STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of EDDY CONWAY, Complainant, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, State of Hawaii; DARWIN L.D. CHING, Director, Department of Labor and Industrial Relations, State of Hawaii; and COLLEEN Y. LaCLAIR, Deputy Director, Department of Labor and Industrial Relations, State of Hawaii, Respondents.	CASE NOS.: CU-13-268 CE-13-697 ORDER NO. 2603 ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS DLIR'S MOTION TO DISMISS FIRST AMENDED PROHIBITED PRACTICE COMPLAINT AND HGEA/AFSCME'S MOTION TO DEFER AND DISMISS FIRST AMENDED PROHIBITED PRACTICE COMPLAINT

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS DLIR'S MOTION TO DISMISS FIRST AMENDED PROHIBITED PRACTICE COMPLAINT AND HGEA/AFSCME'S MOTION TO DEFER AND DISMISS FIRST AMENDED PROHIBITED PRACTICE COMPLAINT

On September 9, 2008, Complainant EDDY CONWAY (Complainant or CONWAY), pro se, filed a Prohibited Practice Complaint (Complaint) against Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA/AFSCME or Union) with the Hawaii Labor Relations Board (Board). Complainant alleged, inter alia, that he was wrongfully terminated from his position as an information technology (IT) specialist with the State of Hawaii Department of Labor and on four occasions Respondent breached its duty of fair representation when it refused and failed to file or to prosecute grievances for him. Complainant alleged that after six months of work, he began presenting examples of payroll padding and contracting fraud by agency managers to the agency and the Union and as a result, Complainant was repeatedly and falsely accused of violence in the workplace, insubordination, improperly using State of Hawaii systems, and investigated for "petty and fabricated" complaints. Complainant alleged that the Union refused and failed to file or effectively prosecute grievances concerning: 1) a ten-day suspension for an "imaginary" policy violation in October 2007; 2) a 15-day suspension for "vague

inappropriate conduct" in May 2007; 3) a two-day suspension from a complaint fabricated by Complainant's managers concerning an agency policy, and 4) a letter from the agency delivered on July 3, 2008 and unopposed by the Union, that recited numerous false accusations against Complainant that resulted in Complainant's constructive discharge from employment. Complainant alleged that he was repeatedly misled by Union agents who never effectively prosecuted his grievances. Complainant contends that the Respondent HGEA/AFSCME violated Hawaii Revised Statutes (HRS) §§ 89-13(b)(3), (4) and (5).

On September 15, 2008, the State of Hawaii, Department of Labor and Industrial Relations (State), by and through its counsel, filed a Petition for Intervention with the Board in this matter. On September 19, 2008, the State filed a Certificate of Service of the Petition for Intervention with the Board. On September 19, 2008, the State filed an Answer to Prohibited Practice Complaint with the Board and on September 20, 2008, the State filed a Motion to Dismiss Prohibited Practice Complaint Filed September 8, 2008. The State contended, inter alia, that the allegations of the Complaint regarding suspensions and other matters occurring more than 90 days prior to the filing of the instant Complaint are time-barred; Complainant failed to exhaust his contractual remedies; the Complaint fails to state a claim for relief; and the Board lacks authority to award money damages.

The Board conducted a prehearing/settlement conference on October 15, 2008 and continued the prehearing/settlement conference to October 28, 2008.

On October 28, 2008, Complainant filed a Motion for Leave to File a First Amended Prohibited Practice Complaint, and Notice to the Parties of Change of Address with the Hawaii Labor Relations Board (Board).

Also on October 28, 2008, Respondent HGEA/AFSCME filed a Motion to Defer the Prohibited Practice Complaint Filed September 9, 2008 to the Unit 13 Grievance Procedure (HGEA/AFSCME's Motion to Defer) with the Board. The HGEA/AFSCME contends that Complainant alleged the Union breached its duty of fair representation in failing and refusing to grieve four specific incidents and under the facts presented, the Union complied with its duty of fair representation as the Union had filed its intent to arbitrate a ten- and a 15-day suspension; the Union properly determined a two-day suspension was for proper cause and refused to pursue the grievance; the Union alleged it attempted to notify Complainant of its decision not to arbitrate the two-day suspension and Complainant refused to accept the information; and the HGEA/AFSCME determined that the employer did not violate the applicable collective bargaining agreement (CBA) by informing Complainant on or about July 3, 2008 that he was being given a "Last Chance" opportunity to rectify his behavior in lieu of termination.

On October 28, 2008, the Union filed a Statement of No Objection to DLIR's Intervention in these proceedings.

The Board conducted the continued prehearing/settlement conference in this matter on October 28, 2008.

In Order No. 2557, dated October 28, 2008, the Board granted the State's Petition for Intervention and also set deadlines for the filing of responses to pending motions.

On November 5, 2008, the State filed an Opposition to Complainant's Motion for Leave to File a First Amended Complaint and/or Motion to Dismiss Prohibited Practice Complaint Filed September 8, 2008 with the Board.

On November 10, 2008, the Board issued Order No. 2563, Order Granting Complainant's Motion for Leave to File First Amended Prohibited Practice Complaint, Filed on October 28, 2008.

On November 17, 2008, Respondent State filed a Motion to Dismiss First Amended Prohibited Practice Complaint Filed October 28, 2008 arguing that the allegations in the Amended Complaint were untimely; Complainant failed to exhaust contractual remedies requiring dismissal of the Amended Complaint; the Complaint fails to state a claim for relief; and the Board lacks authority to award monetary damages.

On November 24, 2008, Complainant filed a First Amended Complaint with the Board against the HGEA/AFSCME, and also against DARWIN L.D. CHING (CHING), Director, Department of Labor and Industrial Relations, State of Hawaii and COLLEEN LaCLAIR (LaCLAIR), Deputy Director, Department of Labor and Industrial Relations, State of Hawaii (collectively DLIR) as Respondents in this matter. Complainant alleged in **Count One** that the Union failed to file or to effectively prosecute a grievance on behalf of the Complainant concerning a two-day suspension surrounding events on or about April 2007 regarding violations of a "fabricated policy." Complainant alleged that the Union and DLIR violated the grievance procedure in Article 11, sections A, B, C, D, E, G, and H of the CBA and HRS §§ 89-13(8)[1] (sic) and 89-13(b)(5). In **Count Two**, Complainant alleged that the Union and DLIR failed to follow the grievance procedure concerning a fifteen-day suspension for vague "inappropriate conduct" in May 2007 and constituted political retaliation. Complainant alleged that the DLIR violated the grievance procedure Article 11, sections C, D, E, G, and H of the CBA and HRS §§ 89-13(8) (sic) and 89-13(b)(5). In **Count Three**, Complainant alleged that the Union and DLIR failed to follow the grievance procedure concerning a ten-day suspension for an "imaginary" policy violation in October 2007 and constituted political retaliation. Complainant alleged that the DLIR violated the grievance procedure Article 11, sections C, D, E, G, and H of the CBA and HRS §§ 89-13(8) (sic) and 89-13(b)(5). In **Count Four**, Complainant alleges that the day after Complainant filed the initial Complaint,

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[1]The Board views Complainant's "HRS § 89-13(8)" allegations to refer to "HRS § 89-13(a)(8)" concerning violations of the applicable contract.

Respondent CHING confronted Complainant and made false accusations against him and threatened to terminate him without cause. Complainant alleged that one week later, the DLIR fired Complainant in violation of HRS § 89-13(4)[2] (sic). Complainant contends that CHING fabricated the reasons for dismissal and LaCLAIR joined in and supported the alleged fraud. In **Count Five**, Complainant alleges that in 2007 Respondents rigged the annual election of a steward for the IT group of the DLIR and prevented Complainant from exercising effective membership in the Union as guaranteed under HRS Chapter 89, in violation of HRS § 89-13(b)(1). In **Count Six**, Complainant alleges that after Complainant sent a letter to the DLIR Business Management Officer recommending he dismiss corrupt managers in the IT group, the Union failed to provide a Union card to the Complainant. Complainant contends that he has no current Union card which has prevented him from exercising effective membership in the Union, a right guaranteed under HRS Chapter 89, in violation of HRS § 89-13(b)(1). In **Count Seven**, Complainant contends that after he sent the letter in 2007 to the DLIR Business Management Officer and testified about fraud and wrongful business practices before the Senate Committee on Judiciary and Labor in October, Union representatives prevented Complainant from voting in any Union elections, particularly the election for Union stewards in the IT group. Complainant contends that he has not been permitted to vote for Union stewards or representation since 2007 which has prevented him exercising effective membership in the Union, a right guaranteed under HRS Chapter 89, in violation of HRS § 89-13(b)(1).

Also on November 24, 2008, the Board issued a Notice to Respondents of the First Amended Prohibited Practice Complaint.

On November 26, 2008, Respondent DLIR filed a Motion to Dismiss First Amended Prohibited Practice Complaint Filed November 24, 2008 (DLIR's Motion to Dismiss). DLIR argued that the First Amended Complaint should be dismissed because the allegations regarding the two-day, 15-day and ten-day suspensions, steward election, refusal to provide a Union card, and not being able to vote in a steward or Union representation election were time-barred; the Complaint failed to state a valid claim for relief; the Complaint contains claims which should be deferred to the grievance process; and includes monetary claims which the Board lacks authority to award.

On December 1, 2008, Complainant filed a Motion to Extend Time to File Answers and for Continuance of Hearing. On December 3, 2008, the Board granted the

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[2]The Board views Complainant's "HRS § 89-13(4)" allegations to refer to "HRS § 89-13(a)(4)" which prohibits a public employer or its designated representative to wilfully 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.

extension of time and continued the hearing scheduled on December 2008, in Order No. 2564, dated December 3, 2008.

On December 8, 2008, Respondent HGEA/AFSCME filed a Motion to Defer and Dismiss the First Amended Prohibited Practice Complaint Filed on November 24, 2008 (HGEA/AFSCME's Motion to Defer and Dismiss). Respondent HGEA/AFSCME contends that it complied with its duty of fair representation with respect to the ten-day and fifteen-day suspensions because the Union is proceeding to arbitrate those grievances; the Union investigated the two-day suspension but decided it would not pursue a grievance because the disciplinary action appeared reasonable and the Union attempted to inform Complainant of its decision on or after August 5, 2008 but Complainant returned the mail to the Union; with respect to a July 3, 2008 letter, the Union contends that the employer gave Complainant a "last chance" to rectify his behavior; and thus, the Union argued that the claims based on the four grievances should be dismissed as untrue and should be deferred to the grievance process. Respondent HGEA/AFSCME contends that the Board should defer the claims with pending grievances to the grievance procedure to resolve and should dismiss Complainant's claims regarding effective membership in 2007 as untimely.

On December 9, 2008, Complainant filed a Memorandum Concerning Illness with the Board and on December 9, 2008, Complainant filed an Opposition to Motions to Defer and to Dismiss - Memorandum and Declarations.

On December 11, 2008, the Board held a hearing on Respondent DLIR's Motion to Dismiss and the HGEA/AFSCME's Motion to Defer and Dismiss pursuant to HRS §§ 89-5(i)(4) and (5), and HAR § 12-42-8(g)(3). The respective Respondents were represented by counsel and CONWAY appeared pro se. After careful consideration of the record and arguments presented, the Board makes the following findings of fact, conclusions of law, and order granting in part and denying in part Respondent DLIR's Motion to Dismiss and Respondent HGEA/AFSCME's Motion to Defer and Dismiss.

FINDINGS OF FACT

1. Complainant was, for all relevant times, an IT Specialist employed by the DLIR, State of Hawaii, and a public employee within the meaning of HRS § 89-2.[3] Complainant was included in Unit 13[4] and a member of the Union.

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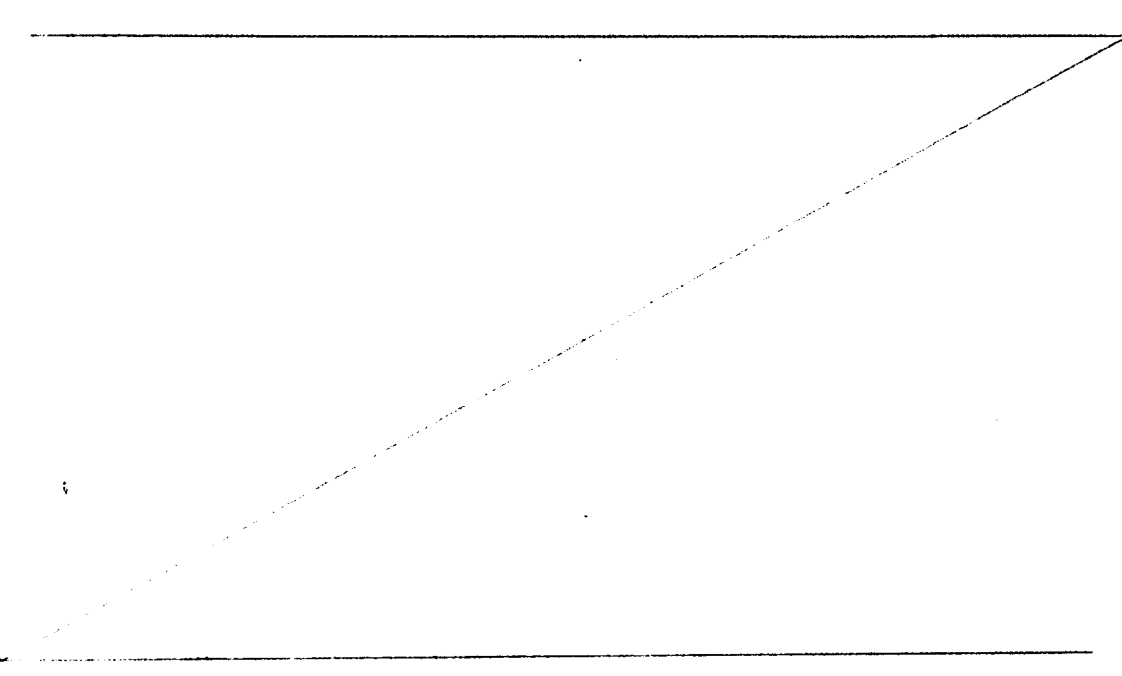
[3]HRS § 89-2 provides in part:

"Employee" or "public employee" means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section 89-6(g).

[4]HRS § 89-6 provides in part:

2. The DLIR was, for all relevant times, an agency of the State of Hawaii; CHING was, for all relevant times, the Director of DLIR; and LaCLAIR was, for all relevant times, the Deputy Director of the DLIR, and represented the interests of the public employer with respect to employees of the agency within the meaning of HRS § 89-2.[5]



(a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

* * *

(13) Professional and scientific employees, who cannot be included in any of the other bargaining units.

[5]HRS § 89-2 provides in 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 the interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

3. The HGEA/AFSCME was, for all relevant times, an employee organization and the exclusive representative within the meaning of HRS § 89-2[6] for DLIR employees included in Unit 13.

4. The HGEA/AFSCME and the public employers are parties to the Unit 13 CBA, effective July 1, 2007, through June 30, 2009.

5. The Board receives copies of collective bargaining agreements in the public sector as reference materials pursuant to HAR § 12-42-128[7] and takes notice of the provisions of Article 11, Grievance Procedure, of the CBA.

6. The Grievance Procedure of the CBA, Article 11, provides, in part:

> A. Any complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure. ...
>
> B. An individual Employee may present a grievance to her immediate supervisor and have her grievance heard without intervention of the Union, provided the Union

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[6]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.

* * *

"Exclusive representative" means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

[7]HAR § 12-42-128 provides as follows:

The public employer entering into a written collective bargaining agreement pursuant to chapter 89, HRS, shall file a copy of the agreement with the board within thirty days after execution and issuance.

has been afforded an opportunity to be present at the conference(s) on the grievance. Any adjustment made shall not be inconsistent with the terms of this Agreement. By mutual consent of the Union and the Employer, any time limits within each step may be extended.

C. Informal Step. A grievance shall, whenever possible, be discussed informally between the Employee and the Employee's immediate supervisor within the twenty (20) working days limitation provided for in paragraph "A" above. In such an event the Employee shall identify the discussion as an informal step grievance. The grievant may be assisted by the grievant's representative. The immediate supervisor shall reply within seven (7) working days. In the event the Employer does not respond within the time limits prescribed herein, the Union may pursue the grievance to the next step.

D. Step 1. If the grievant is not satisfied with the result of the informal conference, the grievant or the Union may submit a written statement of the grievance within seven (7) working days after receiving the answers to the informal complaint to the division head or the division head's designee; or if the immediate supervisor does not reply to the informal complaint within seven (7) working days, the Employee or the Union may submit a written statement of the grievance to the division head or the division head's designee within fourteen (14) working days from the initial submission of the informal complaint; or if the grievance was not discussed informally between the Employee and the Employee's immediate supervisor, the Employee or the Union may submit a written statement of the grievance to the division head or the division head's designee within the twenty (20) working day limitation provided for in paragraph "A" above.

A meeting shall be held between the grievant and a Union representative with the division head or the division head's designee within seven (7) working days afer the written grievance is received. Either side may present witnesses. The division head or her designee shall submit a written answer to the grievant or the Union within seven (7) working days after the meeting.

E. Step 2. If the grievance is not satisfactorily resolved at Step 1, the grievant or the Union may appeal the grievance in writing to the department head or the department head's designee within seven (7) working days after receiving the written answer. The department head or the department head's designee need not consider any grievance in Step 2 which encompasses different alleged violations or charges than those presented in Step 1. A meeting to discuss the grievance shall be held within seven (7) working days after receipt of the appeal. The department head or the department head's designee shall reply in writing to the grievant or the Union within seven (7) days after the meeting.

* * *

G. Step 3. If the grievance is not satisfactorily resolved at Step 2, the grievant or the Union may appeal the grievance in writing to the Employer or the Employer's designee within seven (7) working days after receipt of the answer at Step 2. Within seven (7) working days after the receipt of the appeal, the Employer and the Union shall meet in an attempt to resolve the grievance. The Employer or the Employer's designee need not consider any grievance in Step 3 which encompasses a different alleged violation or charge than those presented in Step 2. The Employer or the Employer's designee shall reply in writing to the Union within seven (7) working days after the meeting.

H. Step 4. Arbitration. If the grievance is not resolved at Step 3 and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or the Employer's representative of its desire to arbitrate within ten (10) working days after receipt of the Employer's decision at Step 3. ...

7. By letter dated December 7, 2006, DLIR Business Management Officer Patrick Fukuki (Fukuki) issued a written reprimand to Complainant for alleged insubordination. By letter dated January 5, 2007, the HGEA/AFSCME, by Union agent Susan Goya (Goya) filed a formal grievance on Complainant's behalf with former Department of Labor and Industrial Relations Director Nelson B. Befitel (Befitel) challenging the written reprimand. The HGEA/AFSCME initially filed a Notice of Intent to Arbitrate, dated April 13, 2007, with DHRD Director Marie Laderta

(Laderta), but withdrew its intent to proceed to arbitration by letter, dated May 8, 2007.

8. By letter dated December 18, 2006, Fukuki issued another written reprimand to Complainant for alleged "sustained insubordination." By letter dated January 17, 2007, the HGEA/AFSCME, by Goya, filed a formal grievance on Complainant's behalf with Befitel challenging the written reprimand. By letter dated April 10, 2007, LaCLAIR informed Goya, that the grievance was denied. The HGEA/AFSCME filed a notice of intent to arbitrate with Laderta by letter dated April 13, 2007 but withdrew its intent to proceed to arbitration by letter, dated May 8, 2007.

9. By letter dated May 24, 2007, Fukuki notified Complainant that he would be suspended for two days, effective May 30 - 31, 2007, for alleged continued use of defamatory email and malicious remarks about co-workers which violated Directive No. 2003-04, Unlawful Harassment in Employment and Services and the Department of Human Resources and Development's (DHRD) "Acceptable Usage of Information Technology Resources," Policy No. 103.001.[8] By letter dated June 7, 2007, the HGEA/AFSCME, by Goya, filed a formal grievance with Befitel on Complainant's behalf, challenging the two-day suspension. By letter dated December 4, 2007, LaCLAIR informed Goya that the grievance was denied.

10. By letter dated October 2, 2007, Fukuki issued a ten-day suspension to Complainant for violating the Department of Human Resource Development's (DHRD) Workplace Violence Program - Policy 800.002, and the DLIR's Workplace Violence Action Plan by allegedly intimidating and frightening an employee. The suspension was effective October 3 - 16, 2007. By letter dated October 29, 2007, the HGEA/AFSCME, by Goya, filed a formal grievance with CHING,[9] on Complainant's behalf, challenging the ten-day suspension based on the complaint alleging workplace violence. By letter dated July 10, 2008, Union Agent Joy Kuwabara (Kuwabara) notified Complainant that a grievance meeting on the ten-day and a 15-day suspension was scheduled on July 29, 2008. By letter dated August 18, 2008, Kuwabara requested, <u>inter alia</u>, a copy of an

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[8]There appears to be confusion in the arguments before the Board as to which two-day suspension is referred to in Count One of Complainant's First Amended Prohibited Practice Complaint. As Count One refers to events from April 2007, the Board finds that the two-day suspension at issue is referred to in Finding of Fact #9 and not the two-day suspension referred to in Finding of Fact #12 which arose from events in August 2007.

[9]CHING was appointed interim Department Director on August 9, 2007.

investigation report and a meeting on the grievance. By letter dated September 19, 2008, the HGEA/AFSCME, by Kuwabara, submitted its notice of intent to arbitrate the ten-day suspension.

11. Also, by letter dated October 2, 2007, Fukuki issued a 15-day suspension, effective October 17 - November 6, 2007, to Complainant due to several incidents of alleged misconduct and complaints, i.e., raising his voice during a meeting with Wage Standards Division (WSD) employees; questioning a WSD employee about another employee's competence; making inappropriate comments about the staff in the EDP Systems Office, etc. By letter dated October 29, 2007, the HGEA/AFSCME, by Goya, filed a formal grievance with CHING on Complainant's behalf, challenging the 15-day suspension. By letter dated September 19, 2008, the HGEA/AFSCME, by Kuwabara, submitted its notice of intent to arbitrate the 15-day suspension.

12. By letter dated November 7, 2007, Fukuki issued a two-day suspension to Complainant, effective November 8 - 9, 2007, for violating DHRD's Acceptable Usage of Information Technology Resources Policy (Policy No. 103.001), and the DLIR Helpdesk Policy and Procedures. The suspension was based upon a complaint that Complainant allegedly entered and submitted a work request on behalf of someone without her approval on August 2, 2007. By letter dated August 5, 2008, the HGEA/AFSCME, by Nora A. Nomura, Deputy Executive Director, notified Complainant that the Union did not pursue a grievance based upon its review of the employer's actions. The letter was returned to the HGEA/AFSCME on or about August 28, 2008 marked "Return to Sender, Unclaimed, Unable to Forward" on the envelope. On or about September 8, 2008, HGEA/AFSCME representatives hand-delivered copies of the August 5, 2008 letter to Complainant at his workplace. Initially, Complainant accepted the letter; but later returned the document to the HGEA/AFSCME unopened.

13. By letter dated July 3, 2008, CHING informed Complainant he believed there were grounds sufficient to terminate him but in lieu of termination, he was giving Complainant a "Last Chance" to rectify his behavior. CHING stated that Complainant would be supervised through the Director's office and would work on special projects; the first project was to develop a mobile computer lab/learning center. CHING also set parameters on who Complainant could interact with, where he could go, his work hours, that he needed to report by phone to Christopher Jay, Acting Departmental Personnel Officer, when he arrived and left for the day, etc. CHING also stated:

> You are cautioned that you must obey all laws, statutes, rules, orders and directives from me, my office, my agents, and/or representatives. Failure to do so will result in termination.

Complainant signed the July 3, 2008 as "Received and Acknowledged."

14. By letter dated September 22, 2008, Complainant was informed that he would be discharged, effective October 2, 2008, for allegedly failing to comply with the provisions of the Last Chance Status and Assignment.

15. The Department held a pre-termination hearing on September 29, 2008 attended by Complainant and HGEA/AFSCME representatives.

16. Complainant was terminated effective October 2, 2008.

17. By letter dated October 14, 2008, Kuwabara filed a Step 2 grievance with CHING on Complainant's behalf challenging Complainant's termination and requested that the department mutually agree to waive Step 2 of the grievance procedure and permit the Union to proceed to arbitration. Kuwabara requested that CHING notify her of his agreement to waive Step 2. By letter dated October 21, 2008, CHING notified Kuwabara that the department agreed to waive Step 2 of the grievance procedure.

18. By letter dated October 24, 2008, Kuwabara filed a letter with DHRD Director Laderta notifying her of the Union's intent to arbitrate Complainant's termination.

19. Complainant's First Amended Prohibited Practice Complaint, <u>inter</u> <u>alia</u>, adds CHING and LaCLAIR as Respondents in these proceedings; alleges the creation of a hostile work environment and unjust discipline, up to and including termination; alleges Respondents failed to follow the grievance procedure; alleges the Union failed to prosecute grievances on his behalf; alleges improper election of a Union steward, and that he was not permitted to vote for Union stewards or representation since 2007. With respect to the alleged failure to file or prosecute grievances on his behalf, Complainant cited: a ten-day suspension for an imaginary policy violation, in October 2007; a fifteen-day suspension for vague "inappropriate conduct" in May 2007; a two-day suspension resulting from a complaint fabricated around April 2007 by Complainant's managers concerning an agency policy; and an "outrageous" letter from CHING, delivered on July 3 which was unopposed by the Union and recited allegedly false accusations against Complainant which he had no opportunity to reply to or grieve and which constructively terminated Complainant's employment.

20. In Count One of the First Amended Complaint concerning the two-day suspension arising from events of April 2007, Complainant alleges that the HGEA/AFSCME failed to file or effectively prosecute a grievance on the two-day suspension. Based upon a review of the record, the Board finds that on or about May 24, 2007, Complainant was suspended for two days for alleged continued use of defamatory email and malicious remarks about co-workers. The Board finds based on the record that by letter dated June 7, 2007, the HGEA/AFSCME filed a grievance with Befitel on Complainant's behalf challenging the two-day suspension and by letter dated December 4, 2007, Deputy Director LaCLAIR informed Goya that the grievance was denied. There is no evidence in the record submitted to the Board thus far which indicates whether Complainant requested the Union take the grievance to arbitration, whether any further action was taken by the Union, and if no action was taken, when Complainant knew or should have known that fact. Thus, the Board is unable to determine, inter alia, when Complainant's cause of action accrued based on the record submitted thus far and cannot find that the claim is untimely.

21. In Count Two of the First Amended Complaint, Complainant alleged that the DLIR and the Union failed to follow the grievance procedure concerning a fifteen-day suspension for vague "inappropriate conduct" in May 2007 which constituted political retaliation and contended that the DLIR violated the grievance procedure, Article 11, sections C, D, E, G, and H of the CBA and HRS §§ 89-13(8) (sic) and 89-13(b)(5). In Count Three, Complainant alleged that the Union and DLIR failed to follow the grievance procedure concerning a ten-day suspension for an "imaginary" policy violation in October 2007 which constituted political retaliation and contended that the Respondents violated the grievance procedure, Article 11, sections C, D, E, G, and H of the CBA, and HRS §§ 89-13(8) (sic) and 89-13(b)(5).

22. The HGEA/AFSCME is presently challenging the 15-day and ten-day suspensions in arbitrations pursuant to the CBA grievance procedure.

23. In Count Four of the First Amended Complaint, Complainant alleged that the day after he filed the initial Complaint, Respondent CHING threatened to terminate him and one week later, the DLIR fired Complainant in violation of HRS § 89-13(4) (sic). Complainant also alleged that CHING delivered a July 3 letter which created a hostile workplace and constructively terminated him and the HGEA/AFSCME failed to oppose the letter.

24. The HGEA/AFSCME is presently challenging Complainant's termination in arbitration pursuant to the CBA grievance procedure.

25. In Count Five of the First Amended Complaint, Complainant alleged that the HGEA/AFSCME rigged the election of stewards in 2007. The Board finds that the claims arise from events occurring in 2007, well before the filing of the instant Complaint and fall outside the Board's 90-day statute of limitations.

26. In Count Six of the First Amended Complaint, Complainant alleged that after he sent a 16-page letter in 2007 to the DLIR Business Management Officer recommending dismissal of corrupt managers in the IT group, the HGEA/AFSCME failed to provide a Union card to the Complainant. Complainant contends that he has no current Union card which has prevented him from exercising effective membership in the Union as guaranteed under HRS Chapter 89, in violation of HRS § 89-13(b)(1). Based on the record before the Board, contrary to Complainant's claims that he was prevented from exercising effective membership in the Union the Board finds that the HGEA/AFSCME provided Complainant with grievance assistance as early as January 5, 2007. In addition, the Board finds that this claim arises from events occurring in 2007 which fall outside the Board's 90-day statute of limitations and are time-barred. However, accepting Complainant's allegations as true for the purposes of the instant motions to dismiss, i.e., that HGEA/AFSCME failed to provide him a Union card because Complainant sent a copy of a 16-page letter to the DLIR Business Management Officer and that Complainant can establish specific timely instances where he was prevented him from exercising effective membership in the Union within 90 days of the filing of the Complaint, the Board finds these claims remain.

27. In Count Seven of the First Amended Complaint, Complainant alleged that after he sent the letter to the DLIR Business Management Officer in 2007 and testified about fraud and wrongful business practices before the Senate Committee on Judiciary and Labor in October, Union representatives prevented Complainant from voting in any Union elections, particularly the election for Union stewards in the IT group. Thus, Complainant contends that he has been prevented him exercising effective membership in the Union as guaranteed under HRS Chapter 89, in violation of HRS § 89-13(b)(1). Based upon a review of the record, the Board finds that the claims arising from events which occurred in 2007 well before the filing of the instant Complaint fall outside the Board's 90-day statute of limitations and are time-barred. However, accepting Complainant's allegations as true for the purposes of the instant motions to dismiss, i.e., that within 90 days of the filing of the instant Complaint, Union representatives prevented Complainant from voting in a Union election because Complainant sent a 16-page letter to the DLIR Business Management Officer in 2007 and testified before the Legislature complaining of fraud and wrongful business

practices, the Board finds that these claims are not barred by the statue of limitations.

DISCUSSION AND CONCLUSIONS OF LAW

1. The Board has jurisdiction over this Complaint pursuant to HRS §§ 89-5 and 89-14.

2. The applicable statutes and rules require that prohibited practice complaints be filed within 90 days of the alleged violation. The Board's Administrative Rules, 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).

3. 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)).

4. 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. TriCounty 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").

5. The Board has construed the 90-day limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HPERB 186, 199 (1983). The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. 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).

6. As the initial Complaint in this matter was filed on September 9, 2008, claims which arose prior to 90 days of the filing of the complaint or June 11, 2008 would be barred by the Board's statute of limitations. Based on a review of the record in this case thus far, the Board concludes that Count Five which alleges that the Union rigged a steward election in 2007 is time-barred.

7. The Board concludes with regard to Count Six, where Complainant alleges he was prevented from exercising effective membership because the HGEA/AFSCME failed to provide Complainant him a Union card, any instances which occurred more than 90 days prior to the filing of the Complaint are time-barred.

8. The Board concludes with regard to Count Seven, where Complainant alleged that the Union representatives prevented him from voting any Union elections, including elections for Union stewards, after he sent the letter to the DLIR Business Management Officer in 2007 and testified about fraud and wrongful business practices before the Senate Committee on Judiciary and Labor in October, any instances which occurred more than 90 days prior to the filing of the instant Complaint are time-barred.

9. 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)) (Yamane).

10. The Intermediate Court of Appeals has noted:

> A Rule 12(b)(6), [Hawaii Rules of Civil Procedure], dismissal is warranted only if the claim is "clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some facts which will necessarily defeat the claim."
>
> Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 776 P.2d 745, 749 (1983) (quoting 2A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 12.08, at 2271 (2d ed. 1982)).

11. 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. Yamane, 111 Hawai`i 74, 81, 137 P.3d 980, 987 (2006) (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)).

12. HRS § 89-3, provides:

> Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, including retiree health benefit contributions, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4.

13. HRS § 89-13 provides in part as follows:

> (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> * * *
>
> (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;
>
> * * *
>
> (8) Violate the terms of a collective bargaining agreement; ...

(b) 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;

* * *

(5) Violate the terms of a collective bargaining agreement.

14. Pursuant to Article 11 of the applicable CBA, either the Union or the employee is entitled to file a grievance at Step 1 of the Grievance Procedure but only the Union can request the grievance be arbitrated.

15. 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." Poe v. Hawaii Labor Relations Board, 105 Hawaii 97, 101, 94 P.3d 652, 656 (2004) (citations omitted). "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 orderly and less time-consuming settlement of disputes through alternative means." Id. (Citations omitted).

16. In Poe, the Hawaii Supreme Court discussed when an employee who is covered by a grievance procedure in a collective bargaining agreement may bring an action against the employer:

> Based on analogous federal cases previously cited by this [C]ourt and the policy considerations articulated in them, we hold that an employee who is prevented from exhausting his or her contractual remedies may bring an action against an employer for breach of a collective bargaining agreement "provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance."

Id. at 103-04, 94 P.3d at 658-59 (quoting Vaca v. Sipes, 386 U.S. 171, 186 (1967)). Accordingly, an employee may bring an action against the employer for breach of a collective bargaining agreement when the employee is prevented from exhausting his or her contractual remedies, and the employee can prove that the union breached its duty of fair representation in the handling of the grievance.

In Poe, because Poe did not prove that his union breached its duty of fair representation, the Hawaii Supreme Court concluded that Poe "lacked standing" to pursue his claim against the employer before the Board. Id. at 104, 94 P.3d at 659.

17. A public employee may pursue a grievance in his or her own name without intervention of the union, except for the final step of arbitration. That Poe chose to pursue the grievance steps on his own (short of arbitration) as provided for in the collective bargaining agreement cannot therefore be viewed as a conflict with the role of the exclusive representative; furthermore, even where Poe asked the union to pursue his grievance (to Step 4 arbitration) the Court held that Poe nevertheless lacked standing to pursue his claim against the employer because he failed to establish that the union breached its duty of fair representation in refusing to do so.

18. In Poe, the Court acknowledged that there are issues relating to the exhaustion requirement that the Court had not addressed in previous opinions:

> Although this [C]ourt's opinion in *Poe I* cited federal cases for the proposition that exceptions to the exhaustion requirement exist, it had no occasion to address the requirement under federal law that the employee demonstrate that the union breached its duty of fair representation in order to bring a claim that the employer breached its duty of fair representation. However, this court has, in prior cases, alluded to the duty of fair representation.

105 Hawaii at 103, 94 P.3d at 658 (emphasis added). The Board must evaluate labor law in the state in light of the Hawaii Supreme Court's evolving guidance. In the present case, the most recent Poe decision discusses in depth the requirements that must be met before an employee may bring an action against the employer beyond the grievance procedure.

19. Historically, the Board and the state courts have used federal precedent to guide their interpretation of state public employment law. See, Hokama v. University of Hawai`i, 92 Hawai`i 268, 272 n. 5, 990 P.2d 1150, 1154 n. 5 (1999). Federal cases are split on the issue of exhaustion of contractual

remedies. See, e.g., Spielberg Mfg. Corp., 112 NLRB 1080 (1955); Dubo Mfg. Corp., 142 NLRB 431 (1963); C&C Plywood Corp., 385 U.S. 421 (1967); NLRB v. Great Dane Trailers, 388 U.S. 26 (1967); Collyer Insulated Wire, 192 NLRB 837 (1971); General American Transportation Corp., 228 NLRB 808 (1977); United Techonologies, 268 NLRB 557 (1984). Similarly, the Board has in the past has deferred, refused to defer, and conditionally deferred prohibited practice claims to the grievance process where the claim may constitute both a statutory and contractual violation. See, e.g., Hawaii Nurses Association and Ariyoshi, 2 HLRB 218 (1979); UPW and Watada, Case No. CE-01-594; Hawaii State Teachers Association and DOE, 1 HPERB 253 (1972).

20. In the present case, it is undisputed that the HGEA/AFSCME filed grievances on Complainant's behalf on a number of disciplinary actions, including a 15-day suspension, a ten-day suspension and termination. Although Complainant alleged that HGEA/AFSCME failed to effectively prosecute the grievances, the Board finds that the HGEA/AFSCME is proceeding to arbitration on these grievances. As the instant prohibited practice charges in Counts Two and Three concern suspensions and are based on contractual violations, the Board exercises its discretion to defer jurisdiction over the prohibited practice claims to arbitration.

21. With respect to Count Four, Complainant alleges that he was terminated one week after he filed the Complaint with the Board in violation of HRS § 89-13(a)(4). Complainant contends that DLIR fabricated the reasons for his dismissal. As the HGEA/AFSCME is pursuing Complainant's termination to arbitration contending that the termination is not supported by just cause, the Board finds that the just cause issues are particularly suited to be determined by an arbitrator and the Board exercises its discretion to defer jurisdiction over Complainant's termination claim to the arbitrator. Unlike the suspension cases based purely upon violations of the applicable collective bargaining agreement, supra, Count Four alleges a violation of presumably HRS § 89-13(a)(4). For this reason, the Board will defer the matter to arbitration and dismiss the claim before the Board but shall retain jurisdiction over this dispute solely for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the HRS Chapter 89. See Collyer Insulated Wire, 192 NLRB 837, at 843.

22. In Count Five of the First Amended Complaint, Complainant alleged that the HGEA/AFSCME rigged the election of stewards in 2007. The Board finds that the claims arise from events occurring in 2007, well before the filing of the instant Complaint and fall outside the Board's 90-day statute of limitations.

23. In Count Six of the First Amended Complaint, Complainant alleged that after he sent a 16-page letter in 2007 to the DLIR Business Management Officer recommending dismissal of corrupt managers in the IT group, the HGEA/AFSCME failed to provide a Union card to the Complainant. Complainant contends that he has no current Union card which has prevented him from exercising effective membership in the Union as guaranteed under HRS Chapter 89, in violation of HRS § 89-13(b)(1). Based on the record before the Board, contrary to Complainant's claims that he was prevented from exercising effective membership in the Union the Board finds that the HGEA/AFSCME provided Complainant with grievance assistance as early as January 5, 2007. In addition, the Board finds that this claim arises from events occurring in 2007 which fall outside the Board's 90-day statute of limitations and are time-barred. However, accepting Complainant's allegations as true for the purposes of the instant motions to dismiss, i.e., that HGEA/AFSCME failed to provide him a Union card because Complainant sent a copy of a 16-page letter to the DLIR Business Management Officer and that Complainant can establish specific timely instances where he was prevented him from exercising effective membership in the Union within 90 days of the filing of the Complaint, the Board finds these claims remain.

24. In Count Seven of the First Amended Complaint, Complainant alleged that after he sent the letter to the DLIR Business Management Officer in 2007 and testified about fraud and wrongful business practices before the Senate Committee on Judiciary and Labor in October, Union representatives prevented Complainant from voting in any Union elections, particularly the election for Union stewards in the IT group. Thus, Complainant contends that he has been prevented him exercising effective membership in the Union as guaranteed under HRS Chapter 89, in violation of HRS § 89-13(b)(1). Based upon a review of the record, the Board finds that the claims arising from events which occurred in 2007 well before the filing of the instant Complaint fall outside the Board's 90-day statute of limitations and are time-barred. However, accepting Complainant's allegations as true for the purposes of the instant motions to dismiss, i.e., that within 90 days of the filing of the instant Complaint, Union representatives prevented Complainant from voting in a Union election because Complainant sent a 16-page letter to the DLIR Business Management Officer in 2007 and

testified before the Legislature complaining of fraud and wrongful business practices, the Board finds that these claims remain.

ORDER

In summary, the Board denies HGEA/AFSCME's motion to dismiss Count One; defers Counts Two and Three to the contractual grievance process and dismisses the claims; defers Count Four to the contractual grievance process and dismisses the claim, but shall retain jurisdiction over this dispute solely for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the HRS Chapter 89; dismisses Count Five as untimely; dismisses Count Six, in part, as untimely; and dismisses Count Seven, in part, as untimely.

Based on the foregoing, the Board grants in part and denies in part Respondents DLIR's Motion to Dismiss First Amended Prohibited Practice Complaint and HGEA/AFSCME's Motion to Defer and Dismiss First Amended Prohibited Practice Complaint.

NOTICE OF SECOND PREHEARING/SETTLEMENT CONFERENCE

NOTICE IS HEREBY GIVEN that the Board will conduct a second prehearing conference in this matter on **April 27, 2009 at 9:30 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii at the designated time.

DATED: Honolulu, Hawaii, April 6, 2009.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

EMORY J. SPRINGER, Member

Copies sent to:
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