STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII STATE TEACHERS ASSOCIATION, Complainant, and BOARD OF EDUCATION, Department of Education, State of Hawaii; PATRICIA HAMAMOTO, Superintendent, Department of Education, State of Hawaii; and SUSAN H. KITSU, Department of Education, State of Hawaii, Respondents.	CASE NO. CE-05-667 ORDER NO. 2548 ORDER DENYING RESPONDENTS' MOTION TO DISMISS AND DENYING HSTA'S MOTION FOR SUMMARY JUDGMENT; AND NOTICE OF SECOND PREHEARING CONFERENCE

ORDER DENYING RESPONDENTS' MOTION TO DISMISS AND DENYING HSTA'S MOTION FOR SUMMARY JUDGMENT; AND NOTICE OF SECOND PREHEARING CONFERENCE

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

On June 5, 2008, Respondents filed a Motion to Dismiss Prohibited Practice Complaint Filed May 27, 2008 (Motion to Dismiss), arguing, inter alia, that the Complaint is time-barred; and, that only consultation, not negotiation, was required and Respondents consulted with the HSTA.

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

On July 7, 2008, the HSTA filed a Motion for Summary Judgment, arguing, inter alia, that University of Hawaii Professional Assembly v. Tomasu, 79 Hawaii 154 (1995) is dispositive on the issue of negotiability; that the DOE policies impact on the terms and conditions of employment and are negotiable; and that Respondents violated their duty to negotiate on mandatory subjects by their unilateral actions.

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

After careful consideration of the record and arguments presented, the Board makes the following findings of fact, conclusions of law, and order denying Respondents' Motion to Dismiss and denying the HSTA's Motion for Summary Judgment, except to the extent that the allegations in the Complaint regarding the repeal of Title 8, Subtitle 2, Chapter 41 of the DOE rules, are hereby dismissed.

FINDINGS OF FACT

1. At all times relative to this Complaint, Respondent BOE was or is a public employer within the meaning of HRS §89-2[1], and Respondents Hamamoto and Kitsu are or were public employers within the meaning of HRS § 89-2 as individuals who represent a public employer or act in the public

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

> "Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees.

employer's interest in dealing with public employees, for employees belonging to bargaining Unit 05.[2]

2. At all times relevant to this Complaint, the HSTA is or was an employee organization within the meaning of HRS § 89-2[3] and the exclusive representative of employees belonging to bargaining Unit 05.

3. The HSTA and Respondent BOE are parties to the Unit 05 Agreement effective July 1, 2007, through June 30, 2009.

4. Article XXI of the Agreement, entitled "Maintenance of Benefits," provides in relevant part:

> A. Except as modified herein, teachers shall retain all rights, benefits and privileges pertaining to their conditions of employment contained in the Standard Practices at the time of the execution of this Agreement.
>
> B. Subject to the foregoing paragraph, nothing contained herein shall be interpreted as interfering

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[2]HRS § 89-6 provides in relevant part:

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[.]

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

"Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees' beneficiary association trust, and other terms and conditions of employment of public employees.

> with the Employer's right to make, amend, revise, or delete any portion of the Standard Practices; provided, however, that the [HSTA] shall be consulted on any changes to be made.

5. Article XXIII of the Agreement, entitled "Entirety Clause," provides in relevant part:

> This document contains the entire agreement between the parties and no other agreement, representation or understanding will be binding on the parties unless made in writing by mutual consent of both parties.

6. On or about November 7, 2007, Fay Ikei (Ikei), the Acting Assistant Superintendent of the Department of Education (DOE), sent to Joan Lee Husted (Husted), the Executive Director of the HSTA, a letter notifying the HSTA that the Committee on Special Programs of the BOE approved the DOE Proposed Policy # 4211, entitled "Department of Education Anti-Harassment, Anti-Bullying, and Anti-Discrimination Against Student(s) by Employee." The letter stated that Proposed Policy #4211 was being submitted to the HSTA "for consult and confer." According to its return receipt, the letter was received by the HSTA on November 9, 2007.

7. Proposed Policy #4211 was developed pursuant to recommendation from the Safe Schools Community Advisory Committee (SS-CAC), comprised of community leaders and government stakeholders, who made recommendations on how to improve safety in Hawaii schools. One of the recommendations was to adopt and implement a policy against harassment, bullying, and discrimination by staff against students. Proposed Policy #4211 was to apply to all DOE employees.

8. The November 7, 2007, letter from Ikei to Husted requested HSTA's comments on the proposed policy, and attached for review a copy of the proposed policy. The letter also stated in relevant part:

> Your timely response would be greatly appreciated by December 10, 2007. If the Department does not receive a response by this date, it shall assume HSTA has no comment on the matter.

The letter further stated that should Husted have any questions, she should contact Jennifer Kehe (Kehe), and provided a contact telephone number.

9. The draft policy attached to the November 7, 2007, letter from Ikei provided in relevant part:

> The Department of Education strictly prohibits discrimination, including harassment, by any employee against a student based on the following protected classes: Race, color, national origin, sex, physical or mental disability, and/or religion. In addition to the above protected basis, the department strictly prohibits any form of harassment and/or bullying based on the following: Gender identity and expression, socioeconomic status, physical appearance and characteristic, and sexual orientation.
>
> A student shall not be excluded from participation in, be denied the benefits of, or otherwise be subjected to harassment, bullying, or discrimination under any program, services, or activity of the Department of Education.
>
> The Department of Education expressly prohibits retaliation against anyone engaging in protected activity. Protected activity is defined as anyone who files a complaint of harassment, bullying, or discrimination, participates in complaint or investigation proceedings dealing with harassment, bullying, or discrimination under this policy, inquires about his or her rights under this policy, or otherwise opposes acts covered under this policy.
>
> The Department of Education shall develop regulations and procedures relating to this policy that will include personnel action consequences for anyone who violates this policy.

10. On or about February 15, 2008, Ray Camacho (Camacho), Deputy Executive Director of the HSTA, sent an e-mail regarding the proposed policy to Kehe, stating in relevant part:

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

11. On or about February 20, 2008, Camacho sent a letter to Ikei regarding the proposed policy in response to Ikei's November 7, 2007, letter to Husted. Camacho's letter affirmed HSTA's support for a policy of safe school

climates, and noted that workplace violence includes not only physical assaults, but any act at work in which a person is abused, threatened, intimidated, bullied, assaulted, or experiences fear. The letter further stated that:

> The policy, as drafted, has fallen short in many respects. It does not address the way in which each person in the school setting, including the teacher, is treated and protected. It doesn't approach the depth and breath of the recommendations for addressing harassment as tabled at the [BOE] on September 10, 2007. It is unfortunate that there were no public school teachers represented on the SS-CAC because they could have provided important information and knowledge of the issues. The participation of staff, including teachers is very important in establishing policies, and accompanying procedures in regards to advancing respectful communities in regards to race relations race relations [sic], national origin, ancestry, color, cross cultural [sic], religion, sex, gender identity, physical and mental disability, socioeconomic status, physical characteristics and human rights understanding.
>
> We look forward to a policy that will address a comprehensive approach to safe schools in keeping with the SS-CAC Committee recommendations. Such a policy could also incorporate Regulation #1110-7 Safe Workplace Policy.[4] However, we would note that Regulation #1110-7 should also be revisited. Our limited experience with this policy indicates to us that it is inconsistently implemented. We further note that Regulation #1110-7 appears to have been prematurely implemented without clear definitions, investigation directives and procedures. We welcome a policy that covers all administrators, teachers, staff and students within school communities in the workplace and their interactions with each other.
>
> As is the case for all policy and regulation proposals, the [HSTA] reserves its right to continue to comment as it evolves through implementation.

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[4]DOE Policy #1110-7, the Safe Workplace Policy, addresses workplace violence.

12. On February 21, 2008, the BOE conducted a General Business Meeting, at which the BOE discussed and unanimously approved Proposed Policy #4211, with typographical corrections made.

13. By letter dated February 22, 2008, Ikei responded to Camacho's February 20, 2008, letter. Ikei stated in part that the SS-CAC representatives included a teacher who was the representative for teachers as advocates of students, and there were others on the team with teaching backgrounds. Ikei also clarified in relevant part,

> DOE proposed Policy #4211 is not an anti-discrimination, anti-harassment or anti-bullying policy for employment purposes. This policy is clearly identified for students. The policy clearly states that it is for the protection of students against employees who may harass, discriminate, or bully children.
>
> You also claim that the policy falls "short in many respects." You stated that it does not address the way in which teachers would be treated and protected. Please note that the collective bargaining agreement covers these teachers' rights and protections adequately. Further, the DOE will follow its normal course in developing regulations and procedures as it always does immediately after a policy is adopted. Normal disciplinary procedures will be followed as outlined in the collective bargaining agreement and other DOE rules, policies, and/or procedures.

Ikei further clarified that the proposed policy did not go to the BOE on September 10, 2007, but went before the Committee on Special Programs on November 5, 2007, and the request for consult and confer was sent to HSTA on November 7, 2007. Ikei also clarified that Policy #1110-7, the Safe Workplace Policy, is limited to employee workplace violence and not students, whereas Policy #4211 is intended to cover student protection.

Ikei further noted that Kitsu, director of the Civil Rights Compliance Office, and Kehe, Labor Relations Specialist, scheduled two meeting times to meet with Camacho to discuss the issue, and both times Camacho cancelled due to other commitments. Ikei stated, "We are still willing to discuss this further should you have any additional concerns." Ikei provided Kitsu's contact telephone number in case Camacho wished to schedule a time to meet.

14. On or about March 28, 2008, the DOE adopted Standard Practice (SP) 0211, entitled "Board of Education – Anti Harassment, Anti-Bullying, and Anti-Discrimination Against Students(s) by Employees." SP 0211 applies to all DOE employees; provides definitions of bullying, discrimination, gender identity and expression, harassment, physical appearance and characteristics, retaliation, sexual orientation, and socio-economic status; discusses responsibilities of parties; contains frequently asked questions; and other provisions. SP 0211 also provides in part (emphases added):

> 6. **Responsible Parties**
>
> Civil Rights Compliance Office
>
> The [DOE], Office of the Superintendent's Civil Rights Compliance Office, shall coordinate the implementation of this policy.
>
> Principals, Vice Principals, Complex Area Superintendents, and/or the Civil Rights Compliance Office Specialist and/or Director
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> Principals, Vice Principals, Complex Area Superintendents, and/or the Civil Rights Compliance Office Specialists and/or Director, including, but not limited to, assistant superintendents, school administrators, and other management personnel are responsible for maintaining a learning environment free of harassment, bullying, and/or discrimination.
>
> Any principal, vice principal or complex area superintendent who witnesses or receives report(s) of harassment, bullying, or discrimination shall take immediate and appropriate action reasonably calculated to end the harassment, bullying, and/or discrimination. This means, the principal, vice principal, or complex area superintendent shall immediately contact the Civil Rights Compliance Office to initiate an investigation into complaints stemming from allegations that fall under this policy.
>
> Staff
>
> While at school and during school-related functions, employees have a responsibility to refrain from engaging in any behavior that violates a student's or students' rights under this policy.
>
> Student(s)/Parent(s)/Legal Guardians(s)

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

7. **Limited Confidentiality**
Reports and investigations will be conducted with as much discretion as possible. Information about the complaint and/or report will be shared on a "need to know" basis only.[5]

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

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

An employee who witnesses or knows about any incident that falls under the policy, may also file a

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[5]SP 0211 also provides under "Frequently Asked Questions":

3. How will the results of the investigation be communicated?
The complainant and respondent will be notified when the investigation is concluded. A final report will be provided to the decision-maker for appropriate action.

complaint concerning inappropriate conduct towards a student by either completing the complaint form or by informing the principal, vice principal, complex area superintendent, or the staff in the Civil Rights Compliance Office.

15. The DOE developed an Implemental Plan for Board of Education Policy 4211 (Implementation Plan). The Implementation Plan provides in part:

> 9. **Policy Implementation Plan**
> Rollout Communications and Training Plan
>
> A. Key Messages and Objectives
>
> The DOE does not tolerate any form of harassment, bullying, and/or discrimination against a student by an employee or officially recognized volunteer of the department. Any complaints will be immediately investigated, and if any evidence corroborates an allegation, prompt action will be taken by the proper officials, up to termination and in line with provisions under the collective bargaining agreements, laws, rules, DOE policies and procedures, and other relevant authorities.

16. Camacho received a copy of SP 0211, the Implementation Plan, and a Comparison Between Chapter 41[6] and BOE Policy #4211 from a teacher who attended the BOE meeting held on March 25, 2008, and April 14, 2008.

17. By letter dated May 12, 2008, Camacho sent to Ikei a request for bargaining over "changes in terms and conditions of employment resulting from the unilateral formulation, adoption, and implementation of Policy No. 4211" and requested certain information from the DOE in connection with its request for bargaining. In this letter, the HSTA asserted in part that the DOE:

> (a) has adopted a vague an [sic] ambiguous standard of conduct and invites numerous complaints against teachers; (b) provides for "zero tolerance" resulting in termination or other

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[6]HAR Title 8, Subtitle 2, Part 1, Chapter 41 (Chapter 41), governs the DOE's civil rights policy and complaint procedure with respect to race, color, religion, sex, age, national origin, ancestry, or disability.

> adverse action regardless of circumstances; (c) adopts a new standard of proof i.e., if 'any evidence corroborates an allegation"; (d) changes the "proper cause" standard of Article V [of the Unit 05 Agreement]; (e) modifies due process requirements and procedures; (f) eliminates reasonable provisions for job security of employees; and (g) adopts confidentiality requirements which amend the right of the [HSTA] to information needed to enforce teacher protections and other provisions of the unit 5 agreement.

18. By letter dated May 21, 2008, Ikei responded to Camacho's May 12, 2008, letter, asserting in part that the DOE submitted Proposed Policy #4211 to the HSTA by letter dated November 7, 2007, and requested comments on the proposed policy; that on December 20, 2007, the HSTA requested additional time to provide comments on the proposed policy, which the DOE allowed; that a consult and confer meeting was scheduled for Tuesday, February 12, 2008, but was cancelled by the HSTA; that by letter dated February 20, 2008, the HSTA submitted its comments on the proposed policy; and that the DOE considered the HSTA's comments on the proposed policy. Ikei's letter further stated that the HSTA's request for negotiation was raised for the first time by letter dated May 12, 2008; that the DOE maintains the adoption and implementation of the policy is not a subject of negotiation; and, further, the HSTA's request for negotiation is untimely.

19. On May 27, 2008, the HSTA filed its Complaint against Respondents, alleging, inter alia, that on or about March 28, 2008, Respondents unilaterally formulated, adopted, and/or implemented mid-term changes to the Unit 05 Agreement without negotiations or mutual consent of the HSTA relating to an anti-harassment, anti-bullying, and anti-discrimination policy; a new standard of practice documents and new disciplinary policies and procedures; repealing Title 8, Subtitle 2, Chapter 41 of the DOE rules (Chapter 41); and new forms and policies affecting material and significant changes in wages, hours, and other terms and conditions of employment. The Complaint further alleges that Respondents refused to negotiate over mandatory subjects of bargaining, declined to cease and desist from their unilateral course of conduct, and failed to provide information needed for good faith bargaining. The Complaint alleges Respondent wilfully violated the rights of public employees in HRS §§ 89-3 and 89-9(a), and committed prohibited practices in violation of HRS § 89-13(a)(1), (5), (7), and (8).

20. On June 5, 2008, Respondents filed their Motion to Dismiss, arguing, inter alia, that the Complaint is time-barred; and, that only consultation, not negotiation, was required and Respondents consulted with the HSTA.

21. By letter dated June 12, 2008, the DOE offered to consult and confer with the HSTA regarding SP 0211.

22. By letter dated July 1, 2008, the HSTA requested bargaining regarding SP 0211 and also requested information the HSTA stated it needed for such bargaining.

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

24. On July 7, 2008, the HSTA filed a Motion for Summary Judgment, arguing, inter alia, that University of Hawaii Professional Assembly v. Tomasu,[7] 79 Hawaii 154 (1995) is dispositive on the issue of negotiability; that the DOE policies impact on the terms and conditions of employment and are negotiable; and that Respondents violated their duty to negotiate on mandatory subjects by their unilateral actions.

25. The Board held a hearing on HSTA's Motion for Summary Judgment on July 22, 2008, pursuant to HRS §§ 89-5(i)(4) and (5), and HAR § 12-42-8(g)(3).

26. The Board finds that there are material facts that preclude dismissal or summary judgment. What effect or impact the policy has on terms and conditions of employment are not clear from the pleadings. For example, the Implementation Plan provides in part that, "if any evidence corroborates an allegation, prompt action will be taken by the proper officials, up to termination[.]" However, the Implementation Plan also provides that such action purportedly would be "in line with provisions under the collective bargaining agreements." Thus, it is not clear whether, or to what extent, the policy affects terms and conditions of employment such that the implementation of the policy is subject to negotiation rather than consultation.

27. The facts indicate that Respondents consulted with the HSTA over the proposed policy. It is not clear, however, whether the Implementation Plan itself was submitted to the HSTA for consultation, or when the Implementation Plan was created or available for consultation.

28. The Board finds that the HSTA was notified of the proposed policy on November 9, 2007. The initial communication (letter dated November 7,

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[7]Tomasu held that the implementation of a policy designed to comply with the Drug Free Workplace Act triggered a duty to bargain because it affected terms and conditions of employment.

2007) from the DOE to the HSTA was sent to Husted, the Executive Director of the HSTA. Subsequent communications between the HSTA and the DOE involved Camacho, the Deputy Executive Director of the HSTA. The Board finds that notice to Husted or Camacho constitutes notice to the HSTA. The documents received by the HSTA on November 9, 2007, provided notice that the policy would "strictly" prohibit discrimination, including harassment, by any employee against a student based on race, color, national origin, sex, physical or mental disability, and/or religion; and would "strictly" prohibit any form of harassment and/or bullying based gender identity and expression, socioeconomic status, physical appearance and characteristic, and sexual orientation. Notice was also provided that the DOE would develop regulations and procedures "relating to this policy that will include personnel action consequences for anyone who violates this policy."

29. However, the facts are not clear as to whether the HSTA waived its right to negotiate over the implementation of the policy (if such implementation is subject to negotiations), or failed to file the present Complaint in a timely manner, by failing to request negotiations within a reasonable time after receiving notice of the proposed policy. Material facts include the parties' past practice of providing notice of proposed policies (including the timing of the notice and content of notice).

30. Respondents asserted at hearing that Chapter 41 was not being repealed. The HSTA has not disputed this assertion. Accordingly, the Board finds that Chapter 41 is not being repealed at this time.

DISCUSSION AND CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant Complaint 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.

5. 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.

6. 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.

7. "When a motion for summary judgment is made . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided [by Rule 56], must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Hawaii Rules of Civil Procedure (HRCP) Rule 56. Thus, "[a] party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, 'nor is [the party] entitled to a trial on the basis of a hope that [the party] can produce some evidence at that time.'" Henderson v. Professional Coatings Corp., 72 Haw. 387, 501, 819 P.2d 84, 92 (1991).

8. 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;
>
> * * *

(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[.]

9. Pursuant to HRS § 89-9, the employer and exclusive representative are required to negotiate in good faith with respect to wages, hours, contributions to health benefits trust funds, and other terms and conditions of employment that are subject to collective bargaining and that are to be embodied in a written agreement. Additionally, 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.

10. HRS § 89-14 provides in relevant part that, "[a]ny 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." In turn, HRS § 377-9(l) provides that, "[n]o complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence. The Board has held that statutes of limitations are to be strictly construed and that the Board would dismiss a prohibited practice complaint filed even one day beyond the limitations period. See Petramala v. HGEA, 5 HLRB 172, 175 (1993); Fitzgerald v. Ariyoshi, 3 HPERB 186, 198-99 (1983).

11. Historically, the Board and the state courts have used federal precedent to guide their interpretation of state public employment law. See, Hokama v. University of Hawai`i, 92 Hawai`i 268, 272 n. 5, 990 P.2d 1150, 1154 n. 5 (1999).

12. The obligation to bargain collectively forbids unilateral action by the employer with respect to pay rates, wages, hours of employment, or other conditions of employment during the term of a labor contract, even if the action is taken in good faith. It is well established that an employer's

unilateral action in altering the terms and conditions of employment, without first giving notice to and conferring in good faith with the union constitutes an unlawful refusal to bargain. University of Hawaii Professional Assembly v. Tomasu, 79 Hawai`i 154, 159, 900 P.2d 161, 166 (1995). The duty to bargain also arises if a union unilaterally demands "midterm" bargaining, midway through an active collective bargaining agreement, on bargainable subjects such as wages, hours, or terms of employment. Id. In the Tomasu case, the Hawaii Supreme Court found a duty to bargain over the implementation of an anti-drug policy statement that involved topics of mandatory bargaining (what the mandatory drug treatment program would entail, where the employees would go for treatment, and how the treatment programs would be funded).

13. If an employer gives a union advance notice of its intention to make a change to a term or condition of employment, it is incumbent upon the union to act with due diligence in requesting bargaining in order to preserve its right to bargain over that subject. See City Hospital of East Liverpool, 234 N.L.R.B. 58 (1978); Golden Bay Freight Lines, 267 N.L.R.B. 1073 (1983) (cited by Regal Cinemas, Inc. v. N.L.R.B., 317 F.3d 300 (C.A.D.C. 2003)). However, notice must be given sufficiently in advance of actual implementation to allow reasonable opportunity for bargaining. See Golden Bay Freight Lines.

14. The Board concludes that there are material facts that preclude dismissal or summary judgment. What effect or impact the policy has on terms and conditions of employment are not clear from the pleadings. For example, the Implementation Plan provides in part that, "if any evidence corroborates an allegation, prompt action will be taken by the proper officials, up to termination[.]" However, the Implementation Plan also provides that such action purportedly would be "in line with provisions under the collective bargaining agreements." Thus, it is not clear whether, or to what extent, the policy affects terms and conditions of employment such that the implementation of the policy is subject to negotiation rather than consultation. It is also not clear whether the Implementation Plan itself was submitted to the HSTA for consultation, or when the Implementation Plan was created or available for consultation.

15. The facts are also not clear as to whether the HSTA waived its right to negotiate over the implementation of the policy (if such implementation is subject to negotiations), or failed to file the present Complaint in a timely manner, by failing to request negotiations within a reasonable time after receiving notice of the proposed policy. Material facts include the parties' past practice of providing notice of proposed policies (including the timing of the notice and content of notice).

16. The Complaint also alleges unilateral action regarding the repeal of Chapter 41; however, it has been asserted by Respondents, and not disputed by the HSTA, that Chapter 41 is not being repealed. Accordingly, the allegations regarding the repeal of Chapter 41 may be summarily disposed of and, to that extent, the Board dismisses such allegation from the Complaint.

ORDER

For the reasons discussed above, the Board hereby denies Respondents' Motion to Dismiss and denies the HSTA's Motion for Summary Judgment, except to the extent that the allegations regarding the repeal of Chapter 41 are hereby dismissed.

NOTICE OF SECOND PREHEARING CONFERENCE

NOTICE IS HEREBY GIVEN, that the Board will conduct a Second Prehearing Conference on **September 29, 2008 at 9:00 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii.

DATED: Honolulu, Hawaii, September 15, 2008.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

EMORY J. SPRINGER, Member

SARAH R. HIRAKAMI, Member

Copies sent to:

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