STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of THE EDUCATIONAL LABORATORY: A HAWAII NEW CENTURY PUBLIC CHARTER SCHOOL ("ULS") LOCAL SCHOOL BOARD ("LSB"), Complainant, and HAWAII STATE TEACHERS ASSOCIATION, Respondent.	CASE NO. CU-05-305 DECISION NO. 479 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

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

Any conclusion of law that is designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact that is designated as a conclusion of law shall be deemed or construed as a finding of fact.

Any proposed finding of fact submitted by a party not already ruled upon by the Board by adoption herein, or rejected by clearly contrary findings of fact herein, is hereby denied and rejected. [i]

I. PROCEDURAL BACKGROUND

The Findings of Fact and Conclusions of Law regarding various pleadings, motions, and other filings that were filed in this case through October 4, 2013, are provided in more detail in the Board's Order No. 2948: Order Denying Respondent's Motion to Dismiss Complaint; Granting Complainant Local School Board's Motion to Stay Grievance/Arbitration Proceedings in HSTA Grievance #OC-11-23; Denying HSTA's Request to Schedule Hearing on Prohibited Practice Complaint; Granting in Part and Denying in Part Complainant The Education Laboratory's Motion for Partial Summary Judgment on its Complaint; Denying HSTA's Motion

to Stay Proceedings Until Review by Hawaii Supreme Court of Special Proceedings is Completed; Granting Complainant The Educational Laboratory's Motion to Strike Untimely Answer to Prohibited Practice Complaint Filed September 23, 2013; and Denying HSTA's Request to File Proposed Findings of Fact and Conclusions of Law with Brief Now Scheduled to be Filed on or by October 21, 2013. The Findings of Fact and Conclusions of Law in Order No. 2948 are hereby incorporated into this Findings of Fact, Conclusions of Law, and Decision and Order; however, a brief summary of proceedings are also provided below.

A. Pleadings, Motions, and Other Filings Filed through October 4, 2013

On April 28, 2011, Complainant THE EDUCATIONAL [sic] LABORATORY: A HAWAII NEW CENTURY PUBLIC CHARTER SCHOOL ("ULS") LOCAL SCHOOL BOARD ("LSB") (Complainant or Employer) filed a prohibited practice complaint (Complaint) against Respondent HAWAII STATE TEACHERS ASSOCIATION (Respondent or HSTA).

On May 2, 2011, the Board sent Respondent a NOTICE TO RESPONDENT OF PROHIBITED PRACTICE COMPLAINT (Notice), with a copy of the Complaint attached, and directed Respondent to "file with this Board the original and five (5) copies of your answer to the Prohibited Practice Complaint, with proof of service upon Complainant, no later than 4:30 p.m. of the tenth day after service of the complaint. If you fail to timely file and serve an answer, such failure may constitute an admission of the material facts alleged in the complaint and a waiver of a hearing." On May 3, 2011, the Board sent an ERRATA TO NOTICE TO RESPONDENT OF PROHIBITED PRACTICE COMPLAINT, DATED MAY 2, 2011, to correct the erroneous case number contained in the Notice.

On May 12, 2011, HSTA filed a MOTION TO DISMISS COMPLAINT, asserting that the Complaint was barred by the statute of limitations set forth in Hawaii Revised Statutes (HRS) § 377-9(l); the Complaint was beyond the subject matter jurisdiction of the Board; and the Complaint failed to state a claim for relief under HRS chapter 89 and the public policy which strongly favors the arbitration of disputes arising from collective bargaining agreements. The Motion to Dismiss Complaint did not cite to any authority under, or pursuant to which, it was being filed.

On May 19, 2011, Complainant filed COMPLAINANT LOCAL SCHOOL BOARD'S OPPOSITION TO HSTA'S MOTION TO DISMISS FILED MAY 12, 2011.

On July 13, 2011, Complainant filed COMPLAINANT LOCAL SCHOOL BOARD'S MOTION TO STAY GRIEVANCE/ARBITRATION PROCEEDINGS IN HSTA GRIEVANCE #OC-11-24.

On July 20, 2011, HSTA filed HSTA'S MEMORANDUM IN OPPOSITION TO COMPLAINANT LOCAL SCHOOL BOARD'S MOTION TO STAY GRIEVANCE/ARBITRATION PROCEEDINGS IN HSTA GRIEVANCE #OC-11-24 FILED ON JULY 13, 2011.

On August 10, 2011, Complainant filed COMPLAINANT LOCAL SCHOOL BOARD'S REPLY TO HSTA'S OPPOSITION TO MOTION TO STAY GRIEVANCE/ARBITRATION PROCEEDINGS IN HSTA GRIEVANCE #OC-11-24.

On August 12, 2011, the Board heard oral argument on HSTA's Motion to Dismiss Complaint and Complainant's Motion to Stay Grievance/Arbitration Proceedings in HSTA Grievance #OC-11-24. With respect to the Motion to Dismiss Complaint, the Board orally ruled that it denied the motion to dismiss; with respect to the Motion to Stay Grievance/Arbitration Proceedings in HSTA Grievance #OC-11-24, the Board took the matter under advisement.

On November 10, 2011, HSTA filed HSTA'S REQUEST TO SCHEDULE HEARING ON PROHIBITED PRACTICE COMPLAINT, requesting that "the Board set for hearing the prohibited practice complaint," and asserting in an accompanying affidavit that, "[t]he Board denied HSTA's motion to dismiss and took under advisement the Local School Board's motion to stay grievance/arbitration proceedings," and that, "[a]s the parties have not waived the time in which to hold a hearing on a complaint, HSTA requests that the Board notice a status conference for the purpose of scheduling trial dates to hear the merits of the Employer's prohibited practice complaint."

The Board conducted a status conference on May 6, 2013, during which it established deadlines to file motions and set the hearing on motions for September 20, 2013, at 9:00 a.m.

On July 23, 2013, Complainant filed COMPLAINANT THE EDUCATION LABORATORY'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON ITS COMPLAINT.

On August 14, 2013, HSTA filed HSTA'S MOTION TO STAY PROCEEDINGS UNTIL REVIEW BY HAWAII SUPREME COURT OF SPECIAL PROCEEDINGS IS COMPLETED.

On August 21, 2013, Complainant filed COMPLAINANT'S OPPOSITION TO RESPONDENT'S MOTION TO STAY PROCEEDINGS PENDING [sic] REVIEW BY HAWAII SUPREME COURT OF SPECIAL PROCEEDINGS IS COMPLETED FILED AUGUST 14, 2013.

On August 27, 2013, HSTA filed HSTA'S MEMORANDUM IN OPPOSITION TO COMPLAINANT THE EDUCATION LABORATORY'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON ITS COMPLAINT. On August 28, 2013, HSTA filed its ERRATA TO HSTA'S MEMORANDUM IN OPPOSITION TO COMPLAINANT THE EDUCATION LABORATORY'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON ITS COMPLAINT.

On August 28, 2013, HSTA filed HSTA'S NOTICE OF SUBMISSION OF EXHIBIT 27 IN SUPPORT OF ITS MOTION TO STAY PROCEEDINGS UNTIL REVIEW BY HAWAII SUPREME COURT OF SPECIAL PROCEEDINGS IS COMPLETED, FILED AUGUST 14, 2013, attaching a copy of Exhibit 27 which is a copy of the Hawaii Supreme Court's Order Accepting Application for Writ of Certiorari in CAAP-12-0000295, S.P. No. 11-1-0411, Hawaii State Teachers Association v. University Laboratory School, Education Laboratory Public Charter School Local School Board (Grievance OC-11-24).

On September 5, 2013, Complainant filed COMPLAINANT THE EDUCATION LABORATORY'S REPLY TO HSTA'S OPPOSITION TO COMPLAINANTS' [sic] MOTION FOR PARTIAL SUMMARY JUDGMENT.

Also on September 5, 2013, HSTA filed HSTA'S REPLY IN SUPPORT OF ITS MOTION TO STAY PROCEEDINGS UNTIL REVIEW BY HAWAII SUPREME COURT OF SPECIAL PROCEEDINGS IS COMPLETED.

On September 20, 2013, the Board heard oral argument on Complainant's Motion for Partial Summary Judgment, and on HSTA's Motion to Stay Proceedings Until Review by the Hawaii Supreme Court of Special Proceedings is Completed. The Board orally ruled that HSTA failed to file an answer to the Complaint, despite the Board's denial of HSTA's Motion to Dismiss Complaint following oral argument on August 12, 2011. HSTA argued that the time to file runs from the issuance of a written, not oral, order, but cited no authority for it; Complainant argued that historically, a party must answer within ten days of notice of the decision, pursuant to Hawaii Rules of Civil Procedure (HRCP). The Board held that Hawaii Administrative Rules (HAR) § 12-42-45(g) provides, "[i]f the respondent fails to file an answer, such failure shall constitute an admission of the material facts alleged in the complaint and a waiver of hearing." The Board also denied HSTA's motion for stay because the failure to file an answer constitutes an admission of material facts and waiver of hearing, and accordingly, there is no reason for a stay as the Board does not need the expertise or ruling of an arbitrator where the facts in the Complaint are deemed true; and further, the Board has its own expertise over negotiation disputes and complaints involving the failure to bargain. The parties were ordered to submit proposed conclusions of law and legal arguments in support of their positions.

On September 23, 2013, HSTA filed HSTA'S ANSWER TO COMPLAINT pursuant to HAR § 12-42-45.

On September 25, 2013, Complainant filed COMPLAINANT THE EDUCATION LABORATORY'S MOTION TO STRIKE UNTIMELY ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED SEPTEMBER 23, 2013.

On September 26, 2013, HSTA filed HSTA'S REQUEST TO FILE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH BRIEF NOW SCHEDULED TO BE FILED ON OR BY OCTOBER 21, 2013, pursuant to HAR § 12-4-8(17)(B).

On October 2, 2013, HSTA filed RESPONDENT HSTA'S OPPOSITION TO COMPLAINANT THE EDUCATION LABORATORY'S MOTION TO STRIKE UNTIMELY ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED SEPTEMBER 23, 2013.

On October 4, 2013, Complainant filed COMPLAINANT'S REPLY TO HSTA'S OPPOSITION TO MOTION TO STRIKE ITS UNTIMELY ANSWER.

On November 5, 2013, the Board issued Order No. 2948: Order Denying Respondent's Motion to Dismiss Complaint; Granting Complainant Local School Board's Motion to Stay Grievance/Arbitration Proceedings in HSTA Grievance #OC-11-23; Denying HSTA's Request to Schedule Hearing on Prohibited Practice Complaint; Granting in Part and Denying in Part Complainant The Education Laboratory's Motion for Partial Summary Judgment on its Complaint; Denying HSTA's Motion to Stay Proceedings Until Review by Hawaii Supreme Court of Special Proceedings is Completed; Granting Complainant The Educational Laboratory's Motion to Strike Untimely Answer to Prohibited Practice Complaint Filed September 23, 2013; and Denying HSTA's Request to File Proposed Findings of Fact and Conclusions of Law with Brief Now Scheduled to be Filed on or by October 21, 2013.

B. The Parties' Pleadings Filed after October 4, 2013

On October 21, 2013, Complainant filed COMPLAINANT'S SUPPLEMENTAL BRIEFING ON QUESTIONS OF LAW.

Also on October 21, 2013, HSTA filed HSTA'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, and HSTA'S BRIEF ON LEGAL ISSUES PRESENTED IN THE PROHIBITED PRACTICE COMPLAINT FILED BY THE EDUCATION LABORATORY.

On October 22, 2013, HSTA filed ERRATA TO HSTA'S BRIEF ON LEGAL ISSUES PRESENTED IN THE PROHIBITED PRACTICE COMPLAINT FILED BY EDUCATION LABORATORY, and ERRATA TO HSTA'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

On November 14, 2013, HSTA filed RESPONDENT HSTA'S ANSWER TO THE PROHIBITED PRACTICE COMPLAINT PURSUANT TO HRS § 89-5(E).

On November 18, 2013, Complainant filed COMPLAINANT THE EDUCATION LABORATORY'S MOTION TO STRIKE SECOND UNTIMELY ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED SEPTEMBER 23, 2013.[ii]

Also on November 18, 2013, HSTA filed RESPONDENT HSTA'S SUBMISSION OF TRANSCRIPT FROM HAWAII SUPREME COURT ORAL ARGUMENT IN S. CT. NO. 12-0295.

On November 25, 2013, HSTA filed RESPONDENT HSTA'S OPPOSITION TO COMPLAINANT THE EDUCATION LABORATORY'S MOTION TO STRIKE SECOND UNTIMELY ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED SEPTEMBER 23, 2013.

On November 27, 2013, Complainant filed COMPLAINANT'S REPLY TO HSTA'S OPPOSITION TO MOTION TO STRIKE ITS SECOND UNTIMELY ANSWER.

C. Complainant's Motion to Strike Second Untimely Answer To Prohibited Practice Complaint Filed September 23, 2013

As a preliminary matter, the Board hereby grants Complainant's Motion to Strike Second Untimely Answer to Prohibited Practice Complaint Filed September 23, 2013. The Board previously held that HSTA failed to file a timely answer and granted Complainant's Motion to Strike Untimely Answer to Prohibited Practice Complaint Filed September 23, 2013, in Board Order No. 2948. For the reasons articulated in Order No. 2948, the Board hereby grants Complainant's Motion to Strike Second Untimely Answer to Prohibited Practice Complaint Filed September 23, 2013.

II. THE FACTUAL ALLEGATIONS CONTAINED IN THE COMPLAINT

Pursuant to HAR § 12-42-45(g), "[i]f the respondent fails to file an answer, such failure shall constitute an admission of the material facts alleged in the complaint and a waiver of hearing."

Accordingly, the Board hereby adopts the material factual assertions in the Complaint as part of its Findings of Fact.

Complainant acts by and through its LSB, which has the power to negotiate supplemental collective bargaining agreement with the exclusive representatives of their employees.

Respondent HSTA is the exclusive representative as defined in HRS § 89-2 of the employees in Bargaining Unit 5.

On June 30, 2009, the ULS became the employer of the employees listed on Exhibit 1 and Exhibit 2 of the Memorandum of Agreement (MOA) who at that time were employed at the University of Hawaii (UH) in Bargaining Unit 8 – Administrative, Professional, and Technical (APT), represented by the Hawaii Government Employees Association (HGEA) and assigned to work at the ULS. The MOA is attached to the Complaint as "Exh A – 000001-000003"; Exhibit 1 and Exhibit 2 are attached to the Complaint as "Exh A – 000004" and "Exh A – 000005," respectively.

The MOA required the transfer of Bargaining Unit 8 APT UH employees listed on Exhibits 1 and 2 to the ULS, as well as a change in bargaining unit designation from HGEA-Unit 8 to HSTA-Unit 5 or HGEA-Units 06 or 13, pursuant to HRS § 89-6. The affected employees listed on Exhibits 1 and 2 of the MOA maintained their then-current pay, as well as had any and all accrued vacation and sick leave credits and all other public employee entitlements transferred to the ULS. The UH, HGEA, HSTA, and ULS were all signatories to the MOA.

On November 3 and November 25, 2009, the ULS and HSTA (collectively, "Parties") initially engaged in negotiations over cost and non-cost items to facilitate decentralized decision making pursuant to paragraph 8 of the MOA via a Supplemental Agreement pursuant to HRS § 89-10.55(c).

The Parties initially agreed to meet on December 1, 2009, December 3, 2009, and February 23, 2010. However, before the Parties could meet, the HSTA unilaterally cancelled all bargaining sessions.

On March 12, 2010, the ULS submitted a written request to HSTA's Interim Executive Director Jim Williams and its UniServ Director Beverly Miller, requesting to resume negotiations over a Supplemental Agreement for the ULS pursuant to the MOA.

On March 23, 2010, the HSTA responded to the ULS regarding the March 12, 2010, letter, and tentatively proposed the week of April 12-16, 2010, to reopen bargaining over a Supplemental Agreement with the ULS.

On May 3, 2010, the HSTA submitted a Request for Information in connection with the negotiations over the Supplemental Agreement, and again unilaterally cancelled a previously scheduled bargaining meeting for May 4, 2010.

On May 5, 2010, the ULS answered the request for information and emphasized the importance of promptly negotiating the Supplemental Agreement in light of the fact that May 14, 2010, constituted the end of the ULS's school year and that it was vitally important to inform Unit 5 employees with employment contracts for the upcoming 2010-2011 school year.

The Parties engaged in substantive negotiations over a Supplemental Agreement on May 18, 19, 20, and 21, 2010.

The HSTA submitted Counter Proposals on May 18, 20, and 21, 2010.

On May 21, 2010, the Parties reached a tentative agreement on the proposal that were to be included in the Supplemental Agreement, including but not limited to the Union's salary placement proposal, dated May 21, 2010. The Union's salary placement proposal dated May 21, 2010, referred to an "Exhibit 1" under its Paragraph 2. However, there was no "Exhibit 1" attached to the tentative agreement reached on the Union's salary placement proposal of May 21, 2010, that was initialed and dated by the Parties, nor had one been submitted by HSTA to the ULS's negotiations committee for review, comment and bargaining.

From May 23, 2010, through May 24, 2010, the parties exchanged emails to make corrections, additions, and deletions over the language and contents of the Supplement Agreement.

On May 24, 2010, the HSTA, through its UniServ Director Beverly Miller, met with the ULS negotiations committee and asked them to sign Page 64 of the Supplemental Agreement acknowledging acceptance of the agreement. "Exh J – 000001" attached to the Complaint shows the signatures of the Parties' representatives, dated June 21, 2010, to the Agreement that was effective July 1, 2009, to and including June 30, 2011. The HSTA and UniServ Director Beverly Miller never provided or furnished the ULS with the entire final Supplemental Agreement prior to the HSTA printing the document and distributing it to its members and ULS administrative staff.

A copy of the Supplemental Agreement was prepared, printed, and distributed by the HSTA to the ULS Unit 5 faculty members, effective July 1, 2009, to July 30, 2011, which is attached to the Complaint as "Exh K – 000001 – 000069." The Supplemental Agreement is supplemental to the HSTA's master Agreement for that time period, a copy of which is attached to the Complaint as "Exh L – 000001 – 000109."

The section of the Supplement Agreement governing "Salary Placement and Red Circling" is referred to as "Appendix XIV" in the Supplemental Agreement. Appendix XIV provides, in relevant part (on page "Exh K – 000067" attached to the Complaint):

> Designation: "an employee's appropriate salary placement designation (class and step) is made onto the unit 5 master agreement salary schedule. For step placement, parties shall use the attached chart (Exhibit 1) indicating negotiated step increments for unit 5 members.

However, "Exh K" does not include any attached chart or "Exhibit 1" as noted in Appendix XIV. The ULS contends that the only salary schedule that was discussed, deliberated, and agreed upon by the parties during negotiations was the document entitled "Teachers' Gross Annual Salary Schedule" used by HSTA's Negotiation Team member Brendan Brennan in his PowerPoint Presentation to the ULS Negotiations Team on May 19, 2010, a copy of which is attached to the Complaint as Exhibit N.

On July 7, 2010, and July 31, 2010, the ULS presented its Unit 5 faculty members of HSTA with their employment contracts (see Exhibit O attached to the Complaint), which listed their annual salaries for the upcoming 2010-2011 ULS academic school year, which salary ranges were consistent with the negotiated salary ranges contained in Exhibit N.

On October 29, 2010, the HSTA, through its Negotiations Specialist Ray Camacho, notified the ULS via email to ULS Principal Keoni Jeremiah, that HSTA had "inadvertently omitted an 'Exhibit 1' from Appendix XIV (Salary Placement and Red Circling)" and for the first time submitted a copy of their proposed Exhibit 1 to the ULS. The document entitled "Appendix XIV, Salary Placement and Red Circling, Exhibit 1" purports to detail the history of negotiated step increment for the HSTA master agreement. A copy of this document is attached to the Complaint at "Exhibit P."

On November 9, 2010, Principal Jeremiah responded to Mr. Camacho that the ULS disagreed with HSTA that Exhibit 1 from Appendix XIV is the document identified in Exhibit P, and referred the HSTA to the document identified as Exhibit N. As evidenced in "Exh P1 –

000001" attached to the Complaint, Principal Jeremiah notified Mr. Camacho, in relevant part, that:

> Since our teachers only became members of HSTA on June 30, 2009 [sic]. Our position is that Marybeth [Hamilton] was subject to collective bargaining with the HGEA and received salary increases during those periods when she was a HGEA member.
>
> I don't recall the sheet that listed the HSTA steps being discussed as a tool for placement to set salaries. I recall someone asking Beverly how would we know what years HSTA received step increments, and she presented the table you've attached. At no time during the negotiations did we assume that we would be following that table in setting their salaries.
>
> Also, our decision to accept the agreement was based on calculations using numbers from the salary table that Brendan used in his presentation (which was basically the 3x3 grid that came from the DOE website).
>
> Although the sheet that you sent was present at our negotiations, all of the convertees were already given their own collective bargaining increases when they were HGEA members.
>
> I had assumed that the missing Exhibit 1 was the salary table that Brendan used when making his PowerPoint presentation (which basically was the attached 3x3 grid). In conducting our placement review for our convertees, our decision was either they had SATEP/no SATEP, and number of years (less than 5 years or more than 6). Based on those two factors, we placed them on the 3x3 grid. If their current salary was more than their placement, they were "red circled" and were allowed to maintain their current salary and those whose current salary was less were given the higher rate of pay.

On November 12, 2010, Mr. Camacho notified Principal Jeremiah that the HSTA was not in agreement with the ULS's position, and that UniServ Director Beverly Miller would be contacting him to arrange a meeting to further discuss the dispute.

On November 18, 2010, Principal Jeremiah met with HSTA representatives Camacho and Miller to discuss the dispute. There was no agreement by the parties over the dispute after the conclusion of the meeting.

By letter dated December 2, 2010, Jim Shon, Chair of The Education Laboratory Collective Bargaining Committee, responded to HSTA representatives Camacho and Miller, notifying HSTA that the ULS bargaining committee met on November 23, 2010, regarding Appendix XIV of the MOA, and that:

> As all parties to the negotiations can attest, as well as, provided within the ground rules, all tentative agreements to the Supplemental Agreement were documented by a "Bargaining Unit 5 Tentative Agreement" initialed by myself, as chair of the committee, and you, as Association representative, along with a date the tentative agreement was made. Our records reflect each section of the Supplemental Agreement has these initials.
>
> None of The Education Laboratory LSB Collective Bargaining Committee Members have any record or memory of signing off on any other documents, including the questioned Exhibit contained in Appendix XIV. The specific salary schedules, which are in the Master Agreement labeled Exhibit A and Exhibit 1, are the only specific salary exhibits which we recognize as part of our supplemental agreement.
>
> Our negotiation notes and recollections indicate that the Ed Lab CBC made an initial proposal for salary placements based on an HSTA framework posted on DOE web site. This was not agreed to, and your negotiating team made a counter proposal, presented to all members of both teams via a power point presentation, which included the proposal salary level for all unit 5 employees. The cost of this specific HSTA proposal was approximately $1.8 million. This breaks down to approximately $1.2 for transfers, and $700K for "new hires." This proposal, which listed each and every Ed Lab Unit 5 member's proposed salary, including Red Circled Employees, was agreed to by our CBC. However, neither the specific salary status information of this proposal, nor any other charts or lists outside of the Master Agreement, was incorporated into the Supplemental Agreement signed on May 21, 2010. The only implied changes to individual unit 5 member salaries during this fiscal year would be any who received a credential for a SATEP or a teaching license subsequent to the May 21, 2010 final agreement.
>
> The specifics of the agreement and the overall costs were reported to The Education Laboratory Local School Board on May 27, 2010, at which

time the LSB ratified the agreement. This report was public and circulated to all who might be interested, including the two HSTA representatives on the LSB. No issue was raised regarding significant additional costs to the school regarding the incorporation of historical step increments obtained by the HSTA through prior negotiation being applicable to Unit 5 Ed Lab LSB employees. As you know, the low per pupil allocation was often noted as a constraint on The Education Laboratory during negotiations.

It is my understanding that one Unit 5 Ed Lab LSB employee, seeking an adjustment in salary placement, did have initial discussions with our Principal, and did forward a list of historical step increases for HSTA, and asserted that this list was inadvertently omitted from the tentative agreement on Appendix XIV. This Exhibit was never submitted as a proposal or counter proposal during the course of our bargaining session. Furthermore, we did not deliberate, discuss, or engage in any type of communication with HSTA over this particular Exhibit. However, we did discuss the salary level schedule as presented in the Association's Power Point presentation.

Thus, we are somewhat surprised that HSTA would attempt to assert the incorporation of a document that clearly was not part of the HSTA's formal proposal or counter proposal during negotiations. Moreover, the document was not even printed in the final Supplemental Agreement what the Association printed. The HSTA Historical Step Increase List was never provided to members of the Ed Lab negotiating team, nor was ever discussed, and therefore it was never agreed upon. In fact, I, as Chair of the CBC for the LSB had never seen the list until the meeting of our Ed Lab CBC on November 23, 2010. It goes without saying, that the HSTA power point salary placement proposal presented to us during negotiations would not have been agreed to had it incorporated a separate agreement for costs that we haven't has time to examine, as well as present to the LSB.

There is no Exhibit contained in the Tentative Agreement signed on May 21, 2010 for Appendix XIV. The only Exhibit 1 that we acknowledge and recognize is contained in the HSTA Master Agreement under APPENDIX IV.

> To summarize, there is no record of any Exhibit attached to Appendix XIV in the Temporary Agreement.

(See "Exh Q" attached to the Complaint).

By letter dated December 17, 2010, HSTA representatives Camacho and Miller responded to Mr. Shon, and stated in relevant part:

> It is agreed that Appendix XIV (Salary Placement and Red Circling), was thoroughly discussed, and proposals were exchanged. On May 21, 2010, a tentative agreement on the final language for the Appendix XIV was memorialized by initials of each party's representative (see attached).
>
> Our records confirm that the exhibit referenced in Appendix XIV was provided across the table to your committee and all teacher members of the negotiations team; however, it was only in the production of the final Supplemental Agreement that the document was inadvertently omitted.
>
> While there were discussions on overall salary costs, it was also understood that the salary placement issues would still need to be pursued for each bargaining unit member, once the relevant data was made available (e.g., teacher's transcripts, verification of DOE teaching experience, etc.). The Union's initial proposal was to establish a joint committee for this purpose. However, the Employer had opposed this concept, yet did not oppose the ability of a teacher to appeal his/her salary placement. The final agreement provided for an appeal process through the grievance procedure.
>
> As the title of Appendix XIV indicates, the intent was to address "Salary Placement and Red Circling." The plain language of Appendix XIV explicitly details the methodology for placement of teachers covered by the collective bargaining agreement. In Appendix XIV, page 62, first paragraph, it specifically states in the second sentence, "For step placement, parties shall use the attached chart (Exhibit 1) indicating negotiated step increments for unit 5 members." As of this date, we have information that indicates the Employer has failed to implement the language in accordance with the contractual language.

> We are perplexed by the Employer's failure to recognize the above facts. We consider your position a willful disregard for the negotiated agreement covering the placement and red-circling of teachers covered under the HSTA/ULS collective bargaining agreement. We suggest you to reconsider your position, and request a written response by January 3, 2011.

(See "Exh R" attached to the Complaint).

By letter dated January 3, 2011, Mr. Shon replied to Mr. Camacho and Ms. Miller, reiterating his position and further stating:

> HSTA and our School have not reached agreement as to the contents of HSTA's proposed Exhibit 1 of Appendix XIV. Accordingly, we demand further negotiations on this subject immediately. We are prepared to meet next week at a time of mutual agreement.

(See "Exh S" attached to the Complaint).

By letter dated January 7, 2011, Mr. Camacho and Ms. Miller responded to Mr. Shon, stating:

> HSTA's position regarding the above-noted matter has not changed from our December 17, 2010 letter to you.
>
> However, in the spirit of collaborative labor relations, we are willing to meet and discuss this matter with you before taking any further action.
>
> We are available to meet on Monday, January 10th, after school at Ed. Laboratory, PCS.

(See "Exh T" attached to the Complaint).

On Friday, January 21, 2011, the HSTA and the LSB agreed to form a fact-finding committee to review the salary placement designation process (see "Exh U" and "Exh V" attached to the Complaint). However, the Parties were not in agreement as to the intent and purpose of the ad-hoc subcommittee (see "Exh V" and "Exh W" attached to the Complaint).

By email dated March 24, 2011, HSTA notified Mr. Shon that "[b]ased on the response in your letter dated March 9, 2011, we don't see the purpose of the meeting on Monday, March 28, 2011 since the intent and/or agenda item to be discussed has not been completed. Please be advised that we are having legal counsel review the matter." ("Exh X" attached to the Complaint).

On or about April 13, 2011, HSTA filed a class grievance, alleging that "[i]n a letter dated March 9, 2011, the Employer refused to implement the proper salary placement for teachers, thereby, repudiating Appendix XIV of the supplemental agreement."

By letter dated April 15, 2011, Principal Jeremiah notified HSTA that "The Education Laboratory PCS, is in receipt of your above-cited grievance. Unfortunately, I am unable to meet the five (5) day contractual deadline to hold a grievance meeting to discuss this matter." Principal Jeremiah proposed four alternate dates and times to conduct the Step 2 grievance meeting.

On April 21, 2011, HSTA made its demand for arbitration.

Based on factual allegations contained in the Complaint, the Board finds that the Parties bargained over, and came to an agreement on, the understanding that the affected employees' step placement for salary purposes would be governed by an attached "Exhibit 1" to the Supplemental Agreement. This is evidenced by the May 21, 2010, tentative agreement between the Parties, and the Supplemental Agreement signed by the Parties' representatives on June 21, 2010, that references "Exhibit 1" in its Appendix XIV.

The Board also finds that the actions of both Parties over the course of negotiations and subsequent to the discovery of the absence of an "Exhibit 1" attached to the Supplemental Agreement, were consistent with each party's own understanding of what constituted "Exhibit 1," but that the Parties were not in agreement with each other as to what constituted "Exhibit 1." (See, e.g., correspondence between HSTA and Principal Jeremiah and Mr. Shon).

The Board therefore finds that the Parties did not reach a meeting of the minds on the contents of an "Exhibit 1," despite the Parties' agreement that there would *be* an "Exhibit 1."[iii]

The Board further finds that neither party wilfully violated any provision of HRS chapter 89 or the master agreement in attempting to incorporate the party's own understanding of what constituted "Exhibit 1" into the Supplemental Agreement. The Board also finds that neither party willfully refused to bargain in good faith over "Exhibit 1." The Board cannot find that

either party acted with conscious, knowing, and deliberate intent to violate the provisions of HRS chapter 89 or to refuse to bargain collectively in good faith.

III. ALLEGATIONS OF PROHIBITED PRACTICES

The Complaint alleges the following:

A. Violation of HRS § 89-13(b)(1) and (2)

That HSTA's unilateral creation and distribution of its own version of Exhibit 1 for Appendix XIV without properly bargaining the document into the July 1, 2009, through June 30, 2011, Supplemental Agreement between the ULS and HSTA constitutes (1) an improper interference with and coercion of ULS employees in the exercise of rights guaranteed under HRS chapter 89; (2) an improper interference with the Unit 5 faculty members' employment contracts which list annual salaries for the upcoming 2010-2011 ULS academic school year consistent with the negotiated salary ranges contained in Exhibit N; and (3) a failure to bargain in good faith.

That HSTA's unilateral refusal to recommence bargaining over the content of Exhibit 1 for Appendix XIV also constitutes a refusal to bargain in good faith over wages and terms and conditions of employment.

B. Violation of HRS § 89-13(b)(4)

That HSTA seeks to unilaterally increase the wages of faculty members beyond what was bargained for in the July 1, 2009, through June 30, 2011, Supplemental Agreement in violation of HRS § 89-9.

That HSTA's attempt to use the grievance process to reform the July 1, 2009, through June 30, 2011, Supplemental Agreement between the ULS and HSTA also violates HRS § 89-10.8(a)(1).

C. Violation of HRS § 89-13(b)(5)

That HSTA's attempts to reform and/or modify expressed terms and conditions of the July 1, 2009, through June 30, 2011, Supplemental

Agreement between the ULS and HSTA constitutes [sic] a repudiation of that agreement.

That HSTA's unilateral creation and distribution of its own version of the Agreement violates Article XXIII – Entirety Clause of the Supplemental Agreement which states, "This document contains the entire agreement between the parties and no other agreement, representation or understanding will be binding on the parties unless made in writing by mutual consent of both parties. Editorial revision in the ratification copy of this Master Agreement between the Board and the Association may be made, provided that no items are substantially altered."

IV. REMEDIES SOUGHT

Complainant seeks the following remedies:

(1) An order declaring that HSTA has committed prohibited practices as stated in the Complaint and declaring that Exhibit 1 of Appendix XIV was never properly negotiated;

(2) An order requiring HSTA to return to the bargaining table to negotiate in good faith the terms and conditions of Exhibit 1 of Appendix XIV;

(3) An order declaring the Parties bound by all other terms of the July 1, 2009, through June 30, 3011, Supplemental Agreement between the ULS and HSTA as drafted by HSTA and signed by the parties;

(4) An order prohibiting HSTA from interfering or coercing ULS employees in the exercise of their rights under HRS chapter 89;

(5) An order declaring that HSTA's grievance is in direct violation of HRS § 89-10.8(a)(1) and is thus null and void;

(6) Interlocutory relief in favor of Complainant; and

(7) Other remedies.

V. CONCLUSION OF LAW AND DISCUSSION

Pursuant to HRS § 89-13(b), it shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under [chapter 89];
>
> (2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative as required in section 89-9[iv];
>
> * * *
>
> (4) Refuse or fail to comply with any provision of [chapter 89]; or
>
> (5) Violate the terms of a collective bargaining agreement.

Pursuant to HRS § 89-10.8(a), a public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. The grievance procedure shall be valid and enforceable and shall be consistent with the following:

> (1) A dispute over the terms of an initial or renewed agreement shall not constitute a grievance.

A. Prohibited Practice Pursuant to HRS § 89-13(b)(1)

The Hawaii Supreme Court has held that the crucial inquiry with regard to standing is whether a party has alleged such a personal stake in the outcome of the controversy as to warrant the party's invocation of a court's jurisdiction and to justify exercise of a court's remedial powers on the party's behalf. Mottl v. Miyahira, 95 Hawai'i 381, 389, 23 P.3d 716, 724 (2001) (quoting Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 67, 881 P.2d 1210, 1213 (1994)). In deciding whether a party has the requisite interest in the outcome of the litigation, the Hawaii Supreme Court employs a three-part test: (1) has the plaintiff suffered an actual or threatened injury as a result of the defendant's conduct; (2) is the injury fairly traceable to the defendant's actions; and (3) would a favorable decision likely provide relief for plaintiff's injury. Id. In applying this three-part test, the Hawaii Supreme Court opinions appear to have moved from "legal right" to "injury in fact" as the standard for judging whether a plaintiff's

stake in a dispute is sufficient to invoke judicial intervention (Life of the Land v. Land Use Commission, 63 Haw. 166, 174, 623 P.2d 431, 439 (1981)). However, regardless of whether the "injury in fact" or "legal right" standing is utilized here, the Board holds that Complainant lacks standing to bring the § 89-13(b)(1) action.

In Kohl v. Takushi, Decision No. 432, Case Nos. CE-13-385, CU-13-140 (2002), the Board held that a member of HGEA who brought a prohibited practice complaint against HGEA was not a public employer, and therefore lacked standing to charge the union with a breach of the duty to bargain collectively in good faith with the public employer. Similarly, HRS § 89-13(b)(1) prohibits interference, restraint, or coercion of any *employee* in the exercise of any right guaranteed under chapter 89. Complainant has not sufficiently alleged an injury in fact or a legal right to bring the § 89-13(b)(1) action, because it has not shown that it is an "employee" or that it represents the interests of any affected employee in a legally cognizable manner.

B. Prohibited Practice Pursuant to HRS § 89-13(b)(2)

Pursuant to HRS § 91-10(5), in contested cases, the party initiating the proceedings 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.

Pursuant to HRS § 89-13(b)(2), it is a prohibited practice for an employee organization or its designated agent willfully to refuse to bargain collectively in good faith with the public employer. With respect to prohibited practices, the Hawaii Supreme Court has said that "willfully" means "conscious, knowing, and deliberate intent to violate the provisions of HRS chapter 89." In re Hawai'i Government Employees Association, AFSCME, Local 152, AFL-CIO v. Casupang, 116 Hawaii 73, 99, 170 P.3d 324, 350 (2007) (quoting Aio v. Hamada, 66 Haw. 401, 410, 664 P.2d 727, 734 (1983)).

As discussed above, the Board found that the Parties did not reach a meeting of the minds on the contents of an "Exhibit 1" despite the agreement between the Parties that there would be an "Exhibit 1." The Board further found that neither party willfully refused to bargain in good faith over "Exhibit 1" in attempting to incorporate its own understanding of the contents of "Exhibit 1" into the Supplemental Agreement.

Accordingly, the Board holds that Respondent did not commit a prohibited practice pursuant to HRS § 89-13(b)(2).

C. Prohibited Practice Pursuant to HRS § 89-13(b)(4)

As discussed above, the Board found that the Parties did not reach a meeting of the minds on the contents of an "Exhibit 1," and that neither party wilfully violated any provision of HRS chapter 89 or the master agreement in attempting to incorporate the party's own understanding of what constituted "Exhibit 1" into the Supplemental Agreement.

Here, HSTA's attempt to use the grievance process does not rise to a prohibited practice pursuant to HRS § 89-13(b)(4), notwithstanding the provisions of HRS § 89-10.8(a)(1). The Board found that the actions of both Parties over the course of negotiations and subsequent to the discovery of the absence of an "Exhibit 1" attached to the Supplemental Agreement, were consistent with each party's own understanding of to what constituted "Exhibit 1," even though the Parties were not in agreement with each other as to what constituted "Exhibit 1." Furthermore, with respect to grievances, a union may need to preserve filing deadlines so as not to waive any claim as it progresses through the grievance process. The Board holds that the filing of a grievance and demand for arbitration here does not constitute a prohibited practice pursuant to HRS § 89-13(b)(4).[v]

D. Prohibited Practice Pursuant to HRS § 89-13(b)(5)

The Board holds that HSTA's actions at issue here, of attempting to incorporate its own understanding of the contents of "Exhibit 1" into the Supplemental Agreement, does not constitute a prohibited practice pursuant to HRS § 89-13(b)(5), notwithstanding the Entirety Clause contained in the Supplemental Agreement. Pursuant to HRS § 89-10(a), which governs written agreements, any agreement reached between the employer and exclusive representative "shall be reduced to writing and executed by both parties." In this case, the Board found that each party had its own understanding of what constituted "Exhibit 1," even if the Parties were not in agreement with each other as to what constituted "Exhibit 1." The Board cannot find by a preponderance of the evidence that HSTA's action of attempting to incorporate its understanding of "Exhibit 1" into the Supplemental Agreement is a prohibited practice rather than justifiable action under HRS § 89-10(a).

VI. DECISION AND ORDER

For the reasons discussed above, the Board denies the Complaint in its entirety, and hereby dismisses the Complaint. The Board further lifts the stay on Grievance #OC-11-23 that was imposed in Order No. 2948.

The Board does not order that affirmative action be taken by either party; however, the Board strongly recommends that the Parties work toward reaching a mutually agreed-upon "Exhibit 1," given the Parties' clear understanding and agreement that the Supplemental Agreement would have an "Exhibit 1" attached.

DATED: Honolulu, Hawaii, March 19, 2014.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to:

Richard H. Thomason, Deputy Attorney General
Rebecca L. Covert, Esq.

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[i] Included in Board Order No. 2948 is the Board's denial of HSTA's Request to File Proposed Findings of Fact and Conclusion of Law with Brief Now Scheduled to be Filed on or by October 21, 2013. However, HSTA had filed Proposed Findings of Fact and Conclusions of Law on October 21, 2013. Pursuant to Hawaii Revised Statutes § 91-12, "[i]f any party to the proceedings has filed proposed findings of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so present.

[ii] Complainant's motion is entitled "Complainant The Education Laboratory's Motion to Strike Second Untimely Answer to Prohibited Practice Complaint Filed September 23, 2013." However, the Memorandum in Support of Motion that accompanied the motion indicates that is it HSTA's Answer filed on November 14, 2013, that Complainant was moving to be stricken.

[iii] A meeting of the minds is necessary to form a binding agreement; where there is no meeting of the minds sufficient to form an agreement, there is no unlawful repudiation. See, Intermountain Rural Electric. Ass'n., 309 N.L.R.B. 1189 (1992); see also, Interprint Co. and Graphic Arts International Union, 273 N.L.R.B. 1863 (1985).

[iv] HRS § 89-9 governs scope of negotiations; consultation.

[v] The Board does not hold that the filing of a grievance or demand for arbitration can never constitute a prohibited practice; rather, the Board's holding here is limited to the facts of this case.