

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NOS.: CE-10-182
)	CU-10-90
LOT KALUAU,)	
)	ORDER NO. 980
Complainant,)	
)	ORDER GRANTING, IN PART,
and)	EMPLOYER'S MOTION TO DIS-
)	MISS; NOTICE OF HEARING
JOHN WAIHEE, Governor of the)	
State of Hawaii; DEPARTMENT OF)	
PUBLIC SAFETY, State of Hawaii;)	
GEORGE SUMNER, Director, Depart-)	
ment of Public Safety, and)	
UNITED PUBLIC WORKERS, LOCAL)	
646, AFSCME, AFL-CIO,)	
)	
Respondents.)	

ORDER GRANTING, IN PART, EMPLOYER'S
MOTION TO DISMISS; NOTICE OF HEARING

On February 24, 1993, Complainant LOT KALUAU (KALUAU) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board). KALUAU alleged that GEORGE SUMNER, Director, Department of Public Safety (SUMNER) violated the departmental grievance procedure by failing to render a written decision within ten working days. KALUAU also alleged that SUMNER violated section 16 of the bargaining unit 10 agreement, and Chapters 76, 77, 78 and 79, Hawaii Revised Statutes (HRS). KALUAU also alleged that the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) failed to represent him fairly.

On March 3, 1993, Respondents JOHN WAIHEE, Governor of the State of Hawaii; DEPARTMENT OF PUBLIC SAFETY, State of Hawaii; and GEORGE SUMNER, Director, Department of Public Safety, State of

Hawaii (collectively Employer), by and through their counsel, filed a motion to dismiss for failure to state a claim upon which relief can be granted. Employer argues that Complainant seeks to overturn the settlement agreement dated November 23, 1992 between the Employer and the UPW which was properly entered into under Chapter 89, HRS.

On March 8, 1993, Respondent UPW, by and through its counsel, filed a motion to dismiss the prohibited practice charge for lack of jurisdiction because it is untimely and for failure to state a claim. UPW contends that the Complainant seeks to set aside the settlement agreement entered into on November 23, 1992 between the State of Hawaii and UPW. UPW further contends that the ninety-day statute of limitations ran on February 21, 1993. In addition, Respondent UPW contends that the complaint should be dismissed because the conduct of the Union and the State falls within the wide range of reasonableness contemplated by the Legislature under Chapter 89, Hawaii Revised Statutes (HRS).

The Union alleges that in 1991, the Halawa Correctional Center filled twenty-six vacancies in ACO IV positions. Nine employees filed grievances on the selection. The State settled the grievance by re-doing the selection in 1992. The 1992 selection was again challenged by the filing of a class action grievance by the UPW. The selection was challenged because the Union determined that the State had improperly used sick leave and attendance records and overlooked past experience and relevant seniority. Two arbitration awards were rendered during the same time period

overturning promotions which were based upon consideration of the employees' sick leave records. The arbitrators in those cases awarded the promotions to the senior employees within the bargaining unit. Thereafter, the class grievance was settled on November 23, 1992 after a review of the applicants, their qualifications and relevant contractual provisions. According to the terms of the settlement, twenty-five employees who were qualified on the basis of temporary assignments and seniority at Halawa were placed into the positions.

On April 1, 1993, Employer filed a supplemental memorandum in support of its motion to dismiss. Employer contends that the Complainant fails to state a claim against the Employer because the Union and the Employer had the authority to enter into a settlement of the issues; the Board lacks jurisdiction over the departmental grievance procedure and the complaints are time-barred.

On April 20, 1993, the UPW filed a motion to dismiss proceedings without responding briefs or hearings. Counsel for UPW stated that the Complainant failed to comply with the Board's deadline to file its brief.

The Board hereby denies the UPW's motion to dismiss. At the hearing on the motion to amend complaint held on April 14, 1993, the Board set the deadline for Complainant's brief as "next Friday" which was April 23, 1993. Hence, the Board finds that Complainant was timely in filing his response to UPW's motion to dismiss on April 22, 1993.

With regard to UPW's motion to dismiss the complaint for failure to state a claim, the Board finds that there is insufficient evidence in the record to determine whether the Union's actions fall within the wide range of reasonableness espoused in Air Line Pilots Ass'n v. O'Neill, 111 S.Ct. 1129 (1991). Therefore, the Board will reserve ruling on the motion at this time and will conduct a further evidentiary hearing limited to the issues of why the decision was made to award the promotions to certain employees, rather than redo the selection and how the employees were selected for the positions.

With respect to the Employer's motion to dismiss for failure to state a claim, the Board finds that it does not have jurisdiction over the departmental grievance procedures nor the alleged violations of Chapters 76, 77, 78, and 79, HRS. The Board thus hereby dismisses those allegations.

With respect to the Employer's argument that this complaint is time-barred, the Employer relies upon the November 23, 1992 date as determining when the cause of action accrues. However, the record indicates that the Employer notified Complainant by memorandum dated, November 24, 1992, that he would be returned to his former rank in accordance with the settlement agreement. Using the date of November 24, 1992 for purposes of computation of the applicable limitations period since the Complainant was notified of the settlement and adverse action on that date, the complaint had to be filed by February 24, 1993 which it was. Hence, the Board hereby denies Employer's motion to dismiss on the basis that it was filed beyond the applicable limitations period.

A hearing was held on Respondents' motions to dismiss on May 18, 1993. Based upon a review of the record, the Board makes the following findings.

UPW argues that the instant complaint was filed outside of the applicable limitations period. The UPW contends that the Complainant seeks to overturn the settlement agreement executed on November 23, 1992. Thus, UPW argues that Complainant's cause of action accrued on that date.

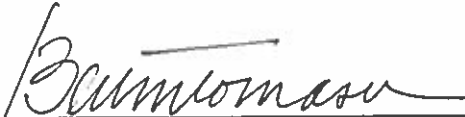
Section 377-9(1), HRS, which is applicable to the Board by § 89-14, HRS, provides that no unfair labor practice complaint shall be considered unless filed within ninety days of its occurrence. Previously, the Board held that statutes of limitation are to be strictly construed and therefore dismissed a prohibited practice complaint which was filed one day beyond the limitations period. Alvis W. Fitzgerald, 3 HPERB 186 (1983); Michael K. Iwai, 5 HLRB ____ (1993).

Since KALUAU complains that he was denied representation by the UPW, the Board considers significant when KALUAU was on notice that the Union refused to assist him. KALUAU's calendar attached to his complaint indicates that Union business agent Mel Rodrigues indicated that the Union would not represent the junior ACO's on December 1, 1992 and denied him grievance forms and representation on December 11, 1992. Thus, using December 11, 1992 as the date that Complainant's cause of action accrued, the Board concludes that the complaint was timely.

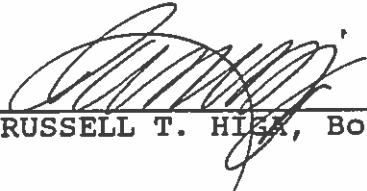
YOU ARE HEREBY NOTIFIED that the Board will conduct a hearing on the foregoing issues pursuant to § 89-5, HRS, on November 18, 1993 at 10:00 a.m. in the Board's hearings room, Room 203, 550 Halekauwila Street, Honolulu, Hawaii 96813.

DATED: Honolulu, Hawaii, October 21, 1993.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIEA, Board Member



SANDRA H. EBESU, Board Member

Copies sent to:

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- Michael Azama, Deputy Attorney General
- Joyce Najita, IRC