

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of

CLARENCE YAMAMOTO, BROOKS  
TAMAYE, HOWARD RODRIGUES, JOHN  
YAMAMOTO, JOHN DE JESUS, NATHAN  
HILLEN, GORDON YEN, JEFFREY  
KINORES, KIEF APO, WESLEY PURDY  
and MICHAEL COELHO,

Complainants,

and

HAWAII GOVERNMENT EMPLOYEE  
ASSOCIATION; BRANDON LEE, Union  
Agent, Hawaii Government Employees  
Association; ALTON WATANABE,  
Division Chief, Maui Division, Hawaii  
Government Employees Association; and  
TEHANI NUNEZ, Union Agent, Maui  
Division, Hawaii Government Employees  
Association,

Respondents.

CASE NO. CU-03-314

ORDER NO. 2850

ORDER GRANTING IN PART AND  
DENYING IN PART RESPONDENTS'  
MOTION TO DISMISS PROHIBITED  
PRACTICE COMPLAINT FILED ON  
APRIL 16, 2012, FILED ON MAY 8,  
2012; AND ORDER GRANTING  
COMPLAINANTS' MOTION FOR  
LEAVE TO AMEND THE HLRB-4,  
FILED APRIL 16, 2012 WITH THE  
ATTACHED AMENDED HLRB-4,  
FILED ON MAY 16, 2012

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APRIL 16, 2012 WITH THE ATTACHED AMENDED HLRB-4, FILED ON MAY 16, 2012

On April 16, 2012, Complainants, *pro se*, filed a Prohibited Practice Complaint<sup>1</sup> (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). Complainants alleged that Respondents violated Hawaii Revised Statutes (HRS) §§ 89-9(a) and 89-13(b)(4), by not providing Complainants with fair and equal representation.

On May 8, 2012, the Board conducted a prehearing/settlement conference, by conference call, in this matter, with Complainants appearing by telephone and Respondents' counsel appearing before the Board.

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<sup>1</sup>The Prohibited Practice Complaint form is an HLRB Form 4.

Also on May 8, 2012, Respondents, by and through their counsel, filed a Motion to Dismiss Prohibited Practice Complaint Filed on April 16, 2012 (Motion to Dismiss) with the Board. Respondents argued, *inter alia*, that Complainants alleged they had "issues" with some of Respondent BRANDON LEE's (Lee) comments in the First Consultative Response to DOCARE's Proposed Directive Systems, and Special Purpose Vehicles - Personal Watercraft, Policies and Procedures dated August 5, 2011; that Complainants met with Respondents ALTON WATANABE (Watanabe) and TEHANI NUNEZ (Nunez) on August 26, 2011; that by letter dated August 29, 2011, Complainants requested that Lee's demands be retracted in writing, with the expressed caution that "if the HGEA is not willing or is unable to fulfill this we will have no alternative and will file a complaint with a higher authority"; that Respondent did not retract Lee's comments; and that the Complaint was filed on April 16, 2012, more than ninety (90) days after the occurrence of any alleged prohibited practices.

Complainants did not file a response to Respondents' Motion to Dismiss Prohibited Practice Complaint.

On May 16, 2012, Complainants filed a "Request Motion for Leave to Amend the HLRB-4, Filed April 16, 2012 with the Attached Amended HLRB-4" (Motion to Amend Complaint), with the Board. Complainants sought to add the names of three Complainants to the allegations in the Complaint and to correct the March 12, 2011 meeting date to March 12, 2012.

On May 18, 2012, Complainants filed a "Certificate of Service Motion for Leave to Amend the HLRB-4, Filed April 16, 2012 with the Attached Amended HLRB-4", with the Board.

On May 23, 2012, the Board conducted a hearing on the foregoing motions. Complainants were represented by Complainant CLARENCE YAMAMOTO (Yamamoto), who appeared, *pro se*, and Respondents were represented by Peter Liholiho Trask, Esq. All parties had full opportunity to present evidence and argument to the Board. Based upon a review of the record and the arguments presented, the Board makes the following findings of fact, conclusions of law, and order granting in part and denying in part Respondents' motion to dismiss the Complaint and granting Complainants' motion to amend their Complaint.

#### FINDINGS OF FACT

1. To the extent that any of these Findings of Fact are better characterized as Conclusions of law, they are to be so construed.
2. Complainants Yamamoto, BROOKS TAMAYE, HOWARD RODRIGUES, JOHN YAMAMOTO, JOHN DE JESUS, NATHAN HILLEN, GORDON

YEN, JEFFREY KINORES, KIEF APO (Apo), WESLEY PURDY (Purdy), and MICHAEL COELHO (Coelho) are officers with the Maui Branch of the Division of Conservation and Resources Enforcement, Department of Land and Natural Resources, State of Hawaii and public employees<sup>2</sup> within the meaning of HRS § 89-2. Complainants are members of bargaining unit 03<sup>3</sup> and are represented by the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union).

3. HGEA is an employee organization<sup>4</sup> and the exclusive representative<sup>5</sup> of Unit 03 employees.

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<sup>2</sup>HRS §89-2 provides in part as follows:

“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)].

<sup>3</sup>Pursuant to HRS 89-6(a), bargaining unit 03 is composed of nonsupervisory employees in white collar positions.

<sup>4</sup>HRS 89-2 provides in part as follows:

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 employer-union health benefits trust fund, and other terms and conditions of employment of public employees.

<sup>5</sup>HRS 89-2 provides in part as follows:

“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.

4. The Complaint does not include allegations pertaining to Complainants Apo, Purdy, and Coelho.
5. The Complaint states in part as follows:

Complainants on August 26, 2011, met with HGEA union agents Watanabe and Nunez regarding not being providing fair and equal representation as evident by the submitted PWC comments directed against officers with the DLNR DOCARE, Maui Branch by union agent Brandon Lee. Mr. Lee's comments and issues clearly had direct negative impacts to our branch and it's (sic) officers. We are entitled to fair and equal representation provided for in 89-13(b)(4), HRS and 89-8(a).

**March 12, 2011**, union agents Alton Watanabe and Tehani Nunez was (sic) present or had knowledge of/and conducted a video conference meeting with union agent Brandon Lee. Only four unit 3 employee's (sic) from the branch were invited to participate in the meeting. Amongst items that were discussed was the DLNR-DOCARE PWC issue. Input was solicited from the attendee's regarding the aforementioned. Even after being informed of our fair and equal representation concerns, the HGEA agents violated the aforementioned HRS section by conducting a secretive meeting by only inviting selected individuals and discussing an issue that we had stated we wanted to be consulted. [emphasis added.]

6. Exhibit 3 attached to the Complaint is a letter dated March 21, 2012, addressed to "To Whom It May Concern", and appears to be a complaint submitted on behalf of officers within the Maui Branch of the Division of Conservation and Resources Enforcement, advising that the officers filed a prohibited practice complaint against the union. The letter indicated that the officers learned that on March 12, 2012, HGEA agents Watanabe and Nunez conducted a video conference meeting with Oahu agent Brandon Lee

from their Maui office where only several select individuals were informed and invited to participate in the meeting on PWC operations, as well as other matters. As dues-paying members of the HGEA, the officers felt they should be afforded the opportunity to collaboratively and collectively express their views on the issues.

7. Complainants also referenced a March 12, 2012 meeting in its request for relief in paragraph 5 of the allegations of the Complaint which included in part as follows:

An order requesting respondents HGEA to provide complainants any and all documents, minutes, recordings from the March 12, 2012 meeting.

8. At the hearing on the instant motions on May 23, 2012, Complainants' representative stated that there was a typographical error in the date of the alleged secret meeting in the Complaint and that the date of the meeting was in fact March 12, 2012, and not March 12, 2011. After reviewing the Complaint and the attached Exhibit 3, the Board finds that the alleged secret meeting was held on March 12, 2012, which falls within the applicable limitations period.
9. As the Complaint was filed on April 16, 2012, the Board lacks jurisdiction over alleged prohibited practices occurring prior to January 17, 2012.

#### CONCLUSIONS OF LAW

1. 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.
2. 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.

### **Motion to Dismiss Complaint**

- 3. 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.

- 4. 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)).

- 5. Similarly, 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].

6. 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."
7. 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 (8<sup>th</sup> Cir. 1978).
8. Respondents contend, *inter alia*, that the instant Complaint should be dismissed because the Board has a ninety (90) day statute of limitations pursuant to HRS § 377-9; that Complainants knew they disagreed with the HGEA's response to the employer's request to consult on August 5, 2011; that Complainants met with Respondents Watanabe and Nunez on August 26, 2011 regarding not being provided fair and equal representation; and the Complaint was filed on April 16, 2012, more than ninety (90) days after the Complainants knew they were aggrieved.

9. In the instant case, Complainants also alleged that on March 12, 2012, they were not invited to attend a meeting conducted by HGEA business agents to discuss watercraft and other issues. Thus, the Complaint filed on April 16, 2012 was timely filed as to the March 12, 2012 meeting. All other allegations of prohibited practices occurring prior to January 17, 2012 are outside of the Board's ninety (90) day statute of limitations and are hereby dismissed as untimely.

### **Motion to Amend Complaint**

10. On May 16, 2012, Complainants filed a Motion to Amend Complaint with the Board. Complainants added the names of (Kief) Apo, (Wesley) Purdy, and (Michael) Coelho to paragraph 1 of the Allegations of the Complaint. Complainants also changed the March 12, 2011 date in their statement of other relevant facts, to March 12, 2012.
11. HAR § 12-42-43 provides as follows:

Any complaint may be amended in the discretion of the board at any time prior to the issuance of a final order thereon.

12. In their Motion to Amend Complaint, Complainants seek to add the names of omitted Complainants to the allegations of the Complaint and to correct a typographical error in the date of a meeting. Based on the foregoing, the Board in its discretion, grants Complainants' Motion to Amend the Complaint.

### ORDER

Based on the foregoing, the Board grants in part and denies in part Respondents' Motion to Dismiss Prohibited Practice Complaint Filed on April 16, 2012, filed on May 8, 2012.

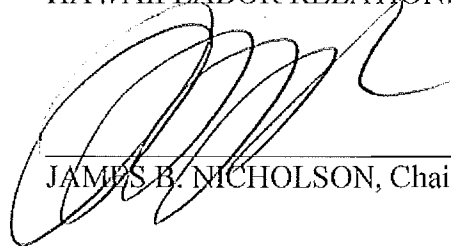
In addition, the Board grants Complainants' Motion to Amend Complaint. Complainants shall immediately file their Amended Prohibited Practice Complaint with



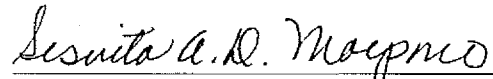
the Board, with their proposed changes and without the untimely allegations which have been dismissed herein. The Board will thereupon issue a Notice to Respondents of the Amended Prohibited Practice Complaint and will schedule a second prehearing/settlement conference in this matter.

DATED: Honolulu, Hawaii, June 1, 2012.

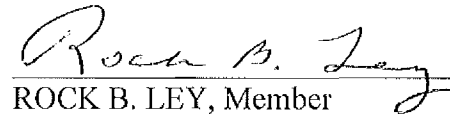
HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SESNITA A.D. MOEPONO, Member



ROCK B. LEY, Member

Copies sent to:

Peter Liholiho Trask, Esq.  
Clarence Yamamoto

