

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-13-75
MALCOLM A. SUSSEL,)	ORDER NO. 933
)	
Complainant,)	ORDER GRANTING RESPONDENT'S
)	MOTION TO DISMISS COMPLAINT
and)	
)	
HAWAII GOVERNMENT EMPLOYEES)	
ASSOCIATION, AFSCME, LOCAL 152,)	
AFL-CIO,)	
)	
Respondent.)	
_____)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS COMPLAINT

On November 19, 1990, MALCOLM A. SUSSEL (SUSSEL or Complainant) filed with the Hawaii Labor Relations Board (Board) an unfair labor practice complaint, Case No. CU-13-75, against Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION/AFSCME (HGEA or Union), alleging violations of Chapter 377, Hawaii Revised Statutes (HRS). On November 20, 1990, Complainant filed an Amended Prohibited Practice Complaint against the HGEA alleging, inter alia, violations of Chapter 89, HRS.

Complainant alleges that he was illegally removed and/or demoted from the position of administrator of the Oahu Civil Defense Agency (OCDA), City and County of Honolulu (City) in January 1985. The HGEA filed an appeal on behalf of SUSSEL before the City Civil Service Commission (Commission) challenging the alleged demotion. SUSSEL was represented by Charles K.Y. Khim, Esq. (Khim) before the Commission and in the First Circuit Court

through early August 1990. During this time, Khim's fees were paid by the HGEA. In early August 1990, Khim asked Dennis King, Esq. (King), an attorney who represented SUSSEL in federal court proceedings, to work with him in presenting SUSSEL's remanded claims before the Commission. King agreed to assist Khim. On August 29, 1990, Khim informed King that he and the HGEA were withdrawing from providing legal representation to SUSSEL. SUSSEL objected to the withdrawal of legal representation. On August 31, 1990, Khim filed a Notice of Withdrawal with the Commission and despite repeated requests has refused to represent SUSSEL in the Commission proceedings. Complainant alleges that HGEA breached its representations to him and its union obligations to provide him with legal representation since SUSSEL is a union member.

On June 27, 1991, HGEA, by and through its counsel, Khim filed a Motion to Dismiss, Or In the Alternative Motion for Summary Judgment with the Board.

On July 29, 1991, Complainant filed a Motion to Disqualify HGEA's Attorney, and HGEA filed a Motion to Strike Affidavit of Malcolm A. Sussel and Memorandum In Opposition To Respondent's Motion to Dismiss Or For Summary Judgment.

A hearing on these motions was held on July 30, 1991. After hearing arguments, the Board denied Complainant's Motion To Disqualify HGEA's Attorney based on Khim's representation that he would withdraw as counsel if the Board denied HGEA's motion to dismiss or alternatively, for summary judgment and proceeded to hear the case on the merits. Tr. at 14.

With respect to HGEA's Motion to Strike Complainant's Affidavit and Memorandum In Opposition, HGEA moves to strike these documents, pursuant to Administrative Rules Section 12-42-8(g)(10)(B) on grounds that they fail to meet the requirements of Administrative Rules Section 12-42-8(g)(3)(c)(iii) which provides:

(iii) Answering affidavits, if any shall be served on all parties and the original and five copies, with certificate of service on all parties, shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise. (Emphasis added).

HGEA's motion to dismiss or for summary judgment was filed on June 27, 1991. Complainant's responsive documents were filed with the Board on July 25, 1991, in excess of the five-day filing period provided by the rule. However, the Board has the discretion to extend the deadline imposed if it deems appropriate. In its notice of hearing on the motions, dated July 3, 1991, the Board provided that written arguments in opposition to the motions should be filed by July 25, 1991. As the documents complained of were filed on July 25, 1991, the Board hereby denies HGEA's Motion to Strike.

In his Amended Prohibited Practice Complaint, Complainant alleges HGEA violated Sections 89-3 and 89-13(b)(1), (3), (4), (5); and Sections 377-6(1), (6), 377-7(1), (3) and 377-8, HRS. In its motion to dismiss or in the alternative, for summary judgment, HGEA argues that the Board lacks jurisdiction over the complaints because they were filed beyond the applicable limitations period. In addition, HGEA contends that the Board lacks jurisdiction over the unfair labor practice complaint because SUSSEL is not covered

by Chapter 377, HRS. Further, HGEA contends that the Board lacks jurisdiction over SUSSEL because he is excluded from collective bargaining and the coverage of Chapter 89, HRS.

The Board finds that HGEA's arguments with regard to the statute of limitations are without merit. SUSSEL complains that HGEA's withdrawal of legal representation on August 29, 1990 constituted unfair labor or prohibited practices. HGEA contends that SUSSEL's filing of the instant complaints on November 19, 1990 and November 20, 1990, respectively, were more than ninety days beyond the alleged adverse action. In calculating the applicable time period we find that the instant complaints were filed well within the applicable time constraints.

Turning to SUSSEL's claims arising from alleged violations of Chapter 377, HRS, the Board hereby dismisses those claims on grounds that Chapter 377, HRS, is inapplicable to this case.

Section 377-1(2), HRS, provides:

(2) "Employer" means a person who engages the services of an employee, and includes any person acting on behalf of an employer, but shall not include the State or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact. (Emphasis added).

Section 377-1(2), HRS, specifically excludes the State and its political subdivisions from the definition of "Employer" and coverage of Chapter 377, HRS. The City is a political subdivision of the State. It is undisputed that Complainant was for all time relevant employed by the City and a public employee. Thus, the Board hereby dismisses the claims of Chapter 377, HRS,

violations because those allegations fail to state a claim for relief by SUSSEL.

With respect to the alleged violations of Chapter 89, HRS, the gravamen of SUSSEL's complaint is that the HGEA breached its duty of fair representation when it refused to represent him in the further proceedings before the Commission. In order to find a breach of duty, the Board must first determine whether the exclusive representative owes such a duty to SUSSEL, an excluded employee.

Section 89-2, HRS, defines "exclusive representative" as an employee organization which has been certified to represent all employees in an appropriate bargaining unit. The HGEA has been certified to represent bargaining units 2, 3, 4, 6, 8, 9 and 13.

The duty of fair representation arises from Section 89-8(a), HRS, which provides, in part:

As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership. . . (Emphasis added).

Therefore, the HGEA owes a duty of fair representation to all employees who occupy positions assigned to the bargaining units which it represents. Conversely, the HGEA does not owe a duty of fair representation to employees who occupy positions which are excluded from these units. The status of the position which SUSSEL was demoted or downwardly reallocated from is controlling in determining Complainant's status for collective bargaining purposes.

Section 89-6(c), HRS, provides, in pertinent part:

(c) No elected or appointed official, member of any board or commission, representative of a public employer, including the administrative officer, director, or chief of a . . . county department or agency . . . shall be included in any appropriate bargaining unit or entitled to coverage under this chapter. (Emphasis added).

Here, SUSSEL was a member of the HGEA; however, at the time of the adverse action, SUSSEL, the administrator of OCDA, a City agency, was excluded from collective bargaining and the coverage of Chapter 89, HRS. Thus, the HGEA owed no duty of fair representation to the Complainant to challenge the downward reallocation of his position. Consequently, the Board dismisses Complainant's claims arising under Chapter 89, HRS, because SUSSEL has no standing to raise allegations of a breach of duty of fair representation action against the HGEA.

While Complainant may have come to rely heavily upon the HGEA to represent him in prosecuting an action to restore him to the excluded administrator's position, this Board cannot exercise jurisdiction on claims predicated on alleged violations of Chapters 89 and 377, HRS, to compel the HGEA to continue its legal representation. While Complainant may or may not have valid claims in other forums under various legal theories, the Board dismisses the instant complaints before it on the grounds stated above.


ORDER

For the foregoing reasons, the Board hereby grants the HGEA's motion to dismiss the instant complaints.

MALCOLM A. SUSSEL v. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION,
AFSCME, LOCAL 152, AFL-CIO; CASE NO. CU-13-75
ORDER NO. 933
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DATED: Honolulu, Hawaii, March 18, 1993.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


GERALD K. MACHIDA, Board Member


RUSSELL T. HIGA, Board Member

Copies sent to:

Malcolm A. Sussel
Charles K.Y. Khim, Esq.
Joyce Najita, IRC