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Case No. CE-13-841

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of AQUILINO R. IDAO, Complainant, and DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, Office of Consumer Protection, State of Hawaii, Respondent.	CASE NO. CE-13-841 ORDER NO. 3082 ORDER CONSOLIDATING CASES FOR DISPOSITION; DENYING RESPONDENT STATE OF HAWAII, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS' MOTION TO DISMISS IN LIEU OF ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED JUNE 2, 2014; DISMISSING THE PROHIBITED PRACTICE COMPLAINT FOR UNTIMELINESS, OR ALTERNATIVELY ON OTHER GROUNDS; AND ISSUING, IN PART, AND REFUSING, IN PART, TO ISSUE A DECLARATORY RULING
In the Matter of AQILINO R. IDAO, Petitioner.	CASE NO. DR-13-107

ORDER CONSOLIDATING CASES FOR DISPOSITION; DENYING RESPONDENT STATE OF HAWAII, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS' MOTION TO DISMISS IN LIEU OF ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED JUNE 2, 2014; DISMISSING THE PROHIBITED PRACTICE COMPLAINT FOR UNTIMELINESS, OR ALTERNATIVELY ON OTHER GROUNDS; AND ISSUING, IN PART, AND REFUSING, IN PART, TO ISSUE A DECLARATORY RULING

I. FACTUAL AND PROCEDURAL BACKGROUND

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.

A. CE-13-841 Prohibited Practice Complaint

On June 2, 2014, Complainant AQUILINO R. IDAO (Mr. Idao or Complainant/Petitioner), self-represented litigant (SRL or *pro se*) filed a Prohibited Practice Complaint (Complaint) with the Hawaii Labor Relations Board (Board) against Respondent DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, Office of Consumer Protection, State of Hawaii (DCCA, Department, or Respondent). The Complaint alleges violations of Hawaii Revised Statutes (HRS) § 89-13(2) and (7) and states "REFER TO PAGE #6" and "SEE ITEMS ON PAGES #5 THROUGH #355." In Paragraph 6 of the Complaint, which requests complainants "Provide a clear and concise statement of any other relevant facts[,]" the Complaint states "10 PAGES MEMO DATE 6/2/14" and "SEE ATTACHED 3a, 3b, 3c, 3d, 3e, 3f, 3g [sic] 3h & 3i."

Attachments to the Complaint include, but are not limited to: 1) a June 2, 2014 Memorandum to the Board from Mr. Idao regarding prohibited practice complaint; 2) emails between Complainant and DCCA Personnel Officer Patrick Chen (Chen), Office of Consumer Protection (OCP) Executive Director Bruce Kim (Kim), and Internet Crime Analyst for the National White Collar Crime Center Angel Heldreth; 3) an October 21, 2013 Memorandum to Mr. Idao from Chen regarding the October 15, 2013 Internal Complaint with an attached Personnel Complaint Form, filed by Mr. Idao and dated October 15, 2013 citing misapplication of Hawaii Constitution Article (Art.) XVI, § 4 Oath of Office (Internal Complaint); 4) an October 15, 2013 Memorandum to Chen from Mr. Idao regarding failure to swear personnel in as public/police officers; 5) an August 23, 2013 Hawaii Government Employees Association (HGEA or Union) Fact Sheet filed by Mr. Idao, accompanied by an August 23, 2013 Memorandum to HGEA and the Board from Mr. Idao regarding prohibited practices[i]; 6) an August 15, 2013 Memorandum to Chen and an August 14, 2013 Memorandum to Kim regarding a complaint of a violation of HRS Chapter [sic] 76-16(d) for hiring of investigators not meeting Civil Service Standards of Recruitment; 7) an April 22, 2013 Memorandum to Lopez and DCCA Deputy Director Uchida (Uchida) from Mr. Idao regarding DCCA complaints and enforcement officer and Consumer Resources Center (CRC) responsibility for Residential Landlord Tenant Center (LTC) Hotline; 8) an October 22, 2012 Memorandum to file documenting a conference with Aku Idao and Edna Kelley regarding performance conference; 9) a September 6, 2012 complaint to State of Hawaii Auditor Marion Higa (Higa) regarding grievances over departmental law enforcement duties and responsibilities; 10) a September 5,

2012 complaint to Lopez, Kim, and DCCA-OCP Attorney Landon Murata (Murata) from Mr. Idao regarding grievances; 11) a September 4, 2012 Memorandum to Mr. Idao from Kim regarding FINCEN Requests; 12) a July 10, 2012 Memorandum from DCCA Director Keali'i Lopez (Lopez) notifying Mr. Idao that his complaint to Christopher Young (Young) of the Attorney General's Office is "in the nature of an employment dispute and an internal matter for the DCCA," which will be investigated; 13) a May 22, 2012 Memorandum to Young from Mr. Idao regarding definition and opinion of DCCA law enforcement responsibilities; 14) a March 2, 2012 Memorandum to Kim from Mr. Idao regarding DCCA law enforcement duties and responsibilities; 15) a February 23, 2012 Memorandum to Lopez and Kim from Mr. Idao regarding department law enforcement duties and responsibilities; 16) a January 18, 2012 and a February 2, 2012 Memoranda to Ernest Wakukawa, HGEA Unit 13 Shop Steward (Wakukawa), from Mr. Idao regarding his grievance[ii] for violations of Art. 17D, HGEA CBA and his investigation of Hawaii Revised Statutes (HRS) violations (Wakukawa Memorandum); 17) a January 13, 2012 Memorandum to Lopez from Mr. Idao regarding DCCA violations of HRS, Hawaii Organic Act, Chapter [sic] 26-9(b), 487-1, and 487-10 and Civil Service Standards and Requirements; 18) a January 10, 2012 Memorandum to Lopez from Mr. Idao regarding DCCA duties and responsibilities; 19) a January 6, 2012 and a January 5, 2012 Memoranda to Lopez from Mr. Idao regarding law enforcement responsibilities of OCP; 20) a January 3, 2012 Memorandum to Kim from Mr. Idao regarding OCP major duties and responsibilities; 21) a December 29, 2011 Memorandum to Kim from Mr. Idao regarding the CRC; and 22) an August 16, 2011 Memorandum to Kim from Mr. Idao regarding request for updated DCCA identification (ID) and OCP Commission ID cards.

Those attachments establish that Mr. Idao made numerous complaints to DCCA including but not limited to: 1) the Internal Complaint not only claiming a violation of the Hawaii Constitution, Art. XVI, § 4 OATH OF OFFICE for failing to swear in personnel as public/police officers but also HRS and Civil Service Rules violations on various grounds and a failure to provide valid ID cards, certificates, proper training, certification, and equipment to perform the duties of the job; 2) an August 23, 2013 complaint regarding indifference to the HGEA CBA, Art.17.D. and other HRS violations for an August 14, 2013 performance appraisal; 3) an August 15, 2013 complaint to Chen and the August 14, 2013 complaint to Kim regarding violation of HRS Chapter [sic] 76-16(d) for hiring of investigators not meeting Civil Service Standards of Recruitment; 4) an April 22, 2013 complaint to Lopez and Uchida regarding the CRC LTC; 5) a September 6, 2012 complaint to Higa regarding grievances over departmental law enforcement duties and responsibilities; 6) a September 5, 2012 complaint to Lopez, Kim, and Murata regarding grievances; 7) a July 10, 2012 Memo from Lopez to Mr. Idao regarding an Idao complaint referred by Attorney General; and 8) a January 18, 2012 Memo to State of Hawaii and HGEA filing a grievance regarding Unit 13 CBA and HRS violations.

Those attachments further substantiate that Mr. Idao made multiple requests for review and appropriate action, including but not limited to: 1) the Internal Complaint requesting recognition and swearing in all attorneys and investigators according to HRS and Civil Service Rules, provision of valid commission cards and law enforcement officers ID cards, certificates, proper training, certification, and equipment to perform duties and responsibilities of the job; 2) the September 6, 2012 complaint to Higa requesting a DCCA audit; 3) a May 22, 2012 request by Mr. Idao to Young for advice and counsel to DCCA administrators regarding DCCA definition and opinion of law enforcement responsibilities; 4) a March 2, 2012 request to Kim and a February 23, 2012 Memo to Lopez for recognition of DCCA law enforcement duties and responsibilities and appropriate action and performance of functions, duties, and responsibilities; 5) the Wakukawa Memoranda requesting action regarding HGEA CBA, Art. 17 D and HRS violations; 6) a January 24, 2012 Memo to Lopez and other DCCA management regarding the LTC requesting that the DCCA complaints and enforcement officer and the CRC should be responsible for facilitating and administering the LTC Hotline; 7) January 6, 2012 and January 13, 2012 Reports of Investigation requesting action regarding problems and resolutions of certain deficiencies in law enforcement and intake of consumer complaints; 8) a January 13, 2012 Memo to Lopez and other DCCA management regarding HRS, Hawaii Organic Act and HRS violations and recommendations requesting appropriate action to perform duties, functions, and responsibilities; 9) a January 10, 2012 Memo to Lopez and other DCCA management requesting action regarding OCP duties and responsibilities; 10) a January 6, 2012 Memo to Kim regarding OCP law enforcement responsibilities requesting appropriate action to perform duties, functions, and responsibilities; 10) a January 5, 2012 Memo to Lopez and other DCCA management regarding OCP requesting appropriate action to perform duties, functions, and responsibilities; 11) a January 3, 2012 Memo to Kim requesting action regarding OCP major duties and responsibilities; 12) a December 29, 2011 Memo to Kim regarding CRC requesting certain remedies; and 13) an August 16, 2011 memo to Kim requesting an update of DCCA ID and OCP commissioned ID cards.

Based on the attachments, the specific "laws, regulations, and employee rights contrary to Hawaii Revised Statutes Chapter 89" relied on by Mr. Idao for this Complaint and the above-referenced complaints and requests appear to include, but are not limited to, the following: HRS §§ 26-9, 26-14.6, and 26-39; HRS §§ 28-4, 28-8.3; HRS Chapter 76, HRS §§ 76-13, HRS §76-16; HRS § 92-17; HRS §353C-4; HRS § 431:2-402; HRS §§ 480-1, 480-2, 480-3, 480-3.1, 480-15, 480-15.1, 480-16, 480-20, and 480-22; HRS§ 481-1; HRS §§ 487-1, 487-2, 487-3, 487-5, 487-6, 487-7, 487-8, 487-9, 487-10, 487-13, 487-14, 487-15, and 487-16; HRS §§ 521-3, 521-64, 521-74.5, and 521-77; HRS § 634-21; HRS §§ 701-118; HRS §§ 702-201, 702-202, 702-203, 702-204, 702-206, 702-212, 702-213, and 702-214; HRS §§703-301 and 703-303; HRS §710-1000; HRS §712A-7; HRS §§ 712-1270, 712-1270.3; The Constitution of the State of Hawaii (Hawaii Constitution or Haw. Const.) Art. I, §5 Due Process and Equal Protection; Art. XIII, § 1 and § 2 Public Employees; Art. XIV Code of Ethics; Art. XVI General and Miscellaneous

Provisions, Civil Service § 1, Oath of Office § 4 and Intergovernmental Relations § 5; Organic Act § 1 Definitions and § 19 Oath of office; and the Law Enforcement Officers Safety Act (LEOSA) of 2004, 18 U.S.C. 926B and 926C.

On June 4, 2014, the Board issued a Notice to Respondent of Prohibited Practice Complaint; Notice of Prehearing/Settlement Conference and Notice of Hearing on the Prohibited Practice Complaint. The Notice scheduled the Prehearing/Settlement Conference for June 19, 2014 and the hearing on the merits of the case for July 7, 2014.

On June 5, 2014, the Board issued an Errata to correct the hearing date to July 9, 2014.

On June 16, 2014, DCCA filed Respondent State of Hawaii, Department of Commerce and Consumer Affairs' Motion to Dismiss in lieu of [sic] Answer to Prohibited Practice Complaint Filed June 2, 2014 (Motion).

On June 20, 2014, the Board issued a Notice of Motion Hearing, Waiver of § 377-9(b), Hawaii Revised Statutes and § 12-42-46(b), Subchapter 3, Chapter 42, Title 12, Hawaii Administrative Rules; Notice of Hearing and Deadlines (Notice of Motion Hearing).

On June 20, 2014, Complainant filed Complainant's Memorandum in Opposition to Respondent's [sic] State of Hawaii, Department of Commerce and Consumer Affairs Motion to Dismiss in Leiu [sic] of Answer to Probibited [sic] Practice Complaint Filed June 2, 2014 (Memorandum in Opposition).

On June 26, 2014, the Board filed an Errata to its Notice of Motion Hearing correcting the date of the motion hearing to July 30, 2014.

On July 3, 2014, DCCA filed Respondent's Reply Memorandum to Complainant's Memorandum in Opposition to State of Hawai'i, Department of Commerce and Consumer Affairs' Motion to Dismiss in Lieu of Answer to Prohibited Practice Complaint Filed June 2, 2014 (Reply Memorandum).

On July 30, 2014, the Board held a hearing on the DCCA's Motion.

B. DR 13-107 Petition for Declaratory Ruling

On July 29, 2014, Mr. Idao filed a Petition for Declaratory Ruling (DR Petition) with the Board alleging in paragraph 3:

> Petitioner is COMPLAINANT and the reason for Submission is that it has been determined that on December 8, 2014, the Respondents [sic] Written Notification and Ruling on Complainants [sic] internal Complaint filed on 10/15/13 indicates that the Respondents failed to properly apply HRS 74, as well as did not investigate Complainants Other Adverse Actions that (could not) be processed through COLLECTIVE BARGAINING PROCESS.

In response to DR Petition, paragraph 4 requesting that the Petitioner designate the specific HRS Chapter 89 or Chapter 377 provision, or the Board's Administrative Rule or Order, the applicability of which is in question, Mr. Idao designated HRS §§ 89-1 and 76-1. The DR Petition had attached a July 28, 2014 Memorandum to the Board with a subject of Memorandum in support [sic] for Petition for Declaratory Ruling.

In response to DR Petition, Paragraph 6, requesting a clear and concise statement of the position or contentions of the Petitioner as to the applicability of the above position, Mr. Idao states:

> On October 15, 2013, Complainant filed an Internal Complaint on Department of Commerce and Consumer Affairs, Personnel Complaint Form, and checked Type of Complaint; Other Adverse Employment Action that Cannot be Processed Through Collective Bargaining Process:
>
> In Box A. Cite the Specific personnel law, rule, or written policy, which you allege has been misinterpreted, misapplied or violated: Complainant cited: Article XVI, General and Miscellaneous Provisions, Hawaii Constitution, Article 16, Section 4: Oath of Office.
>
> Attachment to 10/15/13 Complaint Form: 23 pages of Memorandum Citing: Violations of Malfeasance, Dysfunctions and Obstruction of Government Operations:
>
> Respondents violates [sic] HRS 76-42, Internal Complaint procedures: in its entirety (due process, no informal or formal discussion or other attempts to process Internal Complaint against OCP and DCCA. (a)....The internal complaint procedures may be used for other matters,...required by law.....On July 8, 2014, Complainant receives Official One and Only communications or written notification of outcome of Investigation on Complaints Internal Complaint filed on 10/15/13 well over 180 days.

> Respondent disregarded, ignored and/or failed to Decipher [sic] that the Complainant served Notice that this Internal Complaint was not under the Bargaining Units-Contract jurisdiction and that the Complaint was based on Labor Relations Dispute on issues pertaining to HRS 710-1010, Obstruction of Government Operations.

(Emphasis added)

The July 28, 2014 Memorandum in support [sic] for Petition for Declaratory Ruling: re: HLRB CE 13-841 (DR Petition Memorandum) attached to the DR Petition states in pertinent part:

> Since mid-2011 and particularly beginning January 2012, I have endured acts of deliberate indifference and defiance of common sense of Law Enforcement responsibilities due to DCCA, OCP administrations misinterpretations and violations of numerous civil service laws of employment and lack of set policies and Standards required for the supervision of a Governmental Agency and it's [sic] Law Enforcement Powers and understanding of its Authority, Responsibility, Roles and Duties.
>
> My complaint is that the Department of Commerce and Consumer Affairs administration has continually diluted and abridged its statutory role, duty and responsibility to Enforce All Laws to protect any person aggrieved by illegal unfair or deceptive business activity conducted in the State of Hawaii. DCCA and OCP have ignored the statutory duty, role and responsibility of the Department of Commerce & Consumer Affairs Complaint's [sic] and Enforcement Officer, by the failure to receive, investigate and prosecute complaints, by appointing unqualified, un-trained and incompetent staff of Investigators and Attorney's [sic] by deliberately misapplying or ignoring mandated Civil Service requirement to Administer Oath's [sic] of Office to Public and Police Investigations and prosecution process for Criminal violations and writing off complaints as Civil Matters.
>
> All of my efforts to persuade the Department of Commerce and Consumer Affairs to perform or conduct Law Enforcement and seek Criminal justice have been met with frustration; endless disappointment as all attempts and efforts are fruitless, with negative results in getting assistance or information-decision that my complaint has merit or is unfounded.

C. Background Events Leading Up to the Complaint and DR Petition

Complainant/Petitioner Mr. Idao is, and was for all times relevant, an employee of the DCCA as a Supervising Investigator and a member of bargaining unit 13 (Unit 13), as defined in HRS § 89-6(a)(13).

Respondent DCCA is the "Employer" as defined in HRS § 89-2.

The HGEA is the "exclusive representative," as defined in HRS § 89-2, for all employees in Unit 13, as defined in HRS § 89-6(a)(13).

Mr. Idao stated that on or about 2012, he began writing memoranda and complaints to various DCCA administrators communicating his concerns regarding the DCCA's handling of its investigators. Those concerns and complaints included, but were not limited to, that DCCA has not complied with various Hawaii constitutional and statutory requirements by failing to: recognize that DCCA and OCP investigators have responsibility not just for civil but also criminal investigations and to properly enforce, investigate, and prosecute complaints; appoint employees meeting the minimum requirements of certified training, experience, and education as civil service appointed investigators; and provide proper training for investigative staff, equipment and technical support to staff investigators, and valid commission cards, law enforcement officer ID cards and certificates for investigators; and administer an oath of office to investigators and attorneys.

In March 2012, Complainant/Petitioner stated that he filed a "formal grievance" with the Union regarding his concerns.

After receiving no response from HGEA for two months, Mr. Idao stated that he contacted the Union and was verbally informed that his grievance was closed based on the DCCA's management rights.

In May 2012, Mr. Idao also forwarded a copy of his complaint and concerns to Young of the Office of the Attorney General.

In July 2012, Young advised Lopez that Mr. Idao's complaint was in the nature of a labor relations dispute.

On July 10, 2012, Lopez notified Mr. Idao that an internal investigation would be conducted. However, Mr. Idao stated that he never received any results of such investigation.

On October 22, 2012, Mr. Idao stated that Kim informally counseled him regarding performance concerns, including the sending of memoranda, observing the proper chain of command, and that regular duties should take precedence over the writing of memoranda. Kim further indicated that OCP was a civil not a criminal enforcement agency and investigations were strictly confined to civil consumer protection laws.

Mr. Idao stated that Kim did not give him a copy of a memorandum to file regarding the October 22, 2012 counseling until his annual Employee Performance Appraisal held on August 14, 2013.

On August 23, 2013, Mr. Idao stated that he "filed" a grievance with HGEA and received a verbal response that DCCA had management rights.

On October 15, 2013, Complainant/Petitioner filed the Internal Complaint with Chen.

On October 21, 2013, Chen responded confirming receipt of the Internal Complaint and stating that the complaint "is currently being reviewed and action will be take on the complaint in accordance with the Section 1.4 of the DCCA Personnel Complaint Procedure."

II. 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.

A. Consolidation of Cases No. CE-13-841 and DR-13-107

HAR §12-42-8(g)(13) states:

> (13) The board, on its own initiative or upon motion, may consolidate for hearing or other purposes or may contemporaneously consider two or more proceedings which involve substantially the same parties or issues if it finds that such consolidation of proceedings or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings.

(Emphases added)

From the face of the Complaint, the parties to Case No. CE-18-841, the prohibited practice case, are Complainant Mr. Idao and Respondent DCCA. The issues raised by the allegations stem from Mr. Idao's dispute with the DCCA over the handling of its investigators.

Based on the attachments to the Complaint, it is obvious that the October 15, 2013 Internal Complaint is also one of the numerous grounds relied on for the HRS §89-13 Complaint allegations. While the sole party involved in the Case No. DR-13-107, the declaratory ruling case, is the Petitioner Mr. Idao, there is no question based on Paragraph 6 of the DR Petition and from the attached Memorandum that the issues in that case likewise arise from the DCCA's handling of Mr. Idao's October 15, 2013 Internal Complaint and DCCA's alleged failures in its handling of its investigators. Notwithstanding its failure to intervene, DCCA and its alleged conduct are undoubtedly implicated in the DR case. The Board concludes that despite being framed differently and relying on different statutory provisions, the DR Petition and the Complaint arise from similar facts and substantially the same issues.

Finally, the Board finds that the consolidation of the proceedings and contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will facilitate, rather that unduly delay, the proceedings. Based on the HAR §12-42-8(g)(13) criteria being satisfied in this case, the Board, on its own initiative, hereby orders consolidation of these two cases for disposition.

B. Motion to Dismiss in CE-13-841

In support of its Motion, DCCA asserts that the Board lacks jurisdiction because of Complainant's failure to exhaust contractual remedies; and that he lacks standing. At the Motion hearing, Respondent further argued that even if Complainant is correct in his interpretation of the various statutes cited, these statutes do not fall within the Board's authority under HRS Chapter 89.

In Complainant's Opposition, Mr. Idao argues, among other things, that he: 1) attempted to remedy the alleged violations through all the proper avenues provided by "Hawaii Revised Statutes and laws;" 2) submitted the HGEA Fact Sheet and an August 23, 2013 Memorandum to HGEA; 3) complained of violations of the HGEA CBA Articles 17 D. and 18 A; 4) has brought several validated causes of action for the filing of this Complaint, which have been ignored, not responded to in a timely manner, and treated with the same conduct of indifference and denial since August 16, 2011; 5) began the grievance process in early 2012 through directing Memoranda through the proper chain of command but which never left the OCP Executive Director Kim's desk; 6) filed grievances with the HGEA on several occasions in 2012-13 and complaints with the offices of the state auditor and attorney general in fiscal year 2012 with no relief, remedy, or justice; and 7) was written up, counseled, ordered not to perform any criminal violation, and subjected to detrimental counseling that was made part of his permanent file. Complainant concludes that DCCA's conduct showing deliberate indifference and "ignoring the rules of due process and due and diligence [sic] on matters that have been the cause of dysfunction and injustice," has not been settled. Finally, in response to Respondent's assertion

that he provided no indication regarding the results of his August 23, 2013 grievance filed with HGEA, Mr. Idao states:

> THE FACTS ARE THAT HGEA AND RESPONDENT IGNORED THAT PROCESS AND IGNORED MY GREIVANCE [SIC] AND FAILED TO GIVE ANY CONSIDERATION OF MY COMPLAINT CITING THAT MANAGEMENT HAS THE RIGHT TO MANAGE AND THAT MY COMPLAINT WAS NOT UNDER THE BARGAINING UNITS OR THE UNIONS [SIC] JURISDICTION. I ASKED FOR THIS IN WRITING FROM HGEA BUSINESS AGENT RAJANI JEMARI (808) 543-0016 ON ALL GREIVANCES [sic] FILED AND HAVE NOT RECEIVED ANYTHING.

(Capitalization in original)

In its Reply, DCCA takes the position that neither the Board nor the Merit Appeals Board (MAB) has jurisdiction. In support, DCCA maintains that this case "is not really a classification issue," implicating MAB jurisdiction, which the Board is authorized to determine, because there is no allegation that Complainant is actually doing the work of a different classification. Rather, DCCA characterizes Complainant's allegation as his superiors not allowing him to do the work of a different position classification that he should be doing, in violation of a variety of laws over which the Board and MAB have no jurisdiction.

1. Standards of Review

The Board conforms to the legal standards for motions to dismiss under Hawaii Rules of Civil Procedure (HRCP) Rule 12(b) set forth by the Hawaii appellate courts.

A motion to dismiss for lack of subject matter jurisdiction under HRCP Rule 12(b)(1) is based on the contents of the complaint, the allegations of which must be accepted as true and construed in the light most favorable to the plaintiff. Dismissal is improper unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him [or her] to relief." In considering a motion to dismiss for lack of subject matter jurisdiction, the Board is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Yamane v. Pohlson, 111 Hawaii 74, 81, 137 P.3d 980, 987 (2006) (*citing* Casumpang v. ILWU, Local 142, 94 Hawaii 330, 337, 13 P.3d 1235, 1242 (2000)).

Regarding an HRCP Rule 12(b)(6) motion to dismiss for failure to state a claim, "Dismissal is warranted only if the claim is clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the support made, or of facts sufficient to make

a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Justice v. Fuddy, 125 Hawaii 104, 108, 253 P.3d 665, 669 (App. 2011) (Fuddy), (*citing* Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983)). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. We must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory." Fuddy, 125 Hawaii at 107-08, 253 P.3d at 668-69; Young v. Allstate Ins. Co., 119 Hawaii 403, 412, 198 P.3d 666, 675 (2008) (Young). The Board's consideration of a motion to dismiss for failure to state a claim is strictly limited to the allegations of the complaint, and the Board must deem those allegations to be true. However, in weighing the allegations of the complaint as against a motion to dismiss, the Board is not required to accept conclusory allegations on the legal effect of the events alleged. Pavsek v. Sandvold, 127 Hawaii 390, 402-03, 279 P.3d 55, 67-68 (App. 2012) (*citing* Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985)). It has also been held that when ruling on a Rule 12(b)(6) motion to dismiss, the court may, however, consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment. U.S. v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003); Morris v. McHugh, 997 F.Supp.2d 1144, 1154 (D. Haw. 2014).

2. The Board Interprets the Complaint to Allege Violations of HRS §89-13 (a)(1), (2), (5), (6), (7), and (8).

HRS §89-13(a) states in pertinent part:

> §89-13 Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
>
> (2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;
>
> ***
>
> (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
>
> (6) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;
>
> (7) Refuse or fail to comply with any provision of this chapter; [or]
>
> (8) Violate the terms of a collective bargaining agreement[.]

Paragraph 5. of the Complaint alleges violations of HRS § 89-13 (2) and (7). These statutory references are erroneous because there are no such statutory provisions.

The Board subscribes to the principle that a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim, which would enable him [or her] to relief. Erickson v. Pardus, 551 U.S. 89, 94 (2007); Estelle v. Gamble, 429 U.S. 97, 106 (1976); Haines v. Kerr, 404 U.S. 519, 520-21 (1972). In addition, the Board notes HRCP Rule 8(f) that, "All pleadings shall be so construed as to do substantial justice." Further, HRCP Rule 8(a) requiring only that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief. Under Hawaii law, the rule is satisfied if the statement gives the defendant fair notice of the claim and the ground upon which it rests. Hall v. Kim, 53 Haw. 215, 221, 491 P.2d 541, 544 (1971); Au v. Au, 63 Haw. 210, 221, 616 P.2d 173, 181 (1981) (*citing* Hall v. Kim, 53 Haw. 215, 491 P.2d 541 (1971)). Finally, as stated above, in applying HRCP Rule 12(b)(6), documents attached to the complaint are permitted to be considered without converting the motion to dismiss into a motion for summary judgment.

Applying these rules to the Complaint in this case, the Board finds that in the June 2, 2014 Memorandum attached to the Complaint, Mr. Idao sets forth HRS § 89-13(a) (1), (2), (5), (6), (7), and (8) and (b) (1), (4), and (5). While the references to HRS § 89-13(b) are incorrect because that provision is specifically limited to prohibited practices by "an employee organization or its designated agent," the Board finds that HRS § 89-13(a) (1), (2), (5), (6), (7), and (8) are proper citations for prohibited practices committed by "a public employer or its designated representative." Consequently, based on the Complaint and the attached June 2, 2014 Memorandum, the Board interprets the Complaint to allege violations of these provisions.

3. DCCA's Motion for Dismissal of Complaint for Failure to Exhaust Contractual Remedies and for Lack of Standing is Denied

DCCA bases its Motion on the grounds that the Complaint must be dismissed for lack of jurisdiction because Complainant failed to exhaust his contractual remedies and for lack of standing. However, the Motion was not supported by attachment of the relevant HGEA CBA provisions regarding the grievance procedure nor is the HGEA CBA contained in the record. For this reason, the Board finds insufficient evidence from which to determine whether there are contractual remedies that required exhaustion[iii] before Complainant had standing to bring the prohibited practice Complaint. The Board is, therefore, compelled to deny DCCA's Motion.

Despite being unable to dismiss the Complaint for lack of jurisdiction on this ground as requested by DCCA, the Board is nevertheless required to dismiss the Complaint on other grounds.

4. The Board Has No Jurisdiction Over the Complaint Based on Untimeliness.

HRS § 377-9(l) states, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." (Emphasis added) This provision is made applicable to prohibited practice complaints by HRS § 89-14.[iv] Accordingly, the administrative rule HAR § 12-42-42(a) implementing HRS §§ 89-13 and 89-14 specifically incorporates this time requirement for prohibited practice cases, "A complaint that any public employer...has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee...within ninety days of the alleged violation."

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, and may not be waived by either the Board or the parties. Hikalea v. Department of Environmental Services, City and County of Honolulu, Case No. CE-01-808, Order No. 3023 at *5-6 (October 3, 2014) (Hikalea Order) (*citing* Thomas v. Commonwealth of Pennsylvania Lab. Rels. Bd., 483 A.2d 1016 (Pa. 1984) (failure to comply with the statute of limitations for unfair labor practice goes to the subject matter jurisdiction of the labor relations board)).

In construing and applying this time limit requirement, the Board's approach has been to adhere to the principles that statutes of limitations are to be strictly construed; and that because time limits are jurisdictional, the defect of missing the deadline even by one day is unable to be waived. Valeho-Novikoff Order, at *10 (*citing* Fitzgerald v. Ariyoshi, 3 HPERB 186, 199 (1983); Iwai v. HGEA, Local 152, 5 HLRB 132, 134 (1993); Cantan v. Dep't. of Evtl. Waste Mgmt., CE-01-698, Order No. 2599, at *8-9 (3/24/2009); Kang v. Hawaii State Teachers Ass'n., CE-05-440, Order No. 1825, at *4 (12/13/99)).

Lastly, in applying this requirement, the Board has conformed to the rule that the limitations period begins to run when "an aggrieved party knew or should have known that his [or her] statutory rights were violated." United Public Workers, AFSCME, Local 646 v. Okimoto, 6 HLRB 319, 330 (2003) (*citing* Metromedia, Inc. KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978)).

Resolution of the statute of limitations issue based on the facts of this particular case presents a challenge. Under the usual scenario involving a collective bargaining agreement grievance procedure, the limitations period begins to run against the employer after the grievance

procedure contained in the collective bargaining agreement has been exhausted by either the union or the employee-grievant. In this case, there is no evidence of the HGEA CBA grievance procedure or of exhaustion. Moreover, it appears that Mr. Idao either chose not to or failed to file a grievance directly with DCCA himself. However, in the June 2, 2014 Memorandum, Complainant stated that, "[t]he most recent acts of violations of HRS 89-13 began on August 23, 2013 , when ...Idao filed a 2nd grievance with the Hawaii Government Employee's Association...."[v] Mr. Idao stated that this request was denied by HGEA based on management rights. The Board concludes, that at this point when HGEA allegedly denied this request, Mr. Idao knew or should have known that that his issues with the DCCA's handling of his concerns and complaints regarding investigators, the October 22, 2012 informal counseling by Kim, and August 14, 2013 Annual Performance Review[vi] were not going to be addressed; and that any alleged prohibited practices claims arising out of his disputes with DCCA accrued. Accordingly, the Board determines that under the circumstances of this particular case, the 90-day period began to run on the date of HGEA's alleged denial of Mr. Idao's request for the filing of a grievance. While the date of that alleged denial is uncertain, the Board concludes that the filing of the Complaint on June 2, 2014, over nine months after Mr. Idao's request to the HGEA, was obviously well beyond the 90-day limitations period. The Board is, therefore, required to hold that the Complaint should be dismissed for untimeliness.

"The lack of jurisdiction over the subject matter cannot be waived by the parties. If the parties do not raise the issue, [the Board] *sua sponte* will, for unless jurisdiction of the [Board] over the subject matter exists, any judgment rendered is invalid." Tamashiro v. Dep't of Human Servs., 112 Hawaii 388, 398, 146 P.3d 103, 113 (2006) (*citing* Chun v. Employees' Ret. Sys. of the State of Hawaii, 73 Haw. 9, 14, 828 P.2d 260, 263 (1992)). The Board, therefore, holds that the Complaint was untimely filed and must be dismissed.

Even if the Complaint was timely, the Board is alternatively constrained to dismiss the Complaint on another jurisdictional ground set forth below.

5. The Board Has No Jurisdiction Over Alleged Violations of HRS Chapters 26, 28, 92, 353C, 480, 481, 487, 521, 634, 702, 703, 710, and 712; the Hawaii Constitution; the Organic Act; and the federal LEOSA and The Particular Chapter 76 Claims in This Case.

An administrative agency can only wield powers expressly or implicitly granted to it by statute. Morgan v. Planning Dept., County of Kauai, 104 Hawaii 173, 184, 86 P.3d 982, 993 (2004) (citing TIG Ins. Co. v. Kauhane, 101 Hawaii 311, 327, 67 P.3d 810, 626 (App. 2003)).

The Complaint states in paragraph 5, "REFER TO PAGE #6" and "SEE ITEMS ON PAGES #5 THROUGH #355." The June 2, 2014 Memorandum to the Board contained in those reference pages and items set forth HRS §89-13(a)(1), (2), (5), (6), (7), and (8) and (b)(1), (4), and (5) and provided more specificity regarding the specific facts supporting the violations of these provisions. This Memorandum states, in relevant part:

> The Department of Commerce and Consumer Affairs (DCCA), under the Direction [sic] of Keali'i S. Lopez, Deputy Director Jo Ann M. Uchida Takeuchi and the Office of Consumer Protection's OCP, Executive Director, Bruce B. Kim, have consistently ignored or sidestepped a number of laws, regulations and employee rights contrary to Hawaii Revised Statutes Chapter 89. And, as evidenced by their indifference they have failed to recognize the law enforcement responsibilities as statutorily mandated to enforce PENAL, CRIMINAL, and CIVIL statutes as well as Administrative Rules and Regulations, thereby denying due process to the PERSONS [sic] defined as consumers and legitimate business persons and; commercial ENTITIES [sic] who have reported being victimized. Also affected are the legitimate business persons, business entities, and consumers from foreign nations who have filed complaints seeking justice, relief and remedy for violations of law that were required to be received investigated by DCCA and OCP then prosecuted by the State of Hawaii.
>
> ***
>
> The Department of Commerce and Consumer Affairs and the Office of Consumer Protection have failed to settle the issue of recognition and to comply with Civil Service provisions to appoint, commission and swear (in) investigators:
>
> The most recent acts of violations of HRS 89-13 began on August 23, 2013, when Supervisory Investigator Idao filed a (2nd) grievance with the Hawaii Government Employee's Association (HGEA) unit 13: violations of Article 17-Personal Rights and Representation.
>
> Section D – The employer shall provide employees with supplies and equipment which are required in the performance of the employee's official duties. Except in the case of negligence on the part of the employee, when such equipment is stolen, lost, damaged and/or worn out it shall be repaired and replaced by the employer.

(Emphasis added). While Mr. Idao alleges HRS § 89-13 violations and an HGEA CBA, Art. 17 violation in his Complaint, the crux of his dispute with DCCA appears to rest in the Department's alleged failure "to recognize the law enforcement responsibilities as statutorily mandated to enforce PENAL, CRIMINAL, and CIVIL statutes as well as Administrative Rules

and Regulations," and "to settle the issue of recognition and to comply with Civil Service provisions to appoint, commission and swear (in) investigators." The Complaint and attachments substantiate that other "laws, regulations and employee rights contrary to Hawaii Revised Statutes Chapter 89" referenced and relied on in the Complaint are contained in HRS Chapters 26, 28, 76, 353C, 431, 480, 481, 487, 521, 634, 701, 702, 703, 710, 712; the Hawaii Constitution; the Organic Act; and the federal LEOSA.

The Board's general jurisdiction under HRS Chapter 89 is established in HRS § 89-5,[vii] stating:

> (a) There is created a Hawaii labor relations board to ensure that collective bargaining is conducted in accordance with this chapter and that merit principles under section 76-1 is maintained.

HRS § 89-5(i) more specifically delineates the Board's powers and functions regarding HRS Chapter 89, stating in pertinent part:

> (i) In addition to the powers and functions provided in other sections of this chapter, the board shall:
>
> (1) Establish procedures for, investigate, and resolve, any dispute concerning the designation of an appropriate bargaining unit and the application of section 89-6 to specific employees and positions;
>
> (2) Establish procedures for, resolve disputes with respect to, and supervise the conduct of, elections for the determination of employee representation;
>
> (3) Resolve controversies under this chapter; [and]
>
> (4) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper[.]

A review of HRS § 89-5(i) shows that the Board's powers and functions are limited to procedures, proceedings, and controversies involving Chapter 89. In this case, while the Complainant has cast his claims as HRS Chapter 89 prohibited practices, he relies on numerous constitutional and statutory provisions unrelated to HRS Chapter 89 for those claims. There simply is no authority in HRS § 89-5, to sustain the Board's jurisdiction regarding any of the alleged violations of HRS Chapters 26, 28, 92, 353C, 480, 481, 487, 521, 634, 702, 703, 710, 712; the Hawaii Constitution; the Organic Act; or the federal LEOSA.

Regarding the HRS Chapter 76 allegation, the Board acknowledges that based on its general authority in HRS § 89-5(a), which references "merit principles under section 76-1" and other provisions, such as HRS § 89-13(a)(5) and HRS §76-14, its jurisdiction extends to consideration of certain HRS Chapter 76 issues in the context of cases involving a prohibited practice for failure to bargain in good faith as required in HRS § 89-9 or Merit Appeals Board (MAB) jurisdiction.[viii] Nevertheless, there is no authority for the Board's jurisdiction regarding the particular allegation in this case involving HRS §§ 76-13 and 76-16. The Board, therefore, dismisses these claims.

6. The Board Dismisses the Complaint for Failure to State a Claim.

In addition to dismissal of the Complaint based on jurisdictional grounds, the Board may also act on its own initiative to note the inadequacy of a complaint and dismiss it for failure to state a claim without notice when the claimant cannot possibly win relief.[ix] Sparling v. Hoffman Constr. Co., 864 F.2d 635, 637-38 (9th Cir. 1988); Ogeone v. Nakakuni, 2013 U.S. Dist. LEXIS 177068, at *3 (D. Haw.); Marshall v. Citimortgage, Inc., 2012 U.S. Dist. LEXIS 178162, at *2-3 (D. Haw.). Alternatively, in addition to the jurisdictional grounds, the Board holds that each of the HRS §89-13(a) allegations may be dismissed because the Complainant cannot possibly win relief for the following reasons.

a. HRS § 89-13(a)(2) Claim Must Be Dismissed Because of Lack of Adequate Facts in Support.

In this case, it appears that Mr. Idao's basis for his HRS §89-13(a)(2) prohibited practice claim is the DCCA's alleged disregard of his grievances and his internal complaints. However, in his DR Petition, Complainant alleges that the internal complaints "[were] not under the Bargaining Units-Contract jurisdiction." The Board agrees that as conceded by Mr. Idao, the internal complaints are outside of collective bargaining. Hence, such complaints just cannot form the basis for any HRS § 89-13 violations. Specifically the allegation that DCCA disregarded Complainant's grievances cannot be shown to violate HRS § 89-13(a)(2) for two reasons. First, despite Mr. Idao's submission of the January 18, 2012 and February 2, 2012 Memoranda regarding HGEA CBA Art. 17 D and HRS violations and the August 23, 2013 HGEA Fact Sheet and Memorandum to HGEA, there is no evidence in the record that HGEA or the Complainant ever filed a grievance with DCCA under the HGEA CBA. Consequently, if no grievance was ever filed, there are no facts to support Mr. Idao's claim that DCCA disregarded a grievance. Second, HRS § 89-13(a)(2) makes it a prohibited practice for a public employer or its designated representative to willfully "dominate, interfere, or assist in the formation, existence, or administration of any employee organization[.]" In construing this provision, the Board has applied the National Labor Relations Board's interpretation of the analogous federal provision to

hold that an HRS §89-13(a)(2) violation requires a showing that the employer's acts of assistance for a union interfere with the employees' right to choose their representative. United Public Workers, AFSCME, Local 646, 6 HLRB 72, 75 (2000). While the Board has found HRS §89-13(a)(2) violations in circumstances showing that the employer interfered with union administration by refusing to recognize a union representative or by initiating discussions and direct dealing with the employee without her union representative, *see, e.g.,* State of Hawaii Organization of Police Officers v. Kauai Police Department, 5 HLRB 104, 111 (1992); Stucky v. Board of Education, 6 HLRB 386, 392-93 (2004), this case presents no similar circumstances.

The Board finds that Complainant can prove no set of facts in support of his claim regarding an HRS § 89-13(a)(2) violation; and holds that this charge must be dismissed for failure to state a claim.

b. The HRS § 89-13(a)(5) Allegation Is Dismissed Because of An Absence of Law and Adequate Facts in Support.

HRS § 89-13(a) (5) makes it a prohibited practice "for a public employer or its designated representative wilfully to...[r]efuse to bargain collectively in good faith with the exclusive representative as required in section 89-9" (emphasis added). The Board rules that the HRS § 89-13(a)(5) allegation must likewise be dismissed for failure to state a claim for several reasons.

First, Complainant has presented no legal arguments supporting this claim. The Board has held that where a party fails to present any legal arguments supporting an HRS §89-13(a)(5) allegation, the claim must be dismissed for a failure to carry the burden of proof. Hawaii Government Employees Ass'n., AFSCME, Local 152 v. Sasano, et. al., 5 HLRB 410, 421 (1994) (Sasano). Second, the plain language of HRS§ 89-13(a)(5) confines the employer's prohibited practice liability for a refusal to bargain collectively in good faith only to an "exclusive representative." As Complainant falls within the definition of an "employee" or "public employee," rather than an "exclusive representative," under the HRS § 89-2, the right to good faith collective bargaining by the employer guaranteed in HRS §89-13(a)(5) does not inure to him. The Board has held that because there is no duty upon the employer to bargain in good faith with an individual under HRS § 89-9(a), a prohibited practice complaint lacks standing to allege a violation of the duty to bargain collectively in good faith against employer respondents. Hikalea Order, at *12. Finally, while an employer's unwarranted failure or refusal to process a grievance has been recognized by the Board as a wilfull breach of the duty to bargain in good faith under HRS § 89-13(a)(5), *see, e.g.,* University of Hawaii Professional Assembly v. Board of Regents, 5 HLRB 615, 619 (1996); Burns v. Anderson, 3 HPERB 114, 122 (1982) (Burns); State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, 3 HPERB 71, 79 (1982) (SHOPO II); State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, 3 HPERB 25,

35 (1982) (SHOPO I), there is no allegation nor evidence that DCCA was ever presented with a grievance in this case. Consequently, this HRS §89-13(a)(5) allegation must be dismissed. *See*: Lepere v. Waihee, 5 HLRB 277, 283 (1994) (The Board dismissed complainant's allegations of a Subsection 89-13(a)(5) violation where the complainant failed to provide any evidence to demonstrate the employer's wilfull refusal to bargain collectively in good faith with the exclusive representative in that case.); United Public Workers, AFSCME, Local 646 v. Waihee, 4 HLRB 742, 752 (1990) (Waihee); Lepere v. Waihee, 5 HLRB 123, 127 (1993).

c. The HRS § 89-13(a)(6) Claim Is Dismissed for An Absence of Law and Sufficient Facts in Support.

HRS § 89-13(a)(6) prohibits the public employer from refusing to participate in good faith in the HRS § 89-11 mediation, fact-finding, and arbitration procedures. In prior decisions, the Board has concluded that HRS § 89-11 is simply not applicable to grievance resolution mechanisms involving a contract violation or interpretation. Therefore, the Board has dismissed similar allegations of violations of HRS § 89-13(a)(6) for failure to state a claim, finding that insufficient evidence in the record and the lack of legal arguments do not support a violation. Lepere v. United Public Workers, AFSCME. Local 646, Case No. CU-10-66, Order No. 1076, at *9 (June 13, 1994); Sasano, 5 HLRB at 421.

For similar reasons, the Board dismisses the HRS § 89-13(a)(6) claim in this case for failure to state a claim.

d. The HRS §89-13(a)(7) Allegation Must Be Dismissed Because of The Absence of an Allegation Regarding an HRS Chapter 89 Violation Independent of HRS § 89-13.

HRS § 89-13(a)(7) makes it a prohibited practice for an employer or its designated representative to "refuse or fail to comply with any provision of this chapter."

The Board has construed HRS § 89-13(a)(7) to require that the statutory violation alleged "must occur independently of Section 89-13, H.R.S." reasoning that, "[a]ny other interpretation would render Subsection 89-13(a)(7), H.R.S., meaningless and redundant." Burns, 3 HPERB at 123. Since a review of the Complaint shows that the only HRS Chapter 89 allegations in this care are violations of HRS § 89-13, the Board is also constrained to dismiss this allegation for failure to state a claim based on an absence of law in support.

e. The HRS § 89-13(a)(1) and (8) Allegations Are Required to Be Dismissed Based on an Absence of Adequate Facts in Support

The only factual allegations which appear to support a prohibited practice are those regarding Mr. Idao's attempt on August 23, 2013 to process a grievance through the HGEA for breach of Art. 17. D. of the HGEA CBA.

HRS § 89-13(a)(1) makes it a prohibited practice for a "public employer or its designated representative willfully to...[i]nterfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter[.]" Complainant appears to be claiming that DCCA's alleged conduct in failing to process his grievances and complaints is the interference, restraint, or coercion in the exercise of his rights under HRS Chapter 89. The Board has held that an employer's deliberate refusal to submit a grievance to arbitration, interfered with and restrained employees' right to engage in the lawful, protected activity of pursuing their grievance thus violating a right implicitly guaranteed by HRS Chapter 89 is a violation of HRS § 89-13(a)(1). United Public Workers, AFSCME Local 646 v. Kunimura, 3 HPERB 507, 516-17 (1984).

HRS § 89-13(a)(8) makes it a prohibited practice for the "public employer or its designated representative willfully to "[v]iolate the terms of a collective bargaining agreement." The Hawaii Supreme Court has held that, "Where the terms of public employment are covered by a collective bargaining agreement pursuant to HRS Chapter 89 and the agreement includes a grievance procedure to dispose of employee grievances against the public employer, an aggrieved employee is bound by the terms of the agreement." Santos v. State, 64 Haw. 648, 655, 646 P.2d 662, 667 (1982). Hence, the Board has ruled in numerous decisions that an employer's failure or refusal to utilize or process a grievance in accordance with the procedure set forth in the collective bargaining agreement is a prohibited practice under HRS § 89-13(a)(8). State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, 1 HPERB 715, 720 (1977); State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, 3 HPERB at 24; SHOPO I, 3 HPERB at 45; SHOPO II, 3 HPERB at 80; Burns, 3 HPERB at 122; Caldeira v. Malapit, 3 HPERB 523, 551-52 (1984).

In this case, however, DCCA was never presented with a grievance, and therefore, could not have failed or refused to utilize or process a grievance. The Board must, therefore, find that Complainant failed to present any evidence in support of HRS § 89-13(a)(1). The Board has dismissed both an HRS §89-13(a)(1) prohibited practice claim where the evidence does not support a violation of this provision, *see e.g.*, Hawaii Federation of College Teachers, Local 2003 v. University of Hawaii Professional Assembly, 1 HPERB 464, 472-73 (1974), and an HRS 89-13(a)(8) claim where there is insufficient evidence to support such an allegation, *see, e.g.*, United Public Workers, AFSCME, Local 646 v. Fasi, 5 HLRB 290, 300 (1984).

Similarly, the Board holds that these claims must be dismissed for failure to state a claim based on lack of sufficient evidence.

C. The Board Issues A Declaratory Ruling That HRS § 89-1 Does Not Apply to the October 15, 2013 Internal Complaint, but Declines to Issue A Declaratory Ruling on Any Other DR Petition Issues.

In the DR Petition, Mr. Idao designates HRS §§ 89-1 and 76-1 as the applicable provisions in question. He alleges that:

> Respondents violates [sic] HRS 76-42, Internal Complaint procedures;
> ***
> Respondent disregarded, ignored, and/or failed to Decipher [sic] that the Complainant served Notice that this Internal Complaint was not under the Bargaining Units-Contract jurisdiction and that the Complaint was based on Labor Relations Dispute on issues pertaining to HRS 710-1010, Obstruction of Government Operations.

The Board interprets this DR Petition to request the Board to issue a declaratory ruling that the Internal Complaint was not subject to HRS § 89-1 but was rather subject to HRS § 76-42 **Internal complaint procedures**. The DR Petition Memorandum clarifies that the Petition arises out of Mr. Idao's frustration and conflict with Respondents regarding the alleged appointment of unqualified and untrained investigators and attorneys, the alleged deliberate misapplication or disregard of a statutory and constitutional administration of oath of office required for public and police employees, and an alleged October 22, 2012 wrongful counseling of Complainant by Respondent Kim for "not following proper procedures and stepping outside the boundaries of the Chain of Command."

The Board's authority to issue a declaratory ruling rests in HRS § 91-8, stating:

> § 91-8 **Declaratory rulings by agencies.** Any interested person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

In addition, HRS § 89-5(i)(3) requires the Board to "[r]esolve controversies under this chapter[.]" HRS § 89-5(i)(9) mandates the Board to "[a]dopt rules relative to the exercise of its powers and authority and to govern the proceedings before it in accordance with chapter 91."

Under HRS §§ 91-9 and 89-5, the Board has promulgated HAR § 12-42-9, providing in relevant part:

> **§ 12-42-9 Declaratory rulings by the board.** (a) Any public employee, employee organization, public employer, or interested person or organization may petition the board for a declaratory order as to the applicability of any statutory provision or of any rule or order of the board.
>
> ***
>
> (f) The board may, for good cause, refuse to issue a declaratory order. Without limiting the generality of the foregoing, the board may so refuse where:
>
> ***
>
> (4) The matter is not within the jurisdiction of the board.

(Emphases added)

1. The Board Declares That The October 15, 2013 Internal Complaint Is Not Subject to HRS § 89-1.

HRS § 89-1 Statement of findings and policy.

***

(b) The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are best effectuated by:

(1) Recognizing the right of public employees to organize for the purpose of collective bargaining;

(2) Requiring public employers to negotiate with and enter into written agreements with exclusive representatives with matters of wages, hours, and other conditions of employment, while at the same time, maintaining a merit principle pursuant to section 76-1; and

(3) Creating a labor relations board to administer the provisions of chapters 89 and 377.

The Board declares that HRS §89-1 does not apply to the Internal Complaint for several reasons. First, the Hawaii Supreme Court has held that the HRS § 89-1 statement of purpose does not impose rights or duties upon which an enforceable claim will lie. In Poe v. Haw. Labor Rels. Bd., 97 Haw. 528, 540, 40 P.3d 930, 942 (2002) (Poe), the complainant Poe made an allegation that the employer in that case "contravened the declared policy of HRS Chapter 89 as set forth in HRS § 89-1" by not "promoting harmonious and/or cooperative relations between itself and...its employees[.]" After clarifying that the purpose of HRS § 89-1 is to "provide a useful guide for determining legislative intent or purpose," the Court disagreed with Poe, specifically holding and reasoning as follows:

> Finally, we observe that HRS § 89-1, the statement of policy does not impose rights or duties upon which an enforceable claim will lie. The general rule of statutory construction is that policy declarations in statutes, while useful in gleaning the purpose of the statute, are not, of themselves a substantive part of the law which can limit or expand upon the express terms of the operative statutory provisions.
> ***
> Therefore, the broad policy statements within HRS § 89-1, entitled "Statement of findings and policy," do not impose binding duties or obligations upon any parties but, rather, provide a useful guide for determining legislative intent and purpose. These statements, therefore, do not implicate the prohibited practice provision of "refus[ing] or failing to comply with any provision of [HRS] chapter [89]," as set forth in HRS § 89-13(a)(7). Hence, Poe's claim that the Employer violated HRS §89-1 was properly dismissed.

(Emphasis added) Based on Poe, because HRS § 89-1 does not impose binding duties or obligations upon any parties upon which an enforceable claim will lie nor implicate the HRS § 89-13 prohibited practice provision, the Board declares that HRS § 89-1 cannot subject the Internal Complaint to HRS Chapter 89.

Second, consistent with Poe, as discussed above, the Board has held that the Internal Complaint cannot be the basis for HRS § 89-13 prohibited practices. Based on analogous reasoning regarding prohibited practices, the Board holds that the Internal Complaint is also outside the scope of HRS Chapter 89 jurisdiction. The face of the Internal Complaint shows that under "Type of Complaint," Mr. Idao checked "Other Adverse Employment Action That Cannot be Processed Through Collective Bargaining Process." This is supported by the DR Petition allegations, stating:

...the reason for Submission [sic] is that it has been determined that on December 8, 2014, the Respondents [sic] Written Notification and Ruling on Complainants internal Complaint filed on 10/15/13 indicates that the Respondents failed to properly apply HRS 74, as well as did not investigate Complainants Other Adverse Actions that (could not) be processed through COLLECTIVE BARGAINING PROCESS. (Emphases added).

***

Respondent disregarded, ignored and/or failed to Decipher [sic] that the Complainant served Notice that this Internal Complaint was not under the Bargaining Units-Contract jurisdiction and that the Complaint was based on Labor Relation Dispute on issues pertaining to HRS 710-1010, Obstruction of Government Operations.

Finally, most compelling are the allegations that the Internal Complaint involved an improper application of Chapter 74 and based on issues pertaining to HRS 710-1010, which obviously removes the issue from HRS Chapter 89. Hence, for the above-stated reasons, the Board issues a declaratory ruling that HRS § 89-1 cannot apply to the October 15, 2013 Internal Complaint.

However, regarding the second issue of whether the October 15, 2013 Internal Complaint was subject to HRS Chapter 74, § 76-42, or § 710-1010, the Board refuses to issue a declaratory ruling for lack of jurisdiction. Under HAR § 12-42-9, the Board's declaratory ruling jurisdiction is limited to "the applicability of any statutory provision or of any rule or order of the board." As discussed previously, under HRS § 89-5, the Board's jurisdiction is limited to HRS Chapter 89 and limited issues under HRS Chapter 76, which do not include HRS § 76-42 **Internal complaint procedures**. Accordingly, the Board lacks jurisdiction to resolve the second issue involving HRS Chapter 74, § 76-42, and §710-1010.

2. The Board Refuses to Issue A Declaratory Ruling for Lack of Jurisdiction Regarding The Remaining DR Petition Issues.

As with his prohibited practice Complaint, the Board likewise has no jurisdiction over the issues pertaining to HRS Chapter 76-1 and the Hawaii Constitution, Art. 15, § 4; HRS §§ 701-301 and 710-1000 raised in the DR Petition for two reasons. First, there is no statutory authority for the Board's jurisdiction to determine the applicability of any of these statutory and constitutional provisions. Second, in the DR Petition and the attached Memorandum to the Board, Mr. Idao maintains that the Office of Attorney General has a conflict of interest implicating HRS § 26-9 and HRS Chapter 28. There is simply no authority in HRS § 89-5 or any other statutory provision for this Board's jurisdiction to resolve this issue implicating these

provisions. Hence, the Board refuses to issue a declaratory ruling for good cause on these remaining DR Petition issues for lack of jurisdiction under HAR § 12-42-9(f)(4).

ORDER

For all of the foregoing reasons, the Board issues an order: 1) consolidating CE-13-841 and DR-13-107 for disposition; 2) denying the DCCA's Motion to Dismiss; 3) dismissing the prohibited practice Complaint for lack of jurisdiction based on untimeliness; and alternatively for lack of jurisdiction over some of the alleged state and federal statutory violations, and Hawaii Constitution and Organic Act violations and for a failure to state a claim; 4) issuing a declaratory ruling that HRS § 89-1 is not applicable to the October 15, 2013 Internal Complaint; and 5) declining to issue a declaratory ruling regarding the remaining issues raised in the DR Petition, including the applicability of HRS §§ 76-1 and 76-42; Hawaii Constitution, Art. 15, § 4; HRS §§ 710-1010, 701-301, and 710-1000.

The CE-13-841 and DR-13-107 cases are hereby closed.

DATED: Honolulu, Hawaii, July 30, 2015.

HAWAII LABOR RELATIONS BOARD

HAWAII LABOR RELATIONS BOARD STATE OF HAWAII

Susanita A.D. Moepono

SUSANITA A.D. MOEPONO, Member

Rock B. Ley

ROCK B. LEY, Member

Copies sent to:

Aquilino R. Idao
James E. Halvorson, Deputy Attorney General

[i] There is nothing in the record in this case that shows that Complainant filed a prohibited practice complaint with the Board on or about August 23, 2013. The record shows that Mr. Idao used the term "prohibited practices" broadly in his communications to reference not only the prohibited practice Complaint in this case but also DCCA actions that he believes could constitute prohibited practices and the term "complaints" more broadly to

include not only the present Complaint but also complaints made to the DCCA, the State of Hawaii Auditor, the Office of the Attorney General, and the HGEA. The Board clarifies that the only prohibited practice complaint filed with the Board under HRS Chapter 89 is the one at issue in this case filed on June 2, 2014.

[ii] Like his use of the terms "prohibited practices" and "complaint," Mr. Idao references "grievance(s)" in his communications and arguments set forth in the record. The only evidence that Mr. Idao attempted to file a "grievance" in the technical sense under the HGEA Unit 13 collective bargaining agreement (HGEA CBA) is an August 23, 2013 HGEA Fact Sheet. Mr. Idao states that he gave this Fact Sheet to HGEA and was told by the HGEA that a grievance would not be pursued because of management rights. Accordingly, based on the record, a grievance under the HGEA CBA apparently was never filed by the HGEA or the Complainant with the DCCA.

[iii] The Board acknowledges that HRS § 89-10.8, which governs "Resolution of disputes; grievances[,]" provides that a "public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement." However, the terms of such a procedure applicable to Mr. Idao's bargaining unit are not in evidence before the Board.

[iv] HRS § 89-14 states in pertinent part 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[.]"

[v] In addition to the HGEA Fact Sheet and the Memorandum documenting the August 23, 2013 grievance request to HGEA, the record in this case contains Memoranda, dated January 18, 2012 and February 2, 2012, from Complainant to HGEA regarding CBA Art.17 D and HRS violations. Based on the HGEA Fact Sheet and the January 18, 2012 Memorandum, it appears that Mr. Idao requested the Union to file a grievance on these two dates. In the February 2, 2012 Memorandum, he references "my grievance" but does not appear to specifically request the filing of a grievance. At any rate, the August 23, 2013 request to HGEA to a grievance is the most recent request, which was denied by the HGEA.

[vi] In the August 23, 2013 Memorandum to Wakukawa, Mr. Idao states:

> The generation of this complaint began on Thursday, August 14, 2013 at approximately 9:30 AM. I participated in a pre-scheduled Employee Performance Appraisal review with DCCA, OCP Executive Director, Bruce K. KIM....Executive Director KIM completed his review of my personnel EPA and had me sign the acknowledgement of the appraisal form. Attached to this form was a "CONFIDENTIAL" Memo To File: Conference with Aku Idao & Edna Kelly, dated 10/22/12, RE: Performance Concerns....

[vii] The Board has jurisdiction to administer two other statutes: HRS Chapter 377 (Hawaii Employment Relations Act) and Chapter 396 (Hawaii Occupational Safety and Health Law), neither of which is obviously implicated in this case.

[viii] There are various provisions delineating the interface of HRS Chapter 89 with Chapter 76. For example, HRS § 89-5 contains the reference to the "mainten[ance]" of "merit principles under section 76-1" as one of the Board's responsibilities. This language was added to HRS § 89-5 by 2000 Haw. Sess. Laws Act 253, § 95 at 890. The committee report accompanying S.B. 2859, S.D. 1, H.D. 1, C.D. 1, 20th Leg. Reg. Sess. (2000), the original measure which became Act 253, indicated that the merit principle was redefined as "the selection of persons based on their fitness and ability for public employment and the retention of employees based on their demonstrated appropriate conduct and productive performance and incorporated into HRS Chapter 89. Conf. Comm. Rep. No.

2686, at 3 *available at* http://www.capitol.hawaii.gov/session2000/CommReports/SB2859_SD1_SSCR2628. The Senate committee report accompanying a prior draft of this measure explained that "[t]he purpose of this measure is to reform the public employment laws that were enacted to implement two constitutional mandates—that there be civil service based on merit and that public employees have the right to bargain collectively." The Senate report further stated that, "[Y]our Committees have made this 'bright line' concept the basis for deliberations on the many concepts contained in this measure" and clarified that the "bright line" was a clear delineation of "classification, reclassification, recruitment, examination, initial pricing, and health fund and retirement benefits as matters of civil service and subjecting all other matters to negotiation[.]" Moreover, HRS § 89-13(a)(5) makes it a prohibited practice for a public employer or its designated representative willfully to "refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9." HRS §89-9 specifically addresses that "bright line" between civil service and those subject to negotiation noted in Conference Committee Report No. 2686, Finally, HRS § 76-14(c)(2) specifically authorizes the Board to resolve "any controversy regarding its [Merit Appeals Board's] authority to hear the appeal." However, none of these provisions addressing the interface of Chapters 89 and 76 are implicated in this particular case.

[ix] In so ruling, the Board adopts the federal court's interpretation of the analogous Federal Rule of Civil Procedure Rule 12(b)(6). As the Hawaii Intermediate Court of Appeals has held, "Because HRCP 12(b) is identical to Rule 12(b) of the Federal Rules of Civil Procedure (FRCP), the federal courts' interpretation of this rule is highly persuasive. Romero v. Star Mkts., 82 Hawaii 405, 414, 922 P.2d 1018, 1027 (1996) (*citing* Shaw v. North American Title Co., 76 Haw. 323, 326, 876 P.2d 1291, 1294 (1994)).