

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO,

Complainant,

and

LINDA LINGLE, Governor, State of Hawaii;
MARIE LADERTA, Director, Department of
Human Resources Development, State of
Hawaii; MUFI HANNEMANN, Mayor, City
and County of Honolulu; CHARMAINE
TAVARES, Mayor, County of Maui;
BERNARD P. CARVALHO, Jr., Mayor,
County of Kauai; WILLIAM KENOI, Mayor,
County of Hawaii; THOMAS KELLER,
Administrative Director, The Judiciary, State of
Hawaii; and THOMAS M. DRISKILL, Jr.,
President and Chief Executive Officer, Hawaii
Health Systems Corporation,

Respondents.

CASE NOS.: CE-01-717a
CE-10-717b

ORDER NO. 2661

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER GRANTING
COUNTY RESPONDENTS' MOTIONS
TO DISMISS AND/OR FOR SUMMARY
JUDGMENT OR PARTIAL SUMMARY
JUDGMENT; DENYING UPW'S
MOTION FOR INTERLOCUTORY
RELIEF AGAINST STATE OF HAWAII
AND FOR SUMMARY JUDGMENT
AGAINST ALL RESPONDENTS; AND
DENYING STATE RESPONDENTS'
MOTION TO DISMISS OR IN THE
ALTERNATIVE MOTION FOR
SUMMARY JUDGMENT; AND NOTICE
OF HEARING

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
GRANTING COUNTY RESPONDENTS' MOTIONS TO DISMISS
AND/OR FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY
JUDGMENT; DENYING UPW'S MOTION FOR INTERLOCUTORY
RELIEF AGAINST STATE OF HAWAII AND FOR SUMMARY
JUDGMENT AGAINST ALL RESPONDENTS; AND DENYING STATE
RESPONDENTS' MOTION TO DISMISS OR IN THE ALTERNATIVE
MOTION FOR SUMMARY JUDGMENT; AND NOTICE OF HEARING

On July 10, 2009, Complainant UNITED PUBLIC WORKERS, Local 646, AFL-CIO (Complainant, UPW, or Union) filed a prohibited practice complaint (Complaint) against Respondents LINDA LINGLE, Governor, State of Hawaii (Governor); MARIE LADERTA (Laderta), Director, Department of Human Resources Development, State of Hawaii (Laderta); THOMAS KELLER, Administrative Director, the Judiciary (Keller or Judiciary); THOMAS M. DRISKILL, JR., President and CEO, Hawaii Health Systems Corporation (Driskill or HHSC) (the Governor, Laderta, Keller, and Driskill collectively "State Respondents"); MUFI HANNEMANN, Mayor, City and County of Honolulu (Mayor Hannemann or City and County of Honolulu); CHARMAINE TAVARES, Mayor, County

of Maui (Mayor Tavares or County of Maui); BERNARD P. CARVALHO, Mayor, County of Kauai (Mayor Carvalho or County of Kauai); and WILLIAM KENOI, Mayor, County of Hawaii (Mayor Kenoi or County of Hawaii) (Mayors Hannemann, Tavares, Carvalho, and Kenoi collectively "County Respondents").

The Complaint alleged, *inter alia*, that the amounts of contributions to be paid by the State and various counties, the Judiciary and the HHSC to the Hawaii Employer Union Health Benefit Trust Fund (EUTF or Trust Fund) for plan years 2007 to 2008, and 2008 to 2009, were negotiated as provided in Section 62 of the current unit 1 and 10 collective bargaining agreements (CBAs or agreements); that in accordance with Sections 66 and 68 of the July 1, 2007, to June 30, 2009, agreements the UPW submitted written notices and proposals to all public employers on or about June 16, 2008, to modify the amount of contributions payable by all public employers to the EUTF for plan years 2009 to 2010, and 2010 to 2011; that the Union proposed that the amounts of employer contributions for health benefit plans, including medical PPO, HMO, or HDHP, be increased to 100% of the full premium for single and family plans; that on or about July 8, 2008, duly designated representatives of the UPW and public employers commenced negotiations over wages, hours, and other terms and conditions of employment (including the amount of employer contributions to the EUTF) for bargaining unit 1 and 10 employees; that on or about May 19, 2009, and thereafter the Respondents decided to unilaterally change the amounts of employer-employee contributions to be made to EUTF for extended health benefit plans in effect for plan years 2008 to 2009 for bargaining unit 1 and 10 employees; and that the unilateral decisions and changes to the amount of contributions to EUTF were made without prior notice, consultation, negotiations, or mutual consent of the UPW, contrary to Section 1.05 of the unit 1 and 10 agreements. The Complaint alleged Respondents wilfully committed prohibited practices in violation of Hawaii Revised Statutes (HRS) §§ 89-13(a)(1), (5), (7), and (8).

On August 10, 2009, State Respondents filed their Motion to Dismiss or in the Alternative Motion for Summary Judgment, arguing the Board lacks jurisdiction over the amounts of contributions for health benefits plan; the UPW waived any claim that Respondents' contributions to the EUTF should be more than the amount that was appropriated by the legislature; the status quo is the dollar amount paid by the Employer and the State is not bound by the amounts contributed to the EUTF under prior agreement; the UPW's claim for money damages (i.e., back pay and interest for the increased amounts of employees contributions from July 1, 2009) is barred by the State's sovereign immunity; and the UPW fails to state a claim for relief under HRS §§ 89-13(a)(1), (5), (7), and (8) because there is no new or extended agreement that governs alleged violations occurring after the agreements expired on June 30, 2009; because the Employer bargained in good faith as required in HRS § 89-11; Respondents did not refuse or fail to comply with any provisions of HRS chapter 89, and Respondents did not violate HRS § 89-13(a)(1).

On August 11, 2009, the County of Maui filed its Motion for Summary Judgment, arguing that the County of Maui already negotiated the EUTF contribution amount for the 2008-2009 benefit plan, which requires “effective July 1, 2008 for the plan year 2008-2009 an amount equivalent to sixty-percent (60%) of the final premium rates established by the Trust Fund Board”; and that the County of Maui has not unilaterally amended the employer’s contribution amount for EUTF. Also on August 11, 2009, the County of Hawaii, the County of Kauai, and the City and County of Honolulu filed their Motions to Dismiss and/or for Summary Judgment or Partial Summary Judgment, arguing the public employers had previously negotiated the EUTF contribution amount for the 2008-2009 benefit plan, requiring the employer to contribute “effective July 1, 2008 for the plan year 2008-2009 . . . [an] amount equivalent to sixty-percent (60%) of the final premium rates established by the Trust Fund board”; and that the mayors did not unilaterally amend the Employer’s contribution amount for EUTF.

Also on August 11, 2009, the UPW filed its Motion for Interlocutory Relief against State of Hawaii and for Summary Judgment as to All Respondents, arguing the amount of Employer contributions to EUTF for health benefits is a mandatory subject of collective bargaining; Respondents violated the Katz doctrine by unilaterally terminating Section 62 rights and benefits of employees; the requirement to pay 60% of premium costs arises also from the express and implied terms of the UPW agreements; and that all Respondents have breached their statutory duty to bargain in good faith over employer contributions for the extended plans.

On August 14, 2009, the County of Maui filed its Joinder to the other County Respondents’ Motions for Summary Judgment.

On August 18, 2009, the County of Hawaii filed its Memorandum in Opposition to UPW’s Motion for Interlocutory Relief Against State of Hawaii and for Summary Judgment as to All Respondents. Also on August 18, 2009, the County of Maui filed its Opposition to Complainant’s Motion for Summary Judgment; and the County of Kauai filed its Memorandum in Opposition to UPW’s Motion for Interlocutory Relief against State of Hawaii and for Summary Judgment as to All Respondents.

On August 19, 2009, the City and County of Honolulu filed its Opposition to UPW’s Motion for Summary Judgment.

On August 19, 2009, the UPW filed its Memorandum in Opposition to Respondents Linda Lingle and Marie Laderta, Thomas R. Keller, and Thomas M. Driskill, Jr.’s Motion to Dismiss or in the Alternative Motion for Summary Judgment. The UPW also filed its Memorandum in Opposition to Respondents County of Maui, County of Kauai, County of Hawaii, and City and County of Honolulu’s Motions to Dismiss and/or for Summary Judgment.

Also on August 19, 2009, the State Respondents filed their Memorandum in Opposition to UPW's Motion for Interlocutory Relief Against State of Hawaii and for Summary Judgment Against All Respondents.

On August 20, 2009, the Board heard oral argument on the parties' pending motions.

On August 24, 2009, the UPW filed its Motion to Amend Complaint. On September 8, 2009, the Board granted the UPW's Motion to Amend Complaint, set deadlines for supplemental memoranda, and scheduled further hearing on the pending motions.

Also on September 8, 2009, and the UPW filed its First Amended Prohibited Practice Complaint (Amended Complaint). The Amended Complaint makes additional allegations to the original Complaint, including, inter alia, that the amounts of contributions to be paid by the State, the various counties, the Judiciary, and the HHSC to the EUTF for plan years 2007 to 2008, and 2008 to 2009 were negotiated as provided in Section 62 of the current unit 1 and unit 10 agreements as follows:

- a. Section 62D of the unit 1 agreement states, in part:

D. Effective July 1, 2008

Effective July 1, 2008 for plan year 2008-2009, with the exception of items 5 and 6, the Employer shall pay a specific dollar amount equivalent to sixty percent (60%) of the final premium rates established by the Trust Fund Board for the respective health benefit plan, plus one hundred percent (100%) of all administrative fees.

- b. Section 62D and 62E of the unit 10 agreement states, in part:

D. Effective July 1, 2008

Effective July 1, 2008 for plan year 2008-2009, with the exception of items 5 and 6, the Employer shall pay a specific dollar amount equivalent to sixty percent (60%) of the final premium rates established by the Trust Fund Board for the respective health benefit plan, plus one hundred percent (100% of the administrative fees).

E. Effective July 1, 2009

Effective July 1, 2009 for plan year 2009-2010, with the exception of items 4 and 5, the Employer shall pay a specific dollar equivalent to sixty percent (60%) of the final premium rates established by the Trust Fund Board for the respective health benefit plan, plus one hundred percent (100%) of all administrative fees.

- c. The amounts of contributions to be paid under Section 62 of the unit 1 and 10 agreements are uniform for the State and counties (as has historically been the case).

Other additional allegations in the Amended Complaint include, inter alia, that on or about May 19, 2009, and thereafter the Respondents decided to unilaterally change the amounts of employer-employee contributions to be made to the EUTF for the extended health benefits plans in effect for the plan years 2008 to 2009 for bargaining unit 1 and 10 employees as follows:

- a. Upon being informed by the EUTF on May 6, 2009 that trustees had decided to extend existing health benefit plans to July 31, 2009, on or about May 19, 2000 [sic] Marie Laderta and Linda Lingle unilaterally set the amount of State contributions for said plans.
- b. On May 18, 2009 respondents Hannemann, Tavares, Carvalho and Kenoi unilaterally decided to set the amounts of County contributions (different from State contributions [sic] amounts) for the extended health plans to July 31, 2009.
- c. On June 4, 2009 respondents Laderta and Lingle agreed to accept (by not objecting to) the unilateral actions taken by respondents Hannemann, Tavares, Carvalho, and Kenoi to set different amounts of contributions for employers to EUTF for the extended health plans.
- d. On June 4, 2009 the EUTF notified all respondents that the amounts of State contributions (set by Laderta and Lingle on or about May 19, 2009), and the amounts [of] County contributions set separately by respondents Hannemann, Tavares, Carvalho, and Kenoi on May 28, 2009 was accepted by all respondents and would be implemented effective July 1, 2009 to August 31, 2009.

- e. The June 4, 2009 unilateral decision by respondents was an unprecedented change in amounts of State and county contributions for health benefit plans which had historically been uniform for the State and counties since 1985 for all employer jurisdictions, and significantly increases the proportion and amount of employee contribution of state employees.
- f. On June 16, 2009 (twelve days after implementing their unilateral decisions) and without prior notice, consultation, or discussion with the UPW[,] respondents notified UPW of a completely new set of "counter-proposals" incorporating the aforementioned June 4, 2009 unilateral action.
- g. On June 29, 2009 EUTF notified all respondents that the extended health benefit plans and the separate amounts of contributions for the State and counties would be in effect from July 1, 2009 to September 30, 2009.
- h. On July 15, 2009 EUTF notified all respondents that the extended health benefit plans and the separate amounts of contributions for the State and counties would be in effect from July 1, 2009 to October 31, 2009.

The Amended Complaint alleged that Respondents wilfully committed prohibited practices in violation of HRS §§ 89-13(a)(1), (5), (7), and (8), as follows:

- a. Respondents interfered, restrained, and coerced employees in the exercise of their rights under Section 89-3, HRS, by failing to recognize the UPW as the exclusive bargaining representative of bargaining unit 1 and 10 employees for the purpose of collective bargaining over changes in wages, cost items, and amounts of employer/employee contributions to health benefit plans, and by unilaterally making significant changes in pay rates to State employees on or about July 20, 2009 and thereafter (in violation of Section 89-13(a)(1), HRS);
- b. Respondents breached their duty to bargain over changes to wages, cost items, and amounts of contributions for health benefits plan contrary to the unilateral change

doctrine under N.L.R.B. v. Katz, 369 U.S. 736 (1962), contrary to Section 89-9(a), HRS by setting separate and distinct amounts of contributions for State and county employees and implementing for State employees changes to the prevailing terms of Section 62 of the unit 1 and 10 agreements (in violation of Section 89-13(a)(5), HRS);

- c. Respondents violated Sections 89-3, 89-6(d), and 89-9(a), HRS (in violation of Section 89-13(a)(7), HRS).
- d. Respondents abrogated Sections 1.05, 62, 66, and 68 of the unit 1 and 10 collective bargaining agreements by making mid-term changes without mutual consent (required by Section 1.05), violating renewed terms of the unit 1 and unit 10 agreements without prior written notice (as required by Section 66 of the unit 1 agreement and Section 68 of the unit 10 agreement), and by repudiating the terms of Section 62 of the unit 1 and unit 10 agreements setting uniform amounts of contributions for state and counties (in violation of Section 89-13(a)(8), HRS).

On September 15, 2009, the County of Maui filed its Supplemental Memorandum in Support of Motion for Summary Judgment.

On September 16, 2009, the City and County of Honolulu filed its Supplemental Memorandum in Support of Motion to Dismiss and/or for Summary Judgment or Partial Summary Judgment; the County of Hawaii filed its Supplemental Memorandum in Support of Motion to Dismiss and/or for Summary Judgment or Partial Summary Judgment; State Respondents filed their Supplemental Motion to Dismiss First Amended Complaint Filed September 8, 2009, and/or in the Alternative, Motion for Summary Judgment; and the UPW filed its Supplemental Memorandum in Support of Motion for Interlocutory Relief and for Summary Judgment.

On September 21, 2009, State Respondents filed their Memorandum in Opposition to UPW's Supplemental Memorandum in Support of Motion for Interlocutory Relief and for Summary Judgment; the UPW filed its Memorandum in Opposition to the Counties' Supplemental Memorandum Regarding Motion to Dismiss and/or for Summary Judgment; and the UPW filed its Opposition to State of Hawaii's Motion to Dismiss First Amended Complaint and/or for Summary Judgment.

On September 23, 2009, the Board heard additional oral argument on the pending motions.

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 County Respondents' Motions to Dismiss and/or for Summary Judgment or Partial Summary Judgment; denying the UPW's Motion for Interlocutory Relief Against the State of Hawaii and for Summary Judgment against All Respondents; and denying State Respondents' Motion to Dismiss or in the Alternative Motion for Summary Judgment.

FINDINGS OF FACT

1. The UPW is an employee organization and exclusive representative within the meaning of HRS § 89-2,¹ 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 is an employer or public employer pursuant to the definitions provided in HRS § 89-2,² and is a public employer for purposes of

¹HRS § 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.

* * *

“Exclusive representative” means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

²HRS § 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

negotiating a collective bargaining agreement for Unit 1 and Unit 10 pursuant to HRS § 89-6(d).³

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. Keller and Driskill are public employers pursuant to HRS § 89-2, and pursuant to HRS § 89-6(d) for purposes of negotiating a collective bargaining agreement for Unit 1 and Unit 10.
5. Mayor Hannemann, Mayor Tavares, Mayor Carvalho, and Mayor Kenoi are public employers pursuant to HRS § 89-2, and pursuant to HRS § 89-6(d) for purposes of negotiating a collective bargaining agreement for Unit 1 and Unit 10.⁴
6. Pursuant to HRS § 87A-5, the EUTF is governed by a board of ten trustees: five trustees (one of whom shall represent retirees) to represent employee-beneficiaries, and five trustees to represent public employers.

board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

³HRS § 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:

- (1) For bargaining units (1), (2), (3), (4), (9), (10), and (13), the governor shall have six votes and the mayors, the chief justice, and the Hawaii health systems corporation board shall each have one vote if they have employees in the particular bargaining unit[.]

⁴The City and County of Honolulu is the only county with employees in Unit 10.

7. The Unit 1 and Unit 10 agreements with effective dates July 1, 2007, through June 30, 2009, provide in relevant part:

SECTION 1. RECOGNITION.

* * *

1.05 CONSULT OR MUTUAL CONSENT.

The Employer shall consult the Union when formulating and implementing personnel policies, practices and any matter affecting working conditions. No changes in wages, hours or other conditions of work contained herein may be made except by mutual consent.

8. The Unit 1 agreement with effective dates July 1, 2007, through June 30, 2009, provides in relevant part:

SECTION 62. BENEFIT PLANS.

Subject to the applicable provisions of Chapters 87A and 89, Hawaii Revised Statutes, the Employer shall pay monthly contributions to the Hawaii Employer-Union Health Benefits Trust Fund ("Trust Fund" or EUTF) as follows:

A. "Health Benefit Plan" shall mean the medical PPO, HMO, HDHP, prescription drug, dental, vision and dual coverage medical plans.

B. "Prevalent Medical Benefit Plan" shall mean the medical PPO, HMO, or HDHP as determined by the EUTF Board of Trustees to have the largest number of total active Employee enrollments as of December 31 of the previous fiscal year.

C. Effective 7/1/07

Effective July 1, 2007 for plan year 2007 – 2008, the Employer shall pay monthly contributions which include the cost of the Trust Fund administrative fees to the Trust Fund not to exceed the monthly contribution amounts as specified below:

1. For each Employee-Beneficiary with no dependent-beneficiaries enrolled in the following Trust Fund health benefit plans.

<u>BENEFIT PLAN</u>	<u>TOTAL MONTHLY CONTRIBUTION</u>
a. Medical (PPO, HMO or HDHP)(drug & chiro)	\$149.44
b. Dental	\$ 16.46
c. Vision	\$ 3.64
d. Dual coverage (medical, drug, chiro):	
(1) HMSA	\$ 86.36
(2) Royal State	\$ 31.16
e. Stand-alone Drug Plan	\$ 27.12

The Employer shall pay the same monthly contribution for each Employee-Beneficiary enrolled in a self-only medical plan (PPO, HMO or HDHP), regardless of which plan is chosen.

2. For each Employee-Beneficiary with one dependent-beneficiary enrolled in the following Trust Fund health benefit plans:

<u>BENEFIT PLAN</u>	<u>TOTAL MONTHLY CONTRIBUTION</u>
a. Medical (PPO, HMO or HDHP)(drug & chiro)	\$372.92
b. Dental	\$ 32.94
c. Vision	\$ 6.74
d. Dual coverage (medical, drug, chiro):	
(1) HMSA	\$216.26
(2) Royal State	\$ 76.10
e. Stand-alone Drug Plan	\$ 68.48

The Employer shall pay the same monthly contribution for each Employee-Beneficiary enrolled in a two-party medical plan (PPO, HMO or HDHP), regardless of which plan is chosen.

3. For each Employee-Beneficiary with two or more dependent-beneficiaries enrolled in the following Trust Fund health benefit plans:

<u>BENEFIT PLAN</u>	<u>TOTAL MONTHLY CONTRIBUTION</u>
a. Medical (PPO, HMO or HDHP)(drug & chiro)	\$484.00
b. Dental	\$ 68.16
c. Vision	\$ 8.82
d. Dual coverage (medical, drug, chiro):	
(1) HMSA	\$283.98
(2) Royal State	\$ 86.74
e. Stand-alone Drug Plan	\$ 93.88

The Employer shall pay the same monthly contribution for each Employee-Beneficiary enrolled in a family medical plan (PPO, HMO or HDHP), regardless of which plan is chosen.

4. For each Employee-Beneficiary enrolled in the Trust Fund group life insurance plan, the Employer shall pay \$4.16 per month which reflects one hundred percent (100%) of the monthly premium and administrative fees.

D. Effective July 1, 2008

Effective July 1, 2008 for plan year 2008-2009, with the exception of items 5 and 6, the Employer shall pay a specific dollar amount equivalent to sixty percent (60%) of the final premium rates established by the Trust Fund Board for the respective health benefit plan, plus one hundred percent (100%) of all administrative fees:

1. The amounts paid by the Employer shall be based on the plan year 2008-2009 final monthly premium rates

established by the Trust Fund for each Employee-Beneficiary with no dependent-beneficiaries enrolled in the following Trust Fund health benefit plans:

- a. Medical (PPO, HMO or HDHP) (drug & chiro)
- b. HMSA Dual coverage medical, drug, chiro
- c. Stand-alone Drug

The Employer shall pay based on the prevalent medical benefit plan the same monthly contribution for each Employee-Beneficiary enrolled in a self only medical plan (PPO, HMO or HDHP), regardless of which plan is chosen.

2. The amounts paid by the Employer shall be based on the plan year 2008-2009 final monthly premium rates established by the Trust Fund for each Employee-Beneficiary with one dependent-beneficiary enrolled in the following Trust Fund health benefit plans:

- a. Medical (PPO, HMO or HDHP) (drug & chiro)
- b. HMSA Dual coverage medical, drug, chiro
- c. Stand-alone Drug

The Employer shall pay based on the prevalent medical benefit plan the same monthly contribution for each Employee-Beneficiary enrolled in a two-party medical plan (PPO, HMO or HDHP), regardless of which plan is chosen.

3. The amounts paid by the Employer shall be based on the plan year 2008-2009 final monthly premium rates established by the Trust Fund for each Employee-Beneficiary with two or more dependent-beneficiaries enrolled in the following Trust Fund health benefit plans:

- a. Medical (PPO, HMO or HDHP) (drug & chiro)
- b. HMSA Dual coverage medical, drug, chiro
- c. Stand-alone Drug

The Employer shall pay based on the prevalent medical benefit plan the same monthly contribution for each Employee-Beneficiary enrolled in a family medical plan (PPO, HMO or HDHP), regardless of which plan is chose

4. The amounts paid by the Employer for the following health benefit plans shall be based on the plan year 2008-2009 final monthly premium rates established by the Trust Fund. Monthly contributions shall not exceed the amounts specified in items 4a and 4b for Vision and Dual Coverage Medical plans offered by Royal State.

MAXIMUM MONTHLY PREMIUM ONLY CONTRIBUTIONS

	<u>Self</u>	<u>2-party</u>	<u>Family</u>
a. Vision	\$ 3.59	\$ 6.64	\$ 8.67
b. Dual coverage (medical, drug, chiro)			
Royal State	\$32.32	\$80.38	\$89.38

5. a. For each Employee-Beneficiary with no dependent-beneficiaries enrolled in the Trust Fund's Dental plan, the Employer shall pay a specific dollar amount equivalent to sixty percent (60%) of the final premium rates established by the Trust Fund Board for the 2008-2009 Dental plan (self-only) plus one hundred percent (100%) of the administrative fee.

b. For each Employee-Beneficiary with one dependent beneficiary enrolled in the Trust Fund's Dental plan, the Employer shall pay a specific dollar amount equivalent to sixty percent (60%) of the final premium rates established by the Trust Fund Board for the 2008-2009 Dental plan (two-party) plus one hundred percent (100%) of the administrative fee.

c. For each Employee-Beneficiary with two or more dependent beneficiaries enrolled in the Trust Fund's Dental plan, the Employer shall pay a specific dollar amount based on the actual 2008-2009 Dental plan

rates established by the Trust Fund Board, adjusted and calculated as described in Exhibit A.

d. In no case will employer contributions for Dental plan premiums exceed the following:

MAXIMUM MONTHLY PREMIUM ONLY CONTRIBUTIONS

	<u>Self-only</u>	<u>2-party</u>	<u>Family</u>
Dental	\$16.76	\$33.53	\$69.73

6. For each Employee-Beneficiary enrolled in the Trust Fund group life insurance plan, the Employer shall pay no more than \$4.12 per month which reflects one hundred percent (100%) of the monthly premium. The Employer shall also pay one hundred percent (100%) of all administrative fees.
- E. No later than three (3) weeks after the Trust Fund Board formally establishes and adopts the final premium rates for Fiscal Years 2008-2009, the Office of Collective Bargaining shall distribute the final calculation of the Employers' monthly contribution amounts for each health benefit plan.
- F. Should the Trust Fund Board eliminate any significant portion (e.g. the elimination of prescription drug benefits in the medical plan) or part of a Trust Fund health benefit plan or adopt a new plan, this Section shall be reopened for the purpose of renegotiating the Employers' monthly contribution amounts.
- G. Rounding Employer's Monthly Contribution. Whenever the Employer's monthly contribution (premium plus administrative fee) to the Trust Fund is less than one hundred percent (100%) of the monthly premium amount, such monthly contribution shall be rounded to the nearest cent as provided below:
 1. When rounding to the nearest cent results in an even amount, such even amount shall be the Employer's monthly contribution. For example:

(a) $\$11.397 = \$11.40 = \$11.40$ (Employer's monthly contribution)

(b) $\$11.382 = \$11.38 = \$11.38$ (Employer's monthly contribution).

2. When rounding to the nearest cent results in an odd amount, round to the lower even cent, and such even amount shall be the Employer's monthly contribution.

For example:

(a) $\$11.392 = \$11.39 = \$11.38$ (Employer's monthly contribution)

(b) $\$11.386 = \$11.39 = \$11.38$ (Employer's monthly contribution)

Employer contributions effective July 1, 2007 reflect the rounding described in item G.

Employer contributions effective July 1, 2008, shall be rounded as described in item G after administrative fees have been determined by the Trust Fund Board.

H. Should the Union consider establishment of a Voluntary Employees' Beneficiary Association Trust (VEBA) pursuant to Act 245, Session Laws of Hawaii 2005, this Agreement is subject to reopening by mutual consent, for the purpose of negotiating Employer contributions. The Union will provide written notification of its intent and the parties will meet not later than 15 working days after receipt of notification for the purpose of renegotiating the affected provisions and execution of a Memorandum of Understanding.

9. Section 62 of the Unit 10 agreement with effective dates July 1, 2007, through June 30, 2009, has similar provisions as Section 62 of the Unit 1 agreement, with the exception of the following paragraphs that exist only in the Unit 10 agreement (as Section 62.E.) and not the Unit 1 agreement:

Effective July 1, 2009

Effective July 1, 2009 for plan year 2009-2010, with the exception of items 4 and 5, the Employer shall pay a specific dollar amount equivalent to sixty percent (60%) of the final premium rates established by the Trust Fund Board for the

respective health benefit plan, plus one hundred percent (100%) of all administrative fees.

1. The amounts paid by the Employer shall be based on the plan year 2009-2010 final monthly premium rates established by the Trust Fund for each Employee-Beneficiary with no dependent-beneficiaries enrolled in the following Trust Fund health benefit plans:

- a. Medical (PPO, HMO or HDHP) (drug & chiro)
- b. Dual coverage (medical, drug, chiro)
 - 1. HMSA
 - 2. Royal State
- c. Vision
- d. Stand-alone Drug Plan

The Employer shall pay based on the prevalent medical benefit plan the same monthly contribution for each Employee-Beneficiary enrolled in a self only medical plan (PPO, HMO or HDHP), regardless of which plan is chosen.

2. The amounts paid by the Employer shall be based on the plan year 2009-2010 final monthly premium rates established by the Trust Fund for each Employee-Beneficiary with one dependent-beneficiary enrolled in the following Trust Fund health benefit plans:

- a. Medical (PPO, HMO or HDHP) (drug & chiro)
- b. Dual coverage (medical, drug, chiro)
 - 1. HMSA
 - 2. Royal State
- c. Vision
- d. Stand-alone Drug Plan

3. The amounts paid by the Employer shall be based on the plan year 2009-2010 final monthly premium rates established by the Trust Fund for each Employee-Beneficiary with two or more dependent-beneficiaries enrolled in the following Trust Fund health benefit plans:

- a. Medical (PPO, HMO or HDHP) (drug & chiro)
- b. Dual coverage (medical, drug, chiro)
 - 1. HMSA

- 2. Royal State
 - c. Vision
 - d. Stand-alone Drug Plan

The Employer shall pay based on the prevalent medical benefit plan the same monthly contribution for each Employee-Beneficiary enrolled in a family medical plan (PPO, HMO or HDHP), regardless of which plan is chosen.

4. a. For each Employee-Beneficiary with no dependent-beneficiaries enrolled in the Trust Fund's Dental plan, the Employer shall pay a specific dollar amount equivalent to sixty percent (60%) of the final premium rates established by the Trust Fund Board for the 2009-2010 Dental plan (self-only) plus one hundred percent (100%) of the administrative fee.

b. For each Employee-Beneficiary with one dependent beneficiary enrolled in the Trust Fund's Dental plan, the Employer shall pay a specific dollar amount equivalent to sixty percent (60%) of the final premium rates established by the Trust Fund Board for the 2009-2010 Dental plan (two-party) plus one hundred percent (100%) of the administrative fee.

c. For each Employee-Beneficiary with two or more dependent beneficiaries enrolled in the Trust Fund's Dental plan, the Employer shall pay a specific dollar amount based on the actual 2009-2010 Dental plan rates established by the Trust Fund Board, adjusted and calculated as described in Exhibit A.

5. For each Employee-Beneficiary enrolled in the Trust Fund group life insurance plan, the Employer shall pay one hundred percent (100%) of the monthly premium plus 100% of all administrative fees.

10. Section 66 of the Unit 1 collective bargaining agreement 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.

11. Section 68 of the Unit 10 collective bargaining agreement 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.

12. The UPW submitted written notices and proposal to all public employers on or about June 16, 2008, to modify the amount of contributions payable by all public employers to the EUTF for plan years 2009 to 2010, and 2010 to 2011. The Union proposed that the amounts of employer contributions for health benefit plans, including medical PPO, HMO, or HDHP, be increased to 100% of the full premium for single and family plans. On or about July 8, 2008, duly designated representatives of the UPW and the public employers commenced negotiations over wages, hours, and other terms and conditions of employment, including the amount of employer contributions to the EUTF, for bargaining unit 1 and 10 employees.

13. On February 1, 2009, the Board declared a statutory impasse for Unit 1 and Unit 10. On March 3, 2009, the UPW and the Employer agreed to extend the alternate impasse procedure for the successor Unit 10 agreement. Interest arbitration has not yet concluded for Unit 10.
14. In or around April 2009, during the course of negotiations, Laderta informed the UPW State Director that for Fiscal Year 2010, the State would only be paying the same dollar amount for EUTF contributions as paid in Fiscal Year 2009. The Employer submitted its last counter-proposals to the UPW for Unit 1 and Unit 10 on June 16, 2009, including a counter-proposal for the amount of Employer's contribution to the EUTF (that the amounts of contributions to the EUTF reflect the same dollar amount paid by the Employers for plan year 2008-09).
15. Although the parties exchanged proposals and negotiated over the amount of the Employer's contributions to the EUTF since July 8, 2009, no agreement has been reached.
16. Notice of an increase in premium rates and extension of current benefit plans for active employees and retirees through July 31, 2009, was provided by the EUTF to department heads, personnel officers, and employee organization by letter dated May 6, 2009. The EUTF provided the following explanation:

These actions were necessitated because the Board of Trustees has not been able to reach agreement on the benefit plans and rates to be offered for the full 2009—2010 plan year. The Board will consider further extensions for the months of August and September at a later date, if it continues to be unable to reach agreement for the full plan year.
17. On May 19, 2009, the EUTF administrator notified all department heads, personnel officers, and employee organizations that health benefit plans by EUTF in effect on June 30, 2009, would be extended through to July 31, 2009. The notice reminded the parties that rates were previously transmitted. On May 21, 2009, the administrator indicated that the plans would be extended through August 31, 2009.
18. On May 28, 2009, Kenneth Nakamatsu, Director of Human Resources for the City and County of Honolulu, informed the EUTF that the City would continue to contribute 60% of the cost of the continued plans.
19. By letter dated June 4, 2009, the EUTF administrator notified department heads, personnel officers, and employee organizations that the counties will

make a separate determination regarding the employer contribution to the EUTF, and that Laderta had no objection.

20. On June 5, 2009, Mayor Kenoi, along with Mayors Hannemann, Tavares, and Carvalho, informed the EUTF that the counties will continue to contribute 60% of the costs of the continued plans.
21. On June 29, 2009, the EUTF informed the public employers and employee organizations that the EUTF approved an extension of the current benefit plans with the revised rates through September 30, 2009. On July 16, 2009, the EUTF informed the public employers and employee organizations that the EUTF decided to approve an extension of the current benefit plans with the revised rates through October 31, 2009.
22. In the past, the parties have reached an agreement on the amounts of the EUTF contributions for the next plan years prior to the end of the contract period, which were timely submitted to the Legislature for appropriations for the following fiscal years. However, at the close of the 2009 Legislative session, no agreement had been reached regarding the EUTF contributions. The 2009 Legislature only appropriated funds for Fiscal Year 2010 sufficient to cover the dollar amounts paid by the State to the EUTF for plan year 2008-09 that just ended.
23. The EUTF Board has not made a final decision on plans and rates for the periods after June 30, 2009. Instead, the EUTF Board temporarily extended the 2009 benefit plans, and temporarily increased the rates for certain benefit plans. The EUTF Board approved the interim rates for Fiscal Year 10 which currently has been extended to October 31, 2009.
24. On July 10, 2009, the UPW filed its Complaint. The Complaint alleged, inter alia, that the amounts of contributions to be paid by the State and various counties, the Judiciary and the HHSC to the EUTF for plan years 2007 to 2008, and 2008 to 2009, were negotiated as provided in Section 62 of the current unit 1 and 10 agreements; that in accordance with Sections 66 and 68 of the July 1, 2007, to June 30, 2009, agreements the UPW submitted written notices and proposals to all public employers on or about June 16, 2008, to modify the amount of contributions payable by all public employers to the EUTF for plan years 2009 to 2010, and 2010 to 2011; that the Union proposed that the amounts of employer contributions for health benefit plans, including medical PPO, HMO, or HDHP, be increased to 100% of the full premium for single and family plans; that on or about July 8, 2008, duly designated representatives of the UPW and public employers commenced negotiations over wages, hours, and other terms and conditions of employment (including the amount of

employer contributions to the EUTF) for bargaining unit 1 and 10 employees; that on or about May 19, 2009, and thereafter the Respondents decided to unilaterally change the amounts of employer-employee contributions to be made to EUTF for extended health benefit plans in effect for plan years 2008 to 2009 for bargaining unit 1 and 10 employees; and that the unilateral decisions and changes to the amount of contributions to EUTF were made without prior notice, consultation, negotiations, or mutual consent of the UPW, contrary to Section 1.05 of the unit 1 and 10 agreements. The Complaint alleged Respondents wilfully committed prohibited practices in violation of HRS §§ 89-13(a)(1), (5), (7), and (8).

25. On August 10, 2009, State Respondents filed their Motion to Dismiss or in the Alternative Motion for Summary Judgment, arguing the Board lacks jurisdiction over the amounts of contributions for health benefits plan; the UPW waived any claim that Respondents' contributions to the EUTF should be more than the amount that was appropriated by the legislature; the status quo is the dollar amount paid by the Employer and the State is not bound by the amounts contributed to the EUTF under prior agreement; the UPW's claim for money damages (i.e., back pay and interest for the increased amounts of employees contributions from July 1, 2009) is barred by the State's sovereign immunity; and the UPW fails to state a claim for relief under HRS § 89-13(a)(1), (5), (7), and (8) because there is no new or extended agreement that governs alleged violation occurring after the agreements expired on June 30, 2009, because the Employer bargained in good faith as required in HRS § 89-11, Respondents did not refuse or fail to comply with any provisions of HRS chapter 89, and Respondents did not violate HRS § 89-13(a)(1).
26. On August 11, 2009, the County of Maui filed its Motion for Summary Judgment, arguing that the County of Maui already negotiated the EUTF contribution amount for the 2008-2009 benefit plan, which requires "effective July 1, 2008 for the plan year 2008-2009 an amount equivalent to sixty-percent (60%) of the final premium rates established by the Trust Fund Board"; and that the County of Maui has not unilaterally amended the employer's contribution amount for EUTF.
27. Also on August 11, 2009, the County of Hawaii filed its Motion to Dismiss and/or for Summary Judgment or Partial Summary Judgment, arguing the public employers, including Mayor Kenoi, have previously negotiated the EUTF contribution amount for the 2008-2009 benefit plan, requiring the employer to contribute "effective July 1, 2008 for the plan year 2008-2009. . . [an] amount equivalent to sixty-percent (60%) of the final premium rates established by the Trust Fund board"; and that Mayor Kenoi has not unilaterally amended the Employer's contribution amount for EUTF.

28. Also on August 11, 2009, the County of Kauai filed its Motion to Dismiss and/or for Summary Judgment or Partial Summary Judgment, arguing the public employers, including Mayor Carvalho, have previously negotiated the EUTF contribution amount for the 2008-2009 benefit plan, requiring the employer to contribute “effective July 1, 2008 for the plan year 2008-2009 . . . [an] amount equivalent to sixty-percent (60%) of the final premium rates established by the Trust Fund board”; and that Mayor Carvalho has not unilaterally amended the Employer’s contribution amount for EUTF.
29. Also on August 11, 2009, the UPW filed its Motion for Interlocutory Relief Against State of Hawaii and for Summary Judgment as to All Respondents, arguing the amount of Employer contributions to EUTF for health benefits is a mandatory subject of collective bargaining; Respondents violated the Katz doctrine by unilaterally terminating Section 62 rights and benefits of employees; the requirement to pay 60% of premium costs arises also from the express and implied terms of the UPW agreements; and that all Respondents have breached their statutory duty to bargain in good faith over employer contributions for the extended plans.
30. Also on August 11, 2009, the City and County of Honolulu filed its Motion to Dismiss and/or for Summary Judgment or Partial Summary Judgment, arguing the public employers, including Mayor Hannemann, have previously negotiated the EUTF contribution amount for the 2008-2009 benefit plan, requiring the employer to contribute “effective July 1, 2008 for the plan year 2008-2009 . . . [an] amount equivalent to sixty-percent (60%) of the final premium rates established by the Trust Fund board”; and that Mayor Hannemann has not unilaterally amended the Employer’s contribution amount for EUTF.
31. On August 14, 2009, the County of Maui filed its Joinder to the other County Respondents’ Motions for Summary Judgment.
32. On August 18, 2009, the County of Hawaii filed its Memorandum in Opposition to UPW’s Motion for Interlocutory Relief Against State of Hawaii and for Summary Judgment as to All Respondents. Also on August 18, 2009, the County of Maui filed its Opposition to Complainant’s Motion for Summary Judgment; and the County of Kauai filed its Memorandum in Opposition to UPW’s Motion for Interlocutory Relief Against State of Hawaii and for Summary Judgment as to All Respondents.
33. On August 19, 2009, the City and County of Honolulu filed its Opposition to UPW’s Motion for Summary Judgment.

34. On August 19, 2009, the UPW filed its Memorandum in Opposition to Respondents Linda Lingle and Marie Laderta, Thomas R. Keller, and Thomas M. Driskill, Jr.'s Motion to Dismiss or in the Alternative Motion for Summary Judgment. The UPW also filed its Memorandum in Opposition to Respondents County of Maui, County of Kauai, County of Hawaii, and City and County of Honolulu's Motions to Dismiss and/or for Summary Judgment.
35. Also on August 19, 2009, the State Respondents filed their Memorandum in Opposition to UPW's Motion for Interlocutory Relief Against State of Hawaii and for Summary Judgment.
36. On August 20, 2009, the Board heard oral argument on the parties' pending motions.
37. On August 24, 2009, the UPW filed its Motion to Amend Complaint. On September 8, 2009, the Board granted the UPW's Motion to Amend Complaint, set deadlines for supplemental memoranda, and scheduled further hearing on the pending motions.
38. Also on September 8, 2009, the UPW filed its Amended Complaint. The Amended Complaint makes additional allegations to the original Complaint, including, *inter alia*, that the amounts of contributions to be paid by the State, the various counties, the Judiciary, and the HHSC to the EUTF for plan years 2007 to 2008, and 2008 to 2009 were negotiated as provided in Section 62 of the current unit 1 and unit 10 agreements as follows:
 - a. Section 62D of the Unit 1 agreement states:
 - D. Effective July 1, 2008
Effective July 1, 2008 for plan year 2008-2009, with the exception of items 5 and 6, the Employer shall pay a specific dollar amount equivalent to sixty percent (60%) of the final premium rates established by the Trust Fund Board for the respective health benefit plan, plus one hundred percent (100%) of all administrative fees
 - b. Section 62D and 62E of the unit 10 agreement states:
 - 62.D Effective July 1, 2008 for plan year 2008-2009, with the exception of items 5 and 6, the Employer shall pay a specific dollar amount equivalent to sixty percent (60%) of the final premium rates established by the Trust Fund

Board for the respective health benefit plan, plus one hundred percent (100% of the administrative fees).

62.E Effective July 1, 2009 for plan year 2009-2010, with the exception of items 4 and 5, the Employer shall pay a specific dollar equivalent to sixty percent (60%) of the final premium rates established by the Trust Fund Board for the respective health benefit plan, plus one hundred percent (100%) of all administrative fees.

c. The amounts of contributions to be paid under Section 62 of the unit 1 and 10 agreements are uniform for the State and counties (as has historically been the case).

39. Other additional allegations in the Amended Complaint include, *inter alia*, that on or about May 19, 2009, and thereafter the Respondents decided to unilaterally change the amounts of employer-employee contributions to be made to the EUTF for the extended health benefits plans in effect for the plan years 2008 to 2009 for bargaining unit 1 and 10 employees as follows:

a. Upon being informed by the EUTF on May 6, 2009 that trustees had decided to extend existing health benefit plans to July 31, 2009, on or about May 19, 2000 [sic] Marie Laderta and Linda Lingle unilaterally set the amount of State contributions for said plans.

b. On May 18, 2009 respondents Hannemann, Tavares, Carvalho and Kenoi unilaterally decided to set the amounts of County contributions (different from State contributions [sic] amounts) for the extended health plans to July 31, 2009.

c. On June 4, 2009 respondents Laderta and Lingle agreed to accept (by not objecting to) the unilateral actions taken by respondents Hannemann, Tavares, Carvalho, and Kenoi to set different amounts of contributions for employers to EUTF for the extended health plans.

d. On June 4, 2009 the EUTF notified all respondents that the amounts of State contributions (set by Laderta and Lingle on or about May 19, 2009), and the amounts [of] County contributions set separately by respondents Hannemann, Tavares, Carvalho, and Kenoi on May 28, 2009 was accepted by all respondents and would be implemented effective July 1, 2009 to August 31, 2009.

- e. The June 4, 2009 unilateral decision by respondents was an unprecedented change in amounts of State and county contributions for health benefit plans which had historically been uniform for the State and counties since 1985 for all employer jurisdictions, and significantly increases the proportion and amount of employee contribution of state employees.
 - f. On June 16, 2009 (twelve days after implementing their unilateral decisions) and without prior notice, consultation, or discussion with the UPW[,] respondents notified UPW of a completely new set of "counter-proposals" incorporating the aforementioned June 4, 2009 unilateral action.
 - g. On June 29, 2009 EUTF notified all respondents that the extended health benefit plans and the separate amounts of contributions for the State and counties would be in effect from July 1, 2009 to September 30, 2009.
 - h. On July 15, 2009 EUTF notified all respondents that the extended health benefit plans and the separate amounts of contributions for the State and counties would be in effect from July 1, 2009 to October 31, 2009.
40. The Amended Complaint alleges that Respondents wilfully committed prohibited practices in violation of HRS §§ 89-13(a)(1), (5), (7), and (8), as follows:
- a. Respondents interfered, restrained, and coerced employees in the exercise of their rights under Section 89-3, HRS, by failing to recognize the UPW as the exclusive bargaining representative of bargaining unit 1 and 10 employees for the purpose of collective bargaining over changes in wages, cost items, and amounts of employer/employee contributions to health benefit plans, and by unilaterally making significant changes in pay rates to State employees on or about July 20, 2009 and thereafter (in violation of Section 89-13(a)(1), HRS);
 - b. Respondents breached their duty to bargain over changes to wages, cost items, and amounts of contributions for health benefits plan contrary to the unilateral change doctrine under N.L.R.B. v. Katz, 369 U.S. 736 (1962), contrary to Section 89-9(a), HRS by setting separate and

distinct amounts of contributions for State and county employees and implementing for State employees changes to the prevailing terms of Section 62 of the unit 1 and 10 agreements (in violation of Section 89-13(a)(5), HRS);

- c. Respondents violated Sections 89-3, 89-6(d), and 89-9(a), HRS (in violation of Section 89-13(a)(7), HRS).
 - d. Respondents abrogated Sections 1.05, 62, 66, and 68 the unit 1 and 10 collective bargaining agreements by making mid-term changes without mutual consent (required by Section 1.05), violating renewed terms of the unit 1 and unit 10 agreements without prior written notice (as required by Section 66 of the unit 1 agreement and Section 68 of the unit 10 agreement), and by repudiating the terms of Section 62 of the unit 1 and unit 10 agreements setting uniform amounts of contributions for state and counties (in violation of Section 89-13(a)(8), HRS).
- 41. On September 15, 2009, the County of Maui filed its Supplemental Memorandum in Support of Motion for Summary Judgment.
 - 42. On September 16, 2009, the City and County of Honolulu filed its Supplemental Memorandum in Support of Motion to Dismiss and/or for Summary Judgment or Partial Summary Judgment; the County of Hawaii filed its Supplemental Memorandum in Support of Motion to Dismiss and/or for Summary Judgment or Partial Summary Judgment; State Respondents filed their Supplemental Motion to Dismiss First Amended Complaint Filed September 8, 2009, and/or in the Alternative, Motion for Summary Judgment; and the UPW filed its Supplemental Memorandum in Support of Motion for Interlocutory Relief and for Summary Judgment.⁵
 - 43. On September 21, 2009, State Respondents filed their Memorandum in Opposition to UPW's Supplemental Memorandum in Support of Motion for Interlocutory Relief and for Summary Judgment; the UPW filed its Memorandum in Opposition to the Counties' Supplemental Memorandum

⁵The UPW's legal theories were (1) the refusal to recognize the Union for the purpose of collective bargaining violates employee rights; (2) unilateral changes to uniform rates of contributions constitute a breach of the statutory duty to bargain; (3) the decision to change state contribution amounts below 60% lacked a "simple majority" within the employer group; and (4) the employer violated express and implied terms of the applicable collective bargaining agreements.

Regarding Motion to Dismiss and/or for Summary Judgment; and the UPW filed its Opposition to State of Hawaii's Motion to Dismiss First Amended Complaint and/or for Summary Judgment.

44. On September 23, 2009, the Board heard additional oral argument on the pending motions.
45. In short, the UPW argues that Respondents unilaterally and unlawfully changed the amount of contributions to the EUTF; breached their duty to bargain over contributions to the EUTF; unilaterally changed "pay rates" of employees (i.e., take-home pay); and impermissibly set separate amounts of contributions for the State and counties.
46. In short, the counties argue that they maintain the "status quo" by continuing to pay 60% of premiums (plus 100% of administrative fees) of the increased premium rates established by the EUTF, as required by the agreements, and thus made no unilateral changes.
47. In short, the State argues that HRS § 87A-32(a)(1) requires the employer's monthly contribution to the EUTF to be a "specified dollar amount" not a percentage, and the State is thus maintaining the status quo by continuing to pay the same dollar amount it paid to the EUTF for plan year 2008-2009 that just ended, and made no unilateral changes. Additionally, the State argues that the Legislature only appropriated an amount equal to the dollar amounts paid by the State to the EUTF for plan year 2008-2009 that just ended.
48. Since July 1, 2009, the Counties have continued to contribute to the EUTF 60% of the costs of the revised rates of the extended plans plus 100% of all administrative costs. Since July 1, 2009, the State has continued to contribute the same dollar amount that it contributed to the EUTF for plan year 2008-2009, which is the amount appropriated by the Legislature for EUTF contributions for Fiscal Year 2009-2010.

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 meet 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. An injury is irreparable, within the law of injunctions, where it is of such a character that a fair and reasonable redress may not be had in a court of law, so that to refuse the injunction would be a denial of justice; where, in other words, from the nature of the act, or from the circumstances surrounding the person injured, or from the financial condition of the person committing it, it cannot be readily, adequately, and completely compensated for with money. Klausmeyer v. Makaha Valley Farms, Ltd., 41 Haw. 287, 339-40 (1956).
9. HRS § 87A-32(a), which governs State and county contributions to the EUTF for active employees, provides in relevant part:

The State, through the department of budget and finance, and the counties, through their respective departments of finance, shall pay to the fund a monthly contribution equal to the amount established under chapter 89C or specified in the applicable public sector collective bargaining agreements, whichever is appropriate, for each of their respective employee-beneficiaries and employee-beneficiaries with dependent-beneficiaries, which shall be used toward the payment of costs of a health benefits plan; provided that:

- (1) The monthly contribution shall be a specified dollar amount[.]

10. HRS § 87A-40, which governs employee-beneficiary contributions to health benefit plans, provides in relevant part:

- (a) Each employee-beneficiary shall make a monthly contribution to the fund amounting to the difference between the monthly charge of the health benefits plan selected by the employee-beneficiary and the contribution made by the State or county for the employee-beneficiary to the fund.

11. The Amended Complaint alleges that Respondents wilfully committed prohibited practices in violation of HRS §§ 89-13(a)(1), (5), (7), and (8), as follows:

- a. Respondents interfered, restrained, and coerced employees in the exercise of their rights under Section 89-3, HRS, by failing to recognize the UPW as the exclusive bargaining representative of bargaining unit 1 and 10 employees for the purpose of collective bargaining over changes in wages, cost items, and amounts of employer/employee contributions to health benefit plans, and by unilaterally making significant changes in pay rates to State employees on or about July 20, 2009 and thereafter (in violation of Section 89-13(a)(1), HRS);
- b. Respondents breached their duty to bargain over changes to wages, cost items, and amounts of contributions for health benefits plan contrary to the unilateral change doctrine under N.L.R.B. v. Katz, 369 U.S. 736 (1962), contrary to Section 89-9(a), HRS by setting separate and distinct amounts of contributions for State and county employees and implementing for State employees changes to the prevailing terms of Section 62 of the unit 1 and 10 agreements (in violation of Section 89-13(a)(5), HRS);
- c. Respondents violated Sections 89-3, 89-6(d), and 89-9(a), HRS (in violation of Section 89-13(a)(7), HRS).
- d. Respondents abrogated Sections 1.05, 62, 66, and 68 the unit 1 and 10 collective bargaining agreements by making mid-term changes without mutual consent (required by Section 1.05), violating renewed terms of the unit 1 and unit 10 agreements without prior written notice (as required by Section 66 of the unit 1 agreement and

Section 68 of the unit 10 agreement), and by repudiating the terms of Section 62 of the unit 1 and unit 10 agreements setting uniform amounts of contributions for state and counties (in violation of Section 89-13(a)(8), HRS).

12. 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.

13. 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:

- (1) For bargaining units (1), (2), (3), (4), (9), (10), and (13), the governor shall have six votes and the mayors, the chief justice, and the Hawaii health systems corporation board shall each have one vote if they have employees in the particular bargaining unit[.]

Any decision to be reached by the applicable employer group shall be on the basis of simple majority, except when a bargaining unit includes county employees from more than one county. In such case, the simple majority shall include at least one county.

14. HRS § 89-9 provides in 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.

15. 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[.]

**I. COUNTY RESPONDENTS' MOTIONS TO DISMISS
AND/OR FOR SUMMARY JUDGMENT**

16. A. It is the Counties' contention that the Unit 1 and Unit 10 agreements effective July 1, 2007, through June 30, 2009, make it absolutely clear that the parties have negotiated a EUTF contribution amount for the "plan year 2008–2009" and that these agreements require the employer to contribute "effective July 1, 2008 for the plan year 2008-2009 . . . [an] amount equivalent to sixty-percent (60%) of the final premium rates established by the Trust Fund Board[.]"
- B. Although the extension of the plan for the plan year 2008–2009 included premium increases, the now-expired agreements do not require that the contribution amounts be renegotiated. The agreements make it very clear that the parties are required to reopen Section 62 only where the EUTF eliminates a significant portion of a plan or adopts a new plan. The EUTF did not adopt a new plan nor did EUTF eliminate a significant portion of the plan; thus, there was no requirement under the CBA to renegotiate the contribution amount.
- C. The UPW appears to argue that by maintaining the 60% employer contribution for the increased rates, the employees' contribution of 40% of the increased rates necessarily results in employees paying a higher dollar amount and thus effects a change in "wages." However, both the agreements and HRS § 87A-32 attempt to define the employer's contribution amount, without any specific language to limit the dollar amount of employees' contributions; indeed, HRS § 87A-40 provides that an employee-beneficiary "shall make a monthly contribution to the fund amounting to the difference between the monthly charge of the health benefits plan selected by the employee-beneficiary and the contribution made by the State or county for the employee-beneficiary to the fund" (emphases added). As the Counties argued at hearing on the motions, although the increase in premiums affects an employee's take home pay, so too would an increase in the income tax rate, yet neither can be said to be a unilateral action by the employer to reduce wages constituting a prohibited practice.
- D. 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).

- E. Here, pursuant to HRS § 89-9(a), the Employer's contributions to the EUTF is a mandatory subject of bargaining, and thus would continue beyond the expiration date of the agreement pursuant to the Katz doctrine. The question is whether the Employer is required to maintain its contribution of 60% of the "old" amount (2008–2009 plan) which translates to the specific dollar amount that the State is currently contributing, or whether the Employer is required to maintain a contribution of 60% of the current, higher, rates, as the Counties are currently doing. (As mentioned above, only the employer's contributions are expressly defined in the agreements, and must

therefore be maintained under the Katz doctrine; the agreement do not expressly specify the amount of employees' contributions). Under either scenario (60% of the old rates, or 60% of the current, higher rates), the Board concludes that the County Respondents did not wilfully interfere, restrain, and coerce employees in the exercise of their rights under HRS § 89-3; fail to recognize the UPW as the exclusive bargaining representative of bargaining unit 1 and 10 employees for the purpose of collective bargaining over changes in wages, cost items, and amounts of employer/employee contributions to health benefit plans; unilaterally make significant changes in pay rates to county employees; fail to bargain in good faith; violate a provision of chapter 89; or violate a provision of the agreements.

F. Even assuming, arguendo, that the Counties' position is incorrect (i.e., the Counties are contributing more than is required), the Board concludes that the Counties' interpretation of Section 62 of the agreements was reasonable and there is no evidence that Respondent Counties wilfully engaged in any act enumerated in HRS § 89-13(a). The Hawaii Supreme Court has said that "wilfully" means "conscious, knowing, and deliberate intent to violate the provisions of HRS chapter 89." In re Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, 118 Hawai'i 73, 99, 170 P.3d 324, 350 (2007). With respect to the UPW's allegation that the Respondents committed a prohibited practice because the State and the Counties are contributing different amounts to the EUTF, the Board concludes that the difference in contributions is a result of the difference in interpretation of Section 62 of the agreements, and as stated above, the Respondent Counties' interpretation is at least reasonable and there is no evidence of improper motive.

17. Accordingly, the Board grants Respondent Counties' Motions to Dismiss and/or for Summary Judgment or Partial Summary Judgment.

II. UPW'S MOTION FOR INTERLOCUTORY RELIEF AGAINST STATE OF HAWAII AND FOR SUMMARY JUDGMENT AGAINST ALL RESPONDENTS

18. In its Motion for Interlocutory Relief Against the State and for Summary Judgment Against All Respondents, the UPW seeks an interlocutory order, inter alia, enjoining the State and its officers from refusing to pay the equivalent of sixty percent (60%) of the final premium rates established by the EUTF for all plans on and after July 1, 2009 (except for child dental and group life insurance

which should be 100% of premiums) in accordance with Section 62D of the Unit 1 agreement and Section 62E of the Unit 10 agreement; and the unilateral change doctrine in Katz, and further moves for summary judgment for the breach of the duty to bargain in good faith by Respondents over the monthly amounts of employers' contributions for health benefit plans on and after July 1, 2009. After reviewing the record and the arguments presented, the Board finds that the UPW is not entitled to interlocutory relief at this juncture. The Board is concerned with issues involving the interpretation of HRS Chapter 89 and the Unit 1 and Unit 10 agreements, and apparent inconsistency between Section 62 of the respective agreements which provides that the Employer "shall pay a specific dollar amount equivalent to sixty percent (60%) of the final premium rates established by the Trust Fund Board[.]" and the requirement in HRS § 87A-32(a) which provides in part, that the Employer's "monthly contribution shall be a specified dollar amount[.]"⁶ There also outstanding unresolved issues including, whether Section 62 of the agreements must be read in light of HRS § 87A-32(a) or not; whether the parties' past practice is relevant; what the intentions of the parties were in entering into Section 62; what the State Respondents sought from the Legislature; what the Legislature intended by its appropriation to the EUTF; whether the State Respondents acted wilfully, etc. Accordingly, the Board concludes that the UPW has not sufficiently demonstrated the likelihood of success on the merits.

19. With respect to the balance of irreparable harm, should the UPW prevail on the merits against the State, the harm likely to be suffered by the employees is financial and not of such a character that a fair and reasonable redress may not be had following further proceedings, such that to refuse the interlocutory relief would be a denial of justice; such injury can be readily, adequately, and completely compensated for with money. Klausmeyer v. Makaha Valley Farms, Ltd., 41 Haw. 287, 339-40 (1956). With respect to any injury to the bargaining process, the Board concludes that the parties are still negotiating over agreements covering the period after June 30, 2009, and that a Board order regarding EUTF contributions could provide a fair and reasonable redress should the UPW prevail on the merits.
20. With respect to public interest, the Board is mindful of the policies underlying Chapter 89 supporting joint-decision making over wages and working conditions. At this juncture, because of the unresolved factual questions remaining in this case, the Board is unable to conclude that the public interest supports the granting of interlocutory relief at this time against the State. The record indicates that with regard to the State's contributions to the EUTF in

⁶The legislative history of that section suggests that the Legislature rejected the idea of the employer's contribution being specified as a percentage.

2009, the Legislature appropriated an amount equal to the contributions under the old rates. The Board is unclear of its authority to order the State to contribute more to the EUTF than the Legislature appropriated for that purpose.

21. Accordingly, for these reasons and for the reasons discussed in Section I of the Conclusions of Law and Discussion, the Board denies the UPW's Motion for Interlocutory Relief Against State of Hawaii and for Summary Judgment Against All Respondents.

III. STATE RESPONDENTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT.

22. As mentioned above, with respect to the State's interpretation of Section 62 of the agreements, there are issues that remain unresolved to the Board's satisfaction, including whether Section 62 of the agreements must be read in light of HRS § 87A-32(a) or not; whether the parties' past practice is relevant; what the intentions of the parties were in entering into Section 62; whether the Board has authority to order the State to contribute more than the Legislature appropriated; and whether certain language in the agreement in a "mistake" as asserted by the State.
23. For these reasons, the Board denies the State's Motion to Dismiss or in the Alternative for Summary Judgment,⁷ with the exception that the Board grants summary judgment in favor of the State to the same extent it granted summary judgment to the Counties on the issues of Section 62 not required to be re-opened because the EUTF did not adopt a new plan nor did the EUTF eliminate a significant portion of the plan, and that an increase in contribution by an employee due to a rate increase is not a unilateral action by the employer to reduce wages constituting a prohibited practice.

ORDER

Based upon the foregoing, the Board grants County Respondents' Motions to Dismiss and/or for Summary Judgment or Partial Summary Judgment; denies the UPW's Motion for Interlocutory Relief Against the State of Hawaii and for Summary Judgment

⁷If the State's position turns out to be incorrect, the State will have contributed less than it was required to do. By contrast, if the Counties' position turns out to be incorrect, the Counties will have contributed *more* than they were required to do. Accordingly, the Board can find no wilful violation by the Counties absent evidence of improper motive, regardless of the issues that remain in dispute. Those issues in dispute, however, prevent the Board from granting summary judgment in favor of the State.

against All Respondents; and denies State Respondents' Motion to Dismiss or in the Alternative Motion for Summary Judgment.

Notice of Hearing

YOU ARE HEREBY NOTIFIED that the Board will conduct a hearing on the remaining issues of the Complaint on **December 2, 2009 at 8:30 a.m.**, in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii 96813. The hearing will continue from day to day until completed.

DATED: Honolulu, Hawaii, November 9, 2009.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member



SARAH R. HIRAKAMI, Member

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