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Case No. 16-CE-01-883a & b

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and HAWAII HEALTH SYSTEMS CORPORATION, State of Hawaii, Respondent.	CASE NOS.: 16 CE-01-883a 16 CE-10-883b ORDER NO. 3199 ORDER DENYING HAWAII HEALTH SYSTEMS CORPORATION'S MOTION TO DISMISS; AND GRANTING, IN PART, AND DENYING, IN PART, UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO'S MOTION FOR SUMMARY JUDGMENT

ORDER DENYING HAWAII HEALTH SYSTEMS CORPORATION'S MOTION TO DISMISS; AND GRANTING, IN PART, AND DENYING, IN PART, UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO'S MOTION FOR SUMMARY JUDGMENT

For the reasons set forth below, the Hawaii Labor Relations Board (Board) issues its Findings of Fact, Conclusions of Law, and Order denying Respondent HAWAII HEALTH SYSTEMS CORPORATION, State of Hawaii's (HHSC or Respondent) Motion to Dismiss Unfair Labor Practice [sic] Complaint Filed July 25, 2016; and granting, in part, and denying in part, UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO's (UPW, Union, or Complainant) Motion for Summary Judgment.

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

I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

A. Factual Background

The UPW is an employee organization within the meaning of HRS § 89-2,[i] and is the exclusive representative of nonsupervisory employees in blue collar positions in bargaining unit

(Unit) 1 and institutional, health, and correctional workers in Unit 10, as provided by HRS § 89-6.[ii]

The HHSC is an employer or public employer as provided by HRS § 89-2.[iii]

Linda Rosen (Rosen) is the chief executive officer of the HHSC and a duly designated representative of a public employer as provided by HRS § 89-2.

The UPW has been a party to successive collective bargaining agreements with public employers since on or after July 1, 1972. The Complaint arose from the two current collective bargaining agreements to which UPW is a party, which are multi-employer collective bargaining agreements, effective July 1, 2013 to June 30, 2017. The Unit 1 collective bargaining agreement is with the employers State of Hawaii, the Judiciary, the HHSC, the Counties of Kauai, Maui, Hawaii, and the City and County of Honolulu (Unit 1 CBA), and the Unit 10 CBA is with the employers State of Hawaii, the Judiciary, the HHSC, and the City and County of Honolulu (Unit 10 CBA and collectively CBAs).

On July 25, 2016, Complainant UPW filed a prohibited practice complaint (Complaint) with the Board against HHSC and its Chief Executive Rosen.[iv] The gravamen of the Complaint alleges the following:

> 32. Effective November 16, 2006 the legislature in Act 295, 2006 SLH, prohibited smoking in enclosed and partially enclosed public places.
>
> a. The statute (Act 295, 2006 SLH) prohibited smoking within twenty feet of entrances, exists [sic], windows that open, and ventilation intakes that serve enclosed or partially enclosed areas.
>
> b. However, Act 295, stated: "An employee who works in a setting where an employer allows smoking does not waive or otherwise surrender any legal rights the employee may have against employer or any other party."
>
> c. On and after 2006 State agencies and departments in consultation and/or negotiations with the UPW jointly adopted designated smoking areas on State premises throughout Hawaii to permit smoking by bargaining unit 1 and 10 employees as a condition of work during rest periods, meal periods, and off duty times.
>
> 33. Designated smoking areas were uniformly established in all medical centers *and* facilities of the Hawaii Health Systems Corporation in consultation and/or negotiations with UPW from on and after 2005 to the present. These designated smoking areas are referred to in the following policies and procedure adopted by the following HHSC facilities and centers:

a. Samuel Mahelona Memorial Hospital	122-2-6 effective 4/26/05 and 122-2-6 effective 10/15/10 (Attachment 1)
b. West Kauai Medical Center	122-2-10 effective 7/29/05 (Attachment 2)
c. Leahi Hospital	122-4-7 effective 11/16/06 and 122- 4-7 supersedes policy dated 3/15/05 (Attachment 3)
d. Maluhia	MPAT0004 effective 3/1/10 (Attachment 4)
e. Lanai Community Hospital	570-205.01 effective 11/1/01 and 850-102-01 effective 9/9/09 (Attachment 5)
f. Maui Memorial Medical Center	Draft 850-122-3 original date 2/16/93, last revised 7/13/06 and policy number 850-122-03 effective 11/06 (Attachment 6)
g. Kula Hospital	850-122-01 effective 9/2009 (Attachment 7) 7)
h. Hilo Medical Center	850-101-03 reviewed last on 07/09, 850-101-03 reviewed last on 01/2011, 850-101-03 reviewed last on 07/12 (Attachment 8)
i. Hale Hoola Hamakua	unknown policy number last reviewed on 4/5/2011 (Attachment 9)
j. Kona Community Hospital	122-12 effective 11/16/06 (Attachment 10)
k. Kohala Hospital	101.10 approved 8/28/09 (Attachment 11)

34. In 2013 the Union filed several class action grievances contesting the elimination of designated smoking areas without negotiations and mutual consent of the union at Maui and Big Island facilities and medical centers of HHSC, and those grievances are currently before arbitrator/mediator Keith Hunter.

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35. During the 2016 legislative session HHSC successfully urged legislators to prohibit the use of tobacco products on the premises of all facilities and medical centers operated by the corporation and to prohibit collective bargaining over the prohibition by an amendment to HRS Chapter 323F. 2016 Session Laws of Hawaii, Act 25, Section 2, became effective on April 26, 2016.

See Attachment 12.

36. On July 12, 2016 the UPW requested negotiations over the changes to wages, hours, and other terms and conditions of employment relating to the implementation and enforcement of Act 25, 2016 SLH. See Attachment 13.

37. On July 15, 2016 Respondents declined to negotiate with UPW with respect to the smoking policies implementing and enforcing Act 25, 2016 SLH. See Attachment 14.

38. On July 18, 2016 UPW submitted the following union proposals for negotiations and requested respondents to have a duly authorized representative contact the union no later than July 21, 2016 to commence bargaining:

1. Effective immediately HHSC shall continue to permit bargaining unit 1 and 10 employees to smoke during their rest periods, meal periods, and other non-work times in areas outside of and adjacent to HHSC facilities, including but not limited to public properties, sidewalks, and facilities where smoking is not prohibited by law.

2. Employees are authorized to leave HHSC premises during their rest periods and meal breaks and shall be afforded adequate travel time to engage in smoking if they so desire.

3. Employees who smoke on HHSC premises shall be subject to progressive discipline as follows:

a. For a first offense within 2 years - an oral counseling.

b. For a second offense within 2 years -a written reprimand.

c. For a third offense within 2 years - a one day suspension.

d. For a fourth offense within 2 years - a three day suspension.

e. For a fifth offense within 2 years - a five day suspension.

f. For a sixth offense within 2 years -a ten day suspensions.

g. For a seventh offense within 2 years - a twenty day suspensions.

h. For an eighth offense within 2 years- a thirty day suspension.

i. For a ninth offense within 2 years-a discharge.

4. No employee shall be disciplined pursuant to the progressive discipline schedule without prior notice at each step of the process. The employer shall not impose discipline by accumulating violations over any period of time, and the employer shall not proceed with more serious penalties without first exhausting prior steps of the foregoing schedule.

5. An employee shall have a right to file a grievance to contest any disciplinary action.

6. The employer shall remove all records of disciplinary actions within two (2) years of the offense pursuant to Section

17 on derogatory materials.

7. It is expressly understood that the union will be challenging [Act 25], 2016 Session Laws of Hawaii before the Hawaii Labor Relations Board and the Court. In the event the union prevails in its challenge HHSC shall restore designated smoking areas in all of its facilities and medical centers.

See Attachment 15.

39. Neither HHSC nor Linda Rosen contacted the UPW to commence negotiations on the foregoing union proposals as requested by July 21, 2016.

40. By the aforementioned and other conduct to be established during the course of the proceedings before the Hawaii Labor Relations Board, HHSC has violated the statutory, contractual, and constitutional rights of bargaining unit 1 and 10 employees by implementing and enforcing the prohibition of Act 25, 2016 SLH, without proper negotiations.

41. By reason of the foregoing premises the employees represented by the UPW have and will suffer damages, including but not limited to the loss of the right to smoke in designated areas during rest and meal periods, and the loss of the right to seek redress of their grievances leading to final and binding decisions and awards by arbitrators.

42. Complainant and the public employees they represent have no plain, adequate or complete legal remedies to redress their wrongs alleged herein, and unless afforded declaratory, injunctive, and other affirmative relief will suffer irreparable harm and injury and the public interest in collective bargaining under Article XIII, Section 2 of the State Constitution and Article I, Section 10 of the U.S. Constitution will be undermined.

IV.

COUNT 1 - VIOLATION OF EMPLOYEE RIGHTS TO NEGOTIATE CHANGES OVER THE IMPACT OF ACT 25, 2016 SLH

43. The allegations of paragraphs 1 through 42 are restated, realleged, and fully incorporated herein.

44. In University of Hawaii Professional Assembly v. Tomasu, 79 Hawai'i 154, 160, 900 P.2d 161, 167 (1995), our Supreme Court held that the duty to bargain under HRS chapter 89 applies to topics over which an employer has discretion in the promulgation of policies relating to the implementation of a legislative (or statutory) mandate.

45. Although Act 25, 2016 SLH, prohibits the use of tobacco products on

the premises of all facilities and medical centers operated by HHSC and prohibits collective bargaining over the prohibition, the amendment to HRS Chapter 323F affords to HHSC discretion in the implementation of the legislative (or statutory) mandate.

46. On July 12, 2016 and July 18, 2016 the UPW requested Respondents to negotiate over changes to existing terms and conditions of employment consistent with the legislative mandate of Act 25, 2016 SLH.

47. The union proposals submitted on July 18, 2016 are mandatory topics of collective bargaining which do not infringe upon the legislative or statutory mandate which prohibits the use of tobacco products on HHSC premises under Act 25, 2016 SLH, or collective bargaining regarding said prohibition.

a. Proposal 1 authorizes bargaining unit 1 and 10 employees to smoke during rest periods, meal periods, and other non-work times in areas outside of and adjacent to HHSC facilities.
b. Proposal 2 amends the time periods allotted for rest periods and meal periods and to afford adequate travel time for bargaining unit 1 and 10 employees to smoke outside of HHSC premises.
c. Proposals 3 and 4 call for a progressive discipline system which is intended to achieve corrective purposes and objectives.
d. Proposal 5 authorizes grievances over disputes regarding the implementation of the progressive discipline system.
e. Proposal 6 requires the removal of derogatory materials including all disciplinary records pursuant to Section 17.
f. Proposal 7 allows for the restoration of designated smoking areas in HHSC facilities and medical centers in the event of a successful challenge to Act 25, 2016 SLH made by the UPW in count 4 of this complaint.

48. The parties to the unit 1 and 10 agreements have consistently recognized discipline (in Section 11), rest and meal periods (in Section 18), derogatory materials (in Section 17), and/or the grievance procedure (in Section 15) to be mandatory subjects of collective bargaining. See also, e.g. United Public Workers, AFSCME, Local 646, AFL-CIO v. Cayetano, 6 HLRB 96 (2000).

49. The Hawaii Labor Relations Board has held that disciplinary criteria, procedures, and penalties are mandatory subjects of collective bargaining (notwithstanding statutory or other mandates of law). See United Public Workers, AFSCME, Local 646, AFL-CIO v. Yamashiro, Case No. CE-01-260 (Order No. 1277). Attachment 16.

50. In United Public Workers, AFSCME, Local 646, AFL-CIO v. Cayetano, Case No. CE-01-382 (Dec. No. 413), the Board held that the refusal to negotiate over smoking policies is a prohibited practice by a public employer. Attachment 17.

51. Respondents' willful refusal to negotiate over the July 18, 2016 proposals of the union constitutes a violation of the rights of employees under Sections 89-3, and 89-9 (a), HRS, and are prohibited practices under Section 89-13(a) (1), (5), and (7), HRS.

V.

COUNT 2 - ABRIDGEMENT OF THE PRIOR RIGHTS OF PUBLIC EMPLOYEES UNDER STATUTES & CONSTITUTIONS

52. The allegations of paragraphs 1 through 51 are restated, realleged, and fully incorporated herein.

53. Since the initial unit 1 and 10 collective bargaining agreements of 1972 and 1973 Section 14 incorporates the prior statutory rights of employees and prohibits employers from abridging said statutory rights.

54. In 1993 arbitrator Ted Tsukiyama held that Section 14.01 incorporates into the agreement the obligation to negotiate as set forth in Section 89-9 (a), HRS. Attachment 18.

55. In 1995 Section 14 was amended to incorporate the prior constitutional rights of employees and prohibits employers from abridging said constitutional rights.

56. Section 14 of the unit 1 and 10 agreements covering the period July 1, 2013 to June 30, 2017 provides as follows:

> 14.01 Nothing in this Agreement shall be construed as abridging, amending or waiving any rights, benefits or perquisites presently covered by constitutions, statutes or rules and regulations that Employees have enjoyed heretofore, except as expressly superseded by this Agreement. (Emphasis added).

57. In 1995 Arbitrator Edward Parnell held that a public employer abridges prior rights of employees in violation of Section 14 by unilaterally implementing a smoke free policy in public schools. Attachment 19.

58. In 2002 Arbitrator Ronald Libkuman held, inter alia, that a public employer abridges the prior statutory and constitutional rights of employees, abrogates HRS Chapter 89, and impairs the contractual rights of bargaining unit 1 employees under Section 14 contrary to Article 1, Section 10 of the U.S.

Constitution. The Libkuman award was confirmed by the circuit court. See Attachment 20.

59. In 2007 the Hawaii Labor Relations Board in United Public Workers, AFSCME, Local 646, AFL-CIO and Takaba, CE-01-532 (2007), held that non-compliance with the Libkuman decision and award constitutes a prohibited practice in violation of Section 89-13 (a) (7) and (8), HRS. See Attachment 21.

60. In 2003 arbitrator Michael Nauyokas held that a public employer abridges the prior constitutional rights of employees under the U.S. Constitution contrary to the 14th amendment as determined by the Supreme Court in Garrity v. State of New Jersey, 385 U.S. 493 (1967), by inter-mingling disciplinary and administrative procedures at the Hawaii Youth Correctional Facility. The Nauyokas decision and award was confirmed by the circuit court. Attachment 22 is a copy of the Nauyokas award and the court confirmation order.

61. In 2007 arbitrator Kenneth Goya held that a public employer abridges the prior constitutional rights of employees under the due process clause of the U.S. Constitution as construed by the U.S. Supreme Court in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), by failure to provide a hearing prior to the discharge of a bargaining unit 10 employee on leave without pay. The Goya decision and award was confirmed by the circuit court. Attachment 23.

62. The prior decision and awards by arbitrators Tsukiyama, Parnell, Libkuman, Nauyokas, and Goya are final and binding under Section 15.20b of the unit 1 and 10 collective bargaining agreements.

63. The unilateral implementation and enforcement of the prohibition on the use of tobacco products on HHSC premises and the prohibition on collective bargaining over the same pursuant to Act 25, 2016 SLH, by respondents abridges the prior statutory rights of public employees in willful violation of Section 14.01.

a. In Decision No. 413 the Hawaii Labor Relations Board held that the failure to negotiate over smoking policies is a prohibited practice in violation of Section 89-13 (a) (5) and (7), HRS. There was no appeal from Decision No. 413 and pursuant to res judicata and collateral estoppel doctrines the claims and issues decided in said decision and order are not subject to re-litigation herein.

b. The National Labor Relations Board and the Courts have held that smoking and changes to smoking policies in the private and public sectors constitute mandatory subjects of collective bargaining.

c. The implementation and enforcement of Act 25, 2016 SLH, which is contrary to the rights of employees as previously determined by labor boards and courts is an abridgement of the prior statutory rights of bargaining unit 1 and 10 employees, in violation of Section 14.01 of the unit 1 and 10 agreements.

d. The prior decisions and awards rendered by arbitrators Tsukiyama, Parnell, Libkuman, Nauyokas, and Goya are "final and binding" on the parties to the unit 1 and 10 agreements pursuant to Section 89-10.8, HRS.

64. The unilateral implementation and enforcement of the prohibition on the use of tobacco products on HHSC premises and the prohibition on collective bargaining over the same pursuant to Act 25, 2016 SLH, by respondents abridges the prior constitutional rights of public employees in willful violation of Section 14.01.

a. Article XIII of the Hawaii State Constitution affords to private and public employees the right to engage in collective bargaining, including the right to negotiate over core subjects.

b. As the Hawaii Supreme Court held in United Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi, 101 Hawai'i 46, 62 P.3d 189 (2002), a legislative enactment which impinges upon the right of public employees to negotiate over wages, hours, and terms and conditions of employment violates Article XIII, Section 2 of the Hawaii State Constitution.

c. Yogi stands for the proposition that the legislature has broad discretion in setting the parameters of collective bargaining as long as it does not impinge upon the constitutional rights of public employees to organize for the purpose of collective bargaining, and to negotiate over core subjects of collective bargaining, that is wages, hours, and conditions of employment. Malahoff v. Saito, 111 Hawai'i 168, 186, 140 P.3d 401, 419 (2006).

d. Act 25, 2016 SLH which prohibits collective bargaining over a prohibition on the use of tobacco products on HHSC premises abridges the constitutional right to negotiate over a core subject of collective bargaining contrary to Article XIII, Section 2 of the State Constitution.

e. Article I, Section 10 of the U.S. Constitution prohibits the impairment of contract. University of Hawaii Professional Assembly v. Cayetano, 183 F.3d 1096 (9th Cir. 1999). See also the United Public Workers, American Federation of State, County, Municipal Employees, Local 646, AFL-CIO v. David Y. Ige, No. 16-15219. Attachment 24.

f. Act 25, 2016 SLH, which became effective on April 26, 2016 constitutes a substantial impairment of the contractual rights of bargaining unit 1 and 10 employees under which smoking in designated areas in various HHSC facilities and medical centers is an established "condition of work" which may not be changed without the mutual consent of the union under Section 1.05 (second sentence), as determined by arbitrator Edward Parnell in 1995. See also Attachment 19.

65. Respondents' refusal to negotiate over changes to existing conditions of work, and the unilateral implementation of the prohibition on the use of tobacco products and collective bargaining constitutes a willful breach of Section 14.01 of unit 1 and 10 agreements which is a prohibited practice under Section 89-13 (a) (8), HRS.

VI.

COUNT 3 – VIOLATION OF SECTION 89-19, HRS, ON HRS CHAPTER 89, TAKING PRECEDENCE OVER HRS CHAPTER 323F

66. The allegations of paragraphs 1 through 65 are restated, realleged, and fully incorporated herein.

67. Since the inception of the public sector collective bargaining in 1970 HRS chapter 89 takes precedence over all conflicting statutes as follows:

Sec. -19. Chapter takes precedence, when. This chapter shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary local ordinances, executive orders, legislation, rules, or regulations adopted by the State, a county, or any department or agency thereof, including the departments of personnel services or the civil service commission. (Emphasis added).

68. Courts have consistently held that collective bargaining statutes take precedent over all conflicting laws regarding the subject matter. See e.g., Minnesota Arg. Aircraft Ass'n v. Township of Mantrap, 498 N.W.2d 40 (Minn. App. 1993); Kent County Deputy Sheriffs' Ass'n v. Kent County Sheriff, 605 N.W.2d 363 (Mich. App. 2000); State E'ment Rels. Bd. v. Union Township Trustees, 755 N.E.2d 369 (Ohio App. 2001); Bowyer v. Indiana Dep't. of Nat. Resources, 798 N.E.2d 912 (Ind. App. 2003); Masone v. City of Aventura, 147 So.3d 492 (Fla. 2014).

69. Since Section 2 of Act 25 which amends HRS chapter 323F (2016 SLH) is in conflict with the meaning of collective bargaining in Section 89-2, HRS, and the duty to bargain under Section 89-9 (a), HRS, it is pre-empted by Section 89-19, HRS.

70. On July 12, 2016 UPW requested respondents to negotiate and to cease and desist from implementing and enforcing Act 25, 2016 SLH, inter alia, due to Section 89-19, HRS, which pre-empts said enactment.

71. On and after July 15, 2016 respondents knowingly refused to comply with the union's request and willfully violated Section 89-19, HRS. Said conduct constitutes a prohibited practice in violation of Section 89-13 (a) (7), HRS.

VII.
COUNT 4 - VIOLATION OF CONSTITUTIONAL RIGHTS OF PUBLIC EMPLOYEES

72. The allegations of paragraphs 1 through 71 are restated, realleged, and fully incorporated herein.

73. The "right to organize for purpose of collective bargaining" is constitutionally protected in the states of New York, New Jersey, Missouri, Florida, and Hawaii.

74. The right "to bargain collectively is so important that is has been elevated to constitutional status and is regarded as a fundamental right." S. Jersey Catholic School Teachers v. St. Teresa, 696 A.2d 709 (N.J. 1997).

75. Article XIII of the Hawaii State Constitution guarantees this right for persons in private and public employment in Hawaii as follows:

> Article XIII Organization; Collective Bargaining
>
> Private Employees
>
> Section 1. Persons in private employment shall have the right to organize for the purpose of collective bargaining.
>
> Public Employees
>
> Section 2. Persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law.

76. Laws which restrict the freedom to engage in collective bargaining in this manner violate the right of employees "to organize for the purpose of collective bargaining." Cliff v. Blydenberg, 661 N.Y.S.2d 736, 740 (N.Y. 1997) (salary cap on county employees violate Article I, Section 17 of the New York Constitution); Quirk v. Regan, 565 N.Y.S.2d 422, 425 (N.Y. 1991) (lag pay statute repugnant to constitutional guarantees of public employees); City of Tallahassee v. Public Employees Relations Commission, 410 So. 2d 487 (Fla. 1981) (removal of retirement matters from the collective bargaining process abridges the rights of employees protected under Article I, Section 6 of the Florida constitution).

77. Article I, Section 10 of the United States Constitution states in relevant portions:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal: coin Money: emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. (Emphasis added).

78. 2016 Hawaii Session Laws, Act 25, Section 2 (which amends HRS Chapter 323F) abrogates the constitutional rights of public employees under Article **XIII,** Section 2 of the State Constitution and Article I, Section 10 of the United State [sic] Constitution.

VIII. PRAYER FOR RELIEF

WHEREFORE, Complainant UPW prays for the following relief:

a. From the Hawaii Labor Relations Board, interlocutory, cease and desist, declaratory, make whole, and affirmative relief pursuant to Section 377-9 (d), HRS, for prohibited practices as alleged in counts 1, 2, and 3 of the complaint.

b. After the Hawaii Labor Relations Board has been given an opportunity to address statutory questions, Complainant requests from the Circuit Court and the Appellate Courts, injunctive, declaratory, make whole, and other appropriate relief for violations of the constitutional rights of public employees as alleged in count 4 of the complaint.

On July 29, 2016, the Board issued the Notice to Respondent(s) of Prohibited Practice Complaint; Notice of Prehearing Conference; and Notice of Hearing on the Prohibited Practice Complaint.

On August 11, 2016, HHSC filed Respondent Hawaii Health Systems Corporation's Answer to Unfair Labor Practice Complaint Filed July 25, 2016.

On August 15, 2016, the Board held a Prehearing Conference attended by counsel for the parties and established deadlines for the proceedings that were confirmed in writing by the Notice of Dispositive Motion Hearing and Setting Deadlines (Notice of Motion) issued on that date. The Notice of Motion set deadlines that included August 22, 2016 to file dispositive motions, August 29, 2016 to file a response, and an August 30, 2016 hearing date on the motions.

B. Hawaii Health System Corporation's Motion to Dismiss

1. HHSC's Motion to Dismiss

In accordance with the deadlines established in the Notice of Motion, on August 22, 2016, HHSC filed Respondent Hawaii Health Systems Corporation's Motion to Dismiss Unfair Labor Practice Complaint Filed July 25, 2016 (HHSC Motion). In support, HHSC argues that the Board should dismiss the Complaint because the UPW's allegations that Act 25 is unconstitutional "permeate" all of the other allegations requiring that the complaint be filed initially in the circuit court, which would then render the Complaint to become moot.

Alternatively, HHSC asserts that the Complaint should be dismissed because: the dispute is not ripe for hearing based on HHSC's proposal to consult with UPW regarding the implementation of Act 25; and that it did not engage in willful conduct under HRS § 89-13(a) simply by complying with Act 25. In support of the HHSC Motion, HHSC submitted a Declaration of Clifford Caesar (Caesar Declaration).

On August 25, 2016, HHSC filed an Errata to Declaration of Clifford Caesar in Support of Respondent Hawaii Health Systems Corporation's Motion to Dismiss Unfair Labor Practice Complaint Filed July 25, 2016 (Filed August 2, 2016) correcting the Caesar Declaration, paragraph 6 to change the name of "Martti Rodrigues" to "Martti Fernandez."

2. UPW's Opposition to HHSC's Motion to Dismiss

On August 30, 2016, UPW filed UPW'S OPPOSITION TO MOTION TO DISMISS COMPLAINT (UPW Opposition) based on several grounds.

First, UPW argues that HHSC's contention that the Board lacks subject matter jurisdiction regarding the statutory claims presented in counts 1, 2, and 3 of the Complaint, and that the circuit court should first determine the constitutional claims presented in count 4 of the Complaint is erroneous. In support, UPW argues that Hawaii Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Lingle, 124 Hawai'i 197, 239 P.3d 1 (2010) (HGEA); Lee v. United Pub. Workers, AFSCME, Local 646, AFL-CIO, 125 Hawai'i 317, 260 P.3d 1135 (App. 2011) (Lee); Hawaii State Teachers Ass'n v. Abercrombie, 126 Hawai'i 318, 271 P.3d 613 (2012) (HSTA); United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Abercrombie, 131 Hawai'i 142, 315 P.3d 768 (App. 2013) (Abercrombie), establish that the circuit court has no jurisdiction under HRS § 89-14 to determine whether Act 25 is unconstitutional until after the Board has first determined whether HHSC and Rosen committed prohibited practices, and an appeal has been filed from the agency decision under HRS §§ 377-9 and 91-14 by a person aggrieved by the Board's decision and order.

Second, UPW takes the position that under the primary jurisdiction doctrine applied in United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Abercrombie, 133 Hawai'i 188, 197-98, 325 P.3d 600, 609-10 (2014) (UPW), the Board is compelled to decide counts 1, 2, and 3 alleging prohibited practices over which the Board has exclusive original jurisdiction notwithstanding circuit court jurisdiction to ultimately decide count 4 of the Complaint.

Finally, UPW argues that: 1) HHSC's statement regarding its willingness to consult with UPW regarding the implementation of Act 25 is erroneous, "factually and legally unfounded and flawed for many reasons" based on the union's motion for summary judgment discussed further below, Dayton M. Nakanelua's supplemental declaration, and the applicable case law regarding ripeness; 2) HHSC has unilaterally implemented Act 25 by seeking and obtaining the dismissal of the class grievances before Arbitrator Keith Hunter (Arbitrator Hunter) and by notifying bargaining unit employees that they are no longer permitted to smoke on any HHSC premises; 3) Count 3 of the Complaint on pre-emption is clearly ripe for adjudication based on HRS § 89-19 because HHSC obviously has not agreed to negotiate the smoking ban as mandated by Act 25; and 4) HHSC's contention that it has not engaged in any willful conduct is erroneous because Rosen and HHSC were fully aware of the UPW's contention that Act 25 was pre-empted under HRS § 89-19.

3. Motion Hearing on HHSC's Motion to Dismiss

On August 30, 2016, the Board held a hearing on the HHSC Motion to Dismiss. HHSC reiterated the arguments set forth in support of its Motion to Dismiss and supplemented with the following points. HHSC argues that to the extent that UPW is raising argument related to Arbitrator Hunter's decision in the grievance proceedings or raising a new grievance to be filed, the matter is not before the Board but rather under the CBA grievance procedure. Regarding primary jurisdiction, HHSC distinguished the Lingle and Abercrombie cases, HHSC argues that the Abercrombie Court said that the doctrine of primary jurisdiction does not apply where there is a pure question of law at issue and technical matters calling for special competence of an administrative expert are not involved, which is generally the case here. HHSC asserts that the only factual issue within the Board's jurisdiction to determine is whether, based on the limited correspondence in July and August between the parties, this matter is ripe for hearing; and that to do so, the Board must accept Act 25 as constitutional. HHSC concluded its argument by asserting that the statute clearly states that smoking on the premises is prohibited and negotiation is prohibited, which includes discipline under HRS § 89-9(d); and that although distinguishable, Decision No. 413 also provided that compliance with statutes is nonnegotiable.

UPW reiterated and supplemented its contentions presented in the UPW Opposition with the following arguments. First, UPW noted that the standard of proof is that HHSC has the clear

burden to establish beyond any doubt that UPW cannot prove any set of facts in support of its claims for relief.

Second, UPW asserted that HHSC has neither addressed the cases cited by UPW in support of its position that the Board has "exclusive original jurisdiction" regarding prohibited practices under HRS § 89-14 and must first adjudicate the prohibited practices in Counts 1, 2, and 3 before the circuit court can adjudicate the constitutional question, nor presented any cases or argument of its own. UPW asserted that if UPW files a circuit court complaint, as urged by HHSC, the complaint would be dismissed under HGEA.

Third, UPW contended that HHSC's motion does not address or distinguish the primary jurisdiction issue from the HRS § 89-14 doctrine of exclusive jurisdiction. The UPW argued that the Board cannot ignore constitutional requirements, such as due process, and the fact that under the CBA, an abridgment of prior rights, including constitutional rights, is a prohibited practice. The UPW clarified that it is not suggesting that the Board can reverse a legislative mandate where there is no discretion. However, the request for bargaining is not over the mandate but over the effect, the implementation, the policies, and the manner in which employees are to be treated in light of the statutory mandate.

Fourth, regarding ripeness, UPW asserted that HHSC ignores the applicable two-part test—whether the issues are fit for adjudication; and if you do not adjudicate, are the parties subject to hardship because of the withholding of jurisdiction in the context of the Board's power under HRS § 89-5(i)(4) and (10),[v] which facilitate and adjudicate the prompt resolution of prohibited practice cases. The UPW pointed out that HHSC's position has shifted from whether the court has jurisdiction to whether HHSC has agreed to consult. UPW argued that the claim arose when HHSC refused to negotiate, and ripeness is a question of timing based on the employees being told that they cannot smoke anymore. UPW concluded by asserting that consultation is a breach of the duty to bargain.

Finally, as proof of the wilfullness, UPW argued that HHSC: obstructed the grievance process by having a law passed and getting the arbitrator to dismiss the case while the parties were in the settlement process; ignored the Union's chief negotiator's request to contact him before July 1, the Union's two requests for bargaining, and the notice from UPW that the law is preempted, in conflict, and could not be implemented until negotiated; responded that it was not required to bargain and notified UPW that the enactment would be implemented effective April; sent a "tricky" email to a Chip Uwaine (Uwaine), who was not UPW's chief negotiator, followed by Caesar's August 18, 2016 letter to Nakanelua stating that UPW had received a letter from HHSC proposing to negotiate; and refused to negotiate the UPW proposals, none of which interfere with the statutory mandate.

C. UPW's Motion for Summary Judgment

1. UPW's Motion for Summary Judgment

On August 22, 2016, UPW filed its Motion for Summary Judgment (UPW MSJ) asserting that there are no genuine disputes of material fact and the Union is entitled to judgment as a matter of law as to count I (violation of employee rights to negotiate changes over the impact of Act 25, 2016 Session Laws of Hawaii (SLH)), count II (abridgement of the prior rights of public employees under statutes and constitutions), and count III (violation of section 89-19, HRS, that chapter 89 takes precedence over HRS Chapter 323) of the Complaint.

UPW alleges and supports its MSJ through the Declaration of Dayton M. Nakanelua (Nakanelua and Nakanelua Declaration respectively) and the exhibits attached, which establish the following undisputed facts. To comply with Act 295 enacted effective November 16, 2006, on or after 2006, certain designated smoking areas were uniformly established in all HHSC medical centers and facilities in consultation and negotiation with the UPW. However, in 2012 and 2013, certain HHSC Big Island and Maui facilities unilaterally implemented policies eliminating designated smoking areas on the hospital premises and discipline of non-complying employees. On February 15, 2013, UPW filed two class grievances over the elimination of the smoking areas, which were consolidated before Arbitrator Hunter. HHSC and UPW met and jointly agreed to restore the designated smoking areas. During the 2016 legislative session, HHSC successfully urged the adoption of Act 25, which amended HRS Chapter 323F and states in relevant part:

> SECTION 2. Chapter 323F, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:
>
> "5323F- Tobacco and electronic smoking devices use prohibited. (a) Notwithstanding the less restrictive requirements of chapter 328J, the Hawaii health systems corporation shall prohibit the use of any tobacco product or electronic smoking device by any person on the premises of all facilities operated by the corporation within the State, to the extent not prohibited by federal law and regulation.
>
> (b) Pursuant to section 89-9(d), the tobacco and electronic smoking device use prohibitions under this section shall not be subject to collective bargaining.

On June 20, 2016, HHSC notified UPW of its intention to formulate and adopt a uniform policy banning smoking in all of its facilities and medical centers pursuant to Act 25, retroactive to the effective date of the enactment. HHSC provided further notice regarding its intention to seek a dismissal of the grievances before Arbitrator Hunter. On July 12, 2016, UPW State Director Nakanelua sent a letter to Rosen stating in relevant part:

As the exclusive bargaining representative of unit 1 and 10 employees the United Public Workers, AFSCME, Local 646, AFL-CIO (UPW or Union) hereby requests the Hawaii Health Systems Corporation (HHSC or Employer) to negotiate over changes to wages, hours, and other terms and conditions of employment relating to the implementation of Act 53 [sic], 2016 Session Laws of Hawaii.

We understand that HHSC intends to adopt and implement a uniform policy banning smoking in all of its facilities and medical centers and prohibiting adequate time during meal and rest periods to smoke in authorized public places by bargaining unit 1 and 10 employees. Such unilateral changes in conditions of work violates the statutory rights of employees (see United Public Workers AFSCME. Local 646, AFL-CIO v. Benjamin Cayetano, 6 HLRB 112) and impinges upon core or mandatory subjects of collective bargaining contrary to Article XIII, Section 2 of the Hawaii State Constitution.

HHSC's reliance on Act 53 [sic] (2016 SLH) since the amendment to HRS Section 323F conflicts with the meaning of collective bargaining as defined in Section 89-2, HRS, and the duty to bargain over wages, hours, and terms and conditions of employment under Section 89-9 (a), HRS. Section 89-19, HRS, pre-empts any conflicting statute on the subject matter of collective bargaining.

Accordingly, we request that you cease and desist from unilaterally changing existing conditions of work authorizing designated smoking areas and permitting employees to have adequate meal and rest periods to smoke in authorized public places without restrictions.

(Emphasis added)

On July 15, 2016, Rosen responded with a letter stating in relevant part:

HHSC asserts that it does not need to negotiate with UPW with respect to the smoking policy. Notwithstanding this assertion and without waiving its position, HHSC will share with UPW its intended policy and implementation plan to be in compliance with Act 53 [sic] (1016 [sic] SLH) in the near future. HHSC will attempt to reasonably alleviate and address legitimate concerns that the UPW may have that are directly related to the Act 53 [sic] policy, to the extent permitted by the amendments to HRS Section 323F.

(Emphasis added)

On July 18, 2016, Nakanelua sent a letter disagreeing with HHSC's position regarding negotiation, submitting the seven proposals set forth above in paragraph 38 of the Complaint for negotiations to HHSC, and requesting that:

> Please have your representative contact the undersigned by no later than Thursday, July 21, 2016 to commence the bargaining process.
> Please be advised that we consider a refusal to bargain to constitute a prohibited practice under HRS Chapter 89. The union will request attorney's fees and costs for non compliance [sic] under Section 377-9(d), HRS.

No HHSC representative responded to the July 18, 2016 proposals or contacted the state director prior to July 21, 2016 when HHSC Human Resources Officer Sandra K. Park (Park) emailed Uwaine at the UPW requesting a meeting to discuss the HHSC smoking ban and providing available dates.

On July 25, 2016, the Complaint was filed.

On August 17, 2016, Arbitrator Hunter granted HHSC's motion to dismiss the grievances because Act 25 has removed the arbitrator's jurisdiction and authority to fashion just and appropriate remedies. On August 18, 2016, HHSC Director of Human Resources Clifford Caesar (Caesar) sent a letter (August 18, 2016 letter) to Nakanelua noting the lack of response to the July 18, 2016 letter, requesting a meeting and providing available dates, and transmitting a draft of Policy No. 0024A Tobacco Free Campus (Draft Policy 0024A). The letter stated:

> We are in the process of developing a new policy and procedure to comply with Act 25. Now that Act 25 is the governing law, our new policy will repeal all existing policies and advise our employees that it is a violation of Act 25 to smoke on the premises of the HHSC facilities. In addition, the policy will provide
> that because smoking on the premises of any HHSC facility is a violation of law, an employee may be subject to disciplinary action in accordance with existing policies. We have attached a preliminary draft of the policy and procedure. Please feel free to review these documents and comment.
>
> To date, the policy and procedure have been reviewed by HHSC subject matter experts. Prior to completion and in accordance with section 323F-7, Hawaii Revised Statutes, the policy and procedure will need to be reviewed by the HHSC Regional CEOs, after which it will be reviewed by the statutorily created policy committee. If approved by the policy committee, it will go to the HHSC Corporate Board of Directors for final approval.

> As we go through this process, we will inform you of any revisions. Naturally, you will be given an opportunity to provide feedback. In the meantime, employees are on notice that all HHSC facilities are no smoking facilities.

(Emphasis added) Draft Policy 0024A provided in relevant part:

> 1. The Regional Director, Director of Human Resources (DHR) is responsible for the policy and communicating procedures to employees in their respective regions in compliance with state law.
> 2. Each departmental manager and supervisor is responsible for informing their employees, including volunteers, of the policy, Act 25 and its provisions, and these procedures.
> ***
> C. Enforcement
> 1. Issues and problems that cannot be resolved by the respective Regional Human Resources Director or Safety Officer shall be referred to the Regional Chief Executive Officer (RCEO).
> 2. All department heads, supervisory staff, human resources, safety, and security shall be responsible for the enforcement of Act 25.
> 3. All new hires shall be given a copy of the Tobacco Free Campus Procedures at the time of hire or during orientation.

On August 24, 2016, Nakanelua responded to Caesar by a letter, which stated in pertinent part:

> First, at no time has any representative of HHSC ever contacted me to schedule bargaining on July 21, 2016 as you claim in paragraph 1 of your August 18, 2016 letter. I'm sure you're aware that as state director I serve as the chief negotiator for the union. You and Ms. Rosen have dealt directly with me previously as the union's chief negotiator. I don't understand why Ms. Rosen or you did not call me or write a prompt response to my letter dated July 18, 2016. The union considers a 30 day delay (from July 18, 2016 to August 18, 2016) for a response to our July 18, 2016 proposals to be wholly unjustified under the circumstances. As you know on July 25, 2016 a complaint for prohibited practices was filed with the Hawaii Labor Relations Board for failure to bargain in good faith.
>
> Second, on July 12, 2016 I requested Ms. Rosen, inter alia, to "(1) Please provide a copy of all notices, memorandum, and other records notifying employees of HHSC of the implementation of Act 25, (2016 SLH) (error) on and after April 26, 2016 to the present ... (and) (4) Please provide a copy of all draft policies of HHSC which purport to implement Act 25 (2016 SLH)." Your August 18,

> 2016 letter states in relevant portions that "employees are on notice that all HHSC facilities are no smoking facilities." We request that you indicate who, when, and in what manner employees were notified that HHSC facilities are no smoking facilities. As to request #4 we appreciate receiving the draft policies on August 18, 2016. Please indicate when the policy will be reviewed by the statutorily created policy committee, the regional CEO's, and the board of directors.

Caesar responded to Nakanelua by an August 26, 2016 letter, which in addition to providing available dates to meet, stated in pertinent part:

> In response to your letter dated August 24, 2016, requesting to negotiate over the change to the HHSC Smoking Policies, we are willing to meet with you to discuss your concerns without waiving our position that the smoking prohibition at all HHSC facilities, in accordance with Act 25 is not a mandatory subject of bargaining. We are following the law and have advised our regions to advise their employees of such. Signage as prescribed by Act 25 is currently being developed for each of our regions to read: "Tobacco and electronic smoking device use is prohibited. In accordance with Act 25."
>
> I apologize that you did not get the message but please know that our HR Officer, Sandy Park, reached out by phone and email to Chip Uwaine in an attempt to schedule a meeting with you.
>
> As I stated in my letter to you dated August 18, 2016, we are still in the process of working through a policy and procedures - in accordance with Act 25 - and we have no new information to provide you since that last communication.

Nakanelua responded in an August 29, 2016 letter reiterating a request to commence negotiations and that, "HHSC cease and desist from implementing Act 25, 201 SLH until your proposed policies (which amend existing policies at various hospital [sic] allowing designated smoking areas on premises) which have been fully reviewed, negotiated, and adopted by appropriate HHSC officials, and until we have had a chance to negotiate over the union proposals submitted on July 18, 206)."

In its Memorandum in Support of Motion, regarding count 1, UPW asserts that the union state director's declaration and the indisputable documentary evidence shows that Respondents breached their duty to bargain over the effects and the adoption of policies to implement Act 25. UPW argues that the Hawaii Supreme Court (Court) has held that a public employer has a duty to bargain over policy statements affecting bargaining topics pertaining to the implementation of legislative mandates where the employer has "discretion" on the implementation thereof, based on

Univ. of Hawai'i Prof'l Assembly v. Tomasu, 79 Hawai'i 154, 900 P.2d 161 (1995) (Tomasu); that the Board has held that policies to implement the federal mandate through "disciplinary action" and "disciplinary penalties" require negotiations with the union based on United Public Workers, ASFSCME, Local 646, AFL-CIO v. Stephen Yamashiro, Board Case No. CE-01-260, Order No. 1277 (1999) (Yamashiro) and United Public Workers, AFSCME, AFL-CIO, Local 646, AFL-CIO v. Jeremy Harris, Board Case No. CE-01-397, Decision 398, 6 HLRB 32 (1999) (Harris); and that State policies implementing a complete ban on smoking represent a material change in conditions of work requiring negotiations. The UPW contends that HHSC is required to amend those policies because Act 25's prohibitive mandate to HHSC to "prohibit the use of any tobacco product or electronic smoking device by any person on the premises of all facilities operated by the corporation within the State" is not self-executing and inconsistent with numerous policies at HHSC facilities. UPW further argues that on July 12, 2016, HHSC notified the Union of its formulation for adoption of a uniform policy banning smoking in all of its statewide facilities and medical centers in mid-July to implement Act 25; on that same date, the Union requested that HHSC cease and desist from its unilateral course of conduct and requested negotiations; on July 1, 2016, Respondents declined to negotiate "with respect to the smoking policy;" and that this refusal to negotiate over the policies to implement Act 25 constitutes a breach of the duty to bargain in good faith under these decisions. The Union further contends that while Act 25, subsection b. states that the decision to prohibit smoking, i.e. the use of tobacco products on HHSC premises "shall not be subject to collective bargaining," nothing in Act 25 prohibits negotiations over the effects of the legislative prohibition and its implementation; that on July 18, 2016 UPW submitted seven proposals not inconsistent with the Act 25 prohibition and negotiable as "conditions of employment" "germane to the working environment" to negotiate the effects of the legislature's decision to prohibit smoking on HHSC. UPW concludes that HHSC's refusal to bargain over the implementation and effects of Act 25; and its unilateral course of conduct in successfully urging the legislature to enact Act 25 and then seeking and obtaining dismissal of pending grievances before Arbitrator Hunter over the elimination of designated smoking areas on the Big Island and Maui interferes, restrains, and coerces employees in the exercise of their grievance rights in violation of HRS § 89-3 and 89-13(a)(1).

Regarding count II, UPW contends that Respondents have violated HRS § 89-13(a)(8) by willfully abridging the prior rights of employees as set forth in statutes and constitutions incorporated by CBA § 14.01 through their refusal to negotiate a change in the smoking policies after the enactment of Act 25.

Regarding count III, UPW asserts that Respondents' July 15, 2016 failure to bargain was a willful violation of HRS § 89-13(a)(7) because Act 25 is in direct conflict with the definition of "collective bargaining" in HRS § 89-2 and the duty to bargain under HRS § 89-9(a) and preempted by HRS § 89-19. UPW argues that HRS Chapter 89 takes precedence over all conflicting statutes and pre-empts contrary legislation based on HRS § 89-19, state court decisions holding that

collective bargaining statutes take precedence over all conflicting laws regarding the subject matter, and the principle of labor law preemption under San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). The Union concludes that the new provision in HRS Chapter 323F is preempted because "the legislation is directly at odds with the protections afforded to public employees under HRS Chapter 89," citing Act 25's conflict with HRS § 89-10.8 providing public employees with the right to a grievance and final and binding determinations over collective bargaining agreement violations; the pending grievances dismissed after Act 25; Act 399 adopted in 1988; the right of public employees to negotiate over wages, hours, and other terms and conditions of employment set forth by HRS §§ 89-3 and 89-9(a); and the Board's decision in United Public Workers, AFSCME, Local 646, AFL-CIO v. Cayetano, Board Case No. CE-01-382, Decision No. 413 (2000), which held that State policies implementing a complete ban on smoking in DOT buildings represented a material change in working conditions requiring negotiations.

2. HHSC's Opposition to UPW's Motion for Summary Judgment

On August 29, 2016, HHSC filed Respondent Hawaii Health Systems Corporation's Opposition to UPW's Motion for Summary Judgment Filed August 22, 2016 (HHSC Opposition). HHSC attached the Declaration of Clifford Caesar (Caesar Declaration) to its Opposition, which presented no dispute of fact. Instead, HHSC argues that the Complaint should be dismissed because UPW's assertion that, "Act is unconstitutional permeates all of its allegations, and the constitutionality of Act 25 must be decided by the Circuit Court[;]" and further, that the Complaint should be dismissed to preserve the circuit court's sole authority over Act 25's constitutionality and the Board's resources by having constitutional questions decided first by the circuit court. Second, the HHSC asserts that the UPW MSJ must be denied and the Complaint dismissed because the Board should defer to the grievance process and decline jurisdiction because the UPW may be attempting to relitigate Arbitrator Hunter's dismissal of the grievances. Alternatively, HHSC contends that UPW may be trying to present the Board with an entirely new grievance regarding the implementation of Act 25 without proceeding under the CBA grievance procedure. HHSC concludes that the UPW MSJ should be denied because HHSC has not engaged in any prohibited practice or willful conduct by complying with Act 25 and communicating with the UPW. HHSC argues that there was no obligation to bargain with the UPW "over the implementation and effects of Act 25" because: matters of discipline are not subject to mutual consent based on the lack of a CBA provision regarding smoking or making the issue a mandatory subject of bargaining; HRS § 89-9(d)(1), (4), (6), and (7) specifically bar HHSC from negotiating over the prohibition against smoking and discipline or other matters; and of the Board's decision in In the Matter of State of Hawaii Organization of Police Officers, Decision No. 481, Case No. CE-12-875. Finally, regarding count III, HHSC maintains that Act 25 does not conflict with HRS Chapter 89 and is not preempted by HRS § 89-19.

3. Hearing on UPW's Motion for Summary Judgment

At the hearing, UPW orally reargued points made in the UPW Memorandum with the following additional contentions. Regarding the standard for review, UPW noted that the employer did not submit declarations countering and opposing factually the UPW's declarations and exhibits. While conceding that there is no express CBA provision establishing the right to smoke, UPW reiterated that there is an undisputed past practice and custom regarding designated smoking areas on the premises as a condition of work for Unit 1 and 10 members; that a multiemployer agreement is involved establishing conditions of work regarding smoking on the premises; and HHSC wants to have a right that interferes and conflicts with Chapter 89 midterm in the contract. UPW further asserted that under Yamashiro and Harris, the question of discipline is negotiable, and proposal 3 proposes a progressive discipline system enforceable through the grievance procedure, which HHSC has not argued are not mandatory subjects of bargaining. UPW maintained that progressive discipline, derogatory materials, right to a grievance and to rest periods are adjustments needed because of and are not contradicted by Act 25 mandate. UPW asserted that deferral to arbitration has not been applied where there is an impediment to arbitration and the arbitrator has held that there is no right to grieve over the designated smoking areas because Act 25 eliminates the arbitrator's jurisdiction regarding a meaningful remedy.

Regarding preemption, the UPW urged the application of the two-part test set forth in Richardson v. City and County of Honolulu, 76 Hawaii 62, used to determine whether State statutes preempt a conflicting local ordinance. The two-part test requires a finding whether the legislation covers the same subject matter and embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state, or if the legislation conflicts with state law. UPW asserted that Act 25 is preempted under either test because Chapter 89 contemplates a multiemployer bargaining process which led to a condition of work with designated smoking areas in effect up through June 30, 2017, and the Legislature has no right to enact a statute directly conflicting with that state comprehensive scheme.

Finally, UPW summarized its response to HHSC's arguments: this is a question of law and not of fact for the Board to determine; HHSC has not opposed the factual basis for the motion; HHSC's jurisdictional arguments are contrary to UPW's arguments in the motion to dismiss under HRS § 89-14 and the primary jurisdiction doctrine; HHSC's argument regarding deferral to grievance arbitration is contradicted by their offer to consult and the arbitrator's order that he can provide no remedy; Act 25 is preempted because it prohibits collective bargaining not under Chapter 89 but as an amendment to HRS § 323F; the refusal to bargain was knowing and clear; Board Decision No. 413 did not decide preemption but decided that a policy changing smoking policies and establishing conditions of work were negotiable; and that NLRB precedent is binding in this jurisdiction. Further, UPW distinguished the differences between collateral estoppel precluding readjudication of issues that were decided and res judicata precluding relitigation of

any claims that were adjudicated. UPW argues that under Santos, collateral estoppel precludes adjudication of the central question of whether under chapter 89, the duty to bargain over a change over a smoking policy is a mandatory subject of bargaining because Board Decision 413 was not appealed and remains good law. Regarding counts 3 and 4, UPW took the position that the Board cannot decide the Count 4 constitutionality issue but can decide the issue in Count 3 of whether Act 25 is in conflict with the statutory scheme under Chapter 89 and whether to enforce the provisions of the HRS§ 89-19 preemption. Finally, UPW asserted that a violation of HRS § 89-19 is a prohibited practice under HRS § 89-13(a)(7). In response to questioning from the Board, UPW confirmed that the proposals at issue are midterm bargaining requests similar to those in Tomasu and National Treasury.

HHSC also provided further oral arguments in opposition to the UPW MSJ. HHSC asserted that Decision 413 was a statutory not a preemption decision and not applicable to the present prohibited practice claims because the statute in this case clearly requires that pursuant to HRS § 89-9(d), the tobacco and electronic smoking device use prohibitions under this section shall not be subject to collective bargaining. HHSC distinguished the UPW's cases on the ground that these cases did not involve the situation present in this case where the Board is asked to overturn a statute. HHSC argued that the more appropriate cases are State Organization of Police Officers v. Society of Professional Journalists, University of Hawaii and Cammack v. Waihee, in which the Court found no preemption because a collective bargaining agreement cannot suspend the effect of a validly enacted statute and the public employer's responsibilities include duties imposed by duly enacted legislation. Finally, HHSC argued that UPW is compelled to go to court to overturn Act 25 because the Board cannot overturn or determine the unconstitutionality. More specifically, regarding count 1, HHSC asserted that because UPW acknowledges that the CBA doesn't provide for smoking and HHSC does not admit any past practice, Act 25 trumps barring HHSC from negotiating that issue. Further, HHSC argued that Act 25 is a statute unique to this employer; and that HHSC's commitment to providing quality health care for Hawaii and taking steps to lessen preventable disease noted in Act 25 is a unique mission which "takes it out of the orbit of all of those other cases."

At the end of the motion hearing, the Board orally: 1) denied HHSC's Motion; granted in part the UPW MSJ concerning the Employer's refusal to negotiate regarding terms and conditions of employment in counts 1, 2, and 3 of the Complaint; and denied the UPW MSJ count 4 for lack of jurisdiction over the constitutionality of Act 25 and any other constitutional claims set forth in the Complaint; 2) dismissed HHSC's motion to quash subpoenas based on mootness; and set aside the previously noticed hearing on the merits set for Friday, September 2, 2016; and 3) stated that a final written order in accordance with HRS § 91-12 would be issued setting forth Findings of Fact, Conclusions of Law, the remedies and penalties, and closing of the case.

II. DISCUSSION AND CONCLUSIONS OF LAW

A. Standards of Review

1. Motion to Dismiss for Lack of Subject Matter Jurisdiction

The Board adheres to the legal standards set forth by the Hawaii appellate courts for motions to dismiss under the Hawaii Rules of Civil Procedure (HRCP) Rule 12(b).

A motion to dismiss for lack of subject matter jurisdiction pursuant to HRCP Rule 12(b)(1) is based on the contents of the complaint, the allegations of which must be accepted as true and construed in the light most favorable to the plaintiff. Dismissal is improper unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In considering a motion to dismiss for lack of subject matter jurisdiction, the Board is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawaii 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawaii 1, 7, 175 P.3d 111, 117 (App. 2007).

2. Motion for Summary Judgment

a. General Standard

Under HRCP Rule 56 (b), a party "may move with or without supporting affidavits for a summary judgment in the party's favo[r]." Ralston v. Yim, 129 Haw. 46, 56, 292 P.3d 1276, 5-1286 (2013) (Ralston). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any 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. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." *Id.* at 55-56, 292 P.3d at 1285-1286; Querubin v. Thronas, 107 Haw. 48, 56, 109 P.3d 689, 697 (2005); Thomas v. Kidani, 126 Haw. 125, 129, 267 P.3d 1230, 1234 (2011). Further, any doubt concerning the propriety of granting a motion for summary judgment should be resolved in favor of the non-moving party. French v. Hawaii Pizza Hut, Inc., 105 Haw. 462, 473, 99 P.3d 1046, 1057 (2004) (French).

b. Standard Where the Moving Party Has the Burden of Proof

Regarding the moving party's burden of demonstrating its entitlement to summary

judgment, the Hawaii Supreme Court (Court) has stated:

> A summary judgment motion challenges the very existence or legal sufficiency of the claim or defense to which it is addressed. In effect the moving party takes the position that he is entitled to prevail
>
> …because his opponent has no valid claim for relief or defense to the action, as the case may be. He thus has the burden of demonstrating that there is no genuine issue as to any material fact relative to the claim or defense and he is entitled to judgment as a matter of law.
>
> He may discharge his burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his opponent. For if no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless.

Suzuki v. State, 119 Hawaii 288, 297, 196 P.3d 290, 299 (App. 2008) (Suzuki). Noting that Rule 56(c) is modeled after the federal Rule 56 (c), the Suzuki Court quoted the U. S. Supreme Court's interpretation of the federal Rule:

> In our view, the plain language of [FRCP] Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is entitled to judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. The standard for granting summary judgment mirrors the standard for a directed verdict under [FRCP Rule] 50(a). . . .

Suzuki, *id.*, 196 P.3d at 299.

Finally, regardless of which evidentiary standard is required of the moving party, "Once the moving party has satisfied its initial burden of showing the absence of a genuine issue of material fact and its entitlement to a judgment as a matter of law, the opposing party 'may not rest upon the mere allegations or denials of [the opposing party's] pleading' but must come forward, through affidavit or other evidence with 'specific facts showing that there is a genuine issue for trial.' Rule 56(e). If the opposing party fails to respond in this fashion, the moving party is entitled to summary judgment as a matter of law." Suzuki, 119 Hawaii at 296-297, 196 P.3d at 298-299,

citing Hall v. State, 7 Haw.App. 274, 284, 756 P.2d 1048, 1055 (1988); Foronda v. Hawaii International Boxing Club, 96 Hawaii 51, 58, 25 P.3d 826, 833 (2001); Tri-S Corp., 110 Hawaii 473, 494, n. 9, 135 P.3d at 103, n. 9 (2006).

c. Burden of Proof Regarding Affirmative Defenses

Finally, "[g]enerally the [respondent] has the burden of proof on all affirmative defenses, which includes the burden of proving facts which are essential to the asserted defense. United States Bank Nat'l Assn v. Castro, 131 Hawaii 28, 41-42, 313 P.3d 717, 730-31 (2013). (Citations omitted) Further, a [complainant-movant] is not required to disprove affirmative defenses asserted by a defendant in order to prevail on a motion for summary judgment. GECC Fin. Corp. v. Jaffarian, 80 Hawaii 118, 119, 905 P.2d 624, 625 (1995).

B. Relevant Constitutional and Statutory Provisions

The Constitution of the State of Hawaii, Article XIII provides in relevant part:

ORGANIZATION; COLLECTIVE BARGAINING
***
PUBLIC EMPLOYEES

Section 2. Persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law.

HRS § 89-2 sets forth the definition of "collective bargaining" as follows:

> Collective bargaining" means the performance of the mutual obligations of the public employer and an exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund, and other terms and conditions of employment, except that by any such obligation neither party shall be compelled to agree to a proposal or be required to make a concession. For the purposes of this definition, "wages" includes the number of incremental and longevity steps, the number of pay ranges, and the movement between steps within the pay range and between the pay ranges on a pay schedule under a collective bargaining agreement.

Article I, Section 10 of the United States Constitution states in relevant part:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

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HRS § 89-3 states:

§89-3 Rights of employees. Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4.

HRS § 89-5 (i), HRS, specifically provides in relevant part:

(i) In addition to the powers and functions provided in other sections of this chapter, the board shall:

(1) Establish procedures for, investigate, and resolve, any dispute concerning the designation of an appropriate bargaining unit and the application of section 89-6 to specific employees and positions;

(2) Establish procedures for, resolve disputes with respect to, and supervise the conduct of, elections for the determination of employee representation;

(3) Resolve controversies under this chapter; and

(4) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper;

***

HRS § 89-9 states in relevant part:

§89-9 Scope of negotiations; consultation. (a) The employer and the exclusive representative shall meet at reasonable times, including meetings sufficiently in advance of the February 1 impasse date under section 89-11, and shall negotiate in good faith with respect to wages, hours, the amounts of contributions by the State and respective counties to the Hawaii employer-union health benefits trust fund to the extent allowed in subsection (e), and other terms and conditions of employment which are subject to collective bargaining and which are to be embodied in a written agreement as specified in section 89-10, but such obligation does not compel either party to agree to a proposal or make a concession.

(b) The employer or the exclusive representative desiring to initiate negotiations shall notify the other party in writing, setting forth the time and place of the meeting desired and the nature of the business to be discussed, sufficiently in advance of the meeting.

(c) Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.

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

(1) Direct employees;

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

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

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

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

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

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

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

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

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

HRS § 89-13(a) states in relevant part:

§89-13 Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

***

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

***

(7) Refuse or fail to comply with any provision of this chapter;

(8) Violate the terms of a collective bargaining agreement[.]

HRS § 89-14 states:

§89-14 Prevention of prohibited practices. Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9; provided that the board shall have exclusive original jurisdiction over such a controversy except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section [89-12(c)] or (2) the judicial review of decisions or orders of the board in prohibited practice controversies in accordance with section 377-9 and chapter 91. All references in section 377-9 to "labor organization" shall include employee organization.

C. HHSC's Motion to Dismiss and UPW's Motion for Summary Judgment on Constitutional Claims.

HHSC's Motion to Dismiss is based on the ground that the Complaint should be dismissed in its entirety because the Board lacks subject matter jurisdiction to decide the constitutionality of Act 25. Alternatively, HHSC argues that the Complaint should be dismissed because the dispute

is not ripe; and even if it were, HHSC has not engaged in any willful conduct. The UPW opposes the HHSC's position regarding the subject matter jurisdiction asserting that the Board is required to resolve the prohibited practices allegations contained in counts 1, 2, and 3 of the Complaint based its "exclusive original jurisdiction" and "primary jurisdiction" regarding the prohibited practices notwithstanding the circuit court's jurisdiction over the constitutional claim in count 4.

The Board dismissed the constitutional allegations, including count 4 in its entirety and those alleged in counts 2 and 3, including paragraph 64, based on the lack of Board jurisdiction over constitutional claims and retained jurisdiction to resolve the remaining prohibited practice allegations that HHSC violated HRS § 89-13(a)(1), (5), (7), and (8) for their unilateral enforcement and implementation of Act 25 for the following reasons.

Regarding the Board's dismissal of the constitutional allegations, the Board, as an administrative agency, can only wield powers expressly or implicitly granted by statute. Hawaii Gov't Emp. Ass'n. v. Casupang, 116 Hawaii 73, 97, 170 P.3d 324, 348 (2007) (Casupang); Morgan v. Dep't of Planning, County of Maui, 104 Hawaii 173, 184, 86 P.3d 982, 993 (2004). A review of Chapter 89, HRS, unequivocally shows that the Board has no power to consider constitutional questions. HRS § 89-5(i) sets forth the Board's authority to resolve controversies and disputes.

HRS § 89-5 (i), HRS, specifically provides in relevant part:

> (i) In addition to the powers and functions provided in other sections of this chapter, the board shall:
>
> (1) Establish procedures for, investigate, and resolve, any dispute concerning the designation of an appropriate bargaining unit and the application of section 89-6 to specific employees and positions;
>
> (2) Establish procedures for, resolve disputes with respect to, and supervise the conduct of, elections for the determination of employee representation;
>
> (3) Resolve controversies under this chapter; and
>
> (4) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper;
>
> ***

(Emphasis added) Absent from this provision establishing the powers and functions of the Board is any explicit authority for the Board to resolve controversies regarding constitutional challenges. Rather, the Board's authority to resolve controversies is limited to those "under this chapter."

While this provision states more broadly that the Board's power extends to "powers and functions provided in other sections of this chapter," a review of other Chapter 89 provisions similarly shows no authorization for the Board to resolve constitutional challenges.

Moreover, both the Hawaii courts and the Board have consistently determined that the jurisdiction over constitutional questions rests with the court, and not the Board, as an administrative agency. In HOH Corp. v. Motor Vehicle Industry Licensing Board, 69 Haw. 135, 141, 736 P.2d 1271 1275 (HOH), the Court stated that, "[a]lthough an administrative 'agency may always determine questions about its own jurisdiction [it] generally lacks the power to pass upon constitutionality of a statute.' Instead, "[t]he 'delicate and difficult office [of ascertaining whether…legislation is in accordance with, or in contravention of [constitutional] provisions' is confined to the courts." Id. at 142, 736 P.2d at 1275 (*quoting* United States v. Butler, 297 U.S. 1, 53). *See also*: Hawaii Insurers Council v. Lingle, 120 Hawaii 51, 72, 201 P.3d 564, 585 (2008) (*quoting* HOH, 69 Haw. at 141, 736 P.2d at 1275); HGEA, 124 Hawaii at 218, 239 P.3d at 22. Based on HOH, this Board has also noted in In Re United Public Workers, Local 646 and Lum, et. als., Board Case No. CE-01-634, Decision 471 at 5 (2007), *citing* DOH [sic] Corporation v. Motor Vehicles Industry Licensing Board , 69 Hawaii 135 (1987) that "[w]ith regard to constitutionality, as an administrative agency the Board is without jurisdiction to address such questions."

Regarding the Board's jurisdiction over prohibited practice claims, however, the Hawaii appellate courts have also specifically held that the Board has "exclusive original jurisdiction" over the statutory issues raised by the Complaint. In Casupang, the Court recognized the Board's "exclusive original jurisdiction" over prohibited practices based on the HRS § 89-14 language "any controversy concerning prohibited practices;" In addition, the Court noted that HRS § 89-5(i)(4) mandates the Board to "conduct proceedings on complaints or prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper[;]" and HRS § 89-5(i)(4) authorizes the Board to "[c]onduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper [.]" The Court concluded that "in deciding prohibited practice complaints, the Board is vested with the power 'reasonably necessary' to effectuate resolution of such complaints. In that regard, as stated before, it may take actions 'necessary and proper' in the conduct of the proceedings and make inquiries 'necessary' to decide the controversies." 116 Hawaii at 97-98, 170 P.3d at 348-49. (Footnote and citations omitted)

In subsequent decisions relied on by the UPW,[vi] the Hawaii appellate courts have further clarified the manner and effect of the Board's "exclusive original jurisdiction" over HRS Chapter 89 issues as it relates to the circuit court's jurisdiction regarding the constitutional claims involved in the dispute. In HGEA, 124 Hawaii at 207-08, 239 P.3d at 11-12, in determining that the Board

should be given the opportunity to address the HRS Chapter 89 issues before the court reaches the constitutional issues, the Court specifically rejected the analysis presented by the HHSC in this case, stating:

> Although it appears that the HLRB lacks jurisdiction to consider the constitutional issue, pertinent statutes reveal that the HLRB has jurisdiction to "[r]esolve controversies under [HRS chapter 89.]" *HRS § 89-5(i)(3)*; *see id. § 89-5(a)*; id. *§ 89-5(i)(4)*; see also *HRS § 89-1(b)(3)*. As such, a constitutional analysis is unnecessary for the HLRB to adjudicate the statutory issues that are presented in HGEA's first amended complaint. Instead, the HLRB's analysis may be guided by rules of statutory construction or any other rule it may deem to be appropriate. For this reason, HGEA's assertion is unpersuasive.
>
> In other words, if the HLRB determined that the furlough plan constituted a valid exercise of Lingle's management rights under *HRS § 89-9(d)*, then the circuit court would have jurisdiction to determine whether the exercise of such a statutory management right violates *article XIII, section 2*. However, if the HLRB reached the contrary conclusion and determined that Lingle's actions were not authorized under HRS Chapter 89, then the circuit court would not need to reach the constitutional issue.
>
> Thus, the circuit court erred by reaching the constitutional issue without first giving the HLRB the opportunity to address the issues arising under HRS Chapter 89. As we noted in *City & County of Honolulu v. Sherman, 110 Hawai'i 39, 56 n.7, 129 P.3d 542, 559 n. 7 (2006)*, "[a] fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." (Citation omitted.) Moreover, requiring that statutory issues be submitted to the HLRB furthers the legislative policy, reflected in *HRS § 89-14*'s grant of "exclusive original jurisdiction," of having the administrative agency with expertise in these matters decide them in the first instance. Stated differently, that legislative purpose is frustrated if the HLRB's jurisdiction can be defeated by characterizing issues that fall within the scope of HRS Chapter 89 as constitutional claims and then addressing them directly to the circuit court.

(Footnotes omitted) (Emphasis added)

Although arising out of a different procedural context, also persuasive is the Court's ruling in UPW, 133 Hawaii at 207, 325 P.3d at 619, that the "primary jurisdiction," may also apply to the jurisdictional issues between the Board's prohibited practice jurisdiction and the court's

constitutional jurisdiction requiring a stay of the retaliation claims before the court pending the outcome of the administrative process. The Court articulated the doctrine as follows:

> This court adopted the doctrine of primary jurisdiction directly from Western Pac. R.R., holding that primary jurisdiction applied "where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." We concluded, "[w]hen this happens, the judicial process is suspended pending referral of such issues to the administrative body for its views." We opined, "[i]n effect, the courts are divested of whatever original jurisdiction they would otherwise possess. And 'even a seemingly contrary statutory provision will yield to the overriding policy promoted by the doctrine.'"

Id. at 198, 325 P.3d at 609. (Citations omitted)

Contrary to HHSC's assertion, a review of the Complaint set forth above shows that the constitutional claims simply do not "permeate" all of the allegations, but rather are confined primarily to count IV and paragraph 64 of count II. Accordingly, the Board is compelled to deny HHSC's Motion for being overly broad and deny the UPW MSJ to the extent that the MSJ applies to the constitutional claims. However, based on its "exclusive original jurisdiction" over prohibited practices under HRS § 89-14 and the guidance of the Hawaii appellate courts discussed above, the Board is compelled to adjudicate the statutory issues presented by Complaint. Accordingly, the Board dismisses the constitutional allegations and addresses the prohibited practice claims presented in this case.

D. The UPW's Motion for Summary Judgment

The Complaint alleges violations of HRS § 89-13(a)(1), (5), (7), and (8). In addition to establishing that HHSC violated these statutory provisions by its conduct, HRS § 89-13(a) requires that that the enumerated act be done "wilfully." "[W]ilfully" means "conscious, knowing, and deliberate intent to violate the provisions of HRS chapter 89." HGEA, 116 Hawaii at 99, 170 P.3d at 350, *citing* Aio v. Hamada, 66 Haw. 401, 410, 664 P.2d 727, 734 (1983). "[I]n assessing a violation of HRS § 89-13, the Board was required to determine whether Respondent[] acted with the 'conscious, knowing, and deliberate intent to violate the provisions' of HRS chapter 89." *Id.*, 170 P.3d at 350. Subsequent to HGEA, the Board, in "look[ing] to the Hawaii Supreme Court's evolving guidance in interpreting provisions of HRS chapter 89," has concluded that the assessment of an alleged prohibited practice requires the Board to render a specific determination regarding whether the Respondent acted with "conscious, knowing, and deliberate intent" to violate the provisions of HRS Chapter 89. *Id.* at 99, 170 P.3d at 350. Hawaii State Teachers Ass'n v. Board of Education, Board Case No. CE-05-672, Order No. 2541, at * 11 (2008); United Public

Workers, AFSCME. Local 646, AFL-CIO v. Char, Board Case No. CE-10-744, Order No. 2697, at *12-13 (2010).

The Board granted UPW's MSJ on these prohibited practice violations, finding that there are no material facts in dispute and UPW has met its burden of demonstrating that HHSC has no valid defense to the action by showing if this case went to trial there would be no competent evidence to support a judgment for HHSC. Suzuki, 119 Hawaii at 297, 196 P.3d at 299. The Complaint alleges that HHSC declined to negotiate with UPW regarding smoking policies implementing and enforcing implementing Act 25 and committed prohibited practices under HRS § 89-13(a)(1), (5), and (7) by its wilfull refusal to negotiate over the July 18, 2016 proposals of the Union; under HRS § 89-13(a)(8) by its refusal to negotiate over changes to existing conditions of work and the unilateral implementation of the prohibition on the use of tobacco products and collective bargaining in breach of Section 14.01 of the CBAs; and under HRS § 89-13(a)(7) by its knowing refusal to comply with the Union's request to negotiate and cease and desist from implementing and enforcing Act 25 based on HRS § 89-19, which preempts the enactment.

HRS § 89-13(a)(1), (5), (7) and (8) prohibits an employer from: wilfull interfer[ence], restrain[t], or coerc[ion] of any employee in the exercise of any right guaranteed under this chapter; refusal to bargain collectively in good faith with the exclusive representative as required in section 89-9; refusal or failure to comply with any provision of this chapter; and violation of the terms of a collective bargaining agreement. The Board finds based on the Nakanelua Declaration and the attached exhibits that UPW presented undisputed facts that since 2006, there existed certain designated smoking areas in all HHSC medical centers and facilities to permit smoking by Unit 1 and 10 employees as a condition of work during rest periods, meal periods, and off duty times based on consultation and/or negotiations between the State and the UPW. Further, that on February 15, 2013, UPW filed class grievances when certain HHSC Big Island and Maui facilities unilaterally implemented policies eliminating designated smoking areas on the hospital premises and discipline of non-complying employees. HHSC's Answer alleged that "designated smoking areas were established pursuant to management discretion." However, HHSC failed to establish this allegation with any declarations or other evidence to dispute Nakanelua's Declaration that these designated smoking areas were established by consultation and negotiation. (HAR § 12-42-8(g)(3)(C)(iii requires affidavits,[vii] if any, to be filed within five days after service of a motion, unless the Board directs otherwise.) The non-movant "may not rest upon the mere allegations or denials of [the opposing party's] pleading" but must come forward through affidavit or other evidence with 'specific facts showing that there is a genuine issue for trial' Rule 56(e). If the opposing party fails to respond in this fashion, the moving party is entitled to summary judgment as a matter of law." Suzuki, 119 Hawaii at 296-297, 196 P.3d at 298-299, *citing* Hall v. State, 7 Haw. App. 274, 284, 756 P.2d 1048, 1055 (1988). The communications between the Union and UPW following the adoption of Act 25 establish the undisputed facts that UPW demanded negotiations over the changes to wages, hours, and other terms and conditions of employment involved with the implementation of Act 25; requested HHSC to cease and desist from its unilateral

course of conduct; submitted seven proposals for negotiations; and requested the commencement of the bargaining process. HHSC's response and its defense to these prohibited practice allegations was that "it does not need to negotiate with UPW with respect to the smoking policy" because "Act 25 bans smoking on HHSC facilities and prohibits negotiations with the UPW over the prohibition." HHSC then proceeded, among other things, to advise employees that the HHSC premises are no smoking facilities; notify the Union that there will be a new policy and procedure pursuant to Act 25 repealing all existing policies and advising all employees that smoking on the HHSC premises is an Act 25 violation which may subject them to disciplinary action in accordance with existing policies; and transmit a "preliminary" draft policy subject to approval on several levels, which although establishing procedures for implementing Act 25 and prohibiting the use of tobacco and electronic devices on HHSC premises, contains no specific disciplinary provisions.

Pursuant to the standards set forth above, HHSC has the burden of proving its defense that it has no obligation to bargain based on Act 25's amendment to HRS Chapter 323F. This amendment added a new section (b) stating, "Pursuant to section 89-9(d), the tobacco and electronic smoking device use prohibitions under this section shall not be subject to collective bargaining." HHSC argues that the prohibition on collective bargaining regarding the tobacco and electronic smoking device use specifically arises out of HRS § 89-9(d)(1), (4), (6), and (7), which provides in pertinent part:

> (d) …The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with the merit principle or the principle of equal pay for equal work pursuant to section 76-1 or which would interfere with the rights and obligations of a public employer to:
>
> (1) Direct employees;
>
> (2) Determine qualifications, standards for work, and the nature and contents of examinations;
>
> (3) Hire, promote, transfer, assign, and retain employees in positions;
>
> (4) Suspend, demote, discharge, or take other disciplinary action against employees for proper cause;
>
> (5) Relieve an employee from duties because of lack of work or other legitimate reason;
>
> (6) Maintain efficiency and productivity, including maximizing the use of advanced technology, in government operations;

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

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

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

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

Accordingly, HRS § 89-9(d)(1), (4), (6), and (7) prohibits the employer and the exclusive representative from agreeing to any proposal regarding directing employees; suspending, demoting, discharging, or taking other disciplinary action against employees for proper cause, maintaining efficiency and productivity, including maximizing use of advanced technology, in government operations, and determining methods, means, and personnel by which the employer's operations are to be conducted.

The Board disagrees with HHSC's opposition and defense for several reasons.[viii] First, the Board finds that HHSC's interpretation of the Act 25 provision that, "Pursuant to section 89-9(d), the tobacco and electronic smoking device use prohibitions under this section shall not be subject to collective bargaining" is not supported by the language of HRS § 89-9(d). There is simply nothing in the plain language of this provision barring negotiations regarding the prohibition against smoking, nor does the Board find support in its own decisions or court decisions interpreting this provision to exclude tobacco and electronic use prohibitions from collective bargaining. Most significantly, HHSC points to nothing on the face of HRS § 89-9(d) specifically barring negotiations on the prohibition against tobacco and electronic smoking use, nor does HHSC set forth an interpretation of HRS § 89-9(d)(1), (4), (6), and (7) to cover such a prohibition. HHSC's position that this bar on collective bargaining over tobacco and electronic use prohibitions rests on the preclusion of discipline and other matters from negotiation under HRS § 89-9(d)(1), (4), (6), and (7) is overly broad and has no merit. While HRS § 89-9(d) provides that the employer's rights and obligations to "[s]uspend, demote, discharge, or take other disciplinary action against employees for proper cause" should not be interfered with, this provision further clarifies that, "[t]his subsection …shall not preclude negotiations over the procedures and criteria on…suspensions, terminations, discharges, or other disciplinary actions as a permissive subject of bargaining…." In short, there is no absolute bar of negotiations with UPW pursuant to HRS § 89-

9(d) over the prohibition against tobacco and electronic smoking device use, nor does HRS § 89-9(d) preclude the prohibition from collective bargaining. Where the terms of a statute are plain, unambiguous and explicit, the Board will not look beyond that language for a different meaning, but will give effect to the statute's plain and obvious meaning. *See* Bhakta v. County of Maui, 109 Hawaii 198, 208, 124 P.3d 943, 953 (2005). HHSC has not met its burden of proving its defense.

Regarding the refusal to negotiate allegations, the Board finds the requisite wilfullness based on the fact that HHSC became aware of the issue of Act 25 being in conflict with Chapter 89 on July 12, 2016 when Nakanelua sent the letter informing HHSC that, "HHSC's reliance on Act [25] (2016 SLH) [sic] since the amendment to HRS Section 323F conflicts with the meaning of collective bargaining as defined in Section 89-2, HRS, and the duty to bargain over wages, hours, and terms and conditions of employment under Section 89-9(a), HRS…." Nonetheless, in a July 15, 2016 letter and during these proceedings, HHSC has never altered its position that it did not need to negotiate with UPW regarding the smoking policy and sought and obtained dismissal of the consolidated grievance before Arbitrator Hunter. Based on these undisputed facts, the Board finds that the HHSC committed prohibited practices by its wilfull refusal to negotiate in violation of HRS § 89-13(a)(5).

Moreover, the Board finds that HHSC's position overlooks the duty to consult established in HRS § 89-9(c) providing that, "Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer…, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input…prior to effecting changes in any major policy affecting employee relations. (Emphasis added) HRS § 89-9(c) requiring consultation with the union on certain matters affecting employee relations is applicable to all major, substantial and critical matters other than those requiring negotiation, which affect employee relations. Hawaii Firefighters Ass'n., Local 1463, IAFF, AFL-CIO v. State of Hawaii, Board Case No. CE-11-27, Decision No. 74, 1 HPERB 650, 657 (1977), *aff'd* Hawaii Firefighters Ass'n., Local 1463 v. HPERB, Civil No. 50767 (1978) (HFFA).

The Board is compelled to agree with UPW that even if the prohibition against tobacco and electronic smoking is not a negotiable subject, there is a distinct and separate claim pursuant to HRS § 89-9(c). The HHSC does not dispute that the duty to consult applies in this case based on its assertion in support of its ripeness defense that it has offered to consult. Further, the Board finds that HHSC is unilaterally without negotiation seeking to alter a smoking policy providing for designated smoking areas, which has previously been a subject of negotiation and/or consultation. Accordingly, this conduct constitutes "changes in a major policy affecting employee relations[]" requiring the employer "to make every reasonable effort to consult with the exclusive representatives and consider their input…prior to effecting [such] changes Hawaii Nurses Ass'n.

v. Ariyoshi, Board Case No. CE-09-41, Decision No. 104, 2 HPERB 218, 224-26 (1979); State of Hawaii Organization of Police Officers v. Kauai Police Department, County of Kauai, Board Case No. CE-12-143, Decision No. 327, 5 HLRB 104, 112 (1992).

However, despite HHSC's representation regarding its offer to consult, the Board determines based on the undisputed facts and the principles, standards, and requirements regarding consultation set forth below that the duty to consult has not been met in this case and that the failure to do so was wilfull. "Section 89-9(c), HRS, requires that consultation be initiated by the employer. It is not incumbent upon the exclusive bargaining representative but upon the employer to seek and request consultation." Sage v. Bd. of Regents, Univ. of Hawaii, Board Case No. CE-07-8, Decision No. 54, 1 HPERB 505, 511 (1974). "Consultation ordinarily requires more than mere notice. Consultation contemplates asking for (and listening to) the advice or opinion of the union; it contemplates, short of requiring negotiation, deliberating together and comparing views." Hupy v, Ariyoshi, Board Case No. CE-09-23, Decision No. 77, 1 HPERB 689, 696 (1977). In Hawaii Gov't Emp. Ass'n. v. Lingle, Board Case No. CE-01-569a, Decision No. 468, 7 HLRB 38, 43 (2007), the Board noted that the standard of review on questions of consultation was expanded by Decision No. 394, Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO, VI HLRB 1, (1978), stating:

> In that decision the Board adopted as applicable to HRS § 89-9(c), the test crafted by Arbitrator Ted T. Tsukiyama in the Arbitration between the *Department of Water, County of Kauai and United Public Workers, AFSCME, Local 646., AFL-CIO*, (9/11/87). Arbitrator Tsukiyama stated:
>
> > From the foregoing, the Arbitrator infers the requirement upon management "to consult" includes: (1) notice to the union, (2) of proposed personnel practices and policies of a major, substantial and critical nature, other than those requiring negotiations, (3) in reasonable completeness and detail, (4) requesting the opinion, advice or input of the Union thereto, (5) listening to, comparing views and deliberating together thereon (i.e., "meaningful dialog"), and (6) without requirement of either side to concede or agree on any differences or conflicts arising or resulting from such consultation.

In this case, despite the obligation to consult resting on HHSC as the employer, there is no dispute that UPW, rather than HHSC, initiated negotiations on July 18, 2016 by its demand for negotiation and the transmittal of the seven proposals. Instead of providing a written response by the July 21, 2016 deadline to the demand for negotiation and the seven proposals, Park emailed Uwaine requesting a meeting. HHSC did not transmit their Draft Policy 0024A to UPW until August 16, 2016. Draft Policy 0024A was not only "preliminary," needing review by the HHSC Regional

CEO's, the statutorily created policy committee, and the HHSC Corporate Board of Directors for final approval, but also failed to specifically address the disciplinary aspects. Nevertheless, despite the preliminary nature of the draft policy and the lack of specificity regarding any disciplinary process or action, HHSC made clear in its August 16, 2016 letter that "employees are on notice that all HHSC facilities are no smoking facilities," and that "an employee may be subject to disciplinary action in accordance with existing policies." As discussed above, this proposed draft policy was a "major policy affecting employee relations" but was lacking in "reasonable completeness and detail." Finally, on August 26, 2016, despite its admissions that a policy and procedure were still in progress, HHSC informed the employees by signage that, "Tobacco and electronic device use is prohibited. In accordance with Act 25." The Board finds based on the foregoing standards that the undisputed facts establishing that HHSC failed to initiate the consultation process; failed to provide "reasonable completeness and detail" on a "major policy affecting employee relations" which HHSC maintains is not a subject of negotiation; and failed to ask, listen to, and deliberate and compare views with UPW (meaningful dialogue) prior to informing the employees of the prohibition against tobacco and electronic device use demonstrate that HHSC failed to engage in meaningful consultation in derogation of its duty. Further, the Board finds that this failure was wilfull based on the fact that despite the duty to consult resting on HHSC as the employer and its obvious knowledge of the duty as evidenced by its belated offer to consult following the UPW's demand for negotiations, HHSC, in derogation of its duty to consult, nevertheless not only failed to meaningfully consult with UPW but then effected the change by notifying the employees of the prohibition of the use of tobacco and electronic devices and notifying the Union that employees may be subject to disciplinary action in accordance with existing policies. HFFA, 1 HPERB at 658-59. Accordingly, the Board determines that HHSC's wilfull failure to consult prior to effectuating the change in the smoking policy violates HRS § 89-9(c), 89-13(a)(5) and (7).

III. ORDER

For the reasons set forth above, the Board hereby denies HHSC's Motion to Dismiss; dismisses all of the constitutional allegations in the Complaint; and grants in part and denies in part UPW's MSJ. The Board further orders that:

1. HHSC cease and desist from engaging in prohibited practices and commence consultation or negotiation regarding the tobacco and electronic device use and other effects of the smoking policies in dispute.

2. Upon submission of adequate proof by the UPW, the Board may order further affirmative relief, including attorneys' fees in accordance with HRS § 377-9; and

3. Respondent shall immediately post copies of this Order on its website and in conspicuous places at the work sites where employees of Units 1 and 10 assemble, and leave such copies posted for a period of 60 days from the initial date of posting.

This case is closed.

DATED: Honolulu, Hawaii, October 28, 2016.

HAWAII LABOR RELATIONS BOARD

SESNITA A.D. MOEPONO, Member

J.N. MUSTO, Member

DISSENT OF KERRY M. KOMATSUBARA

I dissent from Order No. 3199 (Majority Decision) issued by a majority (Majority) of the members of the Hawaii Labor Relations Board (Board). The Majority (1) granted, in part, and denied, in part,[1] Complainant United Public Workers, AFSCME, Local 646, AFL-CIO's (Union) Motion for Summary Judgment filed on August 24, 2016 (Union SJ Motion),[2] and (2) denied Respondent Hawaii Healthcare Systems Corporation's (HHSC) Motion to Dismiss Unfair Labor Practice Complaint Filed July 25, 2016 (HHSC Motion to Dismiss).[3]

In the Union SJ Motion, the Union seeks "a cease and desist order prohibiting the use of tobacco products or electronic smoking device on the premises of all facilities operated by HHSC."[4] Although the Union contends that the focus of the Union SJ Motion is on the implementation (not the ban) of the legislatively mandated prohibition of smoking on HHSC

[1] Order No. 3199 dismissed all of the constitutional allegations in the Complaint filed in this case.

[2] Attached to the Union SJ Motion were the Declaration of Dayton M. Nakanelua (Nakanelua Declaration) and the Memorandum in Support of Motion (Union Memorandum).

[3] The HHSC Motion to Dismiss was filed on August 22, 2016, and attached thereto were the Declaration of Clifford Caesar (Caesar Declaration) and the Memorandum in Support of Motion (HHSC Memorandum).

[4] Union SJ Motion at p. 2.

campuses,[5] the Union does not dispute that the relief sought in this action is to "stop" the smoking ban and permit employees to smoke on HHSC healthcare campuses until HHSC receives the mutual consent of the Union regarding the specific terms of implementation of the smoking ban.[6]

The questions before the Board are:

1. After the passage of Act 25, are HHSC employees allowed to smoke on any HHSC healthcare campus?

2. After the passage of Act 25, is HHSC required to negotiate with the Union the right of its members to smoke on any HHSC healthcare campus?

3. After the passage of Act 25, is HHSC required to negotiate with the Union any other matter related to or touching upon smoking (e.g., the implementation of Act 25) on any HHSC healthcare campus?[7]

My answer to each of the foregoing questions would be "No."

The Majority's analysis of this case ignores the foregoing questions in denying the HHSC Motion to Dismiss and partially granting the Union SJ Motion. I dissent for the following reasons:

1. <u>The Constitutionality of Act 25 Is Relevant to All Claims and Defenses</u>.

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[5] The Union's counsel explained in oral argument (Transcript at page 33, lines 12 through 20) as follows:

"This is not to suggest that you sit here and reverse a mandate by a legislature about which there is no discretion, but **our request for bargaining is not over the question of the mandate**, our request for bargaining, as we will discuss more fully in our motion for summary judgment, **is over the effect, and the implementation**, and the policies, and the manner in which employees are to be treated **in light of the statutory mandate**." (emphasis added)

[6] *See* Exhibit 56 which is attached to the Nakanelua Declaration. Exhibit 56 is a July 12, 2016 letter from Nakanelua to Linda Rosen (CEO of HHSC) wherein he states that the Union requests that HHSC "**cease and desist from changing existing conditions of work** authorizing designated smoking areas and **permitting employees . . . to smoke in authorized public places without restrictions**." (emphasis added) Thus, Exhibit 56 seems to indicate that the Union's effort here is to maintain the status quo and to temporarily ban the smoking ban.

[7] The Union argues (*see*, Union Memorandum at pages 34 - 44) that Act 25 has changed the "working conditions" for Units 1 and 10 workers at HHSC's healthcare facilities. The Union cites Sections 18 and 25 of the Unit 1 and Unit 10 collective bargaining agreements (CBAs) as grounds for re-negotiation apparently because HHSC workers may no longer be able to smoke during their rest and/or lunch periods because these periods may be too short in time to allow smokers to leave the HHSC campus, smoke off campus, and then return to campus to work. Although it is unclear, it seems that the Union seeks the elimination of some of the rest and/or lunch periods for **all** workers (smokers and non-smokers) pursuant to Section 18 of the CBAs, and presumably seeks in exchange a shorter work day pursuant to Section 25 of the CBAs. However, and as explained hereinbelow, any attempt by the Union to change the rest and/or lunch periods and the hours of work for smokers and non-smokers because of Act 25 is not subject to mandatory bargaining.

HHSC's primary defense is that Act 25 bans smoking on all of its campuses.[8] Thus, unless the Union can show that Act 25 is unconstitutional or otherwise defective, neither the Union nor the Board can mandate that smoking be allowed on any HHSC healthcare campus. Whether viewed as a matter of mandatory negotiations, conditions of work, prior arbitration decisions or otherwise, the Legislature banned smoking in State-run facilities, including all HHSC healthcare campuses. Thus, the Board cannot, in derogation of Act 25, order HHSC to allow smoking on its campuses or to negotiate the right of Union members to smoke on the healthcare campuses.

HHSC has, throughout its opposition papers (which include the declarations and exhibits attached to the HHSC Motion to Dismiss[9]), taken the position that the passage and adoption of Act 25 controls. The Union has not disputed that Act 25 bans smoking on all HHSC healthcare campuses and that Act 25 took effect on April 26, 2016. Thus, unless the Union can show that Act 25 is unconstitutional, which it posits as the basis for ignoring Act 25, HHSC is obligated to ban smoking.

Under these circumstances, Act 25's constitutionality clearly is relevant to *both* the Union's *affirmative claims* and HHSC's *affirmative defenses*. While the Majority focuses on the Union's affirmative claims in denying the HHSC Motion to Dismiss and granting the Union SJ Motion, it ignores HHSC's *affirmative defenses* based on Act 25.

For example, HHSC argues that it is not required to negotiate with the Union over the smoking ban because of Act 25.[10] Clearly, Act 25 bans smoking on HHSC healthcare campuses and requires, for example, the posting of signs banning smoking. Unless the Union can show that Act 25 is unconstitutional, HHSC is obligated to impose the ban – that is the crux of this case. Thus, whether or not Act 25 is constitutional is relevant to all claims and defenses. Thus, the Majority cannot legitimately rule on both motions by limiting the effect of the unconstitutionality issue to the Union's affirmative claims. This ignores the Union's failure to meet its burden of proving in summary fashion that Act 25 is unconstitutional and is not an appropriate affirmative defense for HHSC.[11]

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[8] *See*, (i) Respondent Hawaii Health Systems Corporation's Answer to Unfair Labor Practice Complaint Filed July 25, 2016, Second Defense on page 14, (ii) Respondent Hawaii Health Systems Corporation's Motion to Dismiss Unfair Labor Practice Complaint Filed July 25, 2016, together with the Memorandum in Support of Motion, and (iii) Respondent Hawaii Health Systems Corporation's Opposition to UPW's Motion for Summary Judgment Filed August 22, 2016. HHSC's primary affirmative defense is the passage and effect of Act 25.

[9] In opposition to the Union's Motion for Summary Judgment, HHSC incorporated by reference the HHSC Motion to Dismiss, including but not limited to the arguments therein. *See*, Respondent Hawaii Health Systems Corporation's Opposition to UPW's Motion for Summary Judgment Filed August 22, 2016, at pages 2 - 5.

[10] HHSC denied the Union's allegations in Paragraph 40 of its Prohibited Practice Complaint filed in this case. *See*, First Defense, Paragraph 7.qq of Respondent Hawaii Health Systems Corporation's Answer to Unfair Labor Practice Complaint Filed July 25, 2016.

[11] By citing Act 25 and its smoking ban, and providing the Board with the Hunter Award (which is defined hereinbelow), HHSC provided sufficient facts to establish the existence of it affirmative defense (all HHSC must do is raise an issue of material fact, which it did in this case). HHSC, in opposing the Union SJ Motion, does not need to show that it would prevail – it is the Union that must show that it is entitled to judgment, and must overcome any asserted affirmative defense.

2. The Union May Be Precluded from Re-Litigating the Effect of Act 25.

HHSC's prior attempts to ban smoking on its healthcare campuses were the subject of grievance proceedings, one of which was *In the Matter of: United Public Workers, AFSCME, Local 646, AFL-CIO, Union, v. State of Hawaii, Hawaii Health Systems Corporation, Employer*, DPR No. 14-0029-A, Grievance: No Smoking Ban, JS-13-02, AN-13-03 (Smoking Ban Arbitration). During the pendency of the Smoking Ban Arbitration, the Legislature passed SB 305 SD1 HD1, and on April 26, 2016, Governor David Ige signed it into law as Act 25.

After the passage of Act 25, Arbitrator Hunter ruled, on motions for summary disposition, that he had no authority to order HHSC to allow smoking on its healthcare campuses after the passage and adoption of Act 25.[12] In effect, Arbitrator Hunter reached a conclusion that is contrary to the Majority's decision in this case.

In the Hunter Award, Arbitrator Hunter found, among other things, that: (i) his jurisdiction as arbitrator was limited to the pending grievances regarding the Big Island and Maui Memorial smoking policies,[13] and (ii) in addressing his prior order denying summary disposition, Hunter stated that:

> "Even though the Arbitrator determined in past orders that there are genuine issues of material fact that are appropriate for a full evidentiary hearing, Act 25 has removed the Arbitrator's jurisdiction in deciding these issues**. Act 25 mandates a smoking ban at all HHSC facilities and that the smoking prohibitions are not subject to collective bargaining.** The Arbitrator, even with broad discretion to fashion just and appropriate remedies, there is still no authority to issue a remedy that contradicts Act 25. In other words, even if the Arbitrator could find that HHSC violated the CBA in implementing smoking bans prior to the enactment of Act 25, **there is no remedy available for the Union**. There is no evidence of injury by employees and the **Arbitrator cannot order HHSC to provide smoking designated areas in contradiction of Act 25**."[14] (emphasis added)

The Union SJ Motion cites many Hawaii arbitration cases that protected the rights

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The Union argues that this Board does not have the authority to determine the constitutionality of Act 25 and that only the circuit court has the authority to determine this question. This may be so and therefore this Board should allow this question to move forward to the circuit court for determination and this Board should wait for the circuit court's ruling before making any determination on the question of any alleged prohibited practice violation – which is exactly what is being suggested by HHSC.

[12] *See*, Arbitrator's Decision Re UPW's Motion to Promote the Fair & Expeditious Resolution of the Controversy and to Protect the Effectiveness of Arbitration dated August 17, 2016, and which is Exhibit "C" attached to the Declaration of Clifford Caesar and is a part of the HHSC Motion to Dismiss (Hunter Award).

[13] Hunter Award at page 12.

[14] Hunter Award at pages 12 – 13.

of Unit 1 and Unit 10 smokers as a "condition of employment" pursuant to past practice and custom under Sections 25 and 18 of the collective bargaining agreements. However, all of the cited cases pre-date Act 25 and involved the question as to where on HHSC campuses would smoking be allowed (which was not in violation of State law since the State law at that time allowed smoking in certain designated areas). Thus, in the pre-Act 25 arbitration cases cited, HHSC had the discretion to determine where on the HHSC campus smoking areas would be designated. Unlike those cases, Act 25 takes away this discretionary authority from HHSC since smoking became totally banned under the legislative mandate. Thus, in the only post-Act 25 arbitration case cited by the parties, which is the Hunter Award, the smoking ban was upheld and Arbitrator Hunter refused to grant the Union its requested remedy for a provisional order requiring HHSC to not implement Act 25.

The Union made many of the same arguments to Arbitrator Hunter that it made to the Board in support of the Union SJ Motion and in opposition to the HHSC Motion to Dismiss, both factual and legal.[15] The Union lost those arguments before Arbitrator Hunter and now seeks a different outcome from this Board. While Arbitrator Hunter attempted to limit the effect of his award, the preclusive effect of the Hunter Award is a matter of law. Thus, whether or not both HHSC and the Union should be bound by the Hunter Award is a matter that should be further address by the Board, but in any event and at the very least, the essence of the ruling in the Hunter Award should not be overturned in summary fashion by the Board in this case.

Furthermore, the Hunter Award should provide guidance to the Majority as to how Act 25 fits into the issue of smoking bans and the authority that any adjudicatory body, including the Board, has. At the very least, most, if not all, arbitration awards regarding the right to smoke on healthcare campuses as a condition of work, are rendered irrelevant by the passage of Act 25 and by the Hunter Award.

Given the foregoing, it is my position that the issues raised by the Hunter Award should be further explored by the Board, and not decided summarily.

3. Mandatory vs. Permissive Negotiations.

The Union argues that the implementation of the smoking ban or other matters related to smoking should be the subject of mandatory negotiations.[16]

Act 25 unambiguously bans smoking on healthcare campuses and requires the

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[15] As stated in the Hunter Award, the Union requested in the Smoking Ban Arbitration "that a provisional order be entered to promote the fair and expeditious resolution of the controversy and to protect the effectiveness of arbitration by **requiring HHSC to . . . not implement Act 25, until the requirements of consultation** on a new policy has been fully complied with as required by Section 89-9 (c)." (emphasis added) Arbitrator Hunter, after taking all of the arguments raised by the Union into consideration, ruled against the Union and denied the Union's request to ban the smoking ban mandated by Act 25.

[16] *See*, Union Memorandum at page 34 wherein the Union argues that "HHSC and Rosen have breached their duty to bargain in good faith with the union over the effects and the adoption of policies to **implement** Act 25, 2016 SLH." (emphasis added)

posting of no smoking signs. Although the Majority seems to base its decision on HHSC's failure or refusal to negotiate and/or consult on the implementation of the smoking ban, they do not first determine whether there is a need to negotiate anything with respect to the implementation of the smoking ban imposed by Act 25. What is there to negotiate over the implementation of the smoking ban? My response would be: Nothing.

Lost in the Majority Decision is the bottom line that smoking is banned. If HHSC did nothing other than to post no smoking signs, then the question is how the ban would be enforced. In reading the Unit 1 and Unit 10 CBAs, there are provisions regarding discipline to address situations where an employee violates the laws of the State of Hawaii.[17] Act 25 is one of the laws of the State which apply to all HHSC healthcare campuses.[18] Presumably, if an employee were "caught" smoking on campus, then he/she would be reported and the normal disciplinary provisions of the CBAs would be followed. Thus, again, what is to be negotiated?

If the Union is claiming that the rest and lunch periods must be negotiated, I question whether this is so? The passage of Act 25 does not take away, shorten or affect any worker's right to have his/her rest and lunch periods. These workers can smoke during their rest and lunch periods, but they cannot smoke on the HHSC healthcare campuses. Nothing in the Units 1 and Unit 10 CBA provisions regarding rest and lunch periods suggest that these periods are for the purpose of smoking. To the contrary, it is undisputed that the rest and lunch periods are for the benefit of all workers, including workers that do not smoke.

Furthermore, HRS Section 89-9(d) preserves certain management rights for HHSC which are not the subject of negotiations. As more fully addressed by the Board in *Hawaii State Teachers Association v. Board of Education, et al.*, Case no. Ce-05-667, Decision 484 (2016) (Decision 484), based on the Hawaii Supreme Court's decision in *United Pub. Workers, Local 646 v. Hanneman*, 106 Hawaii 359, 364-65 (2007), and taking into account the 2007 amendments to Section 89-(d), the Board recognized that unless the subject to a specific existing provision of the collective bargaining agreement is being changed, matters which are management rights are not the subject of mandatory negotiations. Permissive negotiations are allowed but neither party is required to engage in such negotiations.

Here, Act 25 banned smoking and stated that pursuant to HRS Section 89-9(d), negotiations over the smoking ban are not required. The Union argues that mandatory negotiations are required. My question is: Mandatory negotiations over what?

HHSC cannot negotiate with the Union to allow smoking on its healthcare campuses – it is banned and HHSC has no authority or discretion to disregard the smoking ban. The rest and lunch periods provided in the CBAs do not address either the topic of smoking or the

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[17] *See*, Article 11 of both the Unit 1 and Unit 10 CBAs. The CBAs are attached as Exhibits E and F to the Declaration of Clifford Caesar which is attached to the HHSC's Opposition to UPW's Motion for Summary Judgment Filed August 222, 2016.

[18] Act 25 amended HRS Chapter 323F, and not HRS Chapter 89.

activities that an employee may engage in during such periods.[19] Thus, it is clear that an employee, during his/her rest or lunch periods may smoke off campus, but not on campus.

With respect to the Union's arguments concerning discipline, Section 89-9(d) expressly includes discipline as one of the "management rights" that the parties are prohibited from negotiating.[20] Furthermore, to the extent the Union may argue it is seeking to negotiate the *procedures and criteria* on discipline, Section 89-9(d) expressly provides that such procedures and criteria are *permissive* subjects of bargaining[21], and thus the employer cannot be forced to negotiate such permissive subjects against its will.

It also must be recognized that the Union has not established in these summary judgment proceedings that Act 25 requires a change to the rest and lunch periods for workers, including non-smokers, and there has been no showing by the Union that the smoking ban prevents a worker from enjoying his/her rest and lunch periods under the current CBAs.[22] If the Union is seeking to negotiate the duration or frequency of the rest and lunch periods in the CBAs in exchange for a shortening of the hours of work, this desired change should be pursued as mid-term bargaining under Section 89-10(c), HRS. Under Section 89-10(c), mid-term bargaining is only allowed pursuant to the CBAs "provisions for reopening during the term of a collective bargaining agreement." In this case, Section 66.01 of the CBAs provide that "[n]egotiations shall **not be reopened** for the duration of this Agreement except by mutual consent." (Emphasis added) As such, the topic of changing the duration or frequency of the rest and lunch periods requires the mutual consent of HHSC to mid-term bargaining, which in this case, HHSC has not agreed to do so.

5. No Willfulness.

Although addressed by the Majority, willfulness has not been proven. It is a factual issue involving the intention of the parties and the circumstances of each case.

Here, the parties were litigating through the grievance process the issue of the workers' right to smoke on HHSC healthcare campuses. At the urging of HHSC, the Legislature passed, and the Governor signed into law Act 25. Act 25, on its face, banned smoking and did not

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[19] I do not believe that the Union has taken the position that the question of what a worker may or may not do (including whether the worker must remain on the worksite or may leave the worksite during the "break") during his/her rest and lunch periods is a negotiable topic.

[20] Section 89-9(d) provides in relevant part that "[t]he employer and the exclusive representative shall not agree to any proposal . . . which would interfere with the rights and obligations of a public employer to . . . "[s]uspend, demote, discharge, or take other disciplinary action against employees for proper cause[.]"

[21] Section 89-9(d) provides in relevant part that "[t]his subsection . . . shall not preclude negotiations over the procedures and criteria on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions **as a permissive subject of bargaining** during collective bargaining negotiations or negotiations over a memorandum of agreement, memorandum of understanding, or other supplemental agreement." (emphasis added)

[22] See the fourth paragraph of the discussion in #3 herein above.

require negotiations over the issue of smoking with the Union. Further, Arbitrator Hunter issued the Hunter Award which denied the Union's motion and granted HHSC's motion for summary disposition.

This Board has held in the past that compliance with law should not and cannot be the basis of a prohibited practice.[23] The Legislature has made the policy decision which is stated in Section 1 of Act 25, and which states as follows:

> "The legislature finds that facilities within the Hawaii health systems corporation are committed to providing quality healthcare for the people of Hawaii and taking steps to lessen the occurrence of preventable disease. Consistent with this commitment, the corporation must not permit the use of tobacco and other potentially dangerous substances on the campuses of its health facilities. Allowing such use would not only expose vulnerable patients, **employees,** and visitors to the perils of harmful substances, but would also demonstrate a shorting in the corporation's goal of reducing the occurrence of preventable disease.
>
> "The purpose of this Act is to protect, patients, **employees,** and all other visitors to the health facilities within the Hawaii health systems corporation from exposure to **second-hand smoke** and other potentially harmful substances as well as to promote positive health practices by prohibiting any person from using tobacco products or electronic smoking devices, often referred to as e-cigarettes, on the premises of any Hawaii health systems corporation facility." (emphasis added)

Clearly the Legislature contemplated the impacts of Act 25 on all employees of HHSC, including workers that smoke and don't smoke,[24] and the Legislature's ultimate decision

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[23] In *Hawaii Government Employees, AFSCME, Local 152, AFL-CIO v. Linda Lingle, et al.*, Board Case Nos. CE-02-632(a-e), Order No. 2428 (2007) (Order 2428), the Board dismissed a portion of a prohibited practice complaint to the extent the smoking ban was in areas of the Hawaii State Hospital that the Legislature mandated must be smoke-free. Although the Board did not dismiss the claims in the prohibited practice complaint involving areas that were not mandated to be smoke-free, it is clear that the logic in Order 2428 would require this Board to dismiss the Union's request in the Union SJ Motion for a "cease and desist" order to ban the smoking ban at all HHSC campuses.

Similarly, in *Hawaii State Teachers Association v. Board of Education, et al.*, Board Case No. CE-05-672, Order No. 2541 (2008), the Board found no "willfulness" on the part of the DOE-Employer where its actions were in reliance upon a prior Board order (Board Order No. 2509). Thus, the Board recognizes the flaw in finding fault with an employer's actions when such actions are being performed to comply with an existing law or legal order.

[24] I will not address in my dissent whether the Union's action to oppose the smoking ban may be contrary to the interests of Union members that do not smoke and are opposed to any action that would stall HHSC's compliance with Act 25. As in most situations, the interests of some are compromised for the interests others, and I am not here to pass judgment as to the Union's choice. However, I note that the Legislature has made the policy decision to ban smoking at all HHSC campuses to protect the health and safety of **all** patients**, employees** and visitors to HHSC facilities and it should, at least, be difficult if not impossible for the Board to find HHSC's action to adhere to the smoking ban in Act 25 a prohibited practice under Chapter 89. Thus, clearly the Union's request for a cease and desist order, even if only temporarily halting the full implementation of Act 25, confronts and

was to ban smoking on all HHSC healthcare campuses in the interest of public health and safety. Although the Union can debatable whether this policy decision is right or wrong, it is a "far stretch" to claim that HHSA's compliance with a public health and safety law is a willful act that is a prohibited practice under Hawaii's collective bargaining law.

6. The Majority Decision is unclear.

The Majority Decision is unclear. It is unclear because (i) the Majority remains silent on the Union's request for a cease and desist order on the smoking ban, and (ii) the Majority fails to decide the question whether HHSC has a duty to negotiate or consult with the Union regarding the implementation of Act 25.

Regarding the first point of ambiguity, I believe the failure to address the Union's specific request for a cease and desist order to "stop" the smoking ban is because the Majority fails to recognize that this is the essence of this entire case.[25]

Regarding the second point of ambiguity, I note that the evidence presented regarding the past practice between HHSC and the Union shows that the parties did not follow a consistent approach in addressing the topic of smoking in designated areas in HHSC healthcare campuses. For example, although there is evidence that previous discussions regarding the designation of smoking areas for certain HHSC facilities were pursuant to negotiations, there is also evidence that the Union handled discussions regarding the designated smoking areas for Kula Hospital by consultation and not by negotiation.[26] Interestingly, in the only arbitration case involving the topic of smoking at an HHSC facility after smoking was totally banned by State law

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contradicts the Legislature's policy decision to ban smoking to protect the health and safety of all workers (including non-smokers) on HHSC healthcare campuses. The Majority Decision does not address and decide whether the question of the Union's request for a cease and desist order to temporarily halt the implementation of the smoking ban is granted or denied.

[25] It also could be argued by HHSC that he relief sought by the Union in this case should be analyzed pursuant to the requirements for injunctive relief since the Union seeks a "cease and desist" order against the smoking ban. The standard for a preliminary injunction is as follows:

> "'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 issues of a temporary injunction; and (3) whether the public interest supports granting an injunction.' (Cites omitted.) '[T]he more the balance of irreparable damage favors issuance of the injunction, the less the party seeking the injunction has to show the likelihood of success on the merits.' (Cite omitted)" *Nuuanu Valley Ass'n v. City and County of Honolulu*, 119 Hawaii 90, 106 (2008).

In this case, it cannot be argued that the Union presented any evidence or argument that it met the requirements for injunctive relief. First, there was no showing by the Union of irreparable harm, and there was no discussion or showing by the Union that the public interest supports the granting of injunctive relief.

[26] *See*, Union Exhibit 34-6 which is attached to the Nakanelua Declaration. Nakanelua writes to Mr. Wes Lo of HHSC that "[s]ince your **consultation** request, the Union has visited the new location of the designated smoking area and we agree to the relocation." (emphasis added)

(i.e., Act 25), the Union sought to discuss the topic through consultation and not negotiation.[27] *See*, Footnote 14 hereinabove.

For the reasons stated above, I disagree with the Majority and I would have denied the Union SJ Motion.

KERRY M. KOMATSUBARA, Chair

Copies to:

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[i] HRS § 89-2 governing definitions, states 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, and other terms and conditions of employment of public employees.
> ***
> "Exclusive representative" means the employee organization certified by the board under section 89-9 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

[27] At this point in this case, it is not clear as to who contacted whom and who refused to discuss the effect of Act 25. For example, HHSC asserts that on July 21, 2016, it proposed to the Union several dates and times to "meet to discuss the HHSC smoking ban." (*See*, Exhibit "B" attached to the Caesar Declaration.) HHSC asserts that the Union never responded. (*See*, Caesar Declaration at ¶ 4) Also, in reviewing HHSC's July 15, 2016 response to Nakanelua's July 12, 2016 request for information and negotiations, HHSC took the position that with respect to the smoking policy, it was willing to "share with UPW its intended policy and implementation plan to be in compliance with Act 25 [sic] (2016 [sic] SLH) in the near future. HHSC will attempt to reasonably alleviate and address legitimate concerns that the UPW may have that are directly related to the Act 25 [sic] policy, to the extent permitted by the amendments to HRS Section 323F." (*See*, Exhibit 57 to the Nakanelua Declaration.) Thus, at the very least, there seems to be questions of fact as to whether HHSC did in fact attempt to consult or at least discuss with the Union the implementation of Act 25.

[ii] HRS § 89-6(a) governing appropriate bargaining units provides in relevant part:

> (a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:
>
> (1) Nonsupervisory employees in blue collar positions;
>
> ***
>
> (10) Institutional, health, and correctional workers[.]

[iii] HRS § 89-2, governing definitions, provides in relevant part:

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

[iv] Linda Rosen is named as a Respondent in the Complaint. However, on the Complaint form, Linda Rosen is designated as the "personal representative." The definition of "[e]mployer" or "public employer," includes HHSC and "any individual who represents one of these employers or acts in their interest in dealing with public employees." Accordingly, because Linda Rosen is listed in her "official capacity" as the HHSC chief executive officer, the Board deems that the "Respondent" in this case is HHSC. "HRS § 98-13(a) permits prohibited practice complaints to be brought against public employers and designated representatives of public employers. However, when public officials are named in their official capacities, the suit is not different against the government itself." Stucky v. Takeno, Board Case No. CU-05-283, Order No. 2834, at *13 (2012), *citing* Will v. Michigan Dept. Of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304 (1989).

[v] HRS § 89-5(i) states in relevant part:

> (i) In addition to the powers and functions provided in other sections of this chapter, the board shall:
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> ***
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> (4) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper;
>
> ***
>
> (10) Executive all of its responsibilities in a timely manner so as to facilitate and expedite the resolution of issues before it[.]

[vi] In HSTA, 126 Hawaii at 322, 271 P.3d at 617, based on its reasoning regarding the frustration of legislative purpose set forth in HGEA, the Court further extended its HGEA ruling to apply even to a situation where the dispute ultimately relates to a prohibited practice but the complaint requests relief only on constitutional grounds without references to statutory issues over which the HLRB has exclusive jurisdiction. In Abercrombie, 131 Hawaii at 151-52, 315 P.3d at 778-79, the Court extended its HGEA ruling to declaratory ruling petitions, reasoning that the legislature has delegated to the Board exclusive original jurisdiction over prohibited practice controversies and the Board has jurisdiction to declare whether a particular action presented in a petition may constitute a prohibited practice because of its authority to take action regarding prohibited practices. In Lee, 125 Hawaii at 323, 260 P.3d at 1141, the Court held that the Board has exclusive original jurisdiction over a hybrid action brought by a public employee against the union for breach of duty of fair representation and the employer for breach of the collective bargaining agreement by wrongfully termination, and the court properly dismissed the lawsuit for lack of jurisdiction.

[vii] HAR § 12-42-8 (g)(3)(C)(iii) states:

(3) Motions:
(C) All motions other than those made during a hearing shall be subject to the following:
***
(iii) Answering affidavits, if any, shall be served on all parties and the original and five copies, with certificate of service on all parties, shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise.
***