STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of EUGENE OPUNUI SEMINAVAGE, Complainant, and KA WAIHONA O KA NA`AUAO, Public Charter School; HAWAII STATE TEACHERS ASSOCIATION, and DEPARTMENT OF EDUCATION, State of Hawaii Respondents.	CASE NOS.: CE-05-648 CU-05-260 ORDER NO. 2502 ORDER GRANTING RESPONDENT DEPARTMENT OF EDUCATION, STATE OF HAWAII'S MOTION TO DISMISS; AND GRANTING RESPONDENTS' MOTIONS TO DISMISS

ORDER GRANTING RESPONDENT DEPARTMENT OF EDUCATION, STATE OF HAWAII'S MOTION TO DISMISS; AND GRANTING RESPONDENTS' MOTIONS TO DISMISS

On October 29, 2007, Complainant EUGENE OPUNUI SEMINAVAGE (SEMINAVAGE or Complainant), pro se, filed a Prohibited Practice Complaint (Complaint) against the Respondents[1] with the Hawaii Labor Relations Board (Board). Complainant alleged that he was a special education teacher at KA WAIHONA O KA NA`AUAO, Public Charter School (KA WAIHONA or School) since 2002 and he was improperly terminated from employment on July 24, 2006. Complainant alleged that he applied for a transfer to Waianae High School with the DEPARTMENT OF EDUCATION, State of Hawaii (DOE) on April 25, 2006 but was denied employment on July 19, 2006. Complainant alleged that the HAWAII STATE TEACHERS ASSOCIATION (HSTA or Union) filed a grievance on his behalf challenging his termination on August 15, 2006 and, inter alia, breached its duty of fair representation in its attempts to contest the termination. Complainant thus alleged that the employer committed prohibited practices in violation of Hawaii Revised Statutes (HRS)

[1]After the filing of the instant Complaint on October 29, 2007, the Board served a Notice to Respondents of Prohibited Practice Complaint with KA WAIHONA O KA NA`AUAO and the HAWAII STATE TEACHERS ASSOCIATION designated as Respondents. After the filing of an answer by Respondent STATE OF HAWAII DEPARTMENT OF EDUCATION (DOE) on November 13, 2007, the Board issued Order No. 2477 on November 16, 2007, amending the caption to include the DOE as a party Respondent.

§§ 89 13(a)(1), (2), (3), (6), (7), and (8) and the Union committed prohibited practices in violation of HRS §§ 89-13(b)(1), (2), (3), (4), and (5).

At the prehearing/settlement conference held on December 5, 2007, Complainant requested a continuance of the proceedings to obtain counsel to represent him. The Board granted the continuance and permitted the parties to file dispositive motions no earlier than January 22, 2008 and no later than January 28, 2008 and scheduled a hearing on any motions filed on February 5, 2008.

On December 5, 2007, Respondent DOE filed a motion to dismiss the complaint contending that the allegations concerning the DOE were time-barred and Complainant failed to exhaust his contractual remedies.

On January 28, 2008, Respondents DOE, KA WAIHONA, and the HSTA filed motions to dismiss the complaint, respectively. The DOE contended again that the complaint was time-barred; the DOE is not Complainant's employer and thus the Complaint failed to state a claim upon which relief could be granted; and the Board lacked subject matter jurisdiction over recruitment or hiring. KA WAIHONA argued that the Complaint was untimely and Complainant failed to exhaust available contractual remedies. The HSTA argued that the Complaint should be dismissed because it is untimely.

By letter dated February 1, 2008, HSTA's counsel requested a continuance of the February 5, 2008 motion hearing due to a conflict in his schedule.

Also by letter dated February 1, 2008, Michael Jay Green, Esq. (Green), informed the Board that he and Denise M. Hevicon, Esq., had been retained by Complainant to represent him in these proceedings. Green requested a two-week continuance of the scheduled hearing. Green noted that HSTA's counsel also contacted Complainant to request a continuance of the February 5, 2008 hearing.

On February 8, 2008, Complainant filed a Statement of No Opposition to Respondent DOE's Motion to Dismiss. Also on February 8, 2008, Complainant filed a consolidated memorandum in opposition to the HSTA's and KA WAIHONA's respective motions to dismiss contending that the contradictory versions of the grievance process creates an issue of fact as to when the statute of limitations period began to run; that Seminavage did not know until August 6, 2007 that the School was unwilling to proceed to Step 2 of the grievance process and that the HSTA was no longer continuing to prosecute the grievance and his complaint is therefore timely filed; and Respondents' motions are contradictory as to whether mediation was requested and refused. The HSTA submitted affidavits of Georgiana Alvaro on February 14 and 26, 2008 and KA WAIHONA filed a reply to Complainant's opposition on February 22, 2008. In its reply

KA WAIHONA argued that Complainant's new claim that the School improperly declined to mediate was not properly pled and is untimely.

On February 27, 2008, the Board conducted a hearing on the instant motions to dismiss pursuant to HRS §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3). Denise Hevicon, Esq., appeared for Complainant, Vernon Yu, Esq., appeared for the HSTA, and Richard H. Thomason, Deputy Attorney General, appeared for KA WAIHONA.

After careful consideration of the record and the arguments presented, the Board grants Respondent DOE's motion to dismiss and Respondents' Motions to Dismiss for failure to exhaust contractual remedies.

FINDINGS OF FACT

1. Complainant was, at all times relevant to these proceedings, a special education teacher at KA WAIHONA, a charter school, and an employee within the meaning of HRS §§ 89-2 and 89-10.55[2] and included in Bargaining Unit 05.

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[2]HRS § 89-2 contains Definitions for Chapter 89 and provides in relevant part:

> "Employee" or "public employee" means any person employed by a public employer except elected and appointed officials and such other employees as may be excluded from coverage in section 89-6.

HRS § 89-10.55 pertains to Charter school collective bargaining; bargaining unit; employer; exclusive representative and provides in part:

> (a) Employees of charter schools shall be assigned to an appropriate bargaining unit as specified in section 89-6; . . . ..

HRS § 89-6(a)(5) pertains to Appropriate bargaining units and provides:

> (a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:
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> * * *
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> (5) Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of full-time equivalent; . . . .

2. KA WAIHONA is a charter school within the meaning of HRS § 302B-1[3] and is an employer with respect to the employees at the school pursuant to HRS §§ 302B-1, 302B-9, 89-10.55, and 89-2.

Each public charter school is governed by a local school board as defined in HRS 302B-1 which provides as follows:

> HRS § 302B-1 defines Local School Board as:
>
> > "Local school board" means the autonomous governing body of a charter school that receives the charter and is responsible for the financial and academic viability of the charter school, implementation of the charter, and the independent authority to determine the organization and management of the school, the curriculum, virtual education, and compliance with applicable federal and state laws, and that has the power to negotiate supplemental collective bargaining agreements with exclusive representatives of their employees.

Pursuant to the foregoing provision, the local school board is empowered to negotiate supplemental collective bargaining agreements with exclusive representatives of their employees. HRS § 302B-9 provides that charter schools are subject to the collective bargaining law in Chapter 89 and again recognizes that the local school board of the charter school is empowered to negotiate and enter into supplemental agreements with exclusive representatives as defined in Chapter 89.

HRS § 302B-9 pertains to Exemptions from state laws (for public charter schools) and provides in part:

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[3]HRS § 302B-1 provides definitions for Chapter 302B, Public Charter Schools, and provides in part:

> "Charter school" refers to those public schools holding charters to operate as charter schools under this chapter; including start-ups and conversion charter schools, and that have the flexibility and independent authority to implement alternative frameworks with regard to curriculum, facilities management, instructional approach, virtual education, length of the school day, week, or year, and personnel management.

Exemptions from state laws. (a) Charter schools shall be exempt from chapters 91 and 92 and all other state laws in conflict with this chapter, except those regarding:

(1) Collective bargaining under chapter 89; provided that:

(A) The exclusive representatives as defined in chapter 89 and the local school board of the charter school may enter into supplemental agreements that contain cost and noncost items to facilitate decentralized decision-making; . . . .

Similarly, HRS § 89-10.55 pertains to Chapter school collective bargaining; bargaining unit; employer; exclusive representative and provides that the local school board is an "employer" and empowered to negotiate memoranda of agreement or supplemental agreements applicable to the school's employees and provides in part:

(b) For the purpose of negotiating a collective bargaining agreement for charter school employees who are assigned to an appropriate bargaining unit, the employer shall be determined as provided in section 89-6(d).

(c) For the purpose of negotiating a memorandum of agreement or a supplemental agreement that only applies to employees of a charter school, the employer shall mean the local school board, subject to the conditions and requirements contained in the applicable sections of this chapter governing any memorandum of agreement or supplemental agreement.

Thus, while HRS § 89-2 does not specifically include the charter school local school board as an "employer" or "public employer,"[4] based upon the

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[4]HRS § 89-2 provides in relevant part:

"Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees.

foregoing provisions, the local school board of KA WAIHONA is empowered to negotiate with the exclusive representatives under HRS Chapter 89 with respect to its employees and is the employer of employees at the school. In this case, the School represents the interests of the local school board in dealing with its employees, including Complainant, and is therefore an "employer" within the meaning of Chapter 89.

3. The HSTA or Union is an employee organization and the exclusive bargaining representative, within the meaning of HRS § 89-2,[5] of employees included in Bargaining Unit 05 including the employees at KA WAIHONA.

4. The Board takes notice that the Board of Education, State of Hawaii and the HSTA were parties to a collective bargaining agreement for 2005-2007 (Master Agreement).

5. The DOE is an administrative agency and represents the interests of the Board of Education, State of Hawaii with respect to DOE employees and is therefore an employer within the meaning of HRS § 89-2.

6. The KA WAIHONA Local School Board (LSB) and the HSTA are parties to a supplemental agreement within the meaning of HRS § 302B-9 for 2005-2007 (Agreement), within the meaning of HRS § 302B-9, covering employees at KA WAIHONA.

7. Article I of the Agreement, provides as follows:

> This agreement is entered into this 1st day of July, 2004 by and between the Ka Waihona O Ka Naauao Local School Board, hereinafter called "the Employer" and the Hawaii State Teachers Association, hereinafter called "the Association."

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[5]HRS § 89-2 provides in relevant part:

"Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

Pursuant to certification by the Hawaii Labor Relations Board in Case Number 1, the Employer recognizes the Association for the purpose of collective bargaining pursuant to the Hawaii Public Employment Act, as the exclusive representative of a unit consisting of teachers and other personnel of the Ka Waihona O Ka Naauao Public Charter School, hereinafter called "the school" under the salary schedule attached hereto and by reference made a part hereof, pursuant to Section 297-33(a), Hawaii Revised Statutes (HRS).

* * *

8. Article V - Grievance Procedure in the Agreement provides in part:

A. DEFINITIONS.

GRIEVANCE. Any claim by the Association or a teacher that there has been a violation, misinterpretation or misapplication of a specific term or terms of this Agreement shall be a grievance.

* * *

E. FORMAL PROCESS.

Step 1.

a. If the matter is not settled on an informal basis in a manner satisfactory to the teacher involved then the teacher or the certified bargaining representative may institute a formal grievance by setting forth in writing on the form set forth in Appendix I, the nature of the complaint, the specific term or provision of the Agreement allegedly violated and the remedy sought.

b. The grievance must be presented to the Employer in writing within twenty (20) days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed with (sic) twenty (20) days after the alleged violation first became known or should have become known to the teacher involved.

c. The Employer or a committee of the Employer shall hold a meeting for the purpose of obtaining evidence pertaining to the grievance and for the purpose of attempting to settle the matter. The decision will be in writing and delivered to the grieving party within five (5) days afer the hearing/meeting.

Step 2.

MEDIATION. The parties agree that a grievance may be submitted to mediation after the Association has submitted the grievance to the Employer in Step 1. The parties shall use a neutral mediator and the resolution will be final and binding on both parties.

a. If a neutral mediator cannot be agreed to, the parties will request a list of five (5) mediators from the Mediation of the Pacific mediation service. The mediator shall be chosen by the parties by alternately striking one (1) name at a time from the list. The first party to scratch a name shall be determined by lot. The mediator whose name remains on the list shall serve for that case.

b. The mediation rules of the Mediation of the Pacific shall apply to the proceedings except as otherwise provided herein or as otherwise amended by mutual agreement.

c. The fees and expenses of the mediation shall be shared equally by the Employer and the Association. Each party will pay the cost of presenting its own case.

d. When the mediator find that any disciplinary action was improper, the action may be set aside, reduced or otherwise modified by the mediator. The mediator may award back pay to compensate the teacher wholly or partially for any salary lost. Such back pay award shall be offset by all other compensation received by the

grievant(s) including but not limited to unemployment compensation or wages.

* * *

G. The parties by mutual written agreement may waive Step 1 of the Grievance Procedure and proceed with mediation.

* * *

J. The Employer has the right to suspend, demote, discharge or take other disciplinary action against a teacher for proper cause.

K. Disciplinary action taken against any teacher shall be for proper cause and shall be subject to the Grievance Procedure.

9. On or about April 10, 2006, Principal Alvin Parker (Parker) informed SEMINAVAGE that he would be terminated from KA WAIHONA on July 24, 2006. SEMINAVAGE had previously been evaluated regarding alleged unsatisfactory work performance and was placed on an action plan to improve his performance. In April 2006, Complainant sought a transfer to positions with the DOE. According to Complainant, Parker misled him into believing that Complainant did not have to complete his action plan if he intended to transfer.

10. On July 19, 2006, Complainant was informed that the DOE would not hire him for a special education position. By letter dated July 25, 2006, Complainant wrote to HSTA representative Georgiana Alvaro (Alvaro) asking her to file a grievance on his behalf. Complainant requested copies of his personnel file to determine whether the contents that would justify his firing and moreover, disqualify him from being hired into the DOE positions that had been offered to him.

11. On August 15, 2006, Alvaro prepared a grievance alleging ongoing violations from July 25, 2006 contending that Administrators replaced Complainant without waiting for his transfer to be confirmed and did not evaluate him properly. Alvaro requested Complainant's reinstatement as a special education teacher and expungement of detrimental material from Complainant's personnel file.

12. On August 24, 2006, Judy Toguchi, DOE personnel administrator, affirmed the DOE's decision not to accept Complainant's application for

employment. Complainant was informed that he could reapply after attaining three years of successful teaching experience at a contracted K-12 school not governed by the DOE, with letters of recommendation for employment.

13. On September 13, 2006, the LSB met with Complainant to discuss his grievance. On October 20, 2006, Complainant received a written decision from the LSB denying his grievance.

14. Alvaro requested mediation of the grievance and the School subsequently declined to mediate Complainant's grievance. There is no evidence in the record that Complainant was notified that the School declined the HSTA's request to mediate the grievance. Alvaro continued to attempt to settle the grievance.

15. Complainant made repeated attempts to contact Alvaro and met with Alvaro and Ray Camacho, HSTA's Deputy Director of HSTA, on November 30, 2006 without resolving what would be done.

16. By letter dated December 11, 2006, Alvaro informed Complainant that they were unable to reach a settlement and informed Complainant to direct any questions to Vernon Yu (Yu), HSTA's legal counsel. Alvaro stated in her letter as follows:

> In our last conversation of November 20, 2006, you indicated your intention to pursue legal action. I explained that our settlement proposal was to avoid such action. You said that you needed to speak to your wife but you never called back. Since that time, we have not been able to find support for your settlement conditions. The Employer has also informed me of their unwillingness to enter into a settlement discussion unless it involves a global settlement of all issues. Your insistence on pursuing legal action has caused them to reconsider any meeting. We therefore, are not able to reach settlement for you.
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> Should you have any questions, please have your attorney call our legal counsel, Vernon Yu of Park Park Yu & Remillard at 536-3905.

17. After receiving the foregoing letter, Complainant believed that the HSTA was pursuing the grievance, i.e., Step II binding mediation, since no settlement could be reached. See Complainant's affidavit attached to

Eugene Opunui Seminavage's Memorandum in Opposition to (1) Respondent Hawaii State Teachers Association's Motion to Dismiss Complaint; and 2) Respondent Ka Waihona O Ka Na`auao's Motion to Dismiss Complaint, Each Filed January 18, 2008, filed on February 8, 2008.

18. From December 2006 through June 2007, Complainant made repeated unsuccessful attempts to contact Alvaro to find out what was happening with his grievance.

19. Complainant retained separate counsel, Dennis Chang (Chang), Esq., on or about the last week of May 2007 to review the HSTA contract and explain his rights to him and see if he could help him find out what was happening to his grievance.

20. On June 11, 2007, DOE Superintendent Patricia Hamamoto (Hamamoto) called and informed Alvaro, that she reviewed the DOE file and was sorry that DOE could not hire Complainant and that he needed to work three years before he could reapply to DOE.

21. By letter dated June 12, 2007, Yu wrote to Chang explaining that Alvaro had tried to discuss Complainant's employment with DOE Superintendent Hamamoto. Yu stated:

> This is to inform you that Georgianna Alvaro met with the Superintendent to discuss Mr. Seminavage's request for employment with the DOE. She explained that he is fully licensed and certified in special education, and this is a critical needs area. She further explained that he is living locally on the leeward coast, that he previously worked for the DOE, and that the charter school administrators had rated his job performance at "average." She also presented positive letters from parents and guardians of special education students who he had worked with as a special education teacher. In addition, Ms. Alvaro offered to agree to a "last chance," or other stipulation (such as professional training or development course work) as a condition of accepting him. The Superintendent took notes during the meeting, then stated that she needed time to review his file, and that she would get back to Ms. Alvaro on this matter.
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> On June 11, 2007, the Superintendent called Ms. Alvaro and stated that she reviewed his DOE file, but that she was sorry that the Department could not hire him at this time. He needs

to work in another school or school system for three years before he can re-apply with the DOE. Ms. Alvaro said that he can work at a charter school, and has also recommended applying to Assets.

22. By letter date July 3, 2007, Complainant wrote to Alvaro indicating his confusion because she had previously indicated that Hamamoto would not accept any paperwork and would only review the DOE file. Complainant requested arbitration of his grievance.

23. By letter dated August 1, 2007, Alvaro wrote to Complainant, stating as follows:

> I met with Superintendent Hamamoto on your behalf and did show her the letters you collected from your students' parents or guardians. I also shared with her the form that was solicited from Mr. Parker and Mr. Karapani which indicated that your work was average. She took notes from these documents but returned them to me at the end of the conference and said that she would review your DOE file and call me with her determination.
>
> She called several weeks later to say that she was not willing to support your return to the Department without the conditions previously put forth by Teacher Recruitment. She did not discuss your DOE file with me.
>
> In December 2007, we wrote to you and explained that your continued pursuit of legal action had stymied our potential settlement agreement for you. At that point we were not and will not continue to pursue any settlement through grievance or otherwise for you. Ka Waihona's grievance process eliminates arbitration. Additionally, the arbitration process belongs to the Hawaii State Teachers' Association for determination of whether it is a case the Association finds merit to pursue. We are informing you at this point that you have exhausted all administrative remedies and we are closing your files.

24. Complainant stated in his affidavit, dated February 8, 2008, that he was not apprised that the Union was no longer pursuing his contractual remedies by the December 11, 2006 letter and he believed that HSTA was pursuing the grievance, i.e., Step II binding mediation, since no settlement could be

reached. Complainant states that he also believed that Alvaro was going to continue to communicate with the DOE on his behalf in order to get a job. Complainant was apprised for the first time in HSTA's August 1, 2007 letter that his administrative remedies were exhausted and that HSTA was closing his files.

25. On October 29, 2007, Complainant filed the instant complaint alleging that the HSTA breached its duty of fair representation in its attempts to contest his termination and committed prohibited practices in violation of HRS §§ 89-13(b)(1), (2), (3), (4), and (5).[6] Complainant alleges, inter alia, that the DOE improperly refused to permit him to transfer to a position and KA WAIHONA improperly terminated him and thereby committing prohibited practices in violation of HRS §§ 89-13(a)(1), (2), (3), (6), (7), and (8).[7]

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[6]HRS § 89-13(b) provides as follows:

It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;
(3) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;
(4) Refuse or fail to comply with any provision of this chapter; or
(5) Violate the terms of a collective bargaining agreement.

[7]HRS § 89-13(a) provides, in part, as follows:

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

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
(2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;
(3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;

26. The Board takes notice that the Master Agreement between the HSTA and the State of Hawaii Board of Education, July 1, 2005 - June 30, 2007, provides for a grievance procedure and states in part:

> **D. INFORMAL DISCUSSION.** Any teacher or the Association, in cases of an Association grievance, may institute a grievance by notifying the principal or immediate supervisor of such and shall meet with the principal or immediate supervisor on an informal basis for the purpose of discussing and attempting to settle the matter. When requested by the teacher, the Association grievance representative may intervene to assist.
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> **E. STEP 1. a)** If the matter is not settled on an informal basis in a manner satisfactory to the teacher involved, then the teacher of the certified bargaining representative may institute a formal grievance by setting forth in writing on the form set forth in Appendix I, the nature of the complaint, the specific term or provision of the Agreement allegedly violated and the remedy sought.
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> * * *
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> **F. Step 2. a)** If the answer to the grievance in Step 1 is not delivered within five (5) days or does not satisfactorily resolve the matter, then the grieving party in Step 1 may appeal such answer or any part thereof, by filing the grievance with the Superintendent or designee within five (5) days after the receipt or non-receipt of the answer in Step 1. The Superintendent or designee shall hold a meeting within five (5) days. However, a formal hearing shall be held in lieu of a second level meeting if requested by either party.
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> (6) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;
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> (7) Refuse or fail to comply with any provision under this chapter;
>
> (8) Violate the terms of a collective bargaining agreement; . . . .

G. MEDIATION/ARBITRATION

If a claim by the Association or teacher that there has been a violation, misinterpretation or misapplication of this Agreement is not satisfactorily resolved at Step 2, the Association may present a request for arbitration of the grievance within ten (10) days after receipt of the answer at Step 2.

However, a grievance may be submitted to mediation after the Association has submitted its request for arbitration.

* * *

2. ARBITRATION

* * *

b. In making a decision on a case, the arbitrator shall not have the authority to consider any facts not in evidence, nor shall the arbitrator add to, subtract from, delete, or in any way amend or modify any term or condition of the Collective Bargaining Agreement. The arbitrator's decision shall be in writing and shall contain the rationale supporting the decision. The decision will be final and binding on the parties.

* * *

[Emphasis added.]

DISCUSSION AND CONCLUSIONS OF LAW

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

2. Complainant did not oppose Respondent DOE's motions to dismiss the complaint, filed on January 28, 2007. Accordingly, the allegations of the Complaint as to the DOE are dismissed.

3. The gravamen of the instant complaint is that the Respondent KA WAIHONA unjustly terminated Complainant and the HSTA breached its duty to fairly represent him in the grievance process.

4. Respondents KA WAIHONA and HSTA in their respective Motions to Dismiss contend that any allegations in the Complaint that occurred more than ninety days prior to the filing of the Complaint are time-barred. In addition, KA WAIHONA contends that Complainant failed to exhaust his contractual remedies.

5. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the complainant. Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. See Yamane v. Pohlson, 111 Hawai`i 74, 81 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).

6. However, when considering a motion to dismiss [pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(1)] the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Id. (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).

Statute of Limitations

7. With respect to Respondent's argument that allegations which occurred more than ninety days prior to the filing of the Complaint are time-barred, HAR § 12-42-42 provides in relevant part:

> (a) A complaint that any public employer, public employee, or public organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation. (emphasis added).

8. Additionally, HRS § 89-14 provides that "[a]ny controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9[.]" In turn, HRS § 377-9, dealing with the prevention of unfair labor practices, clearly provides that, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." HRS § 377-9(l).

9. The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. This limitation is jurisdictional and provided by statute; accordingly, it may not be waived by either the Board or the parties. Tri County Tel. Ass'n., Inc. v. Wyoming Public Service Comm'n., 910 P.2d 1359, 1361 (Wyo. 1996) (holding that,

"As a creature of the legislature, an administrative agency has limited powers and can do no more than it is statutorily authorized to do"); see generally, HOH Corp. v. Motor Vehicle Industry Licensing Bd., Dept. of Commerce and Consumer Affairs, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) ("The law has long been clear that agencies may not nullify statutes").

10. A "hybrid § 301" suit under the federal Labor Management Relations Act comprises two causes of action: suit against the employer for a breach of collective bargaining agreement, and suit against the union for breach of its duty of fair representation. See DelCostello v. International Brotherhood of Teamsters, 402 U.S. 151, 163, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). The Supreme Court stated, at 164 - 65:

> Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union' duty of fair representation, which is implied under the scheme of the National Labor Relations Act. [footnote omitted]. "Yet the two claims are inextricably interdependent. 'To prevail against either the company or the Union, ... [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union.'" *Mitchell,* 451 U.S., at 66-67, 101 S.Ct., at 1565-1566 (Stewart, J., concurring in the judgment), quoting *Hines,* 424 U.S., at 570-571, 96 S.Ct., at 1059. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both. ...

11. In Coppage v. U.S. Postal Service, 281 F.3d 1200 (11th Cir. 2002), the Court considered when the hybrid cause of action accrued and stated:

> In *DelCostello,* the Supreme Court adopted the six-month statute of limitations found in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), for all such hybrid cases. *DelCostello,* 462 U.S. at 169-171, 103 S.Ct. at 2293-2294. Thus, [the plaintiff employee] had six months to file her hybrid suit against the Union and the Postal Service from "the date [she] knew or should have known of the Union's final action or the [Postal Service's] final action, whichever is

later." *Adams v. United Paperworkers Int'l,* 189 F.3d 1321, 1322 (11th Cir.1999). The "final action" is the point at which "the grievance procedure was exhausted or otherwise [broken] down to the employee's disadvantage." *Proudfoot v. Seafarer's Int'l Union,* 779 F.2d 1558, 1559 (11th Cir.1986) (*citing Howard v. Lockheed-Georgia Co.,* 742 F.2d 612 (11th Cir.1984)).

Thus, in Schaub v. K & L Distributors, Inc., 115 P.3d 555 (Ak 2005), a terminated employee's hybrid claim against employer for breach of collective bargaining agreement accrued at the latest when the employee met with union representatives who told him they would not file grievance, and therefore the action filed more than six months later was time-barred by federally mandated six-month limitations period.

12. With respect to the statute of limitations, KA WAIHONA contends that the instant complaint against the School because of Complainant's termination is untimely and should be dismissed because the statute of limitations began to run at the earliest, the day Complainant was notified of his termination (April 10, 2006) or at the latest, when he retained legal counsel (sometime before June 12, 2007). KA WAIHONA argues that all of these events are outside the Board's permissible 90-day statute of limitations. The HSTA contends that the statute of limitations as to the Union began to run on or about December 11, 2006 when Alvaro notified Complainant that the HSTA decided not to pursue his grievance. However, Complainant stated in his affidavit, dated February 8, 2008, that he was not apprised that the Union was no longer pursuing his contractual remedies by the December 11, 2006 letter and he believed that HSTA was pursuing the grievance, i.e., Step II binding mediation, since no settlement could be reached. Complainant stated that he also believed that Alvaro was going to continue to communicate with the DOE on his behalf in order to get a job. Viewing the record in the light most favorable to Complainant, the Board finds that Complainant was notified that the Union had exhausted its remedies in August 2007 as evidenced by the HSTA's letter to Complainant advising him of such and Complainant was apprised for the first time in that his administrative remedies were exhausted and that HSTA was closing his files. Accordingly, the Board finds that Complainant's cause of action accrued at the latest when the Union advised Complainant that his remedies were exhausted on or about August 1, 2007, and thus the Complaint against both Respondents filed on October 29, 2007 is timely filed.

Exhaustion of Contractual Remedies

13. With respect to the exhaustion of contractual remedies, the Hawaii Supreme Court, as well as this Board, has used federal precedent to guide its interpretation of state public employment law. Hokama v. University of Hawai`i, 92 Hawai`i 268, 272 n. 5, 990 P.2d 1150, 1154 n. 5 (1999). Based upon federal precedent, the Hawaii Supreme Court has held that it is "well-settled that an employee must exhaust any grievance . . . procedures provided under a collective bargaining agreement before bringing a court action pursuant to the agreement." Id., at 272, 990 P.2d at 1154. The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process, allowing parties to develop their own uniform mechanism of dispute resolution. It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means. Id. See, also, HSTA v. Department of Education, 1 HPERB 253, 261 (1972) (Case No. CE-05-41; Decision No. 22) (the Board has discretion to require the parties to utilize the contractual arbitration procedure); Poe v. Cayetano, 6 HLRB 55, 56 (1999) (Case No. CE-03-283; Decision No. 402) (the complainant must exhaust available contractual remedies prior to bringing a prohibited practice complaint against the employer alleging a violation of the collective bargaining agreement).

14. KA WAIHONA contends that the Complaint should be dismissed because Complainant failed to exhaust his contractual remedies. In the instant case, it is undisputed that Complainant's grievance was heard at Step 1 and when the HSTA requested the School to mediate the grievance at Step 2, the School declined to mediate the grievance.

15. KA WAIHONA is subject to the provisions of HRS Chapter 89. HRS § 302B-9 provides as follows:

> **Exemptions from state laws.** (a) Charter schools shall be exempt from chapters 91 and 92 and all other state laws in conflict with this chapter, except those regarding:
>
> (1) Collective bargaining under chapter 89; provided that:
> (A) The exclusive representatives as defined in chapter 89 and the local school board of the charter school may enter into supplemental agreements that contain cost and noncost items to facilitate decentralized decision-making;

* * *

(C) These supplemental agreements may differ from the master contracts negotiated with the department; ....

16. HRS § 89-10.8 Resolution of disputes; grievances, provides, in part:

(a) A public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. ...

The foregoing provision requires the public employer to enter into a written agreement with the union which sets forth a grievance procedure culminating in a final and binding decision.

17. The grievance procedure in the Master Agreement between the Board of Education and the HSTA provides that the HSTA "may present a request for arbitration of the grievance within ten (10) days after receipt of the answer at Step 2" for a final and binding decision. By contrast, the grievance procedure in the Agreement between KA WAIHONA and the HSTA provides that after Step 1, the grievance "may be submitted" to mediation for a final and binding decision." In either case, whether the HSTA requests arbitration or mediation of a grievance under the respective agreement, the employer must proceed to that step which will culminate in a final and binding decision. This is not a case where the HSTA refused to take Complainant's grievance to mediation or that requiring exhaustion would be futile;[8] the employer here simply declined to mediate Complainant's grievance. As KA WAIHONA agrees that the final step in the grievance process is final and binding mediation, in this case, the schools' declining to mediate the grievance is inconsistent with the provisions of HRS § 89-10.8. As such, the Board notes that under the Agreement's provisions, while there is a deadline to file a grievance, there is no deadline to request mediation. In the Board's view, Complainant currently has a pending grievance and the available remedies provided by

[8]See Poe v. Hawaii Labor Relations Board, et al., 105 Hawai`i 97, 101, 94 P.3d 651, 656 (2002).

the Agreement must be pursued.[9]

18. The Board concludes that the Complainant failed to exhaust his contractual remedies. See Poe, supra. Accordingly, the Board dismisses the instant complaint.

ORDER

The Board hereby grants Respondent DEPARTMENT OF EDUCATION's Motion to Dismiss the Prohibited Practice Complaint Filed May 11, 2007 and Respondents' Motion to Dismiss the Complaint for failure to exhaust contractual remedies.

DATED: Honolulu, Hawaii, April 16, 2008.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

EMORY J. SPRINGER, Member

SARAH R. HIRAKAMI, Member

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[9]"It shall be a policy of this Board to attempt to foster the peaceful settlement of disputes, where 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).