EFiled: Aug 16 2017 02:17PM HAST
Transaction ID 60997556
Case No. CE-01-539

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and PATRICIA HAMAMOTO, Superintendent, Department of Education, State of Hawaii and CONNECTIONS, A New Century Public Charter School, Respondents.	CASE NO. CE-01-539 DECISION NO.: 491 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

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

Pursuant to Hawaii Revised Statutes (HRS) § 91-11,[i] the Hawaii Labor Relations Board (Board) issued PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER on March 31, 2017, exceptions were filed by Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (Complainant or UPW) and Respondents PATRICIA HAMAMOTO, Superintendent, Department of Education, State of Hawaii (Hamamoto) and CONNECTIONS, A New Century Public Charter School (Connections, collectively Respondents) and oral argument held on those exceptions, as more fully set forth below. Accordingly, after review of the complete record, consideration of the exceptions filed by the parties, and oral argument thereon, the Board issues its FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER in this case.

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

or construed as a finding of fact. Any objection or exception not specifically adopted are denied, and those addressed are adopted only as specifically provided in this decision.

I. PROCEDURAL BACKGROUND AND FINDINGS OF FACT

A. Procedural Background

On August 18, 2003, the UPW filed this PROHIBITED PRACTICE COMPLAINT (Complaint) with the Board against then-Superintendent of Education Hamamoto, and John Thatcher, III (Thatcher), Chief Executive Officer of CONNECTIONS, a new century public charter school (Connections or the School). The Complaint alleged, among other things, that on or about September 5, 2000, James Ah Sing (Ah Sing) was hired as a part time custodian at the Mt. View location of Connections; that commencing on or about February 8, 2001 and thereafter, Ah Sing was employed as a full time custodian when Connections relocated its operations from Mt. View to its new Hilo location; that as a school custodian in Position No. 56376, Ah Sing subsequently became a civil servant, passed his probationary period, was covered by the Unit 1 collective bargaining agreement (CBA), and became a member of the UPW; and that on or about June 27, 2003, Respondents unilaterally changed the wages, hours, or work, and the other terms and conditions of employment under the CBA by terminating Ah Sing, effective June 30, 2003, without just or proper cause, eliminating or converting Position No. 56376 from a full time civil service position covered by the CBA to a non-civil service non-bargaining unit position; Respondents committed other acts and deeds to be established during hearing on the Complaint; as a direct result of the aforementioned conduct, Ah Sing sustained special damages (for loss of wages and benefits) and general damages and such aforementioned conduct is inherently destructive of employee rights under chapter 89 and unless enjoined by the Board will continue to cause irreparable harm to the UPW and the collective bargaining process contemplated by § 89-1, HRS.

The Complaint further alleged that Respondents' conduct constituted wilfull violations of the terms and conditions of the CBA union recognition (§ 1), discipline (§ 11), prior rights (§ 14), bill of rights (§ 58), department of education (§ 61), entirety and modification (§ 64), and memoranda of agreement with the UPW and the July 21, 2000, Memorandum of Agreement between the UPW and the DOE requiring all new century public charter schools (NCPCS) to comply with the CBA and to negotiate any changes to said agreement through the Office of Collective Bargaining with UPW (MOA) and constituted violations of HRS § 89-13(a)(8). The Complaint further alleged that Respondents' conduct "contravene[s] the duty to bargain in good faith over mid-term changes in wages, hours, and other conditions of employment under HRS §§ 89-3 and 89-9(a), and the duty to recognize the UPW as the exclusive bargaining agent of Unit 1 employees in HRS § 89-8(a), HRS" and that such "willful refusal and failure to comply with the provisions of HRS chapter 89 constitute prohibited practices under HRS § 89-13(a)(1), (5), and (7)."

The Complaint requested the following relief: declaratory relief in favor of Complainant; compensatory and other make whole relief to adversely affected employees; a cease and desist order prohibiting Respondents from engaging in prohibited practices; and other affirmative relief to ensure full compliance with chapter 89 and the applicable provision of the collective bargaining agreements.

On September 2, 2003, Respondents filed RESPONDENTS' ANSWER TO COMPLAINT.

On September 23, 2003, UPW filed a MOTION TO AMEND COMPLAINT to add § 12 (layoffs) as part of the provisions of the CBA that were wilfully violated. At the September 23, 2003 Prehearing Conference, Respondents had no objection to the Motion to Amend, and UPW stipulated to treating Respondents' Answer to Complaint as denying the Complaint as amended. The Complaint was treated by the Board to include the CBA § 12 (layoff) allegation, and the Answer was treated as denied by Respondents.

On September 30, 2003, Respondents filed RESPONDENTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT (FIRST MOTION TO DISMISS) for failure to state a claim upon which relief can be granted or for lack of jurisdiction based on a failure to exhaust contractual remedies, or in the alternative for summary judgment.

On December 3, 2003, the Board held a hearing on the First Motion to Dismiss. At that hearing, the Board stated that it was inclined to deny the motion. At the hearing, after the UPW made an oral motion to amend the Complaint to include a retaliation or discrimination claim, which was not opposed by Respondents, the Board orally ruled that material facts existed regarding the alleged retaliation or discrimination.

On March 16, 2004, UPW filed UPW'S MOTION FOR SUMMARY JUDGMENT based on a stipulation and order rendered in United Public Workers, AFSCME, Local 646, AFL-CIO, Board Case No. CE-01-537a (Stipulation). UPW contended that the Stipulation would apply to reinstate Ah Sing to his position at Connections.

On June 21, 2004, UPW filed UNION'S MOTION TO AMEND COMPLAINT to clarify the nature of the claims and the theory of the case and to include subsequent occurrences, events, and transaction material to the dispute. More specifically, the UPW sought to amend the Complaint to add claims that Respondents failed to comply with the Stipulation and the Board's March 29, 2004 oral granting of a motion for partial summary judgment; on or about June 4, 2003, Ah Sing was effectively laid off without compliance with a 90 day notice as required by the layoff provision of the CBA; Thatcher terminated a dump rubbish contract with Ah Sing worth approximately

$75.00 per week in retaliation for filing the Complaint; Respondents' failure to comply with the Stipulation constitutes unlawful discrimination against Ah Sing in his terms and conditions of employment in violation of HRS § 89-13(a)(3); and a claim for attorney's fees and costs,

On June 8, 2007, the Board issued a PROPOSED ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT, which stated in relevant part:

> Based upon the evidence in the record, given the confusion in Ah Sing's civil service status, Respondents' less than clear basis for terminating Ah Sing, and the confusion caused by DHRD's instructions to DOE on the rights of public charter school employees, the Board concludes that Ah Sing fell within the terms of the Stipulation and Order and should have been restored to his position under its terms. There being no remaining issues of material fact, the Board hereby grants Complainant's motion for summary judgment finding that Respondents violated HRS§ 89-13(a)(8) by not complying with the terms of the Stipulation and Order.

On June 29, 2007, the Board issued Order No. 2457, FINAL ORDER ADOPTING PROPOSED ORDER AND GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT, dated June 2, 2007.

On July 27, 2007, Respondents filed a NOTICE OF APPEAL TO CIRCUIT COURT from Order No. 2457 in the First Circuit Court in Civil No. 07-1-1397-07.

On August 1, 2007, Respondents filed an AMENDED NOTICE OF APPEAL in Civil No. 07-1-1397-07.

On August 6, 2007, UPW filed a MOTION TO ENFORCE BOARD ORDER 2457 with the Board.

On August 7, 2007, the UPW filed a MOTION TO DISMISS APPEAL FILED ON JULY 27, 2007 in the First Circuit Court for improper venue.

On September 26, 2007, the First Circuit filed an ORDER DENYING UNION'S MOTION TO DISMISS APPEAL FILED JULY 27, 2007 AND ORDER TRANSFERRING VENUE to the Third Circuit Court.

On October 23, 2007, the Board filed a PETITION FOR ENFORCEMENT OF BOARD ORDERS in S. P. No. 07-1-0054. On December 14, 2007, the Third Circuit Court issued an

ORDER GRANTING PETITION FOR ENFORCEMENT, and NOTICE OF ENTRY OF JUDGMENT AND JUDGMENT THEREON.

On December 3, 2008, in Civil No. 07-1-314, the transferred appeal from Order No. 2457, the Third Circuit issued a DECISION AND ORDER ON THE APPEAL OF RESPONDENT-APPELLANTS PATRICIA HAMAMOTO, SUPERINTENDENT, ET. AL. (Third Circuit D & O), dated December 3, 2008, vacating and remanding the case to the Board "for further proceedings consistent with the decision of this court." In so ruling, the Third Circuit overturned the Board's grant of summary judgment in favor of the UPW holding that the Board **"erroneously granted UPW's Motion for summary judgment because there are genuine issues of material fact at least as to whether (1) James Ah Sing was a member of the UPW collective bargaining agreement at the time he was terminated and (2) there is an unresolved controversy as to whether James Ah Sing was intended to be covered by Stipulation and Order Dated March 15, 2004, in United Public Workers, AFSCME, Local 646, AFL-CIO HLRB cases CE-1-537(a) et a [sic] seq."** (Bold and emphasis added). In so ruling, the circuit court further stated and concluded that, "It is apparent that the HLRB sought to resolve and determine the claims in the prohibited practices complaint but in doing so it improperly resolved genuine issues of material fact. As a consequence, the respondents were denied a contested case hearing on the issues." The circuit court further specified as examples of the Board's improper resolution of disputed issues of fact as follows:

> "19. Based on the record, the Board finds that given the Employer's varying versions of Ah Sing's Employment status and his separation from his job as a custodian and Connections at a time when the employment status of charter school employees was at best ambiguous and muddled, Ah Sing fell within the affected class referred to in the Stipulation and Order, Order No. 2237 and should have been reinstated. (Finding of Fact No. 19 at R-726)
>
> "On the record before the Board in this case, the Board can only conclude that Ah Sing's employment status and treatment by the Respondents were hopelessly muddled. The record reflects at least six alternative representations of his employment status and consequent reasons for termination"[ii]: (Discussion R-730)
>
> "And having concluded that Ah Sing was in all probability the victim of the confusion surrounding the employment rights and status of public charter school workers, the Board further concludes that it is neither necessary nor proper to put Ah Sing and the parties through the burden of the uncertainty, time and expense that would have been involved in sorting through the minutia of his particular circumstances." (Discussion, R-731)

Following remand, on July 29, 2009, Respondents filed RESPONDENTS' SECOND MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT (SECOND MOTION TO DISMISS) for failure to state a claim upon which relief can be granted, or in the alternative for summary judgment because there is no dispute that Ah Sing was never a civil service employee entitled to layoff rights.

On July 9, 2014, the Board issued Order No. 3005 DENYING RESPONDENTS' SECOND MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT; DENYING COMPLAINANT'S MOTION TO AMEND COMPLAINT; AND DENYING COMPLAINANT'S MOTION TO CONDUCT PROMPT HEARING AND EXPEDITIOUS RESOLUTION OF ISSUES ON REMAND. (Order No. 3005). In Order No. 3005, the Board more fully set forth the procedural history of this case, which is specifically incorporated herein by reference, with the following additions to avoid repetition.

In Order No. 3005, the Board denied UPW's Motion to Conduct Prompt Hearing and for an Expeditious Resolution of Issues on Remand, Filed May 19, 2004 as moot. The Board further denied UPW's Second Motion to Amend Complaint, filed on June 21, 2004, which sought to add claims that Respondents failed to comply with the Stipulation as well as the Board's oral ruling of March 29, 2009 and that Respondent's failure to so comply constitutes unlawful discrimination against Ah Sing in his terms and conditions of employment; (amendment denied for duplicativeness, as to Hamamoto because a Petition for Enforcement of Board Order was granted by the Third Circuit on December 14, 2007, and as to Connections because Connections was not a signatory to the Stipulation); that on or about June 30, 2003, Ah Sing was effectively laid off without compliance with a 90 day notice required by the CBA layoff provision (amendment denied due to delay, the failure to cure deficiencies in the previous motion to amend complaint, and the UPW's desire for expeditious resolution of the case); that on October 1, 2003, Thatcher terminated a dump rubbish contract with Ah Sing worth approximately $75 per week in retaliation for filing the Complaint (amendment denied as unnecessary and previously granted by the Board); and a request for attorney's fees and costs (amendment denied as unnecessary because of the Board's broad discretion to order remedies and express authority to order costs and attorney's fees pursuant to § 377-9(d)). Regarding Respondents' Second Motion to Dismiss, the Board denied the following motions for the following reasons: 1) summary judgment that Ah Sing was never a civil service employee entitled to layoff rights because of the Third Circuit's ruling overturning the Board's grant of summary judgment in favor of UPW based on a genuine issue of material fact regarding whether Ah Sing was a UPW member when he was terminated and whether Ah Sing was intended to be covered by the Stipulation and "where Respondents present no new evidence of changed circumstances" and Order No. 2457 in which the Board had previously found that "Ah Sing's employment status was 'hopelessly muddled' and that the record reflected 'at least six alternative representations of [Ah Sing's] employment status and consequent reasons for termination[;]'" 2) the motion to dismiss for failure to exhaust administrative remedies based on

the "law of the case" doctrine, finding that this issue had been previously raised by Respondents in their September 30, 2003 Motion to Dismiss, or in the Alternative for Summary Judgment, which was orally denied by the Board on December 3, 2003; 3) the motion to dismiss regarding the issue of charter school independence and the Superintendent's power to supervise or control the new century charter schools because of its relationship to the "unresolved controversy" on the issue of whether Ah Sing was intended to be or was covered by the Stipulation; and 4) regarding the retaliation claim based on a finding that a hearing on the merits was required.

On October 22 and 23, 2014 and on December 11, 2014, the Board conducted the hearings on the merits in this case on remand.

On October 30, 2015, the Respondents filed RESPONDENTS' POST-HEARING BRIEF.

On October 30, 3015, Complainant filed UNION'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER and UNION'S MEMORANDUM OF FACT AND LAW.

On March 31, 2017, the Hawaii Labor Relations Board (Board) issued a PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER (Proposed Findings and Conclusions)[iii] in the above-entitled case, which stated:

FILING OF EXCEPTIONS

> Any person adversely affected by the above Proposed Findings of Fact, Conclusions of Law, 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 being excepted to 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.

By Order No. 3243, filed on April 5, 2017, the Board approved STIPULATION AND ORDER TO RESCHEDULE DEADLINES RELATED TO HLRB'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION, AND ORDER extending the deadlines for the filing of exceptions to May 15, 2017 and a date for a hearing for oral argument on the exceptions to be set by the Board thereafter by agreement of the parties.

By Order No. 3261, filed on May 11, 2017, the Board granted a SECOND STIPULATION AND ORDER TO RESCHEDULE DEADLINES RELATED TO HLRB'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER extending

the deadlines for the filing of exceptions to June 13, 2017 and a date for a hearing for oral argument on the exceptions to be set by the Board thereafter by agreement of the parties.

On June 13, 2017, Respondents filed RESPONDENTS' EXCEPTIONS TO THE PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED March 31, 2017.

On June 13, 2017, UPW filed UPW'S EXCEPTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED MARCH 31, 2017 (UPW Exceptions).

On June 29, 2017, UPW filed UPW'S MOTION TO STRIKE EXHIBIT A OF RESPONDENTS' EXCEPTIONS TO THE PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED MARCH 31, 2017 AND REJECT THEIR EXCPETIONS FILED JUNE 13, 2017 (Motion to Strike).

On June 13, 2017, the Board issued NOTICE OF RESCHEDULED ORAL ARGUMENTS ON EXCEPTIONS TO JULY 14, 2017 setting a date of July 14, 2017 for the oral arguments on the Exceptions.

On July 14, 2017, oral argument on the exceptions was held. Attorney Rebecca Covert represented the UPW at the oral argument. Respondents' counsel did not appear. The Board staff contacted the office for Respondents' counsel of record Deputy Attorney General Jim Halvorson (Mr. Halvorson) and was told that his office did not have the oral argument on the calendar and that Mr. Halvorson was sick. The Board heard the Motion to Strike and the presiding Board Member J N. Musto (Musto) granted the motion. The Board then held the oral argument on the exceptions. Following oral argument, Board Member Musto took the matter under advisement.

On August 14, 2017, the Board issued a written ORDER GRANTING UPW'S MOTION TO STRIKE EXHIBIT A OF RESPONDENTS' EXCEPTIONS TO THE PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED MARCH 31, 2017 AND REJECT THEIR EXCEPTIONS FILED JUNE 13, 2017, in which the Board struck Exhibit A to Respondents' Exceptions and rejected Respondents' Exceptions.

B. FINDINGS OF FACT

Based on the full record herein, including the testimony and documentary evidence presented at the hearing on the merits on remand, the Board makes the following proposed Findings of Fact.

UPW is an employee organization within the meaning of HRS § 89-2[iv] and is the exclusive representative of nonsupervisory employees in blue collar positions in bargaining unit 1 (BU 1), as provided by HRS § 89-6.[v]

Ah Sing worked as a custodian with Connections from on or about September 5, 2000 until June 30, 2003.

Respondent Hamamoto, as the DOE Superintendent is, and was for all relevant times, a public employer within the meaning of HRS § 89-2,[vi] as an "individual who represents one or these employers or acts in their interest in dealing with public employees[,]" for employees belonging to bargaining unit 5, as provided by HRS § 89-6.[vii]

Respondent Connections, a new century public charter school, is and was for all relevant times, located on the Big Island. Connections was one of the first schools to receive a charter approved by the Board of Education on April 20, 2000 under Act 62 adopted in 1999 and was started as a startup charter school and were unable to become a conversion charter school. Connections was a K-6 charter school for the 2000-01 school year and K-12 for the 2001-02 school year. From the 2002-03 school year until 2005, Connections was a K-8 school because of inadequate funding to support a high school. In 2005, Connections received a sub grant from the Gates Foundation to establish a small high school.

The Governor of the State of Hawaii, is and was for all relevant times, the public employer within the meaning of HRS § 89-2 for State of Hawaii employees in BU 1, as provided by HRS § 89-6(d)(1).

The UPW and the State of Hawaii, the Counties of Maui, Hawaii, and Kauai, and the City and County of Honolulu entered into a CBA for BU 1 on December 26, 2000, effective July 1, 1999 to June 30, 2003, which was signed by then Governor Benjamin Cayetano, State's then Chief Negotiator Davis Yogi (Yogi), and then Budget and Finance Director Neal Miyahira, and UPW by then UPW State Director Gary Rodrigues (Rodrigues), among others, and representatives for the Counties of Maui and Kauai.

On or about September 5, 2000, Connections, a school within a school in Mountain View School on the Big Island since 1995, hired Ah Sing for a custodial position under an exempt, non-civil service appointment with a not to exceed (NTE) date of June 30, 2001 to work 19 hours a week at a monthly pay rate of $1,855. Effective December 12, 2000, Ah Sing's appointment was changed to a BC service/maintenance worker in position number 00111418 under the same terms as the September 5, 2000 appointment, including the NTE date of June 30, 2001.

On July 21, 2000, the UPW, the State of Hawaii, and the DOE entered into the MOA, signed by Yogi, Rodrigues, and DOE then Superintendent Paul LeMahieu (LeMahieu), which provided in relevant part:

> Chapter 302A. Education, Section D., New Century Charter Schools, Hawaii Revised Statutes shall be implemented as follows:
>
> 1. New Century Charter Schools shall comply with the Unit 1 Collective Bargaining Agreement that expired on January 31, 2000 until it is replaced by a new Collective Bargaining Agreement.
>
> 2. The Union and the Employer may enter into supplemental agreements that modify the Unit 1 Collective Bargaining Agreement.
>
> 3. It shall be the responsibility of the New Century Charter School to specify, prepare, provide staff support, i.e. providing information as may be necessary to consider proposals, etc., and participate in the negotiation of supplemental agreements to the Collective Bargaining Agreement under the auspices of the Office of Collective Bargaining.
>
> 4. New Century Charter Schools proposing supplemental agreements are urged to consult on proposed supplemental agreements with the Department of Education, that shall, to the extent resources are available and within operating priorities provide advisory assistance, prior to submitting proposals to the Office of Collective Bargaining.

In 2000-01, Connections was covered by the master agreement but did not enter into a supplemental agreement with UPW.

At that time, the understanding was that the employees were employed by the local school board. However, the personnel notification forms and salaries were being processed and paid through the DOE payroll. Connections used the DOE personnel and payroll system until 2005.

For all relevant times, the DOE Charter School Office headed by Chuck Higgins (Higgins) was the conduit between the DOE and the charter schools, such as generating personnel forms.

On January 29, 2001, Connections entered into an amended lease with MARKET CITY, LTD. and OCEAN VIEW CEMETERY, LTD. for the Kress Building in Hilo, Hawaii, effective April 1, 2001.

AN EMPLOYEE PERSONNEL ACTION(S) REPORT shows that effective February 9, 2001, Ah Sing's position was reclassified to an "exempt" "BC Service/Maintenance Wkr" with a change in work week from 19 hours to 40 hours per week and an NTE date of June 30, 2001 subject to annual funding and needing review but for more than 89-days. The Union Code listed is 61 (exempt).

On February 13, 2001, Ah Sing received a copy of the CBA; and on March 23, 2001, a New Employee Benefits Packet, including enrollment information for medical, prescription drug, vision, dental, and group life insurance plans for himself and his family.

School custodians are included as members of BU 1, unless otherwise excluded by HRS § 89-6(f) (for example, part-time employees working less than twenty hours per week, or temporary employees of three months' duration or less).

Ah Sing met with UPW Division Director Roland Kadota (Kadota) as part of the process to obtain BU 1 membership.

On July 1, 2001, Ah Sing was reappointed to his position designated as an exempt appointment with an NTE date of July 31, 2001. The EMPLOYEE PERSONNEL ACTION(S) REPORT, signed by then DOE Superintendent LeMahieu and dated June 20, 2001, notes, "Maintenance Custodian Employment is temporary and at will. Terms and conditions of employment may be corrected and/or employment may be terminated at any time within 24 hours notice[,]" and under Union Code "01."

On July 23, 2001, Ah Sing submitted an Application for Civil Service Positions for a Custodian II position and an Employment Suitability Check for Dept. of Education Employees.

On July 24, 2001, Connections recommended a "Limited Term-Temporary" appointment for Ah Sing to the full-time School Custodian II position number 56376, effective July 31, 2001 with an NTE date of June 30, 2002.

An EMPLOYEE PERSONNEL(S) ACTION REPORT, signed by LeMahieu and dated July 25, 2001, for Ah Sing shows a pay adjustment for the BC Service/Maintenance Worker position no. 111418, with an exempt classification, on July 1, 2001 from $ 1,855 to $ 1,892 and a correction of that rate due to July 2, 2001, effective August 1, 2001.

Effective August 1, 2001, an EMPLOYEE PERSONNEL ACTION(S) REPORT, signed by LeMahieu and dated July 23, 2001, for Ah Sing shows that he was in an exempt position no. 111418 BC described as service/maintenance worker, with a Union code 01, effective August 1, 2001, with an NTE date of 8/31/2001 and notes, "Maintenance Custodian Employment is

temporary and at will. Terms and conditions of employment may be corrected and/or employment may be terminated at any time within 24 hours notice."

On August 13, 2001, Ah Sing submitted a Separation Notice from his custodian position no. 111418, effective August 1, 2001, to accept DOE position no. 56376.

Effective August 2, 2001, an EMPLOYEE PERSONNEL ACTION(S) REPORT, signed by LeMahieu and dated August 21, 2001, for Ah Sing shows "[t]ermination from BC Service/Maintenance Worker" "Close of Business: 08-01-01//Accept LTA position #56376 Cust II 100% at Connection PCS."

An EMPLOYEE PERSONNEL ACTION(S) REPORT, dated August 22, 2001, for Ah Sing shows a rehire as a School Custodian II fulltime position no. 56376 with employee class noted as "LTA" (limited term appointment) and a Union Code 01 with an appointment NTE date of June 30, 2002 authorized by LeMahieu as appointing officer.

All the employees at Connections, including Ah Sing, were hired by the local school board on a year-to-year basis with an NTE date of June 30th of each year.

While employed in a full-time position, Ah Sing worked from 5:30 a.m. to 2:30 p.m., which was the end of the school day.

A January 11, 2002 Hawaii Tribune Herald article reported that Connections filed a lawsuit against the State of Hawaii in 2002 for allegedly failing to properly fund the school by changing the manner in which the State Auditor reimburses charter school for operational costs effectively cutting funds to Connections by more than 30 percent and denying Connections students "equal protection under the law" and for allegedly forcing the school from its Mountain View School location and not providing funds for a new location in violation of the Hawaii State Constitution.

Connections Supervising Teacher Thatcher on behalf of Connections signed a service agreement with Ah Sing as owner of Jimmy's Quality Service for commercial trash hauling services five times a week at a rate of $75.00 per week or $300.00 per month, commencing January 13, 2002 but without any end date.

In a March 20, 2002 letter to Ah Sing from Connections Director of Operations Tom Helm stated, in relevant part:

> The Local School Board has authorized your continued employment with Connections Public Charter School for school year 2002-2003.

> To insure proper planning for our next academic year, it is essential that we have written confirmation of your acceptance. We understand this does not restrict your opportunity to seek a transfer. Acceptance of this position is contingent upon availability of adequate funding.
>
> Please submit your response no later than April 5, 2002. The section below is to be used to indicate your acceptance of this offer of employment.

Ah Sing signed and dated the letter April 2, 2002.

An October 17, 2002 EMPLOYEE PERSONNEL ACTION(S) REPORT for Ah Sing shows Ah Sing appointed by Hamamoto to the School Custodian II position no. 56376, effective with the following notations of Employment Class as "TEMP" with a "Conversion to Civil Service Member w/ NTE 06-30-03, July 2, 2002"; a "Conversion to Probational Appointment /w NTE 06-30-03, effective July 1, 2002; and a pay increase from $1949 to $1988, effective June 1, 2002.

Ah Sing passed the probationary period.

The Minutes of the May 5, 2003 Connections Local School Board meeting stated:

> *Action Taken*: Mr. Greenblatt made a motion to decline to renew James Ah Sing's 89 day contract as of June 30, 2003. Mr. Suzuki seconded the motion and it was approved unanimously.

By a May 6, 2003 Memorandum from Connections Local School Board President Lawrence T. Jackson (May 6, 2003 Memorandum), Ah Sing was notified as follows:

> On Monday, May 5, 2003, the Connections PCS Local School Board took action to decline to renew your 89 day contract as of June 30, 2003. Please discuss this matter with Mr. John Thatcher, Connections PCS Chief Educational Officer, if you have any questions.

Ah Sing did not think that he was an 89-day hire, but he left employment immediately after receiving the notice.

A POSITION CONTROL form, dated May 16, 2003 and signed by Higgins, requested that Position No. 56376 be abolished.

Ah Sing continued picking up the rubbish after his custodian position appointment ended until Thatcher, then Connections student administrative assistant Sandra Kelley, or someone at

Connections told him "they had to cut all ties with me because of this legal thing going on or something".

On June 9, 2003, Director of Human Resources Development (DHRD) Kathleen N.A. Watanabe (Watanabe) sent a letter to Hamamoto entitled Procedures for Hiring Public Charter School Employees, which stated in relevant part:

> As you know by now, the Department of Human Resources Development (HRD) has taken the position that, based on the Public Charter School Law, employees of the Charter Schools do not have civil service status. This also means that DOE civil service employees who become employees of a Public Charter School will lose their civil service status.
>
> We understand that there has been some confusion on this matter and we would like to take this opportunity to clarify what HRD will be doing to correct this problem prospectively.
>
> By the way of background, we have reviewed a memorandum dated January 2, 2001, from the DOE Personnel Director Sandra McFarlane to four Public Charter Schools on the Big Island. The four Public Charter Schools were Connections New Century PCS, Kunu O Ka 'Aina PCS, West Hawaii Explorations Academy PCS, and Waters of Life New Century PCS.
>
> In her memorandum, Ms. McFarlane noted that, for the SY 2000-2001, the positions created for Public Charter School employees were exempt positions and that the appointments of the Public Charter School employees into these positions were exempt appointments. Ms. McFarlane continued by saying that, beginning with SY 2001-2002, all of these exempt positions as well as any newly created classified positions would not be "temporary civil service positions." Accordingly, Ms. McFarlane explained that the filling of these "temporary civil service positions" had to be conducted in accordance with established civil service rules. Ms. McFarlane further instructed the four PCS that they should inform their current exempt employees that they had to apply through the normal civil service recruitment process in order to be considered for the positions they currently held.
>
> Based on DOE's belief that PCS employees were civil service employees, the DOE has been assisting the PCS to fill the Public Charter Schools' "civil service" positions through the normal civil service recruitment process. For example, the DOE, on behalf of the PCS, has been requesting the lists of eligibles [sic] from HRD (HRD Form 305); and HRD has been providing these lists to DOE.

It is our understanding that these requests from DOE did not expressly indicate that the list of eligibles [sic] would be used for a Public Charter School position. The only indication that the DOE request would be used for a Public Charter School position (and not for a DOE public school position) was the notation "PCS" on the request. Other than this notation, there was no way for HRD to know that the DOE request for a list of eligibles was for a Public Charter School position.

In light of this, HRD was unaware (until a few days ago) that its lists of eligibles were being used to fill Public Charter Schools' "civil service" positions.

To correct this misunderstanding, we respectfully request that, effective immediately, DOE stop asking HRD for lists of eligibles [sic]for PCS positions. It is not appropriate to use HRD's lists of eligibles [sic] to fill noncivil service positions.

In addition, we will alert our staff to look for the "PCS" notation on these requests just in case your staff inadvertently submits a request for a PCS position. However, because DOE is the requesting agency, we believe that DOE (rather than HRD) is in the better position to stop these requests to fill PCS positions.

From our side, unless otherwise advised by the Attorney General's office, we will stop sending you any list of eligibles [sic] where the request indicates that is for a Public Charter School position. These requests usually have the notation "PCS" on them. This decision is based on our belief that PCS do not need to fill its positions through the normal civil service recruitment process.

To avoid any further confusion, we ask that you return any list of eligibles [sic] we may have sent you for a PCS position.

Finally, please contact us at 587-1100 so we can discuss how we are going to resolve the problem of PCS employees who have already been selected through the civil service recruitment process and who may, therefore, believe that they have civil service status. This includes the situation at Lanikai Elementary PCS and Wai'alae Elementary PCS, as well as with the other PCS that may have hired employees through the civil service recruitment process.

(Emphasis added)

Watanabe sent a follow-up letter to Hamamoto, dated June 10, 2003, entitled Status of Public Charter School Employees, which provided in relevant part:

> We understand that, at the Board of Education meeting on June 5, 2003, you recommended to the Board of Education that the Board of Education issue a public school charter to Waimea Middle School and the Ho'okako'o Corporation, with the stipulation that DOE civil service (classified) employees currently at Waimea Middle School remain employees of the DOE for one year so as to allow them to retain their civil service status during this one year transition period.
>
> We hereby acknowledge your recommendation and stipulation. In addition, we believe that your recommendation and stipulation will not conflict with our position, which is that civil service employees will lose their civil service status if they become public charter school employees. We see no conflict because, under your recommendation and stipulation, the DOE civil service employees will not become employees of the public charter school. They will remain employees of the DOE. In light of our understanding, your recommendation and stipulation would not conflict with our position.
>
> (Emphasis in original)

Watanabe sent a letter to Hamamoto, dated June 12, 2003, entitled Status of Public Charter School Positions and Employees stating in relevant part:

> Based on our position that Public Charter School employees are not civil service, we are hereby requesting that the DOE convert all Public Charter School positions to reflect the fact that these positions do not have any civil service status. We are also asking that the status of the incumbent in these Public Charter School positions be changed to reflect the fact that the incumbent does not have any civil service status. We are asking that this conversion of the position and the incumbent's status **be done by June 30, 2003**, which is the NTE date set for a lot of these positions.
>
> In addition, we wish to inform you that your department's requests to extend 89-day appointments for incumbents in a Public Charter School position, are not required to be processed through this department. Again, the reason for this is because the Public Charter School position is not a civil service position. Accordingly, any such request currently pending with this department will be returned to your department without any action taken.
>
> (Emphasis and bold added)

Watanabe sent a letter to Hamamoto, dated June 13, 2003 (Watanabe June 13, 2003 letter), regarding "Return of 89-day Appointment Extension Requests for Charter Schools," which stated in pertinent part:

> As a follow up to our letter dated June 12, 2003 concerning the status of public charter school positions and employees, we are returning the eight (8) requests for the third extension of 89-day non-civil service appointments in public charter schools. This is because of our earlier stated reason that the Public Charter School position is not a civil service position. These requests are being returned to your department without any action being taken.

On June 13, 2003, Hamamoto sent a Memorandum to Watanabe entitled "STATUS OF PUBLIC CHARTER SCHOOL POSITIONS AND EMPLOYEES," (Hamamoto June 13, 2003 Memo) which stated in relevant part:

> Thank you for taking the time to discuss the above as well as working to seek reasonable options. As stated, we acknowledge the Department of Human Resources Development (DHRD) position that Public Charter Schools employees do not have civil service status and that the DOE must convert temporary civil service employees to non-civil service employee status by June 30, 2003. Because of the short timeline, we are requesting **90 days beyond the June 30, 2003 deadline** to complete this personnel action so that these employees can continue to be paid.
>
> Also, there are a number of permanent civil service employees in our conversion charter schools (Lanikai and Waialae Elementary School(s) whose status we will need to address. To facilitate this issue, the Board of Education has requested a written opinion from the Attorney General to determine if the law intended to exclude these employees from civil service status. In light of this request, we are also requesting that the timeline for these employees be determined after we receive the Attorney General's opinion.

(Emphasis and bold added)

Watanabe sent another letter to Hamamoto, dated June 18, 2003 (June 18, 2003, 2003 letter), which provided in pertinent part:

> Based on your request, the Department of Human Resources Development (HRD) has agreed that the Department of Education (DOE) will have an extension of 90 days beyond the June 30, 2003 deadline within which to convert the temporary civil service employees of the Public Charter Schools to non-civil service status. This 90-day extension is being granted so that these employees can continue to be paid, without interruption. The new deadline for the conversion will be **September 30, 2003**. Notwithstanding this new deadline, we still expect the conversion of these positions to be done as soon as possible.
>
> With regards to your request that the conversion deadline for the "permanent civil service employees" be determined after receipt of the Attorney General's opinion, we are unable to give you a blanket approval of your request at this time. For now, we understand that you are waiting for the Attorney General's opinion. However, if the opinion not issued within a reasonable time, we will contact to you to discuss what further action will be required.

(Second emphasis and bold added)

On a SEPARATION NOTICE (Classified Personnel) form for Ah Sing from School Custodian II Position No. 56376 Connections Public Charter School, signed by both Thatcher and Higgins, "Other position is not being renewed" was checked for Nature of Separation and the effective date of separation provided was June 30, 2003.

In response to a request from Kadota for information regarding the public charter schools and "any employees that might be impacted by the change of civil service status", DOE Personnel Regional Officer Ronald H. Furukawa (Furukawa) sent a July 3, 2003 letter transmitting a "Listing of Public Charter School Civil Service Employees (lines 42-67)" (Furukawa Listing), which listed "Ah Sing, James A." on line 44 under Connections New Century PCS as a School Custodian II and a 6/30/03 date.

Connections CEO Thatcher sent a letter, dated July 17, 2003, to Ah Sing stating in relevant part:

> Our Local School Board has decided that we can no longer afford to provide custodial services at the Kress Building given the limited funds we will be receiving for the coming school year. Your position (#56376) as a School Custodian II will be eliminated. Thank you for your understanding.

(Emphasis added)

An EMPLOYEE PERSONNEL ACTION(S) REPORT, signed by Hamamoto, dated July 25, 2003, and effective July 1, 2003 noted the end of Ah Sing's employment as a School Custodian II stating, "Duration of temp employment ended COB 06/30/03."

An INFORMATION AND JUSTIFICATION FOR REQUESTED POSITION ACTION regarding Position No. 56376 School Custodian II requested abolishment July 1, 2003 with a stated justification of "Not enough funding available at school."

The Connections PCS Budget Projections for SY 2003-2006, Balance Sheets showed a deficit of $ 25,239.50, and the Connections local school board eliminated the educator assistant, a teacher, and Ah Sing as cost saving measures because their salaries exceeded $30,000. The lawsuit reported by the January 11, 2002 Hawaii Tribune Herald was settled in 2004 or thereafter and one of the causes for the financial concern.

On or about July 17, 2003, Ah Sing met with Kadota regarding the ending of his employment at Connections. Ah Sing did not file a grievance nor did UPW contact Connections because UPW State Director Dayton Nakaneula (Nakanelua) told Kadota that a prohibited practice would cover, so no grievance needed to be filed.

Connections did not hire a full-time custodian until 2013 when the need arose for grounds keeping and maintenance on a long term lease property and minor maintenance on the Kress Building and high school space at Nani Mau Gardens. The employee is a regular full-time employee and UPW member.

On July 23, 2003, the Office of the Attorney General provided a legal opinion in response to a June 16, 2003 request regarding whether employees of Public Charter Schools are entitled to civil service status under Public Charter School Law (Section 302A-1181, HRS). The opinion concluded, in part, "New Century Charter Schools have been exempted from the requirements and restrictions of Hawaii's personnel and civil service laws and regulations. This conclusion is consistent with the express language of HRS § 302A-1184 and the legislative intent underlying the New Century Charter Schools. As a result, positions at New Century Charter Schools are excluded from the civil service and employees of New Century Charter Schools will not have civil service status regardless whether newly established or a conversion of an existing public school. However, when an existing public school converts to a New Century Conversion Charter School, before existing employees may be displaced from their civil service positions as a result of the conversion, layoff rights and procedures must be applied in accordance with the appropriate bargaining agreement or Chapter 89C."

An October 11, 2003 Declaration of Roland Kadota (Kadota Declaration), Paragraph 11. stated in relevant part:

> 11. Prior to the filing of the foregoing prohibited practice complaint I was asked by union counsel (on or about June 27, 2003) to investigate the impact of the unilateral decision and actions by DHRD upon classified employees and positions of the DOE on the Big Island of Hawaii. I contacted Ronald Furukawa, personnel regional officer of the office of human resources of the DOE to provide a listing of all DOE employees in public charter schools on the island covered by the unit 1 agreement and to specify their civil service status. On or about July 3, 2003 Mr. Furukawa provided me a list of affected employees and positions in the various charter schools. Exhibit 18 is a true and accurate copy of the letter I received from Mr. Furukawa and the enclosed information he provided. On or about July 11, 2003 I contacted Ronald Furukawa to obtain additional information regarding the dates of hire, civil service and bargaining unit status of the employees listed in his July 3, 3002 letter, including James Ah Sing. I learned from Mr. Furukawa that the DOE was preparing a listing of all positions and employees on a statewide basis. I also learned at that time (from Mr. Furukawa) that James Ah Sing would not be adversely affected immediately since his employment would not continue beyond June 30, 2003.

(Emphasis in original)

On August 11, 2003, Hamamoto sent a Memorandum to Watanabe, which acknowledged a 90-day extension to DOE to convert Public Charter School Employees to non-civil service status and their immediate replacement of vacant civil service PCS positions with exempt positions. In addition, Hamamoto proposed the following:

> In regards to the future status of all PCS employees, our primary request is to freeze in place their "civil service" status as of June 30, 2003 and allow them one chance to re-enter the DOE as "civil service" employees at any time during their careers. This is similar to arrangements that have been agreed to by teachers and proposed to educational officers who move to a PCS.
>
> If our primary request is not possible, then we would like you to consider an alternative request. We have recently established a Memorandum of Agreement (MOA) with the Hawaii Government Employees Association (HGEA) for the affected employees of Waimea

Middle School in its conversion to a PCS. The MOA allows the PCS employees to retain their "civil service" rights and benefits through June 30, 2004. This will provide these PCS employees with a window of opportunity to seek transfers to other DOE or State positions as a "civil service" member, if they wish to remain in the civil service system.

Our request is that all current "civil service" PCS employees be provided the same window of opportunity. Approximately 26 employees are affected, 12 of whom are permanent civil service employees at Lanikai and Waialae Elementary Schools, which were DOE conversion schools. Because of the serious implications to their employment status, we wish to provide them a sufficient transition period.

While we acknowledge your Department's position in regards to the PCS employees status, we believe that the affected employees need additional time to make appropriate decisions and to transition out of their schools if they desire to seek other employment in order to retain their "civil service" status.

On September 10, 2003, Watanabe responded to a letter from Wai'alae School Board Chair Robert Watada, which stated in pertinent part as follows:

Thank you for your letter of August 26, 2003, expressing your concerns for DHRD's decision to change the status of Public Charter School "civil service" employees to exempt status.

First of all, our decision is based on Hawaii's Public Charter School Law, which provides that new century charter schools shall be exempt from all applicable state laws, except collective bargaining under Chapter 89, discrimination practices under section 378-2, and health and safety requirements. See, HRS Section 302A-1184.

Based on this statutory provision, it is our position that Public Charter Schools are not subject to Chapter 76, which is Hawaii's Civil Service Law. Our position has been supported by a recent Attorney General's opinion issued to the Board of Education.

In light of this statutory provision, we informed Superintendent Hamamoto that the DOE should convert the Public Charter School (PCS) employees, who have a temporary appointment (i.e., an NTE or Not To

Exceed date), to an exempt status at the time their temporary appointment expired. Our records indicated that quite a few of these PCS employees had an NTE date of June 30, 2003. Superintendent Hamamoto immediately informed us that, because of the shortness of time, such an action would result in these employees not receiving their paychecks. Superintendent Hamamoto consequently requested an extension of three months, to September 30, 2003. Because of my concern that these PCS employees would not be receiving their paychecks, I agreed to the three-month extension.

In addition, we have been in consultation with UPW and HGEA to discuss a possible resolution to this problem, especially with respect to "civil service" employees at Lanikai and Wai'alae who remained at these respective schools, after these schools converted to a new century charter school. Discussions with the two unions are still taking place, but we hope to have a mutually agreeable solution soon.

In the meantime, the September 30, 2003 deadline is quickly approaching. Therefore, in light of the concerns expressed in your letter, we will inform Superintendent Hamamoto that the DOE can have another three month extension for these PCS employees whose temporary appointments will be expiring soon. We will ask that the DOE not convert these PCS employees with soon-to-be expired temporary appointments, to exempt status, until after December 31, 2003. It is our desire that, by that time, we will have reached an agreement with UPW and HGEA on how to deal with the status of these PCS employees.

(Emphasis added) On December 18, 2003, Watanabe sent a letter to Hamamoto, which stated in pertinent part:

In September 2003, we informed you that Public Charter School employees who have temporary appointments, could have their temporary appointments extended to December 31, 2003. It was our hope that by December 31, 2003, we could reach some kind of agreement with the UPW and the HGEA on how to deal with the status of these PCS employees. While we have not been able to reach an accord with the UPW or the HGEA, we have subsequently been tasked by the Governor to assist in the resolution of this problem.

> To carry out this assignment, we have been meeting with the PCS administrators to ascertain what they would want the status of their employees to be. It is our belief that resolution of this matter will require some kind of legislative solution. To allow for this possibility, we are willing to let you extend the temporary appointment of these PCS employees to June 30, 2004. Hopefully, by then, we will have legislative clarification on the status of these PCS employees.

(Emphasis added)

On March 15, 2004, a STIPULATION AND ORDER No. 2237 was signed and filed in United Public Workers, AFSCME, Local 646 v. Watanabe, Board Case No. CE-01-537a, by the parties in that case, with the exception of Watanabe. The UPW; the Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO; Patricia Hamamoto; and the Board of Education signed the Stipulation, which stated in relevant part:

> COME NOW the United Public Workers, AFSCME, Local 646, AFL-CIO (UPW), the Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA), Patricia Hamamoto, and the Board of Education (Employer), by and through their undersigned counsel and stipulate to the following in the above referenced case:
>
> 1. The UPW is an employee organization and the exclusive representative, as provided under HRS § 89-2, of employees in bargaining unit 01, non-supervisory employees in blue collar positions.
> 2. The HGEA is an employee organization and the exclusive representative, as provided under HRS § 89-2, of employees in bargaining units 02, supervisory employees in blue collar positions, 03, non-supervisory employees in white collar positions, and 04, supervisory employees in white collar positions.
> 3. Patricia Hamamoto, superintendent of the Department of Education, and the Board of Education are a public employer within the meaning of HRS § 89-2, and are hereafter referred to as "Employer."
> 4. The UPW, HGEA, and the State of Hawaii are at all times relevant herein parties to the collective bargaining agreements covering employees in bargaining units 01, 02, 03, and 04.
> 5. Classified employees of the Department of Education (DOE) covered by these collective bargaining agreements have historically and customarily been part of the "merit" or "civil service" system of the State of Hawaii. There are approximately 150 classified positions of DOE

which are in public charter schools and covered by such civil service system.

6. The collective bargaining agreements contain provisions for the maintenance of prior rights of employees pursuant to civil service statutes and rules, and require negotiations before changes in conditions of work may be implemented.
7. On or about June 9, 2003 the Department of Human Resources Development (DHRD) informed Employer of its position (and policy) that employees of public charter schools in the DOE "do not have civil service status" and are no longer part of the merit system.
8. On or about June 12, 2003 DHRD requested Employer to "convert all public charter school positions to reflect the fact that these positions do not have civil service status" by June 30, 2003, and thereafter informed Employer that DHRD would not provide "certified lists of eligible applicants" and "civil service appointments may not be made to fill public charter school positions."
9. On and after July 8, 2003 the aforementioned DHRD position, policy, and actions were communicated to public charter school administrators and employees.
10. As a direct consequence various public charter school employees (in order to preserve and maintain their civil service status, rights and benefits), initiated transfers and other changes in their terms and conditions of work.
11. As a further consequence on or about July 1, 2003 and thereafter, DOE failed to process for hiring approximately fifteen (15) or more public charter school employees in classified positions through the statewide merit system for compliance with civil service requirements, and as a result these employees are currently exempt from civil service coverage.
12. On or about January 13, 2004 public charter school employees were informed by Employer that the June 30, 2003 deadline for compliance with the DHRD position and policy had been extended to June 30, 2004, and that public charter school employees with civil service appointments would continue "with civil service status through June 30, 2004."
13. On or about March 5, 2004 Employer was informed by DHRD that the June 30, 2004 deadline could be extended to September 30, 2004.
14. Employer hereby stipulates and agrees to cease and desist from implementing the aforementioned DHRD position or policy regarding loss of civil service status for public charter school positions and employees, and to make whole all adversely [sic] employees (including

but not limited to the restoration or return of said employees to their former public charter school positions without loss of rights, privileges, and benefits).

15. Within 30 days from the date of this Stipulation and Order Employer shall process all currently exempt public charter school employees in classified positions through the statewide merit system and restore them to civil service status. All classified positions in public charter schools shall be restored to the merit system within thirty days.
16. Within 30 days from the date of this Stipulation and Order Employer shall provide to UPW and HGEA a report of its compliance with the make whole provisions herein, and shall provide all public charter school employees a copy of this Stipulation and Order.
17. No changes in the terms and provisions of this Stipulation and Order shall be made, except by negotiations and mutual consent of the parties prompted by legislative clarifications hereafter to the public charter school laws or as a result of a final decision and order of the Hawaii Labor Relations Board (subject to judicial review) in this or other related proceedings.
17. [sic] In accordance with the terms and conditions herein Patricia Hamamoto and the Board of Education shall be dismissed as respondents in the above referenced case.

(Emphasis added)

II. 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.

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). *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)). III. RELEVANT STATUTORY PROVISIONS

HRS §89-2 states in pertinent 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. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

HRS § 89-3 provides:

> **§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 § 89-8(a) provides:

§89-8 Recognition and representation; employee participation. (a) The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership. Any other provision herein to the contrary notwithstanding, whenever two or more employee organizations which have been duly certified by the board as the exclusive representatives of employees in bargaining units merge, combine, or amalgamate or enter into an agreement for common administration or operation of their affairs, all rights and duties of such employee organizations as exclusive representatives of employees in such units shall inure to and shall be discharged by the organization resulting from such merger, combination, amalgamation, or agreement, either alone or with such employee organizations. Election by the employees in the unit involved, and certification by the board of such resulting employee organization shall not be required.

HRS § 89-9(a) provides:

§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. HRS § 89-13(a) provides 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[.]

IV. CONCLUSIONS OF LAW AND DISCUSSION

A. ISSUES ON REMAND

As stated above, the Third Circuit, in overturning the Board's grant of summary judgment in favor of the UPW in Order No. 2457, held that the Board "erroneously granted UPW's Motion for summary judgment because there are genuine issues of material fact at least as to whether (1) James Ah Sing was a member of the UPW collective bargaining agreement at the time he was terminated and (2) there is an unresolved controversy as to whether James Ah Sing was intended to be covered by Stipulation and Order Dated March 15, 2004, in United Public Workers, AFSCME, Local 646, AFL-CIO HLRB cases CE-1-537(a) et a [sic] seq[]" and that the Board "sought to resolve and determine the claims in the prohibited practices complaint but in doing so it improperly resolved genuine issues of material fact. As a consequence, the respondents were denied a contested case hearing on the issues." [viii] Accordingly, in determining whether the Respondents violated HRS § 89-13(a) in this case, the Board will first proceed to resolve these issues specifically noted by the circuit court to be addressed on remand.

1. Ah Sing Was a Unit 1 Member

Following the hearing on the merits on remand, there appears to be no dispute that Ah Sing was a Unit 1 member at the time that he left his employment with Connections. The January 2, 2001 DHRD Employee Personnel Action(s) Report (DHRD Report) shows a Union Code of 61 (exempt) for Ah Sing's appointment to a 40-hour "BC Service/Maintenance Wkr," effective from February 8, 2001 to an NTE Date of June 30, 2001. However, a New Hire Classified Employee

Acknowledgement Form and subsequent DHRD Reports[ix] show the Union Code changed to 01. Moreover, on February 13, 2001, Ah Sing signed off on receipt of the Unit 1 CBA. Further, both UPW Division Director Kadota and Ah Sing corroborated a meeting between them required for Ah Sing to obtain Unit 1 membership, and Kadota verified that Ah Sing was a UPW member. Finally, Thatcher, Kelley, and Kadota all agreed that Ah Sing was represented by UPW at the time of his termination.

UPW argues based on Ah Sing's status as a Unit 1 member that Hamamoto had a duty to negotiate with UPW regarding the change in his civil service status. Respondents, however, contend that Ah Sing never filed a grievance or otherwise exhausted his remedies under the CBA. The Board is mindful of its rejection of this position in denying two prior motions to dismiss by Respondents. However, the first denial was prior to the Third Circuit's ruling on appeal from Order No. 2457, in which the court held that the Board "erroneously granted UPW's Motion for summary judgment because [among other things] there are genuine issues of material fact at least as to James Ah Sing was a member of the UPW collective bargaining agreement at the time he was terminated[.]" Regarding the second denial in Order No. 3005, occurring on remand, the Board relied on the prior oral order based on "law of the case."

Notwithstanding these two prior rulings, following the hearing on the merits on remand, the Board exercises its discretion to reconsider this issue based on Hawaii federal precedent. As the Ninth Circuit has held, "The law of the case doctrine is a discretionary one created to maintain consistency and avoid reconsideration, during the course of a single continuing lawsuit, of those decisions that are intended to a put a matter to rest. Law of the case is not synonymous with preclusion by final judgment." Pit River Home & Agric. Coop. Ass'n v. United States, 30 F.3d 1088, 1097 (9th Cir 1994) (*citing* 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4478 at 798 (1981, 603 (Supp. 1993)). "The 'law of the case' rule ordinarily precludes a court from re-examining an issue previously decided by the same court, or a higher appellate court, in the same case. A decision on a factual or legal issue 'must be followed in all subsequent proceedings in the same case in the trial court on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest justice.'" *Id.* at 1096-97. (Emphasis added) More specifically, the Hawaii federal district court, in rejecting the plaintiff's law of the case argument, has relied on the principle that, "A court properly exercises its discretion to reconsider an issue previously decided…[where] the evidence on remand was substantially, different." Casumpang v. Int'l Longshore & Warehouse Union, Local 142, 361 F.Supp.2d 1195, 1201 (D. Haw. 2005).

The Board concludes that the evidence on remand was "substantially different" on this issue because unlike the record at the time of the first and second motions to dismiss, the record on remand is undisputed that Ah Sing was a Unit 1 member. For this reason, the Board, in its

discretion, reconsiders the exhaustion issue and agrees with Respondents based on the record that because Ah Sing was a Unit 1 member at the time of his termination, he was required to file a grievance and exhausted his contractual remedies for the following reasons.

HRS § 89-10.8(a) states in relevant part, "A public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement."

In accordance with HRS § 89-10(a) requirement, the CBA § 15[x] states in relevant part:

15.01 PROCESS.

15.01 PROCESS.
A grievance that arises out of alleged Employer violation, misinterpretation, or misapplication of this Agreement, its attachments, exhibits, and appendices shall be resolved as provided in Section 15.

15.02 DEFINITION.
The term grievance shall mean a complaint filed by a bargaining unit Employee, or by the Union, alleging a violation, misinterpretation, or misapplication of a specific section of this Agreement occurring after its effective date.

15.03 GRIEVANCE WITHOUT UNION REPRESENTATION.

15.03 a. An Employee may process a grievance and have the grievance heard without representation by the Union except as provided in Section 15.18.
***
15.03 b. No meeting shall be held to discuss the grievance without first making an attempt to arrange a mutually acceptable meeting time with the grieving party and the Union, provided that the meeting shall be held within the time limits as provided in Section 15.

15.03 c. No resolution of a grievance filed as provided in Section 15.03 shall be made at any step of the grievance procedure which is inconsistent with this Agreement.
***

15.11 STEP 1 GRIEVANCE.

The grievance shall be filed with the department head in writing as follows:

15.11 a. Within eighteen (18) calendar days after the occurrence of the alleged violation.

The term "after the occurrence of the alleged violation" as provided in Section 15.11 a. shall mean:
***
15.11 a .4. Other Alleged Violation(s): Eighteen (18) calendar days after the alleged violation(s) occurred unless the violation(s) are continuing as provided in Section 15.11 b.

15.11 b. Within eighteen (18) calendar days after the alleged violation first became known to the Employee or the Union if the Employee did not know of the alleged violation if it is a continuing violation.
***
15.16 STEP 3 ARBITRATION.

In the event the grievance is not resolved in Step 2, and the Union desires to submit the grievance to arbitration, the Union shall notify the Employer within thirty (30) calendar days after receipt of the Step 2 decision.
***
15.19 ARBITRABILITY.
15.19 a. A grievance may not be arbitrated unless it involves an alleged violation, misinterpretation, or misapplication of a specific section of this Agreement.
15.19 b. In the event the Employer disputes the arbitrability of a grievance the Arbitrator shall determine whether the grievance is arbitrable prior to or after hearing the merits of the grievance. If the Arbitrator decides the grievance is not arbitrable, the grievance shall be referred back to the parties without decision or recommendation on its merit.

15.20 AWARD.

15.20 a. The Arbitrator shall render the award in writing no later than thirty (30) calendar days after the conclusion of the hearing(s) and submission of briefs provided, however, the submission of briefs may be waived by mutual agreement between the Union and the Employer.

> 15.20 b. The award of the Arbitrator shall be final and binding provided, the award is within the scope of the Arbitrator's authority as described as follows:
>
> 15.20 b .1. The Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the sections of this Agreement.
>
> 15.20 b.2. The Arbitrator shall be limited to deciding whether the Employer has violated, misinterpreted, or misapplied any of the sections of this Agreement.
>
> 15.20 b.3. A matter that is not specifically set forth in this Agreement shall not be subject to arbitration.
>
> 15.20 b.4. The Arbitrator shall not consider allegations which have not been alleged in Steps 1 and 2.

(Emphasis added)

There is no dispute that the CBA contains a grievance procedure culminating in final and binding arbitration to address CBA violations. Moreover, there is no question based on CBA § 15.01 that provides, "A grievance that arises out of alleged Employer violation, misinterpretation, or misapplication of this Agreement…" shall be resolved as provided in Section 15[,]" and § 15.02 defining a grievance as "The term grievance shall mean a complaint filed by a bargaining unit Employee," that this issue of Ah Sing's change in civil service status falls within the definition of a "grievance" and should be resolved as provided under § 15 pursuant to CBA § 15.01. Finally, there is no question that Ah Sing did not file a grievance regarding the change in his civil service status.

In Santos v. Dep't of Transportation, 64 Haw. 648, 655, 646 P.2d 962, 967 (1982) (Santos), the Court articulated the general rule regarding the requirement upon an individual employee of exhaustion of contractual remedies before maintaining an action against the employer:

> It is a general rule that before an individual can maintain an action against his employer, the individual must at least attempt to utilize the contract grievance procedures agreed upon by his employer and the UPW. The rule is in keeping with prevailing National Labor Relations policy and Hawaii policy favoring arbitration as a dispute settlement mechanism.

(Emphasis added) *See also*: Hokama v. Univ. of Hawaii, 92 Hawaii 268, 272-73, 990 P.2d 1150, 1154-55 (1999) (*citing* Santos, 64 Haw. at 655, 646 P.2d at 962). Relying on Hokama and Santos, in Poe v. Hawaii Lab. Rels. Bd., 97 Hawaii 528, 536, 40 P.3d 930, 938 (2002), the Court further held that "Thus, 'individuals who sue their employers for breach of a collective bargaining agreement must first attempt exhaustion of remedies under that agreement." Finally, in Poe v. Hawaii Lab. Rels. Bd., 105 Hawaii 97, 101, 94 P.3d 652, 656 (2004) (Poe II), the Court held:

> Poe contends that the circuit court erred in affirming the decision of the HLRB because the Board incorrectly determined that Poe had failed to exhaust his remedies under the collective bargaining agreement. HLRB and Employer argue, inter alia, that Poe's suit was barred because he failed to prove that HGEA breached its duty of fair representation in not advancing Poe's claims through Step 3 arbitration.
>
> This court has used federal precedent to guide its interpretation of state public employment law. Based on federal precedent, we have held it well-settled that an employee must exhaust any grievance . . . procedures provided under a collective bargaining agreement before bringing a court action pursuant to the agreement. The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process, allowing parties to develop their own uniform mechanism of dispute resolution. It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means.

(Emphasis added) (Internal quotations and citations omitted) UPW has not shown an exception to the doctrine of exhaustion of contractual remedies, such as when the exhaustion would be futile. Poe II, 105 Hawaii at 102, 94 P.3d at 657. In addition, the Complaint alleges violations of CBA §§ 1 (union recognition); 11 (discipline), 14 (prior rights), 58 (bill of rights), 61 (department of education, 64 (entirety and modification), and memoranda of agreement with UPW. The Complainant further argued that under CBA § 12 Layoff, DOE had a duty to conduct a search for other available civil service positions to protect his rights under the agreement and provide 90-day notice of the impending layoff. The significant issue is that Complainant has not established that exhaustion was futile or that any of these alleged contractual violations were not subject to the grievance procedure under the CBA culminating in arbitration. CBA § 15.19 a. states, "A grievance may not be arbitrated unless it involves an alleged violation, misinterpretation or misapplication of a specific section of this Agreement." (Emphasis added)

Accordingly, the Board agrees with Respondents and holds that Ah Sing failed to exhaust his contractual remedies and is precluded from bringing his claims that Respondents violated HRS § 89-13(a)(8) by breaching the terms and conditions of the CBA. While the Respondents' position

regarding failure to exhaust contractual remedies was in the form of argument, rather than a formal motion, the Board nonetheless dismisses this particular CBA claim for lack of jurisdiction. "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)). Moreover, "such a question is in order at any stage of the case[.]" Chun v. Employees' Ret. Sys. of the State of Hawaii, 73 Haw. at 14, 828 P.2d at 263.

In its Exceptions and at oral argument thereon, UPW contended based on Hawaii State Teachers Ass'n. v. Bd. of Educ., 1 HPERB 442, Board Case No. CE-05-10, Decision No. 48 (1974) (HSTA II), that exhaustion does not apply where, in part, the complaint alleged multiple claims, and where there was uncertainty about Ah Sing's Unit 1 status at the time of his 2003 separation; that the Board has "altered the legal framework by deciding it lacks jurisdiction over the contractual remedies" because the exhaustion doctrine "does not strip the Board of jurisdiction[;]" and finally, during oral argument, UPW asserted that the Poe II case does not apply to a case, in which there is no duty of fair representation allegation and the union brought the prohibited practice case. The Board considers and addresses each of the UPW's arguments as follows.

The UPW's argument based on the HSTA II decision that exhaustion simply does not apply to alleged HRS § 89-13(a)(8) collective bargaining agreement violations where the complaint alleged multiple Chapter 89-13(a) violations is an over simplification of that decision. While in HSTA II, the Board determined that exhaustion was not required in that case, the Board adhered to a prior decision Hawaii State Teachers Ass'n v. Dept. of Ed., Board Case No. CE-05-4, Decision No. 22, 1 HPERB 251, 264 (10/24/72), which essentially held that the Board may require exhaustion on a case-by-case basis "when and to the extent appropriate," stating:

> In view of the above reasons, it is clear that the Board has jurisdiction over prohibited practice charges, including those involving alleged breaches of contract, regardless of the presence of a grievance arbitration provision in a collective bargaining agreement. It appears further that in the exercise of this jurisdiction, the Board may require parties to utilize negotiated grievance arbitration procedures when and to the extent appropriate.

Id. at 264. Further, the Board cited to two other decisions HSTA et. al, HPERB Case CE-05-5 and Arrigoni v. Bd. of Ed., Board Case No. CU-05-10, Decision No. 45, 1 HPERB 435 (5/15/74), in which deferral to the contractual grievance/arbitration remedies was found to be "desirable and appropriate". Finally, while the Board's exercise of its prohibited practice jurisdiction in HSTA II was based, in part, on multiple prohibited practice violations, including the breach of contract, the Board also noted the necessity of having the seniority issue resolved expeditiously in order to

minimize the chaos and confusion at the start of the next school year. *Id.* at 446-47. Accordingly, based on HSTA II, the presence of multiple Chapter 89 claims was not dispositive of the issue, but the relevant inquiry is whether in this case the Board should require the parties to utilize the negotiated grievance/arbitration procedures "when and to the extent appropriate".

Further, the Board notes that subsequent to the HSTA II decision and the decisions relied upon in that case, HRS § 89-10.8 was adopted during the 2000 legislative session as Act 253 and providing in relevant part:

> **[§89-10.8] Resolution of disputes; grievances.** (a) A public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. The grievance procedure shall be valid and enforceable and shall be consistent with the following:…

In short, this provision requires that all collective bargaining agreements not only contain a grievance procedure culminating in final and binding arbitration but "be invoked in the event of any dispute concerning the interpretation of application of a written agreement" and that "[t]he grievance procedure shall be valid and enforceable[.]" Therefore, the statutory context, in which the Board is considering the exhaustion issue has changed significantly since the HSTA II decision and the enactment of HRS § 89-10.8 to encourage the resolution of disputes over collective bargaining agreements through the contractual grievance/arbitration procedures. While the Board still has prohibited practice jurisdiction over alleged breaches of contract as noted in HSTA II, the enactment of HRS § 89-10.8 demonstrates the legislative intent that contractual disputes be resolved through the grievance and arbitration process requiring exhaustion.

The Board also rejects UPW's contention that the uncertainty regarding Ah Sing's Unit 1 status at the time of his 2003 separation somehow excused the exhaustion of his remedies. UPW has consistently argued that Ah Sing was a Unit 1 member at the time of his termination. In fact, the record in this case shows that from February 8, 2001, when Ah Sing became a full-time BE Service/Maintenance Worker, both the Respondents and the Union treated and acknowledged Ah Sing as a Unit 1 member, and that on July 17, 2003, Kadota met with Ah Sing regarding his termination of his employment with Connections. The reason that the Union failed to file a grievance was not because of uncertainties regarding Ah Sing's status as a Unit 1 member, but because Nakanelua told Kadota that a grievance was unnecessary because the prohibited practice would cover Ah Sing's termination. The Board further notes that UPW's filing of a prohibited practice complaint regarding his termination also indicates that the Union harbored no significant "uncertainties" that Ah Sing was a Unit 1 employee covered under HRS Chapter 89.

UPW's assertion that the Board has "altered the legal framework by deciding it lacks jurisdiction over the contractual remedies" because the exhaustion doctrine "does not strip the Board of jurisdiction" is simply incorrect and at odds with the established precedent. The Hawaii appellate courts have stated regarding the procedural effect of the exhaustion doctrine that, "In such cases, in the interest of judicial economy, 'the doctrine of exhaustion *temporarily* divests a court of jurisdiction." Leone v. County of Maui, 128 Hawai'i 183, 192, 284 P.3d 956, 965 (App. 2012) (*citing* Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 734 P.2d 161 (1987)). (Italics in original).

Finally, the Board does not concur with UPW's argument that the Poe II case requiring exhaustion is inapplicable to a case where there is no duty of fair representation allegation and the union is the party bringing the prohibited practice case. The Board initially notes that the UPW cites no authority in support of this position. In fact, the Board finds that the relevant authorities support the position that a union is also required to exhaust contractual remedies prior to bringing a prohibited practice complaint. For example, in Univ. of Hawaii Professional Assembly v. Bd. of Regents, Board Case No. CE-07-804, Order No. 2939, at *12 (8/22/13) (*citing* HNA, 2 HPERB at 227-28 and SHOPO I, 6 HLRB at 27) (UHPA), the Complainant made a similar argument that reliance on cases involving claims brought by aggrieved employee bypassing the grievance/arbitration procedure and suing their employees is misplaced because an aggrieved employee is not analogous to the union complainant. In UHPA, the Board rejected that argument, relying on previous decisions of the Board and its predecessor the Hawaii Public Employment Relations Board, including Hawaii Nurses Ass'n v. Ariyoshi, 2 HPERB 218, 227-28 (1979) and State of Hawaii Org. of Police Officers v. Kusaka, 6 HLRB 25, 27 (1998) (The Board dismissed prohibited practice claims because the union bypassed a part or all of the grievance/arbitration procedure in favor of pursuing prohibited practice claims based on violations of the collective bargaining agreement.). Second, the Union filed this prohibited practice charge under HRS 89-13 as the "exclusive representative" of Ah Sing, as a member of Unit 1. "Exclusive representative," as defined in HRS § 89-2, 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." In this representative capacity, the Union "stands in the shoes" of Ah Sing and as such, cannot avoid the exhaustion requirement by asserting that it represents but is not the individual employee. Finally, because pursuant to HRS § 89-10.8 set forth above the exclusive representative (not the individual employee) is required to be a party to a written agreement with the public employer setting forth a grievance procedure culminating in a final and binding decision, there is even a more compelling reason to require the Union to exhaust its contractual remedies.

Based on the foregoing, the Board adheres to its ruling that the exhaustion principle applies to this case requiring the HRS § 89-13(a)(8) allegation to be dismissed for a failure to exhaust the grievance and arbitration procedure in the CBA.

2. Ah Sing Was Not Covered by the Stipulation

Based on the Third Circuit's D & O, the Board is compelled to address the issue of whether Ah Sing was covered by the Stipulation.

On this issue, the Board holds that Ah Sing was not covered by the Stipulation for several reasons.

Paragraphs 9-15 of the Stipulation, which was signed and filed on March 15, 2004, state:

> 7. On or about June 9, 2003 the Department of Human Resources Development (DHRD) informed Employer of its position (and policy) that employees of public charter schools in the DOE "do not have civil service status" and are no longer part of the merit system.
> 8. On or about June 12, 2003 DHRD requested Employer to "convert all public charter school positions to reflect the fact that these positions do not have civil service status" by June 30, 2003, and thereafter informed Employer that DHRD would not provide "certified lists of eligible applicants" and "civil service appointments may not be made to fill public charter school positions."
> 9. On and after July 8, 2003 the aforementioned DHRD position, policy, and actions were communicated to public charter school administrators and employees.
> 10. As a direct consequence various public charter school employees (in order to preserve and maintain their civil service status, rights and benefits), initiated transfers and other changes in their terms and conditions of work.
> 11. As a further consequence on or about July 1, 2003 and thereafter, DOE failed to process for hiring approximately fifteen (15) or more public charter school employees in classified positions through the statewide merit system for compliance with civil service requirements, and as a result these employees are currently exempt from civil service coverage.
> 12. On or about January 13, 2004 public charter school employees were informed by Employer that the June 30, 2003 deadline for compliance with the DHRD position and policy had been extended to June 30, 2004, and that public charter school employees with civil service appointments would continue "with civil service status through June 30, 2004."

13. On or about March 5, 2004 Employer was informed by DHRD that the June 30, 2004 deadline could be extended to September 30, 2004.
14. Employer hereby stipulates and agrees to cease and desist from implementing the aforementioned DHRD position or policy regarding loss of civil service status for public charter school positions and employees, and to make whole all adversely employees (including but not limited to the restoration or return of said employees to their former public charter school positions without loss of rights, privileges, and benefits).
15. Within 30 days from the date of this Stipulation and Order Employer shall process all currently exempt public charter school employees in classified positions through the statewide merit system and restore them to civil service status. All classified positions in public charter schools shall be restored to the merit system within thirty days.

(Emphasis added)

UPW maintains that the Stipulation applies to Ah Sing based on: 1) Nakanelua's testimony that the Stipulation included Ah Sing; 2) the Stipulation, Paragraph 14. providing that "all adversely affected employees" were to be made whole; 3) the reference in Paragraph 11 to the "fifteen (15) or more public charter school employees," which was formulated based on the Furukawa Listing; and 4) "Ah Sing was 'separated' on June 30, 2003 as a classified employee of DOE, Exh. 33-1, which was the precise deadline set by DHRD for compliance with its position. The Board finds these arguments unpersuasive.

The record on remand shows that Ah Sing's employment in the School Custodian II position was a temporary appointment with an NTE (not to exceed) date of June 30, 2003. This appointment by its terms ended on June 30, 2003 and as confirmed by the May 6, 2003 Jackson letter and the Separation Notice signed by Ah Sing on June 27, 2003, this position and Ah Sing's reappointment to that position were not renewed effective June 30, 2003. Upon receipt of the May 6, 2003, Jackson letter, Ah Sing left his employment with Connections immediately upon being notified that he was not going to be reappointed. The deadline for the DHRD policy that the DOE was required to convert temporary civil service employees to non-civil service employee status by June 30, 2003 was extended to September 30, 2003, to December 31, 2003, and finally to June 30, 2004. The Stipulation resolving the issue was not signed and filed until March 15, 2004. Therefore, because Ah Sing was not employed after, at the latest, June 30, 2003, and was not employed at the time that the Stipulation became effective, Ah Sing is not covered by the Stipulation.

In addition, the expiration of Ah Sing's temporary appointment pre-dated all of the occurrences referenced in Paragraphs 9-14 including the communication of the DHRD position on July 8, 2003; the transfers and other changes in terms and conditions of work initiated by the PCS employees, which were a consequence; the DOE's failure to process for hiring 15 or more PCS employees in classified positions on July 1, 2003; and the January 13, 2004 communication to PCS employees from the Employer that the June 30, 2003 deadline for compliance with the DHRD position and policy had been extended to June 30, 2004, and that their civil service appointments would continue "with civil service status through June 30, 2004." While UPW is basically arguing that Ah Sing lost his position because of DHRD's position that PCS employees were not civil service, the record shows that Ah Sing lost his position because his Custodian II position had an NTE date of June 30, 2003 which expired, he was not reappointed to that position because of Connections' lack of funding, and he left his employment immediately upon notification on May 6, 2003.[xi] Finally, pursuant to Paragraph 15 of the Stipulation, DOE agreed to "process all currently exempt public charter school employees in classified positions through the statewide merit system and restore them to civil service status." (Emphasis added) Based on the fact that Ah Sing was not a "currently exempt public charter school employees in classified positions," at the time the Stipulation was signed and filed on March 15, 2004, the DOE did not agree to process him through the statewide merit system and restore him to civil service status as provided in Paragraph 15.

Second, regarding UPW's contention that the Furukawa Listing constitutes the 15 PCS employees referenced in Paragraph 10 employees "initiat[ing] transfers and other changes in their terms and conditions of work" and the "adversely affected employees" referenced in Paragraph 14, this position is not substantiated by the record on remand. The Furukawa letter only references the Furukawa Listing as "Listing of Public Charter School Civil Service Employees." There is no dispute based on the testimony and Kadota Declaration that this letter was a response to a request from Kadota regarding any charter school employees that "might" be impacted by the change of civil service status. The Board finds that this Furukawa Listing is simply not dispositive of whether an employee listed is "an adversely affected employee" at the time of the Stipulation. There is nothing in the letter indicating that the employees on the list initiated transfers and other changes in their terms and conditions of work. Moreover, there is no other evidence in the record on remand indicating that Ah Sing initiated a transfer or other changes in his terms and conditions of work or was otherwise an "adversely affected employee[]. In fact, the Kadota Declaration in Paragraph 11 specifically admitted that when Kadota spoke to Furukawa regarding the listing, "I also learned at that time (from Mr. Furukawa) that James Ah Sing would not be adversely affected immediately since his employment would not continue beyond June 30, 2003." (Emphasis added) Further, the Kadota Declaration, dated on October 11, 2003 after the July 3, 2003 Furukawa Listing, states that he learned from Furukawa "that the DOE was preparing a listing of all positions and employees on a statewide basis." Based on this evidence and as Ah Sing was no longer in a classified position because his appointment expired on June 30, 2003 due to Connections' funding concerns and never

initiated a transfer or other change in his terms and conditions of work, the Board is unable to conclude that he was within the group of 15 PCS employees that the DOE failed to process for hiring on July 1, 2003, as stated in Paragraph 11 of the Stipulation or that he fell within the category of "adversely affected employees" referenced in the Paragraph 14 of the Stipulation.

Third, UPW's assertion that "Ah Sing was 'separated' on June 30, 2003 as a classified employee of DOE, which was the precise deadline set by DHRD for compliance with its position" implies that Ah Sing was separated because of the DHRD deadline. The evidence, however, supports that the reason for the June 30, 2003 NTE was because PCS employees, including those at Connections, were temporary and renewable from year to year by the local school board. Moreover, Ah Sing's NTE date for his appointment confirmed by the October 17, 2002 DHRD Report was set long before Watanabe's June 9, 2003 letter acknowledging DHRD's position that PCS employees were not civil service and Watanabe June 12, 2003 letter establishing the June 30, 2003 deadline for the DOE conversion of PCS employees from temporary civil service to non-civil service. Further, the communications between Watanabe and Hamamoto unequivocally establish that Watanabe extended the DHRD deadline for the conversion on several occasions from June 30, 2003 to September 30, 2003 on June 18, 2003; from September 30, 2003 to December 31, 2003 on September 10, 2003; and again from December 31, 2003 to June 30, 2004 on December 18, 2003.

The Board finds that Nakaneula's statements on this issue are not only uncorroborated by the foregoing evidence in the record but also conflicting and inconsistent. In response to whether the Stipulation included employees who had been let go prior to the Stipulation, Nakanelua stated that, "I can't speak to that directly as to each individual circumstances so I'm uncertain as to that…," but in another portion of his testimony, Nakanelua states that Ah Sing should have been restored to his civil service position and placed in a position based on the Stipulation. Accordingly, the Board concludes that because of this conflict and the lack of support by other evidence in the record, Nakanelua's testimony is not dispositive of this issue.

Finally, the Board rejects the UPW's argument that on remand, the Board should follow the Order No. 2457 findings relevant to whether the Superintendent violated the Stipulation and resolving any other violations alleged in the Complaint based on the doctrine of law of the case. In so ruling, the Board concludes that the UPW's position simply misinterprets and misapplies the doctrine.

In Arizona v. California, 460 U.S. 605, 618 (1983) (Arizona), the U.S. Supreme Court articulated the doctrine:

> Unlike the more precise requirements of res judicata, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that

> when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. See 1B J. Moore & T. Currier, Moore's Federal Practice para. 0.404 (1982) (hereinafter Moore). Law of the case directs a court's discretion, it does not limit the tribunal's power. *Southern R. Co*. v. *Clift*, 260 U.S. 316, 319 (1922); *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912).

Accordingly, based on the parameters of the doctrine, the issue is whether a vacated decision can be the basis for application of the law of the case. Relying on Arizona, the First Circuit Court of Appeals stated in U. S. v. Rivera-Martinez, 931 F.2d 148, 150-51 (1st Cir. 1991) (Rivera-Martinez), held that a vacated decision cannot, reasoning:

> In terms of the dynamics between trial and appellate courts, the phrase "law of the case" signifies, in broad outline, that a decision of an appellate tribunal on a particular issue, unless vacated or set aside, governs the issue during all subsequent stages of the litigation in the nisi prius court, and thereafter on any further appeal. *See Arizona v. California*, 460 U.S. 605, 618, 75 L. Ed. 2d 318, 103 S. Ct. 1382 (1983).

(Emphasis added)

Finally, the U.S. Supreme Court ruled in Johnson v. Bd. of Education, 457 U.S. 52, 53-54 (1982) (*per curiam*), "Because we have vacated the Court of Appeals' judgments in this case, the doctrine of the law of the case does not constrain either the District Court or, should an appeal subsequently be taken, the Court of Appeals." *See also*: Brown v. Bryan County, 219 F.3d 450, 453 n. 1 (5th Cir. 2000) ("With this *vacatur*, our previous opinion is no longer law of the case.")

In this case, there is no doubt that the Third Circuit vacated the Order in its entirety, holding that, "The HLRB Order No. 2457 is vacated and the case remanded to HLRB for further proceeding consistent with the decision of this court." As stated above, the Third Circuit's D & O noted specifically noted the Board's erroneous grant of summary judgment despite genuine issues of material fact regarding whether Ah Sing was intended to be covered by the Stipulation. In support, the Third Circuit specifically noted, among other things, as an example of the Board's improper resolution of disputed issues of fact that, "19. Based on the record, the Board finds that given the Employer's varying versions of Ah Sing's Employment status and his separation from his job as a custodian and Connections at a time when the employment status of charter school employees was at best ambiguous and muddled, Ah Sing fell within the affected class referred to in the Stipulation and Order, Order No. 2237 and should have been reinstated. (Finding of Fact No. 19 at R-726)." Given that Order No. 2457 was issued on summary judgment and found by the Third Circuit to have significant flaws requiring vacating of such Order, the Board should not be constrained or compelled after the full hearing on the merits by the "law of the case" based on

the findings of Order No. 2457 relevant to the Board finding that the Superintendent violated the Stipulation and resolving any other alleged violations.

For the reasons set forth above, the Board holds that Ah Sing was not covered by the Stipulation.

B. THE REMAINING ALLEGATIONS

1. Unilateral Termination Without Failure to Bargain in Violation of HRS §§ 89-3 and 89-9(a).

As stated above, the Complaint alleged that Respondents' conduct "contravene[s] the duty to bargain in good faith over mid-term changes in wages, hours, and other conditions of employment under HRS §§ 89-3 and 89-9(a), and the duty to recognize the UPW as the exclusive bargaining agent of unit 1 employees in HRS § 89-8(a), HRS" and that such "willful refusal and failure to comply with the provisions of HRS chapter 89 constitute prohibited practices under HRS § 89-13(a)(1), (5), and (7)." In support of that allegation, UPW contends that the DOE had a duty to bargain before converting Ah Sing's position to a non-civil service position where Ah Sing held civil service status through DOE's status as his joint employer. The Board disagrees with the Complainant's reasoning for several reasons.

First, the Board has not ascribed to the joint employer theory urged by the Complainant. Indeed, Complainant fails to cite any precedent from the Board or the Hawaii courts recognizing a joint employer situation under HRS Chapter 89.

Second, as stated above, the Board has held that Ah Sing should have filed a grievance regarding the conversion of his position to a non-civil service position. The courts have recognized the distinction between contract administration, including grievances, and contract negotiations:

> Contract administration "involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract." Grievance procedures are a clear example of contract administration.
>
> Whereas in contract administration the union is more concerned with protecting the interests of the individual employee, in contract negotiation the union is more concerned with protecting the interests of all of its members.

Douglas v. United Steelworkers of America, 1989 U.S. Dist. LEXIS 15155, at * 45 (D.W.V.) (Emphasis added); *see also* United Rubber, Cork, Linoleum & Plastic Workers v. NLRB, 368 F.2d

12, 18 (5th Cir. 1966). The Board rules that because the Complaint involves an individual employee right and Ah Sing was a Unit 1 member with protections under the CBA, this matter of Ah Sing's conversion of his position to non-civil service should have been pursued through the grievance as opposed to the bargaining process.

Third, there is nothing in the record showing that DOE actually converted Ah Sing's position from civil service to non-civil service prior to the ending of his appointment. The evidence shows that at the time that Ah Sing's appointment ended, he was still in the School Custodian II position based on the July 17, 2003 letter from Thatcher to Ah Sing, the June 30, 2003 Separation Notice, and the July 25, 2003 Employee Personnel Action Report. Further, based on the June 18, 2003 letter, DHRD extended the June 30, 2003 deadline to convert the PCS temporary civil service employees to non-civil service by 90 days to September 30, 2003 and a December 18, 2003 letter referenced another extension of the deadline to December 31, 2003.

Finally, the communications between DOE and DHRD, such as the June 12, 2003 and June 13, 2003 letters between Watanabe and Hamamoto, further demonstrate that there is no question that DHRD, not DOE, was the department taking the position that PCS employees have no civil service status and that any PCS employees being treated as civil service employees were to be converted. Watanabe stated in her June 9, 2003 letter to Hamamoto that, "As you know by now, the Department of Human Resources Development (HRD) has taken the position that, based on the Public Charter School Law, employees of the Charter Schools do not have civil service status." In her June 12, 2003 letter, Watanabe stated:

> Based on our position that Public Charter School employees are not civil service, we are hereby requesting that the DOE convert all Public Charter School positions to reflect the fact that these positions do not have any civil service status. We are also asking that the status of the incumbent in these Public Charter School positions be changed to reflect the fact that the incumbent does not have any civil service status. We are asking that this conversion of the position and the incumbent' a status be done by June 30, 2003, which is the NTE date set for a lot of these positions.

(Emphasis added) In fact, the June 9, 2003 and June 10, 2003 letters from Watanabe to Hamamoto showed the DOE was taking the opposing position that PCS employees were civil service, "[b]ased on DOE's belief that PCS employees were civil service employees[,]" and its concern that PCS employees retain their civil service status during the transition year.

Finally, the Board holds that based on the particular circumstances in this case in which the employment status of PCS employees, including Ah Sing, was uncertain and ambiguous to the DOE, DHRD, and the charter schools at the time of Ah Sing's termination, the requisite determination of "wilfullness" for violations of HRS § 89-13(a) cannot be found. For all of the

foregoing reasons, the Board is unable to conclude that Complainant has carried his burden of showing that before converting Ah Sing's position from civil service to non-civil service, DOE contravened the duty to bargain in good faith in violation of HRS §§ 89-3 and 89-9(a), and the duty to recognize the UPW as the exclusive bargaining agent of unit 1 employees in HRS § 89-8(a), HRS and wilfully violated HRS § 89-13(a)(1), (5), and (7).

2. Retaliation

As stated above, the Complaint was amended to include a claim that Thatcher terminated a rubbish contract with Ah Sing worth approximately $75 per week in retaliation for filing the Complaint. In its post-hearing Memorandum of Fact and Law, Complainant argues that the retaliation was in violation of HRS § 89-13(a)(1) and (4).

The Board notes that the amended Complaint alleged the retaliation claim, but failed to allege an HRS § 89-13(a)(4) violation in addition to the original Complaint's allegations of violations of HRS § 89-13(a)(1), (3), (5), (7), and (8). In its December 3, 2003 oral order, the Board deemed the Complaint as amended to include the retaliation claim for the filing of the complaint. Therefore, based on the fact that the original Complaint already contained an HRS § 89-13(a)(1) violation claim and that the Board's deemed the Complaint amended to include a retaliation claim for the filing of the complaint, the Board will interpret the oral order to add and include an HRS § 89-13(a)(4) retaliation claim.

The record on remand shows that Complainant introduced testimony uncontroverted by Respondent Connections that the reason for the termination of the rubbish contract was because of the filing of the Complaint. In support of the retaliation allegation, Complainant relies on the Board's decision in desMarets v. Waihee, Board Case No. CE-13-181, Decision No. 379, 5 HLRB 620 (1996) (desMarets). However, desMarets is distinguishable from the retaliation claim alleged in the Complaint, as amended, on two grounds. First, the alleged retaliatory conduct by Thatcher occurred after Ah Sing was no longer employed by Connections. Second, the retaliatory conduct involved a side agreement to dispose of rubbish, which is not an agreement covered by HRS Chapter 89.

Regarding the post-employment aspect of the alleged retaliation, the U.S. Supreme Court in Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997), recognized that former employees fall within term "employees" protected from retaliation for filing a charge under Title VII. The Ninth Circuit has recognized that an adverse post-employment action can be considered retaliatory under Title VII, 42 U.S.C. § 2000e *et. seq*. "if the alleged discrimination is related to or arises out of the employment relationship." Hashimoto v. Dalton, 118 F.3d 671, 675 (9th Cir. 1997) (*citing* Passer v. American Chemical Soc., 290 U.S. App. D.C. 156, 935 F.2d 322, 330 (D.C. Cor. 1991). The Board adopts this principle that an adverse post-employment action may also be considered retaliatory under HRS Chapter 89 under the appropriate circumstances. Moreover, regarding the

issue of whether an agreement for services unrelated to the employee's employment is retaliatory conduct prohibited by HRS § 89-13(a)(4), the U.S. Supreme Court in Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 57 (2006) (Burlington), held that the Title VII antiretaliation provision 42 U.S.C. § 2000e-3[xii] forbidding an employer from "discriminating[ing] against" an employee because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation did not confine the forbidden actions and harms to those related to employment or which occur at the workplace. Similar to 42 U.S.C § 2000e-3, HRS § 89-13(a)(4) does not confine the actions forbidden in a prohibited practice case to those related to employment or occur at the work place. Consequently, based on similar reasoning to that in Burlington, it does not appear that the cancellation of the agreement to dispose of the rubbish at issue in this case would be forbidden on the basis that the services rendered were not related to Ah Sing's employment, particularly because the services contracted for were performed at the workplace.

An employer commits a prohibited practice in violation of HRS § 89-13(a)(4) by retaliating against an employee engaged in protected activity such as signing or filing a petition or complaint under Chapter 89. Weiss v. Bratt, Board Case No. CE-05-452, Decision No. 425, 6 HLRB 188, 191 (2001). In Hawaii Gov't Emp. Ass'n. v. Cayetano, Board Case No. CE-13-518, Decision No. 444, 6 HLRB 336, 350 (2003), based on a line of prior Board decisions, articulated the appropriate analysis for determining whether an employer has retaliated against an employee in violation of HRS § 89-13(a)(4). First, the complainant must demonstrate that anti-union animus contributed to the adverse decision. If the burden is satisfied, then the burden shifts to the employer to show that the action would have been taken in any event, i.e., that there were legitimate, non-discriminatory reasons for the adverse action. The burden then shifts back to the complainant to show that the employer's articulated legitimate, nondiscriminatory reason was a pretext to mask unlawful discrimination.

Applying the analysis to the circumstances of this case, Complainant has demonstrated that the filing of the HRS Chapter 89 complaint contributed to Thatcher's termination of Ah Sing's rubbish contract. The burden then shifts to Respondent Connections to show that there were legitimate, non-discriminatory reasons for this action. The Board finds that Respondent Connections failed to submit any evidence into the record showing a legitimate, non-discriminatory reason or even argument for cancellation of the rubbish contract. Hence, based on Respondent Connections' failure to meet its burden, the Board is compelled to hold that Respondent Connections violated HRS § 89-13(a)(4) by wilfully retaliating against Ah Sing. However, while proving the HRS § 89-13(a)(4) violation, the Board finds that Complainant failed to establish how the retaliation was also an interference in violation of HRS § 89-13(a)(1) as distinguished from a violation of HRS § 89-13(a)(4). The Board concludes that because the retaliatory act in canceling the rubbish service contract occurred after the filing of the Complaint, the proof is inadequate to establish how this act constituted an "interfere[nce], restrain[t], or

coerc[ion]" of Ah Sing "in the exercise of any right guaranteed under this chapter" or "jeopardizes or diminishes [the UPW's] capacity to effectively represent[] its employees in the bargaining unit." Consequently, the Board holds that the Complainant has failed to carry its burden as to the violation of HRS § 89-13(a)(1) regarding the retaliation claim.

V. SUMMARY

In conclusion, the Board holds that Complainant was a Unit 1 employee covered by the CBA, which contained a grievance procedure. The Complainant was, therefore, required to exhaust his contractual remedies before the filing of the Complaint allegation regarding HRS § 89-13(a)(8). Based on the failure of Complainant to exhaust his CBA remedies, the HRS § 89-13(a)(8) claim is dismissed.

The Complainant was not covered by the March 15, 2004 Stipulation because: 1) at the time of the Stipulation, he was not employed pursuant to the appointment, which expired based on the June 30, 2003 NTE date; 2) there is insufficient evidence to show that Ah Sing was an "adversely affected employee[]"; 3) Ah Sing was separated from his employment because his appointment expired on June 30, 2003 and not because of the DHRD deadline for conversion; and 4) the Board is not required to find that the Superintendent violated the Stipulation based on the Board's finding in Order No. 2457 based on the "law of the case" doctrine.

Complainant failed to carry the burden of establishing that before converting Ah Sing's position from civil service to non-civil service that DOE wilfully contravened the duty to bargain in good faith and the duty to recognized UPW in violation of HRS § 89-13(a)(1), (5), and (7).

Based on the failure of Respondent Connections to dispute Complainant's proof that Ah Sing's rubbish contract was canceled because of the filing of the Complaint or to carry their burden of showing a legitimate, non-discriminatory reason for the cancellation, the Board holds that Connections retaliated against Complainant for the filing of the Complaint in violation of HRS § 89-13(a)(4). However, Complainant failed to make the requisite showing that the retaliatory conduct violated HRS § 89-13(a)(1).

VI. ORDER AND REMEDY

Regarding the appropriate remedies in this case, the relevant statutory provisions are as follows. HRS § 89-14 provides in relevant part, "Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9[.]" HRS § 377-9(d) states in relevant part:

Final orders may …require the person to take affirmative action, including reinstatement of employees and make orders in favor of employees making them whole, including back pay with interest, costs, and attorneys' fees….Furthermore, an employer or employee who willfully commits unfair or prohibited practices that interfere with the statutory rights of an employee or employees or discriminates against an employer or employees for the exercise of protected conduct shall be subject to a civil penalty not to exceed $10,000 for each violation. In determining the amount of any penalty under this section, the board shall consider the gravity of the unfair or prohibited practice and the impact of the practice on the charging party, on other persons seeking to exercise rights guaranteed by this section, or on public interest.

Accordingly, the Board hereby orders the following:

(1) Connections shall not discharge or otherwise discriminate or retaliate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter;

(2) Respondents shall immediately post copies of this Decision and Order on their respective websites and in conspicuous places at the work sites where employees of Unit 1 assemble, and leave such copies posted for a period of 60 days from the initial date of posting.

(3) Respondents shall notify the Board of the steps taken to comply herewith within 30 days of receipt of this Decision and Order with a certificate of service to the Complainant.

(4) Any request for affirmative relief by Complainant, including attorney's fees, in accordance with HRS § 377-9, must be requested by a motion filed no later than twenty days after the date of the final Decision and Order. The affirmative relief requested shall be limited to that attributable to the retaliation claim, and the motion shall include sufficient details to substantiate and provide justification for the affirmative relief requested to enable the Board to determine the reasonableness of the request. Respondents shall have ten days from receipt of the motion to file an opposition. Upon submission of adequate proof by the Complainant, the Board may order further affirmative relief in accordance with HRS § 377-9.

DATED: Honolulu, Hawaii, August 16, 2017.

HAWAII LABOR RELATIONS BOARD

Sesnita A.D. Moepono

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Copies to: Rebecca L. Covert, Esq.
James E. Halvorson, Deputy Attorney General

[i] HRS § 91-11 states:

> **§91-11 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 such portions thereof as may be cited by the parties.

[ii] Order No 2457 noted regarding these six alternative representations of his [Ah Sing's] employment status and consequent reasons for termination reflected in the record:

1. Ah Sing asserts that he was hired to a permanent regular civil service position and that he quits his job at Long's Drugs in order to participate in the benefits of public employment, including health insurance for his children. He was afforded none of his civil service or contractual rights prior to termination

2. Ah Sing was notified by the school that he was being terminated because his 180 limited term appointment had expired.
3. Ah Sing was notified by the school that he was being terminated because of lack of funding.

4. The UPW claims that its representative was informed by the DOE that Ah Sing was being terminated as a result of the directed loss of civil service status.

5. The DOE claims that Ah Sing's separation was the result of the expiration of his one-year limited term appointment.

6. The DOE document memorializing his separation identifies the abolition of his position as the reason.

[iii] As noted in the Proposed Findings and Conclusions, Board Member J N. Musto did not participate in the hearings but as thoroughly reviewed the record in this matter, including the files, transcripts, and exhibits. Accordingly, pursuant to Hawaii Revised Statutes § 91-11, the Board issued the PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER.

[iv] HRS § 89-2 governing Definitions 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.

[v] HRS § 89-6 governing Appropriate bargaining units provides in relevant part:

§89-6 Appropriate bargaining units. (a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

(1) Nonsupervisory employees in blue collar positions[.]

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

§89-2 Definitions. As used in this chapter:
***
"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. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

[vii] HRS § 89-6 governing Appropriate bargaining units provides in relevant part:

> **§ 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; [.]
>
> ***
>
> (d) For the purpose of negotiating a collective bargaining agreement, the public employer of an appropriate bargaining unit shall mean the governor together with the following employers:
>
> ***
>
> (3) For bargaining units (5) and (6), the governor shall have three votes, the board of education shall have two votes, and the superintendent of education shall have one vote[.]

[viii] The Third Circuit noted as examples of the Board's apparent resolution of disputed issues of fact:

> "19. Based on the record, the Board finds that given the Employer's varying versions of Ah Sing's Employment [sic] status and his separation from his job as a custodian and Connections at a time when the employment status of charter school employees was at best ambiguous and muddled, Ah Sing fell within the affected class referred to in the Stipulation and Order, Order No. 2237 and should have been reinstated. (Finding of Fact No. 19 at R-726)
>
> "On the record before the Board in this case, the Board can only conclude that Ah Sing's employment status and treatment by the Respondents were hopelessly muddled. The record reflects at least six alternative representations of his employment status and consequent reasons for termination": (Discussion R-730)
>
> "And having concluded that Ah Sing was in all probability the victim of the confusion surrounding the employment rights and status of public charter school workers, the Board further concludes that it is neither necessary nor proper to put Ah Sing and the parties through the burdens of the uncertainty, time and expense that would have involved in sorting through the minutia of his particular circumstances." (Discussion, R-731)

[ix] *See:* DHRD Report, dated December 3, 2001, showing a pay rate change, effective January 1, 2002, for a School Custodian II, LTA employee classification, appointed June 30, 2002 with an NTE date of June 30, 2002, showing a Union Code of 01; DHRD Report, dated June 20, 2001, showing an extension of his appointment as a BC/Service/ Maintenance Wkr, from July 1, 2001 with an NTE date of July 31, 2001 with Union Code 01; a DHRD Report, dated July 23, 2001, showing extension of his appointment, effective August 1, 2001 with an NTE date of August 31, 2001 shows Union Code 01; and a DHRD Report, dated August 21, 2001, showing that at close of business August 1, 2001, his BC Service/Maintenance Wkr was terminated to "Accept LTA position #56376 Sch Cust II 100% at Connection PCS" with a Union Code 01.

[x] *See* Ex. 1 at *17-20; Ex, 2 at *2-3 to UPW's Opposition to Respondents' Motion to Dismiss and/or for Summary Judgment United Public Workers, Local 646, AFL-CIO v. Okuma-Sepe, Board Case No. CE-01-473.

[xi] In fact, by July 17, 2003, Connections received notice of a July 8, 2003 Decision from the Unemployment Insurance Division that the HRS § 383-29(b) denial provisions did not apply to Ah Sing based on his past unemployment for the 2002-03 school year, his lack of reasonable assurance to return to work for the 2003-04 school year based on the June 30, 2003 ending of his contract, and the employer's statement that he would not be re-employed due to funding.

[xii] 42 U.S.C. § 2000e-3(a) states:

> **(a)** Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§ 2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§ 2000e-2000e-17].