

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CU-12-83
WILLIAM (BILL) GILLESPIE,	)	ORDER NO. 931
Complainant,	)	ORDER DISMISSING PROHI-
and	)	BITED PRACTICE COMPLAINTS
STATE OF HAWAII ORGANIZATION	)	
OF POLICE OFFICERS,	)	
Respondent.	)	

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In the Matter of	)	CASE NO. CE-12-165
WILLIAM (BILL) GILLESPIE,	)	
Complainant,	)	
and	)	
FRANK F. FASI, Mayor of the	)	
City and County of Honolulu,	)	
and HONOLULU POLICE DEPARTMENT,	)	
Respondents.	)	

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ORDER DISMISSING PROHIBITED PRACTICE COMPLAINTS

On May 29, 1992, Complainant WILLIAM (BILL) GILLESPIE (GILLESPIE) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondent STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO or UNION) in Case No. CU-12-83. GILLESPIE contends that Respondent SHOPO refused to represent him in the grievance procedure to contest the termination of his probationary appointment which he alleges was in violation of Article 21 of the SHOPO Collective Bargaining Agreement (contract).

Also on May 29, 1992, Complainant GILLESPIE filed a complaint against FRANK F. FASI, Mayor of the City and County of Honolulu and the HONOLULU POLICE DEPARTMENT (HPD) (collectively EMPLOYER) in Case No. CE-12-165. GILLESPIE contends the EMPLOYER violated Subsections 89-13(a)(5), (6), (7), and (8), Hawaii Revised Statutes (HRS), when his probation was terminated.

The Board consolidated the proceedings on the complaints by Order No. 885 issued on June 17, 1992 because they involved substantially the same parties and issues.

On June 26, 1992, Respondent SHOPO filed a Motion for Summary Judgment with the Board. In its motion, SHOPO argued that Complainant GILLESPIE was an initial probationary appointee and not entitled to grieve his termination under the collective bargaining agreement. The Union relies on Decision 238, Danny L. Creamer, 4 HLRB 118 (1987) as controlling precedent and argues that GILLESPIE's charges are barred by the doctrine of res judicata since the issue has already been decided by the Board.

The Board in Creamer, supra, interpreted Article 21 of the SHOPO contract relating to Probationary Periods to permit a new probationary employee, one who is promoted to a new class, to maintain a grievance challenging the termination of the promotion if prejudice is a controlling factor. The rights of new probationary employees were contrasted with those of initial probationary appointees, like GILLESPIE, who were not afforded access through the grievance procedure. The Board recognized the negotiations history of the contract provision where the parties to the contract

in 1983 reaffirmed their intent that initial probationary employees have no right to grieve their terminations.

On July 16, 1992, Complainant GILLESPIE filed a motion for summary judgment against Respondent SHOPO alleging that he contacted the UNION prior to his termination and was refused assistance or representation based upon the holding in the Creamer case. Complainant also alleges that he requested the Employer to proceed to arbitration but he was denied the opportunity to arbitrate the matter in March 1992. Complainant alleged that res judicata was inapplicable because Creamer dealt with seniority and tenure rights in the promotion article.

Also on July 16, 1992, Complainant GILLESPIE filed a motion for summary judgment against the EMPLOYER contending, inter alia, that he was not afforded the rights guaranteed under relevant contract provisions and further that he never received any information about his termination or the investigation until one month after the termination action.

Additionally, Respondent EMPLOYER filed a motion for summary judgment against GILLESPIE on July 16, 1992. The EMPLOYER, like SHOPO, argued that Complainant was an initial probationary appointee when his employment was terminated and no cause had to be stated to terminate his probation. Further, the EMPLOYER argues that under the terms of the applicable contract, GILLESPIE is not entitled to any appeal procedure.

A hearing was held before the Board on July 20, 1992. All parties were afforded the opportunity to call and cross-examine witnesses, submit exhibits and present oral argument.

The Board finds that the following facts were established:

Complainant GILLESPIE was hired by the EMPLOYER on January 17, 1991 as a Metropolitan Police Recruit, and required to serve an initial probationary period of one year. GILLESPIE was included in bargaining unit 12 and represented for the purposes of collective bargaining by exclusive representative SHOPO.

On June 5, 1991, an internal complaint was filed against GILLESPIE. On June 6, 1991, Sergeant Simmons, a training officer, informed Complainant that a third party complaint of sexual harassment was filed against him and the Major was recommending the termination of Complainant's probationary appointment. GILLESPIE contacted SHOPO and requested assistance. He met with SHOPO General Counsel Michael Kaneshiro. Kaneshiro advised GILLESPIE to consider filing a complaint with the Civil Service Commission and consult with outside counsel regarding the filing of a wrongful termination lawsuit. On or about June 7, 1991, Kaneshiro informed GILLESPIE that the UNION would not represent him.

Also, on June 7, 1991, GILLESPIE submitted a typed response to Major Trepte, HPD Training Division, and volunteered to take a polygraph test regarding the allegations against him. The test was scheduled on June 10, 1991 but was not administered to him. Later that day, Simmons asked GILLESPIE to give him a statement at that time but GILLESPIE wanted to submit a typed response. On June 12, 1991, Complainant's probationary appointment was terminated. GILLESPIE filed a grievance with his EMPLOYER on

July 9, 1991. Patrick Ah Loo, HPD labor relations specialist, advised Assistant Chief Ersel Kilburn that the matter was not grievable because probationary employees were not allowed to appeal the termination of probationary appointments. However, Ken Patterson of the Civil Service Department advised the HPD to accommodate GILLESPIE and to hold a hearing. Chief of Police Michael Nakamura informed GILLESPIE by letter dated July 16, 1991 that his grievance was untimely because it was filed more than twenty (20) calendar days after the adverse action. Chief Nakamura nevertheless afforded GILLESPIE an opportunity for a Step 2 hearing on the termination of his probationary appointment. Complainant requested and received a copy of the internal complaint form on or about July 16, 1991.

The Step 2 hearing was held on August 5, 1991 by Assistant Chief Kilburn. After the hearing, Kilburn recommended to Chief Nakamura that the matter be reinvestigated by Internal Affairs because GILLESPIE raised the issue of a departmental conspiracy against him. An Internal Affairs investigation was conducted to determine any misconduct by GILLESPIE's superior and approximately three months later, the EMPLOYER determined that the department did not violate any rules. Thus, Complainant's grievance was denied at Step 2. Thereafter at Step 3, a hearing was held and the grievance was again denied by letter dated January 27, 1992.

GILLESPIE received a letter on or about March 31, 1992 from the Employer indicating that it would not proceed to arbitration. GILLESPIE filed the instant prohibited practice complaints

with the Board against SHOPO and the EMPLOYER on May 29, 1992. During the course of the hearing before the Board the facts indicated that the instant prohibited practice complaints were not filed in a timely manner. Section 377-9(1), HRS, made applicable to the Board by Section 89-14, HRS, provides that no unfair labor practice complaints shall be considered unless filed within ninety days of their occurrence. The Board has previously held that statutes of limitation are to be strictly construed and therefore dismissed prohibited practice complaints which were filed one day beyond the limitations period. Alvis W. Fitzgerald, 3 HPERB 186 (1983); Michael K. Iwai, 5 HLRB \_\_\_\_, (1993).

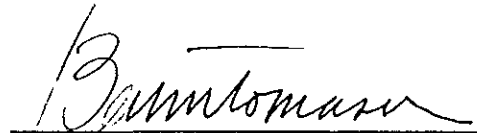
GILLESPIE contends that SHOPO violated Chapter 89, HRS, when it refused to assist him or represent him to contest the termination of his probation. The UNION notified GILLESPIE in June 1991 that it would not file a grievance on his behalf. GILLESPIE's cause of action to challenge the UNION's decision to represent him in the grievance accrued at that time. See also, Section 378-51, HRS. That statute provides that the cause of action against a union for the alleged failure to fairly represent the employee arising from a grievance is deemed to accrue when the employee receives actual notice that a labor organization either refuses or has ceased to represent the employee in a grievance. Here, Complainant's cause of action to challenge the UNION's refusal to represent him in a grievance accrued in June of 1991. Complainant's subsequent filing of the instant prohibited practice complaint on May 29, 1992 is clearly beyond the ninety-day limitations period.

As to the EMPLOYER, GILLESPIE contends, inter alia, that various contractual provisions were violated because he was not afforded a written internal complaint form in a timely manner; there was no formal record of the investigatory interview; etc. The EMPLOYER's actions which GILLESPIE complains of occurred in June of 1991. Even if GILLESPIE's cause of action was deemed to accrue on or about January 27, 1992 when the EMPLOYER's Step 3 response was rendered, the complaint against the EMPLOYER was filed on May 29, 1992, again after the statutory ninety-day limitations period had lapsed.

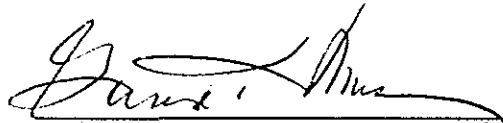
Based upon the foregoing, the Board concludes that it lacks jurisdiction to entertain these complaints and hereby dismisses these complaints.

DATED: Honolulu, Hawaii, March 15, 1993.

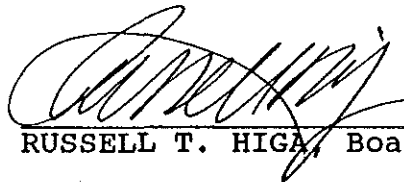
HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



GERALD K. MACHIDA, Board Member



RUSSELL T. HIGA, Board Member

Copies to:

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