STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LEE SCRUTON, Complainant, and DEPARTMENT OF PUBLIC SAFETY, State of Hawaii, Respondent.	CASE NO. CE-13-862 ORDER NO. 3131 ORDER DISMISSING PROHIBITED PRACTICE COMPLAINT DUE TO LACK OF JURISDICTION

ORDER DISMISSING PROHIBITED PRACTICE
COMPLAINT DUE TO LACK OF JURISDICTION

On June 24, 2015, LEE SCRUTON (Complainant or Scruton) filed a prohibited practice complaint (Complaint) with the Hawaii Labor Relations Board (Board) alleging, *inter alia,* that his employer the DEPARTMENT OF PUBLIC SAFETY, State of Hawaii (Respondent) had committed a prohibited practice under Hawaii Revised Statutes (HRS) § 89-13(a)(8) by denying him a temporary assignment (TA) in violation of Article 12 – Temporary Assignments when his immediate supervisor was on a TA in a higher position during the period of December 30, 2014 to June 1, 2015. Complainant further alleges that while his supervisor was on a TA, Complainant was the only Corrections Recreation Specialist (CRS) in the entire recreation unit and was performing the duties of his supervisor.

The Complaint states that:

> As of 12-30-14, [sic] to 6-1-15, Corrections Recreation Specialist IV Valentine Kanehailua, was transferred [sic] out of the Recreation unit and put into a Temporarily Assigned (T.A.) position as a Unit Team Manager (U.T.M.) in the residency section. This move made me the only CRS in the entire

recreation unit. This placement was orchestrated by Residency Section Administrator (RSA) Lance Rabacal.

I then inquired to Mr. Rabacal if I was to be T.A.'d into the IV spot, seeing as though I was T.A.'d before several times when Valentine Kanehailua was on other types of leave. Mr. Rabacal denied me and when I asked why, he stated "because I choose not to". During this time as the only CRS in the department, I have been performing all the duties as discribed [sic] by the CRS IV, for the CRS IV for the past 3-4 years. Previously CRS IV Val Kanehailua was doing Social Work all that time to the prensent [sic]. No recreational duties were being preformed [sic] by him. It should be noted that Mr. Rabacal had an SR-22 doing SR20 work (Mr. Kanehailua) and a SR20 (I) doing SR22 work during that period.

Up until [sic] 6-1-15, I, Lee Scruton CRS III acted as the sole recreation unit employee. I expect to be compensated for that time.

It should be also be noted that I have contacted the Union (HGEA) about my situation, and no action was taken.

(Footnotes and asterisks omitted)

On June 26, 2015, the Board sent a Notice to Respondent(s) of Prohibited Practice; Notice of Prehearing/Settlement Conference and Notice of Hearing on the Prohibited Practice Complaint.

On July 7, 2015, Respondent filed Respondent Department of Public Safety's Motion to Dismiss Complaint, filed on June 24, 2015 (Motion to Dismiss). In support, Respondent claimed that Complainant had failed to exhaust his contractual remedies; and therefore, the Board lacked subject matter jurisdiction.

On July 10, 2015, Respondent filed Respondent Department of Public Safety, State of Hawaii's Prehearing Statement.

On July 17, 2015, the Board held a prehearing/settlement conference, which was attended by the Complainant and counsel for Respondent. The parties waived the statutory 40-day requirement to hold a hearing on the merits pursuant to HRS § 377-9(l) and Hawaii Administrative Rules (HAR) 12-42-46(b). A motion hearing for Respondent's Motion to Dismiss was scheduled for August 7, 2015 at 10:00 a.m. Deadlines of July 24, 2015 were set for the filing of a response by Complainant and July 31, 2015 for Respondent to reply.

On July 22, 2015, Complainant filed his response to the Motion to Dismiss and Respondent's argument that he did not follow the grievance procedure as stated by Article 11 of the Unit 13 contract. Complainant stated, *inter alia,* that:

> In response to the motion to dismiss, my complaint against the Department of Public Safety, the Department points out that I did not follow the grievance procedure as stated by Article 11 of the Unit 13 contract. The fact that this is the sole leg that they stand on shows that I merit the T.A. pay.
>
> When I initially inquired about it, I did go through proper channels by bringing it up to my immediate supervisor Val Kanehailua. Even though I was the sole Corrections Recreation Specialist, I was told he still was. Mr. Kanehailua then went to R.S.A. Lance Rabacal to relay my claim, to which Mr. Rabacal to him no [sic]. I then went to see Mr. Rabacal as to why. His statement to me was "I choose not to". This reply tells me it was his own personal decision to deny me.
>
> I then proceed to call my Union representative, Ms. Denise Sugihara to relate my concerns. She then sent me a [sic] H.G.E.A. Fact Sheet. She told me to fill it out and state my grievance and then fax it back to her. (See attachment A). Two days past [sic] and I did not hear from her. I then called her and spoke with about what to do next. She told me she received the fax and told me there was nothing she could do, that management has a right to manage. At no time did she advise me to follow up by utilizing the grievance process. I assumed that was it that I was out of luck. My only recourse that I thought I had left was to proceed to file a complaint with the Hawaii Labor Relations Board. Given the instruction on grievance procedure I would have surely followed it.

On July 23, 2015, the Board sent a "Notice of Filing Deadlines; Notice of Motion Hearing; and Waiver of HRS § 377-9(b), and § 12-42-46(b), Subchapter 3, Chapter 42, Title 12, Hawaii Administrative Rules."

On July 23, 2015, Respondent Department of Public Safety's Reply to Complainant's Memorandum of Opposition was filed with the Board, which essentially reiterated its original argument.

On August 7, 2015, the Board held a hearing on Respondent's Motion to Dismiss, which was attended by the Complainant and Respondent's counsel. During the hearing, Board Member Moepono inquired regarding when Complainant knew that he would not be temporarily assigned

to his supervisor Valentine Kanehailua's (Kanehailua) position. Complainant answered that during the first week of January 2015, by a department memo, he first learned of Kanehailua's temporary assignment to a Unit Team Manager position from December 30, 2014 to June 1, 2015. Complainant further stated that after receiving the department memo, he asked Kanehailua whether his assignment to Kanehailua's position would be a temporary assignment. Kanehailua told Complainant that he would ask Lance Rabacal (Rabacal). Complainant was later told by both Kanehailua and personally by Rabacal that Rabacal said, no" to the temporary assignment. When Complainant personally asked Rabacal, Rabacal said, "no" because he "[chose] not to." After oral arguments, the Board orally stated that because the Complaint was filed on June 24, 2015, the 90-day limitations period began on or about March 24, 2015. Accordingly, the Board orally ruled that the Complaint in this case was untimely based on Complainant's admission that he was personally informed by Rabacal of the denial of his temporary assignment to Kanehailua's CRS IV position during the first week of January 2015, which occurred outside the 90-day limitations period.

In accordance with HRS § 91-12, the Board issues the following findings of fact, conclusions of law, and written order to accompany the Board's ruling set forth in the record.

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. At all times relevant, Complainant LEE SCRUTON was or is employed by the DEPARTMENT OF PUBLIC SAFETY, State of Hawaii, as a Corrections Recreation Specialist III.

2. At all times relevant, Complainant LEE SCRUTON, was or is a public employee[1] and a member of bargaining unit ("BU") 13.[2]

3. At all times relevant, DEPARTMENT OF PUBLIC SAFETY was or is a state department within the Executive Branch[3] and a public employer.[4]

4. At all times relevant, HGEA is an employee organization and the exclusive representative[5] as defined in HRS. § 89-2, of employees in BU 13.

5. At all times relevant, there is and was a collective bargaining agreement in effect from July 1, 2023 – June 30, 2017, for all BU 13 employees (BU 13 CBA). BU 13 CBA contains Article 11-Grievance Procedure.[6]

6. At all times relevant, Complainant's immediate supervisor was or is Valentine Kanehailua, and Kanehailua's immediate supervisor was or is Lance Rabacal.

7. During the first week of January, 2015, Complainant received a department memo with information that his supervisor, Kanehailua, was being temporarily assigned to a Unit Manager Position from December 30, 2014 to June 1, 2015.

8. During the first week of January, 2015, Rabacal personally told Complainant that he would not be temporarily assigned to Kanehailua's position or a level IV.

9. The Board finds that during the first week of January, 2015 or by the last business day of that week on January 9, 2015, Complainant knew or should have known that he was denied a temporary assignment from a Corrections Recreation Specialist III position to a CRS IV by his employer, the Department of Public Safety.

II. 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.

A. Standard for Motion to Dismiss

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

A motion to dismiss for lack of subject matter jurisdiction pursuant to 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 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. Casumpang v. ILWU, Local 142, 94 Hawaii 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawaii 1, 7, 175 P.3d 111, 117 (App. 2007).

B. Timeliness

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 section 377-

9[.]" The Hawaii Supreme Court (Court) has more specifically stated that, "The procedural aspects of controversies related to prohibited practices are governed by HRS § 377-9." Aio v. Hamada, 66 Haw. 401, 404 n. 3, 664 P.2d 727, 729 n. 3 (1983) (Aio).

HRS § 377-9, which deals with the prevention of unfair labor practices, clearly provides that, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." Accordingly, HRS § 377-9(l) precludes the consideration of prohibited practices unless they have occurred within ninety days of the filing of the complaint. Aio, 66 Haw. at 404 n. 3, 664 P.2d at 729 n. 3.

Similarly, the Board's Administrative Rules, HAR Haw. Rev. Stat. § 12-42 provide, in relevant part:

(a) A complaint that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to HRS § 89-13, may be filed by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation. (Emphasis added).

Based on the foregoing statutory and administrative rules, the Hawaii Intermediate Court of Appeals has upheld a prior Board ruling that, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." Gao v. Hawai'i Labor Rels. Bd., 129 Hawaii 106, 294 P.3d 1092 (App. February 22, 2013 (SDO)).

The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. The 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 *6 (October 3, 2014) (*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)). "[I]t is well established . . . that lack of subject matter jurisdiction can never be waived by any party at any time." Koga Eng'g & Constr., Inc. v. State, 122 Hawaii 60, 84, 222 P.3d 979, 1003 (2010) (*citing* Chun v. Employees' Ret. Sys., 73 Haw. 9, 13, 828 P.2d 260, 263 (1992); In re Rice, 68 Haw. 334, 335, 713 P.2d 426 (1986) (*citing* Meyer v. Territory, 36 Haw. 75, 78 (1942). It is further well-recognized that the Board is required to do what it is compelled by statute. "As a creature of the legislature, an administrative agency has limited powers and can do no more than it is statutorily authorized to do." Mayland v. Flitner, 2001 WY 69, ¶, 28 P.3d 838, 854 (Wyo. 2001); *see also*: Hoh Corp. v. Motor Vehicle Indus. Licensing Bd., Dep't of Commerce & Consumer Affairs, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) (Held "The law has long been clear that agencies may not nullify statutes.") To emphasize the necessity of subject matter jurisdiction, the Court has noted,

"If the parties do not raise the issue, 'a court *sua sponte* will, for unless jurisdiction of the court 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))

Lastly, 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. Fitzgerald v. Ariyoshi, 3 HPERB 186, 198-199 (1983); Valeho-Novikoff v. Okabe, Board Case No. CU-05-302, Order No. 3024, at *10 (2014) (*citing* Fitzgerald v. Ariyoshi, 3 HPERB 186, 198-199 (1983); 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)). Further, the Board has conformed to the rule that 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. United Public Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443 6 HLRB 319, 330 (2003) (*citing* Metromedia, Inc. KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978)).

In the instant case, the Board finds, *sua sponte,* that the Complaint was untimely filed. Accordingly the Board lacks subject matter jurisdiction. As the Board orally determined, the Complaint in this case was filed on June 24, 2015. Based on the filing date of the Complaint, any incident alleged as the basis for the Complaint must have occurred on or after March 26, 2015[7] to fall within the 90-day limitations period. In this case, however, Complainant admits that he was notified by Rabacal during the first week of January 2015, which at the latest would have been January 9, 2015, that Complainant would not receive a temporary assignment to Kanehailua's level IV position. Therefore, Mr. Scruton knew or should have known that the alleged violation of the BU 13 CBA occurred and of the alleged prohibited practice as of January 9, 2015, well before the 90-day limitations period for the June 24, 2015 Complaint. Even reviewing the Complaint, pleadings and oral arguments presented by Complainant in the light most favorable to Complainant, the Board is nonetheless constrained to hold that the Complaint was untimely filed on June 24, 2015 and exceeds the Board's ninety (90) day filing period. Consequently, the Complaint is dismissed for untimeliness.

C. Exhaustion of Contractual Remedies

As stated above, Respondent asserts in its Motion to Dismiss that the Complaint should be dismissed for lack of subject matter jurisdiction based on a failure to exhaust contractual remedies. In support of its position, Respondent relies on: 1) the language of the BU 13 CBA, Article 11-Grievance Procedure requiring that "Any complaint by an Employee or the Union

concerning the application and interpretation of the Agreement shall be subject to the grievance procedure[] and that the grievance must be filed "within twenty (20) working days after the occurrence of the alleged violation;" and (2) the principle that an employee must exhaust any grievance or arbitration procedures under the collective bargaining agreement prior to filing an action based on that agreement set forth by the Court in Hokama v. Univ. of Hawaii, 92 Hawaii 268, 272, 990 P.2d 1150, 1154 (1999) (Hokama) and Poe v. Hawaii Labor Relations Bd., 97 Hawaii 528, 536, 40 P.3d 930 938 (2002) (Poe) and a prior Board order in Univ. of Hawaii Prof'l Assembly v. Bd. of Regents, Board Case No. CE-07-804, Order No. 2929 (2013) (UHPA Order).

The Board concurs with Respondent that even if the Complaint is timely, the Complaint should be dismissed for lack of jurisdiction based on a failure to exhaust contractual remedies.

> HRS § 89-10 states in relevant part:
> ***
> Except for cost items and any non-cost items that are tied to or bargained against cost items, all provisions in the agreement that are in conformance with this chapter, including a grievance procedure...,shall be valid and enforceable and shall be effective as specified in the agreement, regardless of the requirements to submit cost items under this section and section 89-11.

(Emphasis added)

> HRS § 89-10.8(a) states in relevant part:
>
> **[§ 89-10.8] Resolution of disputes; grievances.** (a) A public employer shall enter into a 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. The grievance procedure shall be valid and enforceable and shall be consistent with the following:
>
> (1) A dispute over the terms of an initial or renewed agreement shall not constitute a grievance;
> (2) No employee in a position exempted from chapter 76, who serves at the pleasure of the appointing authority, shall be allowed to grieve a suspension or discharge unless the collective bargaining agreement specifically provides otherwise; and
> (3) With respect to any adverse action resulting from an employee's failure to meet performance requirements of the employee's position, the grievance procedure shall provide that the final and binding

application and interpretation of the BU 13 CBA because the Complaint sets forth BU 13 Article 12-Temporary Assignments and alleges a claim under HRS § 89-13(a)(8) for a willful violation of "the terms of a collective bargaining agreement." However, there is no evidence that Mr. Scruton ever filed a grievance complaint regarding this claim. While the Court has recognized that there are exceptions to this exhaustion principle, such as where the resort to administrative procedures would be futile, Mr. Scruton has failed to assert, much less, prove that any of these exceptions apply. Poe v. Hawaii Labor Relations Bd., 97 Hawaii 536-37, 40 P.3d 930, 938-39 (2002); UHPA Order, at *12 n. 3. Hence, the Board is compelled to find that the exhaustion rule applies and that the Complaint must be dismissed for failure to exhaust contractual remedies.

ORDER

For the reasons discussed above, the Board hereby finds that the Complaint was untimely filed; and therefore, the Board lacks subject matter jurisdiction. Further, even if the Complaint was timely filed, Complainant failed to exhaust his contractual remedies under the BU 13 CBA; and therefore, the Board lacks subject matter jurisdiction. Consequently, the Board hereby dismisses this case. This case is closed.

DATED: Honolulu, Hawaii December 17, 2015.

HAWAII LABOR RELATIONS BOARD

HAWAII LABOR RELATIONS BOARD ★ STATE OF HAWAII ★

KERRY M. KOMATSUBARA, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to:

Lee Scruton, *Pro se*
Miriam P. Loui, Deputy Attorney General

decision shall be made by a performance judge as provided in this section.

(Emphasis added)

HRS § 89-13(a) provides in pertinent part as follows:

> (a) It shall be a prohibited practice for a public employer or its designated agent wilfully to:
> ***
> (8) Violate the terms of a collective bargaining agreement[.]

HRS § 89-14 provides in relevant part:

> § 89-14 Prevention of prohibited practices. Any controversy concerning prohibited practices shall be submitted to the board in the same manner and with the same effect as provided in section 377-9....

A review of the foregoing statutory provisions shows that HRS § 89-14 gives the Board jurisdiction over prohibited practice controversies, which pursuant to HRS § 89-13(a)(8) include BU 13 CBA violations. On the other hand, HRS § 89-10.8 specifically requires a public employer to enter into a 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. Further, pursuant to HRS §§ 89-10 and 89-10.8, the grievance procedure "shall be valid and enforceable."

As noted in the UHPA Order, the Hawaii appellate courts have addressed the quandary of this dual jurisdiction of the Board and the arbitrator. It has become a well-recognized general rule that an employee is required to exhaust his available contractual remedies prior to bringing a prohibited practice complaint alleging an HRS § 89-13(a)(8) violation. Santos v. State of Hawaii, 64 Haw. 648, 655, 646 P.2d 962, 967 (1982); Poe v. Hawaii Labor Relations Bd., 105 Hawaii 97, 101, 93 P.3d 652, 656 (2004)

As stated above, in accordance with HRS § 89-10.8, the BU 13 CBA contains Article 11 establishing a grievance procedure culminating in a final and binding decision to be invoked in the event of a dispute. Article 11 provides that, "Any complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure." Moreover, the grievance procedure provides for an informal step, three formal steps, and a final step of arbitration, which only the Union has the authority to pursue. In this case, from the face of the Complaint, there is no question that Mr. Scruton's claim involves the

[1] HRS § 89-2 **Definitions** provides in part:

> "Employee" or "public employee" means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section [89-6(f)].

[2] HRS. § 89-6(a) provides in part:

> a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:
>
> * * *
>
> (13) Professional and scientific employees, who cannot be included in any of the other bargaining units[.]

[3] HRS. § 26-4 **Structure of government** provides in part:

> § 26-4 Structure of government. Under the supervision of the governor, all executive and administrative offices, departments, and instrumentalities of the state government and their respective functions, powers, and duties shall be allocated among and within the following principal departments that are hereby established:
> ***
> (18) Department of public safety.

[4] HRS § 89-2 **Definitions** states in relevant part:

> "Employer" or "public employer" means the governor in the case of the State,...and any individual who represents one of these employers or acts in their interest in dealing with public employees....

[5] HRS § 89-2 **Definitions** provides in part:

> "Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii public employees health fund, and other terms and conditions of employment of public employees
> ***
> "Exclusive representative" means the employee organization certified by the board under Haw. Rev. Stat. § 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

[6] BU 13 CBA Article 11 states in relevant part:

ARTICLE 11 • GRIEVANCE PROCEDURE

A. Any complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure....The grievance shall be presented to the appropriate supervisor within twenty (20) working days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) working days after the alleged violation first became known or should have become known to the Employee involved,...

B. Any individual Employee may present a grievance to the Employee's immediate supervisor and have the Employee's grievance heard without intervention of the Union, provided the Union has been afforded an opportunity to be present at the conference(s) on the grievance. Any adjustment made shall not be inconsistent with the terms of this Agreement. By mutual consent of the Union and the Employer, any time limits within each step may be extended.

C. Informal Step. A grievance shall, whenever possible, be discussed informally between the Employee and the Employee's immediate supervisor within the twenty (20) working day limitation provided for in paragraph "A" above. In such an event the Employee shall identify the discussion as an informal step grievance. The grievant may be assisted by the grievant's Union representative. The immediate supervisor shall reply within seven (7) working days. In the event the Employer does not respond within the time limits prescribed herein, the Union may pursue the grievance to the next step.

D. Step 1. If the grievant is not satisfied with the result of the informal conference, the grievant or the Union may submit a written statement of the grievance within seven (7) working days after receiving the answers to the informal complaint to the department head or the department head's designee; or if the immediate supervisor does not reply to the informal complaint within seven (7) working days, the Employee or the Union may submit a written statement of the grievance to the department head or the department head's designee within fourteen (14) working days from the initial submission of the informal complaint; or if the grievance was not discussed informally between the Employee and the Employee's immediate supervisor, the Employee or the Union may submit a written statement of the grievance to the department head or the department head's designee within the twenty (20) working day limitation provided for in paragraph "A" above.

A meeting shall be held between the grievant and a Union representative with the department or department head's designee within seven (7) working days after the written grievance is received. Either side may present witnesses. The department head or the department head's designee shall submit a written answer to the grievant or the Union within seven (7) working days after the meeting.

E. Step 2. If the grievance is not satisfactorily resolved at Step 1, the grievant or the Union may appeal the grievance in writing to the Employer or the Employer's designee within seven (7) working days after receiving the written answer. The Employer or the Employer's designee need not consider any grievance in Step 2 which encompasses

different alleged violations or charges than those presented in Step 1. A meeting to discuss the grievance shall be held within seven (7) working days after receipt of the appeal. The Employer or the Employer's designee shall reply in writing to the grievant or the Union within seven (7) working days after the meeting.

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G. Step 3. Arbitration. If the grievance is not resolved at Step 2 and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or the Employer's representative of its desire to arbitrate with ten (10) working days after receipt of the Employer's decision at Step 2. Representatives of the parties shall attempt to select an Arbitrator immediately thereafter. If agreement on an Arbitrator is not reached within ten (10) working days after notice for arbitration is submitted, either party may request the Hawai'i Labor Relations Board to submit a list of five (5) Arbitrators. Selection of an Arbitrator shall be made by each party alternatively deleting one (1) name at a time from the list. The first party to delete a name shall be determined by lot. The person whose name remains on the list shall be designated the Arbitrator. No grievance may be arbitrated unless it involves an alleged violation of a specific term or provision of the Agreement.

If the Employer disputes the arbitrability of any grievance, the Arbitrator shall first determine whether the Arbitrator has jurisdiction to act; and if the Arbitrator finds that the Arbitrator has no such power, the grievance shall be referred back to the parties without decision or recommendation on its merits.

The Arbitrator shall render an award in writing no later than thirty (30) calendar days after conclusion of the hearings or if oral hearings are waived then thirty (30) days from the date statements and proofs were submitted to the Arbitrator. The decision of the Arbitrator shall be final and binding upon the Union, its members, the Employees involved in the grievance and the Employer. There shall be no appeal from the Arbitrator's decision by either party, if such decision is within the scope of the Arbitrator's authority as described below:

1. The Arbitrator shall not have the power to add to, subtract from disregard, alter, or modify any of the terms of this Agreement.

2. The Arbitrator's power shall be limited to deciding whether the Employer has violated any of the terms of this Agreement.

3. The Arbitrator shall not consider any alleged violations or charges other than those presented in Step 2.

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[7] At the hearing on the Motion to Dismiss, the Board orally determined based on the June 24, 2015 filing date of the Complaint that any incident giving rise to the Complaint would have had to occur on or after March 24, 2015 to fall within the 90-day limitations period. Upon further review, the Board finds that any incident alleged as a basis for the Complaint would have had to occur on or after March 26, 2015 to fall within the 90-day limitations period based on the June 24, 2015 filing date of the Complaint.