STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LEE SCRUTON, Complainant, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, and DENISE SUGIHARA, Respondents.	CASE NO. CU-13-336 ORDER NO. 3136 ORDER GRANTING RESPONDENTS HGEA/AFSCME AND DENISE SUGIHARA'S MOTION TO DISMISS IN LIEU OF ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED ON JULY 17, 2015

ORDER GRANTING
RESPONDENTS HGEA/AFSCME AND DENISE SUGIHARA'S
MOTION TO DISMISS IN LIEU OF ANSWER TO
PROHIBITED PRACTICE COMPLAINT FILED ON JULY 17, 2015

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural Background

On July 17, 2015, Complainant LEE SCRUTON (Complainant or Mr. Scruton) filed a prohibited practice complaint (Complaint) with the Hawaii Labor Relations Board (Board) against Respondents HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union), and DENISE SUGIHARA (Sugihara) (collectively Respondents). The Complainant alleges that:

> On December 30th 2014 [sic], CRS IV Val Kanehailua was temporarily assigned (T.A.) to the Unit Team Manager position. I asked R.S.A. Lance Rabacal if I would be T.A.'d into the vacant CRS IV spot. He stated no. When I asked the reason why, he told me [sic] "I choose not to". I then called H.G.E.A.

agent Denise Sugihara about what steps to take to obtain the T.A.. She sent me a [sic] H.G.E.A. fact sheet which I filled out stating my concerns and sent it back to her. I had to call back after not hearing from her, only to be told the decision to T.A. is entirely up to Mr. Rabacal.

On March 18th 2015 [sic], Acting warden [sic] Michael Hoffman issued a memo concerning flexible working hours. It stated all non-uniform employees shall change the flex time they've been working at to 0630-1515. I called union agent Ms. Sugihara again to express my concerns. She then explained that management has the right to manage, and there was nothing they or I could do.

That was twice I went to my union for help and twice I was denied. My aim is to have better representation as a dues paying employee. I feel that the union has been derelict in their duties overseeing the rights and welfare of its members.

On August 3, 2015, the Board held a Pre-Hearing/Settlement Conference in this case, and all parties agreed to waive the requirements of Hawaii Revised Statutes (HRS) § 377-9(b) and Hawaii Administrative Rules (HAR) § 12-42-46(b) that the hearing on the Complaint "be no less than ten and no more than forty days after the filing of the Complaint or amendment thereof."

B. Respondents' Motion to Dismiss

On July 27, 2015, Respondents filed Respondents HGEA/AFSCME and Denise Sugihara's Motion to Dismiss in Lieu of Answer to Prohibited Practice Complaint filed on July 17, 2015 (Motion). In support of the Motion, Respondents rely on two grounds. The first ground is that the Complaint does not satisfy HAR § 12-42-42, and the Board lacks jurisdiction based on HRS § 89-14 because Complainant's factual allegations do not describe or allege a violation of HRS § 89-13 or of the Respondents' duty of fair representation. Respondents note that those allegations include, among other things: Complainant's phone call to Sugihara regarding the December 30, 2014 denial of temporary assignment, in which Sugihara informed Complainant that "'TA' is entirely up to Mr. Rabacal (Employer)"; Complainant's phone call to Sugihara regarding the March 18, 2015 memo regarding the flex time change, in which "he was informed that management had the right to manage, and there was nothing that they could do"; and his "opinions" that "dues paying members are entitled to 'better representation'" and that "the union has been derelict in their duties overseeing the rights and welfare of its members." The second ground is that the Complaint is untimely under HAR § 12-42-42(a) because for the incident that occurred on December 30, 2014, Complainant was required to file his complaint by March 31, 2015 and for the incident that occurred on March 18, 2015, Complainant was required to file by June 18, 2015 .

On August 3, 2015, the Board issued a Notice of Filing Deadlines; Notice of Motion Hearing; and Waiver of § 377-9(b), Hawaii Revised Statutes and § 12-42-46(b), Subchapter 3, Chapter 42, Title 12 Hawaii Administrative Rules. In that Notice, the Board established

deadlines for the Complaint's Response to the Motion of August 7, 2015 and for the Reply from Respondents of August 14, 2015 and an August 20, 2015 hearing date on the Motion.

On August 7, 2015, Complainant filed a Memorandum of Opposition (Opposition Memo) responding to the Motion. In support of his position, Complainant sets forth the following "issues" including, among other things, that: 1) the Complaint is timely because as soon as Complainant received the Warden's memo on March 18, 2015, indicating the change of hours; he immediately called Sugihara, who informed him that there was nothing that he could do because it was in the policies and procedures, and offered no recourse; 2) because Sugihara offered no recourse, "the initiating of the subject matter was done in a timely manner," and "[h]er response of no action can be taken, put everything behind the time frame"; 3) his "complaint" was filed on May 11, 2015, and on May 19, 2015, Complainant found out that an April 21, 2015 Step II grievance was filed on behalf of his co-worker, who initiated a similar type of complaint at the same time after receiving a similar response from Sugihara; 4) the grievance was filed unbeknownst to and without inclination of the co-worker; 5) when Complainant asked Sugihara about his co-worker's grievance, she said that she did not recall their March 18, 2015 conversation; and 6) per the Board's request on July 27, 2015, he contacted Sugihara and explained what the previous Board Chairman told him to tell her but has not heard from her. Further, Complainant attached the March 18, 2015 Memorandum from Michael Hoffman, a March 19, 2015 Memorandum from Lance M. Rabacal regarding "FLEX HOURS" 2015, and a copy of a Step 2 grievance filed by Sugihara on behalf of Tanya Benson, dated as received on May 19, 2015.

On August 11, 2015, Respondents filed Respondents [sic] Reply Memorandum in Support of Their Motion to Dismiss in Lieu of Answer to Prohibited Practice Complaint Filed on July 17, 2015 (Reply). In the Reply, Respondents repeated, reiterated, and incorporated their arguments presented in the Motion and further argued that Complainant has not presented sufficient facts to support his argument that the Complaint is timely.

On August 20, 2015, the Board held a hearing on the Motion to Dismiss. At the hearing, Respondents essentially reemphasized their position. Complainant argued that: he was advised by the previous Board Chair to file the Complaint; it was well within the time limitations when he first inquired about this matter and was told by his Union representative that these are ungrievable cases; and he is a dues paying member, who believed in the Union representative and had nothing in writing to confirm the denial. After hearing oral arguments, the current Board Chair stated that the matter would be taken under advisement.

II. DISCUSSION, CONCLUSIONS OF LAW AND ORDER

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.

A. STANDARDS OF REVIEW

The Board adheres to the legal standards set forth by the Hawaii appellate courts for motions to dismiss under the Hawaii Rules of Civil Procedure (HRCP) Rule 12(b).

A motion to dismiss for lack of subject matter jurisdiction pursuant to HRCP Rule 12(b)(1) is based on the contents of the complaint, the allegations of which must be accepted as true and construed in the light most favorable to the plaintiff. Dismissal is improper unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In considering a motion to dismiss for lack of subject matter jurisdiction, the Board 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. Casumpang v. ILWU, Local 142, 94 Hawaii 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawaii 1, 7, 175 P.3d 111, 117 (App. 2007).

Regarding a motion to dismiss brought under HRCP Rule 12(b)(6) for failure to state a claim, "Dismissal is warranted only if the claim is clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the support made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Justice v. Fuddy, 125 Hawaii 104, 108, 253 P.3d 665, 669 (App. 2011) (*citing* Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983)) (Fuddy). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. We must therefore view a plaintiffs complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory." Fuddy, 125 Hawaii at 107-08, 253 P.3d at 668-69; Young v. Allstate Ins. Co., 119 Hawaii 403, 412, 198 P.3d 666, 675 (2008) (Young). The Board's consideration of a motion to dismiss for failure to state a claim is strictly limited to the allegations of the complaint, and the Board must deem those allegations to be true. However, in weighing the allegations of the complaint as against a motion to dismiss, the Board is not required to accept conclusory allegations on the legal effect of the events alleged. Paysek v. Sandvold, 127 Hawaii 390, 402-03, 279 P.3d 55, 67-68 (App. 2012) (*citing* Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985)); Young, 119 Hawaii at 406, 198 P.3d at 669.

B. MOTIONS TO DISMISS

1. Failure to File in a Timely Manner

The Board's jurisdiction is governed by HRS Chapters 89 and 377. HRS § 377-9(l) states, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." (Emphasis added) This provision is made applicable to prohibited practice complaints by HRS § 89-14. The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. This time requirement has been held jurisdictional and provided by statute, and may not be waived by either the Board or the parties. Hikalea v. Department of Environmental Services, City and County of Honolulu, Case No. CE-01-808, Order No. 3023 at *5-6 (October 3, 2014) (*citing* Thomas v. Commonwealth of Pennsylvania Lab. Rels. Bd., 483 A.2d 1016 (Pa. 1984) (failure to comply with the statute of limitations for unfair labor practice goes to the subject matter jurisdiction of the labor relations board)). In construing and applying this time limit requirement, the Board's approach has been to adhere to the principles that statutes of limitations are to be strictly construed; and that because time limits are jurisdictional, the defect of missing the deadline even by one day is unable to be waived. Valeho-Novikoff v. Okabe, Board Case No. CU-05-302, Order No. 3024, at *10 (2014) (*citing* Fitzgerald v. Ariyoshi, 3 HPERB 186, 198-99 (1983); Cantan v. Dep't. of Evtl. Waste Mgmt., Board Case No. CE-01-698, Order No. 2599, at *8-9 (3/24/2009); Kang v. Hawaii State Teachers Ass'n., Board Case No. CE-05-440, Order No. 1825, at *4 (12/13/99)). Lastly, in applying this requirement, the Board has conformed to the rule that the limitations period begins to run when "an aggrieved party knew or should have known that his [or her] statutory rights were violated." United Public Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443 6 HLRB 319, 330 (2003) (*citing* Metromedia, Inc. KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978)).

The Board finds based on the record that the Complaint in this case was filed on July 13, 2015. Accordingly, applying the foregoing principles, any occurrence alleged as the basis for the Complaint must have occurred on or after April 15, 2015 to fall within the 90-day limitation period.

In his Opposition Memo, Complainant does not respond to the issue of the timeliness of the denial of the T.A. issue. However, the Board disagrees with Respondents' position that December 30, 2014, the day on which Complainant was informed that he would not receive the T.A., is the trigger date for the 90-day limitations period for the filing of the Complaint. The prohibited practice allegation in this case is for a breach of the duty of fair representation by Union on the T.A. issue. Therefore, contrary to the Respondents' contention, the trigger date for this particular allegation is not the date that Complainant was informed that he would not be receiving the T.A., but rather the date that Complainant knew or should have known that the

Union was not going to represent him and that his HRS Chapter 89 rights were allegedly violated. The Complaint alleges that:

> On December 30th 2014 [sic], CRS IV Val Kanehailua was temporarily assigned (T.A.) to the Unit Team Manager position. I asked R.S.A. Lance Rabacal if I would be T.A.'d into the vacant CRS IV spot. He stated no. When I asked the reason why, he told me [sic] "I choose not to". I then called H.G.E.A. agent Denise Sugihara about what steps to take to obtain the T.A.. She sent me a [sic] H.G.E.A. fact sheet which I filled out stating my concerns and sent it back to her. I had to call back after not hearing from her, only to be told the decision to T.A. is entirely up to Mr. Rabacal.

The Board notes that a review of the Complaint unequivocally shows there is no specific date alleged with respect to the date of the call in which Sugihara informed Complainant that the T.A. decision was entirely up to Mr. Rabacal. Moreover, Complainant fails to provide any further evidence on this issue by way of declaration or other supporting document attached to his Opposition Memo establishing the date of this call, which is when he knew or should have known that the Union was not going to represent him and that his HRS Chapter 89 rights were allegedly violated.

The Hawaii appellate courts do not appear to have provided specific guidance regarding the burden of proof in such situations where the Respondent raises the issue of timeliness of complaint as a basis for a motion to dismiss. Accordingly, the Board turns to federal law interpreting the analogous Federal Rule of Civil Procedure 12(b)(1).[1] The Ninth Circuit has analyzed the respective burdens of the parties as, "Although ordinarily the [respondent] bears the burden of proving an affirmative statute of limitations defense, here the statute of limitations is jurisdictional, and '[w]hen subject matter jurisdiction is challenged under Federal Rule of Procedure 12(b)(1) the [complainant] has the burden of proving jurisdiction in order to survive the motion.'" Kingman Reef Atoll Invs., LLC v. United States, 541 F.3d 1189, 1197 (9th Cir. 2008) (*quoting* Tosco Corp. v. Cmtys. For a Better Env't, 236 F.3d 495, 499 (9th Cir. 2001); Napier v. United States, 2013 U.S. Dist. LEXIS 20349, at *6 (D. Cal.) (*citing* Kingman Reef Atoll Invs., LLC v. United States, 541 F.3d 1189, 1197 (9th Cir. 2008)). Complainant does not carry his burden of proving jurisdiction based on his failure to allege or provide any evidence establishing a specific date for the call in which Sugihara informed him that the T.A. decision was entirely up to Rabacal. Therefore, the Board is compelled to dismiss this claim. Despite disagreeing with Respondents' reasoning, the Board nonetheless concludes that Respondents' position that the T.A. claim is untimely is warranted.[2] Even accepting the allegations in the Complaint as true and construed in the light most favorable to the Complainant, for the reasons set forth above, the Board holds that Respondents the T.A. claim was untimely filed and must be dismissed.

Regarding the flex time claim, the Complaint alleges that the Hoffman Memorandum was issued on March 18, 2015, and that when Complainant called Sugihara to express his concerns, Sugihara explained that management had the right to manage and there was nothing that they or I could do. However, as with the T.A. issue, Complainant has alleged no specific date on which this call occurred. In the Opposition Memo, Complainant attempts to argue that the Complaint was timely based on Sugihara's failure to offer any recourse and that on May 19, 2015 (an event within the limitations period), the HGEA filed a Step 2 grievance on behalf of a co-worker. The Board finds that Sugihara's failure to offer any recourse does not toll the limitations period. In addition, while Complainant implies discriminatory conduct by the Union with this reference to his discovery that a Step 2 grievance was filed by HGEA on behalf of a co-worker, this occurrence is not referenced in the Complaint. Consequently, this discovery is also unable to toll the limitations period. As with the T.A. claim, Complainant has failed to carry the burden of proving the timeliness and jurisdiction in order to survive the motion. Consequently, the Board is required to determine that the flex time allegations are untimely filed and are dismissed.

2. Motion to Dismiss for Failure to State a Claim

Based on the dismissal of the Complaint based on untimeliness, the Board does not reach the other ground for the Motion regarding whether the Complaint should be dismissed pursuant to HRCP Rule 12(b)(6) for a failure to state a claim.

ORDER

For the reasons set forth above, the Board hereby grants the HGEA's Motion to Dismiss Complaint based on untimeliness. This case is dismissed and closed.

DATED: Honolulu, Hawaii, January 8, 2016.

HAWAII LABOR RELATIONS BOARD

HAWAII LABOR RELATIONS BOARD ★ STATE OF HAWAII ★

KERRY M. KOMATSUBARA, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to:

Mr. Lee Scruton, Pro Se
Peter Liholiho Trask, Esq., Attorney for Respondents

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[1] The Hawaii Supreme Court has adopted the approach that, "Where an appellate court has patterned a rule of procedure after an equivalent rule within the Federal Rules of Civil Procedure, interpretations of the rule by the federal courts are deemed to be highly persuasive in the reasoning of a state court. Schefke v. Reliable Collection Agency, Ltd., 96 Hawaii 408, 431, 32 P.3d 52, 75 (2001).

[2] If the Respondents had not raised the issue in their Motion, the Board *sua sponte* would have, "for unless jurisdiction of the [Board] over the subject matter exists, any judgment rendered is invalid." Tamashiro v. Dep't of Human Servs., 112 Hawaii 388, 398, 146 P.3d 103,113 (2006) (*citing* Chun v. Employees' Ret. Sys. of the State of Hawaii, 73 Haw. 9, 14, 828 P.2d 260, 263 (1992).