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Case No. CE-11-851

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of KANOA HAAKE, Complainant, and JEFFREY MURRAY, Fire Chief, Maui Fire Department, County of Maui, Respondent.	CASE NO. CE-11-851 ORDER NO. 3223 ORDER GRANTING RESPONDENT JEFFREY MURRAY, MAUI FIRE DEPARTMENT, COUNTY OF MAUI'S MOTION TO DISMISS COMPLAINT

ORDER GRANTING RESPONDENT JEFFREY MURRAY, MAUI FIRE DEPARTMENT, COUNTY OF MAUI'S MOTION TO DISMISS COMPLAINT

For the reasons set forth below, the Hawaii Labor Relations Board (Board) issues its Findings of Fact, Conclusions of Law, and Order granting Respondent JEFFREY MURRAY, MAUI FIRE DEPARTMENT, COUNTY OF MAUI'S MOTION TO DISMISS COMPLAINT.

Any conclusion of law improperly designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

A. Factual Background

Complainant Kanoa Haake (Complainant or Mr. Haake), self-represented litigant (SRL), is and was for all relevant times, an employee or public employee within the meaning of Hawaii Revised Statutes (HRS) § 89-2[i] with the Department of Fire and Public Safety, County of Maui and a member of bargaining unit 11 (Unit 11).[ii]

Respondent Jeffrey Murray (Respondent, Murray, County, or Employer), Fire Chief, Maui Fire Department, County of Maui is, and was for all relevant times, an employer or public employer within the meaning of HRS § 89-2.[iii]

The Hawaii Fire Fighters Association, IAFF Local 1463 (HFFA or Union) is an exclusive representative within the meaning of HRS § 89-2,[iv] and is and was for all relevant times, the exclusive representative for all employees in Unit 11, as defined in HRS § 89-6(a)(11) (firefighters).

The County of Maui and the HFFA are parties to a collective bargaining agreement, effective July 1, 2011 to June 30, 2017 (Unit 11 CBA).

On January 13, 2015, Complainant filed a prohibited practice complaint (Complaint) with the Board, alleging violations of HRS Section 89-13(a)(1)-(8) and (b)(1)-(5).[v] In his Complaint, Mr. Haake alleges verbatim, among other things, the following:

> At approximately 0820 on August 8, 2014 at the Wailea Fire Station I (Kanoa Haake) was relieved of duty by Battalion Chief Allen Duarte with no reason given. At this time contacted Union Representative Jeffery Kihune for an explanation for my removal and none was known at this time. Representative Kihune contacted me later that day and said that there were several complaints filed against me and to wait till further notice.
>
> August 26, 2014 at approximately 0945 I interviewed for the position of Fire Captain under duress of the investigation at the Kahului Fire Station. On September 4, 2014 I received by certified mail letter from Fire Chief Murray non-selection for the position of Fire Captain. On the letter it stated "Should you require more information regarding your right to appeal this decision, please contact the Department of Personnel Services."
>
> While on approved vacation Battalion Chief Collin Yamamoto (BC Y) contacted me at approximately 0740 on September 6, 2014 in regards to an investigatory interview. Upon receipt of his message I arranged to child care and came off of the approved vacation to facilitate a remedy to my situation. Upon meeting with BC Y at 0930 at the Kahului Fire Station Trailer, I was denied the services of Union Recorder Alma Aiwohi. I requested to know what charges I am facing but BC Y refused.
>
> The tone of the investigation was very hostile toward me. Questions were taken out of context and posed in different manners until the response he wanted was solicited. There was no objectivity in the investigatory interview. The tone was set to portray me in a negative view. BC Y used grievances and complaints that I had submitted in the past against me despite my and Union Representative Kihune objections.

After breaking for lunch the investigation resumed and BC Y forbade all types of recording devices to Union Representative Kihune and my objections. When asked on what authority he has to do this he said "my training advises against it" and when asked further he stated that this is his investigation.

During course of the interview BC Y repeatedly asked if I allowed rides for my family on Ladder 14 during the past year. After repeatedly denying this in many different forms to BC Y I was asked why someone would make this complaint. I responded that it seems to be in retaliation for counseling a firefighter about this in the recent past. I asked BC Y to look into this matter and he refused despite the clear directions about this on the MFD disclosure statement I was made to sign at the beginning of the interview.

On September 8, 2014 I met with Personnel Direct Lance Hiromoto about the appeal actions for the non-selection of Fire Captain. Director Hiromoto stated that he had talked to Personnel Specialist Jamie Adams about this and said it was a Union matter.

On September 13, 2014 BC Y left a message on my phone stating that we may meet this afternoon and I am not to contact any HFFA Union Representative on this matter. Naming Jeff (Kihune), Alma (Aiwohi), and Lionel (Montalvo) as those I cannot contact.

On September 15, 2014 was made to sign disclosure statement under threat of insubordination. BC Y continued his line of misleading questioning about events years in the past without the benefit of an official report. I was denied the reports that were in his possession despite numerous requests. Again BC Y questioned me about grievances I had filed in the past against Representative Kihune and my objections. Again BC Y forbade recording of the interview.

Met with Chief Murrary (Fire 1) on September 17, 2014 in regards to my non-selection for Fire Captain positions. Fire 1 stated that my qualifications and scores did not apply to the interview, as it is the only determining factor in promotion to Fire Captain. Fire 1 also stated that the Training Captain position has different criteria than other Fire Captain positions. When I asked what I can do better I was told to "interview better" and he could not tell me how to do that. I asked if I was the only candidate on leave with pay and he said I was, but it had no bearing on the interview. If I was found guilty it would have bearing on interview. I stated the fact that I am on leave with pay is an indication that I have been charged.

At this time Fire 1 stated that the Union (HFFA) said to place me no leave with pay. No information as to the why were given.

Later that afternoon, I met with BC Y in about the investigation and again no information why I was on leave with pay was offered. BC Y again forbade recording of meeting and I refused to sign the minutes.

Following this meeting I met with Personnel Director Lance Hiromoto about the way I was being mistreated by the Fire Administration. Director Hiromoto agreed that there needs to be more transparency. I requested to file a complaint against the Fire Administration for the mishandling of my situation. Director Hiromoto was not aware of any avenue that I could file with. He did not "know" what to tell me.

September 24, 2014 submitted non-selection grievance to HFFA.

September 26, 2014 received a call from Fire l's office stating to call back. Called back numerous times with no response.

October 2, 2014 received notification from Representative Kihune that Fire Administration would like to schedule Step 1 grievance proceedings for non-selection and performance evaluation for October 10, 2014. I stated that it should only be for the non-selection as the administration has disregarded the performance evaluation grievance submitted on July 5, 2014 and I did not consent to an extension.

October 9, 2014 notified HFFA that I would like to resolve my leave with pay prior to non-selection of Fire Captain as I deemed it to be a priority.

October 10, 2014 Fire Administration agreed to focus on my current situation and postpone non-selection filed on September 24, 2014 until resolved from Union Recorder Alma Aiwohi.

December 3, 2014 filed non-selection grievance for additional Fire Captain position. Upon filing consented to postpone this grievance until I was returned to duty.

December 9, 2014 received notification through Fire Chief Secretary that Step 1 for the current non-selection grievance (12/3/14) was scheduled for Friday, December 12, 2014. I told Ms. Sakai that I would like to defer this as the other non-

selection grievance and she stated that she could not make that determination and I needed a formal letter to do this. I informed her that I had done so through HFFA and was told that it was not good enough.

Later that evening, I composed a letter addressed to HFFA reiterating my position per Ms. Sakai's directive. I was informed by my Union Representatives that our Fire Administration would not defer or postpone this grievance. Additionally they would not change their position on the non-selection regardless of the Step 1 meeting and are offering me the opportunity to "opt-out" of Step 1 and proceed to Step 2.

December 12, 2014 I submitted a letter through the HFFA to "opt-out" of Step 1 and proceed to Step 2 in lieu of the information provided by the Fire Administration.

Since this time I have not received any correspondence from the Maui County Fire Administration.

I was relieved of duty in retaliation for filing grievances and participating in ongoing arbitration. This is in direct violation of HRS §89-13 section a. 1, 4, 5, 6, 7, and 8.

I was denied Fire Captain positions in violation of collective bargaining and HRS §89-13 section a. 3, 4, 5, 6, 7, and 8.

Maui Fire Administration disregards collective bargaining requiring Step 1 grievance proceedings without resolution in violation of collective bargaining and of HRS §89-13 section a. 1, 2, 3, 4, 5, 6, 7, and 8.

On January 15, 2015, the Board issued a NOTICE TO RESPONDENT(S) OF PROHIBITED PRACTICE COMPLAINT; NOTICE OF PREHEARING/SETTLEMENT CONFERENCE AND NOTICE OF HEARING ON THE PROHIBITED PRACTICE COMPLAINT.

On January 26, 2015, Respondent filed his RESPONDENT'S ANSWER TO PROHIBITED PRACTICE COMPLAINT.

On January 28, 2015, the Board held a Prehearing/Settlement Conference. On January 29, 2015, the Board issued a NOTICE OF FILING DEADLINES; WAIVER OF SECTION 377-9(b), HAWAII REVISED STATUTES AND SECTION 12-42-46(b), SUBCHAPTER 3, CHAPTER 42, TITLE 12 HAWAII ADMINISTRATIVE RULES confirming in writing the following: the

parties agreed to waive the 40-day requirement of HRS Section 377-9(b) and Hawaii Administrative Rules (HAR) Section 12-42-46(b) and established deadlines of: February 4, 2015 for the filing of motions; February 19, 2015 for the filing of replies; and February 24, 2015 for the filing of responses; a February 13, 2015 date for hearing on the merits was taken off the calendar; and a March 5, 2015 hearing date was set on all filed motions.

On February 4, 2015, Murray filed RESPONDENT JEFFREY MURRAY, FIRE CHIEF, MAUI FIRE DEPARTMENT, COUNTY OF MAUI'S MOTION TO DISMISS COMPLAINT (Motion to Dismiss).

Complainant sent a letter, dated February 17, 2015, responding to the Motion to Dismiss (Opposition).

On February 24, 2015, Respondent filed RESPONDENT JEFFREY MURRAY, FIRE CHIEF, MAUI FIRE DEPARTMENT, COUNTY OF MAUI'S REPLY MEMORANDUM (Reply).

On March 11, 2015, the Board held a hearing on the Motion to Dismiss with Mr. Haake representing himself and Respondent represented by counsel.

On November 10, 2015, the Board issued a NOTICE OF MOTION HEARING establishing a hearing date of November 19, 2015 on the Motion to Dismiss.

On November 12, 2015, Respondent filed RESPONDENT JEFFREY MURRAY, FIRE CHIEF, MAUI FIRE DEPARTMENT, COUNTY OF MAUI'S MOTION TO CONTINUE HEARING for a period of 60 days on the ground that the grievance process is continuing and the Board should reserve its ruling on the Motion to Dismiss until the grievance process is completed.

On November 27, 2015, the Board issued ORDER NO. 3124 GRANTING RESPONDENT JEFFREY MURRAY, FIRE CHIEF, MAUI FIRE DEPARTMENT, COUNTY OF MAUI'S MOTION TO CONTINUE HEARING DATE AND NOTICE OF STATUS CONFERENCE taking the November 19, 2015 hearing date on the Motion to Dismiss off the calendar and setting a status conference on January 21, 2016.

The Board held the status conference on January 21, 2016. On January 22, 2016, the Board issued a NOTICE OF FURTHER STATUS CONFERENCE scheduling another status conference for April 20, 2016.

On April 20, 2016, the Board issued a SECOND NOTICE OF FURTHER STATUS CONFERENCE setting a status conference on June 29, 2016 based on a pending arbitration proceeding before Arbitrator Michael Ben.

On June 30, 2016, the Board issued a THIRD NOTICE OF FURTHER STATUS CONFERENCE setting a status conference on September 19, 2016 based on the pending arbitration.

On September 19, 2016, the Board issued a NOTICE OF RESCHEDULED THIRD STATUS CONFERENCE setting a status conference on September 28, 2016.

On September 28, 2016, the Board held a prehearing/status conference in this matter with Mr. Haake representing himself and Respondent by counsel.

II. DISCUSSION, CONCLUSIONS OF LAW, AND ORDER

A. Standard of Review

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).

1. Motion to Dismiss For Lack of Subject Matter Jurisdiction

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).

2. Motion to Dismiss for Failure to State a Claim

Regarding a motion to dismiss brought under HRCP Rule 12(b)(6) 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 107-108, 253 P.3d at 668-669; 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. Paysek v. Sandvold, 127 Hawaii 390, 402-403, 279 P.3d 55, 67-68 (App. 2012) *(*citing Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985)); Young, 119 Hawaii at 406, 198 P.3d at 669.

B. Relevant Statutory Provisions

HRS § 89-13 states:

> **§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;
>
> (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;
>
> (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;
>
> (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;
>
> (8) Violate the terms of a collective bargaining agreement[.]
>
> ***

C. Motion to Dismiss

As grounds for the Motion to Dismiss, Respondent asserts that Complainant has failed to allege any facts entitling him to relief under HRS § 89-14 and exhaust his administrative remedies. Regarding exhaustion, Murray specifically argues that all of the allegations, including the investigation into Complainant's misconduct for which he was relieved of duty, his non-selection for Fire Captain, denial of due process and collective bargaining rights, and disregard of Step 1 grievance in violation of the CBA grievance procedure are claims subject to exhaustion under the CBA. Further, Respondent argues that Complainant lacks standing to assert the HRS § 89-13(a)(5) and (6) violations because such allegations involve actions between the Employer and the Exclusive Representative. Finally, assuming arguendo, that any of the alleged violations of HRS § 89-13(a)(1) are properly before the Board, Respondent contends that Complainant has failed to allege any facts constituting a violation of rights guaranteed under the Chapter [89].

By a February 17, 2015 letter, Mr. Haake responds to the Motion to Dismiss. In support of the Complaint allegations, Mr. Haake notes the following: coercion based on Respondent's admissions in his Answer that Complainant was told that he was required to sign the pre-investigation disclosure or be subject to discipline for insubordination, Complainant was not provided with copies of his letters from BC Yamamoto and permission to record the interview, a breach of the June 17, 2014 settlement following the filing of a July 5, 2014 fourth personnel evaluation grievance and move to enforce on January 26, 2015, and the evidence of coercion and retaliation in the correspondence between the Board and the Respondent in Ex. A, p. 7 "Respondent was forced to file a Motion to Enforce Settlement[,]" which was in retaliation for Complainant's filing of the Complaint as the grounds for the HRS § 89-13(a)(1) violations; Respondent's failure to object to the claims of denial of the HFFA Recorder Aiwohi's services on September 6, 2014 and the messages from BC Yamamoto regarding not contacting HFFA as the grounds for the HRS § 89-13(a)(2) violation; the non-hiring of Complainant for the Fire Captain position and modification of his terms and conditions of employment as the grounds for the HRS § 89-13(a)(3) violation; Exhibits B and C showing coercion to breach the June 17, 2014 settlement, non-hire for Fire Captain, and modification of terms and conditions of employment as the grounds for the HRS § 89-13(a)(4) violation; Respondent's failure to object to Complainant's claims regarding denial of Aiwohi's services and messages from BC Yamamoto as the basis for HRS§ 89-13(a)(5) violation; correspondence between the Board and Respondent in Ex. A, p. 7 as the ground for the HRS § 89-13(a)(6) violation; and the previous violations cited as the grounds for the HRS § 89-13(a)(7) and (8) violations. Regarding exhaustion of remedies, Mr. Haake's response includes that: he has exhausted all remedies through arbitration and was removed from duty following his filing of a grievance; Respondent's arbitrary interpretation of collective bargaining caused Complainant to forego Step 1; HFFA failed to clarify regarding the status of his letter; and there has been an arbitrary imposition of collective bargaining policies and procedures, which have led to continuing violations since being placed on administrative leave. Finally,

Complainant notes Respondent's "coercive tactics" and HFFA's lack of response to his request for counsel, and requests the Board to stop the Motion to Enforce Settlement as a clear violation of good faith because Respondent cannot be allowed to breach settlement and then seek to enforce it.

In his Reply, Respondent reemphasized that Mr. Haake has failed to exhaust his remedies under the CBA grievance procedures. Further, that all but the December allegations in unnumbered paragraphs 18-22 fall outside of the 90-day statute of limitations and are time-barred pursuant HAR § 12-42-42. Murray further responds to Complainant's Opposition to the Motion: regarding the specific conduct alleged as violations of HRS § 89-13(a)(1)-(8), the requirement of signing the pre-investigation disclosure is not related to his Union activities or affiliation, was not timely filed, and could be filed as a grievance under the CBA, which Complainant has not done; regarding the alleged breach of the June 17, 2014 settlement agreement, Complainant is the party refusing to sign, the Complainant's grievance form was never filed with the Employer, not known by the Union, and was untimely, and the personnel evaluation cannot be the basis for a breach because Complainant refused to sign it; regarding the alleged retaliation based on the County's Motion to Enforce Settlement, this allegation is simply untrue because the County put the Union and arbitrator on notice of its intention to file the Motion, and the Union substantiated that Mr. Haake refused to sign the agreement reached; regarding the allegation of the denial of Aiwohi's services, Complainant had a Union representative with him at each meeting, including on September 6, 2014, and moreover, any allegation of an interview without Union representation is untimely; and finally, any allegations regarding Complainant's non-selection for Fire Captain and any modification of his terms and conditions of employment, are grievable under the CBA.

D. The March 11, 2015 Hearing on the Motion to Dismiss

On March 11, 2015, the Board held a hearing on the Motion to Dismiss with Respondent represented by counsel and Mr. Haake appearing on his own behalf. At the hearing, the Board Chair noted the Board's receipt of Complainant's email with an attached copy of a February 18, 2015 letter from Murray to Mr. Haake providing notice of his termination from his employment, effective March 6, 2015, which was admitted into the record without objection from the Respondent. Complainant did not know whether a grievance had been filed by the Union over the termination. The Board Chair indicated that upon review of the Motion to Dismiss and the Opposition, the Board was inclined to grant the Motion for failure to exhaust, defer to the Unit 11 CBA grievance procedure, but retain jurisdiction of any HRS Chapter 89 issues. In support of the Motion, Respondent reiterated the untimeliness of certain Complaint allegations. Mr. Haake responded that the Complaint was filed within the 90-days based on the ongoing nature of the retaliation against him, and that the Board has jurisdiction under HRS 89-14(a) [sic] based on the retaliatory action. The Board Chair suggested that a discrimination allegation based on the filing of various grievances could be raised before the arbitrator. Respondent informed the Board that

the arbitrator declined to rule on the motion to enforce the settlement based on lack of authority under the CBA; and that as of the March 10, 2015, the arbitration is still alive. Respondent then asserted that all the issues, including the termination and the retaliation, are grievable and would be a basis for an arbitrator to find lack of good cause. Respondent urged that if the Board finds certain matters outside of the CBA, the Board should determine whether the matters are timely or not; and further that a multitude of grievances does not mean that there is a CBA violation or a prohibited practice. The Board Chair noted the Board's concern regarding getting in the way of an arbitration, stated his opinion that discrimination and retaliation would be more expeditiously pursued in arbitration with union representation, and concluded that the Board order would clarify the issues before the Board. While agreeing that the termination is properly pursued through grievance, Mr. Haake argued that the retaliatory practices should be pursued through the Board because the Union failed to fairly represent him to which the Board Chair responded that the HRS Chapter 89 allegations in this case are against the Employer and not the Union.

E. The September 28, 2016 Prehearing/Status Conference

Board Member J N. Musto presided over the September 28, 2016 Prehearing/Status Conference to establish dates for deadlines and a hearing on the merits. Complainant appeared on his own behalf and Respondent by his counsel. Regarding the status of the grievance, Complainant represented that two of the matters set forth in the Complaint are currently in arbitration, including his termination, and that there are also multiple grievances. Complainant stated that the most pressing arbitration is the one involving his March 6, 2015 unlawful termination without pay by the County. Complainant took the position that despite the original Complaint being based on his placement on leave without pay and his non-selection for the Fire Captain position, the prohibited practice issues currently are based on his termination in direct retaliation for filing the Complaint. Complainant maintained that the Complaint was amended because he kept the Board apprised of his termination and the ongoing nature of the issue based on the failure of the County and the Union to adhere to the CBA grievance timeline. However, Mr. Haake further represented that Respondent's counsel agreed that the termination issue was to be decided by the arbitrator. Respondent concurred with Complainant regarding the status of the termination grievance, in which the issue is whether termination was for just cause. Respondent informed the Board that there is a prior grievance with the same arbitrator, which initially was settled but ultimately did not, and is not presently before the arbitrator. The arbitrator was of the opinion that the termination issue should proceed first because this second arbitration may render the first arbitration moot. Regarding the issues before the Board, Respondent stated that some of the violations were not appropriate and should be dismissed; and that other than the Motion to Dismiss, the issues raised in the Complaint are the allegations regarding retaliation for filing grievances (but not retaliation for the filing of the HLRB Complaint); and the failure to promote to Fire Captain. Complainant responded that the Board has jurisdiction over the whole process because the County is not following the CBA timelines and circumvents collective bargaining "time-wise" and based on the

merits, which include 14-15 outstanding grievances in addition to the arbitration, and applies different rules to different individuals and departments. While acknowledging that the Unit 11 CBA has remedies for non-selection to be addressed through the grievance procedure and that the Union complied with that process, Complainant nevertheless asserted that the County has not responded to the grievance, and that there was an agreement with Respondent's counsel that the Board should decide the non-selection for Fire Captain promotion and the arbitrator will decide the termination. Respondent's counsel did not recall any request to or agreement that the Board decide the non-selection issue. Respondent's counsel only recollection was that at the last hearing, the Board member suggested that the arbitration process be completed, and then the parties should come back to the Board regarding the Motion to Dismiss. However, Respondent's counsel stated that the arbitration remains unresolved and urged the Board to rule on the Motion to Dismiss. Board Member Musto culminated the hearing by stating that the Board will consider the Motion to Dismiss and provide an order in writing before setting any further deadlines or dates.

F. Timeliness

The Hawaii appellate courts do not appear to have provided specific guidance regarding the burden of proof in a situation where the Respondent raises the issue of timeliness of complaint as a basis for a motion to dismiss. Accordingly, the Board turns to federal law interpreting the analogous Federal Rule of Civil Procedure 12(b)(1).[vi] The Ninth Circuit has analyzed the respective burdens of the parties as, "Although ordinarily the [respondent] bears the burden of proving an affirmative statute of limitations defense, here the statute of limitations is jurisdictional, and '[w]hen subject matter jurisdiction is challenged under Federal Rule of Procedure 12(b)(1) the [complainant] has the burden of proving jurisdiction in order to survive the motion.'" Kingman Reef Atoll Invs., LLC v. United States, 541 F.3d 1189, 1197 (9th Cir. 2008) (quoting Tosco Corp. v. Cmtys. For a Better Env't, 236 F.3d 495, 499 (9th Cir. 2001); Napier v. United States, 2013 U.S. Dist. LEXIS 20349, at *6 (D. Cal.) (citing Kingman Reef Atoll Invs., LLC v. United States, 541 F.3d 1189, 1197 (9th Cir. 2008)).

The Board's jurisdiction is governed by HRS Chapters 89 and 377. 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. The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. This time requirement has been held 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) (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 v. Okabe, Board Case No. CU-05-302, Order No. 3024, at *10 (2014) (citing Fitzgerald v. Ariyoshi, 3 HPERB 186, 198-99 (1983); Cantan v. Dep't. of Evtl. Waste Mgmt., Board Case No. CE-01-698, Order No. 2599, at *8-9 (3/24/2009); Kang v. Hawaii State Teachers Ass'n., Board Case No. CE-05-440, Order No. 1825, at *4 (12/13/99)).

Moreover, 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, 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)).

Respondent has taken the position that the 90-day limitations period began to run on October 17, 2014 based on a filing date of the Complaint on January 15, 2015. However, the Board finds based on the record that the Complaint in this case was filed on January 13, 2015. Based on this filing date, the 90-day limitations period began to run on October 16, 2014. Regardless, a review of the Complaint shows that all of the allegations reference events between August 8, 2014 and December 12, 2014. Accordingly, the Board dismisses all of the allegations relating to occurrences transpiring prior to October 16, 2014, which include but are not limited to the relief from duty on August 8, 2014 and the disregard of Step 1 grievance proceedings which occurred prior to that date in violation of HRS § 89-13(a)(1) through (8). The only timely allegations regarding occurrences falling within the 90-day are those regarding the December 3, 2014 filing of the non-selection grievance in violation of HRS § 89-13(a)(3) through (8) and disregard of Step 1 grievance proceedings in violation of HRS § 89-13(a)(1) through (8), which may have occurred between October 16, 2014 and January 13, 2015, the date of the filing of the Complaint.[vii] While Mr. Haake relies on the retaliatory[viii] and ongoing nature of the County's conduct, he has presented no support for his position. Despite the timeliness of these allegations, the Board must nevertheless dismiss these claims also for failure to exhaust remedies under the CBA for the following reason.

G. Failure to Exhaust

As to the allegations regarding the filing of a grievance for non-selection as Fire Captain, the filing of a grievance regarding his termination (which was not included in the Complaint but which Complainant argues is included), and any disregard of Step 1 grievance proceedings between October 16, 2014 and the date of the filing of the Complaint on January 13, 2015,[ix] the Board holds that the Complainant failed to exhaust his contractual remedies.

HRS § 89-10.8(a) requires 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, and that the grievance procedure "shall be valid and enforceable[.]"

As required, the Unit 11 CBA provides for a grievance procedure, which may be pursued in the event of an alleged "complaint…concerning the application and interpretation of this agreement," including promotions and disciplinary actions taken against any employee, which may culminate in arbitration. Section 18. GRIEVANCE PROCEDURE. provides in relevant part:

> **Section 18. 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.
> ***
> B. An 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.
> ***
> 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 designee of its desire to arbitrate within ten (10) working days after receipt of
> the Employer's decision at Step 2.
> ***
> 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 the conclusion of the hearings or if oral

> hearings are waived then thirty (30) calendar 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.
> 4. In any case of any disciplinary action where the arbitrator finds such disciplinary action was improper, the arbitrator may set aside, reduce or modify the action taken by the Employer. If the penalty is set aside, reduced or otherwise changed, the arbitrator may award back pay to compensate the Employee, wholly or partially, for any wages lost because of the penalty.

In addition, the Unit 11 CBA contains Section 12. PROMOTIONS[x] and Section 16. DISCIPLINE.[xi]

Further, the Hawaii appellate courts have long held that a complainant must exhaust his available contractual remedies prior to bringing a prohibited practice complaint. In a very early appeal from a decision of the Board's predecessor Hawaii Public Employment Relations Board (HPERB), the Hawaii Supreme Court (Court) in Santos v. Dep't of Transportation, 64 Haw. 648, 655, 646 P.2d 962, 967 (1982), applied this principle to affirm the circuit court's reversal of HPERB's holding that the public employer in that case violated HRS § 89-13(a)(8) by violating a provision of the collective bargaining agreement. In so ruling, the Court cited and applied the general rule that before an individual can maintain an action against his or her employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his employer and the union, noting that, "[t]he rule is in keeping with prevailing National Labor Relations policy and Hawaii policy favoring arbitration as a dispute settlement mechanism." The Santos Court then ruled:

> [W]e hold 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.

Id. at 655-656; 646 P.2d at 967 (citing Winslow v. State of Hawaii, 2 Haw. App. 50, 55, 625 P.2d 1046, 1050 (1981)). This principle has become a guiding principle in cases brought by public employees. *See, e.g.*, Poe v. Hawaii Lab. Rels. Bd., 97 Hawaii 528, 536, 40 P.3d 930, 938 (2002). In Poe v. Hawaii Lab. Rels. Bd., 105 Hawaii 97, 94 P.3d 652 (2004) (Poe), the Court, in holding that the Board did not err in determining that the complainant had failed to exhaust his remedies under the collective bargaining agreement, stated:

> This court has used federal precedent to guide its interpretation of state public employment law. Based on federal precedent, we have held it well-settled that an employee must exhaust any grievance . . . procedures provided under a collective bargaining agreement before bringing a court action pursuant to the agreement. The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process, allowing parties to develop their own uniform mechanism of dispute resolution. It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means. (Emphasis added)

Id. at 101, 94 P.3d at 656. (Citations and internal quotations omitted) The Poe Court further recognized that exceptions to the exhaustion requirement exist, such as when pursuing the contractual remedy would be futile. *Id.* at 102, 94 P.3d at 657. However, there is no showing that such an exception exists in this case.

The Board has adhered to the principles set forth above and dismissed prohibited practice complaints for failure to exhaust contractual remedies. *See, e.g.*, Mussack v. Harano, Decision No. 436, 6 HLRB 273, 277-78 (2002); Hawaii Gov't Emp. Ass'n. v. Dep't of Human Resources Dev., Board Case No. CE-09-361, Order No. 1780, at *6 (1999).

Respondent has taken the position that all of Complainant's allegations have contractual remedies under the CBA, which Complainant has failed to exhaust, including the investigation into Complainant's misconduct for which he was relieved of duty, his non-selection for Fire Captain, denial of due process, and violations of the CBA grievance procedure. After the dismissal of the claims for untimeliness as discussed above, the remaining claims are the December 3, 2014 filing of a grievance regarding Complainant's non-selection for Fire Captain, any disregard of Step 1 grievance proceedings between October 16, 2014 and the date of the filing of the Complaint on

January 13, 2015 and the Complainant's termination, which was not contained in the Complaint (because the claim arose after the Complaint was filed when Complainant received the February 18, 2015 termination letter). Even if the Board accepts Complainant's argument that his notification of the Board of his termination brings this claim into the proceeding, there is no dispute that this matter is now before an arbitrator for resolution. Hence, the Board defers to the arbitration process on this matter. State of Hawaii Organization of Police Officers v. Kusaka, Board Case No. CE-12-403, Decision No. 396, 6 HLRB 25, 28 (1998); Hawaii Nurses Ass'n v. Ariyoshi, Board Case No. CE-09-41, Decision No. 104, 2 HPERB 218, 228 (1979). The allegation regarding the December 3, 2014 grievance filed over Complainant's non-selection for Fire Captain in violation of HRS § 89-13(a)(3)-(8) and any disregard of Step 1 grievance procedure from October 16, 2014 and the date of the filing of the Complaint on January 13, 2015 in violation of HRS § 89-13(a)(1)-(8) also require exhaustion under the CBA. There is no dispute based on the record that a grievance was filed regarding the non-selection for Fire Captain, which is currently pending in the grievance procedure and whether or not any issues regarding disregard of Step 1 are being pursued or not through the grievance procedures, the Board holds that that the grievance procedure is implicated and exhaustion is required regarding these matters, which Complainant has failed to do.

H. Failure to Allege Any Facts Constituting A Violation of HRS § 89-13(a)(1), Lacks Standing to Assert Violations of HRS § 89-13(a) (5) and (6), and Failure to Designate An Independent Statutory Violation to Constitute a Violation of HRS § 89-13(a)(7).

Respondent argues that Complainant failed to allege any facts regarding a violation of HRS § 89-13(a)(1); lacks standing to assert violations of HRS § 89-13(a)(5) and (6); and failed to designate an independent statutory violation to constitute a violation of HRS § 89-13(a)(7). The Board does not reach any of these contentions based on dismissal of the claims for the reasons set forth above.

However, even if the Board did reach these issues, with respect to the argument that Complainant lacks standing to assert violations of HRS §§ 89-13(a)(5) and (6) because he is not the exclusive representative and that the Complainant failed to allege any facts that would constitute a violation of rights guaranteed under Chapter 89, HRS, the Board has previously dismissed claims regarding HRS §§ 89-13(a)(5) and (6) violations brought by a public employee against his public employer based on an absence of law and adequate facts in support. Idao v. Dep't of Commerce and Consumer Affairs, Board Case No. CE-13-841, Order No. 3082, at *19-20 (2015) (Idao). In addition, regarding Complainant's alleged HRS § 89-13(a)(7) violation, in Idao, the Board noted that in previous decisions, the Board has construed this violation to require that the statutory violation alleged "must occur independent of Section 89-13, H.R.S., reasoning that "[a]ny other interpretation would render Subsection 89-1(a)(7), H.R.S., meaningless and redundant." *Id.* at *20 (citing Burns, 3 HPERB at 123). Accordingly, this claim would also be

dismissed based on the Complaint's failure to designate any other independent HRS Chapter 89 violations.

ORDER

For all of the reasons set forth above, the Board grants Respondent's Motion to Dismiss because: 1) all of the allegations set forth in the Complaint based on occurrences prior to October 16, 2014, including the relief from duty and disregard of Step 1 grievance proceedings prior to October 16, 2014 claims, are untimely; and 2) the remaining issues, including Complainant's non-selection for Fire Captain and termination and disregard of Step 1 grievance proceedings between October 16, 2004 and January 13, 2015, the date of the filing of the Complaint are dismissed for failure to exhaust contractual remedies.

This case is closed.

DATED: Honolulu, Hawaii, January 25, 2017.

HAWAII LABOR RELATIONS BOARD

SESNITA A.D. MOEPONO, Member

J.N. MUSTO, Member

Copies to:

Kanoa Haake, Self-Represented Litigant
Thomas Kolbe, Deputy Corporation Counsel, County of Maui

[i] HRS § 89-2 governing Definitions states in relevant 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)].

[ii] HRS § 89-6 governing Appropriate bargaining units states in relevant part:

(a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:
***
(11) Firefighters[.]

[iii] HRS § 89-2 governing Definitions states in relevant part:

"Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

[iv] HRS § 89-2 governing Definitions states in relevant part:

"Exclusive representative" means the employee organization certified by the board under section 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.

[v] HRS Section 89-13(b) states:

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

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;
(3) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;
(4) Refuse or fail to comply with any provision of this chapter; or
(5) Violate the terms of a collective bargaining agreement.

(Emphasis added) While under Paragraph 5. Allegations, the Complaint sets forth HRS Section 89-13(a) and (b), in subsequent more specific allegations in the paragraph, Complainant only alleges violations of HRS Section 89-13(a). For this reason and based on the fact that HRS Section 89-13(b) only applies to a public employee, employee organization, or its designated agent not to a public employer, the Board disregards the Complaint allegations regarding violations of HRS Section 89-13(b)(1)-(5).

[vi] The Court has adopted the approach that, "Where an appellate court has patterned a rule of procedure after an equivalent rule within the Federal Rules of Civil Procedure, interpretations of the rule by the federal courts are deemed to be highly persuasive in the reasoning of a state court." Schefke v. Reliable Collection Agency, Ltd., 96 Hawaii 408, 431, 32 P.3d 52, 75 (2001).

[vii] Mr. Haake stated at the March 11, 2015 hearing on the Motion that he received notice of his termination by a February 18, 2015 letter from Murray, which was admitted into the record. The Complaint in this case was filed on January 13, 2015. Mr. Haake admitted that he failed to amend the Complaint but argued that amendment was not required because he kept the Board apprised of his ongoing issues. The Board is not required to resolve this issue based on the exhaustion doctrine discussed fully below.

[viii] While the Court has not appeared to provide any specific guidance regarding the application of the continuing violation doctrine to retaliation cases, the United States Supreme Court in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002) (Morgan), invalidated the application of the continuing violation doctrine to "discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify," or retaliation claims in Title VII cases. The Hawaii federal district court in Kosegarten v. Dep't of the Prosecuting Atty., 892 F.Supp.2d 1245, 1259 (D. Haw. 2012), noted that Morgan overruled prior Ninth Circuit case law regarding continuing violations of Title VII, stating, "The Supreme Court's decision in Morgan invalidated our previous application of the continuing violation doctrine to discrete acts of discrimination and retaliation." In Aoyagi v. Straub Clinic & Hospital, 140 F.Supp.3d 1043, 1053 (D. Haw. 2015) (citing Morgan, 536 U.S. at 113), the Hawaii federal district court further noted that, "Importantly, however, 'discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges.'" Admittedly, Title VII filing deadlines are obviously pursuant to a different statute, which is not jurisdictional; and therefore, distinguishable from the 90-day period established by HRS §§ 377-9(l) and 89-14. However, nonetheless, the Morgan reasoning appears to support that the claims in this particular case for failure to select for the Fire Captain and retaliation would be determined discrete acts not subject to the continuing violation doctrine.

[ix] The Complainant's position regarding which allegations are contained in the Complaint appears to have shifted during the course of this case. At the most recent Prehearing/Status Conference, held on September 28, 2016, Complainant took the position that while the original Complaint was focused on the placement on leave without pay and his non-selection, the prohibited practice issues currently are based on his termination in retaliation for the filing of the Complaint. However, the Complainant also acknowledged that this termination issue is before an arbitrator for a decision. The Board will nonetheless address all of these allegations in the context of the Motion to Dismiss.

[x] Unit 11 CBA Section 12. PROMOTIONS. states:

> Promotions in the Fire Departments shall be made on the basis of merit, efficiency and fitness as ascertained by examination which, so far as practicable shall be competitive.
> The Fire Chief or designee shall consult with the Union prior to the implementation of any substantive changes to the promotional process.
> An Employee selected for promotion must meet the Employer-established minimum qualifications.
> Other factors being relatively equal, grade seniority shall be given priority (overall department seniority prevails in the event of a tie).
> Prior to placement, the Fire Chief or designee shall make all Employees selected for promotion aware of the vacant positions available for placement and allow them to identify their preferences. Each jurisdiction shall develop a procedure in good faith consultation with the Union to address Employee preferences.
> An Employee who is certified from an eligible list for promotion but not selected shall, upon written request submitted within ten (10) calendar days of non-selection, be entitled to an individual conference with the appointing authority or designated representative to discuss the reasons for such non-selection and the Employee's promotion potential.

[xi] Unit 11 CBA Section 15. DISCIPLINE states:

> Employees shall not be disciplined without just and proper cause. The Employer shall provide written notice of all verbal reprimands (if documented), written reprimands, suspensions, and dismissals to the Employee and Union within ten (10) business days after the effective date of the disciplinary action. Grievances regarding these matters shall be handled in accordance with the provisions of Section 18. Grievance Procedure.