STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and LINDA LINGLE, Governor, State of Hawaii; and BRENNON MORIOKA, Director, Department of Transportation, State of Hawaii, Respondents.	CASE NO. CE-01-701 ORDER NO. 2604 ORDER DENYING RESPONDENTS' MOTION TO DISMISS; AND NOTICE OF HEARING

ODER DENYING RESPONDENTS' MOTION TO DISMISS

On February 12, 2009, Complainant UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO (UPW or Union) filed a Prohibited Practice Complaint (Complaint) against Respondents LINDA LINGLE, Governor, State of Hawaii, and BRENNON MORIOKA, Director, Department of Transportation, State of Hawaii (collectively, Respondents or Employer). The Complaint alleges prohibited practices under Hawaii Revised Statutes (HRS) §§ 89-13(a)(1), (5), and (8), and asserts that the Department of Transportation committed a prohibited practice when it wilfully failed to produce certain information and documents in response to the UPW's February 6, 2008, letter requesting information necessary to the processing of a Step 1 grievance as required by the Unit 01 collective bargaining agreement.

On February 18, 2009, Respondents filed a Motion to Dismiss Prohibited Practice Complaint Filed on February 12, 2009 (Motion to Dismiss), asserting UPW's failure to file a timely Complaint, failure to exhaust contractual remedies, and that the Complaint fails to state a valid claim.

On March 17, 2009, the Board held a hearing on Respondents' 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 Respondents' Motion to Dismiss, for the reasons discussed below.

FINDINGS OF FACT

1. At all times relevant to the Complaint, the UPW was or is an employee organization[1] and the exclusive bargaining representative, within the meaning of HRS § 89-2, of employees included in bargaining unit (Unit or BU) 01, composed of nonsupervisory employees in blue collar positions. See HRS § 89-6(1).

2. At all times relevant to the Complaint, Respondent LINDA LINGLE, Governor, State of Hawaii (Governor), was or is a public employer within the meaning of HRS § 89-2.[2]

3. At all times relevant to the Complaint, Respondent BRENNON MORIOKA, Director, Department of Transportation, State of Hawaii (DOT), was or is an individual who represented the Governor or acted in the Governor's interest in dealing with employees with respect to the grievance referred to in the Complaint, within the meaning of HRS § 89-2.

4. The UPW and the Governor are parties to a Unit 01 collective bargaining agreement (CBA) which for all relevant times includes 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 the collective bargaining agreement.

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[1]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.

[2]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.

5. Section 15.09 of the Unit 01 CBA provides in relevant part:

> Employer shall provide all information in the possession of the Employer which is needed by the grieving party and/or the Union to investigate and/or process a grievance as follows:
>
> 15.09 a. Photocopy and give the material requested to the grieving party and/or the Union within seven (7) calendar days of the request; or
>
> 15.09 b. Make the material requested available to the grieving party and/or the Union within seven (7) days of the request for the purpose of photocopying or review for five (5) calendar days on the condition that the grieving party and the Union agrees to sign Exhibit 15.09 and be responsible for the material until it is returned.

6. On February 6, 2008, the UPW filed a Step 1 grievance on behalf of an Electrician II employed by the DOT at Honolulu Airport (Grievant).

7. By letter dated February 6, 2008, the UPW Business Agent Paula Ota (Ota) requested from the DOT certain information needed by the UPW to process the grievance, pursuant to section 15.09 of the CBA.

8. The letter dated February 6, 2008, from Ota to the DOT specifically requested, inter alia, (A) a copy of all rules, regulations and policies relied upon by the Employer in its action to discipline the Grievant; (B) any and all documents, memoranda, letters, postings notices [sic] and other records which would establish the following regarding the Employer's disciplinary rules, policies, etc: 1) When and how the Employer's disciplinary rules and policies were initially promulgated; 2) When and how the promulgated rules and policies were amended, modified, rescinded, or otherwise altered from the date of inception; 3) When and how bargaining unit employees were notified of the applicable disciplinary rules and policies; and 4) When and how the UPW was informed of said rules and policies and changes; and (C) any and all documents, notes and records used or related to the grievance which would indicate the nature and extent of the investigation conducted by Employer to discover whether the allegations against the Grievant were factual, including but not limited to: 1) All investigative reports and papers; 2) Statements of witnesses; and 3) Notes, memos, or other papers prepared or submitted during the investigative process.

9. The grievance was not resolved at Step 1 or Step 2, and by letter dated September 11, 2008, the UPW noticed the grievance for arbitration.

10. By letter dated January 21, 2009, Michael Nauyokas (Arbitrator) accepted the appointment to arbitrate the grievance.

11. Via telephone conference with the Arbitrator, the parties scheduled the arbitration hearing for March 11, 2009, and agreed to deliver pre-hearing statements and exhibits by February 25, 2009.

12. On January 30, 2009, the DOT served its Pre-Arbitration Statement and Exhibits upon the UPW.

13. The DOT's Pre-Arbitration Statement quotes Sections 4.12.16 and 4.12.03 of the DOT's "Staff Manual."

14. The DOT's Exhibit #8 attached to its Pre-Arbitration Statement includes a DOT memorandum dated December 6, 2007, with subject matter "Report of Investigation – Alleged Misconduct" relating to the Grievant.

15. Also part of the DOT's Exhibit #8 were four attachments, including one identified as "Copy of card reader events log for [Grievant] from midnight 8/20/07 to 11:59 p.m. 8/21/07."

16. The UPW alleges that the DOT did provide the information described above in the Board's Findings of Fact nos. 13 through 15, and further, that the UPW was unaware of the existence of that information until it received the DOT's Pre-Arbitration Statement and attached Exhibits on or around January 30, 2009.

17. The DOT argues that the UPW was already aware of the existence of the Staff Manual and that the UPW previously filed a class-action grievance related to the Staff Manual; that the UPW should have been aware of the existence of the investigation report prior to January 30, 2009, because the UPW was involved during the investigation stage; and, that the DOT must have turned over the investigation report and other information because it is the DOT's usual practice to do so in response to a request by a union or grievant.

18. On February 12, 2009, the UPW filed its Complaint against Respondents, alleging prohibited practices under HRS §§ 89-13(a)(1), (5), and (8), and asserting that the Department of Transportation committed a prohibited practice when it wilfully failed to produce certain information and documents in response to the UPW's February 6, 2008, letter requesting

information necessary to the processing of a Step 1 grievance as required by the Unit 01 collective bargaining agreement.

19. On February 18, 2009, Respondents filed their Motion to Dismiss,[3] asserting UPW's failure to file a timely Complaint, failure to exhaust contractual remedies, and that the Complaint fails to state a valid claim.

20. On February 24, 2009, the UPW filed a Memorandum in Opposition to Respondents' Motion to Dismiss.

21. On March 13, 2009, Respondents filed their Reply to the UPW's Opposition to Respondents' Motion to Dismiss.

22. On March 17, 2009, the Board held a hearing on Respondents' Motion to Dismiss, pursuant to HRS §§ 89-5(i)(4) and (5), and 89-14, and HAR § 12-42-8(g).

23. Review of this 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 UPW. For these reasons, the Board accepts are true, for purposes of the Motion to Dismiss, the factual allegations in the Complaint that the UPW did not receive certain information, including a copy of the investigative report, prior to its receipt of the DOT's Pre-Arbitration Statement and attached Exhibits.

24. For purposes of the Motion to Dismiss, the Board finds that the Complaint is not untimely, for the UPW may not have known of the existence of certain documents, including the investigation report, prior to receipt of the DOT's Pre-Arbitration Statement and attached Exhibits, and therefore would not have known that the DOT's response to the UPW's information request was incomplete until on or around January 30, 2009. Although the DOT asserts that it is the DOT's usual practice to provide such information and a union may expect a copy of the investigation report to be included in

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[3]Respondents apparently filed a Motion to Dismiss in lieu of filing an answer to the Complaint. Historically, the Board has relied upon the HRCP in resolving ambiguities in the Board's rules. See e.g., Hawaii Federation of College Teachers, Local 2003, 1 HPERB 428; United Public Workers, 5 HLRB 177; Hawaii Government Employees Association, Order No. 1903 (July 21, 2000). The issue of a party filing a motion to dismiss in lieu of an answer to a prohibited practice complaint was specifically addressed by the Board in UPW/HGEA and Cayetano, Case Nos. CE-01-378a, CE-03-378b, CE-10-378c, and CE-13-378d, Order No. 2014 (June 6, 2001). In that case, the Board found that its rules are not inconsistent with the HRCP, and relied upon the provisions of HRCP Rule 12(b) to conclude that a respondent's motion to dismiss the complaint filed in lieu of its answer "extends the time for filing of the answer until such time after the Board rules on the motion." (Order No. 2014 at 7).

any response to a request for information, facts in dispute must be viewed in the light most favorable to the non-moving party.

25. The UPW's request for information and the DOT's allegedly incomplete response to that request occurred during Step 1 of the grievance, which was prior to the arbitration stage.

26. The information requested by the UPW that allegedly was not disclosed to the UPW until the arbitration stage of the grievance may be relevant information that is necessary for the proper performance of the UPW's duties in processing a grievance.

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), (5), and (8), 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;

* * *

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

* * *

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

5. **Statute of Limitations**. With respect to the DOT's argument that the Complaint is untimely, 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. For purposes of the Motion to Dismiss, the Board finds that the Complaint is not untimely, for the UPW may not have known of the existence of certain documents, including the investigation report, prior to receipt of the DOT's Pre-Arbitration Statement and attached Exhibits, and therefore would not have known that the DOT's response to the UPW's information request was incomplete until on or around January 30, 2009. Although the DOT asserts that it is the DOT's usual practice to provide such information and a union may expect a copy of the investigation report to be included in any response to a request for information, facts in dispute must be viewed in the light most favorable to the non-moving party. The Board therefore denies the Motion to Dismiss based upon the DOT's timeliness argument.

9. **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).

10. As a general rule, an employer must provide a union with relevant information necessary for the proper performance of its duties. NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36, 87 S.Ct. 565, 567-68 (1967). The failure to provide relevant information may support a finding of a failure to bargain in good faith. See, NLRB v. Truitt Mfg. Co., 351 U.S. 149, 76 S. Ct. 753 (1956).

11. In the present case, the alleged failure by the DOT to provide a complete response to the UPW's request for information may be a violation of

section 15.09 of the Unit 01 CBA; however, using federal case law as guidance, such alleged failure may also interfere with the UPW's proper performance of its duties and constitute a prohibited practice.

12. The Board concludes that deferral to the grievance process is not warranted in the present case. Although the arbitrator controls discovery during the arbitration stage of a grievance, the alleged failure by the DOT to provide a complete response to the UPW's request for information occurred prior to the arbitration stage. Furthermore, because the alleged failure may also interfere with the UPW's proper performance of its duties and constitute a prohibited practice, the Board concludes that the UPW is not required to file a separate grievance regarding the information request and exhaust the grievance process in the CBA prior to bringing the present Complaint.

13. **Failure to State a Valid Claim**. With respect to the assertion that the Complaint fails to state a valid claim, the Board has deferred information disputes to the arbitrator where the information request arose after the arbitration stage of the grievance had been invoked. See HRS § 658A-9, which defines the initiation of arbitration ("A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties"). However, in this case, the information request and response at issue occurred prior to the arbitration stage of the grievance; accordingly, the Board does not defer the prohibited practice complaint to the arbitrator.

ORDER

The Board hereby denies Respondents' Motion to Dismiss as discussed above. Respondents shall file their respective answers with the Board within seven working days of the service of this order.

NOTICE OF HEARING

NOTICE IS ALSO GIVEN that the Board, pursuant to HRS §§ 89-5(i)(4), 89-5(i)(5), and 89-14, and HAR § 12-42-8(g), will conduct a hearing on the merits of the instant complaint on **June 22, 2009 at 9:30 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The purpose of the hearing is to receive evidence and arguments on whether Respondents committed prohibited practices as alleged by the Complainant. The hearing may continue from day to day until completed.

UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO v. LINDA LINGLE, et al.
CASE NO. CE-01-701
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DATED: Honolulu, Hawaii, April 13, 2009.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

EMORY J. SPRINGER, Member

SARAH R. HIRAKAMI, Member

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