> will affect bargainable topics, the UHPA may initiate bargaining at any time upon such topics. Thus, the BOR's duty to bargain with the UHPA is triggered by the UHPA's demand.

Id. at 159-63, 900 P.2d at 166-70. (Emphasis added) If, as the HSTA asserts, Tomasu applies and the impact of BP 4211 is a mandatory subject of bargaining based on the principle that work rules with disciplinary consequences cannot be unilaterally implemented, the DOE cannot unilaterally implement policies that affect bargainable subjects, and the HSTA should be able to demand bargaining midterm on topics subject to mandatory bargaining. Accordingly, based on the Tomasu and principles set forth in Hawaii Fire Fighters Ass'n, Local 1463, AFL-CIO v. Ariyoshi, Board Case No. CE-11-100, Decision No. 242, 4 HLRB 164, 194-203 (1987) (HFFA), discussed more fully below, the duty to bargain applied upon issuance of BP 4211 if the topics covered in the statement over which the DOE is afforded discretion by the federal civil rights laws[xxv] sought to be complied with are subject to mandatory bargaining. The promulgation of BP 4211 and the notice by DOE by the November 7, 2007 letter that BP 4211 was being submitted for consult and confer and that a "timely response will be greatly appreciated by December 10, 2007" provided the required notice that the DOE considered this issue a matter of consultation, rather than negotiation. Further, as stated above, there is no dispute based on Kehe's statement to Kurashima and Camacho's February 15, 2008 email to Kehe, that HSTA was put on notice not only of the proposed policy but that the proposed policy was being submitted for approval at the February 2008 BOE meeting. In addition, based on the communications between Camacho and Ikei in February 2008, the differences between the parties on the issues of teacher treatment and protection under BP 4211 were already apparent to both parties. Hence, there is no merit to HSTA's position that the date of accrual did not arise until April 14, 2008 and that HSTA was not aware of DOE's position that the adoption and implementation of BP 4211 was not a subject for negotiation until May 21, 2008. Under the Tomasu reasoning, the date of accrual when HSTA became apprised of the DOE actions regarding the compliance with the federal civil rights laws arose upon receipt of the November 7, 2007 letter. At this point, HSTA should have, but did not request bargaining. While HSTA may argue that its knowledge of the DOE's position that the BP 4211 was not negotiable does not constitute notice of DOE's position that SP 0211 and the IP were also non-negotiable, there also is no merit to this position. As more fully discussed below, the record in this case unequivocally establishes based on the practice between the parties with respect to prior policies, standard practices or regulations, and implementation plans and CBA Article XXI providing that standard practices were subject to consult and confer, that the policies and standard practices were to consult and confer and the IP was not subject to either consult and confer or bargaining. Accordingly, based on the established practice and CBA Article XXI, there is not support for HSTA's position that it was not aware that the DOE would take the position that SP 0211 and the IP were not bargainable. This Board Member holds that the Complaint is untimely regarding the refusal to bargain claims because all of the above-stated occurrences pre-dated February 28, 2008 when the 90-day limitations period began to run or in the case of the request for bargaining on SP 0211 post-dated the filing of the Complaint.

This conclusion is consistent with the National Labor Relations Board's approach (NLRB) in breach of bargaining duty cases brought under the National Labor Relations Act (NLRA). [xxvi] In those cases, while applying the rules that waivers must be strictly construed and that to find a waiver a union must unmistakably waive rights to bargain, the NLRB has also held that upon receipt of adequate notice, the burden shifts to the union to pursue the matter if it wishes to do so. A failure to do so will constitute a lack of prosecution and due diligence, resulting in a finding that the respondent has not engaged in conduct constituting a refusal to bargain under Section 8(a)(5). Midcenter, Mid-South Hospital v. Hotel & Restaurant Employees and Bartenders Internat'l Union, Local 847, 221 N.L.R.B. 670, 678-79 (1975) (*citing* American Buslines, Inc., 164 NLRB 1055 (1967)) (Midcenter). Accordingly, in American Buslines, Inc. v. Automotive Chauffeurs, Parts & Garage Employees, Local Union No. 926, 164 N.L.R.B. 1055, *1055-56 (1967) (American Buslines), the NLRB dismissed unfair labor practice complaints in an analogous situation to the present case where the union's immediate reaction was merely to protest the proposal in a letter by characterizing it as an invasion of its statutory rights and final course of action was to file an unfair labor practice charge. In so ruling, the N.L.R.B. stated:

> Nevertheless, we find that the record compels dismissal of the complaint. When the Union was first apprised of Respondent's plan to promote all of the porters to utility-baggagemen with the concommitant [sic] disappearance of the Union's bargaining unit, it became incumbent upon the Union to enforce its bargaining rights diligently by attempting to persuade the Respondent to alter its decision if it found the decision unacceptable. In this context, we note that the Respondent in its notifying letter invited the Union to communicate with Respondent "if there is any phase of this situation which you desire to discuss." However, the Union's immediate reaction was merely to protest the proposal in a letter by characterizing it as an invasion of its statutory rights. Its next and final course of action was to file an unfair labor practice charge. In N.L.R.B. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 297, the Supreme Court, in discussing the duty of labor organizations to initiate collective bargaining, held "that the statute does not compel him [the Employer] to seek out his employees or request their participation in negotiations for purposes of collective bargaining...To put the employer in default here the employees must at least have signified to respondent their desire to negotiate." Although this statement was made in a different context, we think it applicable to the facts in this case. Here, Respondent gave the Union 1 week's advance notice of its plan to promote the porters and invited discussion of "any phase of this situation." Nevertheless, the Union failed to prosecute its right to engage in such discussion but contented itself by protesting the contemplated promotions in its letter dated February 10 and by subsequently filing a refusal-to-bargain charge.

> Accordingly, because of the Union's lack of diligence in enforcing its representational rights and the absence of any persuasive evidence that Respondent's conduct was discriminatorily motivated; and, because the contract clearly contemplates transfer and promotion of porters to the utility-baggageman classification without consulation [sic] with the Union, we find that the respondent has not engaged in conduct violative of Section 8(a)(5), and, therefore, we shall dismiss the complaint.

Further, the NLRB has held that "[w]hen an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining." Kentron of Hawaii Ltd. v. District Lodge 37, Local Lodge 1786, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, 214 N.L.R.B. 834, 835 (1974); Midcenter, 221 N.L.R.B. at 678-79. A union which receives timely notice must take advantage of that notice if it is to preserve its bargaining rights. Clarkwood Corp v. Local 25B and Local 43B, Graphic Arts Internat'l. Union, 233 N.L.R.B. 1172, 1172 (1977) (*citing* American Buslines, Inc., 164 N.L.R.B. 1055, 1056 (1967)).

In this case, similar to American Buslines, the issue is whether after Camacho's inaction in failing to seek bargaining on BP 4211 upon clear and unequivocal notice from the DOE of BP 4211, the Union can charge the Employer with a refusal to bargain. Based on the record, there is no question that the DOE unequivocally and clearly notified HSTA of the proposed changes of BP 4211 over three months before the February 21, 2008 BOE meeting and provided a response deadline of December 10, 2007. The record further shows that DOE made numerous attempts not only to inform the Union of the upcoming submission of the policy for approval at the February 2008 BOE meeting but to meet and consult with the HSTA prior to that meeting. Rather than engaging in consult and confer or requesting bargaining, upon receipt a copy of the letter, Camacho put the letter in a pile of standard practices to be reviewed and canceled two meetings set up by the DOE despite the notice of the upcoming policy approval at the February 2008 BOE meeting. In fact, Camacho failed to respond to the consult and confer until his February 15, 2008 email to Kehe merely expressing that "the HSTA has reservations on this policy" and his February 20, 2008 letter to Ikei, which more specifically expressed the reservations but never requested bargaining. Finally, even after adoption of BP 4211, the Union waited until May 12, 2008, over six months after the DOE consult and confer request and almost three months after adoption of BP 4211 to request bargaining. Consequently, this Board Member believes that the Board has appropriate grounds to dismiss the allegation in the Complaint regarding the failure to bargain over BP 4211 for this reason as well.

For the reasons set forth above, this Board Member concludes that the limitations period for the allegations regarding the failure to bargain over BP 4211 began to run as of November 9, 2007 when HSTA received the November 7, 2007 letter. As the 90-day period from November 9, 2007 ran as of February 7, 2008, the filing of the Complaint in this case on May 27, 2008 is untimely with respect to the allegations regarding the failure to bargain over BP 4211, SP 0211,

and the IP. Accordingly, these allegations are dismissed. However, this Board Member further holds that because the 90-day statute of limitations period ran from February 28, 2008 up to May 27, 2008, the date of the filing of the Complaint, the allegations regarding the failure to provide relevant information were timely filed and remain.

C. Alternatively, Assuming The Allegations for Failure to Bargain Over BP 4211, SP 0211, and the IP Were Timely Filed or Requested, The Allegations Must Nevertheless Be Dismissed Because BP 4211 Constitutes Compliance with Federal Law, and BP 4211, SP 0211, and the IP 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, this Board Member notes that based on the Complaint and the positions of the parties in this case, the issue upon which these prohibited practice allegations rest is not whether the Respondents had to and complied with a duty to consult. Rather, the issues in this particular case are whether BP 4211, SP 0211, and the IP involve mandatory subjects of bargaining imposing a duty to bargain on Respondents; and if so, whether the Respondents fulfilled that duty. This Board Member holds that there was no duty to bargain for the following reasons.

1. DOE Had No Duty to Negotiate Regarding Promulgation 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 merely to comply with federal statutes is not a negotiable issue. In HFFA, the union brought a prohibited practice complaint alleging violations of HRS § 89-13(a)(5) and (8), raising the issue of whether the state and county public employers were required to negotiate regarding the implementation of the wage statutes of the Fair Labor Standards Act. Relying on federal case law interpreting the NLRA, the Board noted that:

> Cases make clear that compliance with Federal statutes as such is not a negotiable issue, but that 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.

Id. at 194. Based on federal precedent, the Board recognized that the FLSA does not merely override but needs to be harmonized with the collective bargaining agreement. *Id.* at 195. Hence, the duty to bargain is waived regarding the changes essential to or mandated by federal provisions, but the duty to bargain applies where there are alternative means of compliance. *Id.* at 197. The Board reasoned that discretion, choice, and latitude for departure is the significant factor in determining whether the changes invoke a duty to duty to bargain:

> The conclusion is arrived at after formulating the rule, based on federal cases, that the duty to bargain does not apply only in regard to changes in wages, hours, and working conditions which are essential for federal compliance, where no discretion, choice, or latitude for departure is allowed for the employer. Where such discretion, choice, or latitude is reasonably apparent, the duty to bargain over issues of wages, hours, and working conditions affected in the process of implementation of federal mandates applies.

Id. at 198. Based on the foregoing principles, the Board concluded that the employers violated HRS § 89-13(a)(5) and (8) by their refusal to negotiate the full range, apart from the choice of work period, of the FLSA implementation. In so concluding, the Board found that these violations "willful" [sic] within HRS § 89-13(a) as resulting from a deliberate policy and as a natural consequence of the respondents' actions in unilateral implementation of the FLSA. *Id.* at 207-08 (*citing* In re UPW and Tony T. Kunimura, 3 HPERB 507, 514 (1984)).

However, subsequent to HFFA, in the UHPA case, the union (UHPA) filed a prohibited practice complaint against the BOR for allegedly attempting to unilaterally promulgate and implement UH Executive Policy E11.201 (EP policy), regarding illegal drug and substance abuse with some similarities to this case. In UHPA, there was a provision at issue stating that, "Within thirty days after receiving notice from an employee of a conviction under subparagraph D. above, the University shall (a) take appropriate personnel action against such employee up to and including termination...." However, the provision in UHPA was set forth in the policy not in an IP like in this case. Similar to the HSTA in this case, UHPA took the position that the BOR's refusal to bargain over the details of the implementation, specifically over questions of applicable discipline and the timing and manner of notification of the employer were, among other things, subject to negotiation. The BOR, on the other hand, like the Respondents in this case, took the position that discipline for convictions was subject to the grievance procedure. Also similar to this case, there was no dispute that UHPA was sent the draft of the University policy promulgating procedures mandated by federal law (Federal Drug Free Workplace Act (DFWA)) for consultation

and comment. Both parties relied on the HFFA decision in support of their arguments. Framing the fundamental inquiry in the controversy as to whether the EP policy merely complied with the express mandates of the DFWA or whether the policy addressed discretionary matters which, under HFFA would be subject to negotiations, the Board upon examination of the EP policy, reasoned and determined as follows:

> Such an examination of the adoption by the Executive Policy E11.201 of the requirements of the DFWA shows that the Executive Policy in essence merely adopts the requirements of the DFWA in a manner which indicates that the BOR is in fact merely complying with the dictates of the DFWA rather than adding discretionary terms of implementation to the policy such as would require negotiations.
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> UHPA argues that such details as the range of discipline which can be applied, and when; the manner of notification of the employer; the types and costs and timing of rehabilitation which can be required; and the integration of compliance procedures with the rest of the contract—subjects mentioned in the Executive Policy—should be open to negotiation. While such topics do require that the Employer herein institute various apparatus to administer related procedures, the mere promulgation of policies providing for procedures mandated by federal law does not require negotiation. The range of implementation is built into the federal statute itself. The promulgation in the Executive Policy of the mandate which itself contains the range of choices does not give rise to the duty to negotiate.
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> However, the Board recognizes that as the apparatus making the DFWA functional at the University is established, the various provisions for implementation, including those over which negotiations are now sought by UHPA, will be subject to consultation or negotiation, as the case may be, in particular instances. The Board further recognizes that, as both parties agree, the grievance procedure is available to pursue issues of discipline.
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> Because the Board holds that promulgation of Executive Policy E11.201 merely complies with the DFWA and does not give rise to the duty to negotiate, the Board need not address the issue of whether Section 89-20, HRS, comes into operation.

> The Board concludes that promulgation of Executive Policy E11.201 amounts to implementation of essential terms of the DFWA. Because this promulgation does not exceed the mandates of the DFWA, the Board concludes that the BOR's refusal to bargain over implementation for the essential terms of the DFWA is not a prohibited practice contravening Subsection 89-13(a)(5), HRS.
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> The Board reiterates, however, that actual implementation of the apparatus required for the execution of the mandates of the DFWA, as opposed to the mere publishing or promulgation of those mandates in policy statements, may give rise to the duty to bargain.

4 HLRB at 710-12. (Emphasis added) As stated above, on appeal from the UHPA decision, the Court in Tomasu discussed above affirmed the Board's conclusion that the initial promulgation of a policy that merely complies with federal law is not negotiable. 79 Hawaii at 158, 900 P.2d at 165.

While BP 4211 on its face does not contain the specificity of the UHPA EP policy nor the reference to the federal laws sought to be complied with, the November 7, 2007 letter clearly stated that, "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 HSTA does not dispute that BP 4211 was to comply with these federal civil rights laws or that the promulgation exceeds the mandates of these laws. Accordingly, this Board Member concludes based on that Respondents had no duty to negotiate regarding the promulgation of BP 4211 and committed no prohibited practices on this basis.

Nevertheless, an analysis of the negotiability issue does not end here. On appeal from the Board UHPA decision, the Court upheld the Board's conclusion that compliance with federal statutes is not a negotiable issue. However, the Court made a significant distinction between the negotiation over a policy's compliance with federal law and a policy's implementation of a federal law, stating:

> 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.**

Id. at 194 (underscoring in original) (bold emphasis added). Under *Hawaii Fire Fighters*, "the duty to bargain does *not* apply only in regard to changes in wages, hours, and working conditions which are essential for federal compliance, where no discretion, choice, or latitude for departure is allowed for the employer." However, "where such discretion, choice, or latitude is reasonably apparent, the duty to bargain over such issues of wages, hours, and working conditions affected in the process of implementation of federal mandates applies." *Id.*; *see also In the Matter of the State of Hawai'i Organization of Police Officers (SHOPO) and Maui Police Department, County of Maui*, Decision No. 333, 5 HLRB 146, 150 (1993) (all matters affecting wages, hours, and working conditions are negotiable and bargainable, subject only to the limitations in HRS § 89-9(d).) The HLRB in *Hawaii Fire Fighters* therefore concluded that "the compliance process must include an examination of the possibility for discretionary action. Once this is determined, . . . the duty to bargain is waived in regard to changes *essential to* or *mandated* by federal provisions, but . . . the duty to bargain applies where there are alternative means of compliance." *Id.* at 197 (emphasis in original)

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UHPA argues that such details as the range of discipline which can be applied, and when, the manner of notification of the employer; the types and costs and timing of rehabilitation which can be required; and the integration of compliance procedures with the rest of the contract – subjects mentioned in the Executive Policy – should be open to negotiation. While such topics do require that the Employer herein institute various appartus[es] to administer related procedures mandated by federal law does not require negotiation. *The range of implementation is built into the federal statute itself.* The

> promulgation in the Executive Policy of the mandate which itself contains the range of choices does not give rise to the duty to negotiate.
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> However, the Board recognizes that as the apparatus making the DFWA functional at the University is established, the various provisions for implementation, including those over which negotiations are now sought by UHPA, will be subject to consultation or negotiation, as the case may be, in particular instances.

Id. at 158-59, 900 P.2d at 165-55 (Citations omitted) (Emphasis added)

HSTA does not appear to dispute that the promulgation of BP 4211 is not bargainable. The Board further notes, however, that the record is insufficient to determine whether the employer has discretion in this case under federal law in the implementation of the laws in this case because neither party submitted the federal laws at issue. However, even assuming that Respondents have the requisite discretion, the Board is still compelled to reject HSTA's position that the implementation of BP 4211, including the disciplinary aspects, 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 noted, HSTA's basic contention is that the procedures and criteria regarding disciplinary consequences for violations of BP 4211, SP 0211, and the IP have a material and significant impact on 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) the Tomasu decision set forth above; 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)[xxvii] and Hawaii Nurses Ass'n. v. Ariyoshi, Board Case No. CE-09-41, Decision No. 104, 2 HPERB 218 (1979) (HNA),[xxviii] 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) 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 . A review of Hawaii decisions subsequent to Tomasu and the legislative history of HRS § 89-9(d) show that there is no merit to this position for several reasons.

HSTA asserts based on the HGEA and HNA decisions that the test to determine if a matter is subject to negotiations prior to implementation is whether the subject matter has a material and significant effect or impact on terms and conditions of employment. While HRS § 89-9(a) and the "significant and material relationship to conditions of employment" test may be relevant in determining negotiability, this Board Member finds that a determination of the scope of bargaining requires further analysis. First, the Court in Tomasu 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):

> *HRS § 89-9* sets out the scope of topics subject to mandatory bargaining. However, *section 89-9* contains two subsections that, if read disjunctively, would either grant unlimited discretion to the managerial functions of the employer, *see HRS § 89-9(d)*, or would allow management and employees to submit all aspects of work to the bargaining table. *See HRS 89-9(a).*
> ***
> *Section 89-9(a), (c), and (d)* must be considered in relationship to each other in determining the scope of bargaining. For if Section 89-9(a) were considered disjunctively, on the one hand, all matters affecting the terms and conditions of employment would be referred to the bargaining table, regardless of employer rights. On the other hand, Section 89-9(d) viewed in isolation, would preclude nearly every matter affecting terms and conditions of employment from the scope of bargaining. Surely, neither interpretation was intended by the Legislature.
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> Bearing in mind that the Legislature intended Chapter 89 to be a positive piece of legislation establishing guidelines for joint-decision making over matters of wages, hours and working conditions, we are of the opinion that all matters affecting wages, hours and working conditions are negotiable and bargainable subject only to the limitations set forth in Section 89-9(d).

Id. at 160-61, 900 P.2d at 167-68. (Citations and footnotes omitted) (Emphasis added)

Second, subsequent to the Tomasu, BOR, and Yamashiro decisions, the Court's decision in United Pub. Workers, Local 646 v. Hanneman, 106 Hawaii 359, 364-65, 105 P.3d 236, 241-42 (2005) (Hanneman) and amendments made to HRS § 89-9(d) altered the analysis and determination of this specific issue regarding the scope of topics subject to mandatory bargaining. Hanneman emphasized and clarified that even those subjects determined to be negotiable under Tomasu by meeting the "significant and material relationship to conditions of employment" test, such as disciplinary consequences are subject to, not balanced against management rights.

Moreover, the 2007 amendments to HRS § 89-9 amendments statutorily rendered procedures and criteria on disciplinary actions to be permissive not mandatory subjects of bargaining.

In the Board decision below in Hanneman,[xxix] United Public Workers, AFSCME, Local 646, AFL-CIO v. Harris, Board Case No. CE-01-465, Decision No. 433, 6 HLRB 250 (2002), the union filed a prohibited practice complaint against the City and County of Honolulu respondents for alleged violations arising out of route selection and transfers from a master pool in the Oahu refuse division. Responding to the City's argument that the proposed transfer constituted an exercise of its statutorily protected management rights contained in HRS § 89-9(d), the UPW argued that the Court in Tomasu gave its "seal of approval to the balancing test as applied by the labor board." The Board agreed and applied the balancing test in determining that the proposed transfers and consequent disruption of seniority at both baseyards were likely to have a substantial impact on the terms and conditions of employment of employees subject to the "uku pau" agreement. Further, the Board noted that the City did not demonstrate that the exercise of the right is "fundamental to the existence, direction and operation of the enterprise," and that the proposed transfers were either necessary or sufficient to address any workload imbalance between the baseyards. Therefore, the Board concluded that the proposed transfers and consequent disruption of seniority at both baseyards were likely to have a deleterious effect upon the exercise of bargained for rights. *Id.* at 260. On appeal, the City argued that the proposed transfer was excluded from collective bargaining as a management right under the plain language of HRS § 89-9(d). In reversing the circuit court's decision that affirmed the Board's decision, the Court clarified that under Tomasu ruling, the appropriate analysis for determining negotiability is not the "balancing" test but rather a "subject to" test, stating:

> In the instant case, the HLRB interpreted our holding in *Tomasu* to entitle it to conduct a balancing test in order to determine whether collective bargaining was required for the City's transfer proposal. The HLRB weighed the effects of the transfer proposal on the "working conditions" of the refuse collectors under HRS § 89-9(a) against the interests of the City in preserving its management rights under HRS § 89-9(d). As previously indicated, the HLRB ruled that, inasmuch as (1) the City's proposed transfer was likely to have a substantial impact on the terms and conditions of employment for refuse collectors in the Honolulu baseyard (i.e., no transfers were made in 25 years), the City's proposal was subject to collective bargaining under HRS § 89-9(a). We disagree.
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> The plain language of HRS § 89-9(d) is clear and unambiguous that "the employer and the exclusive representative shall not agree to any proposal...which would interfere with the rights and obligations of a public employer to...hire, promote, *transfer*, assign, and retain employees in positions." (Emphasis added) As such, the HLRB's

> interpretation of HRS § 89-9 is not entitled to judicial deference. Moreover, with respect to the balancing test employed by the HLRB, HRS § 89-9 does not expressly state or imply that any employer's right to transfer employees is subject to a balancing of interests. Contrary to the HLRB's interpretation, our holding in *Tomasu* does not approve of the HLRB's balancing test. Rather, we believe *Tomasu* stands for the proposition that, in reading HRS §§ 89-9(a), (c), and (d) together, parties are permitted and encouraged to negotiate all matters affecting wages, hours and conditions of employment as long as the negotiations do not infringe upon an employer's management rights under section 89-9(d). In other words, the right to negotiate wages, hours and conditions of employment is subject to, not balanced against, management rights. Accordingly, in light of the plain language of HRS § 89-9(d), we hold that the HLRB erred in concluding that the City's proposed transfer was subject to collective bargaining under HRS § 89-9(a).

United Pub. Workers, Local 646 v. Hanneman, 106 Hawaii 359, 364-65, 105 P.3d 236, 241-42 (2005) (Hanneman). (Emphasis added)

Subsequent to Hanneman, Section 89-9(d) was amended by the Hawaii State Legislature. The current HRS § 89-9(d), as amended in 2007, states in relevant part:

> (d) Excluded from the subjects of negotiations are matters of classification, reclassification, benefits of but not contributions to the Hawaii employer-union health benefits trust fund, recruitment, examination, initial pricing, and retirement benefits except as provided in section 88-8(h). The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with the merit principle or the principle of equal pay for equal work pursuant to section 76-1 or which would interfere with the rights and obligations of a public employer to:
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> (4) Suspend, demote, discharge, or take other disciplinary action against employees for proper cause;
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> This subsection shall not be used to invalidate provisions of collective bargaining agreements in effect on and after June 30, 2007, and shall not preclude negotiations over the procedures and criteria on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions as a permissive subject of bargaining during collective bargaining negotiations or negotiations over a memorandum of agreement, memorandum of understanding, or other supplemental agreement.
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> Violations of the procedures and criteria so negotiated may be subject to the grievance procedure in the collective bargaining agreement.

(Emphasis added) The 2007 amendments to HRS § 89-9(d) were enacted as 2007 Haw. Sess. Laws Act 58 § 1, at 100-01.

In State of Hawaii Organization of Police Officers (SHOPO) v. County of Kauai, 134 Hawaii 155, 164, 338 P.3d 1170, 1179 (2014) (County of Kauai), the Court further explained the legislative intent regarding this 2007 amendment to HRS § 89-9(d) and its relationship to the Hanneman decision based on the legislative history of Act 58 as follows:

> The legislature's 2007 amendments to *HRS § 89-9(d)* were made in light of *United Public Workers, AFSCME, Local 646, AFL-CIO v. Hanneman, 106 Hawai'i 359, 105 P.3d 236 (2005)*, wherein the Hawai'i Supreme 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. See 2007 Haw. Sess. Laws Act 58, § 1, at 100-01. Under Hanneman, the scope of topics subject to negotiation cannot "infringe upon an employer's management rights under *[HRS § 89-9(d)]*." *Hanneman, 106 Hawai'i at 365, 105 P.3d at 242*. 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, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions[.]" See S. Stand. Comm. Rep. No. 889, in 2007 Senate Journal, at 1438 ("[t][he purpose of this measure is to amend *[HRS § 89-9(d)]* by clarifying that certain statutory actions shall not be used to invalidate collective bargaining agreements in effect on

and after June 30, 2007, and such actions may be included in collective bargaining agreements."). The Senate Committee stated:

> In interpreting the Hanneman case, one cannot disregard the [collectively bargained Memoranda of Agreements (**MOA**)] that determined the transfer of these employees. Therefore, the transfer was found to be in concert with these MOAs. The MOAs were allowed under *[HRS § 89-9(d)]*, and therefore, either party had the right to exercise their rights under these MOAs. Your Committee believes that the Hawaii [Hawai'i] Supreme Court was upholding the management rights as derived from the MOAs. However, some have viewed the Hanneman case allowing management rights generally whether or not MOAs are involved.

S. Stand. Comm. Rep. No. 889, in 2007 Senate Journal, at 1438. This legislative report discloses an intent to address an interpretation of *HRS § 89-9(d)* under Hanneman that would allow management rights irrespective of their existence under an agreement. Under this interpretation of Hanneman, promotions fell within the scope of management rights under *HRS §89-9(d)* and would therefore lie outside of the scope of the CBA and the arbitrator's authority to act under it. *Hanneman, 106 Hawai'i at 365, 105 P.3d at 242*. The House Committee on Labor & Public Employment found that 1988 amendments to *HRS § 89-9(d)*"expand[ed] the scope of collective bargaining in the public sector . . . [and] was intended to protect contract provisions that would otherwise be considered invalid due to a literal interpretation of what are considered to be management rights." H. Stand. Comm. Rep. No. 1465, in 2007 House Journal, at 1595. The House Committee understood proposed amendments in 2007 were meant to "clarify the rights of public employees to engage in collective bargaining under [HRS Chapter 89], in light of recent court decisions, [Hoopai and Hanneman]." H. Stand. Comm. Rep. No. 1465, in 2007 House Journal, at 1595.

As noted in the County of Kauai decision, there is no question that the 2007 amendments to HRS § 89-9(d) were intended to address the impact of the Hanneman decision's rejection of the balancing test on the range of topics subject to collective bargaining by specifically providing that collective bargaining agreements in effect on and after June 30, 2007 were not invalidated and that such actions may be included in collective bargaining agreements. However, as the House Committee on Finance also stated regarding the final version of the measure, Senate Bill No. 1642,

S.D. 1, H.D.1, a purpose of the bill was also "to establish clear distinctions between mandatory, excluded, and permissive subjects of bargaining" and:

> (1) Allows a public employer to negotiate over procedures and criteria on...suspensions, terminations, discharges, or other disciplinary actions; and
>
> (2) Subjects violations of negotiated and agreed upon procedures and criteria to the grievance procedure contained in a collective bargaining agreement.

H. Stand Comm. Rep. No. 1910, in 2007 House Journal, at 1716. (Emphasis added)

Accordingly, regarding the specific topic at issue in this case, the negotiability of procedures and criteria regarding disciplinary actions, HRS § 89-9(d), as amended in 2007, on its face specifically provides that while negotiations are not precluded, procedures and criteria on "suspensions, terminations, discharges, or other disciplinary actions," are deemed a "permissive," not a mandatory subject of bargaining.

While the Board does not appear to have previously addressed the significance of the distinction between mandatory and permissive subjects of bargaining, the federal courts, in interpreting the analogous unfair labor practice provisions of the NLRA have addressed the significance. In Retlaw Broadcasting Co. v. N.L.R.B., 172 F.3d 660 (9th Cir. 1999), the Ninth Circuit stated:

> The parties may bargain collectively on permissive terms, but they are not required to do so. To insist on a permissive subject to the point of impasse - in other words, to hold up an agreement over a permissive term – is an unfair labor practice because it effectively precludes collective bargaining on mandatory terms: "Such conduct is, in substance, a refusal to bargain about subjects that are within the scope of mandatory bargaining." A valid impasse, accordingly, cannot be based on a permissive term. As other courts have observed, framing a subject as mandatory or permissive has significant consequences for the parties' bargaining obligations under the Act: "The distinction between mandatory and permissive subjects of bargaining is crucial in labor disputes, because it determines to what extent one party may compel the other to bargain over a given term...."

Id. at 665-66. (Citations omitted) (Emphasis added); Brockway Motor Trucks, Div. of Mack Trucks, Inc. v. N.L.R.B., 582 F.2d 720, 725-26 (3rd Cir. 1978); Silverman v. Major League Baseball Player Relations. Comm., 880 F.Supp. 246, 253 (D.N.Y. 1995).

Based on the legislative history of Act 58, there is no doubt that the Legislature recognized and addressed in the 2007 amendment to HRS § 89-9(d), the distinctions between mandatory and permissive subjects of bargaining. The plain language of HRS § 89-9(d), as amended in 2007, leaves no question that procedures and criteria on disciplinary actions are a permissive, not a mandatory subject of bargaining. In fact, in its May 12, 2008 letter that requested bargaining, HSTA acknowledged that criteria and procedures relating to "standards of work," "suspensions," "discharge and other disciplinary actions for proper cause" are within the scope of "permissible bargaining." Further, the legislative history of Act 58 set forth above evidences an intent that violations of negotiated and agreed upon procedures and criteria be subject to the grievance procedure contained in a collective bargaining agreement, which supports Respondents' position that disciplinary actions are subject to the CBA grievance procedures, which employs the standard of "proper cause." Based on the reasoning set forth above, Respondents were not required to bargain regarding procedures and criteria on disciplinary actions because such issues are permissive, not mandatory subjects of bargaining under HRS § 89-9(d). As the U.S. Supreme Court has held in NLRA cases that if an implemented change involves a permissive subject of bargaining, there is no statutory violation. 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

This Board Member finds that the record in this case shows undisputed evidence that the established practice between the HSTA and the DOE Respondents was that policies and standard practices were submitted to an established consult and confer procedure but implementation plans were not. In short, there was no evidence that the policies, standard practices, or implementation plans had ever been the subjects of mandatory bargaining.

While the procedures and criteria for disciplinary actions are a permissive subject of bargaining, there is no dispute that there is a duty to effectively consult with HSTA. For example, as more fully addressed below, CBA Article XXI, Section B. requires the employer to consult with HSTA before amending, revising, or deleting any portion of SP 0211 under CBA. However, as

noted by this Board Member from the outset, the failure to consult on BP 4211, SP 0211, and the IP are not issues in this case.

This Board Member further determines that the record in this case shows undisputed evidence that the Respondents' processing of BP 4211, SP 0211, and the IP was consistent with and in accordance with this undisputed practice established for similar subjects. Accordingly, this Board Member 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, this Board Member 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).

D. There Is No Violation of the CBA; and Therefore, No Violation of HRS § 89-13(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],[xxx] V (Section L.) (Grievance Procedure), and IX (Sections A. and D.) (Personnel Information). Contrary to HSTA's position, this Board Member is unable to find violations of these CBA provisions.

First, HSTA asserts that CBA Section 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.

This Board Member 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[xxxi] at issue involved was significantly broader in scope from Article XXI (Maintenance of Benefits) extending not just to regulations and standard practices but also to statutory benefits. Burns, 3 HPERB at 119, 123. Further, in determining the HRS § 89-13(a)(8) violation in Burns, the Board relied on another provision in the collective bargaining agreement pertaining to leave of absences. 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 the rights and privileges held by teachers prior to SP 0211 and the IP under Chapter 41, HAR. Based on a review of HAR Chapter 41 and SP 0211, this Board Member 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, and that 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, this Board Member further finds that there is no merit to HSTA's position that Respondents have unilaterally changed CBA Article V, Section L., which requires proper cause for discipline, by introducing a corroborating standard for violations of BP 4211. Article V, Section 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. Section L., appears in the 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)

This Board Member finds that there is no merit to HSTA's contention that this reference in the IP section to "evidence corroborating an allegation," unilaterally changed the rights and privileges held by teachers prior to SP 0211 and the 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 policy or a standard practice. In addition, this 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) More importantly, SP 0211, which does have legal import as the procedure implementing BP 4211 in "alignment" with the other provisions, including the CBA, more specifically addresses the standard applicable to imposition of discipline for violations of BP 4211. SP 0211 specifically provides for "Violations of Policy," stating 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 things. Accordingly, there is no question that the proper cause standard set forth in CBA Article V, Section L. remains applicable in determining disciplinary actions under SP 0211 implementing BP 4211.

Finally, HSTA alleges that CBA Article IX, Sections A. and D. were unilaterally changed because SP 0211 and the 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, this Board Member notes that HSTA's reliance upon CBA Article IX, Section

D. is in error because there is no such provision. The requirement that a supervisor report any anonymous complaint about a teacher to the teacher is contained in CBA Article X, Section D. and this Board Member will construe the HSTA's argument to rely on this provision.

CBA ARTICLE IX, Section 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, Section D. states:

> D. Any serious complaint or any repeated minor complaint, including anonymous complaints concerning a teacher, shall be reported immediately to the teacher by the supervisor receiving the complaint. The use of complaints and the filing of said complaints shall be covered by Article IX – Personnel Information.
>
> Any teacher against whom a serious complaint has been filed will have the opportunity to meet with the complainant(s). At the teacher's request, the supervisor shall be present at such a meeting. The supervisor shall call the complainant(s) for a meeting at a mutually acceptable time by the teacher, the complainant(s) and the supervisor.

While HSTA asserts that CBA Article IX, Section A. and Article X, Section D. have been unilaterally changed by SP 0211 and IP, HSTA provides no specificity regarding which provisions were altered that provided a teacher with the right to review the material, obtain a copy of the complaint, or the identity of the complainant prior to an investigation and which provisions in SP 0211 and the IP made the change. While the HSTA employs the term "proceeding" with an investigation in its contention, this Board Member 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, Section A. Accordingly, in the absence of a more specific argument by HSTA, this Board Member is unable to conclude that these CBA provisions have been unilaterally 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, Section 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 Article XXI, Section A. does not apply. However, Section B., does appear 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.

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, this Board Member 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, this Board Member 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 the 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 has maintained that Respondents have violated HRS § 89-13(a)(7) by their failure to collectively bargain in violation of HRS §89-13(a)(5) and their unilateral action in altering the terms and conditions of employment without first giving notice to and conferring in good faith with the union. This Board Member 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 the IP. Even if there was such an allegation, the parties do not dispute that at least with respect to BP 4211 and SP 0211 that the Respondents did consult and confer. Second, as stated above, the U.S. Supreme Court has 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 the policy, standard practice, and the implementation plan in this case are permissive, not mandatory subjects of bargaining for the reasons set forth fully above, this Board Member also rejects HSTA's position that Respondents have violated HRS § 89-13(a)(7).

In addition, even if this Board Member was able to find an HRS § 89-13(a)(5) violation, this finding would be insufficient to warrant a finding of HRS § 89-13(a)(7). 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, this Board Member disagrees with HSTA 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 the principle that "[t]he 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,[xxxii] 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.

This Board Member agrees with the general principles urged by Complainant regarding this issue. The Board has previously recognized that there is an obligation on the employer to provide information required by the bargaining representative for the proper performance of its

duties under HRS Chapter 89. In Veincent, Jr. v. Matayoshi, Board Case No. CE-11-54, Decision No. 130, 2 HPERB 494, 502 (1980) (*citing* NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36, 87 S.Ct. 565, 17 L.Ed 495 (1967) and NLRB v. Truitt Mfg. Co., 351 U.S. 149, 76 S.Ct. 753, 100 L.Ed 1027(1956)), 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:[xxxiii]

> 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. If the requested data is relevant and therefore reasonably necessary, to a union's role as a bargaining agent in the administration of a collective bargaining agreement, it is an unfair labor practice for an employer to refuse to furnish the requested data. 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) The Board has held that because the employer's obligation to provide information relevant to the union's role as bargaining agent arises out of the duty to bargain in good faith, the repeated refusals to provide requested information to provide information relevant to a grievance is a willful violation of the duty to bargain in good faith under HRS § 89-13(a)(5). Sanderson, 3 HPERB at 35-36. Regarding the nature of the duty, the Board recognized that the duty to furnish information is a statutory obligation which exists independent of any agreement between the parties. United Pub. Workers, AFSCME, Local 646 v. Lingle, Board Case No. CE-01-410a, Order No. 1894, at *12 (June 28, 2000) (*citing* American Standard, 203 NLRB 1132, 83 LRRM 1245 (1973)). Hence, there is also a statutory obligation for an employer to provide such information pursuant to HRS § 89-13(a)(5).

"The question of relevance focuses on the relevance of the information at the time of the request. That is, both a union's reasons for requesting the information and employer's reasons for refusing disclosure are evaluated by looking at the information known at the time of the demand

and refusal." NLRB v. George Koch Sons, 950 F.2d 1324, 1330 (7th Cir. 1991) (George Koch). Regarding the burden of proving relevance, the Seventh Circuit stated:

> A primary consideration when determining whether an employer has a duty to disclose information is whether the information is relevant to the union's collective-bargaining duties. Certain types of information are "so intrinsic to the core of the employer-employee relationship" that they are presumptively relevant. "Conversely, when the requested information is not ordinarily pertinent to a union's role as bargaining representative, but is alleged to have become pertinent under particular circumstances, the union has the burden of proving relevance before the employer must comply."

Id. at 1331. However, "[a] union's bare assertion that it needs information...does not automatically oblige the employer to supply all the information in the manner requested. The duty to supply information under § 8(a)(5) turns upon the circumstances of the particular case." Detroit Edison Co. v. NLRB, 440 U.S. 301, 314 (1979) (*citing* NLRB v. Truitt Mfg. Co., 351 U.S. at 153).

As discussed fully above, this Board Member holds that BP 4211, SP 0211, and the IP are not mandatory subjects of bargaining. Consequently, the issue regarding this information request is whether Respondents committed a prohibited practice by failing to provide the information requested regarding those non-mandatory subjects of bargaining.

Based on the federal precedent under the NLRA, there is no doubt that Respondents had no obligation to provide such information regarding non-mandatory subjects; and therefore, have not violated HRS § 89-13(a).

In Soc. Serv. Union, Local 535 v. North Bay Dev. Disabilities Serv., Inc., 287 NLRB 1223 (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). [14] 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).

Id. at 1225 (Emphasis added) (Footnotes omitted). On a petition for review from this NLRB ruling, the employer argued, among other things, that even if the amount of such fee is only a permissive subject of bargaining, the employer was entitled to the information requested from the union if it is relevant to "bargaining, to the contract or to the parties' pending arbitration." In denying the petition, 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."

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.).

This approach that the duty to furnish information pertains to mandatory subjects of bargaining has been adopted by other federal appeals courts in reviewing NLRB rulings regarding the obligation to provide information. The U.S. Supreme Court in Ford Motor Co. v. NLRB, 441 U.S. 488, 49 n. 1 (1979) noted that, "It seems agreed that if food prices and service are mandatory bargaining subjects, the order to furnish information should stand. (*citing* Detroit Edison Co. v. NLRB, 440 U.S. 301, 303 (1979)). To similar effect is the First Circuit Court of Appeals' ruling in NLRB v. New England Newspapers, Inc., 856 F.2d 409, 413 (1st Cir. 1988), in which the court noted that "[w]ith respect to mandatory bargaining subjects, an employer has an obligation under Sections 8(a)(1) and (5) of the act, "to provide information that is needed by the bargaining representative for the proper performance of [bargaining representative's] duties." (Emphasis added) (Citations omitted) *See also*: Nat'l Steel Corp. v. NLRB, 324 F.3d 928, 934-35 (7th Cir. 2003) (Court noted that because the installation and use of hidden cameras is a mandatory subject of collective bargaining, it necessarily follows that the information regarding hidden cameras is relevant to the union's discharge of its statutory duties and responsibilities.); Western Mass. Elec. Co. v. NLRB, 573 F.2d 101, 109-10 (1st Cir. 1978).

The Ninth Circuit Court of Appeals analyzed the issue as a dichotomy that has developed between data bearing directly on mandatory bargaining subjects, which are presumptively relevant and must be disclosed unless the employer proves a lack of relevance, and other kinds of information. Press Democrat Pub. Co. v. NLRB, 629 F.2d 1320, 1324 (9th Cir. 1980). The Third Circuit Court of Appeals in Equitable Gas Co. v. NLRB, 637 F.2d 980, 993 (3rd Cir. 1981), expanded the articulation of the rule to more specifically address the dichotomy, "Information directly relevant to mandatory subjects of bargaining is regarded as 'presumptively relevant', and must therefore be disclosed unless it is plainly irrelevant. No obligation to provide information exists however, unless there is an obligation to bargain over the subject matter." (Citations omitted)

Based on the foregoing federal precedent, this Board Member concludes that because the information request made in the May 12, 2008 letter related to BP 4211, SP 0211, and the IP, which are deemed to be non-mandatory subjects of bargaining, Respondents had no obligation to provide the requested information because this Board Member's determination that BP 4211, SP 0211, and the 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).

Accordingly, to summarize based on the foregoing, this Board Member concludes and holds that: 1) the allegations in the Complaint with respect to Respondents' failure to negotiate regarding BP 4211, SP 0211, and the IP are dismissed for lack of jurisdiction based on untimeliness; 2) even if the allegations are timely, 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; 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); and 4) Respondents did not violate HRS § 89-13(a) for their failure to provide the information requested in the May 12, 2008 letter.

DECISION

For the foregoing reasons, this Board Member is of the opinion to dismiss all claims alleged by HSTA against Respondents in Case No. CE-05-667.

HAWAII LABOR RELATIONS BOARD

Sesnita A. D. Moepono

SESNITA A.D. MOEPONO, Member

ENDNOTES

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[i] HRS 91-11 states:

"Examination of evidence by agency. Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or portions thereof as may be cited by the parties."

[ii] See, HRS § 89-2 defining "employer" and "public employer."

[iii] See, HRS § 89-6 regarding "appropriate bargaining units."

[iv] See, HRS § 89-2 defining "exclusive representative.

[v] In response to inquiry regarding whether the appropriate date was December 2008, Kehe stated, "It should be 2007." Tr. at 365.

[vi] See, Endnote ix, *infra*.

[vii] Kitsu testified that IP's are internal communications and are not normally provided to either its employees or BOE. While HSTA took the position that the BP 4211 IP was also being challenged, most, if not all, of HSTA's concerns revolved around the terms of SP 0211.

[viii] There is no evidence showing that DOE (or any of the Respondents) agreed that HSTA could, in fact, reserve its rights.

[ix] This is not a situation where HSTA demanded negotiations and DOE refused to negotiate. In that situation, the 90 day limitations period may very well have started when DOE refused to negotiate. In this case, there was no demand for negotiations over BP 4211 when it was proposed. In fact, HSTA agreed that BP 4211 was subject to the consult and confer requirement. In this circumstance, the 90 day period begins to run from the time that it was clear that DOE was not going negotiate, i.e., November 7, 2007, when DOE advised HSTA that it would conduct a consult and confer.

In addition, under the doctrine of quasi-estoppel "a party is estopped from taking 'a position inconsistent with a previous position if the result is to harm another.' (Cites omitted.)" County of Kaua'i, 135 Hawaii at 467. As discussed above, HSTA should not be allowed to lull the Respondents into a "false sense of security" by seeming to agree that BP 4211 is subject only to a consult and confer, and then at a much later date (after the Respondents had proceeded with the implementation of BP 4211), take the position that the Respondents had a duty to bargain. HSTA is estopped from doing so.

Similarly, the Board holds the Respondents to the same "standard." Ikei, in her February 22, 2008 letter to Camacho, stated that "[n]ormal disciplinary procedures will be followed as outlined in the collective bargaining agreement and other DOE rules, policies and/or procedures." In addition, SP 0211 clearly made BP 4211 and SP 0211 subject to the Existing Rules. Under these circumstances, the Respondents should not be allowed to lull HSTA into a "false sense of security" by stating that BP 4211, SP 0211 and BP4211 IP would be subject to, and in effect, not change the Existing Rules, and then implement BP 4211 in such a manner as to conflict with any Existing Rule. Thus, the Board's holding that BP 4211, SP 0211 and BP4211 IP are subject to the Existing Rules is also supported by the doctrine of quasi-estoppel.

[x] As noted herein, no claims were alleged with respect to SP 0211 and BP 4211 IP because they had not been given to HSTA when the Complaint was filed.

[xi] The Board believes that its holding is fair to both parties. By holding that there are different "start times" for the 90 day limitation, it allows DOE to proceed with adoption of a BP (which may not raise bargainable topics) with assurances that its adoption would not be subject to challenge, while at the same time, allows HSTA to wait until implementation (assuming that it has no issues with the BP) and the drafting of the SP before being required to assert a claim. There is a balance struck which allows both DOE and HSTA to proceed with the assurance that substantive problems and issues can be raised when and if they arise without being concerned illogical deadlines which may have unintended consequences, i.e., preventing meaningful discussion and consideration of BPs and SPs.

[xii] HSTA further relies on the HNA decision for the position that consultation on BP 4211 does not satisfy the duty to negotiate. The Board does not disagree. However, as the Board previously stated, the issue presented by the Complaint is not whether the Respondents had a duty to consult and did, but rather, whether Respondents had a duty to negotiate and did.

[xiii] Both the HGEA and HNA cases cited by HSTA articulated the "significant and material effect on terms and conditions of employment" test for determining whether a subject is a negotiable term and condition of employment. However, both of these Board decisions pre-date the decision in United Pub. Workers, Local 646 v. Hanneman, 106 Hawaii 359, 105 P.3d 236 (2005) discussed more fully below, and the subsequent amendment to HRS § 89-9(d). Accordingly, these decisions are not dispositive of the negotiability issues in this case.

[xiv] With respect to CBA Article XXII [sic]-RELEASE TIME, the Board notes that the reference to this article is likely an error. The Board interprets HSTA's argument to rest on CBA Article XXIII-ENTIRETY CLAUSE.

[xv] Article 35 PRIOR RIGHTS of the Unit 12 collective bargaining agreement involved in Burns stated:

> "Nothing in this Agreement shall be construed as abridging, amending or waiving any rights, benefits or perquisites presently covered by statutes, rules or regulations of each jurisdiction that the employees have enjoyed heretofore except as specifically superseded by the terms of this Agreement.
>
> It is agreed, however, that the aforementioned perquisites are subject to modification or termination by the Employer, as conditions warrant, after prior consultation with the Union. When the Employer takes such action and the employee or the Union believes that the reason or reasons for the change is or are unjust he or it shall have the right to process such grievance through the Grievance Procedure set forth in Article 32, herein. (Emphasis added.)"

In Burns, the Board held that the City and County of Honolulu violated the sick leave provisions of HRS § 79-8 and Rule 3 of the Director of Civil Service, thereby violating the Unit 12 collective bargaining agreement leave of absence provision and HRS § 89-13(a)(8). In so ruling, the Board found that the prior rights clause of the contract insures that, as nothing in the contract supersedes the right to such leave benefits, these statutory benefits were fully owed to the Complainant. Burns, 3 HPERB at 123.

[xvi] Although Respondents assert in their closing brief that Camacho acknowledged that HSTA consulted and conferred with DOE over both BP 4211 and SP 0211, a close reading of Camacho's testimony indicates that Camacho may have been focusing on BP 4211 or acknowledging that the Respondents requested a consult and confer on both BP 4211 and SP 0211. It is undisputed that DOE did not send HSTA a copy of SP 0211 until June 12, 2008 (after the filing of the Complaint). There was no evidence that a draft of SP 0211 was provided to HSTA or that it was discussed prior to June 12, 2008. Thus, the Board concludes there was no consult and confer over SP 0211, and that Respondents were mistaken in their assertion to the contrary. The Board does, however, remind all parties of the effect of signing a pleading submitted to the Board pursuant to HAR Section 12-42-8(a)(5)

[xvii] The record further shows that HSTA made additional requests for information in a July 1, 2008 letter to Lee in a request for bargaining regarding SP 0211. However, the Complaint in this case was filed on May 27, 2008. Hence, this request is not within the failure to provide information allegations of the Complaint.

[xviii] The Board has held NLRB decisions and interpretations of the NLRA ought to be persuasive when sections of Hawaii's law are similar to the NLRA and when the Legislature has not spoken on the subject. United Pub. Workers, Local 646 v. Hawaii Gov't Emp. Ass'n, Local 152, Board Case No. R-10-6, Decision No. 9, 1 HPERB 71, 79 (1972). More importantly, the Hawaii Supreme Court has used federal precedent to guide its interpretation of state public employment law. Poe v. Hawaii Lab. Rels. Bd., 105 Hawaii 97, 101, 94 P.3d 652, 656 (2004).

[xix] Since all claims related to BP 4211 were ruled untimely, claims based on any information requests regarding BP 4211 were also untimely.

[xx] HRS § 89-2 provides in relevant part:

> "Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. ... (Emphasis added)

[xxi] HRS § 89-6 states in relevant part:

> **HRS § 89-6 Appropriate bargaining units.** (a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:
>
> ***
>
> (5) Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent[.]

[xxii] HRS § 89-2 provides in relevant part:

> "Exclusive representative" means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

[xxiii] In response to inquiry regarding whether the appropriate date was December 2008, Kehe stated, "It should be 2007." Tr. at 365.

[xxiv] BP 2050 provides:

> IMPLEMENTATION OF BOARD OF EDUCATION POLICY
>
> POLICY
>
> The Board of Education (Board) recognizes that effective implementation of Board policy rests in large part on a sound implementation plan.
>
> 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.
>
> In developing the implementation plan, the Department must consider, including but not limited to, the following:
>
> Measures of effectiveness of the policy objective(s);
>
> Timeframes for implementation of the proposed Board policy or proposed amendments to the existing Board policy;
>
> Proposed guidelines;
>
> A communication plan;
>
> A training plan;

A resource support plan;

A monitoring and reporting plan; and

A program review plan.

The Department shall have guidelines in place prior to schools implementing Board policies.

Any exceptions to Board Policy 2050 shall be approved by the Board.

[xxv] The November 7, 2007 letter transmitting BP 4211 states that, "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."

[xxvi] The Board has held that National Labor Relations Board (NLRB) decisions and interpretations of the National Labor Relations Act (NLRA) ought to be persuasive when sections of our law are similar to the National Labor Relations Act and when our Legislature has not spoken on the subject. United Pub. Workers, Local 646 v. Hawaii Gov't Emp. Ass'n, Local 152, Board Case No. R-10-6, Decision No. 9, 1 HPERB 71, 79 (1972). More importantly, the Hawaii Supreme Court has used federal precedent to guide its interpretation of state public employment law. Poe v. Hawaii Lab. Rels. Bd., 105 Hawaii 97, 101, 94 P.3d 652, 656 (2004) (*citing* Hokama v. Univ. of Hawaii, 92 Hawaii 268, 272 n. 5, 990 P.2d 1150, 1154 n. 5 (1999).

[xxvii] HSTA further relies on the HNA decision for the position that consultation on BP 4211 does not satisfy the duty to negotiate. The Board does not disagree. However, as the Board previously stated, the issue presented by the Complaint is not whether the Respondents had a duty to consult and did, but rather, whether Respondents had a duty to negotiate and did.

[xxviii] Both the HGEA and HNA cases cited by HSTA articulated the "significant and material effect on terms and conditions of employment" test for determining whether a subject is a negotiable term and condition of employment. However, both of these Board decisions pre-date the decision in United Pub. Workers, Local 646 v. Hanneman, 106 Hawaii 359, 105 P.3d 236 (2005) discussed more fully below, and the subsequent amendment to HRS § 89-9(d). Accordingly, these decisions are not dispositive of the negotiability issues in this case.

[xxix] As noted in the Hanneman decision, pursuant to Hawaii Rules of Appellate Procedure Rule 43(c) (2004), Mufi Hanneman and Kenneth Nakamatsu were substituted as parties to the appeal. Hanneman, 106 Hawaii at 360 n.1, 105 P.3d at 237 n. 1.

[xxx] With respect to CBA Article XXII [sic]-RELEASE TIME, the Board notes that the reference to this article is likely an error. The Board interprets HSTA's argument to rest on CBA Article XXIII-ENTIRETY CLAUSE, which provides in relevant part:

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

HSTA's reference to this provision appears to be in support of its position that no modifications of the CBA without mutual consent.

[xxxi] Article 35 PRIOR RIGHTS of the Unit 12 collective bargaining agreement involved in Burns stated:

> Nothing in this Agreement shall be construed as abridging, amending or waiving any rights, benefits or perquisites presently covered by statutes, rules or regulations of each jurisdiction that the employees have enjoyed heretofore except as specifically superseded by the terms of this Agreement.
>
> It is agreed, however, that the aforementioned perquisites are subject to modification or termination by the Employer, as conditions warrant, after prior consultation with the Union. When the Employer takes such action and the employee or the Union believes that the reason or reasons for the change is or are unjust he or it shall have the right to process such grievance through the Grievance Procedure set forth in Article 32, herein.

(Emphasis added) In Burns, the Board held that the City and County of Honolulu violated the sick leave provisions of HRS § 79-8 and Rule 3 of the Director of Civil Service, thereby violating the Unit 12 collective bargaining agreement leave of absence provision and HRS § 89-13(a)(8). In so ruling, the Board found that the prior rights clause of the contract insures that, as nothing in the contract supersedes the right to such leave benefits, these statutory benefits were fully owed to the Complainant. Burns, 3 HPERB at 123.

[xxxii] The record further shows that HSTA made additional requests for information in a July 1, 2008 letter to Lee in a request for bargaining regarding SP 0211. However, the Complaint in this case was filed on May 27, 2008. Hence, this request is not within the failure to provide information allegations of the Complaint.

[xxxiii] *See* note vii, *supra*.