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STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

GERALD NAKAMOTO,

Complainant,

and

DEPARTMENT OF DEFENSE, State of  
Hawaii; BRIAN CREMER, Business Agent,  
United Public Workers, AFSCME, Local 646,  
AFL-CIO and UNITED PUBLIC  
WORKERS, AFSCME, LOCAL 646, AFL-  
CIO,

Respondents.

CASE NOS.: CE-01-802  
CU-01-315

ORDER NO. 2010

ORDER GRANTING RESPONDENTS'  
MOTIONS TO DISMISS COMPLAINT

ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS COMPLAINT

On May 2, 2012, Complainant GERALD NAKAMOTO (Complainant or Nakamoto), *pro se*, filed a Prohibited Practice Complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). Complainant, a Building Maintenance Worker Helper BC-05, with the DEPARTMENT OF DEFENSE, State of Hawaii (DOD or Employer) alleged, *inter alia*, that in January 2008, his supervisor told him to perform the work of a higher classification (class), that of Building Maintenance Worker BC-09, and that he performed the work but was not properly compensated. In late 2010 or early 2011, a settlement agreement was drafted to compensate Complainant for performing the higher class of work contingent upon the retraction of his complaints. Complainant alleged that he was told his list of people he complained to was incomplete and claimed that someone else had forged a letter to a general's home address. Complainant further alleged that on several occasions, he requested Respondent UNITED PUBLIC WORKERS, AFSCME, Local 646, AFL-CIO (UPW or Union) to represent him and file a grievance and "the last try" was on April 24, 2012. Complainant also alleged that

he felt he was wronged and pursued other claims, e.g., writing to President Obama, the EOC (sic), etc. He further alleged the matter violated the equal pay act. Complainant alleged that under federal laws, he has two years to make his complaint of not being paid for work he was told to do by his employer.

On May 9, 2012, UPW filed a Motion to Dismiss and/or Summary Judgment with the Board contending that the Complaint should be dismissed for lack of jurisdiction because the Complaint was untimely filed, failed to state a statutory claim for relief, and Complainant failed to exhaust his contractual remedies. UPW alleged that on December 2, 2010, Complainant requested the Union assist him regarding a wage dispute which apparently arose in 2008<sup>1</sup> and UPW State Director Dayton Nakanelua (Nakanelua) assigned Diann Berndt (Berndt), UPW Field Operations Administrator, to review, investigate, and resolve the matter. UPW alleged that Berndt met with employer representatives and reached a tentative resolution which was subject to approval by Complainant, but Complainant refused to agree to the settlement terms. UPW alleged that by letter dated June 9, 2011 to the UPW, Complainant transmitted the tentative settlement he earlier rejected and stated he would have settled based on the enclosed agreement. In the June 9, 2011 letter, Complainant asked Nakanelua to ask the governor to settle and "bury the hatchet for good." UPW alleged that on or about June 22, 2011, the Union requested Employer to consider reopening the settlement agreement, but Colonel Douglas Jackson declined the request and notified UPW which in turn notified Complainant. UPW contended that since Complainant

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<sup>1</sup>Complainant stated, *inter alia*, in the letter addressed to "Dayton (Nakanelua) and Chip (Uwaine)," that at the beginning of 2008 he got a new civilian supervisor who said to continue doing the work and he would get Complainant promoted and that he would get the retroactive pay; that he wrote to the generals in 2009 but received no response; and that between 2009 and 2010, Lt. Col. Mitsuyoshi told his supervisor four times that he was promoted and the pay should be coming. Complainant stated that he contacted Brian of the UPW Maui office and he said he had no grounds for a grievance but Complainant stated that he did the BMW (building maintenance work) work and did not get any pay. Complainant stated that the last time Brian contacted him, Brian said that he contacted Ellie, the personnel director, who said if Complainant could prove he did the BMW work, she would pay him. Complainant indicated that was not the issue; he was told he was promoted to the position and told he would receive retroactive pay. Complainant asked why a grievance could not be filed on those grounds and requested an AFSCME agent to represent him. Ex. 7-1, to Nakanelua's Declaration, dated December 2, 2010.



failed to file a complaint within 90 days from June 22, 2011, the Board lacks jurisdiction over the instant Complaint.

In addition, UPW contended that Complainant's failure to state a hybrid claim for relief under the agreement and required by statute was a breach of duty of fair representation by the union and a violation of the collective bargaining agreement by DOD. In addition, UPW argued that under provisions of the applicable collective bargaining agreement and HRS § 89-8(b), Complainant was entitled to process a grievance on his own. As Complainant failed to file his own grievance on his wage claims, UPW contends that Complainant failed to exhaust the grievance procedure and his Complaint should be dismissed. On May 16, 2012, Complainant filed a response to Respondent's (UPW) Motion to Dismiss and/or for Summary Judgment with the Board and contended, *inter alia*, that the Complaint was filed on a timely basis because there were ongoing episodes of the Union's refusal to file a grievance on numerous requests and the last request was on April of 2012; that UPW was inconsistent as to when and why a grievance should be filed; that Complainant requested UPW under Gary Rodrigues' leadership to file grievances because he was working out of class and should be compensated and that Complainant won each grievance; and that Complainant had asked the Union not to file a grievance based on the settlement agreement but to file on the basis that Complainant was working out of class. Complainant also contended that the settlement agreement was a "setup" because the agreement was contingent upon Complainant's withdrawal of his complaints, and DOD claimed that Complainant wrote to a certain General which Complainant denied. Complainant asked the Board whether UPW had a right to choose if, when, and who they represent in a grievance and contended that UPW overlooked the contract and failed to file a grievance on his behalf and unfairly represented him.

On May 18, 2012, Respondent DOD filed a Motion to Dismiss Prohibited Practice Complaint with the Board. DOD contended that the Complaint should be dismissed because it was untimely filed and that Complainant failed to exhaust his contractual remedies prior to filing the instant Complaint, or, alternatively, that summary judgment should be granted in DOD's favor for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. DOD alleged that Complainant seeks relief from the Board, claiming that DOD committed a prohibited practice by not paying him money he claims is owed to him from the settlement agreement reached in early 2011. DOD claims that Complainant refused to comply with the conditions of the

settlement agreement and knew as of March 24, 2011 that he would not be paid the wages he claims he was owed, and since 90 days elapsed from that time, the instant Complaint is time-barred. In addition, DOD contended that since no grievance was filed by Complainant or on his behalf related to his allegations, Complainant failed to exhaust his contractual remedies and he is barred from bringing the instant Complaint.

Also on May 18, 2012, Complainant filed with the Board his response entitled "RE: Reply to the Dept of Defense response May 11, 2012"<sup>2</sup>.

On May 23, 2012, Complainant filed a document entitled, "Laws of our land My last plea to the honorable board!" Regarding the statute of limitations, Complainant stated that during the 23<sup>rd</sup> Legislative Session, 2005, HB875, HD2 was signed into law. Complainant alleged that the bill states, "Extends claims against the state for unpaid wages to a six-year period. Allows for the payment of interest on claims for unpaid wages or benefits for services rendered by State Employees." Complainant stated further that the First Violation occurred because the Contract signed by the State and UPW, concerning Temporary Assignment sections 23A.04 to 23A.06, does not state that a contingency can be placed on the temporary assignment pay in the Settlement Agreement. Complainant alleged a second violation of 23A.06 which states, "The employer shall compensate the employee within 30 days for T.A." Regarding a possible violation of Contract 15.03 – Right to file a grievance without union representation, Complainant alleged that on "May 17<sup>th</sup>, 2012, went to Maui's UPW office to pick up a grievance application. The secretary went to get one from an agent. She returned and said, "She cannot find one in her files. Tomorrow morning when Lahela comes in, We'll mail one to you, Gerald." Complainant also alleged that on "May 18<sup>th</sup>, 2012, again went to UPW office to get a contract book. One was granted by the secretary. Again told, "Gerald, they cannot find the grievance sheet." Complainant contended that he felt his

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<sup>2</sup>Joseph K. Kim, Brigadier General, Hawaii National Guard filed DOD's response to the Complaint on May 14, 2012. Thereafter, DOD, by and through its counsel, filed a Motion to File an Amended Answer which was granted by the Board in Order No. 2849, Order Granting Respondent State of Hawaii, Department of Defense's Motion for Leave to Amend Answer to Prohibited Practice Complaint, Filed on May 16, 2012. On May 29, 2012, DOD, by and through its counsel, filed an Amended Answer to Prohibited Practice Complaint Filed May 2, 2012 with the Board.



complaint was filed on a timely basis under state law, and that any violation of the Union contract justifies the right of the employee to file a grievance with union representation which was denied.

On May 30, 2012, the Board conducted a prehearing/settlement conference by conference call with Complainant participating by telephone. Counsel for respective Respondents UPW and DOD<sup>3</sup> appeared before the Board. The Board Chair notified the parties that since the hearing on UPW's Motion to Dismiss and/or for Summary Judgment was previously scheduled on June 8, 2012 at 9:00 a.m., the Board would also hear Respondent DOD's Motion to Dismiss at the same time. UPW's counsel then stated that he would stipulate to submit the case to the Board on the filed motion and requested the Board render a ruling without further hearing. Complainant presented additional oral arguments to supplement his written arguments filed with the Board and contended, *inter alia*, that the federal law supersedes the collective bargaining agreement and state law; that the federal law allows 2 years to file for wage claims; that UPW drafted a settlement agreement and the State added contingencies which it had no right to do; that he did not get any of the \$13,223.00 proposed in the settlement agreement; that the instant case involves an ongoing offense so the Complaint is timely; and that Complainant made another plea to UPW on April 24, 2012 to file a grievance and the UPW agent said he would call back but did not. Complainant then stated that he would submit the case to the Board without further hearing. DOD's counsel indicated that she would appear at the hearing scheduled on June 8, 2012 at 9:00 a.m. to argue its Motion to Dismiss Prohibited Practice Complaint filed on May 18, 2012. The Board advised DOD's counsel to notify the Board if counsel agreed to have the case decided without further oral argument. Complainant indicated that he would make the same oral arguments to the DOD's motion that he previously made for the UPW's Motion to Dismiss.

By letter dated May 30, 2012, DOD's counsel requested the Board rule on its Motion to Dismiss Prohibited Practice Complaint without a further hearing, based on its Motion and Memorandum in Support of Motion, filed on May 8, 2012, as well as any pleadings filed by Complainant in response to said

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<sup>3</sup>Deputy Attorney General Claire Chinn appeared for counsel of record Deputy Attorney General Anne Marie Puglisi.

Motion and incorporating Complainant's arguments made at the prehearing conference.

On June 4, 2012, pursuant to DOD's request, the Board issued a Notice of Taking Motion Off of the Hearing Calendar (Notice).

By letter dated July 27, 2012 and filed with the Board on July 30, 2012, Complainant requested the Board put the case on the calendar as soon as possible for the following reasons, i.e., that Congresswoman Hirono's staff made an inquiry to the DOD and Complainant referenced a letter he received that mediation would benefit all parties; that Complainant agreed to mediation but there was no response (from DOD); that an outline of what transpired was requested by federal officials involved with fair labor employment; and that personnel tied to the case had been leaving the department, etc.

Based on a review of the record and consideration of the arguments presented, the Board makes the following findings of fact and conclusions of law and hereby grants Respondents' motions to dismiss complaint.

#### FINDINGS OF FACT

The Board makes the following Findings of Fact. If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

1. For purposes of this Order and for consideration of the UPW's Motion to Dismiss and/or for Summary Judgment, and the DOD's Motion to Dismiss Prohibited Practice Complaint, the Board accepts the allegations in the Complaint as true and as the party against whom the motions are made, the Board views the allegations in the light most favorable to Complainant.
2. Complainant was, for all times relevant, a Building Maintenance Worker Helper BC-05, employed by the DOD and a public employee<sup>4</sup> within the meaning of Hawaii Revised Statutes (HRS)

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<sup>4</sup> HRS §89-2 defines "employee" or "public employee" as:

"Employee" or "public employee" means any person employed by a public employer, except elected and appointed officials and other



§ 89-2, included in bargaining unit (Unit) 01, as set forth in HRS § 89-6.<sup>5</sup>

3. Respondent DOD was for all times relevant, an employer,<sup>6</sup> within the meaning of HRS § 89-2, of employees of the DOD.
4. Respondent UPW was, for all times relevant, the exclusive representative,<sup>7</sup> within the meaning of HRS § 89-2, for Unit 01.

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Employees who are excluded from coverage in section [89-6(f)].

<sup>5</sup>HRS § 89-6 provides the composition of Unit 01 and states in part:

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

(1) Nonsupervisory employees in blue collar positions; . . .

<sup>6</sup>HRS § 89-2 defines “employer” or “public employer” as:

“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. 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.

<sup>7</sup>HRS § 89-2 defines “exclusive representative” as:

“Exclusive representative” means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees

Respondent BRIAN CREMER was, for all times relevant, a business agent for UPW.

5. UPW and the State of Hawaii are parties to a collective bargaining agreement (CBA) for Unit 01.
6. Complainant alleged in his Complaint filed on May 2, 2012 as follows: In January 2008, Complainant's supervisor told him to do the higher class of work of Building Maintenance Worker BC-09, with the intent to promote him. In November 2008, Complainant's supervisor called and said that the paperwork for retroactive pay was on the boss's desk to be signed. General Ishikawa did not sign the promotion papers. A settlement agreement was drafted by the employer in late 2010 or early 2011 whereby Complainant would receive \$13,323.00 contingent upon him withdrawing his letters of complaint. Thereafter, Complainant wrote to President Obama who assigned the matter to an investigator who determined that President Obama had no jurisdiction over Complainant. Complainant was returned to his Building Maintenance Worker Helper duties. Complainant alleged that he asked UPW numerous times to file a grievance based on the fact that he was told to do the work but received no compensation, with the "last try" on April 24, 2012. Complainant also filed with EOC (sic) and alleged the (Employer's) actions violated the equal pay act. Complainant further alleged that UPW felt the dispute ended with the settlement agreement.
7. UPW State Director Nakanelua stated in his May 8, 2012 Declaration filed in support of UPW's Motion to Dismiss and/or for Summary Judgment, that on or after December 2, 2010, Complainant requested Nakanelua review, investigate, and resolve a wage dispute between Nakamoto and the State of Hawaii which arose in 2008. Nakanelua asked Berndt to review, investigate, and possibly resolve the matter. Id. Berndt met with employer representatives and reached a tentative resolution of the dispute which was subject to Complainant's approval. Id. Unfortunately,

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in an appropriate bargaining unit without discrimination and without regard to employee organization membership.



Complainant refused to agree to the settlement terms initially. Id. On or about June 9, 2011, Nakanelua received Complainant's request regarding the proposed settlement. Id. Nakamoto stated, "So I ask, if you could ask Gov Abercrombie settle and we bury the hatchet for good. My word as a Christian." Ex. 8 attached to Nakanelua Declaration, dated May 8, 2012. On or about June 22, 2011, UPW requested DOD reopen the matter, and DOD refused to extend the settlement offer that Complainant had earlier refused. See, Nakanelua Declaration, dated May 8, 2012. Complainant was informed of DOD's refusal to reconsider the matter and the decision not to accept the settlement terms. Id. Thereafter, on June 27, 2011, Nakanelua received a voice message from Complainant<sup>8</sup> and on June 28, 2011, the Maui division sent Nakanelua a message that had been left by Complainant on June 22, 2011.<sup>9</sup> Id.

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<sup>8</sup>A transcript of the voice message for Nakanelua from Complainant, 3:09 p.m., June 27, 2011 stated:

Hi Dayton this is Gerald Nakamoto from Maui [telephone number deleted.]

I didn't have to go the Department of Labor. President Obama is going to personally investigate the case why I'm not getting paid for my furlough and why the furlough's going be rescheduled.

So there's no problem, I don't have to go to the Department of labor and wage a complaint. The President is going to take care of it

OK. Thanks a lot. [Emphasis added.]

Ex. 10-1, attached to Declaration of Nakanelua, dated May 8, 2012.

The foregoing voicemail message refers to payment for furloughs and why the furlough is being rescheduled.

<sup>9</sup> The following message was left by Complainant in the UPW's Maui general mailbox and forwarded by a business agent:

A message for Brian – Uh, this is Gerald, um, its uh, 10 o'clock, un eastern time. Yeah, I got some instructions that eh, either you file a grievance or they told me go to the Department of Labor Relations and if you don't want the, my employer to pay me the overtime or whether they said try to go after the Union to get it then the Department of Labor will try to help, the Department of Labor Relations will help me. Get back to me today I am giving you a chance Brian, help us out either you can do what the contract says or you can f--- up like you have been f-----up, ok bye. [Emphasis added]

8. Ellen Ichishita (Ichishita), Departmental Personnel Officer for DOD stated in her May 19, 2012 Declaration filed in support of DOD's Motion to Dismiss, that Complainant did not make his claim for unpaid wages within the time frame required by the Unit 01 collective bargaining, but in January 2011, UPW and DOD attempted to resolve the issue by drafting a proposed settlement agreement. The settlement agreement attempted to resolve Complainant's claims for work performed at a higher class from November 3, 2008 through August 31, 2010, totaling \$13,323. Id. Under the terms of the settlement, Complainant was required to write letters of retraction to various entities but he refused to complete the condition. Id. Thus, the settlement agreement was never executed. Id. Ichishita stated that on March 24, 2011, she and Berndt conducted a conference call with Complainant regarding the conditions of the settlement, and that he refused to comply and Complainant was advised that he would not be compensated. Id. DOD records show that the UPW filed similar formal grievances on behalf of Complainant on February 6, 2002<sup>10</sup> and November 17, 2005 for temporary assignment pay relating to work performed by

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<sup>10</sup> The Board notes that the 2002 Grievance Form refers to a similar grievance filed on behalf of Complainant January 5, 1996 for compensation for a Temporary Assignment to Building Maintenance Worker. Ex. 3, attached to the Declaration of Ellen Ichishita, dated May 8, 2012. The Grievance Form states as follows:

- b. In 1995, the Department of Defense abolished the Building Maintenance Worker Position assigned to the island of Maui. From November 1 to December 20, 1995, the grieving party performed the duties of a Building Maintenance Worker. On January 5, 1996, a grievance, CC/96/1, was filed on behalf of Gerald Nakamoto citing the Employers failure to pay the grieving party for Temporary Assignment performed as a Building Maintenance Worker. Grievance case CC/96/1 was settled with the remedy being granted by the Employer on January 16, 1996.



Complainant as a Building Maintenance Worker without proper compensation which were successfully resolved. Id.

9. The Board takes notice that the applicable collective bargaining agreement includes provisions on Compensation for Temporary Assignments in 23A.04 and provides in part as follows:

23A.04a.1 Except as provided in Section 23A.05, the basic rate of pay of an Employee who performs temporary assignment involving a position assigned to a class in a higher pay range in the salary schedule shall be adjusted as provided in Section 23A.08b except that any temporary differential (TD) as provided in Section 23A.07 which the Employee was receiving shall not be added to the basic rate of pay but shall be retained by the Employee while performing the temporary assignment.

10. The applicable Unit 01 collective bargaining agreement includes provisions on grievances and provides in part as follows:

15.10 FORMAL GRIEVANCE

In the event the grievance is not satisfactorily resolved on an informal basis, the grieving party and/or the Union may file a formal grievance by completing the grievance form provided by the Union.

15.11 STEP 1 GRIEVANCE

The grievance shall be filed with the department head or the department head's designee in writing as follows:

15.11a. Within eighteen (18) calendar days after the occurrence of the alleged violation. The term "after the occurrence of the alleged violation" as provided in Section 15. 11a shall mean:

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15.11a.4. Other Alleged Violation(s): Eighteen (18) calendar after the alleged violation (s) occurred unless the violation(s) are continuing as provided in Section 15.11b.

15.11.b. Within eighteen (18) calendar days after the alleged violation first became known to the Employee or the Union if the Employee did not know of the alleged violation if it is a continuing violation.

15.11 c. Within eighteen (18) calendar days after the alleged violation is discovered by the grieving party and/or the Union if it is a payroll computational error.

11. Based on the record and viewing the allegations of the Complaint as true and construed in the light most favorable to Complainant, the Board finds that the gravamen of the Complaint is that Complainant claims he was not compensated for work performed by a higher classification from approximately November 3, 2008 through August 31, 2010. Previously, UPW filed grievances for temporary assignment pay on Complainant's behalf on January 5, 1996, February 6, 2002 and November 17, 2005, and Complainant received compensation for the temporary assignments. In this instance, neither Complainant nor UPW filed a grievance against DOD regarding the failure to compensate Complainant for the work performed from 2008-2010, within the timelines of the agreement, i.e., 18 days from the occurrence of the violation of working out of class, the last date being August 31, 2010. However, because of Complainant's prior grievances filed on similar grounds, the Board finds that Complainant knew or should have known that he or his union should have filed a grievance within 18 days after he worked out of class and was not compensated accordingly.

The Board finds that in December 2010, Complainant requested assistance from Nakanelua for a Union agent to represent him, and



Nakanelua assigned Berndt to approach the DOD for a resolution. In late 2010 or early 2011, the UPW and DOD agreed to resolve the dispute and Berndt drafted a proposed settlement with DOD to compensate Complainant in the amount of \$13,323.00 contingent upon Complainant's agreement to 1) provide a list of all recipients (and addresses) of his letters that make any mention or inference of unfair treatment by the employer with regard to this matter; 2) write letters of retraction, to include any complaints filed with the Equal Employment Opportunity Commission, which he will have ready for mailing by the union to all recipients, and 3) provide copies of the letters of retraction. According to the record, Complainant did not agree to the conditions of the Settlement Agreement and on March 24, 2011, Berndt and Ichishita notified Complainant in a conference call that the settlement was not executed and DOD would not pay him any monies. Nothing more transpired regarding the proposed settlement until June 9, 2011, when Complainant again contacted Nakanelua for assistance regarding the settlement. On June 22, 2011, Berndt requested the DOD reopen the matter, but DOD refused. Complainant was informed on or about June 22, 2011 that DOD refused to reopen the matter. The records of telephone messages Complainant left at UPW in late June 2011 concerned overtime and furloughs. The Board finds that all of these events occurred more than 90 days prior to the filing of the instant Complaint on May 2, 2012.

While Complainant stated in his Complaint that he requested UPW to represent him and file a grievance on numerous occasions and the "last try" was on April 24, 2012, there is no evidence in the record to support Complainant's allegation that he requested UPW to file a grievance on April 24, 2012. Nevertheless, the collective bargaining agreement provides that either Complainant or the union may file a grievance but the grievance must be filed within 18 days from the alleged violation. As stated above, Complainant last worked out of class on or about August 31, 2010. Thus, requesting the union to file a grievance on or about April 24, 2012 on the alleged temporary assignment which ended in August 2010 does not give rise to a new cause of action against the UPW. The Board therefore finds that the

instant Complaint filed against the UPW on May 2, 2012 is untimely.

12. As against the DOD, the Board finds that the Complainant failed to file a timely grievance against the DOD for failing to pay him his temporary assignment pay.

### CONCLUSIONS OF LAW

The Board makes the following Conclusions of Law. If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

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. Pohlson, 111 Hawai'i 74, 81, 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9<sup>th</sup> 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 affidavits and testimony, to resolve factual issues concerning the existence of jurisdiction. Id. (citing McCarthy v. United States, 850 F.2d 558, 560 (9<sup>th</sup> Cir. 1988); 5A C. Wright & Miller, Federal Practice and Procedure § 1350, at 213 (1990).
3. HRS § 89-14, provides that any controversy concerning prohibited practices may be submitted to the Board in the same manner and with the same effect as provided in HRS § 377-9, and the Board shall have exclusive original jurisdiction over such a controversy.
4. HRS § 377-9(1) states that no complaint "shall be considered unless filed within ninety days of its occurrence." Hawaii Administrative Rule § 12-42-42 provides that a complaint for prohibited practices may be filed by a public employee "within ninety days of the alleged violation."



5. The ninety (90)-day statute of limitations is a jurisdictional requirement which the Board has no authority to waive. 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").
6. The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. 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 (8<sup>th</sup> Cir. 1978).
7. Complainant contended that state law provides a six-year statute of limitations for wage claims against the State and federal labor statutes afford a two-year statute of limitation to file wage claims. As set forth above, Complainant invokes the Board's jurisdiction by filing a prohibited practice complaint which is governed by HRS §§ 89-14 and 377-9, which clearly require complaints to be filed within 90 days of the occurrence of a prohibited act.
8. At the prehearing/settlement conference held on May 30, 2012, Complainant also argued that the instant case involves an ongoing offense, so his Complaint is timely. In reviewing the allegations of the Complaint, clearly there is no continuing violation as the dates when Complainant worked out of his class were discrete events which occurred on or between November 3, 2008 and August 31, 2010. The DOD's assignment of work out of Complainant's class did not continue to the present. *Cf. Garner v. State*, 122 Hawai'i 150, 223 P.3d 215 (Haw. Ct. App. 2009).

9. Having reviewed the allegations of the complaint in the light most favorable to the Complainant, the Board nevertheless finds that the claims presented are untimely since the Complaint was filed more than 90 days after Complainant knew or should have known that any cause of action under HRS Chapter 89 accrued. The alleged underpayments of wages were made for work performed from approximately November 3, 2008 through August 31, 2010. The Board finds that Complainant is familiar with the Unit 01 grievance procedure because UPW filed grievances in 1996, 2002 and 2005 on his behalf for temporary assignment pay under similar circumstances. Here, Complainant requested assistance from the UPW in December 2010 and while there is no evidence of a grievance filed, Berndt was able to propose a settlement agreement which provided for \$13,323.00 for temporary assignment pay for Complainant. Complainant was offered the settlement in early 2011 but refused to comply with the conditions of the settlement agreement. On March 24, 2011, Berndt and Ichishita notified Complainant that the settlement was not executed, and DOD would not pay him any monies. Thereafter, on June 9, 2011, Complainant contacted Nakanelua for assistance regarding the settlement and on June 22, 2011, the UPW requested DOD to reopen the matter but DOD refused. Complainant was informed on or about June 22, 2011 that DOD refused to reopen the matter. Complainant failed to file a complaint against the UPW within 90 days from June 22, 2011.

Complainant further alleged that his last request to UPW to file a grievance was on April 24, 2012 and the agent said he would call back but did not. As discussed above, the applicable Unit 01 collective bargaining agreement provides that a grieving party or the union may file a grievance with the employer within 18 calendar days after the occurrence of the alleged violation. Complainant knew or should have known based upon his prior grievances, that he or his union should have filed a grievance within 18 days after he worked out of class and was not properly compensated. Thus, the Board does not find that Complainant's telephone call to the UPW on April 24, 2012 tolled the statute of limitations or created a new cause of action against the UPW under the facts presented.



As to the DOD, Complainant seeks wages from the settlement agreement which was drafted in early 2011, and Complainant knew that he would not be paid the wages on March 24, 2011. The instant Complaint was filed more than 90 days after Complainant knew he would not be paid and is therefore time-barred.

Based on the foregoing, the Board lacks jurisdiction over this Complaint.

10. HRS § 89-8(b) provides in part:

(b) An individual employee may present grievance at any time to the employee's employer and have the grievance heard without intervention of an employee organization; provided that the exclusive representative is afforded the opportunity to be present at such conferences and that any adjustment made shall not be inconsistent with the terms of an agreement then in effect between the employer and the exclusive representative.

11. The Unit 01 collective bargaining agreement provides in part:

15.03a. An Employee may process a grievance and have the grievance heard without representation by the union except as provided in Section 15.18.

12. A complaint for a prohibited practice should be dismissed if the Complainant is unable to establish that he has exhausted contractual remedies through a grievance procedure of the applicable collective bargaining agreement. Poe v. Hawaii Labor Relations Bd., 97 Hawai'i 528, 40 P.3d 930 (2002). The Court stated:

In labor relations law, the general rule is that an employee is required to exhaust contractual remedies before bringing suit. See Hokama, 92 Hawai'i at 272, 900 P.2d at 1154, Santos, 64 Haw. at 655, 646 P.2d at 967; Marshall v. University of Hawai'i, 9. Haw. App. 21, 30, 821 P.2d 937, 943 (1991); Winslow, 2 Haw. App. at 55, 625 P.2d at 1050. Thus, "[i]ndividuals who sue their employers for a breach of a collective bargaining agreement must first attempt exhaustion

of remedies under that agreement.” (cite omitted). 97  
Hawai`i at 536, 40 P.3d at 938.

13. As no grievance was filed with DOD regarding the nonpayment of temporary assignment pay as alleged in this Complaint, the Board concludes, in the alternative, that Complainant failed to exhaust his contractual remedies and the instant Complaint against the DOD should be dismissed.

ORDER

Accordingly, based on the foregoing, the Board grants UPW's Motion to Dismiss and/or for Summary Judgment, filed on May 9, 2012 and Respondent Department of Defense's Motion to Dismiss Prohibited Practice Complaint, filed on May 18, 2012.

DATED: Honolulu, Hawaii, May 1, 2013.

HAWAII LABOR RELATIONS BOARD



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JAMES B. NICHOLSON, Chair



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SESNITA A.D. MOEPONO, Member



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ROCK B. LEY, Member

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Gerald Nakamoto

Herbert R. Takahashi, Esq.

Anne Marie Puglisi, Deputy Attorney General