STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII STATE TEACHERS ASSOCIATION, Complainant, and BENJAMIN J. CAYETANO, Governor, State of Hawaii and BOARD OF EDUCATION, State of Hawaii, Respondents.	CASE NO. CE-05-475 DECISION NO. 431 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
In the Matter of BENJAMIN J. CAYETANO, Governor, State of Hawaii, Complainant, and HAWAII STATE TEACHERS ASSOCIATION, Respondent.	CASE NO. CU-05-185

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This consolidated case commenced with the filing by the HAWAII STATE TEACHERS ASSOCIATION (HSTA or Union) of a Prohibited Practice Complaint with the Hawaii Labor Relations Board (Board) pursuant to Hawaii Revised Statutes (HRS) § 89-13, against BENJAMIN J. CAYETANO, Governor, State of Hawaii (CAYETANO or Governor) and the BOARD OF EDUCATION, State of Hawaii (BOE) (collectively State or Employer) on August 14, 2001 in Case No. CE-05-475. Essentially, the HSTA alleges that the State refused to bargain collectively in good faith by refusing to execute and implement the document ratified by the HSTA membership on April 24, 2001. It requests this Board to order the State to implement and execute that document, and also seeks the recovery of damages.

On August 24, 2001, the State filed its Answer denying the material allegations in the Complaint and raising affirmative defenses, including mutual/unilateral mistake, and alleging that the ratification document does not represent the April 23, 2001 oral agreement reached by the parties.

Also on August 24, 2001, CAYETANO filed a Prohibited Practice Complaint against the HSTA in Case No. CU-05-185 arising out of the same collective bargaining process that gave rise to the HSTA Complaint. Essentially, CAYETANO alleged that the parties had reached an oral agreement on April 23, 2001 and that the ratification document did not accurately reflect the terms of the April 23, 2001 oral agreement (with respect to P-Track and the dropping of two salary steps).[1] CAYETANO alleged that the refusal by the HSTA to execute a written agreement that embodied the terms of the April 23, 2001 oral Agreement constituted a prohibited practice and sought an order from this Board requiring the HSTA to execute a document that embodied those terms.

On September 14, 2001, the HSTA filed a Motion for Interlocutory Order Compelling Respondents [State] to Implement Collective Bargaining Agreement and a Memorandum in Support of Motion in Case No. CE-05-475.

The first prehearing conference with this Board was held in both cases on September 19, 2001. At the conference, counsel for the parties reported to the Board a number of agreements, including: (1) consolidation of Case No. CE-05-475 and Case No. CU-05-185; (2) scope of discovery; (3) time for hearing (October 22, 2001); (4) appearance of witnesses at the hearings; and (5) narrowing the scope of the hearings by implementing the April 23, 2001 collective bargaining agreement, with the exception of the P-Track provision.

The Stipulation to Implement the April 23, 2001, Collective Bargaining Agreement with the Exception of the Bonus for Teachers with Advanced Degrees, and for the Withdrawal of HSTA's Motion for Interlocutory Order Compelling Respondents [State] to Implement Collective Bargaining Agreement was filed on September 21, 2001.

A second prehearing conference before the Board was held on September 21, 2001. As a result of that conference, the Board on that same date issued an order directing the parties to mediate the pending dispute and setting forth a timetable and process for the selection of a mediator, in the event the parties were unable to agree upon a mediator.

[1]The failure to include the dropping of two salary steps is not an issue for decision in this consolidated case.

The parties thereafter agreed upon a mediator, Colbert M. Matsumoto, Esq., and a Mediation Agreement was filed on September 27, 2001. The following day, September 28, 2001, a Statement of Selection of Mediator was filed.

On October 11, 2001, the HSTA filed a Motion for Partial Dismissal of Complaint Filed on August 24, 2001 in Case No. CU-05-185; a Memorandum in Support of the Motion, an Exhibit and Affidavit of Counsel. Essentially, the HSTA sought to dismiss: (1) CAYETANO's complaint that the HSTA made unilateral changes to the document ratified by HSTA membership on the grounds that the complaint was filed more than ninety (90) days after the State allegedly knew of the unilateral changes, and (2) the portion of the State's complaint seeking to compel the HSTA to execute a document embodying the April 23, 2001 oral agreement on the grounds that the HSTA has no ability to "implement" the three percent (3%) differential/bonus.

The State filed its Memorandum in Opposition to HSTA's Motion for Partial Dismissal on October 16, 2001. Thereafter, on October 19, 2001, the HSTA filed a Reply Memorandum in Support of its Motion for Partial Dismissal. The Board heard HSTA's Motion for Partial Dismissal on October 22, 2001 and took the motion under advisement. The Board also granted the State's motion to continue the hearing on the merits of the case filed on October 18, 2001 and rescheduled the hearing for November 5, 2001.

A final prehearing conference before the Board was held on November 1, 2001. At that conference, counsel for the parties reported that the mediation ordered by the Board had not been successful and that the hearing on the merits would proceed as scheduled on November 5, 2001. The Board also deferred its ruling on the HSTA's Motion for Partial Dismissal until it had heard the evidence in the case.

Hearings on the merits of the cases were held on November 5, 8, 9, 13, and 19, 2001. At the conclusion of the HSTA's case, all of the HSTA's exhibits were received in evidence without objection. At the conclusion of the State's case, State Exhibit Nos. 6, 7, 8, and 8A were withdrawn. All other exhibits, except State Exhibit No. 14, were received in evidence without objection. State Exhibit No. 14 was received into evidence over HSTA's objection.

Closing briefs were filed with the Board on December 21, 2001. Based on a thorough review of the record and consideration of the arguments presented, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The HSTA is an employee organization and the exclusive representative, within the meaning of HRS § 89-2, of public school teachers employed by the Department of Education (DOE) included in bargaining unit (Unit) 05.

a. At all times relevant, Joan Husted (Husted) was the executive director, chief negotiator and spokesperson for the HSTA.
b. At all times relevant, Irene Igawa (Igawa) was the negotiations specialist for the HSTA.
c. At all times relevant, Karen Ginoza (Ginoza) was the President of the HSTA.
d. At all times relevant, Ruth Dalisay was a teacher and member of HSTA's negotiating team.
e. At all times relevant, Ronald Ray Hart was a teacher and member of HSTA's negotiating team.
f. At all times relevant, Elizabeth "B.J." Field was a teacher and member of HSTA's negotiating team.

2. For purposes of negotiations, the public employer is the Governor and the BOE for DOE employees in Unit 05.
a. At all times relevant, Davis Yogi (Yogi) was the State's Chief Negotiator.
b. At all times relevant, Sandra McFarlane (McFarlane) was the personnel director of the DOE and member of the State's negotiating team.
c. At all times relevant, Neil Miyahira (Miyahira) was the State's Director of Budget and Finance and a member of the State's negotiating team.
d. At all times relevant, Winston Sakurai (Sakurai) served on the BOE and was a member of the State's negotiating team.
e. At all times relevant, Denise Matsumoto (Matsumoto) served on the BOE and was a member of the State's negotiating team.

3. The previous collective bargaining agreement for Unit 05 employees expired on January 31, 2000.

4. On March 21, 2000, HSTA submitted a written formal proposal to the State for the 1999-2001 contract period. The proposal included the following:

> Effective August 21, 2000, the "P" track shall be created in Classes II through VI. The percentage difference between "B" and "P" track shall be three (3) percent.

The proposed P-Track had initially been included in an unfunded Memorandum of Understanding (MOU), known as "Model O" entered into between the parties on February 24, 1997. The Model O MOU expired on June 30, 1999. P-Track provided for a continuing three percent (3%) increase to the salary base for teachers who held advanced degrees above the schedule applied to teachers with basic certificates, B-Track.

5. On October 12, 2000, the HSTA submitted a written proposal to the Employer for a four-year contract, retroactive to 1999, amounting to a 22 percent (22%) increase. HSTA estimated its proposal to cost $260 million. The Employer estimated the cost to be $295 million. HSTA's proposal included the P-Track proposal as submitted in its March 21, 2000 proposal.

6. Both parties estimated the annual cost of P-Track at approximately $6 million. The HSTA's economist Ted Waitt (Waitt) calculated an estimated figure of $6 million which he had discussed with Gordon Chang, a budget analyst with the Department of Budget and Finance who concurred with Waitt's figure based upon a percentage of eligible teachers times the approximate annual payroll of approximately $500 million. The State utilized the same figure for its estimate, also derived from the formula developed/utilized by Gordon Chang.

7. Both proposals were rejected by the State.

8. On November 3, 2000, the Employer submitted in writing an informal proposal with two options neither of which offered retroactive pay increases in the first two years of the contract period. Both options cost $67.8 million. Neither option contained a P-Track proposal and HSTA rejected this proposal almost immediately because it did not represent enough money for a four-year contract.

9. On November 13, 2000, the HSTA filed a notice of impasse with the Board, having spent over 271 hours in bargaining sessions covering 74 separate days beginning on January 20, 1999. While the Employer disputed the parties were at an impasse, it was not based on a failure to bargain in good faith.

10. On December 6, 2000, the Board declared an impasse in contract negotiations for teachers and other employees of the DOE in Unit 05. Based on its investigation, the Board found the Employer and HSTA were unable to reach an agreement after good faith negotiations.

11. Following the declaration of impasse, the HSTA and State followed and met the requirements for resolving the impasse through mediation on December 13 and 18, 2000 and fact-finding from December 27, 2000 to January 8, 2001 as set forth in HRS § 89-11. The parties then entered into a mandated 60-day cooling-off period which ended on March 19, 2001.

12. On March 22, 2001, the HSTA issued a notice of intent to strike on April 5, 2001.

13. On March 16 and 19, 2001, the State filed two prohibited practice complaints against the HSTA alleging bad faith bargaining. On April 13, 2001, the Board

issued Decision No. 422, Board of Education, 6 HLRB 173 (2001), dismissing the complaints.

14. The P-Track proposal here at issue was made by then Superintendent of Education Paul LeMahieu[2] (LeMahieu or Superintendent) on or about April 3, 2001 at a meeting attended by members of HSTA's negotiating team, including Husted, Dalisay, Field, Hart and Igawa, and members of the State's negotiating team which included Yogi, Miyahira, McFarlane, Sakurai, and Matsumoto. To avert a teachers' strike, LeMahieu offered to pay for P-Track estimated to cost $6 or $6.7 million using excess federal impact aid monies.

15. Before LeMahieu made the April 3, 2001 offer, he spoke with Sakurai about his idea of using excess federal impact aid to give additional pay to teachers with professional and masters degrees that he wanted to take to the Governor. LeMahieu obtained the permission of the BOE to use $6 million of the excess federal impact aid for one year to pay for P-Track as a means of averting a strike. According to Sakurai, LeMahieu expected to get about $8 to 10 million in excess federal impact aid each year for three years. Nevertheless, the BOE did not authorize payment for a second year using excess federal impact aid because it did not know how much the DOE would have to spend for a second year until the federal budget is completed and the monies appropriated by Congress.

16. CAYETANO met with LeMahieu and discussed the proposal before the Superintendent proposed it to HSTA's negotiating team on April 3, 2001. The Governor agreed to LeMahieu's proposal on the condition that the funds would not come from the Legislature (General Fund) and that the bonus payment would only be for one year. He would not have agreed to a bonus for more than one year.

17. Miyahira explained that the State General Fund receives reimbursements from the federal government for public schools educating dependents primarily of military personnel. The General Fund is budgeted to use $25 million and any amounts in excess are released to the BOE for its discretionary spending in the DOE's budget each year. In an effort to avoid a strike, LeMahieu committed to use the excess funds to pay for P-Track to give teachers with professional and masters degrees more money. By using these excess federal funds, the

[2]LeMahieu resigned as School Superintendent for reasons unrelated to this matter before the complaints were filed with the Board. Throughout the proceedings before the Board, the BOE was represented by Acting School Superintendent Patricia Hamamoto.

three percent (3%) differential proposed for P-Track was never included as a cost item in the General Fund budget requiring legislative appropriation.

18. When LeMahieu discussed funding the P-Track differential at the bargaining table, Husted was "well aware" (Transcript [Tr.] of hearing held on November 8, 2001 [Vol. II], p. 237, lines 1-7) that the State had rejected HSTA's proposed P-Track as being built into the salary base. Husted offered to change P-Track from being built into the salary base because it would be less costly and still preserve the concept of P-Track. Husted also wanted to call the three percent (3%) a differential instead of a bonus.[3]

19. The HSTA characterizes the Superintendent's proposal as an informal acceptance of the Union's previous written offer of a continuing three percent (3%) differential for P-Track teachers. Since its conceptual inception in 1997, P-Track had always been a continuing annual increase, the Superintendent's offer to pay for P-Track was understood in those terms.

20. The offer to pay for P-Track made by LeMahieu to avert a strike was proposed as a one-time bonus for teachers with professional and masters of education degrees using $6 million from excess federal impact aid funds. Although the use of impact aid funds was mentioned, HSTA insists no single-year or $6 million cap was associated with the proposal. After April 3, 2001, Husted had no other discussion with LeMahieu or the State's negotiating team about LeMahieu's offer to pay for P-Track.

21. On April 5, 2001, the HSTA commenced a legal strike effectively closing each of the State's public schools. The State consequently took all offers, including P-Track, off of the bargaining table.

22. Late in the day of April 21, 2001 (a Saturday), after the conclusion of federal mediation, the State put a P-Track proposal back on the table. Just before the P-Track proposal was included in a proposal presented to HSTA representatives Husted and Ginoza, CAYETANO met with Sakurai and Matsumoto to get their assurance that the BOE wanted to pay for P-Track out of the DOE's budget using excess federal impact aid. Sakurai and Matsumoto agreed to use $6 million of excess federal impact aid in the DOE's budget as first proposed by the Superintendent before the teacher's strike. The State memorialized the offer in a single line written on chart paper summarizing the value as follows: "P-track (DOE) $6.0 mil." This item was included in a

[3]Husted mistakenly believed a bonus would not count for purposes of calculating retirement pay, but later learned that a differential would not either.

proposal presented by the Governor to Husted and Ginoza in his office on April 21, 2001. There was no specific discussion of the P-Track proposal between the Governor, Husted, and Ginoza at the meeting.

23. The State included the $6 million P-Track offer in the proposal in order to achieve a targeted overall percentage increase in the value of the contract.

24. Late on Sunday, April 22, 2001, the HSTA informed Yogi, that the State's April 21, 2001 proposal had been rejected.

25. On April 23, 2001, representatives of the HSTA and State met separately with U. S. District Judge David Ezra. The Judge was responsible for overseeing the implementation of a consent decree ensuring the provision of appropriate educational services for certain classes of special education children (under the Felix consent decree). Husted testified that, "he threatened us with taking over the Department of Education and doing terrible things to us if we didn't settle the agreement." Tr. of hearing held on November 5, 2001 (Vol. I), p. 167.

26. Discussions between the parties resumed on April 23, 2001. According to all of the State witnesses who testified on the issue, there were three meetings that day between HSTA representatives Husted and Ginoza and members of the State team, two of which included the Governor -- one at the Hemmeter Center and two in the Governor's office.[4]

27. No agreement was reached at the meeting at Hemmeter Center.[5] The State negotiating team met with the Governor to discuss the status of negotiations. The Governor decided to ask the HSTA representatives to come to his office

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[4]According to Husted and Ginoza, there was only one meeting with State representatives (at Hemmeter Center) and no meetings with the Governor at his office on that date. Tr. Vol. II, pp. 261-262; Tr. of hearing held on November 9, 2001 (Vol. III), p. 650.

[5]Husted and Ginoza testified that although they rejected the proposal made by the State at Hemmeter Center they did present it to the HSTA negotiating committee without a recommendation. Contrary to Husted and Ginoza's position, the Committee voted to accept the proposal and sent it to the HSTA Board which also accepted the proposal. Tr. Vol. II, at pp. 260-265; Vol. III, p. 646.

for one more meeting. Husted and Ginoza came to the Governor's office and met with the Governor, Representative Neil Abercrombie (Abercrombie) and Charles Toguchi (Toguchi) in the Governor's private office. The State negotiating team remained in the Conference Room in the Governor's Executive Offices.

28. The primary areas of concern for the HSTA representatives were the across-the-board increases (they wanted increases in excess of 10%) and the timing of implementing those increases. The meeting ended without an agreement and the HSTA's representatives left the Governor's office.

29. After Husted and Ginoza left, Toguchi thought that there might have been a misunderstanding concerning the timing of implementing the across-the-board increases. He discussed it with Yogi, Miyahira, and the Governor. The Governor decided to ask Husted and Ginoza to return because he did not want to see the strike continue based upon a misunderstanding. The HSTA representatives were called and asked to return to the Governor's office, which they did.[6]

30. When the HSTA representatives returned, the Governor and Yogi explained the implementation dates with a flip chart in the Governor's private office where Abercrombie and Toguchi were also present. P-Track was not discussed. The P-Track proposal included in the State's proposal made by the Governor at the second meeting on April 23, 2001 was the same one made by the Governor on April 21, 2001. It was again, without discussion or explanation represented on a summary chart as "**P-track (DOE) $ 6.0m**."

31. Once the explanation of the State's proposal was completed and there was a full understanding of the across-the-board increases and implementation dates, the HSTA representatives had a short discussion between themselves and then informed the State representatives that there was no agreement. At that point, Yogi asked Husted and Ginoza if they were going to recommend or "sell" the State's entire proposal to their committee and the HSTA Board. They said yes.[7]

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[6]Not only do Husted and Ginoza maintain that there was no meeting with the Governor at his office on April 23, 2001, they both testified they were called back for a second meeting with the Governor on Saturday, April 21, 2001. Tr. Vol. II, pp. 252-253; 261-262 (Husted); Tr. Vol. III, p. 650 (Ginoza).

[7]Both Husted and Ginoza deny that they ever recommended approval of any State proposal to the HSTA negotiating committee or Board. See, e.g., Tr. Vol. II, p. 266.

32. On April 23, 2001, an agreement was reached between the parties when Yogi received a telephone call at about 8:30 or 9:00 p.m. from Ginoza advising him that he had a deal.

33. The HSTA negotiating committee, against Husted and Ginoza's recommendation to turn down the State's last offer, voted unanimously except for one abstention, to accept the State's last offer.

34. Late at night on April 23, 2001, Yogi was called by Husted to come to HSTA's office because the State team and HSTA team had to work on the language of the Agreement for it to be ratified by the HSTA membership on April 24, 2001 as required under the HSTA by-laws before the strike could end.

35. Between approximately 11:30 p.m. on April 23, 2001 and 4:30 a.m. on April 24, 2001, Yogi, Miyahira, and McFarlane reviewed language drafted by Igawa at Husted's direction.

36. Among the provisions reviewed without any substantive correction was the following language related to P-Track:

> Effective the first day of the 2001-2002 school year, supplementary pay shall be amended to reflect the following:
>
> * * *
>
> 4. Teachers with doctorates in their teaching field from an accredited college or university in Class VI shall receive a six (6) percent differential calculated on their current salary **each year**.
>
> 5. Teachers who hold professional certificates based on a Masters degree or a Professional Diploma shall receive a three percent (3%) differential calculated on their salary **each year**. (emphasis added.)

37. On April 24, 2001 the members of Unit 05 ratified the language developed and reviewed earlier that morning. In addition to the proposed language the teachers were provided with a one-page summary (green sheet) which described the P-Track as a six percent (6%) and three percent (3%) differential respectively, and provided a cost summary of "$6 million for implementation of PD/Masters differential."

38. Immediately following the ratification vote, the HSTA ended its strike.

39. Subsequent to ratification, the DOE set about trying to determine the number of teachers eligible for the P-Track differential, and its consequent actual costs.

A manual review of the files of all potentially eligible teachers yielded an estimate of 7,500 teachers, approximately 50% greater than the 5,000 teacher estimate that was the basis for initial cost projections by both the HSTA and State. The consequent estimated cost of the P-Track differential was therefore estimated at approximately $10 million per year or $20 million if applied to two years.

40. On or about May 9, 2001, the Superintendent transmitted a memorandum to the BOE regarding "Request for Expenditures: Impact Aid Funds FY 01." Among the expenditures for which approval was sought was:

> **Collective Bargaining Model O of Track P $9,300,000**
> It is currently estimated as cost for Year 1 of a 2 year package. (Superintendent's Office.)

41. On or around May 18, 2001, at a contract implementation meeting, Igawa stated that the State had a "big problem" with the cost of P-Track. At an implementation meeting the following week, Yogi offered to pay the differential only in the second year of the contract.

42. The record does not reflect whether or not the BOE acted upon the Superintendent's memorandum, but on or around June 7, 2001, the BOE voted to set aside $11.4 million to pay for the first year of P-Track.

43. On May 2, 2001, Yogi first learned of the problem presented by HSTA's expectation that the P-Track differential would be paid for both of the remaining years of the contract.

44. On June 8, 2001, Yogi wrote to Husted proposing that the contract sections other then P-Track be executed in order to facilitate payment of other cost items.

45. On or around July 12, 2001, the HSTA proposed a Memorandum of Understanding whereby the parties would agree to implement the 1999-2003 bargaining agreement with the exception of Article XVII, Section L.(5) for the year 2002-2003. Thus it proposed an MOU for the implementation of the bargaining agreement except for the second year of P-Track which would be dependent upon the parties "resolving their differences and/or whether sufficient funding can be found within the Department of Education's operating budget for 2002/2003." The proposed agreement further reserved the parties' rights to legal and collective bargaining options should the second year not be paid.

46. On July 17, 2001, Yogi wrote Husted declining to execute the proposed MOU upon advice of counsel. The expressed concern was that since there had been no meeting of the minds on the P-Track provision, there could be no contract, and therefore no subsequent MOU. In lieu of the MOU, Yogi proposed that the State pay for one year of the differential even if it exceeded $6 million.

47. On August 14, 2001, the HSTA filed its instant complaint. And on August 24, 2001, the State filed its instant complaint.

48. On September 21, 2001, the parties stipulated to implement the contractual oral agreement reached on April 23, 2001, with the exception of differential/bonus for teachers with advanced degrees. It was subsequently clarified both by counsel and the Governor that the commitment to implement the oral agreement was for the remainder of the contractual period. We find the Stipulation to implement the agreement subsequent to ratification does not excuse either the Employer or Union from failing to comply with the requirements of HRS § 89-10.

49. The source of funds for the State's offer of "AP-track (DOE) $6.0 million" as first proposed by the Superintendent to avert a strike; then resurrected in the course of negotiations during the teachers'strike; and included in the State's last offer on April 23, 2001 (regardless of whether it was made by the State's team at the Hemmeter Center or by the Governor in a face-to-face meeting with Husted and Ginoza in his private office), never changed. The P-Track provision was initiated, offered and agreed to as a non-cost item. The charts summarizing the offer each identify the funds as coming from the DOE. Since the DOE's budget using federal impact aid could only be committed to cover the cost for one year, the payment for a second year may have required inclusion as a "cost item" and a submission to the legislature for an appropriation.

50. The Employer did not submit P-Track funding for legislative appropriation. No appropriation having been sought, or consequently received, for a second year of P-Track funding, we find that the provision as offered by the Employer and accepted by the Union could only have been for a one year duration and not for each year of the two-year contract.

HSTA's Motion to Dismiss

CAYETANO, in his complaint filed on August 24, 2001, alleges in sum that:

> By refusing to implement and execute the agreement reached during negotiations on April 23 and 24, 2001, Respondent [HSTA] has refused to bargain collectively in good faith with

> the public employer; has breached a collective bargaining agreement, and refused to comply with HRS § 89-10(a), thereby committing prohibited practices in violation of HRS §§ 89-13(b)(2), (4) and (5).[8] CAYETANO complaint at 15.

In the HSTA's motion for partial dismissal, the HSTA seeks to dismiss CAYETANO's complaint:

> (1) to the extent that it seeks relief for HSTA's alleged unilateral changes to the collective bargaining agreement between the parties, and (2) to the extent that it seeks to compel HSTA to implement the disputed terms of the bargaining agreement. HSTA Motion for Partial Dismissal at p. 2.

The HSTA alleges that the alleged unilateral changes cannot serve as a basis for relief because any complaint arising from the alleged occurrence was not filed within the applicable limitations period. It further alleges that the Union cannot be compelled to "implement" the contract because implementation is wholly the responsibility of the

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[8]HRS ' 89-13(b) provides in part:

> (b) It shall be a prohibited practice for a public employee or employee organization or its designated agent willfully to:
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> * * *
>
> (2) Refuse to bargain in good faith with the public employer, if it an exclusive representative, as required in section 89-9.
>
> * * *
>
> (4) Refuse to comply with any provision of this chapter; or
>
> (5) Violate the terms of a collective bargaining agreement.

Employer.

CAYETANO asserts that partial dismissal is not appropriate because the claimed wrongful occurrence or act is not the alleged unilateral changes but rather the continuing failure of the Union to execute a contract reflecting the oral understanding between the parties alleged to have been reached on April 23rd and 24th, 2001. The further claim that in identifying implementation as a part of its requested relief, he meant only the performance of such acts as are necessary to give the contract validity such as the writing and execution of a contract reflecting the allegedly binding oral agreement.

Statute of Limitations

Hawaii Administrative Rules (HAR) § 12-42-42(a) identifies the limitations period applicable to the filing of prohibited practice complaints under HRS § 89-13.[9] It provides as follows:

> Complaints that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, may be filed. . .within ninety days of the alleged violation.

The Board has construed the limitations period strictly and will not waive a defect of even a single day. Alvis W. Fitzgerald, 3 HLRB 186 (1983). The beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Instead, the period begins to run when "an aggrieved party knew or should have known that his statutory rights were violated." Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978).

The Union contends that the complaint is untimely insofar as it arises out of the alleged unilateral changes which were discovered by the State's Chief Negotiator on or about May 2, 2001. The complaint was filed more than 120 days after the discovery. Accordingly, the Union argues that the claims of alleged unilateral changes in the complaint were not filed within the limitations period and accordingly must be dismissed.

In its opposition to the Motion for Partial Dismissal, the State claims that dismissal is inappropriate because it now plans to predicate its claim solely upon the failure

[9]The limitations period is also prescribed by statute. HRS § 89-14 requires controversies concerning "prohibited practices. . .be submitted. . .in the same manner and with the same effect as provided in section 377-9. . .." HRS § 377-9(l) in turn provides that, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence."

of the Union to reduce to writing and execute the oral agreement of April 23rd and 24th, 2001. It represents that it will make no claim of a prohibited practice arising out of the alleged unilateral change.

The current representation of the Employer that it does not intend to request that the Board identify the alleged unilateral change as a prohibited practice, is, of course binding upon neither the Employer nor the Board. In the absence of an amendment to the complaint or stipulations between the parties, this appears to be more a matter of litigation strategy than establishing the parameters of the case. In fact, in his complaint, CAYETANO alleges violations based upon both the unilateral change and failure to execute[10] and there is nothing to prevent him from returning to this position. Further, both a union's unilateral modification of a bargaining agreement[11] and failure to execute a bargaining agreement[12] may constitute distinct violations of Chapter 89. If supported by the evidence, the Board could find prohibited practices on either or both grounds as long as the complaint stands in its current form.

The State's complaint clearly indicates that the Chief Negotiator knew of the alleged discrepancies between their understanding of the verbal agreement and the teachers' written characterization of the P-Track on May 2, 2001. The State thus knew or should have known of the alleged unilateral change well outside of the limitations period. The State contends, however, that subsequent negotiations on the subject left it unclear as to whether the teachers intended to retain their posture. It is the general rule, however, that the running of the limitations period is not tolled by negotiations absent a tolling agreement. Doe v. Blue Cross & Blue Shield United of Wisconsin, 112 F.3d 869 (7th Cir. 1977). The negotiations thus had no effect upon the limitations period and the HSTA's motion for partial dismissal must be granted with respect to the alleged unilateral change.

The partial dismissal does not deprive the State of the entirety of its case. For it also alleges that the HSTA has refused to execute an agreement reached on April 23rd and 24th, 2001. The refusal to execute an agreement embodying agreed upon terms can constitute a violation of a party's duty to bargain in good faith. N.L.R.B. v. Donkin's Inn, Inc., 532 F.2d 138 (9th Cir. 1976). This claim is independent of the unilateral change claim that is hereby dismissed and may still serve as the basis for a finding in favor of CAYETANO. Any evidence relevant to the proof of this claim, including evidence relating to the alleged unilateral change remains admissible at the evidentiary hearing on that claim.

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[10]"As a result of HSTA's unilateral changes to the collective bargaining agreement, and its refusal to execute a written agreement that embodies the terms agreed to during negotiations, the State hereby seeks relief from this Board from HSTA's prohibited practices under HRS § 89-13(b)." CAYETANO complaint at 3.

[11]See generally, Hardin, The Developing Labor Law, p. 600 (3rd ed. 1992)(union's unilateral change may constitute failure to bargain).

[12]Id., at 602 (refusal to execute contract may constitute failure to bargain).

Implementation by the Union

The Union seeks to strike the word "implement" from the State's complaint. The State argues that to do so would be to engage in a meaningless semantic exercise. Because determining the nature of any violation and of any relief granted is the duty of the Board, see, HAR § 12-42-50, we tend to agree. But because semantic correctness is appropriately important to teachers, we will address the issue.

CAYETANO's complaint alleges a violation based on the HSTA's "Refusing to implement and execute the agreement reached during negotiations. . . ." Complaint at 15. (emphasis added). The teachers claim that the word should be dismissed because it is not within the power of the Union to "implement" the P-Track differential since the awarding of the bonuses is wholly within the power of the Employer. The State argues that "implement" in this context should be understood to mean writing and execution. Since the failure to "execute" is already in the sentence, they thus, in effect, admit to the sin of redundancy. The teachers, in turn, argue that the absurdity of the redundancy, and deviation from the generally accepted definition of "implement" ("to carry out") somehow demonstrates the appropriateness of striking the word.

The Board hereby denies that portion of the HSTA's partial motion to dismiss which seeks to strike "implement." First, points are not deducted for grammar, spelling or vocabulary. And second, and more importantly, the Board finds that the entire context of collective bargaining imposes mutual obligations to "implement." Foremost among these obligations is proceeding in good faith towards promoting "harmonious and cooperative relations between government and its employees and to protect the public by ensuring effective and orderly operations of government." HRS § 89-1. To the degree that such good faith implementation is avoided by intransigence, legal niceties or semantic games, the interests of the teachers, employer and the public are also undermined. There is an ongoing and mutual duty to implement imposed by law on all parties to the collective bargaining process. Although perhaps inelegantly expressed in the State's complaint, its inclusion there is nonetheless appropriate.

DISCUSSION

In these consolidated prohibited practice complaints, the HSTA alleges that the Employer violated HRS §§ 89-13(a)(1), (5), (7), and (8).[13] Conversely, the Employer alleges

[13]HRS § 89-13(a) provides in part:

> **Prohibited practices; evidence of bad faith**. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

that the HSTA violated HRS §§ 89-13(b)(2), (4), and (5).[14] Thus, both parties allege that the other wilfully 1) refused to bargain in good faith, 2) violated the provisions of Chapter 89, and 3) violated the terms of a collective bargaining agreement.[15]

> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
>
> * * *
>
> (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
>
> * * *
>
> (7) Refuse or fail to comply with any provision of this chapter;
> (8) Violate the terms of a collective bargaining agreement; ....

[14]HRS § 89-13(b) provides in part:

> It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
>
> * * *
>
> (2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;
>
> * * *
>
> (4) Refuse or fail to comply with any provision of this chapter; or
> (5) Violate the terms of a collective bargaining agreement.

[15]The HSTA added the additional charge of HRS § 89-13(a)(1), which forbids interference, restraint or coercion of any employee with regard to his exercise of rights under Chapter 89. This provision, however, is applicable only to employers activities intended to influence employees' exercise of rights. Cf., United Food and Commercial Workers Union, 4 HLRB 510, 517, (1988):

> Section 377-6(1), HRS, makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the free exercise of their Section 377-4, HRS, rights. Section 377-4, HRS, guarantees employees the right "to form, join, or assist labor organizations...and to engage in lawful, concerted activities for the purpose of collective bargaining...." In examining an employer's conduct under Subsection 377-6(1), HRS, then, "the test is not whether the language or acts were coercive in actual fact, but whether the conduct in question had a reasonable tendency in the totality of the circumstances to intimidate." Corrie Corp. v. NLRB, 375 F.2d 149, 153, 64 LRRM 2731 (4th Cir. 1967).

Since no such coercive or intimidating acts are evidenced, the Board need not address this charge and the HSTA's complaint is accordingly dismissed with regard to HRS § 89-13(a)(1).

Failure to Bargain in Good Faith

This is the second case in which the Board has been asked to determine whether the bargaining between the HSTA and State over the contract at issue was conducted in good faith.

In Board of Education, 6 HLRB 173 (2001) (HSTA I), the State asserted that the HSTA, in the course of the instant bargaining, failed to bargain in good faith as evidenced by the Union's alleged summary and unconsidered rejections of written proposals.[16] In that case, the Board expressed its reservations regarding the quality of communication between the parties.[17] Therefore it comes as no particular surprise that even after ostensibly reaching an agreement which concluded a regrettable 21-day statewide teachers strike, the parties are without an executed written collective bargaining agreement and once again making accusations of bad faith bargaining.

In the instant proceedings, each side accuses the other of a failure to bargain in good faith based on alleged failures to acknowledge and embody commitments made in the course of bargaining regarding the duration of the P-Track differential. Pleadings, hearings and briefs were largely dedicated to advocating on behalf of almost diametrically opposed versions of what was said and understood. Frankly, the Board can find little value in refereeing this "Rashomon"-like, he-said/she-said, fingerpointing exercise. A finding of bad faith on the part of either party would likely exacerbate animosity and misunderstanding, a

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[16]The case was consolidated with a second complaint by the State alleging coercion by the Union resulted from instructions to record the names and photographs of persons crossing picket lines. The Board ruled that the Union's commitment to withdraw the instructions mooted this part of the case.

[17]In HSTA I, the Board found:

> Husted characterized the good faith of the Employer in addressing some of the Union's questions as follows:
>
> > I believe that the State's negotiator [Yogi] was making a good faith effort to try to wrestle with our questions. The problem was that there were times when I was speaking Greek and he was speaking Latin, and we weren't communicating very well. That's part of what made it difficult. Tr. at 295.
>
> The Board concludes that Husted's characterization is an appropriate description of bargaining to date - good faith, different languages, poor communication. This is especially regrettable when our schools and children are at issue. Our examination of the totality of the circumstances permits us no other conclusion.

Id., at 179.

dismissal of both complaints in the absence of a finding of bad faith would leave the parties and their constituencies in a legal void.

In Ariyoshi v. Hawaii Public Employment Relations Bd., 5 Haw.App. 533, 704 P.2d 917 (1985), the Hawaii Intermediate Court of Appeals reversed an order of the Board's predecessor because the order was "in fact disruptive of public employer-employee relations under the contract and was not in concert with the policy and goals of collective bargaining in public employment as proclaimed in HRS § 89-1" (footnote omitted), 5 Haw.App. at 543. The Board concludes that an assignment of blame and conclusion of wrongdoing would likely be "disruptive of public employer-employee relations." Similarly, a dismissal of the complaints, leaving the status of the contract undefined, would not be "in concert with the policy and goals" of Chapter 89. Accordingly, rather than proceeding in search of bad faith or blame, the Board finds it necessary and proper pursuant to HRS § 89-5(b)(4), to focus our analysis upon ensuring that the status and conduct of the parties comport with the purposes and requirements of Chapter 89.

Refusal to Comply with Provisions of Chapter 89

Both parties exchange allegations that the other committed a prohibited practice by refusing to comply with the provisions of Chapter 89.

The current statutory and contractual status of the HSTA and BOE is by no means clear. The parties announced the reaching of an agreement. An agreement was ratified by the Union membership. Cost items were submitted to the Legislature and appropriations were accordingly made in Act 205, Session Laws of Hawaii (SLH) 2001. The parties were unable to agree on the P-Track term and no substantive bargaining ensued. The parties exchanged offers to execute or implement the terms not at issue. The State rejected partial implementation based on its understanding that the absence of a P-Track agreement negated the existence of any contract. Competing prohibited practice claims were filed with the Board, the parties engaged in futile Board-ordered mediation. The parties stipulated to implementing all but the P-Track provisions, and since September 19, 2001 have presumably been acting as though a binding agreement exists between the State and Union including the payment of all other appropriated funds provided for under the ostensible contract.

The stipulation seems to have imposed some semblance of order. But an examination of the parties' arguments when measured against statutory requirements suggest that this order may be illusory. The statutorily required elements of a public sector collective bargaining agreement are clear and unequivocal:

> **§ 89-10 Written agreements; appropriations for implementation; enforcement.** (a) Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned. The agreement shall be reduced to writing and

> executed by both parties. The agreement may contain a grievance procedure and an impasse procedure culminating in final and binding arbitration, and shall be valid and enforceable when entered into in accordance with provisions of this chapter.
>
> (b) All cost items shall be subject to appropriations by the appropriate legislative bodies. The employer shall submit within ten days of the date on which the agreement is ratified by the employees concerned all cost items contained therein to the appropriate legislative bodies, except that if any cost items require appropriation by the State legislature and it is not in session at the time, the cost items shall be submitted for inclusion in the governor's next operating budget within ten days after the date on which the agreement is ratified. The state legislature or the legislative bodies of the counties acting in concert, as the case may be, may approve or reject the cost items submitted to them, as a whole. If the state legislature or the legislative body of any county rejects any of the cost items submitted to them, all cost items submitted shall be returned to the parties for further bargaining. (Emphasis added.)

The law thus requires that a collective bargaining agreement be ratified, written, executed and receive legislative appropriation for any cost items.

The currently implemented agreement arguably fails to satisfy each element. If there was no initial agreement, there can have been nothing to ratify. The agreement has never been reduced to writing or executed. And these failings arguably leave nothing upon which the Legislature could act, thereby calling into question any appropriation or expenditure made pursuant thereto. A subsequent agreement to implement would therefore be meaningless; there would be nothing to implement.

This, of course, would be an absurd and undesirable conclusion. Union membership, the public, and the Legislature have relied upon the parties' representations that there was an agreement. A strike was ended and public funds subsequently appropriated and expended. These bells could not reasonably be unrung and the Board can find nothing in the purposes or policies of Chapter 89 that would in any way support such a result. Rather, the declared "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," HRS § 89-1, compels the Board to attempt to salvage the situation notwithstanding somewhat confused status of the bargaining agreement.

To reach this end the Board must ensure compliance with the statutory requirements for a binding public sector collective bargaining agreement. There must first be an agreement. It is well-recognized that in "the context of labor disputes, . . .the technical

question of whether a contract was accepted in the traditional sense is perhaps less vital than it otherwise would be. Rather, a more crucial inquiry is whether the two sides have reached an 'agreement,' even though that agreement might fall short of the technical requirements of an accepted contract." NLRB v. Donkins Inn, Inc., supra, at 141. Here, both sides announced and acted as though there was an agreement. The agreement was attempted to be reduced to writing, and the Board has been petitioned to interpret a single contested term. There was substantial reliance on the parties' words and conduct. And both parties currently argue for the existence of, albeit slightly different, agreement. All of this mitigates in favor of concluding that there was an agreement. Cf., Cutter Laboratories, Inc., 265 NLRB 577, 112 LRRM 1026 (1982) (the decision to prepare galley proofs, the implementation of all new contract provisions, and an agreement to submit to arbitration an issue raised under the new agreement and admission of a contract relationship were acts which belied contention that binding agreement had not been reached.)

It is however, also well-recognized that an agreement cannot be found where there is a failure to agree on all substantive and material terms. See, e.g., Intermountain Rural Elec. Ass'n., 309 NLRB 1189, 142 LRRM 1355 (1992). And here it might be argued that P-Track duration is a "material term" so that the failure to agree on the subject precludes an agreement. Both parties recognize the existence of a collective bargaining agreement and the Board is confident that neither would invite the havoc that may result from an attempt to invalidate the entire agreement based only on P-Track duration. We therefore conclude that an agreement existed on April 23, 2001 between the parties for the purposes of HRS § 89-10.

HRS § 89-10 next requires that the agreement be written and executed. The HSTA attempted to draft final contract language. However, as discussed below, we cannot conclude that their language reflected the agreement and there is no evidence that any writing has been offered for execution. In any event, it is undisputed that no contract has been executed as required by law and that both parties have refused to so execute. The failure of writing and execution is therefore a violation of statute. HRS § 89-13 makes it a prohibited practice for either a union or employer to wilfully refuse to comply with any provision of Chapter 89. In implementing a collective bargaining agreement that was not written or executed both parties have refused to comply with the writing and execution requirements of HRS § 89-10.

In order to find a prohibited practice, the Board must conclude that these statutory violations were wilful. In United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 570, 583-84 (1996) the Board discussed the element of "willfulness":

> [T]he Board, while acknowledging its previous interpretation of "willful" as meaning "conscious, knowing, and deliberate intent to violate the provision of Chapter 89, HRS" nevertheless stated that "wilfulness can be presumed where a violation occurs as a natural consequence of a party's actions." (citations omitted.)

Here the violations occurred as a natural consequence of the parties' actions. Both parties are presumably aware of the statute's requirement of execution and both parties have failed to do so. Wilfulness will therefore be presumed and the Board will conclude that both the HSTA and the Employer committed a prohibited practice by their failure to reduce to writing and execute the collective bargaining agreement. Accordingly, the Board will order that both parties reduce to writing and execute the collective bargaining agreement of April 23, 2001.

P-Track Duration

Ordering execution does not, of course, resolve the issue of the P-Track term duration. Conclusion of statutory analysis resolves this dispute.

HRS § 89-10(b) requires that "all cost items. . .be subject to appropriations by the appropriate legislative bodies" and further requires that employers submit all cost items for legislative appropriation. If any cost item is not funded, all cost items are returned for bargaining. HRS § 89-2 defines "cost items" as follows:

> "Cost items" includes wages, hours, amounts of contributions to the State and counties to the Hawaii public employees health fund, and other terms and conditions of employment, the implementation of which requires an appropriation by a legislative body.

Thus, any contract term that requires an appropriation for implementation is a cost item and the failure of the Legislature to make appropriations for a cost item leads to the effective rejection of all cost items in a contract.

The undisputed evidence is that the P-Track provision was initiated, offered and agreed to as a non-cost item. It is uncontested that the Superintendent offered to pay for P-Track with existing excess impact aid funds. The Governor agreed to P-Track only on condition that the BOE would use its own funds, and the charts summarizing the offer each identify the funds as coming from the DOE. The Board finds that the offer was an attempt to avoid having to request or receive legislative appropriations for the P-Track provision. Since the funds that were offered were already available to the BOE no additional appropriation would be required. Since no appropriation was necessary, the item was not a "cost item" and no submission to the legislature for appropriation was necessary. Given this finding, we must also find that the Employer did not submit P-Track funding for legislative appropriation. It is undisputed that it could not be assured or established that excess impact aid funds would be available for the final year of the contract. Assurance of payment in that year would thus have required an appropriation.

No appropriation having been sought, or consequently received, for a second year of P-Track funding, we must find that the provision, as offered by the Employer and accepted by the HSTA was for a one year duration of the two-year contract.

A contrary finding would yield a result not in conformance with the policies and requirements of Chapter 89. If the Board were to have found that a second year of funding was required by the contract, since there is no evidence that then existing BOE funding could accommodate a projected second year, we would then have to find that additional appropriations were required for implementation. If additional appropriations were required for implementation, the program would have been a "cost item" and accordingly required to be submitted to the Legislature for appropriation.

However, given the posture and uncontested understanding of the Employer that new appropriations would not be necessary to fund P-Track, the Board must find that no such cost item was submitted. Consequently, the Legislature could not have provided appropriations for implementation. This means that either the provision or all cost items would have to be returned for further bargaining. Again, this result would be "in fact disruptive of public employer-employee relations under the contract and not in concert with the policy and goals of collective bargaining in public employment as proclaimed in HRS § 89-1" (footnote omitted), 5 Haw.App. at 543. We can thus only conclude that the P-Track provision in the contract means payment for a single year from funds available in the DOE budget at the time agreement was reached.

Accordingly, the Board must order that the P-Track provision included in the written and executed collective bargaining agreement ordered above be limited to a duration of one year to be paid with funds appropriated at the time of the reaching of the agreement.[18]

This conclusion does not necessarily relieve the Employer of any obligation regarding the P-Track differential for the final year of the contract. Members of the Employer's negotiating team reviewed without objection purported contract language which committed a payment "for each year." They claim not to have caught the "error" because of

[18]At the hearings, there appeared to be substantial controversy regarding the class of teachers who would qualify for a P-Track differential. This issue is not before the Board and accordingly will not be addressed. Inasmuch as the collective bargaining agreement between the parties contain a grievance and arbitration provision designed to address such differences in contractual interpretation, the Board anticipates that the parties will utilize this mechanism if they are unable to resolve their differences through bargaining

exhaustion or distraction. In any event, the language was included in the package ratified by the teachers and we find that the ratification constituted detrimental reliance based upon the admitted error of the State's negotiators. We have already concluded that the second year cannot be ordered to be part of the contract since to do so would be inconsistent with the statutory scheme and potentially undermine the validity of the contract. But the State should share in the consequence of its error. Accordingly, we conclude that the Employer is estopped from denying a commitment to provide some sort of P-Track differential in the second year of the contract.

The amount of payment of the differential need not be precisely that provided for in the collective bargaining agreement. The parties' expectation regarding the use of "old" money contributed to the establishment of the contractual parameters, so the use of newly available funds to pay for a second year may require the establishment of different parameters. As per the parties' understanding, the source of funding must be limited to available excess impact aid funds for the relevant year.[19] This needs to be established through the course of good faith bargaining between the parties. Accordingly, the parties are ordered to engage in bargaining regarding the provision of a P-Track differential for the final year of the collective bargaining agreement.

In view of the foregoing, the Board need not address the alleged violations of HRS §§ 89-13(a)(5) and (8) and 89-13(b)(2) and (5).

CONCLUSIONS OF LAW

1. This Board has jurisdiction over these complaints under HRS §§ 89-5(b) and 89-14. Pursuant to HRS § 89-5(b)(2) this Board has the power to resolve any dispute concerning cost items. Under § 89-5(b)(4) regarding prohibited practice complaints, the Board is required to "take such actions . . . as it deems necessary and proper."

2. Under HRS § 89-13(a)(7), it is a prohibited practice for a public employer or its designated representative wilfully to refuse or fail to comply with any provision of Chapter 89. Similarly, under HRS § 89-13(b)(4), it is a prohibited practice for an employee organization or its designated agent wilfully to refuse or fail to comply with any provision of Chapter 89.

3. HRS § 89-10 requires that a collective bargaining agreement be ratified, written, executed and receive legislative appropriation for any cost items.

[19]Additional appropriations would in all likelihood be precluded by the mandate of HRS § 89-10(c) prohibiting the "reopening of cost items."

4. On April 23, 2001 an agreement existed between the parties for the purposes of HRS § 89-10 which included a provision to pay a three percent (3 %) differential for teachers holding a professional or masters of education degree estimated to cost the DOE $6 million from excess impact aid funds.

5. No commitment was, or could be made to pay for a second year of P-Track differentials from excess impact aid funds. Accordingly, any commitment to pay for a second year would potentially constitute a cost item. HRS § 89-10 requires that all cost items be submitted to and funded by the Legislature. Because the costs for a second year were not submitted to and funded by the Legislature, no commitment to pay for a second year can be imposed upon the agreement of April 23, 2001 without potentially threatening the validity of all cost items in the contract.

6. By proceeding to implement the agreement but failing to reduce to writing and executing the collective bargaining agreement for Unit 05, both the Employer and Union wilfully refused to comply with the requirements of HRS § 89-10 thereby committing prohibited practices under HRS §§ 89-13(a)(7) and (b)(4), respectively.

7. The teachers relied to their detriment in ratifying the contract and ending the strike upon language reviewed by the Employer's agents committing the employer to pay a three percent (3%) differential "for each year." As a consequence, the Employer is estopped from denying a commitment to provide a percentage differential to be determined through bargaining and limited to the excess federal impact aid funds available to the BOE and DOE in fiscal year 2002-2003.

ORDER

1. The Employer and the Union are ordered to cease and desist from committing the instant prohibited practice by refusing to reduce to writing and executing the collective bargaining agreement of April 23, 2001. The P-Track provision is limited to a duration of one year to be paid with the DOE's excess federal impact aid funds.

2. The parties are ordered to engage in bargaining over the P-Track differential for the final year of the collective bargaining agreement. The source of funding is limited to excess impact aid funds available to the BOE for that year.

3. The Employer and the Union shall immediately post copies of this decision in conspicuous places at its work sites where employees of Unit 05 assemble and congregate, and on the DOE and HSTA websites for a period of 60 days from the initial date of posting.

4. The Employer and the Union shall notify the Board of the steps taken to comply herewith within 30 days of receipt of this order.

DATED: Honolulu, Hawaii, February 7, 2002 .

HAWAII LABOR RELATIONS BOARD

/s/ BRIAN K. NAKAMURA
BRIAN K. NAKAMURA, Chair

/s/ CHESTER C. KUNITAKE
CHESTER C. KUNITAKE, Member

/s/ KATHLEEN RACUYA-MARKRICH
KATHLEEN RACUYA-MARKRICH, Member

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STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII STATE TEACHERS ASSOCIATION, Complainant, and BENJAMIN J. CAYETANO, Governor, State of Hawaii and BOARD OF EDUCATION, State of Hawaii, Respondents.	)	CASE NO. CE-05-475 ORDER NO. 2067 ORDER GRANTING HSTA=S MOTION TO ALTER OR AMEND DECISION NO. 431
In the Matter of BENJAMIN J. CAYETANO, Governor, State of Hawaii, Complainant, and HAWAII STATE TEACHERS ASSOCIATION, Respondent.	)	CASE NO. CU-05-185

ORDER GRANTING HSTA'S
MOTION TO ALTER OR AMEND DECISION NO. 431

On February 15, 2002, Complainant HAWAII STATE TEACHERS ASSOCIATION (HSTA) filed a Motion to Alter or Amend Decision No. 431 with the Hawaii Labor Relations Board (Board). The HSTA alleged a controversy between the parties has arisen because Conclusion of Law #4 states:

> 4. On April 23, 2001 an agreement existed between the parties for the purposes of HRS § 89-10 which included a provision to pay a three percent (3 %) differential for teachers holding a professional or masters of education

degree estimated to cost the DOE $6 million from excess impact aid funds.

The HSTA contends that BENJAMIN J. CAYETANO, Governor, State of Hawaii and BOARD OF EDUCATION, State of Hawaii (collectively Employer) have narrowed the class of teachers to receive the P-Track differential to teachers with Masters of Education degrees. The HSTA noted that Finding of Fact #36 provides:

> 36. Among the provisions reviewed without any substantive correction was the following language related to P-Track:
>
> Effective the first day of the 2001-2002 school year, supplementary pay shall be amended to reflect the following:
>
> * * *
>
> 4. Teachers with doctorates in their teaching field from an accredited college or university in Class VI shall receive a six (6) percent differential calculated on their current salary **each year**.
>
> 5. Teachers who hold professional certificates based on a Masters degree or a Professional Diploma shall receive a three percent (3%) differential calculated on their salary **each year**. (emphasis added.)

In addition, in footnote 18, the Board stated:

> At the hearings, there appeared to be substantial controversy regarding the class of teachers who would qualify for a P-Track differential. <u>This issue is not before the Board and accordingly will not be addressed</u>. Inasmuch as the collective bargaining agreement between the parties contain a grievance and arbitration provision designed to address such differences in contractual interpretation, the Board anticipates that the parties will utilize this mechanism if they are unable to resolve their differences through bargaining. [Emphasis added.]

The HSTA therefore requested that the Board alter or amend its Conclusion of Law #4 to reflect the fact that the issue of the class of teachers entitled to the first year of the P-Track differential was not addressed and had not been determined by the Board.

Thereafter on February 20, 2002, the Employer filed a memorandum in opposition to the HSTA's motion. The Employer contends that the Board's conclusion is

consistent with the evidence in the record and the Union's argument is not supported by the pleadings or the record in the case.

On February 27, 2002, the HSTA filed a supplemental memorandum in support of its motion. The HSTA contends that its position is consistent with the evidence and the parties' failure to address the issue in their respective written briefs indicates that the matter was not submitted to the Board.

The Board conducted a hearing on the instant motion on March 1, 2002. The parties were represented by counsel and had full opportunity to present evidence and argument to the Board. At the hearing, the HSTA also requested that the Board accordingly amend Finding of Fact #20.

Based upon a consideration of the arguments presented and consistent with footnote #18 of Decision No. 431, the Board hereby grants the HSTA's motion to amend its Finding of Fact #20 and Conclusion of Law #4 to reflect the Board's determination that the eligible class was not an issue necessary or relevant to the determination of this case. Finding of Fact #20 is amended to read:

> 20. The offer to pay for P-Track made by LeMahieu to avert a strike was proposed as a one-time bonus for teachers with professional and masters degrees using $6 million from excess federal impact aid funds. Although the use of impact aid funds was mentioned, HSTA insists no single-year or $6 million cap was associated with the proposal. After April 3, 2001, Husted had no other discussion with LeMahieu or the State's negotiating team about LeMahieu's offer to pay for P-Track.

Conclusion of Law #4 is also amended to read:

> 4. On April 23, 2001 an agreement existed between the parties for the purposes of HRS § 89-10 which included a provision to pay a three percent (3 %) differential for teachers holding a professional or masters degree estimated to cost the DOE $6 million from excess impact aid funds.

DATED: Honolulu, Hawaii, March 7, 2002.

HAWAII LABOR RELATIONS BOARD

/s/
BRIAN K. NAKAMURA, Chair

/s/
CHESTER C. KUNITAKE, Member

/s/
KATHLEEN RACUYA-MARKRICH, Member

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