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STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of CHRIS KUWADA, Complainant, and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Respondent.	CASE NO. CU-10-300 ORDER NO. 2794 ORDER GRANTING THE UPW'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT, AND DENYING THE UPW'S MOTION TO DISMISS COMPLAINT WITHOUT ORAL ARGUMENT OR TESTIMONY AND/OR FOR COSTS AND ATTORNEY'S FEES

ORDER GRANTING THE UPW'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT, AND DENYING THE UPW'S MOTION TO DISMISS COMPLAINT WITHOUT ORAL ARGUMENT OR TESTIMONY AND/OR FOR COSTS AND ATTORNEY'S FEES

On December 28, 2010, Complainant CHRIS KUWADA (Complainant or Kuwada), *pro se*, filed a Prohibited Practice Complaint (Complaint) against Respondent UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO (Respondent or UPW) with the Hawaii Labor Relations Board (Board). The Complaint alleged, *inter alia*, that Kuwada requested information from the UPW regarding the negotiations of furloughs following an arbitration award, but did not receive information or received mis-communications; and, that Kuwada delivered another letter to Dayton Nakanelua at a meeting on October 11, 2010, requesting compliance with Section 7, Bill of Rights for Union Members, including the right for discussion and vote in the decision-making process and the right to pertinent information, but did not receive a response. Kuwada contends that the UPW violated Section 7, Bill of Rights for Union Members; refused to bargain collectively in good faith in violation of Hawaii Revised Statutes (HRS) §§ 89-13(a)(5) and 377-6(4); violated the provisions of the chapter, including the responsibility to represent the interests of all employees without discrimination, in violation of HRS §§ 89-13(b)(4), 89-8, and 378-51; and violated the terms of the collective bargaining agreement in violation of HRS §§ 89-13(a)(8), 89-13(b)(5), 377-6(6), and 377-7(3).

On January 6, 2011, the UPW filed a Motion to Dismiss and/or for Summary Judgment, asserting lack of jurisdiction for untimely filing; failure to state a hybrid claim for relief for breach of a collective bargaining agreement and breach of the duty of fair representation; failure to state a statutory claim for relief; lack of subject

matter jurisdiction over internal affairs of the union; and failure to exhaust contractual remedies.

On January 24, 2011, the UPW filed a Motion to Dismiss Complaint without Oral Argument or Testimony and/or for Costs and Attorney's Fees, asserting that Kuwada failed to oppose the UPW's Motion to Dismiss and/or for Summary Judgment, filed on January 6, 2011, within five days after service of the motion as required by Hawaii Administrative Rules (HAR) § 12-42-8(g)(3)(C)(iii).

On February 3, 2011, the UPW filed a Supplemental Filing in Support of Motion to Dismiss Complaint without Oral Argument Filed January 24, 2011, asserting the Board should grant the motion for lack of prosecution.

On February 14, 2011, Kuwada filed a response to the UPW's motion to dismiss, asserting that he was responding before the fifth working day from the day he received the motion. Kuwada requested that his Complaint be revised to discard the allegation "The employer or the union to refuse to bargain collectively in good faith (HRS 89-13(a)(5) and 377-6(4)" and also the allegation "The employer, the union or employee to violate the terms of the collective bargaining agreement (HRS 89-13(b)(5), 377-6(6), and 377-7(3))." Kuwada stated he wished to continue his allegation "The union to violate the provisions of the chapter, including the responsibility to represent the interests of all employees without discrimination (HRS 89-13(b)(4), 89-8(a), and 378-51)."

After careful consideration of the record and filings in this case, the Board makes the following findings of fact, conclusions of law, and decision and order granting the UPW's Motion to Dismiss and/or for Summary Judgment, and denying the UPW's Motion to Dismiss Complaint without Oral Argument or Testimony and/or for Costs and Attorney's Fees.

FINDINGS OF FACT

1. At all relevant times, Kuwada was or is a public employee of Maui Memorial Medical Center and a member of the UPW, in bargaining unit (Unit or BU) 10. Maui Memorial Medical Center is a facility of the Hawaii Health Systems Corporation (HHSC).

2. At all relevant times, 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 Unit 10, composed of institutional, health, and correctional workers. See HRS § 89-6(10).

3. At all relevant times, Dayton Nakanelua (Nakanelua), was or is the State Director of the UPW.

4. At all relevant times, Lahela Aiwohi (Aiwohi) was or is the Maui Division Director of the UPW.

5. On January 14, 2010, an interest arbitration decision and award was rendered in the impasse over the terms of the Unit 10 collective bargaining agreement effective July 1, 2009, through June 30, 2011.

6. The interest arbitration decision and award authorized the UPW and the employer to meet and confer to draft the terms of the agreement as necessary and appropriate to give effect to the terms of the award.

7. On January 19, 2010, Kuwada sent an e-mail to Melanie Saito (Saito) at upwhawaii.org, which stated:

> Hi Melanie.
> Lot of rumors floating around. Hope to get some facts to relieve some people's stress.
> How would his [sic] affect our [sic] rest of contract?
> Rachel wants to know if there is a draft available?
> People have heard that staff would be sched to work on their day off without overtime pay "to make the 40 hr wk."
> Also would this furlough affect retirement and vac/sick leave # etc?
> Also when, how much with the furloughs.
> Thanks
> Chris

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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.

Oh ps, is there a meeting sched?

8. On January 19, 2010, Saito responded to Kuwada with an e-mail that stated in relevant part:

> No copies of the draft is available. If anyone wants to see it, they can take a look at my copy but I can't allow it to leave my office. The reason being that it is just a draft. We don't know what the furlough days will be or how it will be handled. It is up to the employer to determine the days. Furlough days are considered authorized leave without pay so I do believe it will affect retirement by the number of days. As for your other questions, I will check with Lahela and get back to you.

9. On January 21, 2010, Kuwada sent an e-mail to Saito that stated in relevant part:

> Thanks. I guess this is not private either. My supervisor stated to me that mmmc's plan is to cut hours daily instead of furloughing. Keeping the days of scheduled work. I think, which I talked with Rachel about, is that if there is a contract agreement, the ways of deciphering it will be the question. I hope you guys are prepared for the different variances coming.
> Thanks and good luck.
> [Let] me know if I can help.

10. On January 21, 2010, Saito sent an e-mail to Kuwada that stated in relevant part:

> The arbitrator's decision is not private. I believe it was in the paper last week. I can only assume that the hospital administration is looking at different ways to deal with the furloughs. Like I said it is up to the employer to determine the days. Just remind people that everyone is waiting for the final draft from the arbitrator.

11. On January 22, 2010, Saito sent an e-mail to Rachel Carbonel and Kuwada which stated in relevant part (emphasis original):

> I just wanted to let you know that there have been rumors about HHSC and UPW going back into negotiations about the furloughs. <u>This in [sic] NOT true.</u> The arbitrator's decision

still stands. If anyone, members or administrators are asking about this please refer them to either me or Lahela.

12. After the January 14, 2010, interest arbitration decision and award was rendered, the UPW and the HHSC negotiated a supplemental agreement on furloughs pursuant to HRS §89-6(e).[2] This supplemental agreement is dated April 27, 2010.

13. On April 29, 2010, Kuwada sent an e-mail to Aiwohi that stated in relevant part:

> Missed you following the 1400 hosp meeting yesterday.
> I was wondering about the union's position on the reason why we were not informed of "negotiations" with the hospital re: implementing the furlough.
> I was told by UPW there were no negotiations going on following the arbitration decision. Yet this was stated at the meeting which you were present at.
> More specifically, it was stated that the union "signed off" on this implementation of furlough days.
> Yet again, no communication to the members.
> Finally, I was hoping that with the communication, there would be some consensus with all the members before a decision be made.
> I didn't want to mention this in front of everyone yesterday.
> Thanks

14. On May 2, 2010, and May 4, 2010, Aiwohi responded to the April 29, 2010 e-mail from Kuwada, stating that she would give him a call.

15. On May 3, 2010, Rachel Kalawaia-Carbonel hand-delivered a request/letter to Nakanelua. According to Complaint's attachments, the letter asked for Nakanelua's support in increasing communication between UPW and members at Maui Memorial [Medical Center]; stated that members were

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[2]HRS § 89-6(e) provides:

> In addition to a collective bargaining agreement under subsection (d), each employer may negotiate, independently of one another, supplemental agreements that apply to their respective employees; provided that any supplemental agreement reached between the employer and the exclusive representative shall not extend beyond the term of the applicable collective bargaining agreement and shall not require ratification by employees in the bargaining unit.

either mis-communicated with or left without pertinent information; that UPW agents told them there were no negotiations following the furlough decision, yet on April 30 they were told the UPW and HHSC were negotiating and the UPW signed off on the implementation of the furloughs; that they would all like to participate in, or know about, decisions to be made or continued bargaining; that they would like to be notified of changes in the contract once they occur; and that there are many concerns regarding the tracking and communication of the furlough balances.

16. On August 4, 2010, Kuwada sent an e-mail to Saito, stating in relevant part:

> Per our meeting, could you please follow up with the formal request for increased communication from UPW. This was written, a day and a half petitioned, then hand delivered to Mr. Dayton Nakanelua during a meeting on Oahu by Rachel Carbonel our chief steward sometime in May. I also called to follow up in the end of July leaving a message on Diane's voice mail.
> I/we have not received any response from anyone from UPW as of yet.

17. On August 13, 2010, Kuwada sent an e-mail to Saito that stated in relevant part:

> [J]ust following up if you received this email. I just called Maui UPW a little while ago but was transferred to Honolulu. I did leave a message with [M]r. [N]akanelua's office re the letter and awaiting a response.

18. On August 13, 2010, Saito responded via e-mail, and stated in relevant part:

> I thought it was understood that you would give me a copy of the letter to re-submit to Dayton. If I am to bring this to his attention, I think it would be best to re-submit the letter to him in addition to the inquiry. You can drop a copy to my office or email it to me.

19. There were several other e-mails sent between Kuwada and the UPW in August of 2010, regarding the letter and follow-up inquiry with Nakanelua.

20. On September 2, 2010, Saito sent an e-mail to Kuwada that stated in relevant part:

> I called Dayton's office and left a message on your behalf about the letter you submitted thru Rachel.

21. On October 1, 2010, Kuwada sent an e-mail to Saito that stated in relevant part:

> Following our recent meeting, just checking up on your request to Dayton re communication. Could you cc me communications to him as well.
> Also, I'm getting more signatures for the letter. Will be giving when we send.

22. On October 1, 2010, Saito responded to the e-mail, stating in relevant part:

> I submitted an inquiry to Dayton's office the last time we met, the response shall come from his office. As far as the additional letter, I will be sure that his office gets the letter.

23. On October 8, 2010, Kuwada followed up on the e-mail with Saito, stating in relevant part, "I haven't heard from you since."

24. On October 8, 2010, Kuwada sent an e-mail to "Martti" at upwhawaii.org, that stated in relevant part:

> Just following up. Called Wednesday 10/06/10 and your phone lines were busy or not operational. Called following day Thursday and spoke with vi, left message.
> Please contact me via this email.
> Thanks.

25. Kuwada sent a letter to Nakanelua dated October 11, 2011 [sic], that attached a copy of the May 3, 2010, letter; a copy of the Bill of Rights for

Union Members[3]; and members' signatures; and summarized Kuwada's attempts to contact Nakanelua.

26. On December 28, 2010, Kuwada filed the Complaint against the UPW. The Complaint alleged, *inter alia*, that Kuwada requested information from the UPW regarding the negotiations of furloughs following an arbitration award, but did not receive information or received mis-communications; and, that Kuwada delivered another letter to Nakanelua at a meeting on October 11, 2010, requesting compliance with Section 7, Bill of Rights for Union Members, including the right for discussion and vote in the decision-making process and the right to pertinent information, but did not receive a response. The Complaint contends that the UPW violated Section 7, Bill of Rights for Union Members; refused to bargain collectively in good faith in violation of HRS §§ 89-13(a)(5) and 377-6(4); violated the provisions of the chapter, including the responsibility to represent the interests of all employees without discrimination, in violation of HRS §§ 89-13(b)(4), 89-8, and 378-51; and violated the terms of the collective bargaining agreement in violation of HRS §§ 89-13(a)(8), 89-13(b)(5), 377-6(6), and 377-7(3).

27. On January 6, 2011, the UPW filed a Motion to Dismiss and/or for Summary Judgment (motion to dismiss), asserting lack of jurisdiction for untimely filing; failure to state a hybrid claim for relief for breach of a collective bargaining agreement and breach of the duty of fair representation; failure to state a statutory claim for relief; lack of subject matter jurisdiction over internal affairs of the union; and failure to exhaust contractual remedies.

28. On January 24, 2011, the UPW filed a Motion to Dismiss Complaint without Oral Argument or Testimony and/or for Costs and Attorney's Fees, asserting that Kuwada failed to oppose the UPW's Motion to Dismiss and/or for Summary Judgment, filed on January 6, 2011, within five days after service of the motion as required by HAR § 12-42-8(g)(3)(C)(iii).

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[3]The Bill of Rights for Union Members states:

> Members shall have the right to full participation, through discussion and vote, in the decision-making processes of the Union, and to pertinent information needed for the exercise of this right. This right shall specifically include decisions concerning the acceptance or rejection of collective bargaining contracts, memoranda of understanding, or any other agreements affecting their wages, hours, or other terms and conditions of employment. All members shall have an equal right to vote and each vote cast shall be of equal weight.

29. On February 3, 2011, the UPW filed a Supplemental Filing in Support of Motion to Dismiss Complaint without Oral Argument Filed January 24, 2011, asserting the Board should grant the motion for lack of prosecution.

30. On February 14, 2011, Kuwada filed a response to the UPW's motion to dismiss, asserting that he was responding before the fifth working day from the day he received the motion. Kuwada requested that his Complaint be revised to discard the allegation, "The employer or the union to refuse to bargain collectively in good faith (HRS 89-13(a)(5) and 377-6(4)" and also the allegation, "The employer, the union or employee to violate the terms of the collective bargaining agreement (HRS 89-13(b)(5), 377-6(6), and 377-7(3))." Kuwada stated he wished to continue his allegation, "The union to violate the provisions of the chapter, including the responsibility to represent the interests of all employees without discrimination (HRS 89-13(b)(4), 89-8(a), and 378-51)."

31. Kuwada asserts that the UPW's documents "were mailed to my work place address.[4] The documents were placed in my work place box. I did not 'receive' this Supplemental filing document until approximately 4:30 PM, February 4, 2011." Viewing the facts and inferences in the light most favorable to Kuwada, the non-moving party, the Board finds that Kuwada did not receive the UPW's filings until the close of business on February 4th, 2011 (a Friday). The Board's rules provide that "[a]nswering affidavits, if any, shall be served on all parties and the original and five copies, with the certificate of service on all parties, shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise" (HAR § 12-42-8(g)(3)(C)(iii)). Whether Kuwada received the documents just prior to the close of business or just afterwards, Board rules provide that an answer would have been due by Friday, February 11th, 2011, which would have been the fifth working day after receipt of the documents. Kuwada's response was filed on Monday, February 14, 2011. However, Board rules allow the Board to direct an alternate answering deadline, and the Board does so in the present case. Accordingly, the Board accepts Kuwada's response as timely.

CONCLUSIONS OF LAW

1. 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.

[4]Kuwada's address listed on the Complaint appears to be his work address.

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)).

2. 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)).

3. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter, "relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawai`i 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawai`i 118, 905 P.2d 624.

4. The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id.

5. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. Id.

6. Although withdrawing other allegations, Kuwada stated that he wished to continue his allegation that the UPW violated the provisions of chapter 89, HRS, including the responsibility to represent the interests of all employees without discrimination, in violation of HRS §§ 89-8(a) and 378-51, thus committing a prohibited practice pursuant to HRS § 89-13(b)(4).

7. HRS § 89-8, governing "Recognition and representation; employee participation" provides in relevant part:

> (a) The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination

and without regard to employee organization membership. Any other provision herein to the contrary notwithstanding, whenever two or more employee organizations which have been duly certified by the board as the exclusive representatives of employees in bargaining units merge, combine, or amalgamate or enter into an agreement for common administration or operation of their affairs, all rights and duties of such employee organizations as exclusive representatives of employees in such units shall inure to and shall be discharged by the organization resulting from such merger, combination, amalgamation, or agreement, either alone or with such employee organizations. Election by the employees in the unit involved, and certification by the board of such resulting employee organization shall not be required.

8. HRS § 378-51, governing "Action against labor organization, limitation" provides:

> Any complaint, whether founded upon any contract obligation or for the recovery of damage or injury to persons or property, by an employee against a labor organization for its alleged failure to fairly represent the employee in an action against an employer shall be filed within ninety days after the cause of action accrues, and not thereafter.
>
> Where the alleged failure to fairly represent an employee arises from a grievance, the cause of action shall be deemed to accrue when an employee receives actual notice that a labor organization either refuses or has ceased to represent the employee in a grievance against an employer. Where the alleged failure is related to negotiations or collective bargaining, the cause of action shall be deemed to accrue when the applicable collective bargaining agreement or amendment thereto is executed.

9. HRS § 89-13(b) provides in relevant part:

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

* * *

(4) Refuse or fail to comply with any provision of this chapter[.]

10. With respect to the issue of the UPW negotiating a furlough agreement with the HHSC, and implementing such agreement, without informing its members or allowing member input, the Board finds that the Complaint is untimely.

11. The applicable statutes and rules require that prohibited practice complaints be filed within 90 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)).

12. Similarly, the Board's Administrative Rule, 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.

13. 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").

14. The limitations period begins to run when "an aggrieved party knew or should have known that [the party's] statutory rights were violated." Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978). Kuwada was aware of that the UPW had signed agreements to implement the furloughs on or about April 29, 2010, as indicated in his e-mail to Aiwohi. Accordingly, the Board concludes that the Complaint, filed on December 28, 2010, is untimely.

15. However, assuming for the sake of argument that the Complaint is timely, the Board further concludes that the UPW's negotiation of a "furlough" agreement with the HHSC was authorized by HRS § 89-6(e) which provides in relevant part that "each employer may negotiate, independently of one another, supplemental agreements that apply to their respective employees"; and by HRS § 89-10(a) which provides that ratification is not required for such supplemental agreements. Accordingly, the Board concludes that Kuwada has failed to state a claim against the UPW upon which relief can be granted.

16. With respect to the "Bill of Rights of Members," such rights are an internal, contractual, matter between the union and its members, and do not originate from HRS chapters 89 or 377. Accordingly, the Board lacks jurisdiction to enforce the "Bill of Rights of Members." See, e.g., Wallace Corporation v. Labor Board, 323 U.S. 248, 268, 65 S. Ct. 238, 247 (1944) (neither the National Labor Relations Act nor any other act of Congress expressly or by implication gives to the National Labor Relations Board any power to deal with internal union practices, however unfair they may be to members).

17. With respect to the claim of discrimination, the Board concludes that no illegal discrimination subject to chapter 89, HRS, has been adequately alleged in the Complaint or by facts raised in the pleadings.

18. Accordingly, the Board dismisses the Complaint for the alternate reasons of failure to state a claim upon which relief can be granted and lack of jurisdiction.

19. For these reasons, the Board grants the UPW's Motion to Dismiss and/or for Summary Judgment.

20. The Board rules governing motions, other than those made during a hearing, provide in relevant part:

> The board may decide to hear oral argument or testimony thereon, in which case the board shall notify the parties of such fact and of the time and place of such argument or the taking of such testimony.

HAR § 12-42-8(g)(3)(iv) (emphasis added). It is within the Board's discretion whether or not to hold oral argument on a particular motion. In the present case, the Board exercises its discretion to decide the pending motions without need for oral argument. Given the extensive factual assertions in the parties' pleadings, the Board concludes that is it able to decide the motions without need for oral argument.

21. With respect to the UPW's Motion to Dismiss Complaint without Oral Argument or Testimony and/or for Costs and Attorney's Fees, the Board concludes that the issue of oral argument is moot, given the Board's ruling above. A case is moot when events have so affected the relations between the parties that the two conditions for justiciability – adverse interest and effective remedy – have been compromised. Okada Trucking Co. v. Board of Water Supply, 91 Hawai`i 191, 195-96, 53 P.3d 799, 803-04 (2002).

22. With respect to the issue of Kuwada's alleged failure to respond to the motion to dismiss in a timely manner, the Board's rules allow the Board to direct an alternate answering deadline, and the Board does so in the present case. Accordingly, the Board accepts Kuwada's response as timely. Additionally, even if the Board were to find that Kuwada's response was untimely, the Board would nevertheless conclude that dismissal is not warranted solely for Kuwada's failure to file a timely opposition to the motions to dismiss. See Henry v. Gill Industries, Inc., 983 F.2d 943, 950 (9th Cir. 1993) (holding that if a non-moving party fails to oppose a motion, the court nevertheless may only grant the motion if the motion itself establishes that there is no genuine issue of material fact in dispute).

23. With respect to the issue of attorney's fees and costs, HRS § 377-9(d) provides in relevant part:

> Final orders may dismiss the complaint or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend the person's rights, immunities, privileges, or remedies granted or afforded by this chapter for not more than one year, and require the person to take affirmative action, including reinstatement of

employees and make orders in favor of employees making them whole, including back pay with interest, costs, and attorney's fees. (Emphases added).

24. In Paul's Elec. Service, Inc. v. Befitel, 104 Hawai`i 412, 417, 92 P.2d 494, 499 (2004), the court stated:

> Administrative agencies are created by the legislature, and the legislature determines the bounds of the agency's authority. See Morgan v. Planning Dept., County of Kauai, 104 Hawai`i 173, 184m 86 P.3d 982, 993 (2004) ("'An administrative agency can only wield powers expressly or implicitly granted to it by statute.'" (Quoting TIG Ins. Co. v. Kauhane, 101 Hawai`i 311, 327, 67 P.3d 810, 826 (App. 2003).)).

25. It is clear from the plain reading of HRS § 377-9(d) that in prohibited practice cases, the Board's final order may dismiss the complaint or require a respondent to cease and desist from the unfair labor practice and require affirmative action, and award make whole remedies in favor of employees, including attorney's fees and costs. However, where, as here, the Board dismisses a prohibited practice complaint, the Board concludes that it lacks the authority under § 377-9(d) to award attorney's fees or costs to a respondent against a complainant. Accordingly, the Board denies the UPW's request for attorney's fees and costs.

26. With respect to the Supplemental Filing that asserts lack of prosecution, the Board's rules do not specifically provide for dismissal for failure to prosecute a claim; however, historically, the Board has relied upon the Hawaii Rules of Civil Procedure (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). With respect to motion to dismiss for lack of prosecution, the Board has in the past looked to HRCP Rule 41(b) for guidance (see Board Order No. 2128 (2002) in Flores and Department of Public Safety, et al., Case Nos. CE-10-514 and CU-10-207).

HRCP Rule 41(b) provides in relevant part:

> Involuntary dismissal: Effect thereof.
>
> (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant

may move for dismissal of an action or of any claim against it.

* * *

(3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operate as an adjudication upon the merits.

HRCP Rule 41(b) is analogous to Rule 41(b) of the Federal Rules of Civil Procedure, under which a trial court has the discretion to grant or deny a defendant's motion for dismissal for plaintiff's failure to prosecute. Ellis v. Harland Bartholomew and Associates, 1 Haw. App. 420, 426, 620 P.2d 744, 748 (1980).

In the present case, the Board notes that Kuwada did file a response to the motion to dismiss on February 14, 2011, asserting that he did not receive the UPW's documents until February 4, 2011. Accordingly, as default judgments are not favored (see In re Genesys Data Technologies, Inc., 95 Hawai`i 33, 40, 18 P.3d 895, 902 (2001)), the Board denies the request to dismiss the Complaint for lack of prosecution.

27. For these reasons, the Board denies the UPW's Motion to Dismiss Complaint without Oral Argument or Testimony and/or for Costs and Attorney's Fees.

ORDER

For the reasons discussed above, the Board hereby grants the UPW's Motion to Dismiss and/or for Summary Judgment, and denies the UPW's Motion to Dismiss Complaint without Oral Argument or Testimony and/or for Costs and Attorney's Fees.

DATED: Honolulu, Hawaii, June 8, 2011.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

CHRIS KUWADA v UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO
CASE NO. CU-10-300
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SARAH R. HIRAKAMI, Member

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