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Case No. CE-05-667

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII STATE TEACHERS ASSOCIATION, Complainant, and BOARD OF EDUCATION, Department of Education, State of Hawaii; PATRICIA HAMAMOTO, Superintendent, Department of Education, State of Hawaii; and SUSAN H. KITSU, Department of Education, State of Hawaii, Respondents.	CASE NO. CE-05-667 ORDER NO. 3166 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER; OPINION OF BOARD MEMBER MOEPONO CONCURRING IN PART AND DISSENTING IN PART

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

Board Chair Kerry M. Komatsubara and Board Members Sesnita A.D. Moepono and Rock B. Ley did not participate in the hearings. However, all three Board members have thoroughly reviewed the record in this matter, including the files, transcripts, and exhibits. Accordingly, pursuant to Hawaii Revised Statutes (HRS) § 91-11[i], the Board issues these Proposed Findings of Fact, Conclusions of Law, and Decision and Order.

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 (Kitsu) (collectively Respondents). The Complaint alleged, 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 negotiating with, or obtaining the mutual consent of, HSTA relating to: an anti-harassment, anti-bullying, and anti-discrimination policy; new standards of practice documents and new disciplinary policies and procedures; repeal of DOE Rules Title 8, Subtitle 2, Chapter 41 entitled "Civil Rights Policy and Complaint Procedure" (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 alleged 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 alleged that Respondents willfully violated the rights of public employees in HRS §§ 89-3 and 89-9(a), and committed prohibited practices in violation of HRS §§ 89-13(a)(1), (5), (7) and (8). 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 Hawaii 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 11, 2008, Respondents filed RESPONDENTS' MEMORANDUM IN OPPOSITION TO HSTA'S MOTION FOR SUMMARY JUDGMENT FILED JULY 7, 2008.

Pursuant to HRS §§ 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3), on July 10, 2008, the Board heard Respondents' Motion to Dismiss, and on July 22, 2008, the Board heard HSTA's Motion for Summary Judgment.

After a short delay requested by the parties, 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, the Board makes the following proposed findings of fact.

1. Parties

At all times relevant to this Complaint, Respondent BOE is and was a "public employer;"[ii] 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[t] a public employer or ac[t] in their interest in dealing with public employees[,] for employees belonging to Unit 05.[iii]

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

2. Board Policy No. 4211

By letter dated November 7, 2007 addressed to former HSTA Executive Director Joan Husted (Husted) (November 7, 2007 Letter), DOE Acting Superintendent Faye Ikei (Ikei) notified HSTA of DOE's Committee on Special Programs' approval of a proposed Policy No. 4211 entitled "Department of Education Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) by Employees" (BP 4211). Ikei explained that, "We are submitting this policy for consult and confer" and further stated in relevant part:

> "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 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; inquiries 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. (Emphasis added.)"

Based on the certified mail return receipt, the November 7, 2007 Letter was received by the HSTA on November 9, 2007.

Prior to proposing the adoption of BP 4211 (necessary to comply with federal and state nondiscrimination laws), DOE processed complaints regarding alleged violations of federal and state nondiscrimination protections pursuant to Chapter 41, which is still in effect and was not repealed by the adoption of BP 4211.

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, 2007 Letter was a DOE request to consult and confer on a Board Policy (BP), and not a Standard Practice (SP), Camacho put the November 7, 2007 Letter in a stack of "338 odd SPs to be reviewed" because of his workload. An SP is a formal DOE document adopting the regulations and procedures relating to a BP and includes personnel action consequences for anyone who violates the BP. Normally, an SP is not drafted and presented to HSTA until after the formal adoption of a BP.

In this case, the November 7, 2007 Letter did not include an SP because it was not yet drafted. Therefore, there was no request to consult and confer on the SP for BP 4211. This was consistent with the parties' past practice, i.e., treating a BP and a SP as two separate documents. Thus, DOE would have to make two separate consult and confer requests for the BP and the SP, respectively, in two separate letters. In other words, the adoption of a BP, and the subsequent drafting and adoption of a SP, were separate matters.

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 already 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 HSTA's 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.

In 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 stating that HSTA had reservations about BP 4211 but provided no specific comments.

On February 20, 2008 (the day before the February 21, 2008 BOE Meeting), 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 Ikei, 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 breath [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 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 right to continue to comment as it evolves through implementation."

Kehe received the February 20, 2008 Letter on or about February 21, 2008. Camacho did not attend the February 21, 2008 BOE Meeting. Maurice Morita (Morita) from HSTA was in attendance and 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.

There was no evidence regarding any further communications regarding BP 4211 prior to May 2008. The Board finds that both the Respondents and HSTA were focused on BP 4211, and they both assumed that discussions regarding implementation of BP 4211 would commence upon the adoption of the SP and/or implementation plan (IP) for BP 4211.

At that February 21, 2008 BOE meeting, the BOE also 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 IP. 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 either BP 4211 or BP 2050 from the DOE or the BOE.

On February 22, 2008, Ikei responded to Camacho's February 20, 2008 HSTA Letter, and advised HSTA, among other things, that:

> "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 <u>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</u>.
>
> 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 <u>follow its normal course in developing regulations and procedures</u> as it always does <u>immediately after</u> a policy is adopted. <u>Normal disciplinary procedures will be followed as outlined in the collective bargaining agreement and other DOE rules, policies and/or procedures</u>.

> Your letter goes on to state that the policy does not approach the depth and breath [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. (Emphasis added.)"

Ikei did not mention in her letter that BP 4211 was adopted by BOE and did not provide HSTA with a copy of BP 4211 as adopted (there were typographical errors which were corrected). Camacho did not respond to Ikei's letter. More importantly, there was no evidence that Camacho ever contacted Kitsu to arrange for a meeting to discuss BP 4211. In other words, HSTA did not follow up with DOE regarding BP 4211.

HSTA did not find out that BOE adopted BP 4211 until March 2008, when 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. Even after learning that BP 4211 was formally adopted, no one from HSTA asked DOE to meet and discuss BP 4211.

Based on the foregoing, the Board concludes that, as of February 22, 2008, DOE, in fact, requested a consult and confer on BP 4211, HSTA provided general (but not specific) comments the day before the adoption of BP 4211, HSTA did not request negotiations over BP 4211, DOE responded to HSTA's comments and concerns and offered to meet to discuss the same, and HSTA did not take advantage of DOE's invitation to meet. Thus, the Board finds that DOE consulted and conferred with HSTA regarding BP 4211.

Subsequently, by letter dated May 12, 2008 (May 12, 2008 Letter), HSTA, for the first time, requested that DOE "negotiate over changes in terms and conditions of employment resulting from the unilateral formulation, adoption, and implementation of Policy No. 4211" and included a detailed and comprehensive request for information. Apparently, the May 12, 2008 Letter was prompted by concerns raised in mid-April 2008 during the implementation of BP 4211 pursuant to the SP for BP 4211 (SP 0211) and the IP adopted by DOE (BP 4211 IP).

By letter dated May 21, 2008, Ikei responded to the May 12, 2008 Letter, 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 Employees"] 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],[v] 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."

Thus, as of May 2008, (1) in November 2007, DOE requested that HSTA consult and confer on the draft BP 4211, (2) in late December 2007, HSTA requested an extension to provide comments on the draft BP 4211, which DOE "granted", (3) HSTA cancelled two scheduled February 2008 confer and consult meetings, (4) on February 20, 2008, HSTA commented on the draft BP 4211 (5) on February 22, 2008, DOE responded to HSTA's comments and (6) HSTA did not demand negotiations over the terms of the draft BP 4211 until May 12, 2008. Further, there were no discussions over, or consideration of, an IP or SP for BP 4211 since SP 0211 was not provided to HSTA until June 12, 2008.

3. SP 0211 and Implementation Plan for BP 4211.

There is no dispute that SP 0211 was drafted after the February 21, 2008 BOE adoption of BP 4211 and before the March 28, 2008 DOE adoption of SP 0211. There was no request for a consult and confer over SP 0211 until June 12, 2008, well after the adoption of SP 0211 and after the Complaint was filed.

SP 0211's purpose was "[t]o describe the regulations and procedures of the Board of Education's Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) by Employee Policy," i.e., BP 4211 (emphasis added). In addition, SP 0211 provided that:

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

BP 2050, which was adopted at the same time as BP 4211, required DOE to draft an implementation plan within 45 days of BOE's adoption of any new BP. Kitsu worked on drafting both the regulations (what became SP 0211) and the implementation plan for BP 4211 (BP 4211 IP). BP 4211 IP was adopted by DOE at the same time as SP 0211.

On April 14, 2008, Kitsu presented BP 4211 IP to the BOE for informational purposes only (an IP need not be approved by the BOE). There is no dispute that BP 4211 IP was not normally presented to HSTA or DOE's employees since IPs are considered to be an internal communication tool by DOE. There is also no dispute that SP 0211 was not provided to HSTA prior to the filing of the Complaint on May 27, 2008.

On June 12, 2008, DOE Assistant Superintendent Sheri Lee (Lee) submitted SP 0211 (but not BP 4211 IP) to Camacho and requested a consult and confer regarding the terms of SP 0211. This was consistent with the past practice of the parties to treat a BP and a SP separately, and to submit each to HSTA by separate letters. By letter dated July 1, 2008, Camacho requested (1) bargaining over SP 0211 and (2) additional information needed for bargaining (to be provided in seven days). DOE, by letter dated July 8, 2008, responded that it was in the process of reviewing the comments and concerns raised by Camacho, and that an official written response was forthcoming. There is no evidence that DOE ever provided an official written response to HSTA's demand for negotiation over SP 0211.

Both HSTA and Respondents agree that the consult and confer process for BPs is separate from the consult and confer process for SPs (and presumably IPs). Thus, the obligation to confer and consult arises when a BP is proposed, and if adopted, the obligation to consult and confer arises when an SP is proposed. This "split" recognizes the reality that HSTA may not have a problem with a BP as adopted by the BOE, but may have an objection to the procedures and regulations embodied in an IP and SP. Similarly, in the context of the duty to bargain, HSTA may not have an objection to a BP but the SP and IP implementing the BP may raise bargainable topics. In essence, in analyzing HSTA's prohibited practice claims (whether in the context of a duty to bargain or duty to consult and confer), each of the BP, SP and IP should, and must, be treated separately.

4. HSTA Concerns Regarding BP 4211, SP 0211 and BP 4211 IP

Initially, the Board must determine whether issues related to SP 0211 and BP 4211 IP were properly raised by the parties. Since SP 0211 was not presented to HSTA until after filing of the Complaint, and BP 4211 IP was never presented to HSTA in the context of a request for a consult and confer or a demand for negotiations, neither document was specifically addressed in the Complaint. Further, after reviewing the pleadings filed in this matter, there appears to be no attempt by the parties to amend the Complaint to include claims related to either SP 0211 or BP 4211 IP. However, the parties presented evidence and argued over, and the Board considered, issues related to all three, i.e., BP 4211, SP 0211 and BP 4211 IP. Thus, the Board finds that issues related to all three documents, i.e., BP 4211, SP 0211 and BP 4211 IP, are properly before it.

HSTA's primary concern is a teacher could violate a BP, SP and/or IP, and be subject to discipline. To the extent that the adoption and implementation of a BP pursuant to a SP and IP may materially affect the discipline provisions of the CBA, bargainable topics may arise, and consequently, a BP, SP or IP may be the subject of mandatory bargaining. DOE's position is that BPs, SPs and IPs are subject only to a consult and confer requirement, and not a bargaining requirement, but it would remain open to considering concerns articulated by HSTA and "make adjustments if warranted" at any time.

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 HSTA 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.

Finally, Camacho summed up his concerns regarding BP 4211, SP 0211, and BP 4211 IP as fundamental due process that the investigation will be properly conducted, including the right to know the nature of and who filed 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.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.

However, Camacho was unable to specifically identify which provisions of BP 4211, SP 0211 or BP 4211 IP were vague or ambiguous or which altered the just cause or confidentiality standards or other disciplinary provisions of the CBA. In effect, Camacho raised a series of "what ifs" without specifically pointing out any provisions of BP 4211, SP0211 or BP 4211 IP which specifically conflicted with or changed any provisions of applicable DOE policies, rules, regulations, collective bargaining agreements, and other laws, rules, and regulations concerning the discipline of its members then in effect (Existing Rules).

In defending BP 4211, SP 0211 and BP 4211 IP, DOE repeatedly stated (starting with Ikei's February 22, 2008 letter to Camacho) that nothing in BP 4211, SP 0211 or BP 4211 IP conflicted with or changed the Existing Rules or employee rights in the context of disciplinary actions which may be taken by DOE. When HSTA first raised its general concerns regarding the effect of BP 4211 on disciplinary matters, Ikei stated that "[n]ormal disciplinary procedures will be followed as outlined in the collective bargaining agreement and other Doe rules, policies and/or procedures. (Emphasis added.)"

Moreover, Kitsu testified that in drafting SP 0211 and BP 4211 IP:

> "Again, when we do procedures and we do these implementation of regulations, it's really important that it's very clear that we're doing it in alignment with other provisions, and I put in here, including provisions under collective bargaining agreements.

> So absolutely nothing changed in terms of the rights of the employees and how any disciplinary action would be taken against any employee should any inappropriate conduct be found in an investigation. (Emphasis added.)"

In effect, the Respondents stated to both the Board and HSTA that BP 4211, SP 0211 and BP 4211 IP were not intended to, and in fact, did not amend or change the CBA or any of DOE's existing rules and regulations affecting teachers' discipline, except as the same may be subject to federal laws or regulations preempting state laws or regulations (which were not discussed in depth by the parties).

Based on the foregoing and in holding the Respondents to their collective position and understanding of the nature and reach of each document, the Board finds that each of BP 4211, SP 0211 and BP 4211 IP is subject to all Existing Rules regarding teacher's discipline, except as the Existing Rules (1) may be revised or amended or otherwise changed in accordance with Hawaii law or (2) as the Existing Rules may have been or may be affected by federal law. Any disputes over the foregoing shall be resolved in accordance with the applicable grievance provisions of the CBA then in effect.[vi]

The Board takes this position simply because both parties failed to provide the Board with sufficient evidence to determine whether specific provisions of BP 4211, SP 0211 or BP 4211 IP did or did not violate either the CBA, any other Existing Rules or any provision of HRS Chapter 89. For example:

> (a) HSTA raised concerns regarding the submission of anonymous complaints pursuant to BP 4211 and SP 0211. However, the CBA addressed the submission of anonymous complaints in Article X.D. Section 1. Kitsu testified that, because of due process concerns, any investigation could not be completely confidential and any "defendant" would have to know of the complaint. In addition, as noted above, Kitsu testified that nothing was changed with respect to the Existing Rules in handling teacher discipline by BP 4211, SP 0211 or BP 4211 IP. Finally, other than raising "what if's", HSTA did not provide any specific evidence to show, for example, that the "need to know" confidentiality provision of SP 0211 conflicted with the applicable provisions of the CBA.
>
> (b) Similarly, HSTA's concerns about the "standard of proof" required to hold a teacher in violation of BP 4211 or SP 0211, any ambiguity relating to the definitions of "harassment" or "bullying" or the necessity of time restrictions for the submission of a complaint were similarly based on "what if's" and a failure to

recognize that the Respondents' intent was not to change or modify the existing disciplinary provisions of the Existing Rules.

The testimony of the witnesses and the arguments of the parties clearly support the following conclusions: The Respondents never intended BP 4211, SP 0211 and BP 4211 IP to circumvent or conflict with the Existing Rules because each Respondent understood that HSTA would demand negotiations over the adoption of the same. Similarly, it is clear that HSTA's position was the same: Unless BP 4211, SP 0211 or BP 4211 IP circumvented or conflicted with any Existing Rule, Respondents had a duty to consult and confer, and did not have a duty to negotiate. This is clearly demonstrated by how HSTA's treatment of the adoption of BP 4211 as a consult and confer and not a subject of negotiations.

The real failure in this case was the lack of communication between the Respondents and HSTA concerning SP 0211 and BP 4211 IP. As Camacho testified, many times HSTA may agree with a BP but may disagree with how a BP is actually implemented. Thus, the language used in a SP is of crucial importance to HSTA.[vii] In essence, this is where the "rubber meets the road."

HSTA did not meet with DOE regarding the terms of the draft of BP 4211, and after asking for and being granted an extension to comment on BP 4211, HSTA did not provide its comments until the day before the February 21, 2008 BOE Meeting where BP 4211 was discussed and adopted. HSTA's comments were, in the Board's view, perfunctory and HSTA was merely attempting to reserve its rights to further challenge BP 4211.[viii] The first demand for negotiation was made pursuant to the May 12, 2008 Letter. This was too late -- it was well over 90 days from the date that BOE adopted BP 4211 (February 21, 2008). Any attempt by HSTA to reserve its rights to further comment were ineffective since Respondents never agreed that HSTA could do so, and more importantly, never agreed that any applicable "statute of limitations" would be tolled.

DOE then failed to send a draft of either SP 0211 or BP 4211 IP to HSTA for comment until June 12, 2008, *after* HSTA filed the Complaint. The Board views this failure to discuss SP 0211 as inadvertent and it appears that someone just forgot to include HSTA in the process. However, inadvertent or not, the failure to initiate even a consult and confer over SP 0211 resulted in the filing of the Complaint (probably as a result of member complaints regarding the "roll out" of BP 4211 pursuant to SP 0211 in April 2008), and embroiled both HSTA and Respondents in a long, protracted and expensive dispute before the Board. HSTA, however, never argued and never presented the Board with a breach of duty to consult claim, and therefore, the duty to consult issue is not before, and shall not be decided, by the Board.

After reviewing the testimony of the witnesses, especially Kitsu, and the language of the CBA, BP 4211, SP 0211 and BP 4211 IP, the Board finds that HSTA failed to meet its burden of showing specifically (1) why any of the provisions of BP 4211, SP 0211 or BP 4211 IP are vague or ambiguous or (2) how they amend or modify the provisions of the CBA. For example, SP 0211 specifically provides that any disciplinary action taken against a teacher is subject to the Existing Rules, including provisions of the CBA. Further, any claims that Chapter 41 was being repealed

are not before the Board because, as outlined in Order No. 2548, the parties agreed that Chapter 41 was not being repealed.

Thus, since SP 0211 specifically provides that all investigations and any disciplinary actions regarding a violation of BP 4211 are subject to the Existing Rules (i.e., "DOE policies, regulations, rules, collective bargaining agreements, and other laws, rules, and regulations"), there is no evidentiary support for HSTA's claims that BP 4211, SP 0211 or BP 4211 are in conflict with the requirements of the CBA.

Based on the foregoing, the Board specifically finds that (1) there were no problems with BP 4211 until mid-April 2008, when HSTA started receiving complaints about the implementation of BP 4211, (2) HSTA did not know about SP 0211 until June 12, 2008, (3) BP 4211, SP 0211 and BP 4211 IP do not conflict with or amend the terms of the CBA because each of BP 4211, SP 0211 and BP 4211 IP, as asserted by the Respondents prior to and during the hearings held in this matter, are subject to the provisions of the Existing Rules, which include the CBA and (4) further disputes regarding BP 4211, SP 0211 and BP 4211 IP are be subject to, and should be resolved in accordance with, the grievance procedures 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."

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. The Board 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, the Board 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).

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;
> ***
> (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; [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:
***
(4) Suspend, demote, discharge, or take other disciplinary action against employees for proper cause;
***
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. All Allegations Regarding The Refusal to Bargain Over BP 4211 Are Untimely Filed And Must Be Dismissed; Allegations Regarding SP 0211 And BP 4211 IP Were Timely Filed

1. Claims Regarding BP 4211 Are Not Timely.

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 do 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. Dep't of Human Servs., 112 Hawaii 388, 398, 146 P.3d 103, 113 (2006) *(citing* Chun v. Employees' Ret. Sys. of the State of Hawaii, 73 Haw. 9, 14, 828 P.2d 260, 263 (1992)).

HSTA does not dispute that the 90 day limitations period "starts" from the date it knew or should have known that a prohibited practice has occurred. HSTA argues that in failure to bargain cases, the limitations period does not begin 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 a prohibited practice claim 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 the date of accrual did not arise until: 1) April 14, 2008 when HSTA became apprised of recent DOE actions clearly establishing the unilateral changes brought by the implementation of BP 4211; or 2) May 21, 2008, when DOE took the position that the adoption and implementation of BP 4211 "is not a subject of negotiations."

The Board finds HSTA's position lacks merit. The November 7, 2007 Letter unambiguously stated that DOE's consideration of BP 4211 was subject to consult and confer, and not negotiations. In fact, at that time, HSTA agreed with DOE's position. Thus, DOE clearly indicated, and HSTA understood, "its intention not to negotiate" over BP 4211 on November 7, 2007.[ix] Therefore, the Board finds that HSTA failure to bargain claim with respect to BP 4211 was simply too late (and contrary to HSTA's previous position that consult and confer applied), and any claims regarding the negotiability of BP 4211 as alleged in the Complaint are dismissed.

To hold otherwise would only encourage "game playing." For example, a contrary ruling would allow HSTA to (1) agree with DOE that a proposed BP was subject only to a consult and confer, (2) perfunctorily comment upon a BP, (3) state that it has reservations, and (4) then wait well beyond the 90-day period after the adoption of the BP, i.e., until implementation, to challenge the adoption of the BP by lodging a demand for negotiations. While the Board does not condone "preemptive" demands for negotiation unless there is a substantial basis for doing so (e.g., a BP contains provisions that are in conflict with a collective bargaining agreement), a union should not be allowed to "preserve" a duty to bargain claim by engaging in the foregoing actions. DOE, as an employer, is entitled to finality on matters properly brought to HSTA's attention.

Based on the foregoing, HSTA's claims challenging the adoption of BP 4211 are untimely, and are dismissed.

2. SP 0211 And BP 4211 IP Claims Were Timely Filed.

Prior to, at the earliest, April 14, 2008, HSTA raised no specific problem with BP 4211. It was not until BP 4211 was implemented pursuant to SP 0211 that significant issues arose and HSTA first took the position that BP 4211 was negotiable.[x] In fact, it is clear that both parties treated a BP differently from a SP and an IP. In recognition of the "separateness" of BPs and SPs, the Respondents recognized that an SP (IPs are normally not given to HSTA or its members) must be the subject of a separate notification letter. The Board agrees with the parties.

Since the parties treated BPs, SPs and IPs as separate matters, it is logical that each has a different "start date" for the running of the 90-day limitation period. In reality, as Camacho testified, many times HSTA may have no problem with a BP, but it may have problems with the implementation of a BP and the SP which implements the same. HSTA should not be forced to challenge the BP, SP and IP when the BP is proposed for adoption. Clearly, this does not foster labor relations, and may lead to an increase in the filing of potentially baseless prohibited practice

complaints since the BP has not yet been implemented, and the SP may not have been drafted and adopted.

Here, HSTA's request for bargaining on SP 0211 was not made until *after* DOE sent HSTA a copy of SP 0211 and *requested* a consult and confer on June 12, 2008. Camacho then demanded negotiation pursuant to his July 1, 2008 letter. Although the Complaint (filed May 27, 2008) alleged, among other things, that the Respondents failed to negotiate over BP 4211, there were no allegations regarding SP 0211 or BP 4211. This is simply because HSTA was not made aware of SP 0211 or BP 4211 IP until after the filing of the Complaint. Thus, at the earliest, HSTA knew or should have known that there were problems with the implementation of BP 4211 on or about April 14, 2008. However, DOE did not provide HSTA with a copy of SP 0211, and did not request a consult and confer until June 12, 2008. Consequently, at the earliest, HSTA neither knew nor should have known that DOE's position was that SP 0211 "is not a subject of negotiations" until June 12, 2009. Therefore, HSTA's failure to bargain claims regarding SP 0211 and BP 4211 IP were timely asserted.

Although it can be argued HSTA knew or should have known that the Respondents would not bargain over SP 0211 when BP 4211 was first proposed and any HRS Chapter 89 challenge must be asserted within 90 days, this ignores the reality of the situation facing both DOE and HSTA. Merely because HSTA *may* file a prohibited practice complaint before a BP is implemented (Tomasu, 79 Hawaii at 163, allowing HSTA to file a prohibited practice complaint before a BP is implemented; Tomasu did not hold, however, that a complaint *must* be filed prior to implementation) does not mean that it *must* file a complaint before implementation or before an SP is drafted and presented for consideration. As noted above, both HSTA and the Respondents acknowledge that, in reality, it is when a BP is implemented that both parties become aware of potential disputes.

Thus, given the facts of this case, the Board holds that, with respect to SP 0211 and BP 4211 IP, the 90 day limitation period did not begin to accrue until the Respondents knew or should have known that Respondents would not bargain over either or both. This would not have occurred until HSTA knew or should have known about the existence of SP 0211 and BP 4211 IP, and that DOE would not bargain over the same by, for example, stating that both were the subject of a consult and confer. This did not occur until, at the very earliest, June 12, 2008. Thus, the assertion of claims related to SP 0211 and BP 4211 IP was timely.

In the context of this particular case, if the Board were to rule otherwise, it may allow the respondents to engage in "game playing." DOE could propose an innocuous BP, ask for a consult and confer, receive HSTA's comments, draft and adopt an SP implementing the BP on the 91st day after receiving HSTA's comments, and finally, implement the BP pursuant to the SP. If the Board were to rule that any claims arising out of the failure to bargain over an SP began to run when a BP is proposed or adopted, then the Respondents could escape a legitimate challenge to an SP (even if it contained bargainable topics) by waiting until the 91st day to propose the adoption of an SP. This is not a just and fair result.[xi]

Therefore, based on the foregoing, the Board finds and determines that the (1) HSTA's claims regarding the adoption of BP 4211 were untimely asserted and are dismissed and (2) HSTA's claims regarding SP 0211 and BP 4211 IP were timely asserted.

D. The Adoption Of BP 4211, And Its Implementation Pursuant to SP 0211 and BP 4211 IP (As Adopted by the Respondents) Involve Permissive Rather than Mandatory, Subjects of Bargaining. Accordingly, There Are No Violations of HRS §§ 89-3, 89-9(a), and 89-13(a)(5).

From the outset, based on the Complaint and the positions of the parties in this case, the issue upon which this prohibited practice case rests is not whether the Respondents complied with a duty to consult. Rather, the issue in this particular case is whether BP 4211, SP 0211, and BP 4211 IP involve mandatory subjects of bargaining which require Respondents to bargain, and if so, whether the Respondents breached their duty to bargain. The Board holds that there was no duty to bargain for the following reasons, and the Board need not reach the issue of whether Respondents breached their duty to bargain.

1. DOE Had No Duty to Negotiate Regarding Promulgation And Adoption of BP 4211 Because The Policy Was Adopted to Comply with Federal Law.

Based on past Board and Hawaii court appellate decisions, there is no question that promulgation of a policy to comply with federal statutes is not a negotiable issue. *See*, Tomasu 79 Hawaii at 158, 900 P.2d at 165 (affirming the Board's position that the initial promulgation of a policy that merely complies with federal law is not negotiable).

However, in Tomasu (and as recognized by the Board in previous decisions), the Court treated the *implementation* of a policy to comply with federal mandates as a separate matter.

> "Cases make clear that compliance with Federal statutes as such is not a negotiable issue, but cases implicitly recognize a distinction between negotiation over *compliance* and negotiation over *implementation* of federal statutes. Based on this distinction, it appears that **though compliance is not negotiable, where the employer has discretion under federal law, regulation, or administrative opinions in implementing federal law, the duty to bargain applies.**" (Italics and emphasis in original.)"

Tomasu, 79 Hawaii at 158.

Thus, in addition to being untimely, HSTA's claim that the promulgation of BP 4211 was subject to negotiations (because it affected disciplinary matters) cannot be substantively sustained. As outlined in the November 7, 2007 Letter, the purpose of BP 4211 was to include "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" in order to formalize DOE's "position on Anti-harassment, anti-bullying, and anti-discrimination against students." HSTA did not dispute DOE's position that BP 4211 was promulgated to comply with federal law. Therefore, the duty to bargain does not apply to the promulgation of BP 4211.

The record, however, is insufficient to determine whether the employer had discretion under applicable federal law in implementing BP 4211, such that the duty to bargain arises. However, even assuming that Respondents have the requisite discretion in implementing federal law in this case such that a duty to bargain may arise as to bargainable topics, as discussed below, the Board rejects HSTA's position that the implementation of BP 4211 pursuant to SP 0211 and BP 4211 IP, specifically with regard to disciplinary matters, is negotiable for the reasons set forth below.

2. Procedures And Criteria Regarding Disciplinary Consequences Are A Permissive, Not A Mandatory Subject Of Bargaining under HRS § 89-9(d).

Based on the specific impacts and changes it noted, HSTA's basic contention is that the procedures and criteria regarding disciplinary consequences for violations of BP 4211, SP 0211, and BP 4211 IP materially and significantly impact teachers' terms and conditions of employment, rendering these matters as mandatory subjects of bargaining. In support of this position, HSTA relies on: (1) HRS § 89-9(a); (2) Tomasu; (3) the application of the "significant and material relationship to conditions of employment" test applied in Hawaii Gov't Emp. Ass'n v. Ariyoshi, Board Case No. DR-02-284a, Decision No. 84, 1 HPERB 763, 769 (1977) (HGEA Case)[xii] and Hawaii Nurses Ass'n. v. Ariyoshi, Board Case No. CE-09-41, Decision No. 104, 2 HPERB 218 (1979) (HNA Case),[xiii] to determine whether an item is a mandatory subject of bargaining; and (4) the position that bargaining is required pursuant to the Univ. of Hawaii Prof'l Assembly v. Bd. of Regents, 3 HPERB 562 (1984) (BOR Case) and the United Public Workers, AFSCME, Local 646, AFL-CIO v. Yamashiro, 5 HLRB 239, 260 (1994) (Yamashiro), decisions because a violation of BP 4211, SP 0211, and the IP plan could lead to discipline. Based on the Board's factual findings, Hawaii decisions subsequent to Tomasu and the legislative history of HRS § 89-9(d), there is no merit to HSTA's position.

In Tomasu, the Court held that because the HRS § 89-9 provisions must be read conjunctively to each other, all matters affecting wages, hours and working conditions are negotiable under HRS § 89-9(a) subject to the limitations contained in HRS § 89-9(d). *Id.* at 161. In previous cases, the Board adopted a balancing test in determining negotiability, i.e., the Board analyzed whether the exercise of a management right had a substantial impact upon terms and conditions of employment. The United Public Workers, in a case involving the unilateral transfer of refuse workers, argued that Tomasu gave its "seal of approval to the balancing test as adopted by the" Board. The Board's decision that the proposed unilateral transfer, because it would have a substantial impact on conditions of employment, was negotiable, was appealed and became the subject of the Court's decision in United Pub. Workers, Local 646 v. Hanneman, 106 Hawaii 359, 364-65 (2007) (Hanneman).

In Hanneman, "the court held that management rights under HRS § 89-9(d) precluded collective bargaining over the City and County of Honolulu's unilateral decision to transfer refuse workers to a different employment location. Under Hanneman, the scope of topics subject to negotiation 'cannot infringe upon an employer's management rights [under § 89-9(d)].' (Cites omitted.)" Rodrigues v. Cnty. of Kaua'i, 135 Hawaii 456, 466 (2015) (County of Kaua'i). In other words, the Hanneman Court rejected the Board's use of a balancing test and held that "the right to negotiate wages, hours and conditions of employment is subject to, not balanced against, management rights." Hanneman, supra, 106 Hawaii at 365.

In reaction to Hanneman, in 2007, the State Legislature amended HRS § 89-9(d). Essentially, HRS § 89-9 currently:

> "[P]ertains to the scope of negotiations for public sector collective bargaining, provides that an employer and union may not agree in collective bargaining to any provision 'which would interfere with the rights and obligations of a public employer to' perform several listed functions including to '[h]ire, promote, transfer, assign, and retain employees in positions.' While HRS § 89-9(d) expresses a policy that a collective bargaining agreement should not interfere with an employer's prerogative to make promotions, the provision expressly provides that this subsection 'shall not preclude negotiations over the procedures and criteria on promotions ... as a permissive subject of collective bargaining negotiations. Further, HRA § 89-9(d) states, 'Violations of the procedures and criteria so negotiated may be subject to the grievance procedure in the collective bargaining agreement.'"

County of Kaua'i, supra, 135 Hawaii at 466.

In this case, the issue is the effect of BP 4211, SP 0211 and BP 4211 IP on disciplinary matters. The Board agrees with the County of Kaua'i Court in its reading of HRS § 89-9. It is clear that one of management's prerogatives is to deal with disciplinary matters (HRS § 89-9(d)(4)). Thus, the CBA should not "interfere with [the Respondents'] prerogative to" deal with disciplinary matters; provided that the Respondents and HSTA may negotiate over "the procedures and criteria on suspensions, terminations, discharges, or other disciplinary matters ... as a permissive subject of bargaining during collective bargaining negotiations. (Emphasis added.)" HRS § 89-9(d).

As articulated by the Court in County of Kaua'i, 135 Hawaii at 466:

> "The purpose of the 2007 amendments was to clarify that management rights enumerated in HRS § 89-9(d) do not invalidate or preclude negotiations concerning agreements on procedures and criteria on promotions and other management functions. The House

> Committee on Labor & Public Employment stated that 'negotiations over procedures and criteria of promotions ... are consistent with the underlying purpose of chapter 89, HRS. (Emphasis in original; cites omitted.)"

In effect, HRS § 89-9(d) "expresses a policy to avoid interference through collective bargaining with an employer's function to [handle disciplinary matters], but the statute specifically states that this policy is to be balanced against a policy to encourage negotiations over the procedures and criteria on [discipline] that may be subject to grievance procedures." County of Kaua'i, 135 Hawaii at 466.

Based on the foregoing, disciplinary matters (or any other matter specifically listed in HRS §§ 89-9(d)(1) through 8), while denominated a management right, may be subject to negotiation. However, such negotiations are (1) not mandatory, (2) are permissive and (3) are limited to "procedures and criteria." The Board also holds that (1) the 'balancing" and "material and significant impact" tests will no longer be used to determine bargainability and (2) the fact that a matter may be the subject of permissive bargaining does not, in of itself, trigger a duty to bargain and a party may not be compelled to bargain. *See*, Retlaw Broadcasting Co. v. N.L.R.B., 172 F.3d 660, 665-666 (9th Cir. 1999), ("[t]he distinction between mandatory and permissive subjects of bargaining is crucial in labor disputes, but it determines to what extent one party may compel the other to bargain over a given term").

Therefore, Respondents were not required to bargain either SP 0211 or BP 4211 IP because, even if they touched upon disciplinary matters, bargaining over such issues is permissive, not mandatory. HRS § 89-9(d). Thus, whether or not the Respondents had discretion regarding implementation, Respondents had no duty to bargain, and consequently, there is no statutory violation. *See*, Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 185-86 (1971) (Allied Chemical).

(3) The Employer's Duty to Consult and Confer, Rather Than Negotiate BP 4211 And SP 0211, Is Consistent With the Established Practice Between The Parties. The Record Further Shows That the Established Practice Between The Parties Was Not To Consult and Confer Or Negotiate An Implementation Plan

Based on the undisputed evidence in this case, the established practice between the HSTA and the DOE Respondents was that BPs and SPs were subject to an established consult and confer procedure. IPs were treated by DOE as an internal communication tool, and were not submitted to HSTA or even provided to HSTA. In short, there was no evidence that the BPs, SPs or IPs were ever the subject of mandatory bargaining.

Although Respondents had no duty to bargain because the procedures and criteria for disciplinary actions are a permissive subject of bargaining, there is no dispute that they had a duty to effectively consult with HSTA. For example, as more fully addressed below, CBA Article

XXI.B. requires the employer to consult with HSTA before amending, revising, or deleting any portion of SP 0211. However, as noted by the Board from the outset, the failure to consult on BP 4211, SP 0211, and the BP 4211 IP is not an issue in this case. Further, based on the undisputed evidence, Respondents' processing of BP 4211, SP 0211, and the BP 4211 IP was consistent and in accordance with this undisputed practice.

Accordingly, the Board finds that the established practice between the parties does not support a determination that BP 4211, SP 0211, or the IP were mandatory subjects of bargaining.

For all of the reasons set forth above, the Board holds that HSTA has failed to demonstrate that BP 4211, SP 0211, and the IP were mandatory subjects of bargaining; and therefore, Respondents did not violate HRS §§ 89-3, 89-9(a), and 89-13(a)(5).

E. There Is No Violation Of The CBA; And Therefore, No Violation of HRS Section 13(a)(8).

In support of its HRS § 89-13(a) (8) claim, HSTA argues that Respondents "willfully violated terms of the Unit 5 agreement by unilaterally changing provisions regarding use and retention of derogatory material, evidentiary standard of proof, right to know the identity of and confront the accuser, and prior rights under Chapter 41 that contained provisions for a statute of limitations and provided the accused with a copy of the complaint and other due process protections." In so arguing, HSTA relies on CBA Articles XXI (Maintenance of Benefits), XXII [sic],[xiv] V. L. (Grievance Procedure), and IX A. and D. (Personnel Information). Contrary to HSTA's position, the Board is unable to find violations of these CBA provisions.

First, HSTA asserts that CBA paragraph A. of Article XXI (Maintenance of Benefits) "'insures that, nothing in the contract supersedes the right' to statutory benefits," relying on the Board's decision in Burns v. Anderson, Board Case No., CE-12-76, Decision No. 169, 3 HPERB 114, 119, 123 (1982) (Burns). CBA Article XXI provides in relevant part that:

> "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 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."

The Board finds that HSTA's reliance on both CBA Article XXI and XXII [sic] to support its position is misplaced. First, the Burns decision, which found an HRS § 89-13(a)(8) violation, is distinguishable and not controlling based on critical differences in the facts and collective

bargaining provisions. The Burns prior rights clause[xv] was significantly broader in scope than Article XXI (Maintenance of Benefits) by extending, not just to regulations and standard practices, but also to statutory benefits. Burns, 3 HPERB at 119, 123. Further, in finding an HRS § 89-13(a)(8) violation, the Board, in Burns, relied on another provision in the collective bargaining agreement pertaining to leaves of absence. Second, based on the plain and unambiguous language of CBA Article XXI that the Employer may exercise its management 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," the Employer is required to consult, not negotiate, on any changes to the standard practices.

HSTA further asserts that the Respondents' actions unilaterally changed teachers' rights under Chapter 41, HAR. Based on a review of HAR Chapter 41 and SP 0211, the Board finds no merit to these assertions for two reasons. First, HAR Chapter 41 is not a standard practice but rather an administrative rule. Hence, Article XXI, which pertains to standard practices, simply does not apply to HAR Chapter 41. Second, even if HAR Chapter 41 is considered a standard practice, there is no dispute that HAR Chapter 41 was not repealed and is still in effect. Since BP 4211, SP 0211 and BP 4211 IP are all subject to the Existing Rules, which includes Chapter 41, the established practice was that rules and regulations were subjects for consult and confer and not negotiation. Therefore, the Employer did not violate CBA Article XXI by failing to negotiate.

Based on a review of the relevant documents, the Board further finds that there is no merit to HSTA's position that Respondents have unilaterally changed CBA Article V.L., which requires proper cause for discipline, by introducing a corroborating standard for violations of BP 4211. Article V.L. states:

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

(Emphasis added)

SP 0211, paragraph 8, states in its entirety:

> 1. 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.

The "corroborating" standard, which HSTA alleges changed CBA Article V.L., appears in BP 4211 IP under "Key Messages and Objectives, which states in its entirety:

"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."

(Emphasis added)

The Board finds that there is no merit to HSTA's contention by that referring to "evidence corroborating an allegation" in BP 4211 IP, the Respondents unilaterally changed the rights and privileges held by teachers prior to SP 0211 and BP 4211 IP under Chapter 41, HAR. The reference appears in the "Key Messages and Objectives" section of the IP, which does not appear to have the legal significance or weight of a BP or a SP (as Kitsu testified, an IP is an internal communication not normally given to HSTA or employees). In addition, this BP 4211 IP reference further specifically states that "prompt [disciplinary] action...up to termination" is required to not only to "be taken by the proper officials" but also "in line with provisions under the collective bargaining agreements, laws, rules, DOE policies and procedures and other relevant authorities. (Emphasis added.)" In other words, BP 4211 IP is *subject to* the Existing Rules, and does not amend or change them.

More importantly, SP 0211, which does have legal import as the procedure implementing BP 4211, is in "alignment" with the Existing Rules, including the CBA, which more specifically address the standards applicable to imposition of discipline for violations of BP 4211. SP 0211 includes a specific "Violations of Policy" provision, which state that that an employee, who is found to have violated BP 4211 following completion of an internal investigation, will receive disciplinary action in accordance with the CBA, among other Existing Rules. Accordingly, there is no question that the proper cause standard set forth in CBA Article V.L. remains applicable in determining disciplinary actions under SP 0211 implementing BP 4211.

Finally, HSTA alleges that CBA Article IX.A. and IX.D. were unilaterally changed because SP 0211 and BP 4211 IP had the effect of proceeding with an investigation without the teacher being able to review of the material, obtain a copy of the complaint, or the identity of the complainant. First, the Board notes that HSTA's reliance upon CBA Article IX.D. is in error because there is no such provision. Rather, the requirement that a supervisor report to the accused teacher that an anonymous complaint has been submitted is contained in CBA Article X.D.

CBA ARTICLE IX.A. provides:

> "A. 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.D. states:

> "E. 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."

While HSTA asserts that CBA Articles IX.A. and X.D. have been unilaterally changed by SP 0211 and IP, HSTA provides no specificity regarding which provisions of the CBA were altered, and more importantly, how they were altered by BP 4211, SP 0211 and BP 4211 IP such that, after the adoption of BP 4211, SP 0211 and BP 4211 IP, a teacher cannot (1) review the complaint or other materials, (2) obtain a copy of the complaint, or (3) be provided with the and BP identity of the complainant prior to an investigation. In essence, since BP 4211, SP 0211 4211 IP were *subject to* the Existing Rules, there simply was no unilateral change to any Existing Rules.

In addition, while the HSTA employs the term "proceeding" with an investigation in its contention, the Board is unable to conclude that characterizing an investigation as "proceeding" is sufficient to establish that the investigation process falls within the purview of the "proceedings" provided for in CBA Article IX.A. Accordingly, in the absence of specific evidence supporting

HSTA's contentions, the Board concludes that these CBA provisions have not been altered by SP 0211 or the IP.

Finally, a determination that SP 0211 is subject to consult and confer is in accordance with CBA Article XXI. Paragraph A. of that provision states:

> "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."

Since SP 0211 was not in effect at the time of the execution of the CBA and is not the subject of a memorandum of agreement, memorandum of understanding or other supplemental agreement, Paragraph A. does not apply. However, Paragraph B., appears to be applicable and states:

> "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. " (Emphasis added.)

Based on the plain language of this provision, SP 0211 would be subject to consult and confer, not bargaining. Accordingly, Respondents cannot be deemed to have violated this provision by failing to negotiate regarding SP 0211.

For the above-stated reasons, the Board is unable to find that Respondents violated HRS § 89-13(a) (8).

E. Based On The Determination that Respondents' Failed To Violate HRS §§ 89-3, 89-9(a), 89-13(a)(5), and 89-13(a)(8), There Is No Violation Of HRS § 89-13(a)(1).

For the reasons set forth above, the Board is compelled to reject HSTA's argument that Respondents violated HRS §§ 89-3, 89-9(a), 89-13(a)(5), and 89-13(a)(8) by failing to negotiate and unilaterally implementing BP 4211, SP 0211, and BP 4211 IP. Consequently, because HSTA's "derivative" violation that Respondents interfered with employee rights under HRS § 89-13(a)(1) rests on these allegations regarding Respondents' failure to bargain, the Board is required to reject this "derivative" allegation as well.

F. Respondents Did Not Violate HRS § 89-13(a)(7) Because There Was No Duty To Negotiate and No Violation HRS § 89-13(a)(5) Regarding BP 4211, SP 0211, and the IP.

HSTA asserts that Respondents violated HRS § 89-13(a)(7) by failing to collectively bargain in violation of HRS §89-13(a)(5) and by unilaterally altering the terms and conditions of employment without first giving notice to and conferring in good faith with the union. The Board does not agree. First, as stated above, the Complaint in this case does not allege a failure to consult and confer on BP 4211, SP 0211, and BP 4211 IP. Even if there was such an allegation, the parties do not dispute that at least with respect to BP 4211 the Respondents did consult and confer.[xvi] Although there was no consult and confer with respect to SP 0211, HSTA responded to Respondents' request for a consult and confer with a demand for negotiations, and since the Complaint was already filed, Respondents were not required to respond because the issue of bargainability was already before the Board.

Second, as stated above, the U.S. Supreme Court held in NLRA cases that if an implemented change involves a permissive subject of bargaining, there is no statutory violation. Allied Chemical, 404 U.S. at 185-86. The Board has also held that the unilateral establishment of terms and conditions regarding mandatory subjects of negotiation constitutes a prohibited practice. Hawaii Gov't Emp. Ass'n, Local 152, HGEA/AFSCME v. Ariyoshi, Board Case No. CE-13-14, Decision No. 63, 1 HPERB 570, 579 (1975). Based on its inability to find that Respondents failed to bargain collectively in violation of HRS § 89-13(a)(5) because BP 4211, SP 0211 and BP 4211 IP do not involve bargain topics, and in fact, they are permissive, not mandatory subjects of bargaining for the reasons set forth fully above, the Board also rejects HSTA's position that Respondents have violated HRS § 89-13(a)(7).

Finally, even if the Board was able to find an HRS § 89-13(a)(5) violation, this finding would be insufficient to warrant a finding that HRS § 89-13(a)(7) was violated. In Burns, 3 HPERB at 123, the Board rejected a similar argument by complainants in that case, reasoning that, "These statutory violations must occur independently of Section 89-13, H.R.S. Any other interpretation would render Subsection 89-13(a)(7), H.R.S. meaningless and redundant." Hence, the Board rules against HSTA's argument on this ground as well.

G. Respondents' Failure to Provide Information Does Not Constitute A Prohibited Practice.

Relying on both Board and NLRB case law, HSTA asserts that the Respondents have committed a prohibited practice based on their "failure to provide information requested on a mandatory subject of negotiations and/or to perform its proper performance of its duties has long been recognized by this Board as a prohibited practice under the Act." The record in this case shows that in the May 12, 2008 letter,[xvii] HSTA stated that "the HSTA requests the following information which is needed for bargaining," and that Respondents failed to respond or to state objections or defenses to this request.

While the Board previously addressed an employer's duty to provide information a number of times, factually, HSTA's request for information was based on its contention that BP 4211, SP 0211 and BP 4211 IP raised mandatory subjects of bargaining. There was no grievance pending

and there were no ongoing collective bargaining negotiations extant at the time the demand for information was made. In reviewing Veincent, 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,[xviii] 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

Detroit Newspaper v. NLRB, 598 F.2d 267, 270-271 (D.C. Cir. 1979).

> 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).[xix]

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 2011 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).

(6) 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 outline 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

HAWAII LABOR RELATIONS BOARD ★ STATE OF HAWAII ★

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