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Case No. CE 10-876

HAWAII LABOR RELATIONS BOARD

STATE OF HAWAII

In the Matter of

GORDON B. LINDSEY,

Complainant,

and

NOLAN ESPINDA, Director, Department of
Public Safety, State of Hawaii,

Respondent.

CASE NO. CE-10-876

ORDER NO. 3154

ORDER DISMISSING PROHIBITED
PRACTICE COMPLAINT FILED
JANUARY 19, 2016

ORDER DISMISSING PROHIBITED
PRACTICE COMPLAINT FILED JANUARY 19, 2016

I. BACKGROUND

This case involves GORDON B. LINDSEY's (Complainant) suspension from work by his employer, DEPARTMENT OF PUBLIC SAFETY, State of Hawai'i (Respondent), from December 15, 2014 to December 21, 2014. The following facts regarding the events that followed his suspension are not in dispute.

Complainant's union, the United Public Workers (UPW), filed a Step 1 grievance on behalf of the Complainant on December 10, 2014. The Step 1 grievance was denied by Respondent on July 27, 2015. UPW elected to not pursue the matter to arbitration and informed Complainant of UPW's decision in a letter dated September 29, 2015. Complainant received said letter on October 2, 2015.

On January 19, 2016, Complainant filed a prohibited practice complaint (Complaint) with the Hawaii Labor Relations Board (Board) alleging, *inter alia*, that his employer the DEPARTMENT OF PUBLIC SAFETY, State of Hawai'i (Respondent) had committed a prohibited practice under Hawaii Revised Statutes (HRS) § 89-13 by failing to properly train Complainant and unjustly suspend him for five days.

On January 29, 2016, Respondent filed Respondent's Motion to Dismiss Prohibited Practice Complaint Filed January 19, 2016 (Respondent's Motion), together with its Memorandum in Support of Motion, and Exhibits "A" – "G." In Respondent's Motion, Respondent claims that the Complaint is untimely, that Complainant failed to exhaust his contractual remedies and failed to state a claim for which relief can be granted.

On February 29, 2016, Complainant filed Complainant's Memorandum in Opposition to the Respondent's Motion to Dismiss Prohibited Practice Complaint Filed January 19, 2016, together with Exhibits "A" – "H."

On March 7, 2016, Respondent filed Respondent's Reply Memorandum to Complainant's Memorandum in Opposition to Respondent's Motion to Dismiss Prohibited Practice Complaint, Filed January 19, 2016, together with the Declaration of Julian T. White and Exhibits "H" – "J."

The Board held a hearing on Respondent's Motion on March 17, 2016, which was attended by Complainant and Deputy Attorney General Julian T. White, on behalf of Respondent. After reviewing the documents filed by the parties and the exhibits submitted therewith, and after hearing the arguments of the parties, the Board orally ruled in favor of Respondent and granted Respondent's Motion on the grounds that the Complaint was untimely.

In accordance with HRS § 91-12, the Board issues the following findings of fact, conclusions of law, and written order to accompany the Board's ruling set forth in the record.

II. 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. The Board adopts the statements set forth in Section 1, BACKGROUND, above, as factual findings of the Board.
2. At all times relevant, Complainant was a public employee and a member of bargaining unit 10.
3. At all times relevant, Respondent was a state department within the Executive Branch and was Complainant's public employer.
4. Complainant received on October 2, 2015 that certain letter dated September 29, 2015 from Dayton Nakanelua, Executive Director of UPW (Nakanelua).

377-9[.]” The Hawaii Supreme Court (Court) has more specifically stated that, “The procedural aspects of controversies related to prohibited practices are governed by HRS § 377-9.” Aio v. Hamada, 66 Haw. 401, 404 n. 3, 664 P.2d 727, 729 n. 3 (1983) (Aio Case).

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.” Accordingly, HRS § 377-9(1) precludes the consideration of prohibited practices unless they have occurred within ninety days of the filing of the complaint. Aio Case, 66 Haw. at 404 n. 3, 664 P.2d at 729 n. 3.

Similarly, the Board's Administrative Rules, HAR, § 12-42-42 provide as follows: “(a) A complaint that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to HRS § 89-13, 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).

The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. The limitation is 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 *6 (October 3, 2014), *citing* Thomas v. Commonwealth of Pennsylvania Lab. Rels. Bd., 483 A.2d 1016 (Pa. 1984) for the proposition that failure to comply with the statute of limitations for unfair labor practice goes to the subject matter jurisdiction of the labor relations board.

Lastly, 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 cannot be waived. Fitzgerald v. Ariyoshi, 3 HPERB 186, 198-199 (1983); Valeho-Novikoff v. Okabe, Board Case No. CU-05-302, Order No. 3024, at *10 (2014) (*citing* Fitzgerald v. Ariyoshi, 3 HPERB 186, 198-199 (1983); Cantan v. Dep't. of Evtl. Waste Mgmt., CE-01-698, Order No. 2599, at *8-9 (3/24/2009); Kang v. Hawaii State Teachers Ass'n., CE-05-440, Order No. 1825, at *4 (12/13/99)). Further, the Board has conformed to the rule that 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.” 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)).

In this case, the Board finds that the Complaint was untimely filed and, accordingly, the Board lacks subject matter jurisdiction. The Complaint in this case was filed on January 19, 2016. Based on the filing date of the Complaint, any incident alleged as the basis for the Complaint must have occurred on or after October 21, 2015, to fall within the 90-day limitations

This letter clearly informed Complainant that UPW would not pursue his grievance against his 5-day suspension to arbitration. Complainant does not dispute that he was so informed, but he claims that he did not understand what to do next and claims that he was not advised by UPW as to what to do.¹

5. The Board finds that on October 2, 2015 (the day that Complainant received Nakanelua's letter of September 29, 2015) Complainant knew or should have known that the alleged violation of his rights under Chapter 89, HRS, occurred.

III. CONCLUSIONS OF LAW

The Board makes the following Conclusions of Law. Should it 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. Standard for Motion to Dismiss.

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).

B. Timeliness.

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 as provided in section

¹ Complainant has not filed any other prohibited practice complaint regarding this matter.

period. Complainant admits that on October 2, 2015 he received the September 29, 2015 letter from Dayton Nakanelua informing Complainant that UPW decided to not pursue his grievance to arbitration. Therefore, Complainant knew or should have known on October 2, 2015 that his Chapter 89, HRS, rights were violated. As such, the 90-day filing period ended on December 31, 2015. Even reviewing the Complaint, pleadings and oral arguments presented by Complainant in a light most favorable to Complainant, the Board is nonetheless constrained to hold that the Complaint was untimely filed on January 19, 2016 and exceeds the statutory ninety (90) day filing period. Consequently, the Complaint is dismissed for untimeliness.

C. Exhaustion of Contractual Remedies and Failure to State a Claim.

In light of the Board's ruling that the Complaint was untimely and that the Board lacks subject matter jurisdiction over the dispute therein, the remaining grounds for dismissal of the Complaint are not within this Board's jurisdiction to determine.

IV. ORDER

For the reasons discussed above, the Board hereby finds that the Complaint was untimely filed; and therefore, the Board lacks subject matter jurisdiction. Consequently, the Board hereby dismisses this case. This case is closed.


DATED: Honolulu, Hawaii, March 18, 2016.

HAWAII LABOR RELATIONS BOARD




KERRY M. KOMATSUBARA, CHAIR


SESNITA A.D. MOEPONO, Member


ROCK B. LEY, Member

Copies sent to:
Gordon B. Lindsey, Pro Se Complainant
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