STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LINDA LINGLE, Governor, State of Hawaii and MARIE LADERTA, Chief Negotiator, Office of Collective Bargaining, State of Hawaii, Complainants, and HAWAII STATE TEACHERS ASSOCIATION and RAYMOND CAMACHO, Deputy Executive Director, Hawaii State Teachers Association, Respondents.	CASE NO. CU-05-267 ORDER NO. 2573 ORDER DENYING RESPONDENTS' MOTION TO DISMISS AND DENYING COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT; AND NOTICE OF HEARING

ORDER DENYING RESPONDENTS'
MOTION TO DISMISS AND DENYING COMPLAINANTS'
MOTION FOR SUMMARY JUDGMENT; AND NOTICE OF HEARING

On July 18, 2008, Complainants LINDA LINGLE, Governor, State of Hawaii (Governor), and MARIE LADERTA, Chief Negotiator, Office of Collective Bargaining, State of Hawaii (Laderta), collectively "Complainants," filed the instant prohibited practice complaint (Complaint). Complainants allege, inter alia, that Respondent HAWAII STATE TEACHERS ASSOCIATION (HSTA) has refused to negotiate procedures for random drug and alcohol testing procedures applicable to all bargaining unit 05 (Unit 05) employees, and wilfully violated Hawaii Revised Statutes (HRS) § 89-13(b) by refusing to bargain in good faith; refusing or failing to comply with the provisions of HRS §§ 89-9 and 89-10; violating the terms of the Unit 05 collective bargaining agreement (Agreement); and violating the Memorandum of Understanding Between the State of Hawaii Board of Education and Hawaii State Teachers Association (Drug and Alcohol Testing) (MOU or Appendix II), entered into on July 1, 2007, by and between the State of Hawaii, Board of Education, and the HSTA.

On July 30, 2008, the HSTA filed its Motion to Dismiss Complaint (Motion to Dismiss), asserting lack of standing; failure to name an indispensable party; failure to state a claim for relief regarding "collective bargaining" as defined in HRS chapter 89; violation of Hawaii Administrative Rules (HAR) § 12-42-42(f), and lack of jurisdiction

over claims arising more than ninety days prior to July 18, 2008, in violation of HRS § 377-9(1) and HAR § 12-42-42(a).

On August 28, 2008, Complainants filed an amended prohibited practice complaint, adding RAYMOND CAMACHO, Deputy Executive Director, Hawaii State Teachers Association (Camacho) as a Respondent, and adding the BOARD OF EDUCATION, Department of Education, State of Hawaii (BOE), and PATRICIA HAMAMOTO, Superintendent, Department of Education, State of Hawaii (Hamamoto), as Complainants. (On October 15, 2008, the Board granted the BOE and Department of Education's Motion to Withdraw from the Case in Order No. 2556.) The amended complaint alleges, inter alia, that the HSTA and Camacho have refused to bargain in good faith with the public employer as required by HRS § 89-9; refused or failed to comply with the provisions of HRS §§ 89-9 and 89-10; violated the terms of the Unit 05 Agreement covering the period from July 1, 2007, to June 30, 2009, including but not limited to Articles V, XVII, and XXII; and violated the MOU between BOE and the HSTA entered into on July 1, 2007.

On September 15, 2008, Complainants filed their Motion for Summary Judgment.

On September 29, 2008, the Board heard arguments on Respondents' Motion to Dismiss and Complainants' Motion for Summary Judgment.

For the reasons discussed below, the Board denies Respondents' Motion to Dismiss and denies Complainants' Motion for Summary Judgment.

FINDINGS OF FACT

1. For purposes of negotiating a collective bargaining agreement, the Governor was or is at all times relevant to this proceeding a public employer (HRS § 89-6(d)).[1] For negotiating a Unit 05 agreement, the Governor has three votes.

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[1]HRS § 89-6(d) provides in relevant part:

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

2. The Office of Collective Bargaining and Managed Competition (OCB) is within the Office of the Governor, and assists the Governor in negotiations between the State and the exclusive representatives on matters of wages, hours, and other negotiable terms and conditions of employment. HRS § 89A-1(a). In addition to other duties, the OCB assists the governor in formulating management's philosophy for public collective bargaining as well as planning strategies, conducts negotiations with the exclusive representatives of each employee organization and designates employer spokespersons for each negotiation. HRS § 89A-2.

3. At all times relevant to this Complaint, Complainant Laderta was or is the Chief Negotiator for the OCB, and heads the OCB. HRS § 89A-1(b).

4. The Department of Education (DOE) is headed by an executive board, the BOE. HRS § 26-12.

5. For the purpose of negotiating a collective bargaining agreement, the public employer for Unit 05 includes the board of education with two votes. HRS § 89-6(d)(3). Pursuant to HRS § 89-2, the term "employer" or "public employer" means "the board of education in the case of the department of education[.]"

6. The Superintendent of the DOE administers programs of education and public instruction throughout the State, including education at the preschool, primary, and secondary levels, adult education, school library services, health education and instruction, and such other programs as may be established by law, under the policy direction of the BOE. HRS § 26-12.

7. For the purpose of negotiating a collective bargaining agreement, the public employer for Unit 05 includes the Superintendent of the DOE, with one vote. HRS § 89-6(d)(3).

8. At all times relevant to this Complaint, Hamamoto was or is the Superintendent of the DOE.

9. Respondent HSTA was or is, at all times relevant to this Complaint, an employee organization and the exclusive bargaining representative, within the meaning of HRS § 89-2,[2] of employees included in bargaining unit 05.

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[2]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,

10. Respondent Camacho is the Deputy Executive Director of the HSTA. Camacho was hired by the HSTA on August 2, 2004.

11. On July 18, 2008, Complainants filed the instant Complaint. Complainants allege, inter alia, that the HSTA has refused to negotiate procedures for random drug and alcohol testing procedures applicable to all Unit 05 employees, and wilfully violated HRS § 89-13(b) by refusing to bargain in good faith; refusing or failing to comply with the provisions of HRS §§ 89-9 and 89-10; violating the terms of the Unit 05 Agreement; and violating the MOU between BOE and the HSTA entered into on July 1, 2007.

12. On July 30, 2008, the HSTA filed its Motion to Dismiss, asserting lack of standing; failure to name an indispensable party; failure to state a claim for relief regarding "collective bargaining" as defined in HRS chapter 89; violation of HAR § 12-42-42(f), and lack of jurisdiction over claims arising more than ninety days prior to July 18, 2008, in violation of HRS § 377-9(1) and HAR § 12-42-42(a).

13. Also on July 30, 2008, the HSTA filed its Answer to the Complaint.

14. On August 1, 2008, Complainants filed a Motion to Amend Prohibited Practice Complaint (Motion to Amend). Complainants sought to add Camacho as a Respondent to these proceedings and include new allegations prompted by the HSTA's assertions in its Motion to Dismiss.

15. On August 6, 2008, Complainants filed their Memorandum in Opposition to the HSTA's Motion to Dismiss.

16. On August 8, 2008, the HSTA filed its Opposition to Complainants' Motion to Amend.

17. On August 8, 2008, Complainants filed their Motion for Leave to File Second Amended Prohibited Practice Complaint (Second Motion). The Second Motion sought to incorporate the amendments sought in Complainants' earlier Motion to Amend, add the BOE and Hamamoto as Complainants, and include new allegations.

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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.

18. On August 18, 2008, the HSTA filed its Memorandum in Opposition to Complainants' Second Motion.

19. On August 28, 2008, the Board conducted a hearing on Complainants' Second Motion, and, after due consideration and for good cause shown, granted the motion pursuant to HAR § 12-42-43[3] in Order No. 2546.

20. On August 28, 2008, Complainants filed an Amended Prohibited Practice Complaint, adding Camacho as a Respondent, and adding the BOE and Hamamoto as Complainants. Rather than require the HSTA to submit a motion to dismiss the amended complaint, the Board applies the Motion to Dismiss to the amended complaint, and references to "Complaint" hereinafter refer to the amended complaint.

21. The amended complaint alleges, inter alia, that the HSTA and Camacho have refused to bargain in good faith with the public employer as required by HRS § 89-9; refused or failed to comply with the provisions of HRS §§ 89-9 and 89-10; violated the terms of the Unit 05 Agreement covering the period from July 1, 2007, to June 30, 2009, including but not limited to Articles V, XVII, and XXII; and violated the MOU between BOE and the HSTA entered into on July 1, 2007.

22. On September 9, 2008, the HSTA and Camacho, collectively "Respondents," filed their answer to the amended complaint.

23. As a result of the amended complaint, the HSTA filed a Supplemental Memorandum in Support of Motion to Dismiss Complaint on September 15, 2008, arguing (1) Complainants failed to meet the three-part test on standing; (2) the BOE has the same obligation as HSTA and is an indispensable party; (3) the amended complaint fails to state claims for relief under the Agreement and HRS chapter 89; (4) to the extent the amended complaint relates to a claim relating to salaries, it is barred by HRS § 377-9(b); and (5) the Board has no jurisdiction over claims which allegedly arose before April 19, 2008 (ninety days before July 18, 2008).

24. On September 15, 2008, Complainants filed their Motion for Summary Judgment.

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[3]HAR § 12-42-43 provides:

> Any complaint may be amended in the discretion of the board at any time prior to the issuance of a final order thereon.

25. On September 22, 2008, the HSTA filed its Memorandum in Opposition to Complainants' Motion for Summary Judgment, and Complainants filed their Reply to the HSTA's Supplemental Memorandum in Support of Motion to Dismiss.

26. On October 8, 2008, the BOE and the DOE filed their Motion to Withdraw from the Case (Motion to Withdraw). On October 10, 2008, the HSTA filed its Position on the Motion to Withdraw. On October 15, 2008, the Board granted the Motion to Withdraw in Order No. 2556.

27. On September 29, 2008, the Board heard oral arguments on Respondents' Motion to Dismiss and Complainants' Motion for Summary Judgment

28. In their amended complaint, Complainants allege, inter alia, that during negotiations over the Unit 05 Agreement effective from July 1, 2007, through June 30, 2009, the employer group submitted its "Last, Best and Final Offer" on April 11, 2007, and that, in short, the final offer was that in return for teachers receiving:

    1) an across-the-board increase of 4% for the school year ("SY") 2007-08,

    2) 1 step movement effective the first day of the second semester of the 2007-08 SY,

    3) increased differentials of 25% for certain positions, and

    4) another 4% across-the-board increase, but without any step movement for 2008-08[4] SY, HSTA would have to agree that:

    All BU 5 members shall be subject to random controlled substance and alcohol testing, as well as controlled substance and alcohol testing on the basis of reasonable suspicion.

    (Emphasis in amended complaint; alleged final offer attached as Exhibit "A" to the amended complaint).

29. The amended complaint further alleges the following:

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[4]The Board assumes this is a typographical error, and that Complainants meant the "2008-09 SY[.]"

That the HSTA bargaining team did in fact agree to submit this offer to the HSTA membership for ratification, and that at no time during the ratification process did the HSTA ever state to the employer group or even to its own members that it believed the agreement concerning testing was unconstitutional or only applied to those Unit 05 members who hold commercial driver's licenses (CDL).

That the HSTA has admitted that it fully understood that the final offer was a "take it or leave it" offer and that the pay raises being offered to all teachers were contingent upon the concession of testing.

That the HSTA admitted it presented the final offer to its membership without bothering to ascertain whether or not it had constitutional or any other material concerns.

That on May 2, 2007, HSTA informed the Governor that the agreement as negotiated had been ratified by the members by a vote of 61.3% "yes" and 38.2% "no."

That in order to frame and memorialize the process for actually implementing this obligation, a memorandum of agreement was drafted which was integrated into the 2007-09 contract as Appendix II.[5]

That Appendix II dated July 1, 2007, states that the parties will negotiate procedures for implementing the agreed upon

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[5]Exhibit D attached to the amended complaint, entitled "Appendix II Memorandum of Understanding Between State of Hawaii Board of Education and Hawaii State Teachers Association (Drug and Alcohol Testing)," provides in part:

> Therefore, the Association and the Board of Education shall establish a reasonable suspicion and random Drug and Alcohol Testing (DAT) procedures applicable to all Bargaining Unit 5 employees that are intended to keep the workplace free from hazards of the use of alcohol and controlled substances.
>
> In addition, the Association and the Board of Education agree to negotiate reasonable suspicion and random Drug and Alcohol Testing procedures which shall comply with the U.S. Department of Transportation Rules on Drug and Alcohol Testing and/or State Department of Health Rules on Substance Abuse Testing, and implement such a plan no later than June 30, 2008.

random and reasonable suspicion testing applicable to "all" Unit 05 members to be in place no later than June 30, 2008. The reference in the memorandum to the US DOT and State DOH rules on drug and alcohol testing was placed in the memorandum in order to provide that the testing that would be performed on Unit 05 members as a consequence of the HSTA's acceptance of the final offer would be conducted in accordance with the testing methodology, standards, and guidelines prescribed under those rules.

That at no time during the drafting of the MOU did the HSTA assert that it agreed to something else, such as random testing of Unit 05 members who have CDL licenses or some other targeted group of Unit 05 members.

That there is no dispute that the employer has met its obligation to pay the relevant wage and related benefits increases; however, the HSTA has repudiated its commitment to negotiate procedures for implementing a process by which all Unit 05 members shall be subject to random controlled substance and alcohol testing, as well as controlled substance and alcohol testing on the basis of reasonable suspicion.

That by letter dated July 17, 2008, the HSTA made it clear that it now refused to abide by its side of the employer's final offer because it had "suddenly" and unilaterally concluded that doing so was unconstitutional and would expose it to liability, and that no other excuse was given.

That Camacho, who identifies himself as the HSTA's "Chief Negotiator" in his declaration attached as Exhibit "F" to the amended complaint, claims the HSTA also informed the employer at that time that Appendix II of the Agreement does not in fact provide for random testing applicable to all Unit 05 members, including teachers, but in fact, by its terms, limits random testing to CDL drivers only.

That the HSTA and its "Chief Negotiator" bargained in utterly mendacious and contemptuous bad faith with the employer at each and every stage of the bargaining process.

30. The amended complaint alleges that by the Respondents' actions, Respondents have wilfully violated HRS §§ 89-13(b)(3), (4) and (5), as follows:

a. Refused to bargain in good faith with the public employer as required in HRS § 89-9;

b. Refused or failed to comply with the provisions of HRS §§ 89-9 and 89-10;

c. Violated the terms of the Unit 05 Agreement covering the period from July 1, 2007, to June 30, 2009, including but not limited to Articles V, XVII, and XXIII; and

d. Violated the MOU attached as Appendix II to the 2007-09 Unit 05 Agreement.

31. The HSTA argues in its Memorandum in Opposition to Motion for Summary Judgment that the scope of negotiations pursuant to Appendix II is "far from unambiguous" in that the MOU requires negotiations over "testing procedure which **shall comply with** the U.S. Department of Transportation Rules on Drug and Alcohol Testing and/or State Department of Health **Rules** on Substance Abuse Testing, and implement such a plan no later than June 30, 2008." (emphases in HSTA Memorandum in Opposition).

32. The HSTA also asserts that negotiations over drug and alcohol testing was handled as a non-cost item separately from the costs items such as the across-the-board increments and differentials. The HSTA further asserts that it rejected the employer's "last, best, and final offer" as it pertained to random alcohol and drug testing, and that the letter of understanding drafted by Guy Tajiri, the spokesperson for the employer group, deferred bargaining over drug and alcohol testing to the HSTA and the BOE.

33. The HSTA argues that the question of bad faith, or good faith, in the context of collective bargaining must be considered based on the totality of circumstances, which necessarily requires the Board to determine the intent of the parties based on consideration of the "totality of conduct" of both parties to the bargaining process including the entire bargaining history before and after the agreement to the language at issue.

34. The HSTA also argues that it did not repudiate its rights or obligations under the terms set forth in Appendix II. The HSTA asserts that it received the BOE's initial proposal on November 15, 2007, and Camacho submitted HSTA's first request for information on February 28, 2008; that after obtaining a partial response, Camacho submitted a second request for information on May 9, 2008, and the BOE submitted a partial response on May 20, 2008; that the HSTA formulated a proposal on or about June 7,

2008, that contained a provision for random drug testing in eight situations[6]; and, that the HSTA and BOE representatives met and negotiated on June 19, 23, 24, 26, 27, and 30, 2008. The HSTA further asserts that the HSTA and the BOE negotiated in good faith and on July 8, 2008, reached tentative agreement on all issues except for two items, and that on July 17, 2008, the HSTA proposed to the BOE that the tentative agreement be implemented, the two unresolved issues be submitted to mediation, and that clarification be sought through a declaratory ruling petition filed with this Board. Finally, the HSTA asserts that it was the BOE which determined on or about January 24, 2008, to reject random drug testing because of concerns over lack of school funding.

35. The HSTA further argues that there is genuine dispute over the issue of "wilfulness," for the HSTA's position in bargaining is based in part on its concern over the privacy rights of employees, and on its contention that the information provided by the BOE[7] renders suspicionless random drug testing an illegal subject of collective bargaining. Konno v. County of Hawaii, 85 Hawai`i 61, 78, 937 P.2d 397, 414 (1997).

36. In its Motion to Dismiss, the HSTA argues that Complainants lack standing to complain over negotiations regarding alcohol and drug testing in that the Appendix II was intended only to allow the HSTA and the BOE to negotiate and implement a plan for reasonable suspicion and random drug and alcohol testing which shall comply with U.S. Dept. of Transportation Rules on Drug and Alcohol Testing and/or State Dept. of Health Rules on

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[6]Those situations included: (1) employees who have tested positive for drugs within the past one year after being testing for cause; (2) an employee who admits within the past one year to being under the influence of drugs before being requested to undergo drug testing for cause; (3) employees who have a prior record of any workplace-related criminal drug conviction; (4) employees who within the past one year have been arrested for alleged manufacture, distribution, possession, sale or use of illegal drugs on school premises or school activities in Hawaii; (5) employees who are required to undergo random drug testing pursuant to the Omnibus Transportation Employee Testing Act of 1991; (6) employees who are specifically assigned to perform drug interdiction functions as a primary mission in public schools, provided there is prior notice to and mutual consent of the HSTA in writing; (7) employees who are specifically assigned to perform security functions within public schools and are authorized to carry firearms, provided there is prior notice to and mutual consent of the HSTA in writing; and (8) employees who are subject to random or uniform drug testing as required by statute.

[7]The HSTA asserts that the BOE indicated that only two positions in Unit 05 were subject to CDL drug and alcohol testing under U.S. Dept. of Transportation Rules and Regulations on Drug and Alcohol Testing, and that further information indicated the BOE lacked evidence to support or justify random alcohol or drug testing of Unit 05 employees consistent with federal law.

Substance Abuse Testing, and that Complainants have no standing to assert claims on behalf of Unit 05 teachers under HRS § 89-10.

35. The HSTA also argues that the BOE is an indispensable party in that the BOE is specifically referred to in Appendix II as the party responsible for negotiating with the HSTA over alcohol and drug testing procedures.

36. The HSTA further argues that the Complaint fails to state a claim for relief over refusal to bargain over truly random drug and alcohol testing as requested by Complainants, for it is not the function of the Board to determine the substance of an agreement to be entered into in negotiations, and that a party cannot be compelled to accept a concession or a particular position in bargaining.

37. The HSTA asserts that the controversy over annual increments arose on or about January 29, 2008, and is the subject matter of a complaint filed on June 4, 2008, by Hamamoto, the BOE, the Governor, and Laderta in Case No. CU-05-265. The HSTA argues that a party is prohibited from filing more than one complaint against a party with respect to a single controversy, and that the controversy is untimely as is any controversy involving negotiations occurring more than ninety days prior to the filing of the Complaint.

38. Complainants argue that the BOE's funding position is irrelevant to the excuses posited by the HSTA for repudiating the current Agreement and thus is irrelevant to the gravamen of the Complaint; accordingly, the BOE is not an indispensable party; and, further, that the HSTA by its announcements in July of 2008 has refused to negotiate any procedures for random testing (based upon (1) the reason that the HSTA never obligated itself to do so, and (2) that in the HSTA's opinion, such procedures would be unconstitutional), thereby repudiating the Agreement negotiated between the HSTA and Complainants.

39. Complainants further argue that the HSTA knew full well that acceptance of the Agreement as negotiated would result in random drug testing of teachers, and that reference to the U.S. Dept. of Transportation and State Dept. of Health rules on drug and alcohol testing was placed in the MOU simply to provide that testing that would be performed on Unit 05 members, if in fact the HSTA did accept the employer's final offer, would be conducted in accordance with the guidelines and methodology prescribed under those rules.

40. Complainants further argue that this is not a case where the parties failed to agree on one nut or bolt during negotiations; rather, the HSTA refused to

negotiate any procedures for random testing, supposedly because it never agreed to it, thereby repudiating the Agreement itself. Complainants argue that they will suffer actual injury in that the HSTA's repudiation means they will never have the testing procedures they bargained for, although the employer group has paid the agreed-upon raises without obtaining the benefit of its bargain.

41. Complainants further argue that Case No. CU-05-265 involves the HSTA's bad faith attempt to obtain an additional step movement despite supposedly negotiating all applicable cost items as part of bargaining over the 2007-09 Agreement, and despite the fact that the Legislature refused to fund what the HSTA is asking for, and that by contrast, the present Complaint involves the HSTA's acting in bad faith in negotiating pay raises and step movements for the 2007-09 contract in specific quid pro quo for random testing, then repudiating that agreement.

42. Complainants also argue that the Complaint is timely in that it was filed within ninety days of the HSTA's repudiation of the Agreement, as the HSTA did not enunciate its refusal to negotiate procedures of any kind implementing random testing applicable to all Unit 05 members until July of 2008.

CONCLUSIONS OF LAW AND DISCUSSION

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. During the course of considering a motion to dismiss, if matters outside the pleadings are presented to and not excluded by the Board, the Board may treat the motion as one for summary judgment and disposed of accordingly, giving all parties reasonable opportunity to present all material made pertinent to such motion. See Hawaii Rules of Civil Procedure (HRCP) Rule 12(b); Sierra Club v. Dept. of Transportation, 115 Hawai`i 299, 312-13, 167 P.3d 292, 305-306 (2007).

5. 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.

6. 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.

7. 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.

8. The test for determining standing is set forth in Mottl v. Miyahara, 95 Hawai`i 381, 389 (2001):

> In deciding whether the plaintiff has the requisite interest in the outcome of the litigation, we employ a three-part test: (1) has the plaintiff suffered an actual or threatened injury as a result of defendant's conduct; (2) is the injury fairly traceable to the defendant's actions; and (3) would a favorable decision likely provide relief for plaintiff's injury.

9. Pursuant to HAR § 12-42-42(f) and HRS § 377-9(b), only one complaint shall issue against a party with respect to a single controversy.

10. A prohibited practice complaint must be filed within ninety days of the alleged violation. HAR § 12-42-42(a); HRS §§ 89-14 and 377-9(l).

11. The HLRB has adopted the following standard to assess whether a party has met its statutory duty to bargain, drawn from federal labor law principles regarding bargaining in "good faith": whether the totality of the party's

conduct evinces a present intention to find a basis for agreement and a sincere effort to reach a common ground. Board of Education, 6 HLRB 173, 177 (2001); Del Monte Fresh Produce (Hawaii), Inc. v. ILWU, 112 Hawai`i 489, 500 (2006); see also HRS § 377-1(5) ("Collective bargaining" is the negotiating by an employer and a majority of the employer's employees in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employees in a mutually genuine effort to reach an agreement with reference to the subject under negotiation").

12. HRS § 89-13(b) provides in relevant part:

> It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:
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> * * *
>
> (2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;
>
> (3) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;[8]
>
> (4) Refuse or fail to comply with any provision of this chapter; or
>
> (5) Violate the terms of a collective bargaining agreement.

13. With respect to the HSTA's Motion to Dismiss, the Board concludes that Complainants have standing to bring their claim. The allegations of the amended complaint, if true, would establish injury to Complainants in that for purposes of negotiating the Agreement, the Governor had three votes as part of the employer group and Laderta was the Governor's representative for negotiations; further, that the Agreement that Complainants had

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[8]In the amended complaint, Complainants allege that Respondents "have willfully violated Section 89-13(b)(3)(4) and (5), HRS[.]" The Board notes that HRS § 89-13(b)(3) provides that it is a prohibited practice wilfully to refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11, which appears inapplicable to the present case. However, it appears that this may be a typographical error by Complainants, and that the amended complaint intended to cite to § 89-13(b)(2), (4), and (5), for the amended complaint further alleges that Respondents "[r]efused to bargain in good faith with the public employer as required in section 89-9, HRS" which would indicate a prohibited practice under § 89-13(b)(2) rather than § 89-13(b)(3).

negotiated would effectively be repudiated and Complainants would not receive the benefit of their bargain. Further, such injury is traceable to alleged action (repudiation) by the HSTA, and a favorable decision by the Board may afford relief from the injury in the form of an order requiring the HSTA to negotiate in good faith and cease and desist from engaging in the prohibited practice.

14. The Board further finds that the BOE is not an indispensable party to the amended complaint in that the alleged repudiation of the Agreement was done by the HSTA, and that the BOE's funding position may not be relevant to the issue of whether the HSTA negotiated the Agreement in good faith or whether the HSTA's alleged refusal to negotiate the random testing procedures based upon (1) the reason that the HSTA never obligated itself to do so, and (2) that in the HSTA's opinion, such procedures would be unconstitutional, amounts to a repudiation of the agreement. Furthermore, if it is shown that the BOE is required as a party to afford relief to Complainants, HAR § 12-42-42(e) and HRS § 377-9(b) provide that the Board may bring in additional parties by service of a copy of the complaint.

15. The Board also concludes that Case No. CU-05-265 involves the HSTA's alleged attempt to obtain an additional step movement despite supposedly negotiating all applicable cost items as part of bargaining over the 2007-09 Agreement, and despite the fact that the Legislature refused to fund what the HSTA is asking for, and that by contrast, the present Complaint involves the HSTA's allegedly acting in bad faith in negotiating pay raises and step movements for the 2007-09 Agreement in specific quid pro quo for random testing, then repudiating that agreement. Accordingly, the present case is not founded upon the same controversy as Case No. CU-05-265.

16. The Board concludes that the Complaint is timely in that it was filed within ninety days of the HSTA's alleged repudiation of the Agreement, as Complainants allege the HSTA did not enunciate its refusal to negotiate procedures of any kind implementing random testing applicable to all Unit 05 members until July of 2008.

17. The Board further concludes that Complainants are not seeking to have the Board determine the substance of an agreement to be entered into in negotiations nor compel the HSTA to accept a concession or a particular position in bargaining; rather, Complainants are seeking, if they prevail, declaratory relief and an order requiring the HSTA to negotiate in good

faith and cease and desist from engaging in the prohibited practice. Accordingly, Complainants have stated a claim under HRS chapter 89.

18. The Board therefore denies Respondents' Motion to Dismiss.

19. With respect to Complainant's Motion for Summary Judgment, the Board concludes that there is genuine dispute over material facts, including whether the HSTA accepted or rejected the employer's final offer with respect to random testing; and whether the reference to the U.S. Dept. of Transportation and/or State Department of Health rules regarding drug and alcohol testing was intended to set the scope for such testing (for example, only those with CDL licenses), or merely to provide that testing would be conducted in accordance with the guidelines and methodology prescribed under those rules.

20. The Board further concludes that there is genuine dispute over the issue of wilfulness such that summary judgment is not appropriate, and that the question of bad faith or good faith in the context of collective bargaining must be considered based on the totality of circumstances. The Board concludes that an evidentiary hearing is required in order for the Board to determine whether there has been bad faith during negotiations, and, if there has been repudiation of the Agreement, whether any repudiation was wilful. Accordingly, the Board denies Complainant's Motion for Summary Judgment.

ORDER

For the reasons discussed above, the Board denies Respondents' Motion to Dismiss and denies Complainants' Motion for Summary Judgment.

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the Board will conduct a hearing on the merits of Complainants' Amended Complaint on **March 23 -24, 2009 at 9:00 a.m.** in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii.

LINDA LINGLE, Governor, State of Hawaii, et al. v. HAWAII STATE TEACHERS ASSOCIATION, et al.
CASE NO. CU-05-267
ORDER NO. 2573
ORDER DENYING RESPONDENTS' MOTION TO DISMISS AND DENYING COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT; AND NOTICE OF HEARING

DATED: Honolulu, Hawaii, January 28, 2009.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

EMORY J. SPRINGER, Member

SARAH R. HIRAKAMI, Member

Copies sent to:

Herbert R. Takahashi, Esq.
Richard Thomason, Deputy Attorney General