STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of GENBAO GAO, Complainant, and MARK J. BENNETT, Attorney General, Department of the Attorney General, State of Hawaii and DEPARTMENT OF THE ATTORNEY GENERAL, State of Hawaii, Respondents.	CASE NO. CE-13-767 ORDER NO. 2789 ORDER GRANTING RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED ON AUGUST 30, 2010

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS
PROHIBITED PRACTICE COMPLAINT FILED ON AUGUST 30, 2010

On August 26, 2010, Complainant GENBAO GAO (Complainant or Gao), *pro se*, filed a Prohibited Practice Complaint (Complaint) against MARK J. BENNETT, Attorney General, Department of the Attorney General (Bennett or Respondent) with the Hawaii Labor Relations Board (Board). Complainant alleged, *inter alia*, that he was subject to disciplinary action, i.e., written reprimand, 30-day suspension, and termination, without cause and in retaliation for his inquiries and complaints regarding his supervisor in violation of Hawaii Revised Statutes (HRS) §§ 89-13(a)(4) and (8); that an arbitration award made May 28, 2010 was based on false testimonies; and his termination was in violation of Violence in the Workplace and contractual procedures, and the Americans with Disabilities Act (ADA).

On September 3, 2010, Respondent Bennett, by and through his counsel, filed a Motion to Dismiss Prohibited Practice Complaint Filed on August 30, 2010 contending that the Board lacked jurisdiction over the Complaint because it is time-barred; the Complaint fails to state a claim for relief; the arbitration decision and award is final and binding; and Complainant lacks standing to challenge the arbitration award.

On September 10, 2010, Complainant filed a Motion to Change Respondent Name from Mark Bennet (sic) to the Department of the Attorney General and Motion to Strike the Respondent (sic) Motion to Dismiss.

On October 11, 2010, the Board conducted a hearing on the pending motions and all parties were afforded full opportunity to present evidence and argument. At the outset of the hearing, in response to Complainant's Motion to Change the

Respondent's Name from Mark Bennet (sic) to the Department of the Attorney General, Respondent Bennett's counsel had no objection to adding the "Department of the Attorney General" to the case caption. Accordingly, Complainant's motion to add the "Department of the Attorney General" is granted in part. Based upon a review of the record and consideration of the arguments made, the Board makes the following findings of fact, conclusions of law and order granting Respondents' motion to dismiss the Complaint.

FINDINGS OF FACT

1. Gao was for all times relevant, a Research Statistician III, in the Crime Prevention and Justice Assistance Division, Research and Statistics Branch, Department of the Attorney General, and was a public employee within the meaning of HRS § 89-2.

2. Bennett was for all times relevant, the Attorney General, State of Hawaii, who acted in the interest of the Governor of the State in dealing with public employees and thus, was a public employer within the meaning of HRS § 89-2. The DEPARTMENT OF THE ATTORNEY GENERAL, State of Hawaii, is an agency of the State of Hawaii.

3. Gao was for all times relevant, a member of bargaining unit 13 which is represented by the Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA).

4. Gao received a written reprimand on October 9, 2007 for providing misinformation to the acting Division Manager that his computer had crashed and he was unable to complete his assignment. Thereafter, by letter dated December 10, 2007, Complainant was suspended for 30 days for misuse of his official status to investigate his suspicion about his supervisor's use of a private internet provider. By letter dated November 6, 2008, Complainant was terminated effective November 20, 2008 for making false reports to the Honolulu Police Department regarding an incident involving his supervisor. Complainant had the opportunity to respond to the discharge at a hearing on December 29, 2008 with Respondent Bennett. By letter dated January 7, 2009, Respondent Bennett notified Complainant that the termination was final.

5. The HGEA filed grievances on each disciplinary action which proceeded to arbitration. Arbitrator Walter Ikeda heard the grievances on January 5, 6, and 7, 2010, and issued an arbitration award on the disciplinary actions on May 28, 2010 denying the grievances.

6. Article 11, Grievance Procedure, of the Unit 13 collective bargaining agreement, effective July 1, 2007 to June 30, 2009, provides for arbitration and states in part as follows:

> H. Step 4. Arbitration.
>
> * * *
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> The Arbitrator shall render the Arbitrator's award in writing no later than thirty (30) days after the conclusion of the hearings or if oral hearings are waived then thirty (30) days from the date statements and proofs were submitted to the Arbitrator. The decision of the Arbitrator shall be final and binding upon the Union, its members, the Employees involved in the grievance and the Employer. There shall be no appeal from the Arbitrator's decision by either party, if such decision is within the scope of the Arbitrator's authority as described below:
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> 1. The Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the terms of this Agreement.
>
> 2. The Arbitrator's power shall be limited to deciding whether the Employer has violated any of the terms of this Agreement.
>
> 3. The Arbitrator shall not consider any alleged violations or charges other than those presented in Step 3.
>
> 4. In any case of suspension or discharge where the Arbitrator finds such suspension or discharge was improper, the Arbitrator may set aside, reduce or modify the action taken by the Employer. If the penalty is set aside, reduced or otherwise changed, the Arbitrator may award back pay to compensate the Employee, wholly or partially, for any wages lost because of the penalty.
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> * * *

7. On August 26, 2010, Gao filed the instant Complaint against Respondents alleging, *inter alia*, that his termination, suspension and written reprimand were in retaliation for his 1) April 3, 2007 inquiry into his supervisor's use of publicly funded internet service and 2) his letter to Respondent Bennett and another on September 14, 2007 rebutting a charge that his supervisor

came to the office late in 2005. Gao contends the Respondents thereby violated HRS § 89-13(a)(4).

Gao alleges that the Respondents violated § 89-13(a)(8) because Article 8 G-2 requires a notice of discharge or demotion to be given at least 10 days before the discharge or demotion. Gao also alleges that Respondents sent his discharge letter to the HGEA on January 9, 2009 but the HGEA did not deliver the letter to him until September 21, 2009. Gao moreover alleges that his reprimand violated Hawaii Administrative Rules (HAR) § 14-15-2c[1] requiring the notice of reprimand to be given within seven days of the incident giving rise to the reprimand. Gao further alleges that his termination violated the ADA because he was terminated while he was under a doctor's care.

8. In his Prehearing Statement filed on September 23, 2010, Complainant states, *inter alia*, that his complaint is not time barred because he received an incomplete copy of the arbitration decision and award on July 15, 2010

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[1]HAR § 14-15-2 as cited by Complainant provides in part as follows:

> Discipline. (a) An appointing authority may discipline an employee for just cause.
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> (b) Whenever an employee is orally reprimanded, it shall be done in private.
>
> (c) Whenever an employee is to receive a letter of reprimand, the reprimand shall set forth the specific reasons for its issuance and shall contain a statement of the employee's appeal rights. The reprimand shall be given to the employee within seven working days after the incident giving rise to the reprimand. The seven working day requirement shall not apply in certain mitigating situations, such as, but not limited to:
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> (1) The affected employee was unavailable during the seven working day period to present evidence and arguments on the employee's own behalf;
>
> (2) A complete investigation cannot be concluded within seven working days due to witnesses or information not being readily available.
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> * * *

In researching the foregoing rule, the Board found that the rule was repealed on April 1, 2002. Thus, Complainant's contentions regarding an HAR § 14-15-2 violation are without merit.

from the HGEA which revealed new violations by the Respondents which give rise to this Complaint.

8. With regard to Complainant's charges of retaliation for filing a complaint or giving information under HRS Chapter 89, Complainant alleges that he was disciplined because of his 1) April 3, 2007 inquiry into his supervisor's use of publicly funded internet service and 2) his letter to Respondent Bennett and another on September 14, 2007 rebutting a charge that his supervisor came to the office late in 2005. Based on the record, the Board finds that Complainant's written reprimand occurred on or about October 9, 2007, his 30-day suspension without pay occurred on or about December 10, 2007, his termination was on or about January 20, 2009, and this Complaint was filed on August 26, 2010. The Board finds that any charge of retaliation should have been filed within ninety days of its alleged occurrence. As all of the disciplinary actions occurred more than ninety days prior to the filing of the instant Complaint, the Board lacks jurisdiction over Complainant's allegations of retaliation.

9. The Board finds that the instant Complaint arises from Complainant's disagreement with the arbitration decision rendered by Arbitrator Ikeda on May 28, 2010, sustaining his discipline and denying the grievances filed. Complainant contends that new violations arose from the Arbitrator's findings, disagrees with the weight accorded to alleged false testimonies from witnesses and contends that Respondents did not comply with contractual requirements for the notices of his disciplinary actions. In his Prehearing Statement, filed on September 23, 2010, Complainant requested as relief, "I would like to ask this board to look into the factual evidence and remove all of the AG's disciplinary actions against me and reinstate me or appropriate compensation." Thus, it is clear that Complainant seeks to overturn the arbitration award and relitigate his disciplinary actions before the Board in this case.

CONCLUSIONS OF LAW

1. With respect to the powers of the Board, HRS § 89-5(I) provides in part:

> In addition to the powers and functions provided in other sections of this chapter, the board shall:
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> * * *
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> (3) Resolve controversies under this chapter;

(4) Conduct proceedings on complaints of prohibited practices by employers, and employee organizations and take such actions with respect thereto as it deems necessary and proper;

* * *

(10) Execute all of its responsibilities in a timely manner so as to facilitate and expedite the resolution of issues before it.

2. HRS § 89-13(a) provides in pertinent 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; ....

3. HRS § 89-14 provides as follows:

Any controversy concerning prohibited practice may be submitted to the board in the same manner and with the same effect as provided in section 377-9; provided that the board shall have exclusive original jurisdiction over such a controversy except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section 89-12(e) or (2) the judicial review of decisions or orders of the board in prohibited practice controversies in accordance with section 377-9 and chapter 91. All references in section 377-9 to "labor organization" shall include employee organization.

4. 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)).

5. 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)).

6. The applicable statutes and rules require that prohibited practice complaints be filed within ninety days of the alleged violation. 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. Similarly, 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).

8. 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. See, 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) holding, "The law has long been clear that agencies may not nullify statutes."

9. The Board has construed the ninety-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).

10. In reviewing the Complaint and pleadings filed by Complainant in the light most favorable to Complainant for the purpose of Respondent's Motion to Dismiss, the Board concludes that Gao's allegations that Respondent violated HRS § 89-13(a)(4) by retaliating against him for 1) inquiring into his supervisor's use of publicly funded internet service on April 3, 2007 and 2) rebutting a charge that his supervisor came to the office late in 2005 in his letter to Respondent and another on September 14, 2007 are untimely filed and are outside of the Board's 90-day statute of limitations. Accordingly, Gao's claim of unlawful discrimination is dismissed.

11. It is also clear from the record that Complainant challenges the arbitration award issued by Arbitrator Ikeda and he seeks to relitigate the disciplinary actions taken against him before the Board, including improper notice procedures. Any appeal from an adverse arbitration award however is governed by HRS Chapter 658A, specifically HRS § 658A-28.[2] Under the

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[2]HRS §658A-28 provides in part as follows:

§ 658A-23 Vacating award. (a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was:

(A) Evident partiality by an arbitrator appointed as a neutral arbitrator;

(B) Corruption by an arbitrator; or

(C) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 658A-15, so as to prejudice substantially the rights of

foregoing provision, only the court may vacate an arbitration for the reasons set forth in the statute. Thus, the Board lacks jurisdiction to overturn an arbitration award on the merits and the Board concludes that the Complainant fails to state a claim for relief because the arbitration decision and award is final and binding on Complainant pursuant to Article 11(H) of the applicable Unit 13 collective bargaining agreement.

12. Assuming *arguendo,* the Board has jurisdiction over Complainant's claim that the Respondents violated HAR § 14-15-2 when he was provided notice of a written reprimand in 2007, the Board concludes that Complainant's claim is without merit because the rule was repealed in 1989.

13. The Board concludes that it lacks jurisdiction over Complainant's allegations that his termination violated the ADA because he was under a doctor's care when he was terminated and Workplace Violence policies because the Board's prohibited practice jurisdiction is grounded in HRS Chapters 89 and 377 which does not include violations of the ADA or Workplace Violence. See Morgan v. Planning Dep't, County of Kauai, 104 Hawai'i 173, 184, 86 P.3d 982, 993 (2004) for the proposition that an administrative agency can only wield powers expressly or implicitly granted to it by statute. Thus, the Board lacks jurisdiction to enforce those laws and alternatively, the Complainant fails to state a claim for relief.

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a party to the arbitration proceeding;

(4) An arbitrator exceeded the arbitrator's powers;

(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under section 658A-15(c) not later than the beginning of the arbitration hearing; or

(6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in section 658A-9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section shall be filed within ninety days after the movant receives notice of the award pursuant to section 658A-19 or within ninety days after the movant receives notice of a modified or corrected award pursuant to section 658A-20, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion shall be made within ninety days after the ground is known or by the exercise of reasonable care would have been known by the movant.

* * *

ORDER

Based on the foregoing, the Board grants Respondents' Motion to Dismiss Complaint Filed on August 30, 2010.

DATED: Honolulu, Hawaii, April 27, 2011.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SARAH R. HIRAKAMI, Member

NORMAN K. KATO II, Member

Copies sent to:

Genbao Gao
Maria Cook, Deputy Attorney General