STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and MARIE LADERTA, Director, Department of Human Resources Development, State of Hawaii, Respondent.	CASE NOS.: CE-01-720a CE-10-720b ORDER NO. 2656 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING IN PART RESPONDENTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT AND DENYING COMPLAINANT'S MOTION FOR INTERLOCUTORY RELIEF; AND NOTICE OF HEARING

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING IN PART RESPONDENTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT AND DENYING COMPLAINANT'S MOTION FOR INTERLOCUTORY RELIEF; AND NOTICE OF HEARING

On August 8, 2009, Complainant UNITED PUBLIC WORKERS, Local 646, AFL-CIO (Complainant or UPW) filed a prohibited practice complaint against Respondent MARIE LADERTA (Laderta), Director, Department of Human Resources Development, State of Hawaii (State or Respondent), alleging, inter alia, that on or about July 20, 2009, Laderta announced the impending layoffs of approximately 123 bargaining unit (Unit) 1 and 93 Unit 10 employees; that the Union requested the State to negotiate over the impending layoffs and requested information needed in connection with the negotiations; that the criteria and procedure for layoffs are negotiable as well; that Laderta failed to respond to the request for bargaining or to the information request; and that Laderta has breached her duty to bargain in good faith and has wilfully committed prohibited practices in violation of Hawaii Revised Statutes (HRS) §§ 89-13(a)(5), (7), and (8).

On August 17, 2009, Laderta filed a Motion to Dismiss and/or for Summary Judgment, asserting that by letters dated July 30, 2009, and August 7, 2009, the State responded to the UPW's information request; and that the decision to layoff employees is not negotiable pursuant to HRS § 89-9(d).

On August 24, 2009, the UPW filed a Motion to Amend Complaint and an Opposition to Respondents Marie Laderta's Motion to Dismiss and/or for Summary Judgment.

Also on August 24, 2009, the UPW filed a Motion for Interlocutory Relief, asserting (1) there is a duty to bargain over labor cost savings including furloughs, layoffs, and wage reductions; (2) Laderta also breached her duty to negotiate over the manner, timing, and effects of the massive layoffs; and (3) absent interlocutory relief, there will be irreparable harm to employees and to the process of bargaining.

On August 25, 2009, the UPW filed its Memorandum in Opposition to Respondents Marie Laderta's Motion to Dismiss and/or for Summary Judgment.

On August 26, 2009, Respondent filed a Memorandum in Opposition to the Motion to Amend Complaint, and on August 27, 2009, filed a Memorandum in Opposition to the UPW's Motion for Interlocutory Relief.

On August 27, 2009, the Board issued Order No. 2634, granting the UPW's Motion to Amend Complaint and setting deadlines for the parties to submit supplements to their memoranda.

On August 27, 2009, the UPW filed its First Amended Complaint (Amended Complaint), which added Linda Lingle, Governor, State of Hawaii (Governor or Lingle), and Clayton A. Frank, Director, Department of Public Safety, State of Hawaii (Frank), as respondents (collectively with Laderta, Respondents). The Amended Complaint also added allegations that Lingle's threat of mass layoffs and the shutdown of programs interfered, restrained, and coerced employees in the exercise of statutory and constitutional rights (by and through the UPW); that on July 29, 2009, the UPW submitted a request to negotiate over the decision and implementation of the decision to close Kulani Correctional Facility (Kulani) and submitted a supplemental request for information to Laderta and Frank; that the reduction in force and layoff procedures, time deadlines, criteria, and arbitrary requirements as set forth by Respondents in their August 4, 2009, notices to affected employees were not subject to prior notice, consultation, or negotiation with the UPW; that on and after August 4, 2009, the UPW requested extensions of time deadlines and further information; that Laderta and Frank provided partial responses to the information requests; and that Respondents wilfully interfered with, restrained, and coerced employees in the exercise of rights guaranteed under HRS chapter 89, in violation of HRS § 89-13(a)(1); discriminated regarding terms and conditions of employment to discourage membership in an employee organization through threats to job security, implementation of reduction in force, layoffs and discharges in violation of HRS § 89-13(a)(3); refused to bargain collectively in good faith over furloughs as an alternative to layoffs, and for unilaterally implementing procedures and criteria for reduction in force, displacements, and discharges of bargaining unit employees in violation of HRS § 89-13(a)(5); refused to comply with HRS §§ 89-3 and 89-9(a), (c), and (d), in violation of HRS § 89-13(a)(7); and violated the terms of the Unit 1 and Unit 10 collective bargaining agreements including sections 1, 3, 11, 12, 13, 14, 38, 66, and 68, in violation of HRS § 89-13(a)(8).

On September 2, 2009, the UPW filed its Memorandum Submission in Support of Motion for Interlocutory Relief, arguing that the threats and implementation of mass layoffs are "inherently destructive" of public employee rights, and the Governor's threat of mass layoffs of bargaining unit employees also violates HRS § 89-13(a)(3).

On September 2, 2009, Respondents filed their First Supplement to Motion to Dismiss and/or for Summary Judgment, noting additional information being provided regarding the UPW's information requests. On September 4, 2009, Respondents filed their Second Supplement to Motion to Dismiss and/or for Summary Judgment. Also on September 4, 2009, Respondents filed a Response to UPW's Memorandum Submission in Support of Motion for Interlocutory Relief.

On September 8, 2009, the UPW filed its Supplemental Memorandum in Opposition to Respondents' Motion to Dismiss and/or for Summary Judgment, arguing that Respondents' Motion to Dismiss and/or for Summary Judgment is restricted by the September 2, 2009 filing, and that the unilateral layoffs constitute a refusal to bargain and violations of sections 1.05 and 12.02 of the collective bargaining agreements.

On September 8, 2009, Respondents filed their First Supplemental Response to UPW's Memorandum Submission in Support of Motion for Interlocutory Relief. On September 9, 2009, Respondents filed their Third Supplement to Motion to Dismiss and/or for Summary Judgment. On September 10, 2009, Respondents filed their Fourth Supplement to Motion to Dismiss and/or for Summary Judgment.

On September 10, 2009, the Board heard oral arguments on Respondents' Motion to Dismiss and/or for Summary Judgment, and Complainant's Motion for Interlocutory Relief. Complainant argued that it seeks interlocutory relief to stop interference with union activity; that the State failed to negotiate; and that the layoffs are discriminatory and retaliatory. Respondents argued that the decision to shutdown part of an employer's operations because of economics is not subject to mandatory bargaining; that procedures and criteria are permissive, not mandatory, subjects of bargaining; and that Respondents' Motion to Dismiss in Case Nos.: CE-01-710a, CE-10-710b, shows that layoffs were an alternative to furloughs as early as May 18, 2009, prior to the UPW's court action.

Based upon a consideration of the record and the arguments presented, the Board makes the following findings of fact, conclusions of law, and order granting in part Respondent's Motion to Dismiss and/or for Summary Judgment, and denying Complainant's Motion for Interlocutory Relief.

FINDINGS OF FACT

1. The UPW is an employee organization and exclusive representative within the meaning of HRS § 89-2, which represents the interests of nonsupervisory

public employees in blue collar positions included in Unit 1, and institutional, health, and correctional workers included in Unit 10.

2. Governor Linda Lingle in an employer or public employer pursuant to the definitions provided in HRS § 89-2, and is a public employer for purposes of negotiating a collective bargaining agreement for Unit 1 and Unit 10 pursuant to HRS § 89-6(d).

3. Laderta is the Director of the Department of Human Resources Development, State of Hawaii, and as representative of the Governor in dealing with public employees, is a public employer within the meaning of HRS § 89-2.

4. Frank is the Director of the Department of Public Safety, State of Hawaii, and as a representative of the Governor in dealing with public employees, is a public employer within the meaning of HRS § 89-2.

5. As alleged in the Amended Complaint, and accepted as true for purposes of the pending motions:

   a. On June 16, 2009[1] [sic], the UPW notified the State (and other public employers) of a desire to renew and to amend various provisions of the July 1, 2007 to June 30, 2009 Unit 1 and Unit 10 agreements, pursuant to section 66 (Unit 1) and section 68 (Unit 10).

   b. On June 30, 2009[2] [sic], the State of Hawaii (and other public employers) notified the UPW of a desire to renew and amend various provisions of the July 1, 2007 to the June 30, 2009 Unit 1 and Unit 10 agreements.

   c. Negotiations over the terms of the July 1, 2009 to June 30, 2011 agreement commenced on July 14, 2008.

   d. The State and the UPW discussed a proposed furlough plan on or about April 13, 15, and 23, 2009, and also had discussions on May 19 and 30, 2009, with representatives from other public employee unions present.

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[1]It appears from exhibits submitted in conjunction with the UPW's Motion for Interlocutory Relief that the correct year is 2008.

[2]It appears from exhibits submitted in conjunction with the UPW's Motion for Interlocutory Relief that the correct year is 2008.

e. At all relevant times during the discussions the proposed State furlough plan was presented and discussed as a means of addressing the State's projected fiscal shortfall for the next two years by the Lingle administration, as an alternative to layoffs.

f. During the 2009 regular session of the Legislature, the Governor indicated she preferred not to layoff employees or to raise taxes to address the projected fiscal shortfall.

g. In early May 2008 [sic], the Legislature adopted various "revenue enhancing" measures, over-riding the Governor's vetoes (which were based on her objections to raising taxes).

h. On June 1, 2009, the Governor unilaterally announced a statewide furlough of three days per month for a period of two years.

i. On June 8, 2009, the UPW requested negotiations over the furlough decision.

j. On June 12, 2009, the UPW filed a class grievances [DMN-09-01 and DMN-09-02] for alleged violations of the Unit 1 and Unit 10 agreements relating to the announced furloughs.

k. On June 16, 2009, the UPW filed civil complaints in the circuit court contesting the constitutionality of the furlough decision and seeking injunctive and other relief.

l. On June 16, 2009, the Governor made a statement, "If the unions are successful at blocking furloughs, we will go to some mass layoffs and some shutdown of programs."

m. On June 18, 2009, the Governor stated, "If the furloughs are not implemented, the State would have to layoff at least 2,500 Executive Branch employees to make up for the projected revenue short falls. Such layoffs could also result in shut down of entire programs and services. State executive departments are preparing layoff plans in

the event that public worker unions are successful in blocking the implementation of the furlough plan."

n. On June 19, 2009, the UPW amended its class action grievances for alleged discrimination and violations of sections 3, 12, and 66 of the collective bargaining agreements, and requested information regarding the announced furloughs and layoff plans.

o. On July 2, 2009, the circuit court granted a motion for temporary restraining order in the civil action and enjoined the furlough.

p. On or about July 20, 2009, Laderta announced the impending layoffs of approximately 123 Unit 1 and 93 Unit 10 employees in a letter to the UPW.

q. On July 22, 2009, the UPW requested the State to negotiate over the impending layoffs, and in a letter to Laderta requested information in connection with the negotiations within 7 days of July 22, 2009.

r. On July 23, 2009, Frank notified the UPW of an impending layoff due to closure of the Kulani Correctional Facility on or about October 26, 2009.

s. On July 26, 2009, the UPW submitted a request to negotiate over the decision and implementation of the decision to close Kulani Correctional Facility and submitted a supplemental request for information to Laderta.

t. Laderta did not respond to the July 22, 2009, information request within 7 days as requested by the UPW, and on July 10, 2009, refused to negotiate claiming that layoffs is a management right.

u. On August 3, 2009, Frank informed the inmates at Kulani of their relocation by the end of September 2009.

v. On August 4, 2009, the Governor announced a decision to layoff approximately 1,100 State employees on or

about November 13, 2009, and threatened a second round of layoffs.

w. On and after August 4, 2009, various State officials sent out written notices of layoffs to the 1,100 State employees, including notices to Unit 1 and Unit 10 employees.

x. On August 4, 2009, the notices instructed employees to complete on-line reduction in force (RIF) applications and work force reduction placement questionnaires by August 18, 2009.

y. The layoff procedure, time deadlines, criteria, and requirements set for by Respondents in the August 4, 2009, notices were not subject to prior notice, consultation, or negotiations with the UPW.[3]

z. On August 7, 2009, Laderta and Frank provided partial responses to the request for information submitted on July 22 and 29, 2009.

6. Based upon the Declaration of Dayton Nakanelua, the UPW State Director (Nakanelua) the Board makes the following findings:

a. Negotiations over the terms of the July 1, 2009 to June 30, 2011 agreement commenced on July 14, 2008, and negotiations for the Unit 10 agreement commenced on November 20, 2008.

b. There were no formal meetings in 2008 after November 20, 2008, due in part to the economic downturn.

c. On April 1, 2009, the State made an off the record proposal for a furlough plan of 16 days per year or 32 days for two years.

d. Due to the Lingle administration's interest in furloughs as an alternative to layoffs, by letter dated May 12, 2009, the UPW, HGEA, UHPA, and HSTA decided to request multi-union bargaining.

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[3]It is the UPW's position that these procedures and criteria are mandatory subjects of bargaining.

e. Discussions on a multi-union basis began on or about May 19, 2009.

7. By letter dated June 8, 2009, Laderta wrote to Nakanelua concerning the Governor's June 1, 2009, announcement and requesting consultation over furloughs.

8. By letter dated July 7, 2009, Laderta requested that the parties begin negotiations over: (1) the number of furlough days; (2) the State's furlough plan(s); (3) furlough procedures; and (4) the impact of the furlough plan on affected employees.

9. On July 26, 2009, the UPW submitted a request to negotiate over the decision and implementation of the decision to close Kulani Correctional Facility (Kulani) and submitted a supplemental request for information as it pertained to the closure of Kulani. A similar request was made by letter dated July 29, 2009, to Frank to negotiate the closure of Kulani.

10. By letter dated August 12, 2009, regarding layoff consultation, Laderta informed the UPW that a third option would be available – retirement.

11. On August 31, 2009, Laderta provided a supplemental response to the UPW's July 22 and July 29, 2009, information requests.

12. On September 9, 2009, Laderta further supplemented her responses to the UPW's July 22 and July 29, 2009, information requests.

13. On September 10, 2009, Laderta further supplemented her responses to the UPW's July 22 and July 29, 2009, information requests.

14. On or about May 29, 2009, Georgina Kawamura, Director, Department of Budget and Finance, State of Hawaii, had a meeting with union leaders, including the UPW's State Director, and informed them of the efforts taken to reduce the State's budget. The union leaders were provided with a copy of a document entitled "Roadmap to Rebalancing FY 2009-2011 Financial Plan." The Roadmap included budget expenditure reductions and other spending restrictions.

15. The Hawaii State Constitution requires that general fund expenditures for any fiscal year shall not exceed the State's current general fund revenues and unencumbered cash balances.

16. The Council on Revenues' revenue estimates are used in budget preparation and budget execution. A biennial budget is used.

17. The Governor must submit a balanced financial plan to the Legislature.

18. According to the "Overview of the State's General Fund Fiscal Condition" prepared by the Department of Budget and Finance, and entered as evidence in the HGEA interest arbitration proceeding:

    a. The Council on Revenues' January 12, 2009, update indicated that revenue estimates decreased by $650 million for fiscal years 09-11.

    b. The Council on Revenues' March 13, 2009, update indicated that revenue estimates decreased by an additional $256 million for fiscal years 09-11.

    c. The Council on Revenues' June 1, 2009, update indicated that revenue estimates decreased by an additional $637 million dollars for fiscal years 09-11.

    d. The Council on Revenues' August 5, 2009, update indicated that revenue estimates decreased by an additional $64 million for fiscal years 09-11.

    e. The Council on Revenues' August 27, 2009, update indicated that revenue estimates decreased by an additional $124 million for fiscal year 10-11.

19. Labor costs are a significant portion of general fund expenditures.

20. Section 1 of the Unit 1 and Unit 10 collective bargaining agreements governs union recognition.

21. Section 3 of the Unit 1 and Unit 10 collective bargaining agreements governs discrimination.

22. Section 11 of the Unit 1 and Unit 10 collective bargaining agreements governs employee discipline.

23. Section 12 of the Unit 1 and Unit 10 collective bargaining agreements governs layoffs, including notices, retention points, conditions for placement, placement within department, and employer-wide layoffs.

24. Section 13 of the Unit 1 and Unit 10 collective bargaining agreements governs placement of a laid off employee on the recall list.

25. Section 14 of the Unit 1 and Unit 10 collective bargaining agreements governs prior rights, benefits, and perquisites.

26. Section 38 of the Unit 1 and Unit 10 collective bargaining agreements governs other leaves of absence without pay.

27. Section 66 of the Unit 1 collective bargaining agreement governs duration; Section 66 of the Unit 10 collective bargaining agreement governs entirety and modification.

28. Section 68 of the Unit 10 collective bargaining agreement governs duration; there does not appear to be a Section 68 in the Unit 1 collective bargaining agreement.

29. On August 8, 2009, Complainant UPW filed a prohibited practice complaint against Respondent Laderta, alleging, inter alia, that on or about July 20, 2009, Laderta announced the impending layoffs of approximately 123 Unit 1 and 93 Unit 10 employees; that the Union requested the State to negotiate over the impending layoffs and requested information needed in connection with the negotiations; that the criteria and procedure for layoffs is negotiable as well; that Laderta failed to respond to the request for bargaining or to the information request; and that Laderta has breached her duty to bargain in good faith and has wilfully committed prohibited practices in violation of HRS §§ 89-13(a)(5), (7), and (8).

30. On August 17, 2009, Laderta filed a Motion to Dismiss and/or for Summary Judgment, asserting that by letters dated July 30, 2009, and August 7, 2009, the State responded to the UPW's information request; and that the decision to layoff employees is not negotiable pursuant to HRS § 89-9(d).

31. On August 24, 2009, the UPW filed a Motion to Amend Complaint and an Opposition to Respondents Marie Laderta's Motion to Dismiss and/or for Summary Judgment.

32. Also on August 24, 2009, the UPW filed a Motion for Interlocutory Relief, asserting (1) there is a duty to bargain over labor cost savings including furloughs, layoffs, and wage reductions; (2) Laderta also breached her duty to negotiate over the manner, timing, and effects of the massive layoffs; and (3) absent interlocutory relief, there will be irreparable harm to employees and to the process of bargaining.

33. On August 25, 2009, the UPW filed its Memorandum in Opposition to Respondents Marie Laderta's Motion to Dismiss and/or for Summary Judgment.

34. On August 26, 2009, Respondent filed a Memorandum in Opposition to the Motion to Amend Complaint, and on August 27, 2009, filed a Memorandum in Opposition to the UPW's Motion for Interlocutory Relief.

35. On August 27, 2009, the Board issued Order No. 2634, granting the UPW's Motion to Amend Complaint and setting deadlines for the parties to submit supplements to their memoranda.

36. On August 27, 2009, the UPW filed its Amended Complaint, which added Lingle and Frank as respondents. The Amended Complaint also added allegations that Lingle's threat of mass layoffs and the shutdown of programs interfered, restrained, and coerced employees in the exercise of statutory and constitutional rights (by and through the UPW); that on July 29, 2009, the UPW submitted a request to negotiate over the decision and implementation of the decision to close Kulani and submitted a supplemental request for information to Laderta and Frank; that the reduction in force and layoff procedures, time deadlines, criteria, and arbitrary requirements as set forth by Respondents in their August 4, 2009, notices to affected employees were not subject to prior notice, consultation, or negotiation with the UPW; that on and after August 4, 2009, the UPW requested extension of times deadlines and further information; that Laderta and Frank provided partial responses to the information requests; and that Respondents wilfully interfered, restrained, and coerced employees in the exercise of rights guaranteed under HRS chapter 89, in violation of HRS § 89-13(a)(1), discriminated regarding terms and conditions of employment to discourage membership in an employee organization through threats to job security, implementation of reduction in force, layoffs and discharges in violation of HRS § 89-13(a)(3), refused to bargain collectively in good faith over furloughs as an alternative to layoffs, and for unilaterally implementing procedures and criteria for reduction in force, displacements, and discharges of bargaining unit employees in violation of HRS § 89-13(a)(5), refused to comply with HRS §§ 89-3 and 89-9(a), (c), and (d), in violation of HRS § 89-13(a)(7), and violated the terms of the Unit 1 and Unit 10 collective bargaining agreements including sections 1, 3, 11, 12, 13, 14, 38, 66, and 68, in violation of HRS § 89-13(a)(8).

37. On September 2, 2009, the UPW filed its Memorandum Submission in Support of Motion for Interlocutory Relief, arguing that the threats and implementation of mass layoffs are "inherently destructive" of public employee rights, and that

the Governor's mass layoff of bargaining unit employees also violates HRS § 89-13(a)(3).

38. On September 2, 2009, Respondents filed their First Supplement to Motion to Dismiss and/or for Summary Judgment, noting additional information being provided regarding the UPW's information requests. On September 4, 2009, Respondents filed their Second Supplement to Motion to Dismiss and/or for Summary Judgment. Also on September 4, 2009, Respondents filed a Response to UPW's Memorandum Submission in Support of Motion for Interlocutory Relief.

39. On September 8, 2009, the UPW filed its Supplemental Memorandum in Opposition to Respondents' Motion to Dismiss and/or for Summary Judgment, arguing that Respondents' Motion to Dismiss and/or for Summary Judgment is restricted by the September 2, 2009 filing, and that the unilateral layoffs constitute a refusal to bargain and violations of sections 1.05 and 12.02 of the collective bargaining agreements.

40. On September 8, 2009, Respondents filed their First Supplemental Response to UPW's Memorandum Submission in Support of Motion for Interlocutory Relief. On September 9, 2009, Respondents filed their Third Supplement to Motion to Dismiss and/or for Summary Judgment. On September 10, 2009, Respondents filed their Fourth Supplement to Motion to Dismiss and/or for Summary Judgment.

41. On September 10, 2009, the Board heard oral arguments on Respondents' Motion to Dismiss and/or for Summary Judgment, and Complainant's Motion for Interlocutory Relief. Complainant argued that it seeks interlocutory relief to stop interference with union activity; that the State failed to negotiate; and that the layoffs are discriminatory and retaliatory. Respondents argued that the decision to shutdown part of an employer's operations because of economics is not subject to mandatory bargaining; that procedures and criteria are permissive, not mandatory, subjects of bargaining; and that Respondents' Motion to Dismiss in Case Nos.: CE-01-710a, CE-10-710b, shows that layoffs were an alternative to furloughs as early as May 18, 2009, prior to the UPW's court action.

CONCLUSIONS OF LAW AND DISCUSSION

1. The Board has jurisdiction over the instant motions pursuant to HRS §§ 89-5 and 89-14.

2. Review of a motion to dismiss is based on the contents of the complaint, the allegations of which are accepted as true and construed in the light most favorable to the complainant. Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. See Yamane v. Pohlson, 111 Hawai`i 74, 81 137 P.3d 980, 987 (2006) (citing Love v. United States, 871 F.2d 1488, 1491 (9th Cir. 1989)).

3. However, when considering a motion to dismiss [pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(1)] the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Id., (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).

4. Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter, "relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawai`i 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawai`i 118, 905 P.2d 624. The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id. Inferences to be drawn from the underlying facts alleged in the relevant materials must be viewed in the light most favorable to the non-moving party. Id. However, factual disputes whose resolution would not affect the outcome of the case are irrelevant to the consideration of a motion for summary judgment. See Arpin v. Santa Clara Valley Transportation Agency, 261 F.3d 912, 919 (9th Cir. 2001).

5. In a summary judgment motion, the moving party takes the position that the party is entitled to prevail because the opponent has no valid claim for relief or defense to the action. First Hawaiian Bank v. Weeks, 70 Hawaii 392, 396 (1989). Accordingly, the moving party has the initial burden of identifying those portions of the record demonstrating the absence of a genuine issue of material fact. Id., at 396, 1190; Dunlea v. Dappen, 83 Hawaii 28, 37 (1996). The moving party may discharge its burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for the opponent. Young v. Planning Comm'n., 89 Hawai`i 400, 407 (1999). Once the movant has met this burden, the opposing party has the burden of coming forward with specific facts evidencing a need for trial; an opposing party may not defeat a motion for summary judgment in the absence of any

significant probative evidence tending to support its legal theory. See Kroll Associates v. City and County of Honolulu, 833 F. Supp. 802, 804 (D. Haw. 1993), citing Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir. 1979).

6. The Hawaii Supreme Court has held that the grant of a motion for a preliminary injunction is within a court's discretion. Nuuanu Valley Ass'n. v. City and County of Honolulu, 119 Hawai`i 90, 106, 194 P.3d 531, 547 (2008). The test for granting or denying temporary injunctive relief is three-fold: (1) whether the plaintiff is likely to prevail on the merits; (2) whether the balance of irreparable damage favors the issuance of a temporary injunction; and (3) whether the public interest supports granting an injunction. Id.

7. In Life of the Land v. Ariyoshi, 59 Haw. 156, 577 P.2d 1116 (1978), the trial court denied the request for an injunction and the Hawaii Supreme Court upheld the denial of the injunction, stating the environmental group had failed to meets its burden of showing substantial likelihood of success on the merits of the case. "Since [Life of the Land] has failed to satisfy the first element of the test for temporary injunctive relief, we do not reach the other elements." Id., at 165, 577 P.2d at 1122.

8. The Amended Complaint alleges that Respondents have wilfully:

   a. Interfered, restrained, and coerced employees in the exercise of rights guaranteed under chapter 89 in violation of Section 89-13(a)(1), HRS;

   b. Discriminated regarding terms and conditions of employment to discourage membership in an employee organization through threats to job security, implementation of reduction in force, layoffs and discharges in violation of Section 89-13(a)(3), HRS;

   c. Refused to bargain collectively in good faith over furloughs as an alternative to layoffs, and for unilaterally implementing procedures and criteria for reduction in force, displacements, and discharges of bargaining unit employees in violation of Section 89-13(a)(5), HRS;

   d. Refused to comply with provisions of chapter 89, including Sections 89-3, 89-9(a), (c), and (d), in violation of Section 89-13(a)(7), HRS; and

   e. Violated the terms of the Unit 1 and Unit 10 collective bargaining agreements, including but not limited to Sections 1, 3, 11, 12, 13, 14, 38, 66, and 68, in violation of Section 89-13(a)(8), HRS.

9. HRS § 89-3 provides:

> 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, including retiree health benefit contributions, 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.

10. HRS § 89-9 provides is relevant part:

> (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 or a voluntary employees' beneficiary association trust to the extent allowed in subsection (e), and other terms and conditions of employment that are subject to collective bargaining and that are to be embodied in a written agreement as specified in section 89-10, but the obligation does not compel either party to agree to a proposal or make a concession; provided that the parties may not negotiate with respect to cost items as defined by section 89-2 for the biennium 1999 to 2001, and the cost items of employees in bargaining units under section 89-6 in effect on June 30, 1999, shall remain in effect until July 1, 2001.
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> * * *
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> (c) Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or

may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.

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

(1) Direct employees;

(2) Determine qualifications, standards for work, and the nature and contents of examinations;

(3) Hire, promote, transfer, assign, and retain employees in positions;

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

(5) Relieve an employee from duties because of lack of work or other legitimate reason;

(6) Maintain efficiency and productivity, including maximizing the use of advanced technology, in government operations;

(7) Determine methods, means, and personnel by which the employer's operations are to be conducted; and

(8) Take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.

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

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

11. HRS § 89-13(a) provides in relevant part:

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;

* * *

(3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;

* * *

(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[.]

12. With respect to allegations of prohibited practice pursuant to HRS §§ 89-13(a)(1), (3), and (7) (subsection § 89-13(a)(7) with respect to alleged violation of § 89-3):

    A. The record indicates that the State at all relevant times was or is facing a severe fiscal crisis, and that the State was or is required to balance its budget in the face of ever-increasing revenue shortfalls. Further, that the Governor's consideration of layoffs of public employees as a means of addressing the predicted revenue shortfall precedes the filing of grievances or civil lawsuits by the Union.

    B. Even assuming that the Union has made a prima facie case of interference, restraint, coercion, discrimination, or retaliation, the State has presented a legitimate, non-discriminatory and non-retaliatory reason for its decision to layoff workers, and the Union has not presented evidence to rebut the State's assertions (the decline in revenues) or to demonstrate that the stated reason is mere pretext.

    C. Accordingly, the Board concludes that Respondents are entitled to summary judgment on this issue. In the alternative, to the extent summary judgment is not appropriate on this issue, the Board nevertheless concludes that Complainant has failed to prove the likelihood of success on the merits of this issue and denies injunctive relief based upon this issue.

13. With respect to allegations of prohibited practice pursuant to HRS §§ 89-13(a)(5) and (7) (subsection § 89-13(a)(7) with respect to alleged violation of §§ 89-3 and 89-9(a) and (d)):

    A. The Board concludes that the decision to layoff public employees was not subject to mandatory bargaining. Pursuant to HRS § 89-9(d), excluded from the scope of negotiations are, inter alia, the rights and obligations of a public employer to relieve an employee from duties because of lack of work or other legitimate reason; maintain efficiency and productivity, including maximizing the use of advanced technology, in government operations; and determine methods, means, and personnel by which the employer's operations are to be conducted.

B. For example, in UPW v. Hannemann, 106 Hawai`i 359, 105 P.3d 236 (2005), the Hawaii Supreme Court held that a union cannot infringe upon an employer's management rights under section 89-9(d), and that the decision to transfer employees was not subject to collective bargaining; however, the parties may negotiate procedures governing the transfer of employees. Id., at 365, 105 P.3d 236 at 242. The same analysis applies for layoffs: the decision to impose layoffs is not negotiable; however, the procedure for layoffs is a permissive subject of bargaining.

C. See, also, First National Maintenance Corporation v. National Labor Relations Board, 452 U.S. 666, 101 S. Ct. 2573 (1981) (confirmed that an employer has no duty to bargain with the union as to the decision to layoff employees. The decision itself is not part of the wages, hours, and terms and conditions of employment that require bargaining). The United States Supreme Court stated, "[w]e conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is not part of § 8(d)'s "terms and conditions" . . . over which Congress has mandated bargaining. First National Maintenance Corporation, 452 U.S. at 686, 101 S. Ct. at 2584-2585.

D. It should also be noted, however, that the National Labor Relations Act (at issue in First National and other cases cited by both parties in their memoranda) does not contain a specific "management rights" clause similar to HRS § 89-9(d).[4] Accordingly, the Board must interpret HRS § 89-9(d) in light of the Hawaii Supreme Court's decision in Hannemann, which is the case most on-point, and subsequent revision to that statute by the Legislature.

E. In Hannemann, the Hawaii Supreme Court held:

Rather, we believe Tomasu stands for the proposition that, in reading HRS §§89(a), (c), and (d) together, parties are permitted and

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[4]Similarly, Del Monte Fresh Produce (Hawaii), Inc. v. ILWU, 112 Hawai`i 489, 146 P.3d 1066 (2006), involved collective bargaining pursuant to HRS chapter 377, which does not contain a "management right" clause similar to HRS § 89-9(d).

encouraged to negotiate all matters affecting wages, hours and conditions of employment as long as the negotiations do not infringe upon an employer's management rights under section 89-9(d). In other words, the right to negotiate wages, hours and conditions of employment is subject to, not balanced against, management rights. Accordingly, in light of the plain language of HRS § 89-9(d), we hold that the HLRB erred in concluding that the City's proposed transfer was subject to collective bargaining under HRS § 89-9(a).

The Court also held in a footnote that the City and UPW may negotiate procedures governing the promotion and transfer of employees to positions within a bargaining unit.

F. At the time the Hannemann decision was made, HRS § 89-9(d) contained the following language:

> The employer and the exclusive representative may negotiate procedures governing the promotion and transfer of employees to positions within a bargaining unit; the suspension, demotion, discharge, or other disciplinary actions taken against employees within the bargaining unit; and the layoff of employees within the bargaining unit. Violations of the procedures so negotiated may be subject to the grievance procedure in the collective bargaining agreement.

After the Hannemann decision, that language was replaced with the following:

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

(2007 Haw. Sess. Laws. Act 58, § 1).

G. By the clear language of Act 58 (2007 Haw. Sess. Laws), the management rights provisions of § 89-9(d) shall not be used to invalidate provisions actually included in a collective bargaining agreements in effect on and after June 30, 2007; however, the statute continued to provide that procedures and criteria on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions, are permissive subjects of bargaining.

F. More recently, in Civil No. 09-1-1375-06 (KKS), HGEA v. Lingle, the circuit court addressed the issue raised by the State involving HRS § 89-14 exclusive jurisdiction issues. Although the court concluded that the issue was not ripe for consideration as the Governor had not yet ordered layoffs, the court did state that "layoff procedures and criteria are statutorily recognized permissive subjects of bargaining." (Findings of Fact and Conclusions of Law and Order Granting Plaintiff's Motion for a Preliminary Injunction as to Counts I, II, and III of the First Amended Complaint and Dismissing Count IV Without Prejudice, and Entering Permanent Injunctive Relief Against Defendant as to Counts I, II, and III, para. 51, page 22).

G. Accordingly, the Board concludes that Respondents are entitled to summary judgment on this issue. The Board therefore denies injunctive relief based upon this issue as Complainant has failed to establish likelihood of success on the merits of this issue.

14. With respect to the issue of the procedures and criteria for layoffs, such procedures and criteria are permissive subjects of bargaining, pursuant to HRS § 89-9(d) and the Hannemann decision. Additionally, by letter dated July 30, 2009, the State informed the UPW that it intended to follow the Layoff/RIF procedures set forth in the collective bargaining agreements. See Respondent's Motion to Dismiss and/or for Summary Judgment, Exhibit B. This is not rebutted by the UPW. Accordingly, Respondents are entitled to summary judgment on this issue, and the Board denies Complainant's Motion for Interlocutory Relief with respect to this issue.[5]

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[5]To the extent procedures and criteria are permissive subjects of bargaining, such provisions in the agreements would not continue pursuant to the Katz doctrine. Assuming, arguendo,

15. With respect to allegations of prohibited practice pursuant to HRS § 89-13(a)(7) with respect to alleged violation of § 89-9(c):

    It appears that the parties have not argued this issue, or at least have not argued the issue sufficiently to meet their respective burdens. For example, the parties have not established the scope of the duty to consult; when, if ever, request(s) to consult were communicated to the other party; how much consultation (if any) already occurred; what consultation (if any) remains to be done; etc. Accordingly, the Board denies Respondents' Motion to Dismiss and/or for Summary Judgment with respect to this issue, and denies Complainant's Motion for Interlocutory Relief with respect to this issue.

16. With respect to allegations of prohibited practice pursuant to HRS § 89-13(a)(8):

    A. It appears that the parties have not argued this issue, or at least have not argued the issue sufficiently to meet their respective burdens. For example, Complainant has not sufficiently alleged or argued how the Respondents' actions constitute a violation of Section 11 (governing employee discipline) or Section 38 (governing other leaves of absence) of the collective bargaining agreements.

    B. To the extent the alleged violations of the collective bargaining agreements involved alleged failure to negotiate or bargain, discrimination, retaliation, adherence to the layoff procedures, or interference, restraint, or coercion, the Board grants summary judgment in favor of Respondents and denies Complainant's Motion for Interlocutory Relief on these issues, for all the reasons discussed above. To the extent the alleged violations of the collective bargaining agreements involve other issues (such as employee discipline or leaves of absence), the parties have not argued these issues; accordingly, the Board denies Respondents' Motion to Dismiss and/or for Summary Judgment with respect to these issues, and denies Complainant's Motion for Interlocutory Relief with respect to these issues.

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that procedures and criteria are mandatory subjects of bargaining, then such provisions would continue pursuant to the Katz doctrine. However, given the assertion by Respondents that the provisions are being followed, which was not rebutted by Complainant, it appears Complainant suffered no injury either way, whether the subject is a mandatory or permissible subject of bargaining.

17. With respect to the issue of collective bargaining agreement provisions continuing beyond the agreement's expiration date:

A. In HGEA v. Linda Lingle, Civil No. 09-1-1375-06 (KKS), the circuit court, in its order granting preliminary injunction, cited with approval to NLRB v. Katz, 369 U.S. 736 (1962) (Katz), and stated in its conclusions of law:

> 21. Under the unilateral change doctrine, the employer cannot implement unilateral changes regarding matters that are mandatory subjects of bargaining, and which are in fact under discussion. NLRB v. Katz, 369 U.S. 736 (1962).
>
> 22. Katz was reading section 8(a)(5) of the National Labor Relations Act. This section is a duty to bargain collectively, which is defined as the duty to meet and confer in good faith with respect to wages, hours, and other terms and conditions of employment. This is a similar standard to what is provided in Art. 13 § 2 [of the Hawaii State Constitution]. Thus an employer's unilateral change in conditions of employment under negotiations – i.e. wages in this instance – violates the duty to bargain collectively.
>
> 23. Under Katz, certain terms and conditions of an expired agreement continue in effect by operation of law. They are no longer agreed-upon terms of a contract, they are terms imposed by law, so far as there is no unilateral right to change them. Therefore, because the ordered furloughs change wages, they cannot be imposed by unilateral action.

(Findings of Fact and Conclusions of Law and Order Granting Plaintiff's Motion for a Preliminary Injunction as to Counts I, II, and III of the First Amended Complaint and Dismissing Count IV Without Prejudice, and Entering Permanent Injunctive Relief Against Defendant as to Counts I, II, and III, paras. 21-23, pages 14-15).

18. With respect to Section 66 of the Unit 1 collective bargaining agreement, that section provides:

> DURATION.
>
> 66.01 EFFECTIVE DATES.
>
> The Unit 1 Agreement shall be effective July 1, 2007 and shall remain in full force and effect to and including June 30, 2009. It shall be renewed thereafter in accordance with statutes unless either party hereto gives written notice to the other party of its desire to modify, amend, or terminate the Unit 1 Agreement.
>
> 66.02 NOTICES AND PROPOSALS.
>
> Notices and proposals shall be in writing and shall be presented to the other party between June 15 and June 30, 2008. When the notice is given, negotiations for a new Unit 1 Agreement shall commence on a mutually agreeable date following the exchange of written proposals.

19. With respect to Section 68 of the Unit 10 collective bargaining agreement, that section provides:

> DURATION.
>
> 68.01 The Unit 10 Agreement shall be effective July 1, 2007 and shall remain in effect to and including June 30, 2009. It shall be renewed thereafter in accordance with statutes unless either party hereto gives written notice to the other party of its desire to modify, amend or terminate the Unit 10 Agreement.
>
> 68.02 Notices and proposals shall be in writing and shall be presented to the other party between June 15 and June 30, 2008. When the notice is given, negotiations for a new Unit 10 Agreement shall commence on a mutually agreeable date following the exchange of written proposals.

20. Accordingly, both the Unit 1 and Unit 10 collective bargaining agreements contain an effective start and end date. The plain language of both agreements provides that the agreements shall be renewed thereafter "in accordance with

statutes" (emphasis added); however, there are no statutory provisions within chapter 89 that provides for automatic renewal of agreements. Furthermore, § 89-11, which governs impasse procedures, applies to renewed agreements in the same way and to the same extent as to new agreements, which indicates renewed agreements are to be reached through negotiations in similar manner to new agreements.

21. However, even assuming, arguendo, that the provisions of the agreements are automatically renewed despite the absence of statutes so providing, the plain language of both agreements expressly states that they shall be renewed thereafter in accordance with statutes, "unless either party hereto gives written notice to the other party of its desire to modify, amend or terminate" the agreement (emphasis added). Here, the Union gave notice of its desire to renew and amend various provisions of the agreement (on June 16, 2008), and the public employers gave notice of their desire to renew and amend various provisions of the agreements (on June 30, 2008). By the plain language of the agreements, automatic renewal in accordance with statutes occurs unless notice is given to modify, amend, or terminate – here, such notice was given and it thus appears automatic renewal could not have occurred.

22. For the reasons discussed above, the Board concludes that any continuation of provisions of the Unit 1 and Unit 10 agreements beyond the agreements' expiration dates are controlled by the principles in Katz, cited to with approval by the circuit court in HGEA v. Linda Lingle, Civil No. 09-1-1375-06 (KKS).

23. With respect to the issue of Respondents' alleged failure to provide information, the UPW has alleged that Respondents provided partial responses to the information requests. The UPW has not articulated what information was not provided, or the Union's need for that information. Respondents have included in their pleadings supplemental responses to the information requests. Respondents have also asserted that some of the requested information, such as copies of all the employees' paychecks since the date of employment; copies of all G-1 forms since the date of employment; and copies of all payroll records since the date of employment" are not necessary, relevant, and vital to the Union's performance of its duties. In response, the Union has not articulated why such information is necessary, relevant, and vital.

24. Accordingly, the Board concludes that Respondents are entitled to summary judgment on this issue. In the alternative, to the extent summary judgment is not appropriate on this issue, the Board nevertheless concludes that

Complainant has failed to prove the likelihood of success on the merits of this issue and denies injunctive relief based upon this issue.

SUMMARY

25. With respect to allegations of prohibited practice pursuant to HRS §§ 89-13(a)(1), (3), and (7) (subsection § 89-13(a)(7) with respect to alleged violation of § 89-3), the Board concludes that Respondents are entitled to summary judgment on this issue. In the alternative, to the extent summary judgment is not appropriate on this issue, the Board nevertheless concludes that Complainant has failed to prove the likelihood of success on the merits of this issue and denies injunctive relief based upon this issue.

26. With respect to allegations of prohibited practice pursuant to HRS §§ 89-13(a)(5) and (7) (subsection § 89-13(a)(7) with respect to alleged violation of §§ 89-3 and 89-9(a) and (d)), the Board concludes that Respondents are entitled to summary judgment on this issue. The Board therefore denies injunctive relief based upon this issue as Complainant has failed to establish likelihood of success on the merits of this issue

27. With respect to the issue of the procedures and criteria for layoffs, such procedures and criteria are permissive Respondents are entitled to summary judgment on this issue, and the Board denies Complainant's Motion for Interlocutory Relief with respect to this issue.

28. With respect to allegations of prohibited practice pursuant to HRS § 89-13(a)(7) with respect to alleged violation of HRS § 89-9(c), the Board denies Respondents' Motion to Dismiss and/or for Summary Judgment with respect to this issue, and denies Complainant's Motion for Interlocutory Relief with respect to this issue.

29. With respect to allegations of prohibited practice pursuant to HRS § 89-13(a)(8), to the extent the alleged violations of the collective bargaining agreements involved alleged failure to negotiate or bargain, discrimination, retaliation, adherence to the layoff procedures, or interference, restraint, or coercion, the Board grants summary judgment in favor of Respondents and denies Complainant's Motion for Interlocutory Relief on these issues, for all the reasons discussed above. To the extent the alleged violations of the collective bargaining agreements involve other issues (such as employee discipline or leaves of absence), the Board denies Respondents' Motion to

Dismiss and/or for Summary Judgment with respect to these issues, and denies Complainant's Motion for Interlocutory Relief with respect to these issues.

30. With respect to the issue of collective bargaining agreement provisions continuing beyond the agreement's expiration date, the Board concludes that the provisions of the agreements did not automatically renew, and any continuation of provisions of the Unit 1 and Unit 10 agreements beyond the agreements' expiration dates are controlled by the principles in Katz, cited to with approval by the circuit court in HGEA v. Linda Lingle, Civil No. 09-1-1375-06 (KKS).

31. With respect to the issue of Respondents' alleged failure to provide information, the Board concludes that Respondents are entitled to summary judgment on this issue. In the alternative, to the extent summary judgment is not appropriate on this issue, the Board nevertheless concludes that Complainant has failed to prove the likelihood of success on the merits of this issue and denies injunctive relief based upon this issue.

ORDER

The Board hereby grants in part Respondent's Motion to Dismiss and/or for Summary Judgment as discussed above, and denies Complainant's Motion for Interlocutory Relief.

NOTICE OF HEARING

NOTICE IS FURTHER GIVEN that pursuant to HRS §§ 89-5(i)(4), 89-5(i)(5), and 89-14, and HAR § 12-42-8(g), the Board will conduct a hearing on the remaining issues of the instant complaint, e.g., consultation, violations of the collective bargaining agreement not addressed herein, etc., on **November 2, 2009 at 9:30 a.m.** in the Board's hearing room. The purpose of the hearing is to receive evidence and arguments on whether Respondents committed prohibited practices as alleged by the Complainant. The hearing may continue from day to day until completed.

DATED: Honolulu, Hawaii, October 22, 2009.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SARAH R. HIRAKAMI, Member

Opinion Dissenting, in Part

This Board Member finds that the balance of irreparable harm tips in favor of the Union's need to have meaningful discussion over the impending layoff by following already negotiated Reduction-in-Force (RIF) Policy. The employer turned over a voluminous amount of documents which was requested by the Union to process grievances filed (DMN-09-01) regarding the announced furlough and layoff plans by the State. This Board Member finds that in all fairness to the Union and its members, they should be afforded the same relief as provided to the Hawaii Government Employees Association in Case Nos.: CE-02-723a, et seq., Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO v. Linda Lingle, et al., in Order. 2641, Order Granting, in Part, Complainant's Motion for Interlocutory Relief Filed On August 19, 2009 and Notice of Status Conference and Hearing, where the employer was ordered to have meaningful consultation regarding the layoff as outlined in the RIF policy and be afforded sufficient time to undergo this laborious and difficult task. This Board Member would be inclined to stop the layoffs if such meaningful dialogue did not take place so as to avoid the wrongful termination of Union members. Such action would cause the Union to file grievances of wrongful termination based on the misapplication of the RIF policy. If the Union were to prevail in its grievance and the arbitrator awarded the reinstatement of those wrongfully terminated, another crisis would arise because another wave of employees would be terminated. This Board Member wishes to avoid any further chaos in an already volatile environment.

As for the Duty to Bargain, this Board Member finds that there was a duty to bargain over the effects of the closure of Kulani Prison as in the case of Del Monte Fresh Produce (Hawaii), Inc. v. International Longshore and Warehouse Union, Local 142, AFL-CIO, 112 Hawai`i 489, 146 P.3d 1066 (2006) and Decision No. 464, International Longshore and Warehouse Union, Local 142, AFL-CIO v. Del Monte Fresh Produce (Hawaii), Inc., et al., (2007). The closure of this facility will have a grave impact on the County of Hawaii and its people. The shutdown of a facility will cause its employees to exercise their bumping rights under the RIF Policy. Many will be displaced to other facilities on other islands causing much disruption in their lives. Even with the economic downturn forcing the government to make critical changes, such decision should have been discussed with the exclusive representative when the employer first knew of the impending closure. This Board Member finds that the public's interest supports the granting of an interlocutory order. I find that the policy underlying Chapter 89, HRS, that joint decision-making and the collective bargaining process promotes effectiveness in government.

With respect to the duration clauses, Articles 66 and 68, it is this Board Member's opinion that the agreement's terms continue as agreed to by the parties in their Memorandum of Agreement providing for the Alternate Impasse Procedure, dated March 3, 2009.

For all the reasons discussed, I find that based on the pleadings and arguments presented, that partial injunctive relief is warranted to give the parties an opportunity to engage in meaningful consultation regarding the RIF. I also find that the Employer failed to bargain in good faith as to the closure of Kulani Prison.

EMORY J. SPRINGER, Member

Copies sent to:

Jeffrey A. Keating, Deputy Attorney General
Herbert R. Takahashi, Esq.