STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of CHAD LOS BANOS, Complainant, and United Public Workers, AFSCME, Local 646, AFL-CIO and the Department of Public Safety, State of Hawaii, Respondents.	CASE NOS. CU-10-341 and CE-10-878 ORDER NO. 3172 DISSENTING OPINION OF BOARD MEMBER SESNITA A.D. MOEPONO

DISSENTING OPINION OF BOARD MEMBER SESNITA A.D. MOEPONO

I dissent from the Board Majority's decision based on the Memorandum of Understanding (MOU) regarding the Attendance Program (NEW), dated September 1, 2010. because there was no revised MOU submitted as evidence showing that it was extended beyond June 30, 2011. The MOU states at the end of the agreement the following:

> This MEMORANDUM OF UNDERSTANDING shall become effective on September 1, 2010 and shall remain in effect until June 30, 2011, unless the parties mutually agree to extend the duration of this MEMORANDUM OF UNDERSTANDING.

Moreover, Hawaii Revised Statutes (HRS) § 89-10(a) requires that any collective bargaining agreement or other agreements effective during the term of the collective bargaining agreement, whether a supplemental agreement … or a memorandum of agreement, and any agreement to extend the term of the collective bargaining agreement (CBA) shall be reduced to writing and executed by both parties. This provision states:

> Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned, except for an agreement reached pursuant to an arbitration decision. Ratification is not required for other agreements effective during the term of the collective bargaining agreement, whether a supplemental agreement,

> an agreement on reopened items, or a memorandum of agreement, and any agreement to extend the term of the collective bargaining agreement. The agreement shall be reduced to writing and executed by both parties. Except for cost items and any non-cost items that are tied to or bargained against cost items, all provisions in the agreement that are in conformance with this chapter, including a grievance procedure and an impasse procedure culminating in an arbitration decision, shall be valid and enforceable and shall be effective as specified in the agreement, regardless of the requirements to submit cost items under this section and section 89-11.

(emphasis added)

The only copies of the MOU submitted by the Respondents were of the original MOU. The Board did not receive a copy of a written extension, as required by law, to the MOU. Based on the statute, a Declaration, would not satisfy the statutory requirement. Of note, there is no CBA in the Board's files during the period of 2009-2013 covering the MOU's term. Assuming *arguendo* that there was a CBA for the period of 2009-2013, then the MOU would nevertheless have terminated with that CBA on June 30, 2013 if no written extensions were signed by the parties pursuant to HRS § 89-6(e) which states:

> In addition to a collective bargaining agreement under subsection (d), each employer may negotiate, independently of one another, supplemental agreements that apply to their respective employees; provided that any supplemental agreement reached between the employer and the exclusive representative shall not extend beyond the term of the applicable collective bargaining agreement and shall not require ratification by employees in the bargaining unit.

It is inconceivable for an adjudicator, including this Board, to not raise this issue in order to find "just cause". It is similar to a jurisdictional issue where the question may be raised by the Board *sua sponte.* In fact, the Board Majority does not find in its "Findings of Fact" or "Conclusions of Law" that the MOU is valid.

In the past, whenever there is a question of jurisdiction, the Board has ordered parties to brief the issue. In my opinion, the Board should have requested the parties to provide written evidence of the validity of this MOU.

On April 1, 2016, Respondent UPW filed Dayton Nakanelua's Declaration stating:

> e. The no-fault attendance program was entered by mutual consent under Section 1.05 of the unit 10 agreement.

Section 1.05 of the unit 10 agreement states:

> **1.05 CONSULT OR MUTUAL CONSENT.**
> The Employer shall consult the Union when formulating and implementing personnel policies, practices and any matter affecting working conditions. No changes in wages, hours or other conditions of work contained herein may be made except by mutual consent.

Even if the parties reached mutual consent to an extension of the MOU pursuant to this unit 10 section, HRS § 89-10(a) still requires that such extension by mutual consent be "reduced to writing and executed by both parties." However, neither Respondent DPS nor UPW submitted any written extension as required by law.

Based on the facts of this case and the foregoing reasons, I find that there was no evidence showing a written agreement signed by the parties extending the MOU as required by law. Therefore, the Board majority should not have granted the Motion for a Directed Verdict.

Honolulu, Hawaii, June 30, 2016.

HAWAII LABOR RELATIONS BOARD

Sesnita A.D. Moepono

SESNITA A.D. MOEPONO, Member