



**EFiled: Jan 05 2015 09:50AM HAST**  
**Transaction ID 56547432**  
**Case No. CE-03-824**

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII GOVERNMENT EMPLOYEES  
ASSOCIATION, AFSCME, LOCAL 152,  
AFL-CIO,

Complainant,

and

NEIL ABERCROMBIE, Governor, State of  
Hawaii; DONALD G. HORNER,  
Chairperson, Hawaii State Board of  
Education; HAWAII STATE BOARD OF  
EDUCATION; KATHRYN S.  
MATAYOSHI, Superintendent, Department  
of Education, State of Hawaii; and  
DEPARTMENT OF EDUCATION, State of  
Hawaii,

Respondents.

CASE NO. CE-03-824

DECISION NO. 480

FINAL ORDER ADOPTING THE  
BOARD'S PROPOSED FINDINGS OF  
FACT, CONCLUSIONS OF LAW, AND  
DECISION AND ORDER ISSUED ON  
DECEMBER 19, 2014

**FINAL ORDER ADOPTING THE BOARD'S PROPOSED  
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
DECISION AND ORDER ISSUED ON DECEMBER 19, 2014**

On December 19, 2014, the Hawaii Labor Relations Board (Board) issued the attached Proposed Findings of Fact, Conclusions of Law, and Decision and Order, pursuant to Hawaii Revised Statutes (HRS) § 91-11. No exceptions were filed by any of the parties, and the time for filing exceptions has passed. Accordingly, the Board hereby adopts in its entirety the attached Proposed Findings of Fact, Conclusions of Law, and Decision and Order, as its final Decision and Order in this matter.

Case No. CE-03-824 – HGEA v. Abercrombie, et al. – Final Order Adopting the Board’s Proposed Findings of Fact, Conclusions of Law, and Decision and Order, Issued on December 19, 2014.  
Decision No. 480

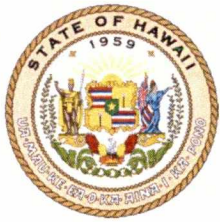
DATED: Honolulu, Hawaii January 5, 2015.

HAWAII LABOR RELATIONS BOARD

  
\_\_\_\_\_  
JAMES B. NICHOLSON, Chair  
\_\_\_\_\_  
SESNITA A.D. MOEPONO, Member  
\_\_\_\_\_  
ROCK B. LEY, Member

Copies sent to:

Peter Liholiho Trask, Esq.  
Jeffrey A. Keating, Deputy Attorney General



STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

**EFiled: Dec 19 2014 10:36AM HAST**  
**Transaction ID 56501282**  
**Case No. CE-03-824**

In the Matter of

HAWAII GOVERNMENT EMPLOYEES  
ASSOCIATION, AFSCME, LOCAL 152,  
AFL-CIO,

Complainant,

and

NEIL ABERCROMBIE, Governor, State of  
Hawaii; DONALD G. HORNER,  
Chairperson, Hawaii State Board of  
Education; HAWAII STATE BOARD OF  
EDUCATION; KATHRYN S.  
MATAYOSHI, Superintendent, Department  
of Education, State of Hawaii; and  
DEPARTMENT OF EDUCATION, State of  
Hawaii,

Respondents.

CASE NO. CE-03-824

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

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

I. The Complaint and Motion to Dismiss

On June 7, 2013, Complainant Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (Complainant or HGEA) filed a prohibited practice complaint (Complaint) against Respondents Neil Abercrombie, Governor, State of Hawaii; Donald G. Horner, Chair, Hawaii State Board of Education; Hawaii State Board of Education (BOE); Kathryn S. Matayoshi, Superintendent, Department of Education, State of Hawaii; and the Department of

Education, State of Hawaii (DOE) (collectively, Respondents). The gravamen of the Complaint includes the following:

That on June 28, 2012, Respondents negotiated with the HGEA a Memorandum of Understanding (MOU) regarding additional work days for Educational Assistants (EAs), who are members of the Unit 3 collective bargaining unit (BU), in Zones of School Innovation (ZSI) or the Hawaii School for the Deaf and Blind (HSDB) for school year (SY) 2012-2013.

That the MOU called for, among other things, an adjustment in compensation and benefits and an increase in hours of work as follows:

- a. 3.7% differential pay based upon the salary schedule currently in effect.
- b. One (1) additional sick leave day.
- c. An additional eight (8) hours of Supplemental Time Off (STO) pursuant to the terms of the 2012 STO Implementation Plan.

That the MOU included an expiration date of June 30, 2013.

That the affected EUs received two pay checks on August 5, 2012, without explanation until October 12, 2012, when the DOE's representative Ronn Nozoe (Nozoe), Deputy Superintendent, issued a memorandum directed to 10-month teachers and EAs in ZSI or HSDB, explaining that the employees' 24 pay checks that are normally spread over a 12-month period with the first check distributed on August 20 and the final check distributed the following August 5, would instead be distributed beginning with the first check on August 5, 2012, and the final check on the following July 20, 2013. Because of this change in the distribution of the checks, if the 2013-14 school year reverted to a regular schedule, the affected EAs would end up with no paycheck for August 5, 2013, from which regular deductions such as Employer-Union Health Benefits Trust Fund (EUTF) health insurance contributions could be made.

That a copy of Mr. Nozoe's October 12, 2012, letter was not sent to the HGEA.

That on or about December 5, 2012, representatives of the HGEA met with Respondents concerning the issue involving the EUTF deductions, and were assured by the Respondents that Respondents were going to make efforts to address those concerns through meetings with the EUTF. The HGEA was advised to "let the field know the DOE will work on it."

That on February 27, 2013, the HGEA inquired as to the status of Respondents' efforts to resolve the EUTF and other issues, and was told an official response was pending.

That on March 25, 2013, Mr. Nozoe issued a second memorandum to employees in ZSI, confirming the termination of the extended learning time under the MOU, and referencing his October 12, 2012, memorandum as well as attaching a "memo explaining how to pay the [EUTF] directly to ensure no lapse in medical coverage occurs."

That Article 54 of the collective bargaining agreement (CBA) requires the public employers to pay monthly contributions to the EUTF in identified amounts, and that it has been an established routine or practice that public employers also deduct from an employee's wages voluntary payments as requested by the employee.

That Respondents' conduct constitutes unilateral modification to the wages, hours and conditions of work, including benefits, of BU 3 Educational Assistants in violation of Respondents' duty to bargain pursuant to Hawaii Revised Statutes (HRS) § 89-9.

That Respondents' conduct constitutes violations of HRS § 89-13(a) (5), (7), and (8).

That during negotiations for BU 3 for the contract period of July 1, 2009, through June 30, 2013, the parties agreed to reinstate/restore the 5% salary reduction effective during the contract period of July 1, 2009, to June 30, 2013, along with granting step movements.

That as a result of Respondents' conduct, there appears to be some question of whether the Respondents' notice to the affected employees concerning their responsibility for making payments normally made by the Respondents also includes denial to those employees of the reinstatement/restoration of the 5% salary reduction and step movements.

On June 17, 2013, Respondents filed a Motion to Dismiss Prohibited Practice Complaint Filed on June 7, 2013 (Motion to Dismiss)<sup>i</sup>, asserting that by letter dated October 19, 2012, Annette Anderson (Anderson), Chief Negotiator for the DOE, sent to Randy Perreira (Perreira), Executive Director of the HGEA, a copy of Mr. Nozoe's October 12, 2012, memorandum, as well as an explanation of the paycheck "lag" if the parties did not continue the ZSI schedule for the following school year, and an invitation for the HGEA to contact Ms. Anderson if the HGEA had any question or concerns. Respondents asserted that the Complaint was untimely.

On June 24, 2013, the HGEA filed its Memorandum in Opposition to Respondents' Motion to Dismiss, asserting that Respondents had assured the HGEA on or about December 5, 2012, that they would resolve the matter and asked the HGEA to inform the field that the DOE would resolve it. Further, that on February 27, 2013, the HGEA inquired about the status, and was informed that a formal response was pending; and that on March 25, 2013, the DOE's formal response was published, which informed the affected parties that the extended learning time program would not be continued, and included a "process memo" explaining to the employees how to pay the EUTF contributions. Further, that on April 18, 2013, the HGEA met with Mr. Nozoe, who expressed the DOE's intent to resolve the issue by pursuing the HGEA's suggestion to pay the EAs on August 5, 2013, and if an overpayment situation occurred, to address it through monthly repayments as provided by law through HRS chapter 78. Finally, that on June 7, 2013, Ms. Anderson informed the HGEA Field Services Officer Irene L.A. Pu'uohau (Pu'uohau) that the HGEA's suggestion of overpayment and then seeking reimbursement could not be done. The HGEA therefore asserted that Respondents' agreement of December 2012 to pay the EAs in August 2013 was not cancelled until the formal response by Respondents on March 25, 2013, and thus the Complaint was timely filed.

On June 27, 2013, the Board orally denied the Motion to Dismiss. The Board hereby incorporates that oral ruling into its decision. Because the HGEA was not notified until on or about March 25, 2013, that the DOE would not issue a paycheck to the affected EAs on August 5, 2013, the Complaint was timely filed.

On July 2, 2013, Respondents filed their Answer to the Complaint.

## II. Motion for Interlocutory Relief

On June 25, 2013, the HGEA filed a Motion for Interlocutory Relief, asserting, *inter alia*, that because Respondents unilaterally decided to issue two paychecks to the affected 10-month EAs on August 5, 2012, those employees would not receive a paycheck on August 5, 2013, which in turn would result in irreparable adverse impacts, including the failure to withhold the Employees' portion of premiums for health benefits resulting in possible loss of health coverage.

On July 3, 2013, Respondents filed a Memorandum in Opposition to HGEA/AFSCME's Motion for Interlocutory Relief (Memorandum in Opposition), asserting, *inter alia*, that the Employees would receive their full amount of compensation for the 2012-2013 school year as well as the 2013-2014 school year, and the employer sought to avoid an over-payment situation. One of the options proposed by Respondents' Memorandum in Opposition was to pay the Employees' 2013-2014 annual salary over 25 pay periods, in lieu of 24 pay periods, with the first payment on August 5, 2013. On July 5, 2013, Respondents filed their First Supplement to Memorandum in Opposition to HGEA/AFSCME's Motion for Interlocutory Relief, which provided further details in its attached document, "25 Pay Period Impact on EA Pay Check."

On July 15, 2013, the Board heard arguments on the HGEA's Motion for Interlocutory Relief. After deliberation, the Board orally granted the Motion, and ordered Respondents to pay Employees pursuant to Respondents' proposed option of paying the 2013-2014 school year annual salary over 25 pay periods in lieu of 24 pay periods, with the first paycheck on August 5, 2013. Based upon the irreparable harm the affected EAs faced, which consisted of, among other things, possible loss of health coverage; the likelihood that the HGEA would prevail at hearing; and public policy favoring unbroken health coverage, the Board hereby incorporates its oral ruling into this Decision.

### III. Hearing on the Merits of the Complaint

The Board held evidentiary hearings on the Complaint on August 27 and 28, September 3 and 26, and November 6, 2013. Board Chair James B. Nicholson did not participate in a portion of the hearing held on August 27, 2013, and Board Member Rock B. Ley did not participate in the hearing held on September 26, 2013. However, all three Board members have thoroughly reviewed the record in this matter, including the files, transcripts, and exhibits. Pursuant to HRS § 91-11, 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 such portions thereof as may be cited by the parties.

Accordingly, **NOTICE IS HEREBY GIVEN** that any party adversely affected by these proposed findings of fact, conclusions of law, and decision and order may file exceptions with the Board within ten days after service of this document. The exceptions shall specify which findings or conclusions are being excepted to, with citations and legal arguments presented in support of the

party's position. A hearing for the presentation of arguments will be scheduled should any party file exceptions, and the parties will be notified thereof.

### FINDINGS OF FACT

At all relevant times, the HGEA was or is an employee organization within the meaning of HRS § 89-2, and Respondents were or are employers or public employers within the meaning of HRS § 89-2.

On June 28, 2012, Respondents negotiated with the HGEA on behalf of certain affected BU 3 employees a MOU regarding additional work days for EAs in ZSI or HSDB for SY 2012-13, which had an expiration date of June 30, 2013. The schools identified in the MOU are the HSDB, Complex Area Kau-Keaau-Pahoa schools, and Complex Area Nanakuli-Waianae schools.

The MOU provided, *inter alia*,

NOW, THEREFORE, the parties agree to the following:

1. In SY 2012-13, the above-identified schools will provide the following:
  - a. 10-month educational assistants assigned to the affected schools will work an additional eight (8), seven (7) hour, work days for purposes of professional development and/or collaboration, which will result in an increased work year of 1560 total hours. Six (6) days will be before the start of the regular school year, and two (2) days will be after the end of the regular school year.
  - b. The additional eight (8), seven (7) hour, work days will occur on July 16, 17, 18, 19, 20, and 23, 2012 and May 29 and 30, 2013.
  - c. July 24, 2012 is an unpaid non-work day.
2. As a result of extending the work year as indicated above, all 10-month educational assistants assigned to the affected school shall have their compensation and benefits adjusted as follows:
  - a. 3.7% differential pay based upon the salary schedule currently in effect.

- b. One (1) additional sick leave day.
  - c. An additional eight (8) hours of Supplemental Time Off (STO), pursuant to the terms of the 2012 STO Implementation Plan.
- 3. Throughout the regular school year, there shall be an additional four (4) days of professional development and/or collaboration on July 26, 27, 2012, October 8, 2012, and May 28, 2013.
  - 4. The parties agree to continue to work together in the future regarding any issues that may arise concerning this Memorandum.

Normally, the first pay check of a school year is issued on August 20<sup>th</sup>, and the final pay check issued on Aug. 5<sup>th</sup>, with a total of twenty-four paychecks issued for a school year.

Pursuant to the MOA, the EAs in the ZSI or HSBD reported to work on July 16, 2014, for professional development.

On August 5, 2012, the affected EAs received two paychecks.<sup>ii</sup> One paycheck was for the final pay period of the 2011-2012 school year. According to the DOE, the second paycheck was ostensibly the result of the MOU for the 2012-13 school year. Because the regular deductions, such as EUTF contributions, flexible spending, savings, etc., were deducted from the first August 5<sup>th</sup> paycheck, the second August 5<sup>th</sup> paycheck had no such deductions made. The affected EAs did not receive an explanation as to the second paycheck at the time it was received.

In August of 2012, the DOE became aware of the issue of the EAs potentially not receiving a paycheck on August 5, 2013; however, the DOE did not contact the HGEA regarding this issue at that time.

On October 12, 2012, Mr. Nozoe issued a memorandum directed to 10-month teachers and EAs in ZSI or HSDB, which stated:

This memo outlines and clarifies how payroll will be processed for 10-month teachers and educational assistants in the [ZSI] and [HSDB].

You received two pay checks on August 5, 2012.

- The first one was to complete the summer pay for school year 2011-12, which is in line with 10-month teachers outside ZSI and HSBD.
- The second check paid for the beginning of the school year 2012-13 due to professional development in July 2012. 10-month teachers outside ZSI and HSDB did not receive this check.

The salary for all 10-month employees is spread over a 12-month period (24 pay checks). In a regularly-scheduled school year, the 24 paychecks start on August 20 and end the following year on August 5.

As of the July 20, 2013 paycheck, ZSI and HSDB 10-month teachers will be fully paid over 24 pay periods. This is because your pay started on August 5 instead of August 20. (10-month teachers outside ZSI and HSDB will receive 24 pay periods from August 20 to August 5 of the next year.)

If school year 2013-14 reverts to a regular schedule, you will not receive a paycheck on August 5, 2013; therefore, you will be responsible for your voluntary deductions such as EUTF, deferred compensation, annuities, savings, bonds, flexible spending and credit union. Further instructions will be provided as we approach that date.

The schools in the ZSI and the HSDB are part of a pilot, and it has not yet been determined if extended learning time and professional development will continue for SY 2013-14 on a revised calendar.

There will be no separation of service based on not receiving an August 5, 2013 pay check if ZSI and HSDB revert to a regular schedule.

The pay check procedure described above is consistent with other transfers of employees, such as from 12-month to 10-month positions. Those transfers result in pay periods with no pay checks as well.

Mr. Nozoe's October 12, 2012, letter indicates that it was copied to various DOE personnel, but not to the HGEA. The October 12, 2012, letter is the first time in the record that the DOE indicated it was treating the MOA as resulting in a revised "School Year."

At hearing on August 27, 2013, Mr. Nozoe described the August 5, 2012, payment as “we wanted to make sure that they got paid to do the additional days, and they got paid in a timely way that’s consistent with the way that we pay,” and explained that the EAs “came in . . . on their summer[.]” Mr. Nozoe agreed during questioning that his position was the second paycheck of August 5, 2012, “was for the professional development” for “the days defined in the MOU.”

By letter dated October 19, 2012, Ms. Anderson notified Mr. Perreira of the following:

In case any of your members have questions regarding the paycheck schedule for the ZSI and HSDB as a result of the Extended Learning Time (ELT) agreement, we provide [the HGEA] with the following information.

Ten-month Educational Assistants in the ZSI and HSDB received two paychecks on August 3, 2012, one representing summer pay to complete the school year (SY) 2011-12 pay schedule and the other representing the first paycheck of the new SY 2012-13. The new SY paycheck is early because the ZSI and HSDB educational assistants attended professional development beginning on July 16, 2012.

The paycheck schedule for 2012-13 for the effected employees moves up one pay period compared to the “regular” school paycheck schedule. The ZSI and HSDB paycheck schedule now becomes August 5, 2012 (*August 3 due to August 5 being a Sunday this year*) to July 20, 2013, with the same 24 semi-monthly paychecks as normal, which constitutes full payment for SY 2012-13. The schedule for the “regular” schools is August 20 to August 5 of the following year.

Unless the parties agree to continue the ZSI schedule in 2013-14, the paycheck schedule will revert to the “regular” schedule for SY 2013-14, which will cause a “lag” of the first 2013-14 paycheck until August 20, 2013, instead of the current ZSI August 5, schedule.

In addition, should an educational assistant transfer out of the ZSI/HSDB to a “regular” school schedule for 2013-14, there also would be a “lag” of the first 2013-14 paycheck until August 20, 2013.

Deputy Superintendent Ronn Nozoe sent a memo to the field on October 12, 2012, that addresses the matter and hopefully answers any further questions that employees may have. We enclose a copy of the memo for your information.

Ms. Anderson was not aware of any legal authority to issue the second paycheck on August 5, 2012. At hearing on September 3, 2013, Ms. Anderson testified that, "without really even the HGEA asking for it, we just thought it was fair if we were having employees start work earlier in the summer, July 16, we wanted to do everything that we could to get them paid sooner. So that resulted in the 8/5 or 8/3/2012 paycheck." Ms. Anderson further testified that she and the HGEA's negotiator Lei Desha had agreed that there would be an earlier paycheck, but there was no agreement as to when the last paycheck would be issued.

At hearing on November 6, 2013, Ms. Pu'uohau, Field Services Officer of the HGEA, testified that, after hearing talk in September 2012 about an extra paycheck received by the EAs in August, she reviewed the MOU, and "just took it as payment was made to the EAs for the work that they performed, and . . . did not hear anything otherwise by the department." However, after receiving a copy of Mr. Nozoe's October 12, 2012, letter, and Ms. Anderson's October 19, 2012, letter, Ms. Pu'uohau became concerned over whether certain contents of the letter pertained to EAs, or just teachers who fall under the Hawaii State Teachers Association (HSTA) contract.

On December 5, 2012, Ms. Pu'uohau met with Mr. Nozoe, DOE Deputy Superintendent, and Doug Murata (Murata), who at the time was DOE Assistant Superintendent of the Office of Human Resources, in an effort to resolve the potential loss of a paycheck in August 2013, as well as to discuss other issues. When Ms. Pu'uohau raised the issue of the EAs' paycheck at the meeting, she was told that the DOE was "going to take care of it," and that she could "let the field know that the Union brought this to the attention of the Department, and the Department will be working on it. Don't worry, we're working on it." Mr. Nozoe agreed that the DOE would attempt to look at ways to resolve the issue. Following this meeting, Ms. Pu'uohau believed that the matter would not affect the EAs, that the EAs would get a check and the EUTF contributions would be taken care of. She then informed the Union agents, who contacted the field.

Ms. Pu'uohau did not hear from the DOE for the next couple of months, and on February 27, 2013, she sent an email to Mr. Murata to check on the status of the EAs' paychecks. On March 2, 2013, Mr. Murata replied, "was this the paycheck issue around [the] EUTF deduction. If so, I am waiting for official word about the continuation, or not of the ELT [Extended Learning Time]." On March 2, 2013, Ms. Pu'uohau replied to Mr. Murata, "Yes it was. May I disclose or shall I wait?" Mr. Murata replied on March 2, 2013, "I will check and see where things officially stand . . . will get back to you next week."

The next response Ms. Pu'uohau received from the DOE was a telephone message from Mr. Nozoe to give her a "head's up" that there was a memo coming out; subsequently, on or about March 25, 2013, Ms. Pu'uohau received a copy of a memorandum dated March 25, 2013,

from Mr. Nozoe, addressed to “Employees in the Zones of School Innovation.” The memorandum informed employees that the ELT in the ZSI would not be continued. The memorandum ended with the following paragraph:

For more information regarding planning for the transition from the current ELT calendar and pay schedule back to the traditional 10-month calendar and pay schedule, please refer to the memo dated October 12, 2012. Also attached is the process memo explaining how to pay the Hawaii Employer-Union Health Benefits Trust Fund (EUTF) directly to ensure no lapse in medical coverage occurs.

Attached to the March 25, 2013, memorandum was a copy of Mr. Nozoe’s October 12, 2012, memorandum.

Although none of the relevant correspondence from the DOE to the HGEA regarding the paycheck issue referenced any authority for the DOE’s actions, the Respondents submitted as exhibits a Memorandum of Agreement between the State of Hawaii and the HGEA, and Regulation #5201. The Memorandum of Agreement, entered into sometime in 2010, was effective July 1, 2011, through June 30, 2013, and provided in relevant part, “compensation shall be administered according to DOE Administrative Regulation #5201, ‘Salary Administration for Ten-month Employees’ as appropriately adjusted for the Employees’ compensation and work year schedules”; furthermore, “[s]alaries shall be paid in semimonthly installments over a period of 12-months subject to proper adjustments for absences without pay and other disruptions to salary earnings. The normal semi-monthly installment is determined by dividing the Monthly Salary Rate by two (2) pay periods.”

Regulation #5201 provides in relevant part, “[s]alaries shall be paid in semimonthly installments over a period of twelve months except when salaries are paid in a lump sum as specified in paragraphs E-2 and E-3[.]”<sup>iii</sup> Regulation #5201 further provides that, “Official Work Year means the recognized paid days as determined each school year by the approved school calendar and as defined by the applicable collective bargaining contract.” The Implementation Instructions for Regulation #5201 provides in part:

3. Normal Salary Payments for 10-Month Teachers and Educational Officers

Affected educational officers and teachers will normally continue to receive their salary payments in 24 semi-monthly installments if they earn and accrue pay for all of the paid days in the school year. Example C and D below illustrate how this works for teachers and educational officers assuming a hypothetical annual salary rate of \$12,000 for SY

1996-97. Note that the first pay check of each new school year will be paid at the end of the first full pay period (September 1-15 for Example C and August 1-15 for Example D) That pay check will contain one full semi-monthly salary payment provided that there are no absences without pay. No pay adjustments are added to the first pay check for partial pay periods at the beginning of the school year because the intent is to proportionately smooth out salary payments over the 24 semi-monthly pay periods.

In granting the HGEA's Motion for Interlocutory Relief, the Board ordered Respondents to pay the affected EAs' 2013-2014 school year annual salary spread out over 25 pay periods rather than the usual 24 pay periods, with the first paycheck on August 5, 2013, to ensure the employees did not suffer a "gap" in paychecks from which EUTF and other deductions could be made. Although the Board's order did not result in alteration of the total annual salaries of the employees, each individual paycheck during that period was less than what the employees were entitled to, to accommodate the division of the annual salaries into 25 payments instead of 24.

#### CONCLUSIONS OF LAW AND DISCUSSION

The Complaint alleges prohibited practices pursuant to HRS § 89-13(a)(5), (7), and (8). Pursuant to HRS § 89-13(a), it shall be a prohibited practice for a public employer or its designated representative wilfully to:

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

\* \* \*

- (7) Refuse or fail to comply with any provision of this chapter; [or]
- (8) Violate the terms of a collective bargaining agreement[.]

Respondents assert that the DOE and the HGEA agreed to the earlier paycheck of August 5, 2012, for the 2012-2013 school year, and that Regulation #5201 and its Implementing Instructions provide for the issuance of 24 paychecks over a period of 12 months; therefore, the EAs were paid pursuant to normal DOE payroll procedures that were agreed to by both the DOE and the HGEA.

However, the Memorandum of Agreement (MOA) between the State of Hawaii and the HGEA that referenced Regulation #5201 was entered into sometime in 2010 (Respondents' Exhibit F did not include the month or date that it was entered into, just the year). The parties subsequently entered into the MOU at issue in this case, regarding the ZSI and HSDB, on June 28, 2012. That MOU specifically provided, "[t]he parties agree to continue to work together in the future regarding any issues that may arise concerning this Memorandum."

In August 2012, the DOE became aware of the issue of the EAs potentially not receiving a paycheck on August 5, 2013; however, the DOE did not contact the HGEA to discuss these concerns. Rather, the DOE waited until October 12, 2012, when Mr. Nozoe issued a memorandum directly to the employees, without copying the HGEA, stating, "If school year 2013-14 reverts to a regular schedule, you will not receive a paycheck on August 5, 2013; therefore, you will be responsible for your voluntary deductions such as EUTF, deferred compensation, annuities, savings, bonds, flexible spending and credit union. Further instructions will be provided as we approach that date." On October 19, 2012, Ms. Anderson issued a similar memorandum to the HGEA, and attached Mr. Nozoe's memorandum.

At trial, Mr. Nozoe gave somewhat conflicting testimony that the August 5, 2012, paycheck was for the "*additional* days" of professional development (emphasis added), for which the EAs came in on their summer break. Thus, his testimony indicates the August 5, 2012, paycheck was intended to be an *additional* payment for the additional work. Ms. Pu'uohau testified that as of September 2012, she had a similar understanding, after reviewing the MOU. At best, the issue was confusing, even to the DOE, and it is reasonable that the affected EAs would have been confused as well. Despite the confusion, the DOE did not attempt to work together with the HGEA to resolve the issue, as required by the MOU, until Ms. Pu'uohau raised the issue with the DOE at a meeting on December 5, 2012.

Furthermore, the DOE assured Ms. Pu'uohau that the DOE was "going to take care of it," and that she could "let the field know that the Union brought this to the attention of the Department, and the Department will be working on it. Don't worry, we're working on it." However, the DOE again did not contact the HGEA until approximately two months later, and only after Ms. Pu'uohau sent an email to inquire on the status. The DOE did not provide a substantive response to Ms. Pu'uohau's email inquiry, until on or about March 25, 2013, when Ms. Pu'uohau received a copy of a memorandum from Mr. Nozoe to "Employees in the Zones of School Innovation," informing employees that the Extended Learning Time in the Zones of Innovation would not be continued, and that employees would have to directly pay the EUTF to ensure no lapses in medical coverage would occur, because there would be no paycheck on August 5, 2013.

The Board finds and concludes that Respondents violated their obligation in the MOU to

“continue to work together in the future regarding any issues that may arise concerning this Memorandum,” which constitutes a breach of the duty to bargain in good faith and a breach of a collective bargaining agreement. “Collective bargaining” is defined in HRS § 89-2 as the mutual obligation of the public employer and the exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, and other terms and conditions of employment.

Collective bargaining in public employment requires both the public employer and the exclusive representative to bargain collectively in good faith. The need for good-faith bargaining or negotiation is fundamental in bringing to fruition the legislatively declared policy “to promote harmonious and cooperative relations between government and employees and to protect public by assuring effective and orderly operations of government.” Board of Education v. H.P.E.R.B., 56 Haw. 85, 528 P.2d 809 (1974).

In Aio v. Hamada, 66 Haw. 401, 410, 664 P.2d 727, 733 (1983), the Hawai‘i Supreme Court affirmed the decision of the Board’s predecessor to look to *Black’s Law Dictionary* for assistance in defining the term “wilful,” and the Board’s holding that “to make out a prohibited practice under Subsection 89-13(b), HRS, conscious, knowing, and deliberate intent to violate the provisions of Chapter 89, HRS, must be proven.”

In the present case, the DOE was aware of the issue of the EAs potentially not receiving a paycheck on August 5, 2013, as far back as August 2012, yet did not attempt to contact the HGEA to discuss their concerns. Instead, the DOE chose to send an October 2012, memorandum directly to the employees without copying the HGEA. One week later, on October 19, 2012, Ms. Anderson issued a similar memorandum to the HGEA, and attached Mr. Nozoe’s memorandum. Thereafter, the DOE did not follow up with the HGEA after the December 5, 2012, meeting, despite providing the HGEA with assurances that the DOE would “take care of it.” The DOE did not provide a substantive response to Ms. Pu‘uohau’s email of February 2013, until it sent a copy of a March 25, 2013, memorandum issued to affected employees that basically just reiterated the initial problem outlined in Mr. Nozoe’s and Ms. Anderson’s October 2012 memoranda. The DOE was aware that the affected employees would encounter a hardship in August 2013 when they experienced a “gap” in paychecks, yet the DOE did not meaningfully “work together” with the HGEA regarding this issue. Based upon the facts in this case, the Board finds the actions of the Respondents, through their representatives, to be wilfull.

Accordingly, the Board holds that Respondents committed a prohibited practice pursuant to HRS § 89-13(a)(5), (7), and (8).

## REMEDY

The Board is granted discretion in crafting remedial orders when an employer commits a prohibited practice. See Del Monte Fresh Produce (Hawaii), Inc. v. International Longshore and Warehouse Union, 112 Hawaii 489, 146 P.3d 1066 (2006) (discussing the Board's discretion under HRS chapter 377 to craft remedial orders when an employer commits an unfair labor practice). In addition to the discretion granted the Board by chapter 377 (as discussed in Del Monte Fresh Produce (Hawaii)), pursuant to HRS § 89-5(i)(4), the Board is empowered to conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and "take such actions with respect thereto as it deems necessary and proper[.]"

In granting the HGEA's Motion for Interlocutory Relief, the Board ordered Respondents to pay the affected EAs their 2013-2014 school year annual salary spread out over 25 pay periods rather than the usual 24 pay periods, with the first paycheck on August 5, 2013, to ensure the employees did not suffer a "gap" in paychecks from which EUTF and other deductions could be made. Although the Board's interlocutory order would not result in alteration of the total annual salaries of the employees, each individual semimonthly paycheck during that period would have been less than what the employees were entitled to, to accommodate the division of the annual salaries into 25 payments instead of 24.

The Board holds that the affected EAs should be compensated for the effect the prohibited practice had on their semimonthly paychecks for the 2013-2014 school year. The total amount that was taken from each or any of the 24 semimonthly paychecks to which the employees were entitled during the 2013-2014 school year, that enabled the affected EAs to receive a check on August 5, 2013, shall be restored to those employees in a lump sum which shall not affect any of the employees' regular paychecks, nor be deemed as constituting one of the 24 semimonthly paychecks to which the employees are otherwise entitled.

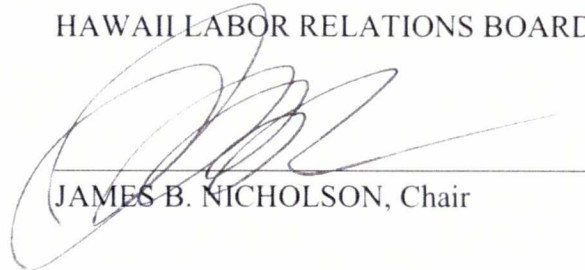
The Board's remedy shall apply to any EA who had his or her semimonthly salary adjusted in response to the Board's interlocutory order, regardless of whether said EA fell within the ZSI or HSDB described in the MOU. This clarification is made in response to the HGEA's Motion for Clarification and Compliance with the Board's Verbal Order Granting HGEA/AFSCME's Motion for Interlocutory Relief on July 15, 2013, filed on April 28, 2014.

With respect to costs and attorney's fees, in Civil No. 10-1-1931-09 (KKS), UPW v. Char, et al., and Civil No. 10-1-1963-09 (KKS), UPW v. Char, et al., consolidated cases before the Circuit Court, the Court held, *inter alia*, that the award of costs and attorney's fees is not discretionary where a prohibited practice complaint filed in behalf of employees was found to be substantiated by the Board. Accordingly, the Board hereby awards costs and reasonable attorney's fees to the HGEA, upon sufficient showing of such costs and fees incurred.

The Board further orders that a copy of this Decision be posted for 60 days in all appropriate locations, and confirmation of the posting be made to the HGEA and the Board.

DATED: Honolulu, Hawaii, December 19, 2014

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



SESNITA A.D. MOEPONO, Member



ROCK B. LEY, Member

Copies sent to:

Peter Liholiho Trask, Esq.  
Jeffrey A. Keating, Deputy Attorney General

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<sup>i</sup> The Motion to Dismiss was treated as a motion to dismiss in lieu of answer pursuant to Hawaii Rules of Civil Procedure (HRCP) Rule 12(a)(3).

<sup>ii</sup> Because August 5, 2012, was a Sunday, the August 5<sup>th</sup> paycheck was actually issued on August 3, 2012. However, for convenience, this Decision refers to the date as the "August 5" paycheck, as that is the normal pay date.

<sup>iii</sup> Paragraph E provides in part:

2. If the summer salary earnings do not amount to at least \$1,000, the remaining summer salary earnings may be paid in one lump sum as soon as possible as determined by the Department.
3. Whenever services are terminated by resignation or retirement, summer Salary earnings may be paid at the time of termination in a lump sum.