights he might possess against the Department of Taxation, and any other State agency, arising out of his employment with this department.
5. The GRIEVANT, will not seek or accept any kind of employment with the State of Hawaii

government including the Executive, Legislative and Judicial Branches of state government.

6. The EMPLOYER, will accept the GRIEVANT'S resignation.
7. The EMPLOYER, will remove written reprimand dated October 20, 2005, and any other related information from the GRIEVANT'S personnel file.
8. The EMPLOYER, will place in GRIEVANT'S personnel file evidence of his resignation and that the GRIEVANT agreed not to seek or accept any type of employment with the State of Hawaii government including the Executive, Legislative and Judicial Branches.
9. The EMPLOYER, will not take further disciplinary action arising from its workplace misconduct investigations of the GRIEVANT conducted in 2005.
10. The EMPLOYER, will notify the Department of the Attorney General, in writing, that the GRIEVANT had agreed to resign and that the EMPLOYER will no take further disciplinary action against the GRIEVANT.
11. The UNION, on behalf of the GRIEVANT, will withdraw all grievances filed once all parties sign the settlement agreement.

The GRIEVANT acknowledges that he has been fully and fairly represented by the Union, and that he freely and voluntarily accepts this Settlement Agreement, with the full knowledge and understanding of its contents and meaning. The GRIEVANT further acknowledges that the UNION has complied with its duty of fair representation in handling this matter.

12. The UNION and the GRIEVANT agree that this Settlement Agreement shall serve as complete resolution of this grievance and issues related to or arising out of this grievance.

* * *

8. On June 19, 2006, Complainant e-mailed a letter to his HGEA representative expressing concern that DoTax may have breached the Settlement Agreement by contacting the Office of the Attorney General regarding the criminal prosecution. See, Complainant's Memorandum in Opposition to Respondents' Motion to Dismiss Prohibited Practice Complaint, Filed January 11, 2012. This was in response to a telephone call from a Deputy Attorney General to Complainant's attorney suggesting that an indictment was imminent. *Id.* Complainant was indicted on August 9, 2007. *Id.* Complainant stated that HGEA did not reply to the Complainant and failed to investigate the matter, although the HGEA agent did respond to a previous settlement breach question. *Id.* Complainant contended that since he asserted his rights in writing, the 90-day statute of limitations should be equitably tolled and if necessary, a six-year contract breach statute of limitations should apply.
9. In his Complaint, Wilson alleged that Respondents violated HRS §§ 89-10.8 and 89-13 by pursuing a criminal prosecution of Complainant based upon allegations previously administratively resolved by the Settlement Agreement of February 17, 2006. Complainant argued that the contract breach was confirmed when First Circuit Court Judge Virginia L. Crandall dismissed the criminal case against Complainant on October 25, 2011. See, Complainant's Memorandum in Opposition to Respondents' Motion to Dismiss Prohibited Practice Complaint, Filed January 11, 2012.
10. Based on the foregoing, the Board finds that Complainant knew or should have known about the alleged breach of the Settlement Agreement by the filing of the criminal indictment on or about June 19, 2006, when he contacted the HGEA regarding a possible breach or when he was indicted on or about August 9, 2007, and not when the charges were dismissed by the Court on October 25, 2011. Thus, the Board finds that the instant Complaint filed on January 4, 2012 was filed more than 90 days after Complainant knew or should have known about any alleged breach of the Settlement Agreement.

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. 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 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. 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:

* * *

 - (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.
4. Complainant contends that Respondents breached the Settlement Agreement and violated HRS § 89-10.8 and committed prohibited practices in violation of HRS § 89-13(a)(1), (4), (6), and (7).
5. HRS § 89-10.8 provides as follows:

Resolution of disputes; grievances. (a) A public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. The grievance procedure shall be valid and enforceable and shall be consistent with the following:

- (1) A dispute over the terms of an initial or renewed agreement shall not constitute a grievance;
- (2) No employee in a position exempted from chapter 76, who serves at the pleasure of the appointing authority, shall be allowed to grieve a suspension or discharge unless the collective bargaining agreement specifically provides otherwise; and
- (3) With respect to any adverse action resulting from an employee's failure to meet performance requirements of the employee's position, the grievance procedure shall provide that the final and binding decision shall be made by a performance judge as provided in this section.

(b) The performance judge shall be a neutral third party selected from a list of persons whom the parties have mutually agreed are eligible to serve as a performance judge for the duration of the collective bargaining agreement. The parties, by mutual agreement, may modify the performance judge list at any time and shall determine a process for selection from the list.

(c) The performance judge shall use the conditions in section 76-41(b) as tests in reaching a decision on whether the employer's action, based on a failure by the employee to meet the performance requirements of the employee's position, was with or without merit.

(d) If it is alleged that the adverse action was not due to a failure to meet performance requirements but for disciplinary reasons without just and proper cause, the performance judge shall first proceed with a determination on the merits of the employer's action under subsection (c). If the performance judge determines that the adverse action may be based on reasons other than a failure to meet performance requirements, the performance judge shall then determine, based on appropriate standards of review, whether the

disciplinary action was with or without proper cause and render a final and binding decision.

6. HRS § 89-13(a) provides in pertinent part as follows:

§ 89-13 Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

* * *

- (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization

- (6) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;

- (7) Refuse or fail to comply with any provision of this chapter;

* * *

7. 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.

8. 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(1)).

9. 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).

10. Failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear a 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.”
11. 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).
12. In the instant case, viewing the facts in the light most favorable to the Complainant and assuming *arguendo*, that the Attorney General’s filing of a criminal indictment is construed as a disciplinary action, the Board finds the ninety (90)-day period for filing a complaint began on or about June 19, 2006, when Complainant contacted the HGEA of a possible breach of the Settlement Agreement or August 9, 2007 when he was indicted. Here, Complainant filed the instant Complaint on January 4, 2012, more than 90

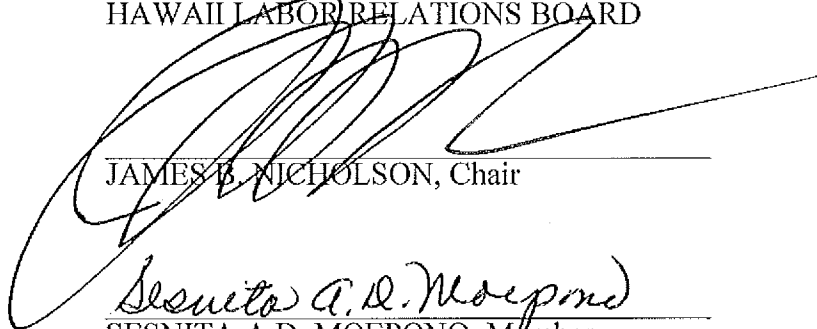
days after Complainant knew or should have known about any alleged breach of the settlement agreement. Accordingly, the Board concludes that Wilson's claim that Respondents violated HRS § 89-10.8 and committed prohibited practices in violation of HRS § 89-13(a)(1), (4), (6), and (7) is untimely. As the Board lacks jurisdiction over the instant Complaint, the Board will not address the remaining arguments in Respondents' Motion to Dismiss Prohibited Practice Complaint Filed on January 4, 2012.

ORDER

For the reasons discussed above, the Board hereby grants Respondents' Motion to Dismiss Prohibited Practice Complaint Filed on January 4, 2012.

DATED: Honolulu, Hawaii, April 5, 2012.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair

Sesnita A.D. Moepono

SESNITA A.D. MOEPONO, Member

Rock B. Ley

ROCK B. LEY, Member

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