and there were no ongoing collective bargaining negotiations extant at the time the demand for information was made. In reviewing Veincnet, Jr. v. Matayoshi, Board Case No. CE-11-54, Decision No. 130, 2 HPERB 494, 502 (1980), while the Board held that there is no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties and set forth the general rules regarding the obligation of the employer to provide information required by the bargaining representative established by the federal courts under the National Labor Relations Act, there are, however, limitations to the employer's obligations:

"However, a union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested. Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met. The same may be said for type of disclosure that will satisfy that duty." (Citations omitted.)

Here, the Board held that HSTA could not force the Respondents to bargain over BP 4211, SP 0211 or BP 4211 IP because they were the subject of the consult and confer requirement and not the negotiations requirement. There is no evidence to show that the Respondents agreed to enter into permissive negotiation regarding BP 4211, SP 0211 or BP 4211 IP. HSTA did not allege and did not pursue a breach of duty to consult claim. In the absence of a duty to bargain, breach of duty to consult or any other argument regarding the relevancy of the requested information other than in the context of mandatory bargaining, Respondents had no obligation to produce the requested information.

Federal precedent is in accord with the approach taken by the Board. See, for example, Soc. Serv. Union, Local 535 v. North Bay Dev. Disabilities Serv., Inc., 287 NLRB 1223, 1225 (1988), the NLRB, in adopting the recommended Order of the administrative law judge that the union did not violate NLRA § 8(b)(3) by refusing to provide information requested by the employer in that case, held that:

"As a general proposition, parties to collective bargaining must disclose information, when requested, that would enable other parties to meaningfully participate in the bargaining process. 'There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties.' (Citation omitted.) NLRB v. Acme Industrial Co., 385 U.S. 432, 435-436 (1976). Similarly, the obligation imposed upon the bargaining representative, 'parallels [the] employer's duty to bargain collectively' with the result that the bargaining representative is, 'likewise obliged to furnish the employer with relevant information.' (Citations omitted.) Local 13

However, to say simply that information is needed for bargaining, or to implement contractual provisions, does not necessarily establish that the Act compels its production. The obligation to provide information is not open-ended and without limitation. One such limitation arises from the type of bargaining subject to which the request for information pertains. When the request pertains to a subject that is nonmandatory -- one that does not involve 'wages, hours, and other terms and conditions of employment' within the meaning of Section 8(d) of the Act, NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-349 (1958) -- then neither employers nor labor organizations are obliged under the Act to furnish "information requested for bargaining on [that] subject."

American Stores Packing Company, A Division of Acme Markets, Inc., 277 NLRB No. 190, slip op. at 9 (January 14, 1986). For the duty to furnish . . . information stems from the underlying statutory duty imposed on employers and unions to bargain in good faith with respect to mandatory subjects of bargaining. C [sic] Cowles Communications, Inc., 172 NLRB 1909, 1909 (1968)." (Emphasis added; footnotes omitted.)

In denying a petition challenging the NLRB's ruling, the D.C. Circuit stated:

"Our conclusion that the Board reasonably determined that the amount of a union's agency fee is not a mandatory subject of bargaining dooms the whole of petitioner's claim....Thus, it is of no moment whether the Union violated the CBA by failing, as alleged, to provide information relevant to negotiation or arbitration of the agency fee issue...; the Union's refusal to provide the requested information simply does not implicate the statute. (Emphasis added; cites omitted.)"

North Bay Dev. Disabilities Serv. v. NLRB, 905 F.2d 476, 479-80 (D.C. Cir. 1990) (North Bay). (Emphasis added) (Citations omitted) See also: Democratic Union Organizing Committee, etc. v. NLRB, 603 F.2d 862, 888 n. 69 (D.C. Cir. 1978) (the court agreed with the administrative law judge that the companies were under no obligation to furnish any of the data requested regarding the companies' decision to institute leasing because the decision was not a mandatory subject of bargaining).

Based on the foregoing, the Board concludes that because the information request made in the May 12, 2008 letter related to BP 4211, which is deemed to be non-mandatory subjects of bargaining, Respondents had no obligation to provide the requested information because the
Board’s determination that BP 4211, SP 0211, and BP 4211 IP “[are] not a mandatory subject of bargaining dooms the whole of [complainant’s] claim[.]” North Bay, 905 F.2d at 479. Hence, there is no violation of HRS § 89-13(a).ix

Similarly, to the extent that HSTA argues that the May 12, 2008 information requests also apply to SP 0211 and BP 4211 IP, there is also no violation for the same reasons.

H. Conclusion

Accordingly, to summarize based on the foregoing, the Board concludes and holds that:

(1) The allegations in the Complaint with respect to Respondents’ failure to negotiate regarding BP 4211 were untimely, and are dismissed for lack of jurisdiction. The allegations with respect to Respondents’ failure to negotiate regarding SP 0211 and BP 4211 IP were timely filed.

(2) With respect to SP 0211 and BP 4211 IP, and even if the allegations were timely with respect to BP 4211, there is no violation of HRS §§ 89-3, 89-9(a), and 89-13(a) (5) because BP 4211, SP 0211, and the IP are not mandatory subjects of bargaining based on the fact that BP 4211, SP 0211, and the IP were promulgated to comply with federal law and/or are permissive subjects of bargaining. In connection with the foregoing, as a matter of fact and based upon Respondents’ statements and representations, BP 4211, SP 0211 and BP 4211 IP are not in conflict with any of the Existing Rules, and in the event of any conflict the Existing Rules shall control. To the extent that the Existing Rules are to be modified, amended or otherwise changed (Revisions), then such Revisions shall be subject to the consult and confer requirement, and to the extent that mandatory negotiable topics are directly involved, shall be subject to negotiation.

(3) Respondents did not violate HRS § 89-13(a)(8) because there was no unilateral implementation of the rights and privileges held by teachers prior to SP 0211 and HAR Chapter 41.

(4) Respondents did not violate HRS § 89-13(a)(1) because there were no HRS §§ 89-3, 89-9(a), and 89-13(a)(5) violations.

(5) Respondents did not violate HRS § 89-13(a)(7) because of their failure to violate their duty to bargain under HRS § 89-13(a)(5).
Respondents did not violate HRS § 89-13(a) for their failure to provide the information requested in the May 12, 2008 letter.

PROPOSED ORDER

For the foregoing reasons, the Board dismisses all of the charges alleged by HSTA against Respondents in Case No. CE-05-667. In addition, the Board orders that, in the event of any conflict between BP 4211, SP 0211 and BP 4211, on the one hand, and any of the Existing Rules, on the other, the Existing Rules shall control. To the extent that the Existing Rules are to be modified, amended or otherwise changed (Revisions), then such Revisions shall be subject to the consult and confer requirement, and to the extent that mandatory negotiable topics are directly involved, each of the Revisions which directly involve a mandatory negotiable subject shall be subject to negotiation. Any dispute arising out of implementation of BP 4211 or the implementation of BP 4211 pursuant to SP 0211 or BP 4211 IP or any Revision shall be resolved in accordance with the grievance procedures outlined in the CBA.

FILING OF EXCEPTIONS

Any person adversely affected by the above Proposed Findings of Fact, Conclusions of Law, and Decision and Order may file exceptions with the Board, pursuant to HRS § 91-11, within ten days after service of a certified copy of this document. The exceptions shall specify which findings or conclusions are objectionable with citations to the factual and legal authorities therefore. A hearing for the presentation of oral arguments will be scheduled should any party file exceptions, and the parties will be notified thereof.

DATED: Honolulu, Hawaii, ________________

June 6, 2016

HAWAII LABOR RELATIONS BOARD

[Signatures]

KERRY M. KOMATSUBARA, Chair

ROCK B. LEY, Member

Copies sent to:
Rebecca L. Covert, Esq.
Jeffrey A. Keating, Deputy Attorney General
Opinion of Board Member Moepono concurring in part and dissenting in part.

This Board Member has included her own Findings of Fact and Conclusions of Law for the purposes of this Opinion. Therefore, any proposed conclusion of law improperly designated as a proposed finding of fact, shall be deemed or construed as a proposed conclusion of law; any proposed finding of fact improperly designated as a proposed conclusion of law shall be deemed or construed as a proposed finding of fact.

I. PROCEDURAL BACKGROUND AND PROPOSED FINDINGS OF FACT

A. PROCEDURAL BACKGROUND

On May 27, 2008, Complainant HAWAII STATE TEACHERS ASSOCIATION (HSTA or Union) filed a prohibited practice complaint (Complaint) with the Hawaii Labor Relations Board (Board) against Respondents BOARD OF EDUCATION (BOE), Department of Education (DOE or Department), State of Hawaii; PATRICIA HAMAMOTO, Superintendent, DOE, State of Hawaii (Hamamoto); and SUSAN H. KITSU, DOE, State of Hawaii (Katsu) (collectively Respondents). The Complaint alleges, among other things, that on or about March 28, 2008, Respondents unilaterally formulated, adopted, and/or implemented mid-term changes to the Unit 05 collective bargaining agreement without negotiations or mutual consent of the HSTA relating to: anti-harassment, anti-bullying, and anti-discrimination policy; new standards of practice documents and new disciplinary policies and procedures; repeal of DOE Rules 1title 8, Subtitle 2, Chapter 41; and new forms and policies affecting material and significant changes in wages, hours, and other terms and conditions of employment. The Complaint further alleges that on May 12, 2008, despite HSTA’s requests, Respondents refused to negotiate all mid-term changes in terms and conditions of employment. Declined to cease and desist from their unilateral course of conduct, and failed to provide the information needed for good faith bargaining. The Complaint alleges that Respondents willfully violated the rights of public employees in Hawaii Revised Statutes (HRS) §§ 89-3 and 89-9(a), and committed prohibited practices in violation of HRS § 89-13(a)(1), (5), (7), and (8).

On May 27, 2008, the Board sent to Respondents a NOTICE TO RESPONDENTS OF PROHIBITED PRACTICE COMPLAINT, with a copy of the Complaint attached, directing the Respondents to serve a copy of their answer no later than 10 days after service of the Complaint.

On June 3, 2008, Respondents filed RESPONDENTS’ ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED MAY 27, 2008.

On June 5, 2008, Respondents filed RESPONDENTS’ MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED MAY 27, 2008 (Motion to Dismiss) on the
grounds, among other things, that the Complaint was time-barred; and that only consultation not negotiation was required and Respondents fulfilled that duty with the HSTA.

On June 13, 2008, HSTA filed HSTA’S MEMORANDUM IN OPPOSITION TO RESPONDENTS’ MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT.

On July 7, 2008, the HSTA filed HSTA’S MOTION FOR SUMMARY JUDGMENT (Motion for Summary Judgment), arguing, among other things, that University of Hawaii Professional Assembly v. Tomasu, 79 Hawai‘i 154, 900 P.2d 161 (1995) (Tomasu), was dispositive of the issue of negotiability; that the DOE policies had an impact on the terms and conditions of employment and were negotiable; and that Respondents violated their duty to negotiate regarding mandatory subjects by their unilateral actions.

On July 10, 2008, the Board held a hearing on Respondents’ Motion to Dismiss, pursuant to HRS § 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3).

On July 11, 2008, Respondents filed RESPONDENTS’ MEMORANDUM IN OPPOSITION TO HSTA’S MOTION FOR SUMMARY JUDGMENT FILED JULY 7, 2008.

On July 22, 2008, the Board held a hearing on HSTA’s Motion for Summary Judgment, in accordance with HRS § 89-5(i)(4) and (5), and HAR § 12-42-8(g)(3).

On September 15, 2008, the Board issued ORDER NO. 2548 DENYING RESPONDENTS’ MOTION TO DISMISS AND DENYING HSTA’S MOTION FOR SUMMARY JUDGMENT. In denying both Motions, the Board concluded that material facts precluded dismissal or summary judgment including, among other things: what effect or impact the policy has on terms and conditions of employment, such that the implementation of the policy is subject to negotiation rather than consultation; whether the Implementation Plan (IP) itself was submitted to HSTA for consultation or when the IP was created or available for consultation, whether HSTA waived its right to negotiate over the implementation of the policy (if such implementation is subject to negotiations), or failed to file the Complaint in a timely manner, by failing to request negotiations within a reasonable time after receiving notice of the proposed policy; and the parties’ past practice of providing notice of proposed policies (including the timing of the notice and content of the notice). However, the Board dismissed the Chapter 41 repeal allegations from the Complaint based on the undisputed fact that Chapter 41 was not being repealed.

On September 19, 2008, HSTA filed a MOTION TO DEFER FURTHER PROCEEDINGS IN CASE to allow the parties an opportunity to negotiate a possible settlement of their differences.

On September 24, 2008, Respondents filed RESPONDENTS’ STATEMENT OF NO OPPOSITION TO HSTA’S MOTION TO DEFER FURTHER PROCEEDINGS IN CASE FILED ON 9/19/08.
On September 29, 2008, the Board rendered ORDER No. 2551 GRANTING COMPLAINANT’S MOTION TO DEFER FURTHER PROCEEDINGS IN CASE, FILED ON SEPTEMBER 19, 2008.


On February 9, 2009, HSTA filed a MOTION TO CONTINUE HEARING DATES.

On February 12, 2009, the Board issued ORDER NO. 2589 GRANTING COMPLAINANT’S MOTION TO CONTINUE HEARING DATES, FILED ON FEBRUARY 9, 2009 rescheduling the hearing to commence on February 24, 2009.

The hearing on the merits was held on February 24, 2009, May 4-5, 2009, and August 31, 2009.

On January 19, 2010, HSTA filed HAWAII STATE TEACHERS ASSOCIATION’S MEMORANDUM OF LAW AND FACT, and Respondents filed RESPONDENT’S POST-HEARING BRIEF.

B. PROPOSED FINDINGS OF FACT

Based on the evidence in the record, including the testimony and documentary evidence presented at the hearing on the merits, this Board Member makes the following proposed findings of fact for the purpose of this Opinion.

At all times relevant to this Complaint, Respondent BOE is and was a “public employer,”.xxx and Respondents Hamamoto as the DOE Superintendent and Kitsu as Director of the Civil Rights Compliance Office, DOE, respectively, are or were public employers within the meaning of HRS § 89-2, as “individual[s] who represent[ ] a public employer or act[ ] in their interest in dealing with public employee[ s,] for employees belonging to Unit 05.xx

At all times relevant to this Complaint, Respondent Complainant HSTA is and was, the certified “exclusive representative,” as defined in HRS § 89-2,xxi of the employees in Unit 05.

1. DOE and HSTA Consult and Confer, Adoption of, and Request for Bargaining On Board Policy #4211

On November 7, 2007, DOE Acting Superintendent Faye Ikei (Ikei) sent a letter (November 7, 2007 letter) on behalf of the Department to former HSTA Executive Director Joan Husted (Husted) notifying HSTA of the BOE Committee on Special Programs’ approval of DOE
Proposed Policy #4211 entitled “Department of Education Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) by Employees” (BP 4211). In the letter regarding “Consult and Confer Regarding Board of Education Approved Department of Education Proposed Policy #4211,” Ikei stated in relevant part:

On November 5, 2007, the Committee on Special Programs of the Board of Education approved Department of Education (DOE) Proposed Policy #4211 entitled “Department of Education Anti-Harassment, Anti Bullying, and Anti Discrimination Against Student(s) by Employees”. We are submitting this policy for consult and confer.

This policy was developed pursuant to recommendation from the Safe Schools Community Advisory Committee. This Committee was comprised of community leaders and government stakeholders who made recommendations on how to improve safety in Hawaii schools. One of the key recommendations was to adopt and implement a policy against harassment, bullying and discrimination by staff against students.

The policy includes federal law requirements under Title VI of the Civil Rights Act of 1964, and as amended by the Civil Rights Act of 1991, and Title IX of the Education Amendments of 1972, also known as the Patsy T. Mink Equal Opportunity in Education Act.

The rationale for the proposed policy is to ensure that the DOE formalizes its position on anti-harassment, anti-bullying, and anti-discrimination against students. This policy will apply to all DOE employees.

We ask for your comments on the proposed policy. A copy of the proposed policy is attached for your review and comment. Your timely response will be greatly appreciated by December 10, 2007. If the Department does not receive a response by this date, it shall assume HSTA has no comment on the matters. Should you have any questions, please contact Jennifer Kehe at 586-3580.

(Emphasis added)
ATTACHED TO THE NOVEMBER 7, 2007 LETTER WAS THE PROPOSED BP 4211, WHICH PROVIDED.

ANTI-HARASSMENT, ANTI-BULLYING, AND ANTI-DISCRIMINATION AGAINST STUDENT(S) BY EMPLOYEES POLICY

The Department of Education strictly prohibits discrimination, including harassment, by any employee against a student based on the following protected classes: race, color, national origin, sex, physical or mental disability, and/or religion. In addition to the above protected basis, the Department of Education strictly prohibits any form of harassment and/or bullying based on the following: gender identity and expression, socioeconomic status, physical appearance and characteristic, and sexual orientation.

A student shall not be excluded from participation in, be denied the benefits of, or otherwise be subjected to harassment, bullying, or discrimination under any program, services, or activity of the Department of Education.

The Department of Education expressly prohibits retaliation against anyone engaging in protected activity. Protected activity is defined as anyone who files a complaint of harassment, bullying, or discrimination; participates in complaint or investigation proceedings dealing with harassment, bullying or discrimination under this policy; inquires about his or her rights under this policy; or otherwise opposes acts covered under this policy.

The Department of Education shall develop regulations and procedures relating to this policy to include personnel action consequences for anyone who violates this policy.

Based on the certified mail return receipt, the letter was received by the HSTA on November 9, 2007.

Prior to BP 4211, to comply with federal and state nondiscrimination laws, the DOE processed complaints regarding alleged violations of federal and state nondiscrimination protections under HAR Title 8, Chapter 41 Civil Rights Policy and Complaint Procedure (Chapter 41), which is still in effect.

When the November 7, 2007 letter was received, HSTA was in transition between Executive Directors. HSTA Deputy Executive Director Raymond Camacho (Camacho), assumed
the Executive Director duties in addition to his regular duties. Although recognizing that the November 7, 2008 letter was a consult and confer on a policy not a standard practice, when Camacho received the letter in January 2008, he put the letter in a stack of “338 odd SPs to be reviewed” because of his workload.

The standard practice [SP 0211] was not included in the consult and confer on BP 4211 based on the DOE’s understanding that the policy BP 4211 and the standard practice SP 0211 are two different documents with a separate consult and confer process requiring the transmittal of two separate letters.

On December 20, 2007, DOE Personnel Specialist Jennifer Kehe (Kehe) received a telephone call from Gwen Kurashima (Kurashima) at HSTA requesting an extension for the Union to comment on BP 4211. Upon notifying Guy Tajiri (Tajiri), who handled the consult and confer on behalf of the DOE, Kehe was told that Camacho had informed Tajiri that HSTA would be sending its comments.

Kehe and Kitsu scheduled two meetings regarding BP 4211 with Camacho, which Camacho canceled because of other commitments. During a February 1, 2008 call canceling one of those meetings, Kehe informed Kurashima that the HSTA comments would be welcomed “sooner than later because the policy was, in fact, coming up for Board approval,” and that the DOE was trying to schedule these meetings before the February BOE meeting.

By a February 15, 2008 email to Kehe, Camacho responded to the November 7, 2007 letter but did not request bargaining. The email stated in relevant part:

I understand that the matter of Proposed Policy #4211 will be taken to the Board of Education sometime next week. HSTA’s written response is forthcoming. However, in the meantime, please communicate to the Board that the HSTA has reservations on this policy.

Prior to the February 21, 2008 BOE General Business Meeting (February 21, 2008 BOE meeting), Kehe informed Kitsu of Camacho’s February 15, 2008 email indicating the Union’s reservations regarding BP 4211.

On February 20, 2008, Camacho sent a letter with a subject of “Consult and Confer Regarding Board of Education Approved Department of Education Proposed Policy #4211” (February 20, 2008 HSTA letter) to Ihei, stating in pertinent part:
Thank you for the opportunity to respond to your letter dated November 7, 2007 regarding the proposed Policy #4211 entitled "Department of Education Anti-Harassment, Anti-Bullying and Anti-Discrimination Against Student(s) by Employees".

***

The policy, as drafted, has fallen short in many respects. It does not address the way in which each person in the school setting, including the teacher, is treated and protected. It doesn't approach the depth and breadth [sic] of the recommendations for addressing harassment as tabled at the Board of Education on September 10, 2007. It was unfortunate that there were no public school teachers represented on the SS-CAC because they could have provided important information and knowledge of the issues. The participation of staff, including teachers is very important in establishing policies, and accompanying procedures in regards to advancing respectful communities in regards to race relations [sic], national origin, ancestry, color, cross cultural, religion, sex, gender identity, physical and mental disability, socioeconomic status, physical characteristics and human rights understanding.

We look forward to a policy that will address a comprehensive approach to safe schools in keeping with the SS-CAC Committee recommendations. Such a policy could also incorporate Regulation #1110-7 Safe Workplace Policy. However, we would note that Regulation #1110-7 should also be revisited. Our limited experience with this policy indicates to us that it is inconsistently implemented. We further note that Regulation #1110-7 appears to have been prematurely implemented without clear definitions, investigation directives and procedures. We welcome a policy that covers all administrators, teachers, staff and students within school communities in the workplace and their interactions with each other.

As is the case for all policy and regulation proposals, the [HSTA] reserves its right to continue to comment as it evolves through implementation.
Kehe received the February 20, 2008 letter on or about the following day.

Camacho did not attend the February 21, 2008 BOE meeting. While Maurice Morita (Morita) from HSTA was in attendance, HSTA raised no concerns at the meeting regarding the proposed BP 4211.

At the February 21, 2008 BOE meeting, the BOE unanimously approved the proposed BP 4211 with typographical corrections.

At that same meeting, the BOE adopted Board Policy 2050 IMPLEMENTATION OF BOARD OF EDUCATION POLICY (BP 2050) setting forth specific criteria that the DOE was required to consider in developing an implementation plan. BP 2050 provided in relevant part:

Unless otherwise specified by the Board, the Department of Education (Department) shall have up to 45 days from the date the Board adopts a new Board policy or proposed amendment(s) to an existing Board policy, to submit an implementation plan to the appropriate Board committee.

After the February 21, 2008 BOE meeting, HSTA received no official notification of the adoption of the policy from the DOE or the BOE.

However, by a February 22, 2008 letter, Ikei responded to Camacho's February 20, 2008 HSTA letter, stating in relevant part:

You stated in your letter, "Hawaii State Teachers Association (HSTA) supports such a policy and does not believe that workplace violence includes not only physical assaults, but any act at work in which a person is abused, threatened, intimidated, bullied, assaulted or experiences fear." I would like to clarify that DOE proposed Policy #4211 is not an anti-discrimination, anti-harassment or anti-bullying policy for employment purposes. This policy is clearly identified for students. The policy clearly states that it is for the protection of students against employees who may harass, discriminate, or bully children.

You also claim that the policy falls "short in many respects." You stated that it does not address the way in which teachers would be treated and protected. Please note that the collective bargaining
agreement covers these teachers' rights and protections adequately. Further, the DOE will follow its normal course in developing regulations and procedures as it always does immediately after a policy is adopted. Normal disciplinary procedures will be followed as outlined in the collective bargaining agreement and other DOE rules, policies and/or procedures.

Your letter goes on to state that the policy does not approach the depth and breadth [sic] of the recommendations for addressing harassment as tabled at the Board of Education on September 10, 2007. This policy did not go to the Board of Education on September 10, 2007. This policy went before the Committee on Special Programs on November 5, 2007 and on November 7, 2007, the request for Consult and Confer was sent to your office.

It is not clear as to why you believe that DOE Policy #1110-7, the Safe Workplace Policy, which addresses workplace violence, should be incorporated into DOE Policy #4211, which is intended to cover student protection. In most of our investigations, if there are allegations that an employee, including a teacher, was violent at the workplace, it would be investigated; however, DOE Policy #1110-7 is strictly limited to employee workplace violence, and not students.

It is my understanding that Susan Kitsu, Director of the Civil Rights Compliance Office, and Jennifer Kehe, Labor Relations Specialist scheduled two meeting times to meet with you to discuss this important issue, and both times, you cancelled due to other commitments. We are still willing to discuss this further should you have any additional concerns. Please feel free to contact Susan Kitsu at 586.3321 directly if you would like to schedule a time to meet.

In March 2008, Shannon Garan, a teacher on leave assigned to work on HSTA legislative matters who attended the March 25, 2008 BOE meeting, notified Camacho of the adoption of the policy.

Camacho agreed that there was a consult and confer on BP 4211.

By a May 12, 2008 letter from Camacho to Ikee (May 12, 2008 letter), HSTA sent its first request to the DOE “to negotiate over changes in terms and conditions of employment resulting from the unilateral formulation, adoption, and implementation of Policy No. 4211” and a request for information, which stated in relevant part:
The aforementioned policy, standard, documents, the proposed repeal of title 8, subtitle 2, chapter 41 of the DOE, and implementation forms result in significant and material impacts on wages, hours, terms and conditions of employment of bargaining unit employees and changes existing terms and conditions of employment.

A review of available records indicate that the DOE (a) has adopted a vague an [sic] ambiguous standard of conduct and invites numerous complaints against teachers; (b) provides for "zero tolerance" resulting in termination or other adverse action regardless of circumstances; (c) adopts a new standard of proof i.e., if "any evidence corroborates an allegation"; (d) changes the "proper cause" standard of Article V; (e) modifies due process requirements and procedures; (f) eliminates reasonable provisions for job security of employees; and (g) adopts confidentiality requirements which amend the right of the Association to information needed to enforce teacher protections and other provisions of the unit 5 agreement. This is not by any means an exhaustive listing of the impacts and changes to the terms and conditions of employment. These changes alone, however, require bargaining under Section 89-9 (a), HRS.

Moreover, in 2007 our legislature expanded the scope of permissible bargaining over criteria and procedures relating to "standards of work," "suspensions," "discharge and other disciplinary actions for proper cause." See Section 89-9 (d), HRS.

Accordingly, we request that the DOE cease and desist from its unilateral course of conduct, and bargain in good faith over the criteria and procedures pertaining to the aforementioned subject matter. Please designate your spokesperson for bargaining within 7 days, indicating in writing when the DOE is prepared to commence negotiations.

In addition, the HSTA requests the following information which is needed for bargaining within 7 days of this letter.

1. A copy of any and all documents provided to and considered by the Ad Hoc Committee on School Safety on the basis of which the committee purportedly determined (1) "that the application of chapter 41 is ineffective [sic] appropriately address the current needs of students regarding discrimination, harassment, and bullying," and (2) that chapter fails to account for discrimination, harassment and bullying behavior that is based on categories other than traditional protected classes.
2. Did the Board of Education approve Policy No. 4211 (dated March 28, 2008), or approve the recommendation to repeal chapter 41? If so, when was the action taken? Please provide a copy of the Board minutes verifying the specific action taken by the Board.

3. Is there any school in the country which has adopted a so-called "anti-bullying" and "cyber bullying" policy? If so, please provide a copy of the prior policies adopted by other schools. If not, please indicate the basis on which the definition for the terms "anti-bullying" and "cyber bullying" was formulated, the person who formulated it and the manner in which it was formulated.

4. Please provide a copy of all written complaints filed by students and/or parents in the past two years against teachers which would fall within the definition of "bullying" as used in Policy No. 4211 (dated March 28, 2008), and a copy of the actions taken by the DOE on the complaint. Please strike the names of the students, parents, and teachers so that confidentiality is ensured on the complaints and the actions taken.

5. Please provide a copy of any and all "regulations and procedures" relating to Policy No. 4211 (dated March 28, 2008) which includes "personnel action consequences for anyone who violates" said policy. If there are no regulations and procedures at this time, please provide a draft of the proposed regulations and procedures proposed by the DOE.

6. Please provide a true and accurate copy of any documents, records, or information the DOE has which substantiates or is the basis for its contention that "Policy No. 4211 is not an anti-discrimination, anti-harassment or anti-bullying policy for employment purposes" as alleged in a letter dated February 22, 2008.

7. Please provide a true and accurate copy of the organizational chart, position descriptions, and staffing roster of all jobs and employees under Susan H. Kitsu, director of civil rights compliance currently.

8. Please provide a copy of all complaints filed against teachers which were investigated by Susan H. Kitsu and her subordinates from July 2007 to the present, and a copy of the final report of the results of the investigations. Please delete all names and personal information from the complaints and the reports to ensure confidentiality.

If the employer refuses to comply with its duty to bargain in good faith within 7 days, we have no alternative except to pursue a prohibited practice complaint because of the timeframe [sic] for implementation indicated in the documents we have been provided.

By a May 21, 2008 letter, Ikei responded to Camacho’s request for negotiations over BP 4211, stating in pertinent part:
This is in response to your letter dated May 12, 2008 wherein you request the Board of Education and the Department of Education "negotiate over changes in terms and conditions of employment resulting from the unilateral formulation, adoption, and implementation of Policy No. 4211".

By letter dated November 7, 2007, the Department of Education (DOE) sent a letter to the Hawaii State Teachers Association (HSTA) submitting then Proposed Policy #4211 [entitled "Department of Education Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) By Employee(s)"] for consult and confer. In that letter, DOE asked HSTA for comments on the proposed policy. DOE also notified HSTA that if it did not receive a response by December 10, 2007, DOE shall assume that HSTA had no comment on the matter.

On December 20, 2008 [sic], HSTA contacted DOE to request an extension on providing comments on the policy. DOE allowed HSTA additional time for the consult and confer process. A consult and confer meeting was scheduled for Tuesday, February 12, 2008 but was canceled by HSTA.

By letter dated February 20, 2008, HSTA submitted its comments on the policy to DOE. There was no demand for negotiation by HSTA in this letter. At most, HSTA stated it "reserve[d] its right to continue to comment as it [the policy] evolves through implementation." (Emphasis added). DOE considered HSTA's comments and responded to HSTA by letter dated February 22, 2008.

HSTA's request for negotiation was raised for the first time by letter dated May 12, 2008. DOE maintains that the adoption and implementation of the policy is not a subject of negotiation. Further, HSTA's request for negotiation is untimely.

2. DOE and HSTA's Lack of Consult and Confer and Request for Negotiations Regarding The IP

The IP is a DOE and the BOE communication tool distributed to the Union or the employees only upon request.
Pursuant to the requirements of DP 2050, the DOE had 45 days to present the BOE with the IP for BP 4211, including the time frame for implementation, communication plan, training plan, and proposed guidelines that included SP 0211.

Kitsu started drafting the IP and SP 0211 immediately and simultaneously based on the BP 2050 time frame and because the standard practice includes the implementation procedure for the policy and aligns with other provisions, including the CBA.

BOE approval was not required for the IP. On March 28, 2008, Hamamoto signed the IP, which enumerated under “Legal and Other Reference(s): Title VI of the Civil Rights Act of 1964, and as amended by Civil Rights Act of 1991; and Title IX of the Equal Education Amendments of 1972, also known as the Patsy Takemoto Mink Equal Opportunity in Education Act; the Americans with Disabilities Act of 1990; Section 504 of the Rehabilitation Act of 1973; First Amendment of the Federal Constitution; and First Amendment of the State Constitution. SP 0211 states in relevant part:

1. **Policy**

   The Department of Education strictly prohibits discrimination, including harassment, by any employee against a student based on the following protected classes: race, color, national origin, sex, physical or mental disability, and/or religion. In addition to the above protected basis, the department strictly prohibits any form of harassment and/or bullying based on the following: gender identity and expression, socio-economic status, physical appearance and characteristic, and sexual orientation.

   A student shall not be excluded from participation in, be denied the benefits of, or otherwise be subjected to harassment, bullying, or discrimination under any program, service, or activity of the Department of Education.

   The Department of Education expressly prohibits retaliation against anyone engaging in protected activity. Protected activity is defined as anyone who files a complaint of harassment, bullying, or discrimination, participates in complaint or investigation proceedings dealing with harassment, bullying, or discrimination under this policy, inquires about his or her rights under this policy, or otherwise opposes acts covered under this policy.
The Department of Education shall develop regulations and procedures relating to this policy that will include personnel action consequences for anyone who violates this policy.

2. **Background**
   This policy was in part developed to assist the Department of Education with its compliance of the following federal laws: Title VI of the Civil Rights Act of 1964, and as amended by Civil Rights Act of 1991, and Title IX of the Equal Education Amendments of 1972, also known as the Patsy Takemoto Mink Equal Opportunity in Education Act, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973.

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The goal of this policy is to ensure that there is no harassment, discrimination, and/or bullying of students by employees.

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9. **Policy Implementation Plan**
   Rollout Communications and Training Plan

A. **Key Messages and Objectives:**
   The DOE does not tolerate any form of harassment, bullying, and/or discrimination against a student by an employee or officially recognized volunteer of the department. Any complaints will be immediately investigated, and if any evidence corroborates an allegation, prompt action will be taken by the proper officials, up to termination and in line with provisions under collective bargaining agreements, laws, rules, DOE policies and procedures, and other relevant authorities.

The DOE did not request a consult and confer with HSTA regarding the IP.

3. **DOE and HSTA Consult and Confer and Request for Bargaining Regarding SP 0211**

The DOE’s implementation of BP 4211 included SP 0211.

The DOE did a consult and confer on SP 0211.
In drafting SP 0211, Kitsu considered federal laws and guidelines, including Title VI and Title IX, the Americans with Disabilities Act, and Section 504, and information provided by other school districts regarding the legal requirements for conducting investigations and severe, pervasive, or persistent conduct in violation of BP 4211. Specifically, regarding confidentiality, Kitsu relied on BOE Policy No. 1110-11 in effect at that time and the departmental regulations thereon pertaining to employee discrimination complaints.

On March 28, 2008, Hamamoto signed SP 0211, which became effective upon her signature and applied to all DOE employees. SP 0211 provides definitions of bullying, cyberbullying, discrimination, gender identity and expression, harassment, physical appearance and characteristic, retaliation, sexual orientation, and socio-economic status, stating in pertinent part:

1. **Purpose**
   To describe the regulations and procedures of the Board of Education's Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) by Employees Policy.

2. **Effective**
   Upon Superintendent's approval.

3. **Applies To**
   All State of Hawaii Department of Education employees.

4. **Introduction**
   This policy was in part developed to assist the Department of Education with its compliance of the following federal laws: Title VI of the Civil Rights Act of 1964, and as amended by Civil Rights Act of 1991, and Title IX of the Equal Education Amendments of 1972, also known as the Patsy Takemoto Mink Equal Opportunity in Education Act, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973.

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6. **Responsible Parties**
   Civil Rights Compliance Office
   The Department of Education ("DOE"), Office of the Superintendent's Civil Rights Compliance Office, shall coordinate the implementation of this policy.
Principals, Vice Principals, Complex Area Superintendents, and/or the Civil Rights Compliance Office Specialists and/or Director

Principals, Vice Principals, Complex Area Superintendents, and/or the Civil Rights Compliance Office Specialists and/or Director, including, but not limited to, assistant superintendents, school administrators, and other management personnel are responsible for maintaining a learning environment free of harassment, bullying, and/or discrimination.

Any principal, vice principal or complex area superintendent who witnesses or receives report(s) of harassment, bullying, or discrimination shall take immediate and appropriate action reasonably calculated to end the harassment, bullying, and/or discrimination. This means, the principal, vice principal, or complex area superintendent shall immediately contact the Civil Rights Compliance Office to initiate an investigation into complaints stemming from allegations that fall under this policy.

Staff

While at school and during school-related functions, employees have a responsibility to refrain from engaging in any behavior that violates a student's or students' rights under this policy.

Student(s)/Parent(s)/Legal Guardian(s)

Student(s) and their parent(s), or legal guardian(s) are expected to inform the principal, vice principal, complex area superintendent, or staff in the Civil Rights Compliance Office of any harassment, bullying, or discrimination that is covered under this policy in order to address and prevent further incidences from occurring.

7. **Limited Confidentiality**

Reports and investigations will be conducted with as much discretion as possible. Information about the complaint and/or report will be shared on a "need to know" basis only.

8. **Violation of Policy**

Employee(s) who are found to have violated this policy, after an internal administrative investigation has been completed, may
receive disciplinary action as deemed appropriate by an appropriate administrator. Such action will be taken in accordance with DOE policies, regulations, rules, collective bargaining agreements, and other laws, rules, and regulations.

9. Procedures for Filing a Complaint

Any parent(s) or legal guardian(s) or a student, with the parent or legal guardian's knowledge, may file a complaint with a school administrator, the complex area administrator, or the Civil Rights Compliance Office staff on the Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Students by Employees Form. If the parent, legal guardian, and/or student chooses not to use the form, the complaint should nevertheless be accepted by the above entities and an immediate investigation should be initiated.

An employee who witnesses or knows about any incident that falls under the policy, may also file a complaint concerning inappropriate conduct towards a student by either completing the complaint form or by informing the principal, vice principal, complex area superintendent, or the staff in the Civil Rights Compliance Office.

Under SP 0211, the DOE provides the accused employee with a notification letter of the allegations but not a copy of the complaint.

DOE Assistant Superintendent Sheri Lee (Lee) did not send a letter to HSTA Deputy Director Camacho submitting SP 0211 for consult and confer with a copy of the standard practice until June 12, 2008 after the Complaint was filed.

In response, Camacho sent a July 1, 2008 letter, requesting bargaining over SP 0211 and requesting that additional specific information needed for bargaining be provided within seven days of the letter.

The DOE never provided the requested information to the Union.

By a July 8, 2008 letter, Lee responded that the DOE was in the process of reviewing the comments and concerns and that an official written response was forthcoming.

4. Prior Practice Regarding Consult and Confer

   a. Consult and Confer Regarding Policies
The BOE deliberates an issue and establishes a policy to provide guidance to the BOE and the Department. Only the BOE has the authority to adopt and promulgate a policy.

The normal process is that the BOE is required to consult and confer on BOE policies. The consult and confer occurs during the 45-day period between the Committee on Special Programs' adoption of a policy recommendation and the BOE's adoption of the policy, so a recommended policy is immediately sent out to the unions for consult and confer after being passed out of committee, and the response is submitted in writing.

Regarding the Board Policy 1110-11 entitled DEPARTMENT OF EDUCATION APPLICANT AND EMPLOYEE NON-DISCRIMINATION POLICY (BP 1110-11) consult and confer process, after the BOE committee approved the proposed policy for full BOE approval, Kitsu sent the policy to the DOE labor relations office, which transmitted the proposed policy to the three unions for consult and confer.

Regarding BP 1110-11, Camacho sent an August 17, 2005 letter to DOE Assistant Superintendent Gerald Okamoto (Okamoto), stating, “[W]e find substantive changes to the intent of the policy. Therefore, we believe that such changes are inappropriate for the consult and confer process, and should be subjects bargained collectively.”

In a subsequent letter to Okamoto, dated November 2, 2005 letter, regarding BP 1110-11, Camacho stated that while the HSTA “note[s] that the amendments to the proposed regulations and procedures adequately address our concerns” and “supports the intent of this policy, provided that as specific regulations, guidelines, and procedures are developed by the Department of Education, we will reserve our right to continue comment as it evolves through implementation.”

The consult and confer procedure regarding BP 4211 was similar to but not the same as the one used for BP 1110-11.

Since 2005, the practice was that the Union had the ability to have input and provide comments at any time as the policy evolves through implementation and that changes would be made as appropriate.

b. Consult and Confer On Prior Regulations and Implementation Plans

The policy, the standard practice, and the implementation plan are distinguishable; and a teacher could allegedly violate both the policy and the standard practice.

A standard practice provides for the manner in which a policy is implemented, including articulating the purpose, the individuals affected, and the responsibilities of the different levels of the Department.
The standard practice is not subject to BOE approval but is shared with the BOE to ensure that the policies were implemented “according to the Board’s will.”

The standard practice and implementation plan were not created or developed until a BOE policy is approved. After the policy was sent for consult and confer, the DOE practice was to create the regulations, such as was done with BP 1110-11.

The DOE’s established practice regarding consult and confer on the regulations and/or standard practices was to remain open to concerns from the union and to “make adjustments if warranted” at any time.

The DOE established practice was not to consult on an implementation plan.

5. The Agreement Between The HSTA and the BOE, Effective July 1, 2007 – June 30, 2009 for Unit 05

As under BP 1110-11, any employee violating BP 4211, SP 0211, or the IP is subject to discipline under the CBA.

The DOE position is that any conflict between the standard practice and the CBA and any discipline taken against a teacher by the Complex Area Supervisor (CAS) or the Superintendent for violation of BP 4211 or SP 0211 has to be taken in accordance with the CBA and subject to the grievance and arbitration procedure.

The HSTA and Respondent BOE are parties to the Agreement Between The HSTA and the BOE, effective July 1, 2007 – June 30, 2009 for Unit 05 (CBA).

CBA ARTICLE V entitled “GRIEVANCE PROCEDURE” states in relevant part:

A. DEFINITION. Any claim by the Association or a teacher that there has been a violation, misinterpretation or misapplication of a specific term or terms of this Agreement shall be a grievance.

GRIEVING PARTY. Only teachers or their certified bargaining representative, shall have the right to institute and process grievances under this Article.

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L. The Employer has the right to suspend, demote, discharge or take other disciplinary action against a teacher for proper cause.

M. Disciplinary action taken against any teacher shall be for proper cause and shall be subject to the Grievance Procedure. An expedited grievance procedure shall be used for suspensions or terminations of teachers. The informal discussion and/or Step 1 of the grievance procedure shall be waived.

If the grievance goes to arbitration, the arbitration process may be either conventional or expedited. If expedited arbitration is used, either party shall have the right to file closing briefs.

CBA ARTICLE IX entitled ‘PERSONNEL INFORMATION” states in pertinent part:

2. No material derogatory to a teacher’s conduct, service, character, or personality shall be placed in his personnel file unless the teacher has had the opportunity to review such material and the opportunity to affix his signature to the copy to be filed, with the understanding that such signature in no way indicates agreement with the contents thereof. Teachers shall also have the right to submit a written answer to such material, and their answer shall be reviewed by the Superintendent or designee and attached to the file copy. Derogatory materials which teachers have not been given an opportunity to review shall not be used in any proceedings against them.

CBA ARTICLE X entitled “TEACHER PROTECTION” states in relevant part:

D. Any serious complaint or any repeated minor complaint, including anonymous complaints concerning a teacher, shall be reported immediately to the teacher by the supervisor receiving the complaint. The use of complaints and the filing of said complaints shall be covered by Article IX – Personnel Information.

Any teacher against whom a serious complaint has been filed will have the opportunity to meet with the complainant(s). At the teacher’s request, the supervisor shall be present at such a meeting. The supervisor shall call the complainant(s) for a meeting at a mutually acceptable time by the teacher, the complainant(s) and the supervisor.
CBA ARTICLE XXI entitled “MAINTENANCE OF BENEFITS” states in pertinent part:

A. Except as modified herein, teachers shall retain all rights, benefits and privileges pertaining to their conditions of employment contained in the Standard Practices at the time of the execution of this Agreement.

B. Subject to the foregoing paragraph, nothing contained herein shall be interpreted as interfering with the Employer’s right to make, amend, revise or delete any portion of the Standard Practices; provided, however, that the Association shall be consulted on any changes to be made.

CBA ARTICLE XXIII entitled “ENTIRETY CLAUSE” states in relevant part:

This document contains the entire agreement between the parties and no other agreement, representation or understanding will be binding on the parties unless made in writing by mutual consent of both parties.

Editorial revisions in the ratification copy of this Master Agreement between the Board and the Association may be made, provided that no items are substantively altered.

6. HSTA’s Position on Consult and Confer

The HSTA position is that the procedures for implementing BP 4211 and the impact of the policy are mandatory subjects of bargaining because BP 4211, SP 0211, and the IP violations could lead to discipline impacting wages, hours, terms and conditions of employment. HSTA’s assertions rely upon the following testimony and evidence presented in the record.

Camacho acknowledged that a policy, a standard practice, and an implementation plan are different and that there was a consult and confer regarding BP 4211 and SP 0211 in accordance with the normal process.

Regarding an implementation plan, however, Camacho testified that there was no defined normal practice or process for DOE consultation or negotiation with the Union with respect to implementation plans and there was no consult and confer on the IP.

Nonetheless, Camacho stated that the Union’s determination regarding whether there is a duty to bargain, rather than to consult and confer, is not limited to a policy or a standard practice
but by the document received from the DOE putting forward a position impacting wages, terms and conditions of employment.

At the hearing, Camacho stated that the terms “consult[]” and “negotiate” were different words with different meanings. Camacho further stated that the DOE’s willingness to remain open for comments does not resolve the Union’s concerns regarding the policy and the standard practice because of the Employer’s right to implement upon receipt of those comments. With a negotiable subject, however, the Employer is required to negotiate and cease and desist from implementation.

Camacho testified that the failure to bargain concerns are not adequately addressed by the Union’s right to grieve any alleged CBA violations by BP 4211 or SP 0211 through the grievance procedure to an arbitrator’s decision and request appropriate remedies, including rescission of the discipline, because the issues of willful violations and “an insistence of one’s right to impose changes despite the fact that there’s already an agreement in place” remain.

Camacho testified that the specific concerns referenced in his February 15, 2008 email were further discussion taking the conceptual to the practical, including the definitions of what constitutes harassment, bullying, and discrimination and the appropriate regulations or procedures that flow from those definitions, the lack of an HSTA appointed teacher on the Safe Schools Community Advisory Committee that developed the policy, and clarity regarding the impact on teachers and the type of protections in place within the school setting. In short, Camacho stated, “[T]here was not a mutual understanding of the purpose of the policy as it relates to teachers,” and the policy “had direct implications on the existing rights of teachers.”

Camacho testified that when he sent the February 20, 2008 letter to Ieki, he believed that BP 4211 was a matter for consult and confer not bargaining. He characterized the statement in the letter. “As is the case for all policy and regulation proposals, the Association reserves its right to continue to comment as it evolves through implementation,” as a generic statement “if the policy is revisited by the Board” and further clarified that. “[I]t could include standard practices, and … in this case it probably would include the implementation plan.”

Camacho explained that the reason that reservations were expressed rather than a request for bargaining over SP 0211 when the policy was presented was because the process is “multi-layer[ed].” Camacho further explained that while the Union may not see issues that should be negotiated until the standard practice articulates the procedure, it doesn’t mean that “[W]e’ve waived our rights to negotiate the implementation of that policy,” and the matter may shift from consultation to bargaining.
Camacho testified that between March and May 2008, "[T]here were a number of red flags," such as the BOE acting on a policy without being informed that the Union had requested bargaining over the policy; a "rash" of complaints and investigations of teachers based on ambiguous standards, rather than the CBA Article V just cause standards; and due process concerns regarding the right to face your accuser, know the nature of complaint, have information related to the complaint, and not have anonymous complaints used for the purposes of adverse action; and numerous inconsistencies between existing contractual rights for teachers and new standards being developed through the rules under the policy. However, Camacho was unable to specifically note anything in the policy or standard practice that was vague and ambiguous or which altered the just cause or the confidentiality standards.

Finally, Camacho summed up his concerns regarding BP 4211, SP 0211, and the IP as fundamental due process that the investigation will be properly conducted, including the right to know the nature of the complaint and a reasonable expectation of a timely investigation; and the unilateral changes to CBA Article X, such as the anonymous complaints and the requirement to inform the teacher of such complaints and to Article IX, Section A, which requires that the teacher be informed of anonymous complaints and that anonymous complaints cannot be acted on unless the requirements of that provision are met regardless of federal law precluding disclosure of a complainant without a release. Camacho further expressed more specific concerns that the SP 0211 provision that any action be taken in accordance with DOE policies, regulations, rules, CBA provisions, and other laws does not relate to the release of confidential information; does not state that disciplinary actions will be taken with just cause; does not specify which CBA provisions will apply to any actions taken; is vague and ambiguous regarding the sharing of the complaint with the employee; and provides for an investigatory time frame that is too long after filing of the complaint, which require discussion in the context of the CBA.

II. PROPOSED CONCLUSIONS OF LAW AND DISCUSSION

A. Burden of Proof

HRS § 91-10(5) states:

(5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.
Hawaii Administrative Rules (HAR) § 12-42-8(g)(16) of the Board’s rules states:

(16) The charging party, in asserting a violation of chapter 89, HRS, or this chapter, shall have the burden of proving the allegations by a preponderance of the evidence. The party raising any subsequent issue shall have the burden of proving that issue by a preponderance of the evidence.

See also: Hawaii Gov’t Emp. Ass’n, Local 152 v. Keller, Board Case No. CE-13-597, Decision No. 456, 6 HLRB 421, 429 (2005); United Public Workers, AFSCME, Local 646 v. Waihee, Board Case No. CE-01-122, Decision No. 309, 4 HLRB 742, 750 (1990) (Waihee). The preponderance of the evidence is defined as “proof which leads the [tri]er of fact to find that the existence of the contested fact is more probable than its existence.” Minnich v. Admin. Dir. of the Courts, 109 Hawaii 220, 228 (citing Masaki v. Gen. Motors Corp., 71 Haw. 1, 14, 780 P.2d 566, 574 (1989)); Coyle v. Compton, 85 Hawaii 197, 202-03 (1997) (citing Strong, McCormick on Evidence § 339, at 439 (4th ed. 1992)). Further, “the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles.” Waihee, 4 HLRB at 750.

This Board Member has further interpreted this section “to mean that the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles. Henceforth, if any party fails to present sufficient legal arguments with respect to any issue, this Board Member shall find that the party failed to carry its burden of proof and dispose of the issue accordingly.” State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982) (Sanderson). See also: State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-63, Decision No. 162, 3 HPERB 47, 65 (1982); Hawaii Gov’t Emp. Ass’n, AFSCME, Local 152, AFL-CIO v. Sasano, Board Case Nos. CE-03-222a, Decision No. 361, 5 HLRB 410, 421 (1994) (citing SHOPO v. Fasi, 3 HPERB 25, 46 (1982)).

B. Relevant Statutory Provisions

HRS § 89-3 states:

§89-3 Rights of employees. Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in
lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4.

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

§89-13 Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

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(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

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(7) Refuse or fail to comply with any provision of this chapter; [or]

(8) Violate the terms of a collective bargaining agreement[.]

HRS § 89-9 states in pertinent part:

§89-9 Scope of negotiations; consultation. (a) The employer and the exclusive representative shall meet at reasonable times, including meetings sufficiently in advance of the February 1 impasse date under section 89-11, and shall negotiate in good faith with respect to wages, hours, the amounts of contributions by the State and respective counties to the Hawaii employer-union health benefits trust fund to the extent allowed in subsection (e), and other terms and conditions of employment which are subject to collective bargaining and which are to be embodied in a written agreement as specified in section 89-10, but such obligation does not compel either party to agree to a proposal or make a concession.
(c) Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.

(d) Excluded from the subjects of negotiations are matters of classification, reclassification, benefits of but not contributions to the Hawaii employer-union health benefits trust fund, recruitment, examination, initial pricing, and retirement benefits except as provided in section 88-8(h). The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with the merit principle or the principle of equal pay for equal work pursuant to section 76-1 or which would interfere with the rights and obligations of a public employer to:

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(4) Suspend, demote, discharge, or take other disciplinary action against employees for proper cause;

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This subsection shall not be used to invalidate provisions of collective bargaining agreements in effect on and after June 30, 2007, and shall not preclude negotiations over the procedures and criteria on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions as a permissive subject of bargaining during collective bargaining negotiations or negotiations over a memorandum of agreement, memorandum of understanding, or other supplemental agreement.

Violations of the procedures and criteria so negotiated may be subject to the grievance procedure in the collective bargaining agreement.

HRS § 89-10(d) provides:
(d) Whenever there is a conflict between the collective bargaining agreement and any of the rules adopted by the employer, including civil service or other personnel policies, standards, and procedures, the terms of the agreement shall prevail; provided that the terms are not inconsistent with section 89-9(d).

C. Any Allegations Regarding The Refusal to Bargain Over BP 4211, SP 0211, and the IP Are Either Untimely Filed and/or Untimely Requested by The HSTA and Must Be Dismissed.

In Order No. 2548, the Board denied Respondents' motion to dismiss for untimeliness based on unclear and lack of material facts at the time regarding whether the Complaint was filed in a timely manner by failing to request negotiations within a reasonable time after receiving notice of the proposed policy. After the hearing on the merits, the Board concludes based on the full record that the allegations in the Complaint regarding the failure to bargain regarding BP 4211, SP 0211, and the IP are untimely and must be dismissed.

HRS §377-9(l) states, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." This 90-day requirement is made applicable to Chapter 89 prohibited practice complaints by HRS §89-14." In addition, HAR § 12-42-42(a) states:

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

The Board has long held that this ninety (90) day statute of limitations is a jurisdictional requirement which the Board has no authority to waive. Accordingly, the failure to file a complaint within 90 days of its occurrence divests the Board of jurisdiction to hear the complaint. Nakamoto v. Department of Defense, Board Case No. CE-01-802, Order No. 2010, at *15 (May 1, 2013) (Nakamoto Order). The Board has construed the 90-day limitation period strictly and will not waive a defect of even a single day. Fitzgerald v. Ariyoshi, Board Case No. CE-10-75, Decision No. 175, 3 HPERB 186, 199 (1983) (citing Thurston v. Bishop, 7 Haw. 421 (1888) and Wong Min v. City and County of Honolulu, 33 Haw. 373, reh. den.; [sic] 33 Haw. 409 (1935)); Nakamoto Order, at *15; Valeho-Novikoff v. Okabe, Board Case No. CU-05-302, Order No. 3024, at *10 (October 6, 2014).

Moreover, the beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Rather, the applicable period begins to run when "an aggrieved party knew or should have known that his statutory rights were violated." United Public Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443, 6 HLRB 319, 330 (2003) (citing Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978)).
Finally, "The lack of jurisdiction over the subject matter cannot be waived by the parties. If the parties not raise the issue, [the Board] sua sponte will, for unless jurisdiction of the [Board] over the subject matter exists, any judgment rendered is invalid." Tamashiro v. Dept of Human Servs., 112 Hawaii 388, 398, 146 P.3d 103, 113 (2006) (citing Chun v. Employees’ Ret. Sys. of the State of Hawaii, 73 Haw. 9, 14, 828 P.2d 260, 263 (1992)).

This Board Member determines that because the Complaint in this case was filed on May 27, 2008, the 90-day limitations period began to run on February 28, 2008.

HSTA does not dispute that the date from which to determine the untimeliness of the complaint runs from when the Union knew or should have known that a prohibited practice has occurred. However, HSTA maintains that in failure to bargain cases, the statutory bar does not run until the employer provides the union with notice of the unilateral change. Further, relying on the Board’s decision in Hawaii Gov’t Emp. Ass’n, Local 152, AFSCME, AFL-CIO v. Fasi, Board Case No. CE-03-28, Decision No. 73, 1 HPERB 641, 645-46 (1977) (Fasi), HSTA asserts that the claim for prohibited practice does not arise when the employer made the unilateral change, but when it clearly indicated “its intention not to negotiate” over the change. Accordingly, the Union takes the position that: 1) the date of accrual did not arise until April 14, 2008 when HSTA became apprised of recent DOE actions clearly establishing the unilateral changes brought by the implementation of BP 4211; and 2) until May 21, 2008, DOE did not take the position that the adoption and implementation of BP 4211 “is not a subject of negotiations.”

This Board Member finds HSTA’s position lacks merit for several reasons. First, any Complaint allegations regarding the negotiability of SP 0211 and the IP are obviously untimely. The HSTA request for bargaining on SP 0211 was not made until Camacho’s July 1, 2008 letter, which was sent after the Complaint was filed. In addition, with respect to the IP, there simply was no specific request for bargaining. Second, regarding the issue of the negotiability of BP 4211, for the reasons more fully set forth below, this Board Member does not hold that the present case is a failure to bargain case. Hence, Fasi case is inapplicable because in that case, the Board held that the disputed issue of the installation, use, and removal of the two-way radio system was a negotiable subject. Third, even assuming that this Board Member accepts HSTA’s position that this case is a failure to bargain case under Tomasu, HSTA’s position regarding the time limitation runs afof the Court’s reasoning in that decision for the following reasons.

Tomasu was an appeal from the Board’s decision in Univ. of Hawaii Prof’l Assembly v. Bd. of Regents, Board Case No., CE-07-124, Decision No. 303, 4 HLRB 689 (1990) (UHPA). In that case, the Board dismissed the prohibited practice complaint based on a finding that the policy statement at issue was not bargainable because it merely complied with the federal Drug-Free Workplace Act (DFWA), 41 U.S.C. §§ 701-707 (1988); 15 U.S.C. § 634(b)(6); and further, that the need for bargaining had not yet arisen because the Board of Regents of the University of Hawaii (BOR) had not attempted to implement the policy statement. On appeal, the Hawaii Supreme Court (Court) reversed the circuit court’s affirmance of the Board’s decision, holding that because the DFWA inherently mandated implementation, the union “need not wait until the BOR attempts
an implementation of an apparatus to effectuate the policy"... before it can demand bargaining on
bargainable topics potentially affected by the DFWA." Tomasu, 79 Hawaii at 163, 900 P.2d at
170. In so ruling, the Court reasoned:

Whether the UHPA is entitled to demand bargaining over the
implementation of the policy statement, however, also depends
on when the duty to bargain arises. The duty to bargain arises in two
circumstances potentially applicable to this decision: First, the
obligation to bargain collectively forbids unilateral action by the
employer with respect to pay rates, wages, hours of employment, or
other conditions of employment during the term of a labor contract,
even if the action is taken in good faith. It is well established that
an employer's unilateral action in altering the terms and conditions
of employment, without first giving notice to and conferring in good
faith with the union constitutes an unlawful refusal to bargain.
Therefore, when the employer attempts to promulgate a policy that
will affect bargainable topics, the employer cannot do so without
first initiating bargaining on such topics.

Second, the duty to bargain also arises if a union unilaterally
demands "midterm" bargaining, that is, bargaining midway through
an active applicable collective bargaining agreement on bargainable
subjects such as wages, hours, or terms of employment. In National
Treasury Employees Union v. Fair Labor Relations Authority, 258
U.S. D.C. 176, 810 F.2d 295 (D.C. Cir. 1987), the United States
Court of Appeals for the District of Columbia Circuit examined a
request to bargain made under the auspices of the Federal Service
& Supp. II 1984), which dictates the scope of the employer's duty
to bargain in the public sector. In National Treasury, the union
made a written request to bargain with respect to certain conditions
of employment, such as the use of government cars, permission to
work at home, and worksite selection. The employer contended that
it made no duty to bargain because the agency had made no changes
in the areas covered by the proposals. The employer asserted that
the duty to bargain midway through a collective bargaining
agreement arises only when the agency proposes changes.

The National Treasury court examined the employer's duty to
bargain in light of labor relations statutes enacted by Congress, the
legislative intent behind the statutes, general principles of labor law,
and analogous statutes within private sector labor law, all of which
displayed a long-established precedent that the duty to bargain