

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of )  
JOHN A. UENO, )  
Complainant, )  
and )  
UNITED PUBLIC WORKERS, AFSCME, )  
LOCAL 646, AFL-CIO, )  
Respondent. )

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CASE NO. CU-10-68  
ORDER NO. 804  
ORDER GRANTING RESPONDENTS'  
MOTIONS TO DISMISS

In the Matter of )  
JOHN A. UENO, )  
Complainant, )  
and )  
JOHN A. WAIHEE, Governor, State )  
of Hawaii and DEPARTMENT OF )  
CORRECTIONS, State of Hawaii, )  
Respondents. )

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CASE NO. CE-10-137

In the Matter of )  
JOHN A. UENO, )  
Complainant, )  
and )  
JOHN WAIHEE, Governor, State )  
of Hawaii; DEPARTMENT OF )  
PERSONNEL SERVICES, State )  
of Hawaii and DEPARTMENT OF )  
CORRECTIONS, State of Hawaii, )  
Respondents. )

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CASE NO. CE-10-139

In the Matter of )  
JOHN A. UENO, )  
Complainant, )  
and )  
UNITED PUBLIC WORKERS, AFSCME, )  
LOCAL 646, AFL-CIO, )  
Respondent. )

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CASE NO. CU-10-70

In the Matter of )  
JOHN A. UENO, )  
Complainant, )  
and )  
JOHN WAIHEE, Governor, State )  
of Hawaii; DEPARTMENT OF )  
PERSONNEL SERVICES, State of )  
Hawaii and DEPARTMENT OF )  
CORRECTIONS, State of Hawaii, )  
Respondents. )

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CASE NO. CE-10-140

In the Matter of )  
JOHN UENO, )  
Complainant, )  
and )  
JOHN WAIHEE, Governor, State )  
of Hawaii; DEPARTMENT OF )  
PERSONNEL SERVICES, State )  
of Hawaii; DEPARTMENT OF )  
CORRECTIONS, State of Hawaii )  
and UNITED PUBLIC WORKERS, )  
AFSCME, LOCAL 646, AFL-CIO, )  
Respondents. )

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CASE NOS.: CE-10-141  
CU-10-71

ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS

On March 12, 1990, Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) filed a Motion to Dismiss with the Hawaii Labor Relations Board (Board). This motion argues that the charge filed by Complainant JOHN A. UENO should be dismissed for lack of jurisdiction since the prohibited practice charge is untimely. The motion is based on Board's Administrative Rules Section 12-42-42 and Hawaii Revised Statutes (HRS), Sections 89-14 and 377-9 which establish a 90-day statute of limitations.

On April 2, 1990, Respondent UPW filed another motion to dismiss contending that Complainant's allegations are directed to actions by the State Civil Service Commission (Commission), established under Chapter 76, HRS, and thus fails to state a claim for relief under Chapter 89, HRS.

Subsequent to Complainant's filing of Case No. CU-10-68, he filed nine additional complaints concerning the same factual matter, that is, the return of Complainant from an Adult Corrections Officer (ACO) IV position to an ACO III position by Respondents JOHN WAIHEE, the State DEPARTMENT OF PERSONNEL SERVICES and the State DEPARTMENT OF CORRECTIONS, and the UPW's alleged lack of fair representation of Complainant when he contested the return.

A hearing was held on the subject motions to dismiss on August 8, 1990. At the hearing, counsel for Respondent UPW

orally moved that its motions to dismiss be extended to all of the consolidated cases. Counsel for Respondents JOHN WAIHEE, Governor, State of Hawaii, the DEPARTMENT OF CORRECTIONS, State of Hawaii and the DEPARTMENT OF PERSONNEL SERVICES, State of Hawaii (STATE) orally joined in Respondent UPW's Motions to Dismiss. Transcript (Tr.) p. 45.

At the hearing on the Motions to Dismiss, the following stipulated facts were agreed to by the parties:

The vacancy notices for nine ACO IV positions were posted within the DEPARTMENT OF CORRECTIONS on September 17, 1987.

October 2, 1987 was established as the deadline for applications for said vacancies. Complainant's application was accepted even though it was received after the closing date.

Notice of selection was made on January 26, 1988.

Three grievances pertaining to the applicable selection procedure were filed in February of 1988 by employees Dela Cruz, Pittman and Sabourin.

On November 15, 1988, the DEPARTMENT OF PERSONNEL SERVICES issued a third step decision holding that the selection process was inadequate and had to be redone.

On or about January 28, 1989, Complainant went to the Union objecting to the redoing of the selection and was told to reapply for the vacancies. He did not reapply. Complainant was also contacted by DEPARTMENT OF CORRECTIONS representatives and told to reapply. Complainant refused to reapply as a matter of principle.

Complainant was transferred back to the ACO III position via memo dated February 3, 1989. In February of 1989, Complainant appealed to the Commission.

On November 30, 1989, the Commission decided that Complainant should be awarded the promotion to the ACO IV position.

In February of 1990, the UPW asked the Commission to vacate its previous order awarding Complainant the promotion.

On February 14, 1990, the Commission formally reconsidered its prior award of the promotion to Complainant and issued an order withdrawing its prior decision.

On April 24, 1990, the Commission issued a decision finding it had no jurisdiction of the subject matter and accordingly dismissed Complainant's appeal. No appeal to date has been taken to the First Circuit Court.

Complainant filed his initial complaint with the Board on February 22, 1990. Tr. pp. 11-14.

Respondent UPW joined by Respondent STATE argued at the hearing on the Motions to Dismiss that the 90-day statute of limitations applicable to cases brought under Chapter 89, HRS, began to run on February 3, 1989, the date on which the Complainant was reinstated in his original ACO III position. That date, Respondents argue, is the date of the adverse action

and Complainant had 90 days within which to file a complaint with the Board. Since Complainant filed his initial complaint with the Board on February 22, 1990, his cases should be dismissed, Respondents argue, because the 90-day statute of limitations had expired.

Respondents argue that the fact that Complainant passed the six-month probationary period before being reinstated to his former position does not defeat their statute of limitations argument because the mere passage of time does not vest rights in contravention of the statute of limitations. Moreover, Respondents argue, Complainant knew the promotion was under challenge before the probationary period was completed.

Counsel for Complainant argued that the period during which Complainant resorted to the Commission should act to toll the running of the statute of limitations. Counsel noted that Policy 4.1.1 of the departmental grievance procedure, paragraph eight, provides that if the departmental grievance procedure does not operate to resolve a grievance the employee is to then seek redress before the Commission. In effect, counsel argues, Complainant went to the Commission instead of the Board because he was instructed to by the Employer's own directives. Moreover, counsel argues, the Board has recognized some instances in which the statute of limitations may be tolled. Counsel cites the case of Kimura v. Waihee and UPW, 4 HLRB 543 (1988), in which the Board ruled that the statute of limitations was tolled during the period during which issues were being

resolved via the contractual grievance procedure. Counsel for Complainant also relies on United Food & Commercial Workers Union v. Hawaiian Milling Corporation, 4 HLRB 568 (1988), where the Board held that there was no tolling of the statute due to Complainant's mistake of law but where the Board recognized that there could be some instances where tolling would be recognized.

Respondents argue that the 90-day statute of limitations applicable to Board cases was not tolled by Complainant's pursuit of a remedy before the Commission because statutes provide for a 90-day statute of limitations strictly applicable to all complaints filed under Chapter 89. Also, Section 89-19, HRS, states that the provisions of Chapter 89 take precedence over all conflicting statutes and preempts all contrary rules and regulations including those of the Commission.

The Board holds that the statute of limitations for the filing of complaints before the Board did in fact expire before Complainant filed his initial action herein. The Board concludes that the 90-day statute of limitations was not tolled during the period Complainant resorted to the Commission for redress. Tolling as occurred in the Kimura case was recognized as operating in conjunction with the doctrine of the exhaustion of contractual remedies. Chapter 89 grants parties the authority to agree to collective bargaining contracts which include grievance procedures. Through established doctrines, resort to such statutorily mandated grievance procedures delays

the running of the statute of limitations. Tolling must be recognized in the case where resort to the contractual grievance procedure occurs as grievance resolution and subsequent Board deliberation of complaints is integral to the statutory framework for the orderly disposition of collective bargaining controversies.

In the case at hand, Complainant resorted to the departmental grievance procedure instituted pursuant to the Civil Service statutory framework as opposed to the collective bargaining statutory framework. The filing of such a grievance could act to toll the statute of limitations established by the Commission but not that of the Board. Under Section 89-19, HRS, the Board is mandated to apply its statute of limitations irrespective of Complainant's choice to seek a remedy before the Commission. Complainant received notice of his return to his previous ACO III position on February 3, 1989 but did not file a complaint with the Board until February 22, 1990, more than a year later. The Board is thus compelled to conclude that the 90-day statute of limitations ran before Complainant filed the instant cases before the Board.

The Board is not persuaded by Complainant's argument that an exception to the running of the limitations period should be recognized where Complainant resorted to the wrong forum due to good faith reliance on the Employer's policy and procedure. The limitations period for Board filings operates

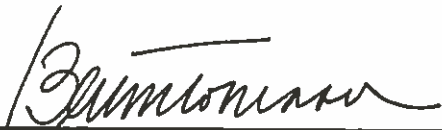


independently of whatever other actions complainants undertake in pursuit of redress. We are also not persuaded that Complainant's successful completion of his probationary period operates to vest his right to the higher position as the substantive statutory and collective bargaining rights in issue herein cannot be adjudicated by the mere passage of time.

The instant cases are therefore dismissed for lack of compliance with the applicable statute of limitations.

DATED: Honolulu, Hawaii, October 4, 1990.

HAWAII LABOR RELATIONS BOARD

  
BERT M. TOMASU, Chairperson

  
GERALD K. MACHIDA, Board Member

  
RUSSELL T. HIGA, Board Member

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