

STATE OF HAWAII

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Transaction ID 59530049
Case No. CE-05-667

HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS
ASSOCIATION,

Complainant,

and

BOARD OF EDUCATION, Department of
Education, State of Hawaii; PATRICIA
HAMAMOTO, Superintendent, Department
of Education, State of Hawaii; and SUSAN
H. KITSU, Department of Education, State of
Hawaii,

Respondents.

CASE NO. CE-05-667

DECISION NO. 484

FINAL DECISION ADOPTING
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, DECISION
AND ORDER AND DENYING THE
MOTION TO REOPEN THE RECORD

**FINAL DECISION ADOPTING PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION
AND ORDER AND DENYING THE MOTION TO REOPEN THE RECORD**

On June 6, 2016, the Hawaii Labor Relations Board (Board) filed Order No. 3166 Proposed Findings of Fact, Conclusions of Law, and Decision and Order; Opinion of Board Member Moepono Concurring in Part and Dissenting in Part (Proposed Findings and Conclusions).

On June 16, 2016, the Complainant HAWAII STATE TEACHERS ASSOCIATION (HSTA) filed a Motion to Reopen Record and Hold Oral Argument “to receive evidence on the developing law and employment policies in the past six years since the matter was submitted to the Board on post-hearing briefs in the area of bullying, particularly in the school environment and within the DOE[,]” and for oral argument on HSTA’s exceptions to the Proposed Findings and Conclusions (Motion to Reopen).

On June 20, 2016, the HSTA filed HSTA's Statement of Exceptions to Proposed Findings of Fact, Conclusions of Law, and Decision and Order Filed on June 6, 2016 (Statement of Exceptions).

On July 1, 2016, Respondents BOARD OF EDUCATION, Department of Education, State of Hawaii; PATRICIA HAMAMOTO, Superintendent, Department of Education, State of Hawaii; and SUSAN H. KITSU, Department of Education, State of Hawaii filed Respondents' Response to HSTA's Statement of Exceptions (Respondents' Response).

On August 18, 2016, the HSTA filed a reply to the Respondents' Response.

On August 22, 2016, the Board held a hearing on the Statement of Exceptions, in which the HSTA was given the opportunity to present further oral arguments in support of its exceptions to the Proposed Findings and Conclusions and the Respondents were given the opportunity to present oral arguments in response. At that hearing, the Board also provided the parties with the opportunity to present oral arguments regarding the Motion to Reopen.

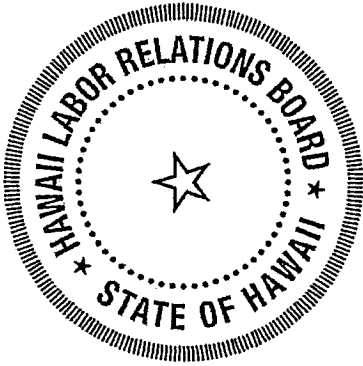
Regarding the Motion to Reopen, after a full consideration of the arguments in support of and against the reopening of the record, the Board denies the Motion based on its finding of the inappropriateness of reopening the record at this stage in the proceedings, *see United Food & Commercial Workers Union, Local 480 v. Hawaiian Milling Corp.*, Board Case No. 87-4 (CE), Decision No. 277, 4 HLRB 500, 503 (1988), to receive evidence following post-hearing briefs on the developing law and employment policies in the area of bullying in the past six years.

Based on a full review of the record in this case, including a careful review of the Statement of Exceptions and Respondents' arguments in response thereto, the Board finds such exceptions to be without merit and are overruled.

The Board hereby adopts the Proposed Findings of Fact, Conclusions of Law, and Decision and Order; Opinion of Board Member Moepono Concurring in Part and Dissenting in Part (Proposed Findings and Conclusions) (attached herein), filed on June 6, 2016, dismissing all of the charges alleged by HSTA against the Respondents with the following minor technical changes: 1) on page 24, Paragraph (3)" is changed to Paragraph "3.;" on page 29, Section "E." is changed to Section "F;" and Section "F" is changed to Section "G;" on page 30, Section "G" is changed to Section "H;" and on page 33, Section "H" is changed to Section "I." The Board further denies Complainant's Motion to Reopen. This case is deemed to be closed.

DATED: Honolulu, Hawaii, September 7, 2016.

HAWAII LABOR RELATIONS BOARD



Kerry M. Komatsubara

KERRY M. KOMATSUBARA, Chair

Sesnita A.D. Moepono

SESNITA A.D. MOEPONO, Member

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STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

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CASE NO. CE-05-667

ORDER NO. 3166

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER; OPINION
OF BOARD MEMBER MOEPONO
CONCURRING IN PART AND
DISSENTING IN PART

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

Board Chair Kerry M. Komatsubara and Board Members Sesnita A.D. Moepono and Rock B. Ley did not participate in the hearings. However, all three Board members have thoroughly reviewed the record in this matter, including the files, transcripts, and exhibits. Accordingly, pursuant to Hawaii Revised Statutes (HRS) § 91-11¹, the Board issues these Proposed Findings of Fact, Conclusions of Law, and Decision and Order.

Any proposed conclusion of law improperly designated as a proposed finding of fact, shall be deemed or construed as a proposed conclusion of law; any proposed finding of fact improperly designated as a proposed conclusion of law shall be deemed or construed as a proposed finding of fact.

I. PROCEDURAL BACKGROUND AND PROPOSED FINDINGS OF FACT

A. PROCEDURAL BACKGROUND

On May 27, 2008, Complainant HAWAII STATE TEACHERS ASSOCIATION (HSTA or Union) filed a prohibited practice complaint (Complaint) with the Hawaii Labor Relations Board (Board) against Respondents BOARD OF EDUCATION (BOE), Department of Education (DOE or Department), State of Hawaii; PATRICIA HAMAMOTO, Superintendent, DOE, State

of Hawaii (Hamamoto); and SUSAN H. KITSU, DOE, State of Hawaii (Kitsu) (collectively Respondents). The Complaint alleged, among other things, that on or about March 28, 2008, Respondents unilaterally formulated, adopted, and/or implemented mid-term changes to the Unit 05 collective bargaining agreement without negotiating with, or obtaining the mutual consent of, HSTA relating to: an anti-harassment, anti-bullying, and anti-discrimination policy; new standards of practice documents and new disciplinary policies and procedures; repeal of DOE Rules Title 8, Subtitle 2, Chapter 41 entitled "Civil Rights Policy and Complaint Procedure" (Chapter 41); and new forms and policies affecting material and significant changes in wages, hours, and other terms and conditions of employment. The Complaint further alleged that on May 12, 2008, despite HSTA's requests, Respondents refused to negotiate all mid-term changes in terms and conditions of employment, declined to cease and desist from their unilateral course of conduct, and failed to provide the information needed for good faith bargaining. The Complaint alleged that Respondents willfully violated the rights of public employees in HRS §§ 89-3 and 89-9(a), and committed prohibited practices in violation of HRS §§ 89-13(a)(1), (5), (7) and (8). On June 3, 2008, Respondents filed RESPONDENTS' ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED MAY 27, 2008.

On June 5, 2008, Respondents filed RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED MAY 27, 2008 (Motion to Dismiss) on the grounds, among other things, that the Complaint was time-barred; and that only consultation not negotiation was required and Respondents fulfilled that duty with the HSTA. On June 13, 2008, HSTA filed HSTA'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT.

On July 7, 2008, the HSTA filed HSTA'S MOTION FOR SUMMARY JUDGMENT (Motion for Summary Judgment), arguing, among other things, that University of Hawaii Professional Assembly v. Tomasu, 79 Hawaii 154, 900 P.2d 161 (1995) (Tomasu), was dispositive of the issue of negotiability; that the DOE policies had an impact on the terms and conditions of employment and were negotiable; and that Respondents violated their duty to negotiate regarding mandatory subjects by their unilateral actions. On July 11, 2008, Respondents filed RESPONDENTS' MEMORANDUM IN OPPOSITION TO HSTA'S MOTION FOR SUMMARY JUDGMENT FILED JULY 7, 2008.

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

After a short delay requested by the parties, the hearing on the merits was held on February 24, 2009, May 4-5, 2009, and August 31, 2009.

On January 19, 2010, HSTA filed HAWAII STATE TEACHERS ASSOCIATION'S MEMORANDUM OF LAW AND FACT, and Respondents filed RESPONDENT'S POST-HEARING BRIEF.

B. PROPOSED FINDINGS OF FACT

Based on the evidence in the record, including the testimony and documentary evidence presented at the hearing on the merits, the Board makes the following proposed findings of fact.

1. Parties

At all times relevant to this Complaint, Respondent BOE is and was a "public employer;"ⁱⁱ and Respondents Hamamoto as the DOE Superintendent and Kitsu as Director of the Civil Rights Compliance Office, DOE, respectively, are or were public employers within the meaning of HRS § 89-2, as "individual[s] who represent[t] a public employer or ac[t] in their interest in dealing with public employees[,] for employees belonging to Unit 05."ⁱⁱⁱ

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

2. Board Policy No. 4211

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

"The policy includes federal law requirements under Title VI of the Civil Rights Act of 1964, and as amended by the Civil Rights Act of 1991, and Title IX of the Education Amendments of 1972, also known as the Patsy T. Mink Equal Opportunity in Education Act.

The rationale for the proposed policy is to ensure that the DOE formalizes its position on anti-harassment, anti-bullying, and anti-discrimination against students. This policy will apply to all DOE employees.

We ask for your comments on the proposed policy. A copy of the proposed policy is attached for your review and comment. Your timely response will be greatly appreciated by December 10, 2007. If the Department does not receive a response by this date, it shall assume HSTA has no comment on the matters. Should you have any questions, please contact Jennifer Kehe at 586-3580. (Emphasis added.)"

Attached to the November 7, 2007 Letter was proposed BP 4211, which provided:

"ANTI-HARASSMENT, ANTI-BULLYING, AND ANTI-DISCRIMINATION AGAINST STUDENT(S) BY EMPLOYEES POLICY

The Department of Education strictly prohibits discrimination, including harassment, by any employee against a student based on the following protected classes: race, color, national origin, sex, physical or mental disability, and/or religion. In addition to the above protected basis, the Department of Education strictly prohibits any form of harassment and/or bullying based on the following: gender identity and expression, socioeconomic status, physical appearance and characteristic, and sexual orientation.

A student shall not be excluded from participation in, be denied the benefits of, or otherwise be subjected to harassment, bullying, or discrimination under any program, services, or activity of the Department of Education.

The Department of Education expressly prohibits retaliation against anyone engaging in protected activity. Protected activity is defined as anyone who files a complaint of harassment, bullying, or discrimination; participates in complaint or investigation proceedings dealing with harassment, bullying or discrimination under this policy; inquiries about his or her rights under this policy; or otherwise opposes acts covered under this policy.

The Department of Education shall develop regulations and procedures relating to this policy to include personnel action consequences for anyone who violates this policy. (Emphasis added.)"

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

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

When the November 7, 2007 Letter was received, HSTA was in transition between Executive Directors. HSTA Deputy Executive Director Raymond Camacho (Camacho), assumed

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

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

On December 20, 2007, DOE Personnel Specialist Jennifer Kehe (Kehe) received a telephone call from Gwen Kurashima (Kurashima) at HSTA requesting an extension for the Union to comment on BP 4211. Upon notifying Guy Tajiri (Tajiri), who handled the consult and confer on behalf of the DOE, Kehe was told that Camacho already informed Tajiri that HSTA would be sending its comments.

Kehe and Kitsu scheduled two meetings regarding BP 4211 with Camacho, which Camacho canceled because of other commitments. During a February 1, 2008 call canceling one of those meetings, Kehe informed Kurashima that HSTA's comments would be welcomed "sooner than later because the policy was, in fact, coming up for Board approval," and that the DOE was trying to schedule these meetings before the February BOE meeting.

In a February 15, 2008 email to Kehe, Camacho responded to the November 7, 2007 Letter but did not request bargaining. The email stated in relevant part:

"I understand that the matter of Proposed Policy #4211 will be taken to the Board of Education sometime next week. HSTA's written response is forthcoming. However, in the meantime, please communicate to the Board that the HSTA has reservations on this policy."

Prior to the February 21, 2008 BOE General Business Meeting (February 21, 2008 BOE Meeting), Kehe informed Kitsu of Camacho's February 15, 2008 email stating that HSTA had reservations about BP 4211 but provided no specific comments.

On February 20, 2008 (the day before the February 21, 2008 BOE Meeting), Camacho sent a letter with a subject of "Consult and Confer Regarding Board of Education Approved Department of Education Proposed Policy #4211" (February 20, 2008 HSTA Letter) to Ikei, stating in pertinent part:

"Thank you for the opportunity to respond to your letter dated November 7, 2007 regarding the proposed Policy #4211 entitled "Department of Education Anti-Harassment, Anti-Bullying and Anti-Discrimination Against Student(s) by Employees".

The policy, as drafted, has fallen short in many respects. It does not address the way in which each person in the school setting, including the teacher, is treated and protected. It doesn't approach the depth and breath [sic] of the recommendations for addressing harassment as tabled at the Board of Education on September 10, 2007. It was unfortunate that there were no public school teachers represented on the SS-CAC because they could have provided important information and knowledge of the issues. The participation of staff, including teachers is very important in establishing policies, and accompanying procedures in regards to advancing respectful communities in regards to race relations race relations [sic], national origin, ancestry, color, cross cultural, religion, sex, gender identity, physical and mental disability, socioeconomic status, physical characteristics and human rights understanding.

We look forward to a policy that will address a comprehensive approach to safe schools in keeping with the SS-CAC Committee recommendations. Such a policy could also incorporate Regulation #1110-7 Safe Workplace Policy. However, we would note that Regulation #1110-7 should also be revisited. Our limited experience with this policy indicates to us that it is inconsistently implemented. We further note that Regulation #1110-7 appears to have been prematurely implemented without clear definitions, investigation directives and procedures. We welcome a policy that covers all administrators, teachers, staff and students within school communities in the workplace and their interactions with each other.

As is the case for all policy and regulation proposals, the [HSTA] reserves right to continue to comment as it evolves through implementation."

Kehe received the February 20, 2008 Letter on or about February 21, 2008. Camacho did not attend the February 21, 2008 BOE Meeting. Maurice Morita (Morita) from HSTA was in attendance and HSTA raised no concerns at the meeting regarding the proposed BP 4211. At the February 21, 2008 BOE Meeting, the BOE unanimously approved the proposed BP 4211 with typographical corrections.

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

At that February 21, 2008 BOE meeting, the BOE also adopted Board Policy 2050 IMPLEMENTATION OF BOARD OF EDUCATION POLICY (BP 2050) setting forth specific criteria that the DOE was required to consider in developing an IP. BP 2050 provided in relevant part:

"Unless otherwise specified by the Board, the Department of Education (Department) shall have up to 45 days from the date the Board adopts a new Board policy or proposed amendment(s) to an existing Board policy, to submit an implementation plan to the appropriate Board committee."

After the February 21, 2008 BOE Meeting, HSTA received no official notification of the adoption of either BP 4211 or BP 2050 from the DOE or the BOE.

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

"You stated in your letter, 'Hawaii State Teachers Association (HSTA) supports such a policy and does not believe that workplace violence includes not only physical assaults, but any act at work in which a person is abused, threatened, intimidated, bullied, assaulted or experiences fear.' I would like to clarify that DOE proposed Policy #4211 is not an anti-discrimination, anti-harassment or anti-bullying policy for employment purposes. This policy is clearly identified for students. The policy clearly states that it is for the protection of students against employees who may harass, discriminate, or bully children.

You also claim that the policy falls 'short in many respects.' You stated that it does not address the way in which teachers would be treated and protected. Please note that the collective bargaining agreement covers these teachers' rights and protections adequately. Further, the DOE will follow its normal course in developing regulations and procedures as it always does immediately after a policy is adopted. Normal disciplinary procedures will be followed as outlined in the collective bargaining agreement and other DOE rules, policies and/or procedures.

Your letter goes on to state that the policy does not approach the depth and breath [sic] of the recommendations for addressing harassment as tabled at the Board of Education on September 10, 2007. This policy did not go to the Board of Education on September 10, 2007. This policy went before the Committee on Special Programs on November 5, 2007 and on November 7, 2007, the request for Consult and Confer was sent to your office.

It is not clear as to why you believe that DOE Policy #1110-7, the Safe Workplace Policy, which addresses workplace violence, should be incorporated into DOE Policy #4211, which is intended to cover student protection. In most of our investigations, if there are allegations that an employee, including a teacher, was violent at the workplace, it would be investigated; however, DOE Policy #1110-7 is strictly limited to employee workplace violence, and not students.

It is my understanding that Susan Kitsu, Director of the Civil Rights Compliance Office, and Jennifer Kehe, Labor Relations Specialist scheduled two meeting times to meet with you to discuss this important issue, and both times, you cancelled due to other commitments. We are still willing to discuss this further should you have any additional concerns. Please feel free to contact Susan Kitsu at 586.3321 directly if you would like to schedule a time to meet. (Emphasis added.)"

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

HSTA did not find out that BOE adopted BP 4211 until March 2008, when Shannon Garan, a teacher on leave assigned to work on HSTA legislative matters who attended the March 25, 2008 BOE meeting, notified Camacho of the adoption of the policy. Even after learning that BP 4211 was formally adopted, no one from HSTA asked DOE to meet and discuss BP 4211.

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

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

By letter dated May 21, 2008, Ikei responded to the May 12, 2008 Letter, stating in pertinent part:

"This is in response to your letter dated May 12, 2008 wherein you request the Board of Education and the Department of Education 'negotiate over changes in terms and conditions of employment resulting from the unilateral formulation, adoption, and implementation of Policy No. 4211'.

By letter dated November 7, 2007, the Department of Education (DOE) sent a letter to the Hawaii State Teachers Association (HSTA) submitting then Proposed Policy #4211 [entitled "Department of Education Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) By Employees"] for consult and confer. In that letter, DOE asked HSTA for comments on the proposed policy. DOE also notified HSTA that if it did not receive a response by December 10, 2007, DOE shall assume that HSTA had no comment on the matter.

On December 20, 2008 [sic],^v HSTA contacted DOE to request an extension on providing comments on the policy. DOE allowed HSTA additional time for the consult and confer process. A consult and confer meeting was scheduled for Tuesday, February 12, 2008 but was canceled by HSTA.

By letter dated February 20, 2008, HSTA submitted its comments on the policy to DOE. There was no demand for negotiation by HSTA in this letter. At most, HSTA stated it "reserve[d] its right to continue to comment as it [the policy] evolves through implementation." (Emphasis added). DOE considered HSTA's comments and responded to HSTA by letter dated February 22, 2008.

HSTA's request for negotiation was raised for the first time by letter dated May 12, 2008. DOE maintains that the adoption and implementation of the policy is not a subject of negotiation. Further, HSTA's request for negotiation is untimely."

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

3. SP 0211 and Implementation Plan for BP 4211.

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

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

"Reports and investigations will be conducted with as much discretion as possible. Information about the complaint and/or report will be shared on a 'need to know' basis' only.

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

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

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

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

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

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

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

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

Camacho testified that between March and May 2008, "[T]here were a number of red flags," such as the BOE acting on a policy without being informed that HSTA had requested bargaining over the policy; a "rash" of complaints and investigations of teachers based on

ambiguous standards, rather than the CBA Article V just cause standards; and due process concerns regarding the right to face your accuser, know the nature of complaint, have information related to the complaint, and not have anonymous complaints used for the purposes of adverse action and numerous inconsistencies between existing contractual rights for teachers and new standards being developed through the rules under the policy.

Finally, Camacho summed up his concerns regarding BP 4211, SP 0211, and BP 4211 IP as fundamental due process that the investigation will be properly conducted, including the right to know the nature of and who filed the complaint and a reasonable expectation of a timely investigation; and the unilateral changes to CBA Article X, such as the anonymous complaints and the requirement to inform the teacher of such complaints and to Article IX.A, which requires that the teacher be informed of anonymous complaints and that anonymous complaints cannot be acted on unless the requirements of that provision are met regardless of federal law precluding disclosure of a complainant without a release. Camacho further expressed more specific concerns that the SP 0211 provision that any action be taken in accordance with DOE policies, regulations, rules, CBA provisions, and other laws does not relate to the release of confidential information; does not state that disciplinary actions will be taken with just cause; does not specify which CBA provisions will apply to any actions taken; is vague and ambiguous regarding the sharing of the complaint with the employee; and provides for an investigatory time frame that is too long after filing of the complaint, which require discussion in the context of the CBA.

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

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

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

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

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

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

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

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

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

(b) Similarly, HSTA's concerns about the "standard of proof" required to hold a teacher in violation of BP 4211 or SP 0211, any ambiguity relating to the definitions of "harassment" or "bullying" or the necessity of time restrictions for the submission of a complaint were similarly based on "what if's" and a failure to

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

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

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

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

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

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

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

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

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

II. PROPOSED CONCLUSIONS OF LAW AND DISCUSSION

A. Burden of Proof

HRS § 91-10(5) states:

"(5) `Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence."

Hawaii Administrative Rules (HAR) § 12-42-8(g)(16) of the Board's rules states:

"(16) The charging party, in asserting a violation of chapter 89, HRS, or this chapter, shall have the burden of proving the allegations by a preponderance of the evidence. The party raising any subsequent issue shall have the burden of proving that issue by a preponderance of the evidence."

Further, "the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles." Waihee, 4 HLRB at 750. The Board has further interpreted this section "to mean that the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles. Henceforth, if any party fails to present sufficient legal arguments with respect to any issue, the Board shall find that the party failed to carry its burden of proof and dispose of the issue accordingly." State of Hawaii

Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982) (Sanderson).

B. Relevant Statutory Provisions

HRS § 89-3 states:

"§89-3 Rights of employees. Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4."

HRS § 89-13(a) states in relevant part:

"§89-13 Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

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

(7) Refuse or fail to comply with any provision of this chapter; [or]

(8) Violate the terms of a collective bargaining agreement[.]"

HRS § 89-9 states in pertinent part:

"§89-9 Scope of negotiations; consultation. (a) The employer and the exclusive representative shall meet at reasonable times, including meetings sufficiently in advance of the February 1 impasse date under section 89-11, and shall negotiate in good faith with respect to wages, hours, the amounts of contributions by the State and respective counties to the Hawaii employer-union health benefits trust fund to the extent allowed in subsection (e), and other terms and conditions of employment which are subject to collective bargaining and which are to be embodied in a written

agreement as specified in section 89-10, but such obligation does not compel either party to agree to a proposal or make a concession.

(c) Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.

(d) Excluded from the subjects of negotiations are matters of classification, reclassification, benefits of but not contributions to the Hawaii employer-union health benefits trust fund, recruitment, examination, initial pricing, and retirement benefits except as provided in section 88-8(h). The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with the merit principle or the principle of equal pay for equal work pursuant to section 76-1 or which would interfere with the rights and obligations of a public employer to:

(4) Suspend, demote, discharge, or take other disciplinary action against employees for proper cause;

This subsection shall not be used to invalidate provisions of collective bargaining agreements in effect on and after June 30, 2007, and shall not preclude negotiations over the procedures and criteria on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions as a permissive subject of bargaining during collective bargaining negotiations or negotiations over a memorandum of agreement, memorandum of understanding, or other supplemental agreement.

Violations of the procedures and criteria so negotiated may be subject to the grievance procedure in the collective bargaining agreement."

HRS § 89-10(d) provides:

"(d) Whenever there is a conflict between the collective bargaining agreement and any of the rules adopted by the employer, including civil service or other personnel policies, standards, and procedures, the terms of the agreement shall prevail; provided that the terms are not inconsistent with section 89-9(d)."

C. All Allegations Regarding The Refusal to Bargain Over BP 4211
Are Untimely Filed And Must Be Dismissed; Allegations Regarding
SP 0211 And BP 4211 IP Were Timely Filed

1. Claims Regarding BP 4211 Are Not Timely.

HRS §377-9(l) states, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." This 90 day requirement is made applicable to Chapter 89 prohibited practice complaints by HRS §89-14. In addition, HAR § 12-42-42(a) states:

"A complaint that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee ... within ninety days of the alleged violation."

The Board has long held that this ninety (90) day statute of limitations is a jurisdictional requirement which the Board has no authority to waive. Accordingly, the failure to file a complaint within 90 days of its occurrence divests the Board of jurisdiction to hear the complaint. Nakamoto v. Department of Defense, Board Case No. CE-01-802, Order No. 2010, at *15 (May 1, 2013) (Nakamoto Order). The Board has construed the 90-day limitation period strictly and will not waive a defect of even a single day. Fitzgerald v. Ariyoshi, Board Case No. CE-10-75, Decision No. 175, 3 HPERB 186, 199 (1983) (*citing* Thurston v. Bishop, 7 Haw. 421 (1888) and Wong Min v. City and County of Honolulu, 33 Haw. 373, *reh. den.*; [sic] 33 Haw. 409 (1935)); Nakamoto Order, at *15; Valeho-Novikoff v. Okabe, Board Case No. CU-05-302, Order No. 3024, at *10 (October 6, 2014).

Moreover, the beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Rather, the applicable period begins to run when "an aggrieved party knew or should have known that his statutory rights were violated." United Public Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443, 6 HLRB 319, 330 (2003) (*citing* Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978)).

Finally, the "lack of jurisdiction over the subject matter cannot be waived by the parties. If the parties do not raise the issue, [the Board] *sua sponte* will, for unless jurisdiction of the [Board] over the subject matter exists, any judgment rendered is invalid." Tamashiro v. Dep't of Human Servs., 112 Hawaii 388, 398, 146 P.3d 103, 113 (2006) (*citing* Chun v. Employees' Ret. Sys. of the State of Hawaii, 73 Haw. 9, 14, 828 P.2d 260, 263 (1992)).

HSTA does not dispute that the 90 day limitations period "starts" from the date it knew or should have known that a prohibited practice has occurred. HSTA argues that in failure to bargain cases, the limitations period does not begin until the employer provides the union with notice of the unilateral change. Further, relying on the Board's decision in Hawaii Gov't Emp. Ass'n, Local 152, AFSCME, AFL-CIO v. Fasi, Board Case No. CE-03-28, Decision No. 73, 1 HPERB 641,

645-46 (1977) (Fasi), HSTA asserts that a prohibited practice claim does not arise when the employer made the unilateral change, but when it clearly indicated "its intention not to negotiate" over the change. Accordingly, the Union takes the position that the date of accrual did not arise until: 1) April 14, 2008 when HSTA became apprised of recent DOE actions clearly establishing the unilateral changes brought by the implementation of BP 4211; or 2) May 21, 2008, when DOE took the position that the adoption and implementation of BP 4211 "is not a subject of negotiations."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Tomasu, 79 Hawaii at 158.

Thus, in addition to being untimely, HSTA's claim that the promulgation of BP 4211 was subject to negotiations (because it affected disciplinary matters) cannot be substantively sustained. As outlined in the November 7, 2007 Letter, the purpose of BP 4211 was to include "federal law requirements under Title VI of the Civil Rights Act of 1964, and as amended by the Civil Rights Act of 1991, and Title IX of the Education Amendments of 1972, also known as the Patsy T. Mink

Equal Opportunity in Education Act" in order to formalize DOE's "position on Anti-harassment, anti-bullying, and anti-discrimination against students." HSTA did not dispute DOE's position that BP 4211 was promulgated to comply with federal law. Therefore, the duty to bargain does not apply to the promulgation of BP 4211.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- "A. Except as modified herein, teachers shall retain all rights, benefits and privileges pertaining to their conditions of employment contained in the Standard Practices at the time of execution of this Agreement.
- B. Subject to the foregoing paragraph, nothing contained herein shall be interpreted as interfering with the Employer's right to make, amend, revise, or delete any portion of the Standard Practices; provided, however, that the Association shall be consulted on any changes to be made."

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

bargaining provisions. The Burns prior rights clause^{xx} was significantly broader in scope than Article XXI (Maintenance of Benefits) by extending, not just to regulations and standard practices, but also to statutory benefits. Burns, 3 HPERB at 119, 123. Further, in finding an HRS § 89-13(a)(8) violation, the Board, in Burns, relied on another provision in the collective bargaining agreement pertaining to leaves of absence. Second, based on the plain and unambiguous language of CBA Article XXI that the Employer may exercise its management right to “make, amend, revise, or delete any portion of the Standard Practices; provided, however, that the Association shall be consulted on any changes to be made,” the Employer is required to consult, not negotiate, on any changes to the standard practices.

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

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

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

(Emphasis added)

SP 0211, paragraph 8, states in its entirety:

1. Violation of Policy

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

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

"A. Key Messages and Objectives:

The DOE does not tolerate any form of harassment, bullying and/or discrimination against a student by an employee or officially recognized volunteer of the department. Any complaints will be immediately investigated, and if any evidence corroborates an allegation, prompt action will be taken by the proper officials, up to termination and in line with provisions under collective bargaining agreements, laws, rules, DOE policies and procedures, and other relevant authorities."

(Emphasis added)

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

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

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

CBA ARTICLE IX.A. provides:

- "A. No material derogatory to a teacher's conduct, service, character, or personality shall be placed in his personnel file unless the teacher has had the opportunity to review such material and the opportunity to affix his signature to the copy to be filed, with the understanding that such signature in no way indicates agreement with the contents thereof. Teachers shall also have the right to submit a written answer to such material, and their answer shall be reviewed by the Superintendent or designee and attached to the file copy. Derogatory materials which teachers have not been given an opportunity to review shall not be used in any proceedings against them."

CBA ARTICLE X.D. states:

- "E. Any serious complaint or any repeated minor complaint, including anonymous complaints concerning a teacher, shall be reported immediately to the teacher by the supervisor receiving the complaint. The use of complaints and the filing of said complaints shall be covered by Article IX – Personnel Information.

Any teacher against whom a serious complaint has been filed will have the opportunity to meet with the complainant(s). At the teacher's request, the supervisor shall be present at such a meeting. The supervisor shall call the complainant(s) for a meeting at a mutually acceptable time by the teacher, the complainant(s) and the supervisor."

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

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

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

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

"Except as modified herein, teachers shall retain all rights, benefits and privileges pertaining to their conditions of employment contained in the Standard Practices at the time of the execution of this Agreement."

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

"Subject to the foregoing paragraph, nothing contained herein shall be interpreted as interfering with the Employer's right to make, amend, revise or delete any portion of the Standard Practices; provided, however, that the Association shall be consulted on any changes to be made. " (Emphasis added.)

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

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

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

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

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

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

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

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

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

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

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

and there were no ongoing collective bargaining negotiations extant at the time the demand for information was made. In reviewing Veincent, Jr. v. Matayoshi, Board Case No. CE-11-54, Decision No. 130, 2 HPERB 494, 502 (1980), while the Board held that there is no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties and set forth the general rules regarding the obligation of the employer to provide information required by the bargaining representative established by the federal courts under the National Labor Relations Act,^{xviii} there are, however, limitations to the employer's obligations:

"However, a union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested. Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met. The same may be said for type of disclosure that will satisfy that duty." (Citations omitted.)

Here, the Board held that HSTA could not force the Respondents to bargain over BP 4211, SP 0211 or BP 4211 IP because they were the subject of the consult and confer requirement and not the negotiations requirement. There is no evidence to show that the Respondents agreed to enter into permissive negotiation regarding BP 4211, SP 0211 or BP 4211 IP. HSTA did not allege and did not pursue a breach of duty to consult claim. In the absence of a duty to bargain, breach of duty to consult or any other argument regarding the relevancy of the requested information other than in the context of mandatory bargaining, Respondents had no obligation to produce the requested information.

Federal precedent is in accord with the approach taken by the Board. See, for example, Soc. Serv. Union, Local 535 v. North Bay Dev. Disabilities Serv., Inc., 287 NLRB 1223, 1225 (1988), the NLRB, in adopting the recommended Order of the administrative law judge that the union did not violate NLRA § 8(b)(3) by refusing to provide information requested by the employer in that case, held that:

"As a general proposition, parties to collective bargaining must disclose information, when requested, that would enable other parties to meaningfully participate in the bargaining process. 'There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties.' (Citation omitted.) NLRB v. Acme Industrial Co., 385 U.S. 432, 435-436 (1976). Similarly, the obligation imposed upon the bargaining representative, 'parallels [the] employer's duty to bargain collectively' with the result that the bargaining representative is, 'likewise obliged to furnish the employer with relevant information.' (Citations omitted.) Local 13

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

However, to say simply that information is needed for bargaining, or to implement contractual provisions, does not necessarily establish that the Act compels its production. The obligation to provide information is not open-ended and without limitation. One such limitation arises from the type of bargaining subject to which the request for information pertains. When the request pertains to a subject that is nonmandatory -- one that does not involve 'wages, hours, and other terms and conditions of employment' within the meaning of Section 8(d) of the Act. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-349 (1958) -- then neither employers nor labor organizations are obliged under the Act to furnish "information requested for bargaining on [that] subject." American Stores Packing Company, A Division of Acme Markets, Inc., 277 NLRB No. 190, slip op. at 9 (January 14, 1986). For 'the duty to furnish . . . information stems from the underlying statutory duty imposed on employers and unions to bargain in good faith with respect to mandatory subjects of bargaining.' C [sic] Cowles Communications, Inc., 172 NLRB 1909, 1909 (1968)." (Emphasis added; footnotes omitted.)

In denying a petition challenging the NLRB's ruling, the D.C. Circuit stated:

"Our conclusion that the Board reasonably determined that the amount of a union's agency fee is not a mandatory subject of bargaining dooms the whole of petitioner's claim....Thus, it is of no moment whether the Union violated the CBA by failing, as alleged, to provide information relevant to negotiation or arbitration of the agency fee issue...; the Union's refusal to provide the requested information simply does not implicate the statute. (Emphasis added; cites omitted.)"

North Bay Dev. Disabilities Serv. v. NLRB, 905 F.2d 476, 479-80 (D.C. Cir. 1990) (North Bay). (Emphasis added) (Citations omitted) *See also: Democratic Union Organizing Committee, etc. v. NLRB, 603 F.2d 862, 888 n. 69 (D.C. Cir. 1978)* (the court agreed with the administrative law judge that the companies were under no obligation to furnish any of the data requested regarding the companies' decision to institute leasing because the decision was not a mandatory subject of bargaining).

Based on the foregoing, the Board concludes that because the information request made in the May 12, 2008 letter related to BP 4211, which is deemed to be non-mandatory subjects of bargaining, Respondents had no obligation to provide the requested information because the

Board's determination that BP 4211, SP 0211, and BP 4211 IP "[are] not a mandatory subject of bargaining dooms the whole of [complainant's] claim[.]" North Bay, 905 F.2d at 479. Hence, there is no violation of HRS § 89-13(a).^{xix}

Similarly, to the extent that HSTA argues that the May 12, 2008 information requests also apply to SP 0211 and BP 4211 IP, there is also no violation for the same reasons.

H. Conclusion

Accordingly, to summarize based on the foregoing, the Board concludes and holds that:

(1) The allegations in the Complaint with respect to Respondents' failure to negotiate regarding BP 4211 were untimely, and are dismissed for lack of jurisdiction. The allegations with respect to Respondents' failure to negotiate regarding SP 0211 and BP 4211 IP were timely filed.

(2) With respect to SP 2011 and BP 4211 IP, and even if the allegations were timely with respect to BP 4211, there is no violation of HRS §§ 89-3, 89-9(a), and 89-13(a) (5) because BP 4211, SP 0211, and the IP are not mandatory subjects of bargaining based on the fact that BP 4211, SP 0211, and the IP were promulgated to comply with federal law and/or are permissive subjects of bargaining. In connection with the foregoing, as a matter of fact and based upon Respondents' statements and representations, BP 4211, SP 0211 and BP 4211 IP are not in conflict with any of the Existing Rules, and in the event of any conflict the Existing Rules shall control. To the extent that the Existing Rules are to be modified, amended or otherwise changed (Revisions), then such Revisions shall be subject to the consult and confer requirement, and to the extent that mandatory negotiable topics are directly involved, shall be subject to negotiation.

(3) Respondents did not violate HRS § 89-13(a)(8) because there was no unilateral implementation of the rights and privileges held by teachers prior to SP 0211 and HAR Chapter 41.

(4) Respondents did not violate HRS § 89-13(a)(1) because there were no HRS §§ 89-3, 89-9(a), and 89-13(a)(5) violations.

(5) Respondents did not violate HRS § 89-13(a)(7) because of their failure to violate their duty to bargain under HRS § 89-13(a)(5).

(6) Respondents did not violate HRS § 89-13(a) for their failure to provide the information requested in the May 12, 2008 letter.

PROPOSED ORDER

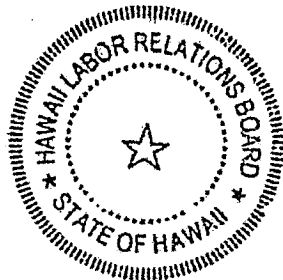
For the foregoing reasons, the Board dismisses all of the charges alleged by HSTA against Respondents in Case No. CE-05-667. In addition, the Board orders that, in the event of any conflict between BP 4211, SP 0211 and BP 4211, on the one hand, and any of the Existing Rules, on the other, the Existing Rules shall control. To the extent that the Existing Rules are to be modified, amended or otherwise changed (Revisions), then such Revisions shall be subject to the consult and confer requirement, and to the extent that mandatory negotiable topics are directly involved, each of the Revisions which directly involve a mandatory negotiable subject shall be subject to negotiation. Any dispute arising out of implementation of BP 4211 or the implementation of BP 4211 pursuant to SP 0211 or BP 4211 IP or any Revision shall be resolved in accordance with the grievance procedures outline in the CBA.

FILING OF EXCEPTIONS

Any person adversely affected by the above Proposed Findings of Fact, Conclusions of Law, and Decision and Order may file exceptions with the Board, pursuant to HRS § 91-11, within ten days after service of a certified copy of this document. The exceptions shall specify which findings or conclusions are objectionable with citations to the factual and legal authorities therefore. A hearing for the presentation of oral arguments will be scheduled should any party file exceptions, and the parties will be notified thereof.

DATED: Honolulu, Hawaii, June 6, 2016.

HAWAII LABOR RELATIONS BOARD




KERRY M. KOMATSUBARA, Chair


ROCK B. LEY, Member

Copies sent to:
Rebecca L. Covert, Esq.
Jeffrey A. Keating, Deputy Attorney General

Opinion of Board Member Moepono concurring in part and dissenting in part.

This Board Member has included her own Findings of Fact and Conclusions of Law for the purposes of this Opinion. Therefore, any proposed conclusion of law improperly designated as a proposed finding of fact, shall be deemed or construed as a proposed conclusion of law; any proposed finding of fact improperly designated as a proposed conclusion of law shall be deemed or construed as a proposed finding of fact.

I. PROCEDURAL BACKGROUND AND PROPOSED FINDINGS OF FACT

A. PROCEDURAL BACKGROUND

On May 27, 2008, Complainant HAWAII STATE TEACHERS ASSOCIATION (HSTA or Union) filed a prohibited practice complaint (Complaint) with the Hawaii Labor Relations Board (Board) against Respondents BOARD OF EDUCATION (BOE), Department of Education (DOE or Department), State of Hawaii; PATRICIA HAMAMOTO, Superintendent, DOE, State of Hawaii (Hamamoto); and SUSAN H. KITSU, DOE, State of Hawaii (Kitsu) (collectively Respondents). The Complaint alleges, among other things, that on or about March 28, 2008, Respondents unilaterally formulated, adopted, and/or implemented mid-term changes to the Unit 05 collective bargaining agreement without negotiations or mutual consent of the HSTA relating to: an anti-harassment, anti-bullying, and anti-discrimination policy; new standards of practice documents and new disciplinary policies and procedures; repeal of DOE Rules Title 8, Subtitle 2, Chapter 41; and new forms and policies affecting material and significant changes in wages, hours, and other terms and conditions of employment. The Complaint further alleges that on May 12, 2008, despite HSTA's requests, Respondents refused to negotiate all mid-term changes in terms and conditions of employment, declined to cease and desist from their unilateral course of conduct, and failed to provide the information needed for good faith bargaining. The Complaint alleges that Respondents willfully violated the rights of public employees in Hawaii Revised Statutes (HRS) §§ 89-3 and 89-9(a), and committed prohibited practices in violation of HRS § 89-13(a)(1), (5), (7), and (8).

On May 27, 2008, the Board sent to Respondents a NOTICE TO RESPONDENTS OF PROHIBITED PRACTICE COMPLAINT, with a copy of the Complaint attached, directing the Respondents to serve a copy of their answer no later than 10 days after service of the Complaint.

On June 3, 2008, Respondents filed RESPONDENTS' ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED MAY 27, 2008.

On June 5, 2008, Respondents filed RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT FILED MAY 27, 2008 (Motion to Dismiss) on the

grounds, among other things, that the Complaint was time-barred; and that only consultation not negotiation was required and Respondents fulfilled that duty with the HSTA.

On June 13, 2008, HSTA filed HSTA'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT.

On July 7, 2008, the HSTA filed HSTA'S MOTION FOR SUMMARY JUDGMENT (Motion for Summary Judgment), arguing, among other things, that University of Hawaii Professional Assembly v. Tomasu, 79 Hawaii 154, 900 P.2d 161 (1995) (Tomasu), was dispositive of the issue of negotiability; that the DOE policies had an impact on the terms and conditions of employment and were negotiable; and that Respondents violated their duty to negotiate regarding mandatory subjects by their unilateral actions.

On July 10, 2008, the Board held a hearing on Respondents' Motion to Dismiss, pursuant to HRS § 89-5(i)(4) and (5), and Hawaii Administrative Rules (HAR) § 12-42-8(g)(3).

On July 11, 2008, Respondents filed RESPONDENTS' MEMORANDUM IN OPPOSITION TO HSTA'S MOTION FOR SUMMARY JUDGMENT FILED JULY 7, 2008.

On July 22, 2008, the Board held a hearing on HSTA's Motion for Summary Judgment, in accordance with HRS § 89-5(i)(4) and (5), and HAR § 12-42-8(g)(3).

On September 15, 2008, the Board issued ORDER NO. 2548 DENYING RESPONDENTS' MOTION TO DISMISS AND DENYING HSTA'S MOTION FOR SUMMARY JUDGMENT. In denying both Motions, the Board concluded that material facts precluded dismissal or summary judgment including, among other things: what effect or impact the policy has on terms and conditions of employment, such that the implementation of the policy is subject to negotiation rather than consultation; whether the Implementation Plan (IP) itself was submitted to HSTA for consultation or when the IP was created or available for consultation; whether HSTA waived its right to negotiate over the implementation of the policy (if such implementation is subject to negotiations), or failed to file the Complaint in a timely manner, by failing to request negotiations within a reasonable time after receiving notice of the proposed policy; and the parties' past practice of providing notice of proposed policies (including the timing of the notice and content of the notice). However, the Board dismissed the Chapter 41 repeal allegations from the Complaint based on the undisputed fact that Chapter 41 was not being repealed.

On September 19, 2008, HSTA filed a MOTION TO DEFER FURTHER PROCEEDINGS IN CASE to allow the parties an opportunity to negotiate a possible settlement of their differences.

On September 24, 2008, Respondents filed RESPONDENTS' STATEMENT OF NO OPPOSITION TO HSTA'S MOTION TO DEFER FURTHER PROCEEDINGS IN CASE FILED ON 9/19/08.

On September 29, 2008, the Board rendered ORDER No. 2551 GRANTING COMPLAINANT'S MOTION TO DEFER FURTHER PROCEEDINGS IN CASE, FILED ON SEPTEMBER 19, 2008.

On December 15, 2008, the Board issued a NOTICE OF HEARING ON PROHIBITED PRACTICE COMPLAINT setting hearing dates on the merits for February 23-25, 2009.

On February 9, 2009, HSTA filed a MOTION TO CONTINUE HEARING DATES.

On February 12, 2009, the Board issued ORDER NO. 2589 GRANTING COMPLAINANT'S MOTION TO CONTINUE HEARING DATES, FILED ON FEBRUARY 9, 2009 rescheduling the hearing to commence on February 24, 2009.

The hearing on the merits was held on February 24, 2009, May 4-5, 2009, and August 31, 2009.

On January 19, 2010, HSTA filed HAWAII STATE TEACHERS ASSOCIATION'S MEMORANDUM OF LAW AND FACT, and Respondents filed RESPONDENT'S POST-HEARING BRIEF.

B. PROPOSED FINDINGS OF FACT

Based on the evidence in the record, including the testimony and documentary evidence presented at the hearing on the merits, this Board Member makes the following proposed findings of fact for the purpose of this Opinion.

At all times relevant to this Complaint, Respondent BOE is and was a "public employer,"^{xx} and Respondents Hamamoto as the DOE Superintendent and Kitsu as Director of the Civil Rights Compliance Office, DOE, respectively, are or were public employers within the meaning of HRS § 89-2, as "individual[s] who represent[t] a public employer or ac[t] in their interest in dealing with public employees[,] for employees belonging to Unit 05."^{xxi}

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

1. DOE and HSTA Consult and Confer, Adoption of, and Request for Bargaining On Board Policy #4211

On November 7, 2007, DOE Acting Superintendent Faye Ikei (Ikei) sent a letter (November 7, 2007 letter) on behalf of the Department to former HSTA Executive Director Joan Husted (Husted) notifying HSTA of the BOE Committee on Special Programs' approval of DOE

Proposed Policy #4211 entitled "Department of Education Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) by Employees" (BP 4211). In the letter regarding "Consult and Confer Regarding Board of Education Approved Department of Education Proposed Policy #4211," Ikei stated in relevant part:

On November 5, 2007, the Committee on Special Programs of the Board of Education approved Department of Education (DOE) Proposed Policy #4211 entitled "Department of Education Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) by Employees". We are submitting this policy for consult and confer.

This policy was developed pursuant to recommendation from the Safe Schools Community Advisory Committee. This Committee was comprised of community leaders and government stakeholders who made recommendations on how to improve safety in Hawaii schools. One of the key recommendations was to adopt and implement a policy against harassment, bullying and discrimination by staff against students.

The policy includes federal law requirements under Title VI of the Civil Rights Act of 1964, and as amended by the Civil Rights Act of 1991, and Title IX of the Education Amendments of 1972, also known as the Patsy T. Mink Equal Opportunity in Education Act.

The rationale for the proposed policy is to ensure that the DOE formalizes its position on anti-harassment, anti-bullying, and anti-discrimination against students. This policy will apply to all DOE employees.

We ask for your comments on the proposed policy. A copy of the proposed policy is attached for your review and comment. Your timely response will be greatly appreciated by December 10, 2007. If the Department does not receive a response by this date, it shall assume HSTA has no comment on the matters. Should you have any questions, please contact Jennifer Kehe at 586-3580.

(Emphasis added)

Attached to the November 7, 2007 letter was the proposed BP 4211, which provided:

**ANTI-HARASSMENT, ANTI-BULLYING, AND ANTI-DISCRIMINATION
AGAINST STUDENT(S) BY EMPLOYEES POLICY**

The Department of Education strictly prohibits discrimination, including harassment, by any employee against a student based on the following protected classes: race, color, national origin, sex, physical or mental disability, and/or religion. In addition to the above protected basis, the Department of Education strictly prohibits any form of harassment and/or bullying based on the following: gender identity and expression, socioeconomic status, physical appearance and characteristic, and sexual orientation.

A student shall not be excluded from participation in, be denied the benefits of, or otherwise be subjected to harassment, bullying, or discrimination under any program, services, or activity of the Department of Education.

The Department of Education expressly prohibits retaliation against anyone engaging in protected activity. Protected activity is defined as anyone who files a complaint of harassment, bullying, or discrimination; participates in complaint or investigation proceedings dealing with harassment, bullying or discrimination under this policy; inquires about his or her rights under this policy; or otherwise opposes acts covered under this policy.

The Department of Education shall develop regulations and procedures relating to this policy to include personnel action consequences for anyone who violates this policy.

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

Prior to BP 4211, to comply with federal and state nondiscrimination laws, the DOE processed complaints regarding alleged violations of federal and state nondiscrimination protections under HAR Title 8, Chapter 41 Civil Rights Policy and Complaint Procedure (Chapter 41), which is still in effect.

When the November 7, 2007 letter was received, HSTA was in transition between Executive Directors. HSTA Deputy Executive Director Raymond Camacho (Camacho), assumed

the Executive Director duties in addition to his regular duties. Although recognizing that the November 7, 2008 letter was a consult and confer on a policy not a standard practice, when Camacho received the letter in January 2008, he put the letter in a stack of "338 odd SPs to be reviewed" because of his workload.

The standard practice [SP 0211] was not included in the consult and confer on BP 4211 based on the DOE's understanding that the policy BP 4211 and the standard practice SP 0211 are two different documents with a separate consult and confer process requiring the transmittal of two separate letters.

On December 20, 2007, DOE Personnel Specialist Jennifer Kehe (Kehe) received a telephone call from Gwen Kurashima (Kurashima) at HSTA requesting an extension for the Union to comment on BP 4211. Upon notifying Guy Tajiri (Tajiri), who handled the consult and confer on behalf of the DOE, Kehe was told that Camacho had informed Tajiri that HSTA would be sending its comments.

Kehe and Kitsu scheduled two meetings regarding BP 4211 with Camacho, which Camacho canceled because of other commitments. During a February 1, 2008 call canceling one of those meetings, Kehe informed Kurashima that the HSTA comments would be welcomed "sooner than later because the policy was, in fact, coming up for Board approval," and that the DOE was trying to schedule these meetings before the February BOE meeting.

By a February 15, 2008 email to Kehe, Camacho responded to the November 7, 2007 letter but did not request bargaining. The email stated in relevant part:

I understand that the matter of Proposed Policy #4211 will be taken to the Board of Education sometime next week. HSTA's written response is forthcoming. However, in the meantime, please communicate to the Board that the HSTA has reservations on this policy.

Prior to the February 21, 2008 BOE General Business Meeting (February 21, 2008 BOE meeting), Kehe informed Kitsu of Camacho's February 15, 2008 email indicating the Union's reservations regarding BP 4211.

On February 20, 2008, Camacho sent a letter with a subject of "Consult and Confer Regarding Board of Education Approved Department of Education Proposed Policy #4211" (February 20, 2008 HSTA letter) to Ikei, stating in pertinent part:

Thank you for the opportunity to respond to your letter dated November 7, 2007 regarding the proposed Policy #4211 entitled "Department of Education Anti-Harassment, Anti-Bullying and Anti-Discrimination Against Student(s) by Employees".

The policy, as drafted, has fallen short in many respects. It does not address the way in which each person in the school setting, including the teacher, is treated and protected. It doesn't approach the depth and breath [sic] of the recommendations for addressing harassment as tabled at the Board of Education on September 10, 2007. It was unfortunate that there were no public school teachers represented on the SS-CAC because they could have provided important information and knowledge of the issues. The participation of staff, including teachers is very important in establishing policies, and accompanying procedures in regards to advancing respectful communities in regards to race relations race relations [sic], national origin, ancestry, color, cross cultural, religion, sex, gender identity, physical and mental disability, socioeconomic status, physical characteristics and human rights understanding.

We look forward to a policy that will address a comprehensive approach to safe schools in keeping with the SS-CAC Committee recommendations. Such a policy could also incorporate Regulation #1110-7 Safe Workplace Policy. However, we would note that Regulation #1110-7 should also be revisited. Our limited experience with this policy indicates to us that it is inconsistently implemented. We further note that Regulation #1110-7 appears to have been prematurely implemented without clear definitions, investigation directives and procedures. We welcome a policy that covers all administrators, teachers, staff and students within school communities in the workplace and their interactions with each other.

As is the case for all policy and regulation proposals, the [HSTA] reserves its right to continue to comment as it evolves through implementation.

Kehe received the February 20, 2008 letter on or about the following day.

Camacho did not attend the February 21, 2008 BOE meeting. While Maurice Morita (Morita) from HSTA was in attendance, HSTA raised no concerns at the meeting regarding the proposed BP 4211.

At the February 21, 2008 BOE meeting, the BOE unanimously approved the proposed BP 4211 with typographical corrections.

At that same meeting, the BOE adopted Board Policy 2050 IMPLEMENTATION OF BOARD OF EDUCATION POLICY (BP 2050) setting forth specific criteria that the DOE was required to consider in developing an implementation plan. BP 2050 provided in relevant part:

Unless otherwise specified by the Board, the Department of Education (Department) shall have up to 45 days from the date the Board adopts a new Board policy or proposed amendment(s) to an existing Board policy, to submit an implementation plan to the appropriate Board committee.

After the February 21, 2008 BOE meeting, HSTA received no official notification of the adoption of the policy from the DOE or the BOE.

However, by a February 22, 2008 letter, Ikei responded to Camacho's February 20, 2008 HSTA letter, stating in relevant part:

You stated in your letter, "Hawaii State Teachers Association (HSTA) supports such a policy and does not believe that workplace violence includes not only physical assaults, but any act at work in which a person is abused, threatened, intimidated, bullied, assaulted or experiences fear." I would like to clarify that DOE proposed Policy #4211 is not an anti-discrimination, anti-harassment or anti-bullying policy for employment purposes. This policy is clearly identified for students. The policy clearly states that it is for the protection of students against employees who may harass, discriminate, or bully children.

You also claim that the policy falls "short in many respects." You stated that it does not address the way in which teachers would be treated and protected. Please note that the collective bargaining

agreement covers these teachers' rights and protections adequately. Further, the DOE will follow its normal course in developing regulations and procedures as it always does immediately after a policy is adopted. Normal disciplinary procedures will be followed as outlined in the collective bargaining agreement and other DOE rules, policies and/or procedures.

Your letter goes on to state that the policy does not approach the depth and breath [sic] of the recommendations for addressing harassment as tabled at the Board of Education on September 10, 2007. This policy did not go to the Board of Education on September 10, 2007. This policy went before the Committee on Special Programs on November 5, 2007 and on November 7, 2007, the request for Consult and Confer was sent to your office.

It is not clear as to why you believe that DOE Policy #1110-7, the Safe Workplace Policy, which addresses workplace violence, should be incorporated into DOE Policy #4211, which is intended to cover student protection. In most of our investigations, if there are allegations that an employee, including a teacher, was violent at the workplace, it would be investigated; however, DOE Policy #1110-7 is strictly limited to employee workplace violence, and not students.

It is my understanding that Susan Kitsu, Director of the Civil Rights Compliance Office, and Jennifer Kehe, Labor Relations Specialist scheduled two meeting times to meet with you to discuss this important issue, and both times, you cancelled due to other commitments. We are still willing to discuss this further should you have any additional concerns. Please feel free to contact Susan Kitsu at 586.3321 directly if you would like to schedule a time to meet.

In March 2008, Shannon Garan, a teacher on leave assigned to work on HSTA legislative matters who attended the March 25, 2008 BOE meeting, notified Camacho of the adoption of the policy.

Camacho agreed that there was a consult and confer on BP 4211.

By a May 12, 2008 letter from Camacho to Ikei (May 12, 2008 letter), HSTA sent its first request to the DOE "to negotiate over changes in terms and conditions of employment resulting from the unilateral formulation, adoption, and implementation of Policy No. 4211" and a request for information, which stated in relevant part:

The aforementioned policy, standard, documents, the proposed repeal of title 8, subtitle 2, chapter 41 of the DOE, and implementation forms result in significant and material impacts on wages, hours, terms and conditions of employment of bargaining unit employees and changes existing terms and conditions of employment.

A review of available records indicate that the DOE (a) has adopted a vague an [sic] ambiguous standard of conduct and invites numerous complaints against teachers; (b) provides for "zero tolerance" resulting in termination or other adverse action regardless of circumstances; (c) adopts a new standard of proof i.e., if "any evidence corroborates an allegation"; (d) changes the "proper cause" standard of Article V; (e) modifies due process requirements and procedures; (f) eliminates reasonable provisions for job security of employees; and (g) adopts confidentiality requirements which amend the right of the Association to information needed to enforce teacher protections and other provisions of the unit 5 agreement. This is not by any means an exhaustive listing of the impacts and changes to the terms and conditions of employment. These changes alone, however, require bargaining under Section 89-9 (a), HRS.

Moreover, in 2007 our legislature expanded the scope of permissible bargaining over criteria and procedures relating to "standards of work," "suspensions," "discharge and other disciplinary actions for proper cause." See Section 89-9 (d), HRS.

Accordingly, we request that the DOE cease and desist from its unilateral course of conduct, and bargain in good faith over the criteria and procedures pertaining to the aforementioned subject matter. Please designate your spokesperson for bargaining within 7 days, indicating in writing when the DOE is prepared to commence negotiations.

In addition, the HSTA requests the following information which is needed for bargaining within 7 days of this letter.

1. A copy of any and all documents provided to and considered by the Ad Hoc Committee on School Safety on the basis of which the committee purportedly determined (1) "that the application of chapter 41 is ineffective [sic] appropriately address the current needs of students regarding discrimination, harassment, and bullying," and (2) that chapter fails to account for discrimination, harassment and bullying behavior that is based on categories other than traditional protected classes.

2. Did the Board of Education approve Policy No. 4211 (dated March 28, 2008), or approve the recommendation to repeal chapter 41? If so, when was the action taken? Please provide a copy of the Board minutes verifying the specific action taken by the Board.

3. Is there any school in the country which has adopted a so-called "anti-bullying" and "cyber bullying" policy? If so, please provide a copy of the prior policies adopted by other schools. If not, please indicate the basis on which the definition for the terms "anti-bullying" and "cyber bullying" was formulated, the person who formulated it and the manner in which it was formulated.

4. Please provide a copy of all written complaints filed by students and/or parents in the past two years against teachers which would fall within the definition of "bullying" as used in Policy No. 4211 (dated March 28, 2008), and a copy of the actions taken by the DOE on the complaint. Please strike the names of the students, parents, and teachers so that confidentiality is ensured on the complaints and the actions taken.

5. Please provide a copy of any and all "regulations and procedures" relating to Policy No. 4211 (dated March 28, 2008) which includes "personnel action consequences for anyone who violates" said policy. If there are not regulations and procedures at this time, please provide a draft of the proposed regulations and procedures proposed by the DOE.

6. Please provide a true and accurate copy of any documents, records, or information the DOE has which substantiates or is the basis for its contention that "Policy No. 4211 is not an anti-discrimination, anti-harassment or anti-bullying policy for employment purposes" as alleged in a letter dated February 22, 2008.

7. Please provide a true and accurate copy of the organizational chart, position descriptions, and staffing roster of all jobs and employees under Susan H. Kitsu, director of civil rights compliance currently.

8. Please provide a copy of all complaints filed against teachers which were investigated by Susan H. Kitsu and her subordinates from July 2007 to the present, and a copy of the final report of the results of the investigations. Please delete all names and personal information from the complaints and the reports to ensure confidentiality.

If the employer refuses to comply with its duty to bargain in good faith within 7 days, we have no alternative except to pursue a prohibited practice complaint because of the timeframe [sic] for implementation indicated in the documents we have been provided.

By a May 21, 2008 letter, Ikei responded to Camacho's request for negotiations over BP 4211, stating in pertinent part:

This is in response to your letter dated May 12, 2008 wherein you request the Board of Education and the Department of Education "negotiate over changes in terms and conditions of employment resulting from the unilateral formulation, adoption, and implementation of Policy No. 4211".

By letter dated November 7, 2007, the Department of Education (DOE) sent a letter to the Hawaii State Teachers Association (HSTA) submitting then Proposed Policy #4211 [entitled "Department of Education Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) By Employees"] for consult and confer. In that letter, DOE asked HSTA for comments on the proposed policy. DOE also notified HSTA that if it did not receive a response by December 10, 2007, DOE shall assume that HSTA had no comment on the matter.

On December 20, 2008 [sic],^{xxiii} HSTA contacted DOE to request an extension on providing comments on the policy. DOE allowed HSTA additional time for the consult and confer process. A consult and confer meeting was scheduled for Tuesday, February 12, 2008 but was canceled by HSTA.

By letter dated February 20, 2008, HSTA submitted its comments on the policy to DOE. There was no demand for negotiation by HSTA in this letter. At most, HSTA stated it "reserve[d] its right to continue to comment as it [the policy] evolves through implementation." (Emphasis added). DOE considered HSTA's comments and responded to HSTA by letter dated February 22, 2008.

HSTA's request for negotiation was raised for the first time by letter dated May 12, 2008. DOE maintains that the adoption and implementation of the policy is not a subject of negotiation. Further, HSTA's request for negotiation is untimely.

2. DOE and HSTA's Lack of Consult and Confer and Request for Negotiations Regarding The IP

The IP is a DOE and the BOE communication tool distributed to the Union or the employees only upon request.

Pursuant to the requirements of BP 2050,^{xxiv} DOE had 45 days to present the BOE with the IP for BP 4211, including the time frame for implementation, communication plan, training plan, and proposed guidelines that included SP 0211.

Kitsu started drafting the IP and SP 0211 immediately and simultaneously based on the BP 2050 time frame and because the standard practice includes the implementation procedure for the policy and aligns with other provisions, including the CBA.

BOE approval was not required for the IP. On March 28, 2008, Hamamoto signed the IP, which enumerated under "Legal and Other Reference(s): Title VI of the Civil Rights Act of 1964, and as amended by Civil Rights Act of 1991; and Title IX of the Equal Education Amendments of 1972, also known as the Patsy Takemoto Mink Equal Opportunity in Education Act; the Americans with Disabilities Act of 1990; Section 504 of the Rehabilitation Act of 1973; First Amendment of the Federal Constitution; and First Amendment of the State Constitution. SP 0211 states in relevant part:

1. **Policy**

The Department of Education strictly prohibits discrimination, including harassment, by any employee against a student based on the following protected classes: race, color, national origin, sex, physical or mental disability, and/or religion. In addition to the above protected basis, the department strictly prohibits any form of harassment and/or bullying based on the following: gender identity and expression, socio-economic status, physical appearance and characteristic, and sexual orientation.

A student shall not be excluded from participation in, be denied the benefits of, or otherwise be subjected to harassment, bullying, or discrimination under any program, service, or activity of the Department of Education.

The Department of Education expressly prohibits retaliation against anyone engaging in protected activity. Protected activity is defined as anyone who files a complaint of harassment, bullying, or discrimination, participates in complaint or investigation proceedings dealing with harassment, bullying, or discrimination under this policy, inquires about his or her rights under this policy, or otherwise opposes acts covered under this policy.

The Department of Education shall develop regulations and procedures relating to this policy that will include personnel action consequences for anyone who violates this policy.

2. **Background**

This policy was in part developed to assist the Department of Education with its compliance of the following federal laws: Title VI of the Civil Rights Act of 1964, and as amended by Civil Rights Act of 1991, and Title IX of the Equal Education Amendments of 1972, also known as the Patsy Takemoto Mink Equal Opportunity in Education Act, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973.

The goal of this policy is to ensure that there is no harassment, discrimination, and/or bullying of students by employees.

9. **Policy Implementation Plan**
Rollout Communications and Training Plan

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.

The DOE did not request a consult and confer with HSTA regarding the IP.

3. DOE and HSTA Consult and Confer and Request for Bargaining **Regarding SP 0211**

The DOE's implementation of BP 4211 included SP 0211.

The DOE did a consult and confer on SP 0211.

In drafting SP 0211, Kitsu considered federal laws and guidelines, including Title VI and Title IX, the Americans with Disabilities Act, and Section 504, and information provided by other school districts regarding the legal requirements for conducting investigations and severe, pervasive, or persistent conduct in violation of BP 4211. Specifically, regarding confidentiality, Kitsu relied on BOE Policy No. 1110-11 in effect at that time and the departmental regulations thereon pertaining to employee discrimination complaints.

On March 28, 2008, Hamamoto signed SP 0211, which became effective upon her signature and applied to all DOE employees. SP 0211 provides definitions of bullying, cyberbullying, discrimination, gender identity and expression, harassment, physical appearance and characteristic, retaliation, sexual orientation, and socio-economic status, stating in pertinent part:

1. **Purpose**

To describe the regulations and procedures of the Board of Education's Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) by Employees Policy.

2. **Effective**

Upon Superintendent's approval.

3. **Applies To**

All State of Hawaii Department of Education employees.

4. **Introduction**

This policy was in part developed to assist the Department of Education with its compliance of the following federal laws: Title VI of the Civil Rights Act of 1964, and as amended by Civil Rights Act of 1991, and Title IX of the Equal Education Amendments of 1972, also known as the Patsy Takemoto Mink Equal Opportunity in Education Act, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973.

6. **Responsible Parties**

Civil Rights Compliance Office

The Department of Education ("DOE"), Office of the Superintendent's Civil Rights Compliance Office, shall coordinate the implementation of this policy.

Principals, Vice Principals, Complex Area Superintendents, and/or the Civil Rights Compliance Office Specialists and/or Director

Principals, Vice Principals, Complex Area Superintendents, and/or the Civil Rights Compliance Office Specialists and/or Director, including, but not limited to, assistant superintendents, school administrators, and other management personnel are responsible for maintaining a learning environment free of harassment, bullying, and/or discrimination.

Any principal, vice principal or complex area superintendent who witnesses or receives report(s) of harassment, bullying, or discrimination shall take immediate and appropriate action reasonably calculated to end the harassment, bullying, and/or discrimination. This means, the principal, vice principal, or complex area superintendent shall immediately contact the Civil Rights Compliance Office to initiate an investigation into complaints stemming from allegations that fall under this policy.

Staff

While at school and during school-related functions, employees have a responsibility to refrain from engaging in any behavior that violates a student's or students' rights under this policy.

Student(s)/Parent(s)/Legal Guardian(s)

Student(s) and their parent(s), or legal guardian(s) are expected to inform the principal, vice principal, complex area superintendent, or staff in the Civil Rights Compliance Office of any harassment, bullying, or discrimination that is covered under this policy in order to address and prevent further incidences from occurring.

7. Limited Confidentiality

Reports and investigations will be conducted with as much discretion as possible. Information about the complaint and/or report will be shared on a "need to know" basis only.

8. 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.*

9. Procedures for Filing a Complaint

Any parent(s) or legal guardian(s) or a student, with the parent or legal guardian's knowledge, may file a complaint with a school administrator, the complex area administrator, or the Civil Rights Compliance Office staff on the Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Students by Employees Form. If the parent, legal guardian, and/or student chooses not to use the form, the complaint should nevertheless be accepted by the above entities and an immediate investigation should be initiated.

An employee who witnesses or knows about any incident that falls under the policy, may also file a complaint concerning inappropriate conduct towards a student by either completing the complaint form or by informing the principal, vice principal, complex area superintendent, or the staff in the Civil Rights Compliance Office.

Under SP 0211, the DOE provides the accused employee with a notification letter of the allegations but not a copy of the complaint.

DOE Assistant Superintendent Sheri Lee (Lee) did not send a letter to HSTA Deputy Director Camacho submitting SP 0211 for consult and confer with a copy of the standard practice until June 12, 2008 after the Complaint was filed.

In response, Camacho sent a July 1, 2008 letter, requesting bargaining over SP 0211 and requesting that additional specific information needed for bargaining be provided within seven days of the letter.

The DOE never provided the requested information to the Union.

By a July 8, 2008 letter, Lee responded that the DOE was in the process of reviewing the comments and concerns and that an official written response was forthcoming.

4. Prior Practice Regarding Consult and Confer

a. Consult and Confer Regarding Policies

The BOE deliberates an issue and establishes a policy to provide guidance to the BOE and the Department. Only the BOE has the authority to adopt and promulgate a policy.

The normal process is that the DOE is required to consult and confer on BOE policies. The consult and confer occurs during the 45-day period between the Committee on Special Programs' adoption of a policy recommendation and the BOE's adoption of the policy, so a recommended policy is immediately sent out to the unions for consult and confer after being passed out of committee, and the response is submitted in writing.

Regarding the Board Policy 1110-11 entitled DEPARTMENT OF EDUCATION APPLICANT AND EMPLOYEE NON-DISCRIMINATION POLICY (BP 1110-11) consult and confer process, after the BOE committee approved the proposed policy for full BOE approval, Kitsu sent the policy to the DOE labor relations office, which transmitted the proposed policy to the three unions for consult and confer.

Regarding BP 1110-11, Camacho sent an August 17, 2005 letter to DOE Assistant Superintendent Gerald Okamoto (Okamoto), stating, "[W]e find substantive changes to the intent of the policy. Therefore, we believe that such changes are inappropriate for the consult and confer process, and should be subjects bargained collectively."

In a subsequent letter to Okamoto, dated November 2, 2005 letter, regarding BP 1110-11, Camacho stated that while the HSTA "note[s] that the amendments to the proposed regulations and procedures adequately address our concerns" and "supports the intent of this policy, provided that as specific regulations, guidelines, and procedures are developed by the Department of Education, we will reserve our right to continue comment as it evolves through implementation."

The consult and confer procedure regarding BP 4211 was similar to but not the same as the one used for BP 1110-11.

Since 2005, the practice was that the Union had the ability to have input and provide comments at any time as the policy evolves through implementation and that changes would be made as appropriate.

b. Consult and Confer On Prior Regulations and Implementation Plans

The policy, the standard practice, and the implementation plan are distinguishable; and a teacher could allegedly violate both the policy and the standard practice.

A standard practice provides for the manner in which a policy is implemented, including articulating the purpose, the individuals affected, and the responsibilities of the different levels of the Department.

The standard practice is not subject to BOE approval but is shared with the BOE to ensure that the policies were implemented "according to the Board's will."

The standard practice and implementation plan were not created or developed until a BOE policy is approved. After the policy was sent for consult and confer, the DOE practice was to create the regulations, such as was done with BP 1110-11.

The DOE's established practice regarding consult and confer on the regulations and/or standard practices was to remain open to concerns from the union and to "make adjustments if warranted" at any time.

The DOE established practice was not to consult on an implementation plan.

5. The Agreement Between The HSTA and the BOE, Effective July 1, 2007 – June 30, 2009 for Unit 05

As under BP 1110-11, any employee violating BP 4211, SP 0211, or the IP is subject to discipline under the CBA.

The DOE position is that any conflict between the standard practice and the CBA and any discipline taken against a teacher by the Complex Area Supervisor (CAS) or the Superintendent for violation of BP 4211 or SP 0211 has to be taken in accordance with the CBA and subject to the grievance and arbitration procedure.

The HSTA and Respondent BOE are parties to the Agreement Between The HSTA and the BOE, effective July 1, 2007 – June 30, 2009 for Unit 05 (CBA).

CBA ARTICLE V entitled "GRIEVANCE PROCEDURE" states in relevant part:

- A. DEFINITION. Any claim by the Association or a teacher that there has been a violation, misinterpretation or misapplication of a specific term or terms of this Agreement shall be a grievance.

GRIEVING PARTY. Only teachers or their certified bargaining representative, shall have the right to institute and process grievances under this Article.

- L. The Employer has the right to suspend, demote, discharge or take other disciplinary action against a teacher for proper cause.
- M. Disciplinary action taken against any teacher shall be for proper cause and shall be subject to the Grievance Procedure. An expedited grievance procedure shall be used for suspensions or terminations of teachers. The informal discussion and/or Step 1 of the grievance procedure shall be waived.

If the grievance goes to arbitration, the arbitration process may be either conventional or expedited. If expedited arbitration is used, either party shall have the right to file closing briefs.

CBA ARTICLE IX entitled 'PERSONNEL INFORMATION' states in pertinent part:

- 2. 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 entitled "TEACHER PROTECTION" states in relevant part:

- 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.

CBA ARTICLE XXI entitled "MAINTENANCE OF BENEFITS" states in pertinent part:

- 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 the 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.

CBA ARTICLE XXIII entitled "ENTIRETY CLAUSE" states 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.

Editorial revisions in the ratification copy of this Master Agreement between the Board and the Association may be made, provided that no items are substantively altered.

6. HSTA's Position on Consult and Confer

The HSTA position is that the procedures for implementing BP 4211 and the impact of the policy are mandatory subjects of bargaining because BP 4211, SP 0211, and the IP violations could lead to discipline impacting wages, hours, terms and conditions of employment. HSTA's assertions rely upon the following testimony and evidence presented in the record.

Camacho acknowledged that a policy, a standard practice, and an implementation plan are different and that there was a consult and confer regarding BP 4211 and SP 0211 in accordance with the normal process.

Regarding an implementation plan, however, Camacho testified that there was no defined normal practice or process for DOE consultation or negotiation with the Union with respect to implementation plans and there was no consult and confer on the IP.

Nonetheless, Camacho stated that the Union's determination regarding whether there is a duty to bargain, rather than to consult and confer, is not limited to a policy or a standard practice

but by the document received from the DOE putting forward a position impacting wages, terms and conditions of employment.

At the hearing, Camacho stated that the terms "consult[]" and "negotiate" were different words with different meanings. Camacho further stated that the DOE's willingness to remain open for comments does not resolve the Union's concerns regarding the policy and the standard practice because of the Employer's right to implement upon receipt of those comments. With a negotiable subject, however, the Employer is required to negotiate and cease and desist from implementation.

Camacho testified that the failure to bargain concerns are not adequately addressed by the Union's right to grieve any alleged CBA violations by BP 4211 or SP 0211 through the grievance procedure to an arbitrator's decision and request appropriate remedies, including rescission of the discipline, because the issues of willful violations and "an insistence of one's right to impose changes despite the fact that there's already an agreement in place" remain.

Camacho testified that the specific concerns referenced in his February 15, 2008 email were further discussion taking the conceptual to the practical, including the definitions of what constitutes harassment, bullying, and discrimination and the appropriate regulations or procedures that flow from those definitions, the lack of an HSTA appointed teacher on the Safe Schools Community Advisory Committee that developed the policy, and clarity regarding the impact on teachers and the type of protections in place within the school setting. In short, Camacho stated, "[T]here was not a mutual understanding of the purpose of the policy as it relates to teachers," and the policy "had direct implications on the existing rights of teachers."

Camacho testified that when he sent the February 20, 2008 letter to Ikei, he believed that BP 4211 was a matter for consult and confer not bargaining. He characterized the statement in the letter, "As is the case for all policy and regulation proposals, the Association reserves its right to continue to comment as it evolves through implementation," as a generic statement "if the policy is revisited by the Board" and further clarified that, "[I]t could include standard practices, and ... in this case it probably would include the implementation plan."

Camacho explained that the reason that reservations were expressed rather than a request for bargaining over SP 0211 when the policy was presented was because the process is "multi-layer[ed]." Camacho further explained that while the Union may not see issues that should be negotiated until the standard practice articulates the procedure, it doesn't mean that "[W]e've waived our rights to negotiate the implementation of that policy," and the matter may shift from consultation to bargaining.

Camacho testified that between March and May 2008, “[T]here were a number of red flags,” such as the BOE acting on a policy without being informed that the Union had requested bargaining over the policy; a “rash” of complaints and investigations of teachers based on ambiguous standards, rather than the CBA Article V just cause standards; and due process concerns regarding the right to face your accuser, know the nature of complaint, have information related to the complaint, and not have anonymous complaints used for the purposes of adverse action; and numerous inconsistencies between existing contractual rights for teachers and new standards being developed through the rules under the policy. However, Camacho was unable to specifically note anything in the policy or standard practice that was vague and ambiguous or which altered the just cause or the confidentiality standards.

Finally, Camacho summed up his concerns regarding BP 4211, SP 0211, and the IP as fundamental due process that the investigation will be properly conducted, including the right to know the nature of and who filed the complaint and a reasonable expectation of a timely investigation; and the unilateral changes to CBA Article X, such as the anonymous complaints and the requirement to inform the teacher of such complaints and to Article IX, Section A, which requires that the teacher be informed of anonymous complaints and that anonymous complaints cannot be acted on unless the requirements of that provision are met regardless of federal law precluding disclosure of a complainant without a release. Camacho further expressed more specific concerns that the SP 0211 provision that any action be taken in accordance with DOE policies, regulations, rules, CBA provisions, and other laws does not relate to the release of confidential information; does not state that disciplinary actions will be taken with just cause; does not specify which CBA provisions will apply to any actions taken; is vague and ambiguous regarding the sharing of the complaint with the employee; and provides for an investigatory time frame that is too long after filing of the complaint, which require discussion in the context of the CBA.

II. PROPOSED CONCLUSIONS OF LAW AND DISCUSSION

A. Burden of Proof

HRS § 91-10(5) states:

- (5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

Hawaii Administrative Rules (HAR) § 12-42-8(g)(16) of the Board's rules states:

(16) The charging party, in asserting a violation of chapter 89, HRS, or this chapter, shall have the burden of proving the allegations by a preponderance of the evidence. The party raising any subsequent issue shall have the burden of proving that issue by a preponderance of the evidence.

See also: Hawaii Gov't Emp. Ass'n, Local 152 v. Keller, Board Case No. CE-13-597, Decision No. 456, 6 HLRB 421, 429 (2005); United Public Workers, AFSCME, Local 646 v. Waihee, Board Case No. CE-01-122, Decision No. 309, 4 HLRB 742, 750 (1990) (Waihee). The preponderance of the evidence is defined as "proof which leads the [trier of fact] to find that the existence of the contested fact is more probable than its existence." Minnich v. Admin. Dir. of the Courts, 109 Hawaii 220, 228 (*citing* Masaki v. Gen. Motors Corp., 71 Haw. 1, 14, 780 P.2d 566, 574 (1989)); Coyle v. Compton, 85 Hawaii 197, 202-03 (1997) (*citing* Strong, McCormick on Evidence § 339, at 439 (4th ed. 1992)). Further, "the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles." Waihee, 4 HLRB at 750.

This Board Member has further interpreted this section "to mean that the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles. Henceforth, if any party fails to present sufficient legal arguments with respect to any issue, this Board Member shall find that the party failed to carry its burden of proof and dispose of the issue accordingly." State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982) (Sanderson). *See also:* State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-63, Decision No. 162, 3 HPERB 47, 65 (1982); Hawaii Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Sasano, Board Case Nos. CE-03-222a, Decision No. 361, 5 HLRB 410, 421 (1994) (*citing* SHOPO v. Fasi, 3 HPERB 25, 46 (1982)).

B. Relevant Statutory Provisions

HRS § 89-3 states:

§89-3 Rights of employees. Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in

lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4.

HRS § 89-13(a) states in relevant part:

§89-13 Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

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

(7) Refuse or fail to comply with any provision of this chapter; [or]

(8) Violate the terms of a collective bargaining agreement[.]

HRS § 89-9 states in pertinent part:

§89-9 Scope of negotiations; consultation. (a) The employer and the exclusive representative shall meet at reasonable times, including meetings sufficiently in advance of the February 1 impasse date under section 89-11, and shall negotiate in good faith with respect to wages, hours, the amounts of contributions by the State and respective counties to the Hawaii employer-union health benefits trust fund to the extent allowed in subsection (e), and other terms and conditions of employment which are subject to collective bargaining and which are to be embodied in a written agreement as specified in section 89-10, but such obligation does not compel either party to agree to a proposal or make a concession.

**

(c) Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.

(d) Excluded from the subjects of negotiations are matters of classification, reclassification, benefits of but not contributions to the Hawaii employer-union health benefits trust fund, recruitment, examination, initial pricing, and retirement benefits except as provided in section 88-8(h). The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with the merit principle or the principle of equal pay for equal work pursuant to section 76-1 or which would interfere with the rights and obligations of a public employer to:

(4) Suspend, demote, discharge, or take other disciplinary action against employees for proper cause;

This subsection shall not be used to invalidate provisions of collective bargaining agreements in effect on and after June 30, 2007, and shall not preclude negotiations over the procedures and criteria on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions as a permissive subject of bargaining during collective bargaining negotiations or negotiations over a memorandum of agreement, memorandum of understanding, or other supplemental agreement.

Violations of the procedures and criteria so negotiated may be subject to the grievance procedure in the collective bargaining agreement.

HRS § 89-10(d) provides:

(d) Whenever there is a conflict between the collective bargaining agreement and any of the rules adopted by the employer, including civil service or other personnel policies, standards, and procedures, the terms of the agreement shall prevail; provided that the terms are not inconsistent with section 89-9(d).

C. Any Allegations Regarding The Refusal to Bargain Over BP 4211, SP 0211, and the IP Are Either Untimely Filed and/or Untimely Requested by The HSTA and Must Be Dismissed.

In Order No. 2548, the Board denied Respondents' motion to dismiss for untimeliness based on unclear and lack of material facts at the time regarding whether the Complaint was filed in a timely manner by failing to request negotiations within a reasonable time after receiving notice of the proposed policy. After the hearing on the merits, the Board concludes based on the full record that the allegations in the Complaint regarding the failure to bargain regarding BP 4211, SP 0211, and the IP are untimely and must be dismissed.

HRS §377-9(l) states, "No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." This 90-day requirement is made applicable to Chapter 89 prohibited practice complaints by HRS §89-14." In addition, HAR § 12-42-42(a) states:

A complaint that any public employer, public employee, or employee organization has engaged in any prohibited practice, pursuant to section 89-13, HRS, may be filed by a public employee...within ninety days of the alleged violation.

The Board has long held that this ninety (90) day statute of limitations is a jurisdictional requirement which the Board has no authority to waive. Accordingly, the failure to file a complaint within 90 days of its occurrence divests the Board of jurisdiction to hear the complaint. Nakamoto v. Department of Defense, Board Case No. CE-01-802, Order No. 2010, at *15 (May 1, 2013) (Nakamoto Order). The Board has construed the 90-day limitation period strictly and will not waive a defect of even a single day. Fitzgerald v. Ariyoshi, Board Case No. CE-10-75, Decision No. 175, 3 HPERB 186, 199 (1983) (*citing* Thurston v. Bishop, 7 Haw. 421 (1888) and Wong Min v. City and County of Honolulu, 33 Haw. 373, *reh. den.*; [sic] 33 Haw. 409 (1935)); Nakamoto Order, at *15; Valeho-Novikoff v. Okabe, Board Case No. CU-05-302, Order No. 3024, at *10 (October 6, 2014).

Moreover, the beginning of the limitations period does not depend upon actual knowledge of a wrongful act. Rather, the applicable period begins to run when "an aggrieved party knew or should have known that his statutory rights were violated." United Public Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443, 6 HLRB 319, 330 (2003) (*citing* Metromedia, Inc., KMBC TV v. N.L.R.B., 586 F.2d 1182, 1189 (8th Cir. 1978)).

Finally, "The lack of jurisdiction over the subject matter cannot be waived by the parties. If the parties not raise the issue, [the Board] *sua sponte* will, for unless jurisdiction of the [Board] over the subject matter exists, any judgment rendered is invalid." Tamashiro v. Dep't of Human Servs., 112 Hawaii 388, 398, 146 P.3d 103, 113 (2006) (*citing* Chun v. Employees' Ret. Sys. of the State of Hawaii, 73 Haw. 9, 14, 828 P.2d 260, 263 (1992)).

This Board Member determines that because the Complaint in this case was filed on May 27, 2008, the 90-day limitations period began to run on February 28, 2008.

HSTA does not dispute that the date from which to determine the untimeliness of the complaint runs from when the Union knew or should have known that a prohibited practice has occurred. However, HSTA maintains that in failure to bargain cases, the statutory bar does not run until the employer provides the union with notice of the unilateral change. Further, relying on the Board's decision in Hawaii Gov't Emp. Ass'n, Local 152, AFSCME, AFL-CIO v. Fasi, Board Case No. CE-03-28, Decision No. 73, 1 HPERB 641, 645-46 (1977) (Fasi), HSTA asserts that the claim for prohibited practice does not arise when the employer made the unilateral change, but when it clearly indicated "its intention not to negotiate" over the change. Accordingly, the Union takes the position that: 1) the date of accrual did not arise until April 14, 2008 when HSTA became apprised of recent DOE actions clearly establishing the unilateral changes brought by the implementation of BP 4211; and 2) until May 21, 2008, DOE did not take the position that the adoption and implementation of BP 4211 "is not a subject of negotiations."

This Board Member finds HSTA's position lacks merit for several reasons. First, any Complaint allegations regarding the negotiability of SP 0211 and the IP are obviously untimely. The HSTA request for bargaining on SP 0211 was not made until Camacho's July 1, 2008 letter, which was sent after the Complaint was filed. In addition, with respect to the IP, there simply was no specific request for bargaining. Second, regarding the issue of the negotiability of BP 4211, for the reasons more fully set forth below, this Board Member does not hold that the present case is a failure to bargain case. Hence, Fasi case is inapplicable because in that case, the Board held that the disputed issue of the installation, use, and removal of the two-way radio system was a negotiable subject. Third, even assuming that this Board Member accepts HSTA's position that this case is a failure to bargain case under Tomasu, HSTA's position regarding the time limitation runs afoul of the Court's reasoning in that decision for the following reasons.

Tomasu was an appeal from the Board's decision in Univ. of Hawaii Prof'l Assembly v. Bd. of Regents, Board Case No., CE-07-124, Decision No. 303, 4 HLRB 689 (1990) (UHPA). In that case, the Board dismissed the prohibited practice complaint based on a finding that the policy statement at issue was not bargainable because it merely complied with the federal Drug-Free Workplace Act (DFWA), 41 U.S.C. §§ 701-707 (1988); 15 U.S.C. § 634(b)(6); and further, that the need for bargaining had not yet arisen because the Board of Regents of the University of Hawaii (BOR) had not attempted to implement the policy statement. On appeal, the Hawaii Supreme Court (Court) reversed the circuit court's affirmance of the Board's decision, holding that because the DFWA inherently mandated implementation, the union "need not wait until the BOR attempts

an implementation of an apparatus to effectuate the policy"... before it can demand bargaining on bargainable topics potentially affected by the DFWA." Tomasu, 79 Hawaii at 163, 900 P.2d at 170. In so ruling, the Court reasoned:

Whether the UHPA is entitled to demand bargaining over the implementation of the policy statement, however, also depends on when the duty to bargain arises. The duty to bargain arises in two circumstances potentially applicable to this decision: First, the obligation to bargain collectively forbids unilateral action by the employer with respect to pay rates, wages, hours of employment, or other conditions of employment during the term of a labor contract, even if the action is taken in good faith. It is well established that an employer's unilateral action in altering the terms and conditions of employment, without first giving notice to and conferring in good faith with the union constitutes an unlawful refusal to bargain. Therefore, when the employer attempts to promulgate a policy that will affect bargainable topics, the employer cannot do so without first initiating bargaining on such topics.

Second, the duty to bargain also arises if a union unilaterally demands "midterm" bargaining, that is, bargaining midway through an active applicable collective bargaining agreement on bargainable subjects such as wages, hours, or terms of employment. In *National Treasury Employees Union v. Fair Labor Relations Authority*, 258 U.S. D.C. 176, 810 F.2d 295 (D.C. Cir. 1987), the United States Court of Appeals for the District of Columbia Circuit examined a request to bargain made under the auspices of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 701-7135 (1982 & Supp. II 1984), which dictates the scope of the employer's duty to bargain in the public sector. In *National Treasury*, the union made a written request to bargain with respect to certain conditions of employment, such as the use of government cars, permission to work at home, and worksite selection. The employer contended that it made no duty to bargain because the agency had made no changes in the areas covered by the proposals. The employer asserted that the duty to bargain midway through a collective bargaining agreement arises only when the agency proposes changes.

The *National Treasury* court examined the employer's duty to bargain in light of labor relations statutes enacted by Congress, the legislative intent behind the statutes, general principles of labor law, and analogous statutes within private sector labor law, all of which displayed a long-established precedent that the duty to bargain

extended to midterm proposals initiated by either management or labor, provided that the proposals do not conflict with the existing agreement. *See, e.g., NLRB v. Jacobs Mfg. Co., 196 F.2d 680, 684 (2d Cir. 1952).* Taking these considerations into account and recognizing the statutory goal of "equalizing the positions of labor and management at the bargaining table," the *National Treasury* court stated:

There is nothing inherently threatening to management prerogatives, however, in allowing midterm bargaining by the union. To allow management to retain the right to raise new issues, but to deny that right to the employees' representatives would produce an inequality in bargaining power without express statutory support or strong policy justification. To limit the right of the union in midterm bargaining would provide management with an unwarranted advantage which would violate a guiding purpose of the statute.

Consistent with the above theories, the BOR cannot unilaterally implement policies that affect bargainable topics (such as wages, hours, or terms of employment), and the UHPA should be able to demand bargaining midterm on topics subject to mandatory bargaining. Thus, in combination with the principles discussed by the HLRB in *Hawaii Fire Fighters*, the duty to bargain applies upon issuance of the policy statement if the topics covered in the statement over which the BOR is afforded discretion by the DFWA are subject to mandatory bargaining.

In the present case, the BOR asserts that because it has not yet attempted to implement the apparatus to effectuate the policy statement, the policy statement alone does not have an effect on wages, hours, or working conditions and therefore is not subject to the duty to bargain. We disagree.

The DFWA does not merely mandate a policy statement setting forth the goals of the university; it also requires implementation.

We therefore hold that, to the extent that the policy statement constitutes compliance with the DFWA, it is not bargainable. However, we also hold that, because the DFWA inherently mandates implementation, the UHPA need not wait until the BOR attempts an implementation of an apparatus to effectuate the policy. Because implementation

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-baggage men with the concomitant [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-baggagehandler classification without consultation [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 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. Kunitura, 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.

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.

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.

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.

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)

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[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.

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.

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.

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:

(4) Suspend, demote, discharge, or take other disciplinary action against employees for proper cause;

This subsection shall not be used to invalidate provisions of collective bargaining agreements in effect on and after June 30, 2007, and shall not preclude negotiations over the procedures and criteria on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions as a permissive subject of bargaining during collective bargaining negotiations or negotiations over a memorandum of agreement, memorandum of understanding, or other supplemental agreement.

Violations of the procedures and criteria so negotiated may be subject to the grievance procedure in the collective bargaining agreement.

(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^{xxx} 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,^{xxxiii} 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). ~~42~~ 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).

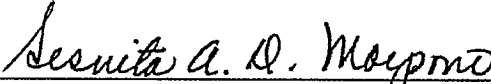
Accordingly, to summarize based on the foregoing, this Board Member concludes and holds that: 1) the allegations in the Complaint with respect to Respondents' failure to negotiate regarding BP 4211, SP 0211, and the IP are dismissed for lack of jurisdiction based on untimeliness; 2) even if the allegations 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, Member

ENDNOTES

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 to 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 Kauai, 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 with 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.

^{xxx} 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.

^{xxxi} 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*.