STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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| In the Matter of<br><br>HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO,<br><br>Complainant,<br><br>and<br><br>LINDA LINGLE, Governor, State of Hawaii; LILLIAN B. KOLLER, Director, Department of Human Services, State of Hawaii; EDWIN NOSE, Departmental Personnel Director, Department of Human Services Personnel Office, State of Hawaii; LUANNE MURAKAMI, Acting Oahu Branch Administrator, Department of Human Services, State of Hawaii; GARRY KEMP, BESSD Assistant Administrator, Department of Human Services, State of Hawaii; and YVONNE TANAKA, Personnel Management Specialist, Department of Human Services, State of Hawaii,<br><br>Respondents. | CASE NOS.: CE-03-573a<br>CE-04-573b<br>CE-13-573c<br><br>ORDER NO. 2294<br><br>ORDER GRANTING RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED SEPTEMBER 16, 2004 |

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS
PROHIBITED PRACTICE COMPLAINT FILED SEPTEMBER 16, 2004

On September 29, 2004, Respondents in the above-captioned matter moved to dismiss the prohibited practice complaint filed September 16, 2004 by Complainant, HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (Union or HGEA), for engaging in prohibited practices in wilful violation of Hawaii Revised Statutes (HRS) §§ 89-13(a)(5), (7), and (8).

On October 7, 2004, the Union filed Complainant's Memorandum in Opposition to Respondents' Motion to Dismiss. Respondents filed their Reply to Complainant's opposition on October 21, 2004.

On October 26, 2004, the Hawaii Labor Relations Board (Board) conducted a hearing on Respondents' Motion to Dismiss, pursuant to HRS §§ 89-5(i)(4) and (i)(5) and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). The parties were allowed full opportunity to present argument to the Board. After careful consideration of the record and

arguments presented, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Complainant, the HGEA was for all relevant times, an employee organization and the exclusive representative, as defined in HRS § 89-2, of public employees in bargaining units (BUs) 03, 04, and 13.

2. Respondent LINDA LINGLE is the Governor of the State of Hawaii and the public employer, as defined in HRS § 89-2, of State employees in BUs 03, 04, and 13.

3. Respondent LILLIAN B. KOLLER (KOLLER) in her capacity as the Director of Human Services, State of Hawaii, is a public employer or the representative of the public employer, as defined in HRS § 89-2, of employees of the Department of Human Services, State of Hawaii (DHS), in BUs 03, 04, and 13.

4. Respondents EDWIN NOSE (NOSE), as DHS Director of Personnel, LUANNE MURAKAMI (MURAKAMI), DHS Acting Oahu Branch Administrator, GARRY KEMP (KEMP), DHS Benefit, Employment and Support Services Division (BESSD) Assistant Administrator, and YVONNE TANAKA (TANAKA), DHS Personnel Management Specialist, at all times relevant and in their respective capacities, are representatives of the public employer, as defined in HRS § 89-2, of DHS employees in BUs 03, 04, and 13.

5. The HGEA and Respondents are parties to collective bargaining agreements for DHS employees in BUs 03, 04, and 13, which contain provisions for a grievance procedure that ends in final and binding arbitration; and requiring consultation with the Union on all matters affecting employee relations, including those that are, or may be, the subject of a regulation promulgated by the Employer or any Personnel Director, and prior to effecting changes in any major policy affecting Employee relations.[1]

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[1]Article 4, Personnel Policy Changes, of the contracts provides:

A. All matters affecting Employee relations, including those that are, or may be, the subject of a regulation promulgated by the Employer or any Personnel Director, are subject to consultation with the Union. The Employer shall consult with the Union prior to effecting changes in any major policy affecting Employee Relations.

B. No changes in wages, hours, or other conditions of work contained herein may be made except by mutual agreement.

6. On May 10, 2004, the HGEA filed a formal grievance[2] on behalf of DHS employees in BU 03, 04, and 13 with KOLLER for failing to consult over changes to conditions of work of Eligibility Workers in the Benefit, Employment and Support Services Division (BESSD), resulting from a decision not to renew a contract with a private vendor--MAXIMUS-- to perform the child care eligibility determination function.

7. On May 26, 2004, HGEA Union agents Adele Fujita, Robert Doi, Carrie Nakagawa and Ian Takeshiba, and Respondents NOSE and TANAKA, conducted a formal step grievance meeting. At this meeting the Union again requested consultation on matters resulting in a change to employees' conditions of work.

8. On June 10, 2004, an informational meeting was held to discuss various issues relating to changes in the DHS BESSD operations attended by HGEA Union agents Adele Fujita and William Chai, and Respondents KEMP, MURAKAMI, NOSE and TANAKA.[3]

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[2]The formal grievance alleged contractual violations in provisions covering:

> 1) Maintenance of Rights and Benefits; 2) Personnel Policy Changes; 3) Discipline; 4) Personal Rights and Representation; 5) Safety and Health; and 6) Overtime; and, stated in part, as follows:
>
> The failure of your department to consult with this Union on these changes is of great concern to us. We have had a rash of calls informing us that child care and applications will be reassigned, that position descriptions will be amended, etc. The uncertainties of these issues are causing morale problems, and it is also becoming a safety and health issue. See, Exhibit (Ex.) "A" attached to Respondent's Motion to Dismiss.

[3]The substance of this informational meeting, is set forth in the instant complaint as follows:

> A. One of the matters discussed during this meeting was the return of the child care eligibility determination to BESSD staff.
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> B. This function has been performed by MAXIMUS, a private company that contracted with the State to perform the child care eligibility determination function for DHS, since FY 2000 (for all neighbor islands) and FY 2001 (for Oahu).
>
> C. Upon information and belief, the State's most recent contract with MAXIMUS expired on June 30, 2004, and Respondents decided not to renew its contract with MAXIMUS.
>
> D. Upon information and belief, Respondents decided to return the child care eligibility determination function to BESSD Eligibility Workers.

9. By letter dated June 21, 2004, KOLLER issued the Employer's response to the class grievance as follows:

> As regards the issue of EWs (Eligibility Workers) performing eligibility determination for both applications and ongoing cases, this matter was addressed during the consultation process related to reorganization of the BESSD, Oahu Branch. The reorganization was approved effective December 5, 2003, after receiving a letter dated November 21, 2003 from the Hawaii Government Employees Association stating, "the implementation of the proposal can proceed as submitted and as clarified in your letter of October 10, 2003." Given this, we consider the matter of EWs' performance of dual eligibility determination closed.
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> The matter of a 'recruitment moratorium limiting EW recruitment to the EW 1 level is discussed in a summary of a meeting held between the Union and the Employer on June 20, 2004 to share information related to the return of child care eligibility determination to the BESSD. The summary is enclosed (sic) your information. Although an explanation of our recruitment strategy is provided, the Employer maintains that how recruitment is conducted is a management right and, as such, is not subjection to negotiation.
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> The aforementioned summary of a meeting held on June 10, 2004 provides information about programmatic changes related to the BESSD's resumption of child care

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E. Respondents' decision to return the child care eligibility determination function to BESSD Eligibility Workers was done without consulting and/or negotiating with the Union on its decision, the effects of its decision, and its impact, on affected employees and their working conditions.

F. Affected employees and the HGEA learned about Respondents' decision to discontinue its contractual relationship with MAXIMUS and return the child care eligibility determination function to BESSD Eligibility Workers approximately two (2) months before the State's contract with MAXIMUS was going to expire.

G. Respondents never contacted HGEA's Executive Director Russell Okata to initiate consultation over its decision to return the child care eligibility determination function to BESSD Eligibility Workers. See, Paragraph 20, Prohibited Practice Complaint filed September 16, 2004.

eligibility determination activities. The Employer believes that the occurrence of such meeting effectively addresses the concerns raised by this grievance. See, Ex. B, attached to Respondents' Motion to Dismiss.

10. On July 7, 2004, in accordance with the contractual grievance procedure, the HGEA issued its letter of intent to proceed to arbitration to the Director of Human Resources Development. See, Ex. C, attached to Respondents' Motion to Dismiss.

11. On September 16, 2004, the HGEA filed the instant prohibited practice complaint against the Respondents for failing to "consult, negotiate, and reach mutual consent with the HGEA on issues concerning the Employer's decision not to review its contract with MAXIMUS, and to shift the child care eligibility determination function previously performed by MAXIMUS to BESSD Eligibility Workers." The HGEA alleged in its complaint that Respondents' conduct will result in significant and material changes to the wages, hours, and terms and conditions of employment of affected employees in BUs 03, 04, and 13, in wilful violation of the terms set forth in the collective bargaining agreements, and HRS §§ 89-9(a) and (c)[4], and hence Respondents are engaging in prohibited practices under HRS §§ 89-13(a)(5), (7), and (8).[5]

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[4]Those sections provide in part, as follows:

§ 89-9. Scope of negotiations; consultation.

(a) The employer and the exclusive representative shall meet at reasonable times, . . . and shall negotiation in good faith with respect to wages, hours, and other terms and conditions of employment which are subject to collective bargaining and which are to be embodied in a written agreement as specified in section 89-10, abut such obligation does not compel either party to agree to a proposal or make a concession; . . .

* * *

(c) Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employee concerned. The employer shall consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.

[5]HRS § 89-13. Prohibited practices; evidence of bad faith, provides, in part, as follows:

(a) It shall be a prohibited practice for a public employer or its designated representative to wilfully to:

* * *

## DISCUSSION

In its complaint, the HGEA contends that the Employer violated Article 4, of the BU 03, 04, and 13 contracts and HRS §§ 89-9(a) and (c), and 89-13(a)(5), (7), and (8), for refusing to consult over the changes in working conditions relating to the resumption of the child care eligibility determination function to DHS' BESSD Eligibility Workers upon expiration of the private contract with MAXIMUS.

The Respondents urge dismissal of the instant complaint on the grounds that 1) the complaint is time-barred by the 90-day statute of limitations; or 2) the Board should decline jurisdiction and defer to the contractual grievance process.

### Statute of Limitations

HRS § 377-9(1), made applicable to these proceedings by HRS § 89-14, provides that "[n]o complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." Accordingly, HAR § 12-42-42(a) sets forth the limitations period applicable to the filing of prohibited practices complaints under HRS § 89-13. The rule provides as follows:

> A complaint that any public employer, public employer, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed...within ninety days of the alleged violation.

The Board has construed the limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HPERB 186 (1983). The beginning of the limitations period does not depend upon actual knowledge of a wrongful action. Instead the period begins to run when "an aggrieved party knew or should have known that his statutory rights were violated." Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978).

The Respondents argue that the Union's failure to consult and bargain in good faith allegations are untimely because no alleged violation occurred within the 90-day statute of limitations period, i.e., after June 19, 2004. Relying on the instant complaint, Respondents contend that the violation occurred at a meeting on April 27, 2004, when the HGEA Union Agent Robert Doi met with DHS employees, who informed him that the child care eligibility determination function was being returned to them upon expiration of the contract with

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(5) Refuse to bargain in good faith with the exclusive representative as required in section 89-9;

* * *

(7) Refuse or fail to comply with any provision of this chapter,

(8) Violate the terms of a collective bargaining agreement; . . . .

MAXIMUS. As an alternative, Respondents argue that Complainant learned of the return of the child care eligibility determination function to DHS from the private contractor at the meeting on June 10, 2004, which satisfied its duty to consult and confer. Hence, the Respondents contend the instant complaint is time-barred.

With regard to the statutory and contractual violations, the Union contends that it first learned that Respondents were not going to consult and/or negotiate upon receipt of Respondent KOLLER's June 21, 2004 response following the class grievance meeting held on May 24, 2004, and the informational meeting on June 10, 2004, both of which covered the Employer's decision to return the child care eligibility determination function to DHS' BESSD Eligibility Workers. Hence, the alleged violations occurred on or about June 24, 2004, when the HGEA received KOLLER's response to the class grievance indicating that the path to consultation was closed. As these alleged violations occurred within the ninety days preceding the filing of the instant complaint filed on September 16, 2004, the Board concludes that the complaint is timely filed.

**Deferral to Grievance**

The Employer submits in its arguments that the contractual and statutory violations raised in the instant complaint are the same as those raised by the underlying grievance, which is pending arbitration. Furthermore, the Employer contends the Union's notice of intent to proceed to arbitration is timely and arbitrable. As such, the Board is persuaded more by the Employer's arguments for deferral, than its reliance on the statute of limitations doctrine.

Chapter 89 expressly authorizes parties to a collective bargaining agreement to establish a "grievance procedure culminating in final and binding decision. . . ." (Emphasis added.) HRS § 89-11(a). Chapter 89, however, also provides the Board with jurisdiction over alleged contractual violations by either an employer or exclusive representatives via its authority to adjudicate prohibited practices complaints. HRS §§ 89-13(a)(8) and 89-13(b)(5). This jurisdictional dilemma is usually resolved by the Board's deferral to the arbitration process.[6] Thus the Board has deferred to the contractual grievance process[7] except where there

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[6]"It shall be the policy of this Board to attempt to foster the peaceful settlement of disputes, wherever appropriate, and application by deferral of matters concerning contractual interpretation to the arbitration process agreed to by the parties." Hawaii State Teachers Association, 1 HPERB 253, 261 (1972).

[7]See, e.g., State of Hawaii Organization of Police Officers, 6 HLRB 25 (1998).

exists countervailing policy considerations[8] or the Union's failure to satisfy its duty of fair representation effectively deprives the employee access to the grievance process.[9]

Such voluntary declination of jurisdiction is akin to the requirement that parties exhaust contractual remedies before access is afforded by the Board. The Hawaii Supreme Court in Santos v. State, Dept. of Transp., Kauai Div., 64 Haw. 648, 655, 646 P.2d 962 (1982) stated that: "It is the general rule that before an individual can maintain an action against his employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his employer and the [union]. (Citation omitted) The rule is in keeping with the prevailing National Labor Relations policy and Hawaii policy favoring arbitration as a dispute settlement mechanism." (Citations omitted.) Application of this rule permits a voluntary declination of jurisdiction and has often been adopted and applied by this Board when a claimant has failed to fully exhaust available contractual remedies. See, Lewis W. Poe v. Hawai`i Labor Relations Board, et al., 105 Hawai`i 97, 94 P.3d 652 (2004).

The instant complaint, however, is factually distinguishable from cases involving the Union's failure to satisfy its duty of fair representation and an employee's obligation to exhaust his or her contractual remedies. Hence the issue is whether there exists countervailing policy considerations as an exception to a deferral to the pending arbitration.

In reviewing the instant complaint, the Board can find no countervailing policy considerations which mitigate in favor of assuming jurisdiction of the complaint. The gravamen of the complaint alleging both statutory and contractual violations, like the underlying grievance, are one and the same, i.e., the Respondents alleged failure to consult, negotiate and reach mutual consent prior to shifting the child care eligibility determination function previously performed by MAXIMUS to BESSD Eligibility Workers. Given the Employer's position that the pending charges can all be resolved in the grievance process, the Board hereby defers this complaint to the pending grievance and arbitration. Therefore, the Board declines jurisdiction over the issues presented in this complaint in the interest of administrative efficiency to avoid the possibility of conflicting rulings as well as the duplication of efforts.

## CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint under HRS §§ 89-5 and 89-14.

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[8]See, e.g., Hawaii State Teachers Association, supra, (arbitration fruitless and parties waive arbitration); Hawaii State Teachers Association, 1 HPERB 442 (1974) (speed); and Hawaii Government Employees Association, 1 HPERB 641 (1977) (subject not covered by contract).

[9]Vaca v. Sipes, 386 U.S. 171, 190-91, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

2. The Board lacks jurisdiction over prohibited practice complaints filed more than 90 days after the occurrence of the alleged violations.

3. Complainant's allegations of HRS §§ 89-9, and 89-13(a)(5), (7) and (8) violations arising from the Employer's failure to consult and bargain in good faith prior to shifting the child care eligibility determination function to DHS employees on or after June 21, 2004, were filed within the applicable limitations period.

4. The Board declines jurisdiction over the instant dispute and defers to the arbitration proceedings as all matters raised in the complaint can be resolved through the arbitration process. In addition, deferral in this case would be in the interest of administrative efficiency to avoid redundancy and possibility of inconsistent rulings.

## ORDER

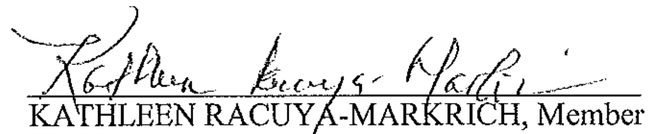
The Board hereby grants Respondents' motion to dismiss the instant prohibited practice complaint.

DATED: Honolulu, Hawaii, December 16, 2004.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member



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