

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of
KAEO KAWAA,

Complainant,

and

LYDIA TRINIDAD, Principal, Kualapuu
Public Conversion Charter School,

Respondent.

CASE NO. CE-05-675

ORDER NO. 2596

ORDER DENYING RESPONDENT'S
MOTION TO DISMISS; NOTICE OF
SECOND PREHEARING/
SETTLEMENT CONFERENCE

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

On June 16, 2008, Complainant KAEO KAWAA (Kawaa or Complainant), pro se, filed a Prohibited Practice Complaint (Complaint) against Respondent LYDIA TRINIDAD (Trinidad or Respondent), Principal, Kualapu`u Public Conversion Charter School (Kualapu`u School). The Complaint alleges prohibited practices under Hawaii Revised Statutes (HRS) §§ 89-13(a)(1), (3), and (4), and asserts that Respondent continues to interfere with and restrain Complainant from protection of rights under the Department of Education's (DOE) Professional Evaluation Program for Teachers (PEP-T); coerce Complainant into complying with unfair, unsubstantiated, and non-procedural PEP-T enforcement; discriminate against the tenure of Complainant in job placement for the 2008-2009 school year; and discriminate against Complainant for filing a complaint.

On June 26, 2008, the Department of the Attorney General, State of Hawaii, filed an Answer to Prohibited Practice Complaint (Answer) on behalf of Respondent. On June 27, 2008, private counsel filed an Answer to Prohibited Practice Complaint on behalf of Respondent. On July 7, 2008, the private counsel representing Respondent filed a Withdrawal of Answer to Prohibited Practice Complaint Filed on June 27, 2008 (Withdrawal), on behalf of Respondent; the Withdrawal stated that the Answer to Prohibited Practice Complaint filed June 26, 2008, filed on Respondent's behalf by the Attorney General's office shall be Respondent's Answer in this matter.

On July 7, 2008, Respondent filed a Motion to Dismiss the Complaint, arguing that the Complaint alleges matters that are untimely; the failure to exhaust contractual remedies requires dismissal; and Complainant failed to state a valid claim.¹

On July 28, 2008, the Board held a hearing on Respondent's Motion to Dismiss, pursuant to HRS §§ 89-5(i)(4) and (5), and 89-14, and Hawaii Administrative Rules (HAR) § 12-42-8(g).

After careful consideration of the record and the arguments presented, the Board denies Respondent Motion to Dismiss, for the reasons discussed below.

FINDINGS OF FACT

1. Complainant was, at all times relevant to the Complaint, a teacher at Kualapu`u School, and an employee within the meaning of HRS §§ 89-2² and 89-10.55³ and included in Bargaining Unit (BU) 05.

¹On July 14, 2008, Respondent filed an identical Motion to Dismiss. By letter dated, and received by the Board, on July 17, 2008, Respondent requested the Board disregard the second motion.

²HRS § 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.

³HRS § 89-10.55 pertains to Charter school collective bargaining, bargaining unit, employer, and exclusive representative, and provides in relevant part:

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

In turn, 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:

* * *

- (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. Kualapu`u School is a charter school within the meaning of HRS § 302B-1⁴ 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.
3. Each public charter school is governed by a local school board as defined in HRS 302B-1, which provides as follows:

“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.

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

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:

⁴HRS § 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.

- (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[.]
5. 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.
6. Thus, while HRS § 89-2 does not specifically include the charter school local school board as an “employer” or “public employer,”⁵ based upon the foregoing provisions, Ho`okāko`o Board – the local school board of Kualapu`u School – 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.

⁵HRS § 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.

7. Respondent 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.
8. The Hawaii State Teachers Association (HSTA or Union) is an employee organization and the exclusive bargaining representative, within the meaning of HRS § 89-2,⁶ of employees included in BU 05, including Complainant.
9. The Board takes notice that the Board of Education, State of Hawaii and the HSTA are parties to a collective bargaining agreement effective July 1, 2007, through June 30, 2009 (Master Agreement).
10. The Ho`okāko`o Board and the HSTA appear to be parties to an Agreement (MOA) applicable to employees at Kualapu`u School, and which contains a grievance process.⁷ A copy of the MOA has not been provided to the Board, and the Board therefore makes no findings on what that grievance procedure may entail, and is unable to determine whether or to what extent the grievance procedure in the MOA differs from the grievance procedure contained in the Master Agreement, or even determine conclusively that the grievance was filed pursuant to an MOA rather than the Master Agreement.⁸ At hearing on Respondent’s Motion to Dismiss, Complainant

⁶HRS § 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.

⁷As part of his Pre-Hearing exhibits, Complainant submitted a copy of a Grievance Form that states in part (emphasis added):

In accordance with Article V, Grievance Process of the Agreement between Ho`okāko`o Corporation and the Hawaii State Teachers Association, a formal grievance is hereby submitted[.]

⁸In Respondent’s Memorandum in Support of her Motion to Dismiss, Respondent argues the Board should defer to the “grievance and arbitration process set forth in Art. V of the BU 05 Collective Bargaining Agreement,” but does not specify whether this refers to the Master Agreement or an MOA between the HSTA and Kualapu`u School, nor did Respondent provide a copy of the grievance procedure at issue. While the Board has a copy of the Unit 05 Master Agreement as part of its reference materials pursuant to HAR § 12-42-128, the Board has not been

represented to the Board that the agreement between the HSTA and Kualapu`u School is "pretty much the same" as the provisions of the Master Agreement, the Board finds that such a vague statement is not sufficient to enable the Board to make a determination as to the grievance procedure at issue here.

11. On June 16, 2008, Complainant filed the Complaint against Respondent. The Complaint alleges prohibited practices under HRS §§ 89-13(a)(1), (3), and (4), and asserts that Respondent continues to interfere with and restrain Complainant from protection of rights under the DOE's PEP-T; coerce Complainant into complying with unfair, unsubstantiated, and non-procedural PEP-T enforcement; discriminate against the tenure of Complainant in job placement for the 2008-2009 school year; and discriminate against Complainant for filing a complaint.

12. According to the Complaint, Page 5 of the PEP-T manual states:
 - (1) A documented performance deficiency(ies) in any of Duties 1-4 or any of these Duties in combination with Duty 5 shall be the basis for movement of a tenured teacher to an annual rating cycle; (2) A conference to discuss the performance deficiency(ies) and the improvement to be made shall be held; (3) If adequate improvement does not result, then the evaluator places the teacher into the annual rating cycle by completing the Suggested Checklist for Moving a Tenured Teacher to an Annual Evaluation Cycle. A summary of Conference must be completed. Copies of the completed Checklist and the Summary of Conference are given to the teacher and copies are submitted to the Personnel Regional Office.

13. Specifically, the Complaint alleges that Respondent failed to: (1) show or present evidence of documented performance deficiencies despite numerous subsequent requests by Complainant; (2) conference with Complainant to discuss deficiencies and improvement to be made; (3) provide Complainant with a period of time in which to make adequate improvement efforts; (4) complete the Suggested Checklist for Moving a Tenured Teacher to an Annual Evaluation Cycle; and (5) give Complainant a copy of the Checklist.

provided with a copy of any MOA between the HSTA and Kualapu`u School despite the Board's previous request to the Charter Schools Administrative Office to be provided with such MOAs.

14. The Complaint further alleges that in a July 31, 2007, Summary of Conference, that the Respondent provided untimely notice and denied Complainant due process required by PEP-T; that Respondent skipped establishing the basis for movement to an annual rating cycle, skipped the required conference to discuss deficiencies and the improvement to be made, skipped the period of time that should have been given to Complainant to show adequate improvement, and immediately moved Complainant to an annual rating cycle.
15. The Complaint also alleges that the PEP-T Data Sheet on Page 23 states, "Submit copy to teacher twenty-four hours before the conference on the evaluation/data"; and that Respondent failed to submit any such document before the July 31, 2007, meeting.
16. Finally, the Complaint alleges that Complainant tried to bring the discrepancies and injustices to the attention of Respondent numerous times in the past, including correspondence dated 8/2/07, 8/29/07, 2/7/08, 4/11/08, 4/14/08, 5/21/08, and 5/23/08; and that despite these efforts, Respondent has continually failed to respond to the questions and address the concerns each time in bad faith.
17. On June 26, 2008, the Department of the Attorney General, State of Hawaii, filed an Answer on behalf of Respondent. On June 27, 2008, private counsel filed an Answer to Prohibited Practice Complaint of behalf of Respondent. On July 7, 2008, the private counsel representing Respondent filed a Withdrawal of Answer to Prohibited Practice Complaint Filed On June 27, 2008, on behalf of Respondent; the Withdrawal stated that the Answer to Prohibited Practice Complaint filed June 26, 2008, filed on Respondent's behalf by the Attorney General's office shall be Respondent's Answer in this matter.
18. On July 7, 2008, Respondent filed a Motion to Dismiss the Complaint, arguing that the Complaint alleges matters that are untimely; the failure to exhaust contractual remedies requires dismissal; and Complainant failed to state a valid claim. Specifically, Respondent argues that (1) the Complaint alleges matters that appear to involve the evaluation of a teacher, but that the time limit to file the Complaint would have been ninety days from the alleged violation, and is now time-barred; (2) a grievance has been filed in this case and the Board should defer to the arbitration process set forth in the BU 05 Collective Bargaining Agreement; and (3) the Complaint fails to identify the subsection of the HRS for which violations are alleged, the Complaint fails to set forth a complete statement of facts supporting the Complaint and lack specific names, times, dates, and places, and the

Complaint fails to allege facts and claims sufficient to supply fair notice of the violations alleged.

19. On July 14, 2008, Respondent filed an identical Motion to Dismiss. By letter dated, and received by the Board on, July 17, 2008, Respondent requested the Board disregard the second motion.
20. On July 16, 2008, Respondent filed a Pre-Hearing Conference Statement.
21. On July 25, 2008, Complainant filed a Pre-Hearing Conference Statement; on July 28, 2008, Respondent filed additional exhibits for the Pre-Hearing Conference. Respondent had submitted certain documents related to his Pre-Hearing Statement via facsimile on July 24, 2008, and July 25, 2008; however, pursuant to HAR § 12-42-8, governing proceedings before the Board, “[t]he date on which the papers are actually received by the [B]oard shall be deemed to be the date of filing.” (HAR § 12-42-8(a)(3)).
22. On July 28, 2008, the Board held a hearing on Respondent’s Motion to Dismiss, pursuant to HRS §§ 89-5(i)(4) and (5), and 89-14, and HAR § 12-42-8(g).
23. At the hearing, Complainant admitted that his Complaint includes a dispute that began in August of 2007, and that a grievance was filed in August of 2007. Complainant asserted that the first step of the grievance is informal discussion, but he cannot get past that step; and, that the HSTA representative tried to hold informal discussions, but Respondent did not go along with it. Complainant further asserted that he received “adverse action” from the employer in the form of an “unsatisfactory” rating on May 30, 2008.
24. Also at the hearing, the employer asserted that a Step 1 grievance was filed on August 29, 2007, and that the grievance is still at Step 1 as of the date of the hearing, July 28, 2008.
25. The Board finds that allegations of events that occurred more than ninety days prior June 16, 2008, as untimely, except to the extent such an allegation required exhaustion of contractual remedies, and exhaustion occurred within ninety days prior to June 16, 2008.
26. The Board further finds that there are facts in dispute or facts that are not sufficiently demonstrated to the Board such that dismissal of the Complaint at this time is not warranted. Such facts include the existence of an MOA between the HSTA and Kualapu`u School; the provisions of any grievance procedure contained in such an MOA; whether Complainant has exhausted

contractual remedies due to HSTA's breach of duty of fair representation in the handling of the grievance; and, if so, whether the exhaustion of contractual remedies occurred within the statute of limitations for filing the Complaint.

DISCUSSION AND CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant Motion to Dismiss pursuant to HRS §§ 89-5 and 89-14.
2. 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)).
3. 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)).
4. The Complaint alleges violation of HRS §§ 89-13(a)(1), (3), and (4), which provides in relevant part:
 - (a) 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;

* * *
 - (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization; [or]

- (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization[.]
5. **Statute of Limitations.** 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).
6. 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).
7. 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").
8. 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's 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[.]

9. 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.

10. In the present case, it is unclear whether Complainant exhausted his contractual remedies – that is, whether the HSTA breached its duty of fair representation in its handling of the grievance – and, if so, when Complainant knew or should have known of such breach. To the extent a breach occurred within the statute of limitations for filing the Complaint, Complainant’s contractual claims would be timely. To the extent Complaint raises non-contractual claims – for example, that Respondent continues to discriminate against the tenure of Complainant in job placement for the 2008-2009 school year – claims that accrued outside the statute of limitations period are untimely and claims that occurred within are timely. At hearing, Complainant asserted that he received adverse action in the form of an unsatisfactory rating on May 30, 2008; should this alleged adverse action be the basis of a claim in the Complaint, such as discrimination or retaliation, such claim would be timely.
11. For these reasons, the Board denies the Motion to Dismiss to the extent Respondent, who carries the burden of production and persuasion for purposes of the Motion to Dismiss, has not shown that all claims in the Complaint are untimely. If it is shown after hearing on the merits that any claims accrued outside of the statute of limitations for filing the Complaint, such claims would be untimely and will be dismissed by the Board.
12. **Exhaustion of Contractual Remedies.** 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).
13. As stated in the Board’s Findings of Fact, the Ho`okāko`o Board and the

HSTA appear to be parties to an MOA applicable to employees at Kualapu`u School, and which contains a grievance process. A copy of the MOA has not been provided to the Board, and the Board therefore made no findings on what that grievance procedure may entail, and is unable to determine whether or to what extent the grievance procedure in the MOA differs from the grievance procedure contained in the Master Agreement, or even determine conclusively that the grievance was filed pursuant to an MOA rather than the Master Agreement. At hearing on Respondent's Motion to Dismiss, Complainant represented to the Board that the agreement between the HSTA and Kualapu`u School is "pretty much the same" as the provisions of the Master Agreement, the Board finds that such a vague statement is not sufficient to enable the Board to make a determination as to the grievance procedure at issue here.

14. Additionally, the Board found that there are facts in dispute or facts that are not sufficiently demonstrated to the Board such that dismissal of the Complaint at this time is not warranted. Such facts include the existence of an MOA between the HSTA and Kualapu`u School; the provisions of any grievance procedure contained in such an MOA; whether Complainant has exhausted contractual remedies due to HSTA's breach of duty of fair representation in the handling of the grievance; and, if so, whether the exhaustion of contractual remedies occurred within the statute of limitations for filing the Complaint. As such, the Board declines to dismiss the Complaint for failure to exhaust contractual remedies at this time.
15. **Failure to State a Claim.** With respect to the failure to state a claim, Respondent argues that the Complaint "fails to identify the subsection or subsection [sic] of Hawaii Revised Statutes for which violations are alleged. The Complaint fails to set forth a complete statement of facts supporting the complaint, and lacks specific names, times, dates, and places. In the case the Complaint simply fails to allege facts and claims sufficient to supply fair notice of the violations alleged."
16. However, the Complaint alleges generally that Respondent committed prohibited practices under HRS §§ 89-13(a)(1), (3), and (4), and asserts that Respondent continues to interfere with and restrain Complainant from protection of rights under the DOE's PEP-T; coerce Complainant into complying with unfair, unsubstantiated, and non-procedural PEP-T enforcement; discriminate against the tenure of Complainant in job placement for the 2008-2009 school year; and discriminate against Complainant for filing a complaint. The Complaint provides further details of events relating to the PEP-T process, including allegations involving a July 31, 2007, summary of conference. The Board concludes that the Complaint is lacking in some detail as to dates, times, specific names, and

places, but contains enough detail to provide fair notice to Respondent of the violations alleged. Additionally, pursuant to HAR § 12-42-45, governing answers to prohibited practice complaints, if a charge is believed by a respondent to be so vague and indefinite that the respondent cannot reasonably be required to frame an answer thereto, such respondent may within five days after service of the complaint, file with the Board a motion for particularization of the complaint. (See HAR § 12-42-45(b)). Here, Respondent did not request particularization of the Complaint.

17. Accordingly, the Board concludes that dismissal of the Complaint for failure to state a claim is not warranted.

ORDER

The Board hereby denies Respondent's Motion to Dismiss as discussed above.

NOTICE OF SECOND PREHEARING/SETTLEMENT CONFERENCE

NOTICE IS HEREBY GIVEN that the Board will conduct a second prehearing conference in this matter on **April 7, 2009 at 9:00 a.m.** by conference call. Complainant will be contacted at his telephone number on file with the Board. Respondent's counsel shall appear in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii at the designated time. **The Board encourages the parties to have a representative with settlement authority and/or is familiar with the dispute appear at the prehearing settlement conference.**

DATED: Honolulu, Hawaii, March 17, 2009.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member



SARAH R. HIRAKAMI, Member

Copies sent to:
Kaeo Kawaa
David Fitzpatrick, Deputy Attorney General