DSTATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

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| In the Matter of<br><br>DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, State of Hawaii,<br><br>Complainant,<br><br>and<br><br>HAWAII GOVERNMENT EMPLOYEES ASSOCITION, AFSCME, LOCAL 152, AFL-CIO,<br><br>Respondent. | CASE NO(S). 19-CU-09-372<br><br>ORDER NO. 3493<br><br>PRETRIAL ORDER AND NOTICES;<br><br>(1) NOTICE TO RESPONDENT(S) OF PROHIBITED PRACTICE COMPLAINT;<br>(2) NOTICE OF FILING REQUIREMENTS;<br>(3) NOTICE OF APPEARANCE AND ACCESSIBILITY OR ACCOMMODATIONS;<br>(4) NOTICE OF PREHEARING CONFERENCE;<br>(5) NOTICE OF PRETRIAL CONFERENCE;<br>(6) NOTICE OF HEARING ON THE MERITS; AND<br>(7) SCHEDULE OF HEARINGS, CONFERENCES, AND DEADLINES |

PRETRIAL ORDER AND NOTICES;
(1) NOTICE TO RESPONDENT(S) OF PROHIBITED PRACTICE COMPLAINT; (2) NOTICE OF FILING REQUIREMENTS;
(3) NOTICE OF APPEARANCE AND ACCESSIBILITY OR ACCOMMODATIONS; (4) NOTICE OF PREHEARING CONFERENCE;
(5) NOTICE OF PRETRIAL CONFERENCE;
(6) NOTICE OF HEARING ON THE MERITS; AND
(7) SCHEDULE OF HEARINGS, CONFERENCES, AND DEADLINES

## PRETRIAL ORDER AND NOTICES

THE PARTIES ARE HEREBY NOTIFIED AND ORDERED TO COMPLY WITH THIS PRETRIAL ORDER AND NOTICES. The Hawai‘i Labor Relations Board (Board) may impose appropriate monetary or other sanctions upon parties or attorneys who do not comply with this Pretrial Order and Notice if the parties or attorneys have not shown good cause for failure to comply or a good faith effort to comply.

This document shall control the course of proceedings and may not be amended except by the Board through an Order or Notice, by a written request by a party with written consent of all the parties (stipulation), or by an order granting a motion filed with the Board. The use of singular, plural, masculine, feminine, and neuter pronouns shall include the others as the context may require.

### (1) NOTICE TO RESPONDENT(S) OF A PROHIBITED PRACTICE COMPLAINT

The attached prohibited practice complaint (Complaint) was filed with the Board by the above-named Complainant(s) on: **April 25, 2019**.

PURSUANT TO HAWAI‘I REVISED STATUTES (HRS) § 377-9(b) AND HAWAI‘I ADMINISTRATIVE RULES (HAR) § 12-42-42: NOTICE HEREBY GIVEN TO RESPONDENT(S) that the above-named COMPLAINANT(S) filed a prohibited practice Complaint with the Board, a copy of which is attached, alleging that you have engaged in or are engaging in prohibited practices in violation of HRS Chapter 89.

YOU ARE DIRECTED to file a written answer to the Complaint within ten (10) days after service of the Complaint. One copy of the answer shall be served on each party, and the original with certificate of service on all parties shall be filed with the Board no later than 4:30 p.m. on the tenth day after service of the Complaint. If you fail to timely file and serve an answer, such failure shall constitute an admission of the material facts alleged in the Complaint and a waiver of hearing. (HAR § 12-42-45(g))

### (2) NOTICE OF FILING REQUIREMENTS

1) **Electronic Filing:**

**The Board provides to all parties and encourages the use of an electronic filing service through File & ServeXpress.** There is no charge to the parties for use of this electronic filing service.

To register, a party is required to complete and submit the Board Agreement to E-File (Form HLRB-25), as amended, which is available at http://labor.hawaii.gov/hlrb/forms/.

Questions regarding the Board's electronic filing system should be directed to the Board's staff at (808) 586-8616.

**2) Filing in Person or by Mail**

A party may mail or file in person an original of any document at the Board's office at 830 Punchbowl Street, Room 545, Honolulu, Hawai'i, 96813. The Board's office is open on the weekdays (excluding state holidays) between 7:45 a.m. to 4:30 p.m.; the office may occasionally be closed from 12:00 p.m. to 1:00 p.m. The date of receipt by the Board shall be deemed the date of filing.

**3) Filing Requirements Regarding Protection of Social Security Numbers and Personal Information**

Before a party files or submits any pleading, correspondence, or other document (Documents) to the Board, whether electronically or manually, the party shall make certain that all social security numbers and personal information are redacted or encrypted. "Personal information" shall include social security numbers, home addresses, dates of birth, bank account numbers, medical and health records, and any other information in which a person has a significant privacy interest. To the extent any personal information is relevant to the Board's consideration of this case, the submitting party shall submit the confidential information by means of a Confidential Information Form that substantially conforms to Form 2 of the Hawai'i Court Records Rules, as amended.

If a party submits a document that requires redaction of a page(s), the party shall by motion request permission from the Board to withdraw and replace the original document, in its entirety, with a redacted copy of such document, pursuant to HAR § 12-42-8(g)(11), "The Board may permit withdrawal of original documents upon submission of properly authenticated copies to replace such document."

The Board may impose appropriate monetary or other sanctions upon parties or attorneys who do not comply with this provision where the parties or attorneys have not shown good cause for failure to comply or a good faith attempt to comply.

**(3) NOTICE OF APPEARANCE AND ACCESSIBILITY OR ACCOMMODATIONS**

All parties have the right to appear in person and to be represented by counsel or any other authorized person in all Board proceedings. Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai'i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, including language access, please call the Board at (808) 586-8616, at least seven (7) days prior to a Board proceeding.

The parties should be aware that the Board is in a secured State of Hawai‘i building and that any party, representative, counsel, or other person attending a proceeding will need to present a government-issued identification for entry.

## (4) NOTICE OF PREHEARING CONFERENCE

PURSUANT TO HRS § 89-5(i)(4) and (i)(5), and HAR § 12-42-47:

NOTICE IS HEREBY GIVEN that the Board will conduct a Prehearing Conference on the date listed below and in the Schedule of Deadlines and Hearing Dates (Schedule) in this document.

DATE AND TIME: May 14, 2019 at 9:00 a.m.

LOCATION: Hawai‘i Labor Relations Board Hearing Room
830 Punchbowl Street – Room 434
Honolulu, Hawai‘i 96813

The purpose of the Prehearing Conference is to clarify the issues, if any; to the extent possible, to reach an agreement on facts, matters, or procedures that will facilitate and expedite the hearing or adjudication of the issues presented; to establish deadlines for prehearing briefing; to identify witnesses and file applications for the issuance of subpoenas; and for such other matters as may be raised.

All parties have the right to appear at the Prehearing Conference in person or telephonically and to be represented by counsel or any other authorized person. Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai‘i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, including language access, please call the Board at (808) 586-8616, at least seven (7) days prior to a Board proceeding.

## (5) NOTICE OF PRETRIAL CONFERENCE

PURSUANT TO HRS §§ 89-5(i)(4) and (i)(5), and 377-9:

NOTICE IS HEREBY GIVEN that the Board will conduct a Pretrial Conference on the date listed below and in the Schedule in this document.

DATE AND TIME: 5/29/2019 at 10:30 a.m.

LOCATION: Hawai‘i Labor Relations Board Hearing Room
830 Punchbowl Street – Room 434
Honolulu, Hawai‘i 96813

1) **Pretrial Statement**

**Both the Complainant(s) and the Respondent(s) shall file a Pretrial Statement with the Board on or by Tuesday, May 21, 2019 at 4:30 p.m., as listed in the Schedule set forth below.** The Pretrial Statement shall include the following:

1. Statement of Issues

2. Witness List

   The witness lists shall include, in the interest of judicial economy, a brief but meaningful summary of the nature of the testimony expected, and the order in which the witnesses are expected to be called upon, subject to the witness' availability. The summary for each witness shall include sufficient information for the Board to determine whether the testimony will be irrelevant, immaterial, or unduly repetitious to any other witness testimony; see HRS § 91-10(1).

   If a party intends to file a request for a subpoena for a witness, such request shall be concurrently filed with the Pretrial Statement, and a notation that a request is being made shall be listed in the witness list.

3. Exhibit List

   The exhibit lists shall include copies of the proposed exhibits. The parties are encouraged to use the File & ServeXpress eFiling system to file the exhibits before or by 4:30 p.m. (HST) on the deadline day. The exhibits shall be combined and filed in a searchable portable document format (PDF) not exceeding 10 megabytes, with each exhibit bookmarked. Alternatively, a party may file exhibits in person or by mail to the Board; the date of receipt by the Board shall be deemed the date of filing.

   If a party intends to file a request for a subpoena duces tecum for any of its exhibits, such request shall be concurrently filed with the Pretrial Statement, and a notation that a request is being made shall be listed in the exhibit list.

   The Complainant shall identify its exhibits using alphabetical letters (A, B, C, D, etc.). Union Respondent(s) shall identify its exhibits using numerical designations preceded by U (e.g., U-1, U-2, U-3, etc.). Employer Respondent(s) shall identify its exhibits using numerical designations preceded by E (e.g., E-1, E-2, E-3, etc.). In the event that there are multiple Union Respondents or Employer Respondents in a particular case, the Board shall specify the designation for each Respondent.

If there are any duplicative exhibits, the parties shall designate them as Joint Exhibits, the parties shall designate one party to file these exhibits, and the Exhibits shall be marked with numerical designations preceded by J (e.g., J-1, J-2, J-3, etc.).

**All Exhibits are to be bates-stamped in the upper right-hand corner.**

Additionally**,** the Exclusive Representative, unless no Exclusive Representative is party to the case, in which case the Employer, must submit to the Board the full applicable collective bargaining agreement(s), including any Memoranda of Understanding, Memoranda of Agreement, or any other supplemental agreement that has any bearing on these proceedings. These documents shall be marked as Board Exhibit 1 or Board Exhibit 1a, 1b, 1c, etc. and **shall be bates-stamped in the upper-right hand corner.**

**2) Pretrial Conference**

At the pretrial conference, the Parties shall be prepared to discuss, raise, and present their position regarding the presentation of the anticipated evidence (witnesses, exhibits) to be introduced at the Hearing on the Merits (HOM), including but not limited to any stipulations, evidentiary issues, objections, or confidentiality issues that require protection from public disclosure and the narrow tailoring of methods to protect that information (e.g. sealing or redaction).

While all parties have the right to appear at the Pretrial Conference in person or telephonically and to be represented by counsel or any other authorized person, **all parties are required to either appear in person or have a representative appear in person.** Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai‘i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, please call the Board at (808) 586-8616.

## (6) NOTICE OF THE HEARING ON THE MERITS

NOTICE IS HEREBY GIVEN, pursuant to HRS §§ 377-9, 89-5(i)(3), (4), (5), and 89-14, and HAR §§ 12-42-46 and 12-42-49 that the Board will conduct an HOM on the instant Complaint at the place, time and date listed below and in the Schedule set forth below. The purpose of the HOM is to receive evidence and arguments on whether Respondent(s) committed prohibited practices as alleged by Complainant(s).

DATE AND TIME: 6/3/2019 at 9:00 a.m.

LOCATION: Hawai‘i Labor Relations Board Hearing Room
830 Punchbowl Street – Room 434
Honolulu, Hawai‘i 96813

All parties have the right to appear at the Hearing on the Merits in person and to be represented by counsel or any other authorized person. **All parties, representatives, and witnesses must appear in person at the hearing on the merits.** Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai‘i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, please call the Board at (808) 586-8616.

## (7) SCHEDULE OF HEARINGS, CONFERENCES, AND DEADLINES

| DATES AND DEADLINES | DATE | TIME |
|---|---|---|
| Prehearing Conference | 5/14/2019 | 9:00 a,m, |
| Dispositive Motion Deadline | 5/21/2019 | |
| Response to Dispositive Motion Deadline | 5/28/2019 | |
| Pretrial Statement; Exchange of Exhibits; Subpoena Deadline | 5/21/2019 | |
| Pretrial Conference and Hearing on Dispositive Motions | 5/29/2019 | 10:30 a.m. |
| Hearing on the Merits | 6/3/2019 | 9:00 a.m. |

**All submissions shall be filed on or before 4:30 p.m. on the deadline date.**

DATED: Honolulu, Hawai‘i, April 29, 2019.

HAWAI‘I LABOR RELATIONS BOARD

HAWAII LABOR RELATIONS BOARD ★ STATE OF HAWAII ★

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

Enclosure: PROHIBITED PRACTICE COMPLAINT

Copies sent to:

Complainant Representative
Respondent Representative

EFiled: Apr 25 2019 04:00PM HAST
Transaction ID 63202196
Case No. 19-CU-09-372

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

**FORM HLRB-4**
**PROHIBITED PRACTICE COMPLAINT**

INSTRUCTIONS. Submit the original[1] of this Complaint to the Hawaii Labor Relations Board, 830 Punchbowl Street, Room 434, Honolulu, Hawaii 96813. If more space is required for any item, attach additional sheets, numbering each item accordingly.

1. The Complainant alleges that the following circumstances exist and requests that the Hawaii Labor Relations Board proceed pursuant to Hawaii Revised Statutes Sections 89-13 and 89-14 and its Administrative Rules, to determine whether there has been any violation of the Hawaii Revised Statutes, Chapter 89.

2. COMPLAINANT Please select one that describes the Complainant:

☐ Public Employee ☑ Public Employer ☐ Public Union (public employee organization)

a. Name, address and telephone number.

Department of Human Resources Development
235 S. Beretania Street, 14th For
Honolulu, HI 96813

b. Name, address, e-mail address and telephone number of the principal representative, if any, to whom correspondence is to be directed.

James E. Halvorson
Deputy Attorney General
235 S. Beretania Street, 15th Floor
Honolulu, HI 96813
James.E.Halvorson@Hawaii.gov
Tele. 808-587-2900

[1] Notwithstanding Board rule 12-42-42(b), the Board only requires the original of the complaint.

3. RESPONDENT Please select one that describes the Respondent:

☐ Public Employee ☐ Public Employer ☑ Public Union (public employee organization)

a. Name, address and telephone number.

Hawaii Government Employees Association
888 Mililani Street, Suite 401
Honolulu, Hawaii 96813
Tele. 808-543-0011

b. Name, address and telephone number of the principal representative, if any, to whom correspondence is to be directed.

Randy Perreira
888 Mililani Street, Suite 401
Honolulu, Hawaii 96813
Tele. 808-543-0011

4. Indicate the appropriate bargaining unit(s) of employee(s) involved.

Bargaining Unit 09

5. ALLEGATIONS

The Complainant alleges that the above-named respondent(s) has (have) engaged in or is (are) engaging in a prohibited practice or practices within the meaning of the Hawaii Revised Statutes, Section 89-13. (Specify in detail the particular alleged violation, including the subsection or subsections of the Hawaii Revised Statutes, Section 89-13, alleged to have been violated, together with a complete statement of the facts supporting the complaint, including specific facts as to names, dates, times, and places involved in the acts alleged to be improper.)

The Hawaii Government Emploees Association is not bargaining in good faith in violation of HRS sectiion 89-13(b)(2),(3),(4) and (5). Collective bargaining between HGEA Unit 09 and the Employeer reached impasse on February 1, 2019. The HGEA represented to the Employer groups athat the arbiration between Bargainng Unit l09 and the Employer would only involve four Articles of the Collective Bargaining Agreement.

On April 8, 2019 a meeting was conducged telphonically between the Employeer, the HGEA and the Arbitrator in which the HGEA again represented that its positiion only involved four Articles of the Collective Bargaining Agreement. Base on that

6. Provide a clear and concise statement of any other relevant facts.

representatiion, the Employer and the Arbitraotr agreed t schedule the Arbitration to be conducted during the week of May 6, 2019.

On April 15, 2019, he Employer learned that HGEA was, in fact, submitting ten Articles for determination in Arbitration. One of these proposal had never been submitted to the Employer in writing.

Pursuant to HRS section 89-11(e)(2)(B), a party in ARbitration must submit its final position to the panel that includes all provisions, including all furhter provisiions which each party is proposing for inclusioon in the final agreement, "provided that such further provisions shall be limited to those specific proposals that were submitted in writing to the other party and were the subject of collective bargaining between the parties up to the time of the impasse."

HGEA did not submit its proposal conerning Article 20 Section H in wrting to the Employer ad were not the subject of collective bargaining betwen the parties up to the time of the impasse.

This violation of statute is particularly egregous in view of the fact that the HGEA is responsible for having Hawaii's Legislature pass this statute. It based its argument to the Legislature on the alleged misconduct of the Employer. Yet, after this staute was enacted, the HGEA did not follow that law in a subsequent Arbiration between the parties and is doing so again. The HGEA is well aware of its obligation to provide the Employer with its proposal in writing and make those prposals the subject of collective bargain prior to impasse.

See attached.

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

**DECLARATION IN LIEU OF AFFIDAVIT**
(If the Complainant is self-represented, then the Complainant must sign this Declaration).

Please select one:
- ☐ the Complainant
- ☒ the Complainant's principle representative
- ☐ the person described below

I, James E. Halvorson, do declare under penalty of law that the foregoing is true and correct.

Date: April 25, 2019

_____

***The person signing above agrees that by signing his or her name in the above space with a "/s/ first, middle, last names" is deemed to be treated like an original signature.***

_____

***Signor's email address***

If you are not the Complainant or listed as the principle representative in #2(b) and you are signing above, then please complete the contact information below.

Your address:

235 S. Beretania Street, 15th Floor

Honolulu, Hawaii 96813

Your phone number: 808-57-2900

Your relationship to the Complainant:

Attorney for Employer

If the Complainant or principal representative is registered with File and ServeXpress (FSX), then you may proceed to electronically file this complaint.

If the Complainant or the principal representative is not registered with FSX and would like to electronically file this complaint through FSX, then complete the Board Agreement to E-File, FORM HLRB-25. (Form HLRB-25 is on the HLRB Website at ***labor.hawaii.gov/hlrb/forms***.) Email the completed form to the Board at ***dlir.laborboard@hawaii.gov***.

CLARE E. CONNORS 7936
Attorney General of Hawaii

JAMES E. HALVORSON 5457
MIRIAM P. LOUI 3582
DENNIS K. FERM 2643
HENRY S. H. KIM 9461

Deputy Attorneys General
Employment Law Division
Department of the Attorney
General, State of Hawaii
235 S. Beretania Street, 15th Floor
Honolulu, Hawaii 96813

Attorneys for Employer
STATE OF HAWAII

STATE OF HAWAI'I

IMPASSE ARBITRATION FOR BARGAINING UNIT 9

BEFORE ARBITRATORS LAWRENCE E. LITTLE, ESQ.;

LEE MATSUI; AND NORA NOMURA

In the Matter of

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO,

Exclusive Representative,

and

DAVID Y. IGE, Governor, State of Hawaii; MARK RECKTENWALD, Chief Justice, the Judiciary, State of Hawaii; HARRY KIM, Mayor, County of Hawai'i; KIRK CALDWELL, Mayor, City and County of Honolulu; DEREK KAWAKAMI, County of Kaua'i; MICHAEL P. VICTORINO, County of Maui; and DR. LINDA ROSEN, Chief Executive Officer, Hawaii Health Systems Corporation,

Employers.

HLRB CASE NO.: 18-I-09-174
AAA CASE NO.: 01-18-0004-7237

EMPLOYER STATE OF HAWAII'S STATEMENT OF OBJECTION TO HGEA'S FINAL OFFER; DECLARATION OF TRAVIS PALMEIRA; EXHIBITS "1" – "15"; CERTIFICATE OF SERVICE

**EMPLOYER STATE OF HAWAII'S**
**STATEMENT OF OBJECTION TO HGEA'S FINAL OFFER**

Employer STATE OF HAWAII ("State") by and through its attorneys, Clare E. Connors, Attorney General; James E. Halvorson; Miriam P. Loui; Dennis K. Ferm; and Henry S.H. Kim, Deputy Attorneys General is submitting its statement of objection to HGEA's final offer dated April 15, 2019. Specifically the Employer is objecting to the part of the Union's Final Position titled ARTICLE 20 – Personal Rights and Representation. Exhibit 1. This final proposal differs materially from the Union Proposal dated June 15, 2018 on the table at the time of impasse on November 7, 2018. Exhibit 2. The Union requested the Hawaii Labor Relations Board (HLRB) to declare impasse by letter dated October 19, 2018 specifically citing the proposals exchanged by the parties on June 15, 2018. Exhibit 3. HLRB issued the order declaring an impasse on November 7, 2018. Exhibit 4. The Union's June 15, 2018 proposal contains no new language for Article 20, Section H, only a strikethrough of a phrase "as determined by the employer". The Union's Final Proposal contains new language in Section H, lines 50 - 61. This violates HRS §89-11 (e)(2)(B) which states with regard to Final positions that it include "all further provisions which each party is proposing for inclusion in the final agreement: provided that such further provisions shall be limited to those specific proposals that were submitted in writing to the other party and were the subject of collective bargaining between the parties up to the time of impasse..." Exhibit 5. The only salary proposal received by the Employer prior to impasse was the Union Proposal dated June 15, 2018. Declaration of Travis J. Palmeira.

**BACKGROUND**

In October 2013 the HGEA and the Employer were engaged in interest arbitration concerning Unit 6. The HGEA objected to a part of the Employer's final offer as not having been submitted to the Union previously. Exhibit 6. The Union filed a prohibited practice

complaint on this issue to the HLRB on October 16, 2013. Exhibit 7. The HLRB issued its lengthy decision on January 17, 2014 ruling that the Employer had not committed a prohibited practice. Exhibit 8. The arbitration panel rendered a final decision on April 17, 2014. Exhibit 9.

Meanwhile, a bill was introduced in the legislature to amend §89-11(e)(2)(B), H.B. 1977. The bill made its way through the legislature. Exhibits 10 a – e. The Unions testified in favor (Exhibits 11 a – g) and the Employer testified against. Exhibits 12 a – l. HLRB testified but took no position. Exhibit 13. The bill passed as Act 75 and went into effect on April 30, 2014. Exhibit 14.

Thus the law was changed to address the HLRB order in the Unit 6 Prohibited Practice and this was before the parties exchanged proposals on June 15, 2018.

**CONCLUSION**

The Union should be held to the written proposal submitted prior to impasse where the language in Article 20, Section H was not amended.

DATED: Honolulu, Hawaii, April 25, 2019.

JAMES E. HALVORSON
MIRIAM P. LOUI
DENNIS K. FERM
HENRY S.H. KIM

Attorneys for Employer
STATE OF HAWAII

STATE OF HAWAI'I

IMPASSE ARBITRATION FOR BARGAINING UNIT 9

BEFORE ARBITRATORS LAWRENCE E. LITTLE, ESQ.;

LEE MATSUI; AND NORA NOMURA

| | |
|---|---|
| In the Matter of<br><br>HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO,<br><br>Exclusive Representative,<br><br>and<br><br>DAVID Y. IGE, Governor, State of Hawaii; MARK RECKTENWALD, Chief Justice, the Judiciary, State of Hawaii; HARRY KIM, Mayor, County of Hawai'i; KIRK CALDWELL, Mayor, City and County of Honolulu; DEREK KAWAKAMI, County of Kaua'i; MICHAEL P. VICTORINO, County of Maui; and DR. LINDA ROSEN, Chief Executive Officer, Hawaii Health Systems Corporation,<br><br>Employers. | HLRB CASE NO.: 18-I-09-174<br>AAA CASE NO.: 01-18-0004-7237<br><br>DECLARATION OF TRAVIS PALMEIRA |

DECLARATION OF TRAVIS PALMEIRA

I, TRAVIS PALMEIRA, declare as follows:

1. I am currently employed as a Personnel Program Officer for the Department of Human Resources Development ("DHRD"), State of Hawaii. I have been employed as a Personnel Program Officer from April 2011 to present. I make this declaration on personal knowledge and I am competent to testify on all matters dated herein.

2. The job duties and responsibilities of a Personnel Program Officer include the following, administers and enforces the State's labor-management agreements and provides staff

support to the DHRD Director and the Office of Collective Bargaining (OCB) in the negotiation of labor contracts. Develops contract proposals to address Employer concerns based on knowledge of labor relations issues and grievances. Serves as the Director's representative in collective bargaining and Employer's spokesperson for bargaining units (BU) 2, 3, 4, 13 and 14 and provides assistance with all other collective bargaining units. In addition, provides staff support for interest arbitration, including preparing the final offer, collecting data, and assisting the Attorney General's office in preparing the Employer's case. May serve as a witness or serve as the Employer representative on the interest arbitration panel.

3. On June 15, 2018, the Employer and the Hawaii Government Employees Association BU 09 (Union) exchanged initial proposals for the bargaining unit contract effective July 1, 2019. Attached is the Union's initial proposal on Article 20 – Personal Rights and Representation identified as BU 09 Union Proposal, June 15, 2018. The Union's initial proposal reflects on page 3 of 4, lines 47-49, the following change, "H. The Employee shall have the right to refuse for good cause [~~as determined by the Employer~~] to work overtime, to accept a temporary assignment, and to perform any work not representative of the Employee's class."

4. The Employer and the Union conducted two (2) negotiation sessions on July 11, 2018 and September 20, 2018. At these negotiation sessions, the Union did not submit in writing to the Employer a Union proposal #2 further amending Section H. Article 20 – Personal Rights and Representation. In addition, the Union did not submit in writing to the Employer any Union proposal #2 amending Section H. Article 20 – Personal Rights and Representation up to the time of impasse. The Union filed impasse on October 19, 2018.

5. On April 15, 2019, the Employer and Union exchanged final positions in accordance with HRS Chapter 89 - 11(e)(2)(B). In the attached Union's final position identified

as BU 09 Union's Final Position, April 15, 2019, the Union submitted new language in Section H. Article 20 – Personal Rights and Representation on page 3 of 5, lines 47-61, as follows: "H. The Employee shall have the right to refuse for good cause [~~as determined by the Employer~~] to work overtime, to accept a temporary assignment, and to perform any work not representative of the Employee's class.

**1. Involuntary/Mandatory Overtime may be used only for the following unforeseen critical situations:**

**a. A code blue occurring at the end of the shift. Involuntary/Mandatory Overtime will not exceed two (2) hours past the end of the scheduled shift;**

**b. Completion of surgical cases in progress in the operating rooms; or,**

**c. Federal or State declared emergencies or activation of the Employer's disaster plan.**

**2. In the event that issues with unit staffing persist, a Labor-Management Committee comprised of Union and Employer representatives will convene to identify and resolve staffing issues.**"

To my knowledge, this is the first time the Employer received written notification of the Union's new language.

I, Travis Palmeira, do declare under penalty of law that the foregoing is true and correct.

Dated: Honolulu, Hawaii, April 25, 2019.

TRAVIS PALMEIRA

**HAWAII GOVERNMENT EMPLOYEES ASSOCIATION**
AFSCME Local 152, AFL-CIO

**RANDY PERREIRA**, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

April 15, 2019

Mr. Lawrence E. Little, Esq.
Arbitration Panel Chairperson
(Via E-Mail)

Mr. Lee Matsui, Employer Panel Member
c/o Office of Collective Bargaining
State of Hawaii
235 S. Beretania Street, 14th Floor
Honolulu, HI 96813

Ms. Nora Nomura, Union Panel Member
c/o Hawaii Government Employees Association
888 Mililani Street, Suite 401
Honolulu, HI 96813

Subject: UNION'S FINAL POSITION ON ISSUES SUBMITTED TO ARBITRATION FOR BARGAINING UNIT 09

Dear Arbitration Panel Members:

Pursuant to section 89-11 (e), Hawaii Revised Statutes, the union is transmitting to the arbitration panel, with a copy to the office of Collective Bargaining, a final position for bargaining unit 09 which includes:

Part I. A list of provisions (articles) in the 2017-2019 Unit 09 collective bargaining agreement not being modified and to be included in the successor agreement, effective July 1, 2019.

Part II. The provisions that the parties have already agreed to in negotiations for inclusion in the successor agreement.

Part III. The unresolved provisions that the union is proposing for inclusion in the final agreement.

Whenever possible, the Ramseyer format is used to reflect changes to existing contract provisions (i.e. language to be deleted is bracketed and new language is underscored).

Sincerely,

Randy Perreira
Executive Director

Enclosures

cc: Office of Collective Bargaining
Alan Davis, Esq.

April 15, 2019

## LISTING OF UNION FINAL POSITION – UNIT 09 ARBITRATION
**(for successor collective bargaining agreement, effective July 1, 2019)**

**Part I.** Provisions (Articles) in the 2017-19 Contract Not Being Modified

Article 1 – Recognition
Article 2 – Conflict
Article 3 – Maintenance of Rights and Benefits
Article 4 – Personnel Policy Changes
Article 5 – Rights of the Employer
Article 6 – Union Security
Article 7 – Union Representative Rights
Article 8 – Union Communications
Article 9 – Orientation
Article 10 – Discrimination
Article 11 – Discipline
Article 12 – Layoff and Reemployment
Article 13 – Technological Changes
Article 14 – Grievance Procedure
Article 15 – Temporary Assignment
Article 16 – Promotions
Article 17 – Compensation Adjustment
Article 17A – Workers' Compensation Leave Benefits
Article 18 – Educational and Professional Improvement
Article 19 – Personnel File
Article 21 – Safety and Health
Article 22 – Temporary Hazard Pay
Article 24 – Rest Periods and Meal Hours
Article 25 – Professional Benefit Arrangements
Article 27 – Meals
Article 28 – Standby Pay
Article 29 – Call Back Pay
Article 30 – Show-up Time and Reporting Pay
Article 31 – Split Shift
Article 33 – Charge Nurse
Article 34 – Working Condition Differential
Article 35 - Transportation
Article 36 – Travel
Article 37 – Kalaupapa Trail
Article 38 – Sabbatical Leave
Article 39 – Leave of Absence for Union Business
Article 40 – Holidays
Article 41 – Vacation Leave
Article 42A – Family Leave
Article 43 – Funeral Leave
Article 44 – Leave for Jury or Witness Duty
Article 45 – Time Off for Blood Donations
Article 47 – Adoptive Leave
Article 48 – Leave for Child Care
Article 49 – Political Campaign Leave
Article 50 – Leave for Industrial Leave
Article 51 – Military Leave
Article 52 – Parking
Article 53 – Miscellaneous
Article 54 – No Strike or Lockout
Article 55 – Drug and Alcohol Testing
Article 58 – Entirety and Modification Clause
Article 59 – Savings Clause
HHSC Supplemental Agreements

**Part II.** Provisions that the Parties Have Already Agreed to in Negotiations for Inclusion In the Final Agreement

Article 57 – Hawaii Employer-Union Health Benefits Trust Fund
(this provision is not to be decided by the arbitration panel)

**Part III.** Unresolved Provisions (Articles) That the Union is Proposing for Inclusion In the Final Agreement

Article 20 – Personal Rights and Representation
Article 23 – Hours of Work
Article 26 – Overtime
Article 32 – Differential
Article 42 – Sick Leave
Article 46 – Other Leaves of Absence
Article 56 – Salaries
Article 60 – Duration
Article (NEW) – Specialty Certification Differential
Article (NEW) – Weekend Differential

## ARTICLE 20 - PERSONAL RIGHTS AND REPRESENTATION

A. The Employer shall not require Employees to transport government equipment in their private vehicles, if such Employees do not receive mileage allowance.

B. Upon the request of the Union, existing dress and personal appearance codes shall be reviewed by the Employer or the Employer's designee and Union. The Employer or the Employer's designee shall consult with the Union before establishing new dress and personal appearance codes.

C. Both parties agree that Employees shall not use their business addresses (place of employment) to receive personal mail; provided, however, if personal mail is sent to Employees' business addresses without their knowledge or consent, the Employer shall endeavor to forward such personal mail unopened.

D. The Employer shall provide Employees with supplies and equipment which are required in the performance of the Employee's official duties. Except in the case of negligence on the part of the Employee, when such equipment is stolen, lost, damaged and/or worn out it shall be repaired or replaced by the Employer.

E. The Employer shall provide legal counsel for an Employee upon request when:

1. The Employee is sued for actions taken by the Employee in the course of the Employee's employment and within the scope of the Employee's duties and responsibilities.

2. The Employee must appear as a defendant or is subpoenaed to appear in court when sued for actions taken in the course of employment and within the scope of the Employee's duties and responsibilities.

3. The Employee must appear as a witness or is subpoenaed to appear in court on a matter arising in the course of employment and within the scope of the Employee's duties and responsibilities.

4. The Employee is required to give deposition or answer interrogatories on a matter arising in the course of employment and within the scope of the Employee's duties and responsibilities.

The Employer shall provide a definitive response to the Employee who has submitted a request for legal counsel within a reasonable time of the receipt of the request.

In addition, the Employee's required presence in any of the foregoing situations shall be considered work time.

F. When grievances are filed against Employees of this unit for actions taken by them in the course of their employment and within the scope of their supervisory and/or managerial duties and responsibilities, the Employer shall provide them with necessary staff support and representation. When such assistance is requested by the Employee and the Employer fails to furnish such assistance, the Employee will not be penalized for any improper action taken.

G. The Employer shall provide Employees with advice and assistance in the interpretation and administration of collective bargaining contracts or agreements covering their subordinates. Whenever Employees perform or carry out their assigned

supervisory and/or managerial duties and responsibilities, based on such advice and assistance, the Employer agrees to provide full support to the Employees should conflict or grievances arise.

H. The Employee shall have the right to refuse for good cause [~~as determined by the Employer~~] to work overtime, to accept a temporary assignment, and to perform any work not representative of the Employee's class.

**1. Involuntary/Mandatory Overtime may be used only for the following unforeseen critical situations:**

**a. A code blue occurring at the end of the shift. Involuntary/Mandatory Overtime will not exceed two (2) hours past the end of the scheduled shift;**

**b. Completion of surgical cases in progress in the operating rooms; or,**

**c. Federal or State declared emergencies or activation of the Employer's disaster plan.**

**2. In the event that issues with unit staffing persist, a Labor-Management Committee comprised of Union and Employer representatives will convene to identify and resolve staffing issues.**

I. If a judgment or court approved settlement is made against an Employee in a civil suit for actions taken by her in the course of her employment and within the scope of her duties and responsibilities, the Employer agrees to do no more than submit to the Legislature or the County Council any judgment (or court approved settlement)

against the Employee, with the Employer retaining the discretion of recommending or not recommending legislative approval.

J. Bill of Rights.

~~[As used herein, the term "complaint" refers to an allegation against an Employee which is made by an individual who is not employed within the same division. Whenever such a complaint is filed, the following shall be applicable: ]~~

1. No Employee shall be required to sign a statement of complaint filed against her.

**2. The Employer shall not pursue an investigation of a complaint against an Employee unless the complaint is in writing.**

[2.]**3.** If the Employer pursues an investigation based on such complaint, the Employee **and the Union** shall be advised of the seriousness of the complaint **and provided copies of the complaint prior to the investigative meeting**. **The Employer's written notification to the Employee and the Union shall include the specific allegations.** The Employee will be informed of the complaint, and will be afforded an opportunity to respond to the complaint, and to furnish evidence in support of her case. The Employee shall have the right to be represented by the Union in presenting her case.

[3.]**4.** Before making a final decision, the Employer shall review and consider all available evidence and data, including factors supporting the Employee's position, whether or not she offers such factors in her own defense.

**5. If the complaint filed against the Employee results in disciplinary action, and the Union or Employee believes that the action taken is improper or**

**unjust, the Union of the Employee shall have the right to process a grievance pursuant to Article 14- Grievance Procedure.**

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HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO
RANDY PERREIRA, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922





October 19, 2018

Mr. Marcus Oshiro, Chair
Hawaii Labor Relations Board
830 Punchbowl Street, Room 434
Honolulu, Hawaii 96813

Dear Mr. Oshiro:

In accordance with Section 89-11, HRS, the Hawaii Government Employees Association (HGEA) is informing you that progress in negotiations is not being made for Bargaining Unit 9 (Registered Professional Nurses) and we are at impasse with the employer. The proposals were exchanged on June 15, 2018. Therefore, we request that the Hawaii Labor Relations Board (HLRB) declare impasse pursuant to Section 89-11(e), HRS.

We are currently requesting to negotiate an alternate impasse procedure with the employer and will provide it to the HLRB once it is finalized. The primary contact person for HGEA Bargaining Unit 9 is Lorena Kauhi, Hawaii Island Division Chief. She can be reached at (808) 935-6841.

Sincerely,

Randy Perreira
Executive Director

cc: Office of Collective Bargaining



Exhibit 3

EFiled: Nov 07 2018 03:36PM HAST
Transaction ID 62648322
Case No. 18-I-09-174

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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|---|---|
| In the Matter of<br><br>HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO,<br><br>Exclusive Representative,<br><br>and<br><br>DAVID IGE, Governor, State of Hawaii; MARK RECKTENWALD, Chief Justice, the Judiciary, State of Hawaii; HARRY KIM, Mayor, County of Hawaii; KIRK CALDWELL, Mayor, City and County of Honolulu; BERNARD P. CARVALHO, County of Kauai; ALAN M. ARKAWA, Mayor, County of Maui; and DR. LINDA ROSEN, Chief Executive Officer, Hawaii Health Systems Corporation,<br><br>Employers. | CASE NO.: 18-I-09-174<br><br>ORDER NO. 3419<br><br>ORDER DECLARING AN IMPASSE AND APPOINTMENT OF MEDIATOR |

ORDER DECLARING AN IMPASSE
AND APPOINTMENT OF MEDIATOR

By letter dated October 19, 2018, the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152 (HGEA) notified the Hawaii Labor Relations Board (Board) that an impasse exists (HGEA Notice) involving bargaining unit 09, which includes Registered Professional Nurses, who cannot be included in any of the other bargaining units. Based upon this representation, the Board finds that the 90-day period required by Hawaii Revised Statutes (HRS) § 89-11(c)(1) has passed. Accordingly, pursuant to HRS § 89-11(c)(1), the Board declares that an impasse exists in the negotiations, and that October 19, 2018, is the date of impasse.

The Board asked the Federal Mediation and Conciliation Service to provide a mediator to assist the parties in the voluntary resolution of their dispute. Federal Mediator Carol Catanzariti agreed to serve and is hereby appointed as mediator, pursuant to HRS § 89-11(e)(1).

In the event the parties enter into an Alternate Impasse Procedure (Procedure) pursuant to HRS § 89-11(a), the parties shall immediately notify the Board and file a copy of such procedure with the Board.

DATED: Honolulu, Hawaii, November 7, 2018.

HAWAII LABOR RELATIONS BOARD

MARCUS OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J.N. MUSTO, Member

Copy to:

Randy Perreira, HGEA Executive Director
The Honorable David Y. Ige, Governor, State of Hawaii
The Honorable Harry Kim, Mayor, County of Hawaii
The Honorable Kirk Caldwell, Mayor, City and County of Honolulu
The Honorable Bernard P. Carvalho, Mayor, County of Kauai
The Honorable Alan M. Arakawa, Mayor, County of Maui
The Honorable Dr. Linda Rosen, Chief Executive Officer, Hawaii Health Systems Corp.
Carol Catanzariti, FMCS

§89-11 Resolution of disputes; impasses. ***

(e) If an impasse exists between a public employer and the exclusive representative of bargaining unit (2), supervisory employees in blue collar positions; bargaining unit (3), nonsupervisory employees in white collar positions; bargaining unit (4), supervisory employees in white collar positions; bargaining unit (6), educational officers and other personnel of the department of education under the same salary schedule; bargaining unit (8), personnel of the University of Hawaii and the community college system, other than faculty; bargaining unit (9), registered professional nurses; bargaining unit (10), institutional, health, and correctional workers; bargaining unit (11), firefighters; bargaining unit (12), police officers; bargaining unit (13), professional and scientific employees; or bargaining unit (14), state law enforcement officers and state and county ocean safety and water safety officers, the board shall assist in the resolution of the impasse as follows:

***

(2) Arbitration. If the impasse continues twenty days after the date of impasse, the board shall immediately notify the employer and the exclusive representative that the impasse shall be submitted to a three-member arbitration panel who shall follow the arbitration procedure provided herein.

(A) Arbitration panel. Two members of the arbitration panel shall be selected by the parties; one shall be selected by the employer and one shall be selected by the exclusive representative. The neutral third member of the arbitration panel, who shall chair the arbitration panel, shall be selected by mutual agreement of the parties. In the event that the parties fail to select the neutral third member of the arbitration panel within thirty days from the date of impasse, the board shall request the American Arbitration Association, or its successor in function, to furnish a list of five qualified arbitrators from which the neutral arbitrator shall be selected. Within five days after receipt of the list, the parties shall alternately strike names from the list until a single name is left, who shall be immediately appointed by the board as the neutral arbitrator and chairperson of the arbitration panel.

(B) Final positions. Upon the selection and appointment of the arbitration panel, each party shall submit to the panel, in writing, with copy to the other party, a final position that shall include all provisions in any existing collective bargaining agreement not being modified, all provisions already agreed to in negotiations, and all further provisions which each party is proposing for inclusion in the final agreement; provided that such further provisions shall be limited to those specific proposals that were submitted in writing to the other party and were the subject of collective bargaining between the parties up to the time of the impasse, including those specific proposals that the parties have decided to include through a written mutual agreement. The arbitration panel shall decide whether final positions are compliant with this provision and which proposals may be considered for inclusion in the final agreement.

***

[am L 2013, c 137, §4; am L 2014, c 75, §1]

COPY

IMPASSE ARBITRATION FOR BARGAINING UNIT 6

BEFORE ARBITRATORS RICHARD N. BLOCK,

IRENE L.A. PUUOHAU AND ANNETTE ANDERSON

STATE OF HAWAII

| | |
|---|---|
| In the Matter of the Arbitration between:<br><br>HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO,<br><br>Exclusive Representative,<br><br>and<br><br>NEIL ABERCROMBIE, Governor State of Hawaii; BOARD OF EDUCATION, Department of Education, State of Hawaii; and KATHRYN MATAYOSHI, Superintendent, Department of Education, State of Hawaii,<br><br>Employers. | CASE NO. I-06-146<br><br>AAA# 74 390 L 00241-13<br><br>VOLUME I<br>(Pages 1 - 171) |

The arbitration in the above matter came on for hearing at the HGEA Meeting Hall, 888 Mililani Street, First Floor, Honolulu, Hawaii 96813, commencing at 9:00 a.m., on Monday, October 21, 2013.

BEFORE:

RICHARD N. BLOCK, Neutral and Chairman
IRENE L.A. PUUOHAO, Union Panel Member
ANNETTE ANDERSON, Employer Panel Member

existing contract language is that continues on to the next page, and then Article 25 of the contract language, that's the actual current contract language, but it continues on through page 5. And then you'll see the contract language that existed as of -- well, as of 2007, that's the contract language for that year on the left-hand side, and all the way through the duration language, accepting, of course, the proposed new articles.

And then in the middle -- no, I think I should begin with the right-hand column. Normally I'll begin with our own proposals. Our own proposals are usually in the middle column.

CHAIRMAN BLOCK: What page are you on?

MR. DAVIS: I'm going to go back to page 1. Go back to page 1, you will see the middle column. That will either be our proposed language, as I'll get to in just a moment, or it will be commentary on what the Employers have proposed.

So here what we've done is shown on the very right-hand column the Employer's proposal for Article 11, which you know from our telephonic conversations is highly disputed, the language with respect to their proposed changes in Article 11 that were never made at any point in time during

negotiations, and that is relevant. That is relevant not only because of the prohibited practices complaints that have been filed with the HLRB, but it's also relevant to almost any interest arbitration panel that I've ever been before because the whole purpose of the interest arbitration panel, in our judgment, is that the panel end up resolving existing disputes between the parties, and that's why interest arbitration exists, not to bring in new proposals that don't pertain to anything that they've discussed, but just the proposals that, in fact, have reached impasse that the panel is, in fact, invested with the responsibility to resolve. I've never heard of an interest arbitration panel doing anything different.

Now, Mr. Halvorson may say something different, and I'll advance that in one phone call we had he said the HGEA has done that. That's simply not true. We've checked on that. There have been differences with respect to what the final offers are with respect to salaries, as they are here, but never has the HGEA union, that I've been involved in, come forward with an entirely new proposal that had not been involved in any of the negotiations, here beginning in 2012, and then the only negotiations that really occurred in April of 2013, the impasse, and then

finally the final offer.

So what you see then on the right-hand column -- I don't want to go through this, but I'll come back to our own language in the middle column -- is on the first paragraph of A, I think it says the reference is to educational candidate, I think that's new, that should also be in red, but the language that is in red there is language that they proposed as part of their final position statement that was not part of the proposals that they made when they reached impasse in April of 2012. So you will see with respect to -- I don't want to go into all of it, but I don't think I need to right now -- on page 1, and on into page 2 with respect to that.

But the changes that they did propose you will see in blue on the right-hand column. Those changes with respect just to the advertising of vacancies, as well as the notification change in Subsection A on the top of page 2, for example, they had proposed on the record simply changing 30, which is the existing language, to 20. See that under Subsection A, the second paragraph on the right-hand column?

CHAIRMAN BLOCK: Yes.

MR. DAVIS: But then they, in their final

position statement, they changed that to 15. Then the next, Subsection B, the original proposal had been 10 that they proposed, where it had, in fact, been 20 before. Well, all of the rest of that language that is in red is totally new.

CHAIRMAN BLOCK: Totally new, did you say?

MR. DAVIS: Totally new as of their final position statement, that that was -- when we saw that we said, my goodness, how can anybody really acting in good faith make such a proposal where, in fact, nothing like that had ever been discussed before, and the only changes that had been made were in respect to minor changes with respect to the notification and advertising proportions, so that's what they've got there. That's all in red.

And then from the previous, middle column on page 1, you see what we wrote there: Union objects to consideration of the Employer's proposal as untimely and in bad faith.

Then June 18, 2012 the Employer proposed to change only the notification periods contained in Subsections A.2.A, which I just walked you through, from 30 to 20, in Subsection A.2.B from 20 to 10. These limited notification proposals were dropped by the Employers during the 2013 negotiations between the

parties. Even what you see in blue was dropped by the parties in April of 2013, and then they came back with what you see for their final proposal on October 11, 2013.

So that's back to our point, even though we've had to, we think because of what they did, file a prohibited practice charge, which I think the record needs to show that all the years that I've been involved in these interest arbitration proceedings we've never had to do before. This is the very first time where the change in a proposal is so dramatic from what had been discussed either in opening proposal or anything that occurred in between, that we had no alternative but to file with local counsel a prohibited practice charge.

But as I mentioned earlier, even though you use different language with respect to unfair labor practice charges on the Mainland much as you do here with respect to unfair bargaining, the concepts are still the same because the duties of your panel are to resolve the issues that remain in dispute, so there's no real difference in terms of the elements that are there with respect to what's filed as an unfair labor practice charge or what's before you. It's your duty, we believe, responsibility as most arbitrators

understand the concept of interest arbitration, to resolve the true issues that are in dispute between the parties, not something that they can create at the last minute of their final positions.

So I've covered just Article 11. We could do the rest, but I think we can save a lot of that for testimony. There will be nuances with respect to some of the other issues that were discussed, but we can do that later with respect to the whole vacation issue, very important issue that's, of course, labeled something different, but it --

CHAIRMAN BLOCK: That's part of compensation, right?

MR. DAVIS: Compensation. That's Article 25, that you remember I had a typo, it said Article 15, but it's actually 25.

CHAIRMAN BLOCK: Took me a moment to sort of realize that compensation encompassed vacation.

MR. DAVIS: That's right, it took me some time as well.

CHAIRMAN BLOCK: I can figure it out.

MR. DAVIS: You can see from the middle column there what their proposal was. I write on the top -- or the bottom of page 2, the Union objects to the Employer's proposal as untimely and bad faith.

On April 12, 2013 the Employer proposed as follows. And then you can see where we've written change in the vacation cap, et cetera. And then in the third bulleted item they were not even definitive with respect to what that cap was. You can read that for yourself, X, Y, to be determined, which is TBD. Nothing else like that. And so what we see then months later is a totally new concept that they've raised for the first time in their proposal that never came up, not in 2012, not in April of 2013, but you can see that there.

Now, I think you will find, as these proceeding go on, that with respect to some of these issues that there may be a basis, interestingly enough, for an agreement in that section on some of the subissues. Not all, but on some of them. And there needs to be some clarity provided by the Employer as to where this language came from.

CHAIRMAN BLOCK: You mean in terms of vacation, slash, compensation?

MR. DAVIS: Right. Some of the dates and things that are contained -- language that are contained there may actually be something that's contained in some parts of the code, and if that's true and there's a basis for an agreement, it's not controversial, it's not

entirely new that's being imposed as of October 11, but then there's certainly a basis for the parties working things out. You've indicated you like to mediate. You've told us that off the record. Who knows, there may be opportunities for those kinds of things.

CHAIRMAN BLOCK: Part of our role, as I understand.

MR. DAVIS: That's right. So long as they do not reach the point of seeking to impose provisions that have never truly been negotiated between the parties, that are not something totally new or make changes that are so substantial that they have no choice, but to say this isn't before you, that A, it's before the HLRB; but B, your duties as interest arbitrators are to resolve existing bona fide issues.

So let's go then to salaries. There you will see Union's proposal in some depth, I'll start with that, and you will find that the -- that you will have testimony with respect to this and, yes, some of those numbers, particularly in Subsection 2 and 3 may jump out at you. My goodness, those are very large numbers, 12 percent. Might as well put it on the record, that's what they're proposing. But they're not proposing that that be divided into four different sections, for example, six, six, six and six, which you'll find from

the evidence that involves other bargaining units in the State of Hawaii that actually are being awarded, have been awarded, even during the bad times of the recession.

That you will find that SHOPO, the police officers, received their increases, they were very substantial that compare to that, all during that period. So did the Fire Fighters. My client, Fire Fighters, received very substantial increases that the State and the local employers never came to them and sought to have them reduced. They never came to them and asked for furloughs, as they did for these other bargaining units. They never came and said we need to renegotiate those particular salary provisions of the contract.

And then on top of that, as you'll see from the most recent police officer's award that Mr. Angelo was involved in, they're receiving very substantial increases. So standing alone the 12 may look high, but when you divide that into four different years it's not high at all. In fact, it compares very favorably. You will hear not only what other bargaining units have done in the State of Hawaii, but also what you will find from the external comparability testimony that you will hear. So I'm going to go into a lot more detail

on that, we'll let the evidence unfold.

But I'll take you to the right-hand side because there, in fact, is something that is entirely new, and that is in red, the preamble. Inasmuch as the Employer and Union agree to create an implementation plan for financial recognition for the professional accomplishment of school level education who retain a rating of highly effective in accordance with the Board of Education Policy 5200, compensation on longevity steps shall be as follows.

Well, you're going to hear a lot of evidence on this, to the extent that it should be coming in at all, but they never agreed to that. That's brand new. That wasn't proposed in April, that wasn't proposed in August of 2012, that language is all brand new.

But it does introduce a concept there that generally, if in fact a concept of evaluation can be fully negotiated and brought before, first, the parties for a full negotiated agreement, that in fact they're not opposed to, and that is the recognition by the award concept of which is something that may well be of interest to the Union, but not something that would, in fact, punish them. That's the core of the dispute that is the subject of what you will find beginning on page 10, at the bottom of page 10, and going on through page

11.

Now, here, while the Employer raised the concept for the first time in April, you will see from the language -- we've actually given to you the proposals -- in April they raised a punitive system with respect to that. Now you will see language of in fact they never agreed to at all, and also never negotiated, going from H, all of H, H-1, 2, 3, 4 and 5.

You're going to see some references there to something called CESSA. We're not going to go into that right now, but you're going to be hearing a lot about CESSA that the Union has been involved in. In fact, there's a memorandum that's part of the evidence with respect to a continuing memorandum that involves a whole educational evaluation system, but nowhere is there anything in that memorandum that permits the Employer to say, or even suggest that the Employer should say that unless you reach a certain level you won't get, A, your salary increase, which is what they're proposing, or B, even your routine step increases.

There's nothing in the prior agreements that are still in effect between the Employers and the Union to the CESSA agreement that even suggested that. Just the opposite, they suggest that the educational

officers, or principals and educational officers should in fact -- there should be a development of a program to reward them or to reward the school, or something like that. Whole follow-through with respect to what's occurring nationally that you're aware of, and you'll hear about State laws that they call here Act 51, that I'm not mentioning here, you'll hear about that, that the whole concept even here in Hawaii is to reward them, not punish them.

And I suspect you're going to hear the same, if I'm not mistaken, even from this gentleman named Clifford. While I haven't talked to him, we've read his documents. We haven't offered them yet to you. You're going to be hearing about them this afternoon, but from everything we've read, he at no time has proposed that there should be a punishment factor that pertains to the principals, which is what they're proposing in these proceedings, not once.

But he has, in fact, and you will hear from the evidence, I believe, suggested that for the principals and educational officers, the supervision of the departments, that there should be a reward factor. Gets very complicated, but also quite important because that's what they want here. But you're going to be hearing evidence that the reason they want this here,

this kind of language that you're seeing on pages 10 and 11 is because that's what they did to the teachers. They did it to the teachers, so we want do it to the principals. That's what this is about.

After they, in fact -- the teachers had no ability to, in fact, engage in interest arbitration, in effect, this concept of a punishment component was imposed upon the teachers' contract. Doesn't exist anywhere else in the State of Hawaii for any other bargaining unit, it doesn't exist from what our own research has shown, and the evidence will show, to any other school district anywhere in the U.S., unless you know something about Michigan that we don't know, that there's a punishment component either for salaries or for step increases that's based on the principals or supervisors of the department.

There's very good reason for that, because the whole purpose of the law is to encourage them to perform and to reward them for their performance, and even, we believe, Mr. Clifford is going to say that. And so will our witnesses. We will have one witness in particular who is very experienced in the State of Hawaii that will testify to the same. This whole concept of punishing people, principals in particular, is not something that was ever seriously considered by

the department until right now; until right now that they've proposed it.

So I'll stop right there right now, because I think it is the point in time, even though I have some more things to say because it does come up again with respect to the evaluation, except you'll see in red there on page 12 and 13, and I think you have an idea of where this is going, but I think I should state, make clear for the record, even though we've done a lot of this off the record, that we formally object to the hearing of any evidence with respect to these issues on which there have been no presentations to the parties until their final positions.

CHAIRMAN BLOCK: And my formal response, and I think you know what I'm going to say because I've already said it, is at this point the proceedings will go forward, that as I understand it, the Union has filed a prohibited practice charge with the Hawaii Labor Relations Board since they claim that the Employer has committed an unfair labor practice and that these matters should not be before me because they have not been fully bargained, and that the Union has also filed a motion to essentially stay these proceedings; am I correct?

Until I am either ordered by -- I should say

until the panel is ordered by the Hawaii Labor Relations Board to stop, if you will, to cease functioning, we have no choice except to continue on because this is a duly appointed panel, nothing has changed.

If it turns out that the Union's charge is upheld and the Hawaii Labor Relations Board directs the panel to no longer consider it, then any evidence regarding that will be disregarded. But at this point we have no choice except to take it because proceedings must go forward as planned.

MR. DAVIS: Thank you for saying that. I think I need to add one more thing, too, is that I think you could probably deduce how we learned about this, term 11, we believe we're on the horns of a dilemma here. There was actually really no alternative except to file the prohibited practice charge and then bring the issue to you, too, and request for the continuance. But we, one side of us doesn't want a continuance. These salary issues are so important to the Union. They're so far behind, as the evidence will show, that we really do want these resolved. We simply don't want them resolved in such a way that the Employer gets this because the Union gets that. And you as an experienced mediator would know that's perhaps what this is really

2013 OCT 16 PM 2:24

HAWAII LABOR RELATIONS BOARD

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

**HLRB-4 PROHIBITED PRACTICE COMPLAINT**

Case No. CE-06-831

INSTRUCTIONS: File the original and five copies, by U.S. Mail or in person, with the Hawaii Labor Relations Board, Princess Keelikolani Building, 830 Punchbowl Street, Room 434, Honolulu, Hawaii 96813. If more space is required for any item, attach additional sheets, numbering each item accordingly.

1. The Complainant alleges that the following circumstances exist and requests that the Hawaii Labor Relations Board proceed pursuant to Hawaii Revised Statutes Sections 89-13 and 89-14, and its Administrative Rules, to determine whether there has been any violation of the Hawaii Revised Statutes, Chapter 89.

2. COMPLAINANT

(a) Name, address and telephone number:

Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO
888 Mililani Street, Suite 601
Honolulu, HI 96813
#536-2351

(b) Affiliation, if any:

(c) Name, address, and telephone number of the principal representative, if any, to whom correspondence is to be directed:

James E.T. Koshiba, Esq.
Charles A. Price, Esq.
Koshiba Price Gruebner & Mau
1003 Bishop Street, Suite 2600
Honolulu, HI 96813
#523-3900

(Rev 6 13)

3. RESPONDENT (Public employer and/or employee organization or its agents against whom complaint is filed)

(a) Name, address and telephone number:

See attached

(b) Name, address, and telephone number of the principal representative, if any, to whom correspondence is to be directed:

David Louie, Attorney General
James Halvorsen, Supervising Deputy Attorney General
Department of the Attorney General
235 S. Beretania Street, Room 1500
Honolulu, HI 96813
(808)587-2990

4. Indicate the appropriate bargaining unit(s) of employee(s) involved:

BU 6 - Educational officers and other personnel of the Department of Education under the same pay schedule.

5. ALLEGATIONS

The Complainant alleges that the above-named respondent(s) has (have) engaged in or is (are) engaging in a prohibited practice or practices within the meaning of the Hawaii Revised Statutes, Section 89-13.

(Specify in detail the particular alleged violation, including the subsection or subsections of the Hawaii Revised Statutes, Section 89-13, alleged to have been violated, together with a complete statement of the facts supporting the complaint, including specific facts as to names, dates, times, and places involved in the acts alleged to be improper.)

See attached.

5. *continued:*

6. Provide a clear and concise statement of any other relevant facts:

See No. 5 above.

NO. 3 (a)

Neil A. Abercrombie, Governor
State of Hawaii
Executive Chambers
State Capitol
Honolulu, HI 96813
#586-0034

Hawaii State Board of Education
P.O. Box 2360
Honolulu, HI 96804
#586-3334

Chair Donald S. Horner
Hawaii State Board of Education
P.O. Box 2360
Honolulu, HI 96804
#586-2012

Superintendent Kathryn S. Matayoshi
Hawaii State Department of Education
P.O. Box 2360
Honolulu, HI 96804
#586-3310

Neil Dietz
Chief Investigator, State of Hawaii
Office of Collective Bargaining
235 S. Beretania Street Suite 1201
Honolulu, HI 96813-2437

Hawaii State Department of Education
P.O. Box 2360
Honolulu, HI 96804
#586-3334

NO. 5:

Public Employer State of Hawaii ("Employer") violated HRS Sections 89-13(5), (6), and (7) by failing to bargain collectively and negotiate in good faith. Specifically, in advance of an interest arbitration scheduled to begin October 21, 2013, the Employer submitted its Statement of Final Position and Final Offer, dated October 11, 2013, pursuant to HRS Section 89-11(e)(2)(B) and the Alternate Impasse Procedure Memorandum of Agreement for Unit 6, entered into on February 28, 2013, in which the Employer submitted to the Neutral Arbitrator and Panel Chair new changes to articles for inclusion in the final collective bargaining agreement that had not previously been submitted to Bargaining Unit 6's exclusive representative, HGEA, for good faith negotiation during the collective bargaining negotiating process leading up to the submission of final offers as required by HRS Chapter 89. The new changes in the Employer's October 11, 2013 Final Offer include but are not limited to the following: (1) Article 11 - Appointments, seeking to effectively allow the Superintendent to fill vacancies without regard to tenure/seniority and to eliminate the agreement that the Board and HGEA shall "develop collaboratively" implementation procedures. Not only was this not previously proposed or negotiated, but it was directly contrary to Superintendent Kathryn Mataysoshi's October 9, 2013 agreement with HGEA to a time line to collaboratively revise the implementation procedures known as Selection, Appointment, and Recruitment for School Level Administrators (SARSA) before the May 2014 recruiting season. (2) Article 25 - Compensation, seeking to effectively require school principals' excess accumulated vacation to be used by a date certain or else forfeited. (3) Article 30 - Salaries, seeking to impose an evaluation and pay for performance or sanction system. These new proposals significantly impact the bargaining unit members, were not the subject of previous negotiations as required by HRS Chapter 89, and constitute and are evidence of bad faith under HRS Section 89-13.

STATE OF HAWAII )
) ss.
CITY AND COUNTY OF )

Wilbert Holck, being first duly sworn on oath, deposes and says: that he is the Petitioner above named, or HGEA's representative, and that he has read the above Petition consisting of this and 0 additional page(s), and is familiar with the facts alleged therein, which facts he knows to be true, except as to those matters alleged on information and belief, which matters he believes to be true.

(Signature)

HGEA Deputy Executive Director
(Title)

Subscribed and sworn to before me
this 16th day of October, 2013.

Kay Umenden

Notary Public, First Circuit
State of Hawaii

My Commission expires: 12-16-2015

KAY H. MENDES NOTARY 07-650 PUBLIC STATE OF HAWAII

Doc. Date: 10-16-2013 # Pages 5
Notary Name: Kay H Mendes First Circuit
Doc. Description: HLRB-4 Prohibited Practice Complaint
Kay Umenden 10-16-2013 (Stamp)
Notary Signature Date

KAY H. MENDES NOTARY 07-650 PUBLIC STATE OF HAWAII

(Rev 6/13)

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

| | |
|---|---|
| In the Matter of<br><br>HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO,<br><br>Complainant,<br><br>and<br><br>NEIL ABERCROMBIE, Governor, State of Hawaii; DONALD S. HORNER, Chair, State Board of Education, State of Hawaii; NEIL DIETZ, Chief Negotiator, Office of Collective Bargaining, State of Hawaii; KATHRYN S. MATAYOSHI, Superintendent, Department of Education, State of Hawaii; BOARD OF EDUCATION, State of Hawaii; and DEPARTMENT OF EDUCATION, State of Hawaii,<br><br>Respondents. | CASE NO. CE-06-831<br><br>ORDER NO. 2956<br><br>ORDER GRANTING RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT |

## ORDER GRANTING RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

For the reasons discussed below, the Hawaii Labor Relations Board (Board) hereby grants RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT (Motion to Dismiss or in the Alternative for Summary Judgment), filed by Respondents NEIL ABERCROMBIE (Abercrombie), Governor, State of Hawaii; DONALD S. HORNER (Horner), Chair, State Board of Education, State of Hawaii; NEIL DIETZ (Dietz), Chief Negotiator, Office of Collective Bargaining (OCB), State of Hawaii; KATHRYN S. MATAYOSHI (Matayoshi), Superintendent, Department of Education, State of Hawaii; BOARD OF EDUCATION (BOE), State of Hawaii; and DEPARTMENT OF EDUCATION (DOE), State of Hawaii (collectively, Respondents) on October 31, 2013.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. Prohibited Practice Complaint

Bargaining Unit 06 is comprised of educational officers and other personnel of the DOE under the same pay schedule. (Hawaii Revised Statutes (HRS) § 89-6(a)(6)). Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (Complainant or HGEA) is the certified exclusive representative of employees in Bargaining Unit 06, pursuant to HRS § 89-8(a). Pursuant to HRS § 89-6(d)(3), for the purposes of negotiating a collective bargaining agreement involving Bargaining Unit 06, the "Employer" is Abercrombie with three votes, the BOE with two votes, and Matayoshi with one vote; any decision reached by the Employer shall be on the basis of a simple majority. Pursuant to HRS § 89A-1(b), Dietz, the State's Chief Negotiator, heads OCB. Pursuant to HRS § 89A-2(3), and subject to the approval of the governor, OCB conducts negotiations with the exclusive representatives of each employee organization and designates employer spokespersons for each negotiation.

On October 16, 2013, Complainant filed the instant Prohibited Practice Complaint (Complaint), alleging that Respondents violated HRS § 89-13(a)(5), (6), and (7)[1] by failing to bargain collectively and negotiate in good faith. Complainant specifically alleged the following:

> [I]n advance of an interest arbitration[2] scheduled to begin October 21, 2013, the Employer submitted its Statement of Final Position and Final Offer, dated October 11, 2013, pursuant to HRS Section 89-11(e)(2)(B) and the Alternate Impasse Procedure Memorandum of Agreement for Unit 6, entered into on February 28, 2013, in which the Employer submitted to the Neutral Arbitrator and Panel Chair new changes to articles for inclusion in the final collective bargaining agreement that had not previously been submitted to Bargaining Unit 6's exclusive representative, HGEA, for good faith negotiation during the collective bargaining negotiating process leading up to the submission of final offers as required by HRS Chapter 89. The new changes in the Employer's October 11, 2013 Final Offer include but are not limited to the following: (1) Article 11 – Appointments, seeking to effectively allow the Superintendent to fill vacancies without regard to tenure/seniority and to eliminate the agreement that the Board and HGEA shall "develop collaboratively" implementation procedures. Not only was this not previously proposed or negotiated, but it was directly contrary to Superintendent Kathryn Matayoshi's October 9, 2013 agreement with HGEA to a time line to collaboratively revise the implementation procedures known as Selection, Appointment, and Recruitment for School Level Administrators (SARSA) before the May 2014 recruiting season. (2) Article 25 – Compensation, seeking to effectively require school principals' excess accumulated vacation to be used by a date certain or [illegible] (3) Article 30 – Salaries, seeking to impose an evaluation performance or sanction system. These new proposals significantly impact the bargaining unit members, were not the subject of

[illegible]

previous negotiations as required by HRS Chapter 89, and constitute and are evidence of bad faith under HRS Section 89-13.

On October 17, 2013, Complainant filed COMPLAINANT'S MOTION FOR INTERLOCUTORY ORDER, requesting that the Bargaining Unit 6 interest arbitration hearings between HGEA and the Employer that were scheduled to begin on October 21, 2013, be stayed or postponed until the Board has decided the pending Complaint.

On October 24, 2013, Respondents filed RESPONDENTS' MEMORANDUM IN OPPOSITION TO HGEA'S MOTION FOR INTERLOCUTORY ORDER TO STAY THE ONGOING INTEREST ARBITRATION PROCEEDINGS.

On October 30, 2013, Complainant filed its WITHDRAWAL OF COMPLAINANT'S MOTION FOR INTERLOCUTORY ORDER, FILED OCTOBER 17, 2013.

On October 31, 2013, Respondents filed their Motion to Dismiss or in the Alternative for Summary Judgment, asserting:

(1) HRS § 89-11 only requires that the articles of a contract to be submitted to interest arbitration must have been previously "opened" by the parties prior to the statutory impasse date;

(2) Neither party gave notice of an impasse in this case, and the parties proceeded to interest arbitration because of the Legislature's act of amending HRS § 89-11 to impose a "drop dead" statutory impasse date, not because the parties had exhausted good faith bargaining and reached mutual impasse;

(3) HGEA has itself routinely submitted Articles to interest arbitration which were either not proposed at all during bargaining, or were substantially modified; and

(4) Article 11 was duly opened by the parties below, and the Employer plainly submitted its proposed changes to Articles 25 and 30 to HGEA's bargaining team prior to the required final offer.

On November 8, 2013, Complainant filed COMPLAINANT'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, FILED OCTOBER 31, 2013 (Memorandum in Opposition),[3] asserting:

(1) The State misconstrues HRS § 89-11(e)(2)(B) and (C);

(2) Regressive bargaining is prohibited;

(3) New post-impasse proposals are prohibited;

(4) The State violated the parties' ground rules; and

(5) Percentage wage increase proposals require current up-to-date economic information and are treated differently.

On November 19, 2013, Respondents filed RESPONDENTS' REPLY TO HGEA'S OPPOSITION TO MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT (Reply Memorandum).

On November 22, 2013, the Board heard oral argument on Respondents' Motion to Dismiss or in the Alternative for Summary Judgment. Following oral argument, the Board notified the parties that it would be taking notice of the legislative history of HRS § 89-11 from 1970 to the present, including all testimony that was submitted to the Legislature, with no objection from the parties.

B. Events Leading Up to Statutory Impasse and Interest Arbitration

By letter dated June 18, 2012, the Employer notified the HGEA that it was submitting the following proposals for Bargaining Unit 06, pursuant to Article 33 of the collective bargaining agreement (CBA), for the period beginning July 1, 2013:

- Proposal #1, Article 11 – Appointments
- Proposal #2, Article 13 – Personnel Information
- Proposal #3, Article 15 – Grievance Procedure
- Proposal #4, Article 25 – Compensation
- Proposal #5, Article 30 – Salaries
- Proposal #6, Article 31 – Hawaii Employer-Union Health Benefits Trust Fund
- Proposal #7, Article 33 – Duration
- Proposal #8, New Article – Alcohol and Controlled Substance Testing
- Proposal #9, New Article – Comprehensive Evaluation and Support System

With respect to Article 11, the Employer proposed the following changes:

a. If the vacancy is advertised during the period from June 1 to August 31 it] [sic] shall be advertised for [~~thirty (30)~~] twenty (20) days prior to selection.

b. If the vacancy is advertised during the period from September 1 to May 31, it shall be advertised for ten (10) ~~twenty (20)~~ days prior to selection.

[e] b. Priority for appointments shall be given to qualified and tenured educational officers in that class who wish to move to that position through lateral transfer or a voluntary demotion and second to all other qualified educational officers with tenure.

With respect to Article 25, the Employer proposed the following, in relevant part:

> **FOR EMPLOYEES INITIALLY HIRED OR RE-EMPLOYED ON OR BEFORE JUNE 30, 2013:**
>
> **12-month Educational Officers:**
>
> * * *
>
> 3. **Unused annual vacation days shall be automatically accumulated for succeeding years, except:**
>
> a) **The total recorded accumulation shall in no event be more than 75 working days; and**
>
> b) **Not more than 15 days a year may be accumulated.**
>
> 4. **A 12-month educational officer whose accumulated vacation credit exceeds 75 working days may be paid salary in lieu of vacation if, upon investigation by the employer, it is found that the excess resulted from administrative orders and/or employer directives.**
>
> **FOR NEW EMPLOYEES INITIALLY HIRED OR RE-EMPLOYED ON OR AFTER JULY 1, 2013:**
>
> * * *
>
> 7. **Unused annual vacation days shall be automatically accumulated for succeeding years, except:**
>
> a) **The total recorded accumulation shall not exceed 45 working days.**
>
> b) **If any recorded accumulation of vacation allowance at the end of any calendar year shall exceed 45 working days, the Employee shall automatically forfeit the unused vacation allowance which is in excess of the allowable 45 working days.**

With respect to Article 30, the Employer proposed:

> **ARTICLE 30 – SALARIES**
>
> ***Delete existing language in its entirety and replace with the following:***
>
> A. The salary schedules in effect on June 30, 2009 shall be designated as Exhibit A.

B. Subject to the approval of the respective legislative bodies and effective July 1, 2013:

1. The salary schedules designated as Exhibit A shall *be* effective for the period July 1, 2013 to and including June 30, 2015.

2. Following B.1 above, Employees shall be placed on the Corresponding pay range and step of Exhibit A.

3. Employees not administratively assigned to the salary schedule shall continue to receive their June 30, 2013 basic rate of pay.

C. There shall be no step movements or annual increments during the period July 1, 2013 to and including June 30, 2015.

The Employer also proposed the following new articles:

NEW ARTICLE – ALCOHOL AND CONTROLLED SUBSTANCE TESTING

The Employer and Union agree that the Employer may conduct reasonable suspicion alcohol and controlled substance tests on all Educational Officers. The Article is intended to help keep the workplace free from the hazards resulting from the use of alcohol and controlled substances. The workplace shall be free from the risks imposed by the use of alcohol and controlled substances for the safety of the students, public and the Employees. Employees are expected to report to work in a physical and mental condition consistent with this agreement which enables them to perform their duties in a safe and productive manner. Employees subject to alcohol and controlled substance tests and who are subject to disciplinary action shall be afforded "due process" as provided in the collective bargaining agreement.

NEW ARTICLE – COMPREHENSIVE EVALUATION AND SUPPORT SYSTEM

The Employer shall implement a statewide comprehensive evaluation and support system for school level educational officers beginning with the 2013-14 school year in accordance with Board of Education Policy 2055. The Employer and Union will continue to work together and collaborate to create an implementation plan for such evaluation system, which includes systems of support for the professional development and growth of the school level educational officers as well as the authority, resources and means to effect changes to achieve the overall purposes of public education and the goals of the department. The parties will focus on and study the pilot program utilized in select schools during school year 2012-13. In addition, the parties will create an implementation plan for financial recognition for the professional

accomplishment of school level educational officers who attain a rating of "highly effective" beginning in school year 2012-13, in accordance with Board of Education Policy 5200.

To the extent there is a need to bargain the effects of the evaluation, support system, and/or alternate forms of compensation, the parties agree to do so in an expeditious and productive manner.

By letter dated June 18, 2012, HGEA notified the Employer that it was submitting the following proposals for Bargaining Unit 06, in accordance with Article 33 of the CBA:

| Article | Title |
|---|---|
| Statement of Issues and Contract proposals | |
| 14 | Representation |
| 18 | Career Development |
| 20 | Professional Improvement |
| 23 | Administrator's Conference |
| 30 | Salaries |
| 31 | Hawaii Employer-Union Health Benefits Trust Fund |
| 33 | Duration |
| New | Legislative Mandates |
| New | Public Transportation Subsidy |

On January 18, 2013, HGEA, BOE, and DOE had their first negotiations meeting in which ground rules were discussed. (Declaration of Irene Pu'uohau). Negotiation sessions were held between HGEA, BOE, and DOE at the HGEA on January 18, January 24, February 2, and March 9, 2013. (Declaration of Irene Pu'uohau).

On January 31, 2013, the Board issued Order No. 2881, ORDER DECLARING AN IMPASSE AND APPOINTING A MEDIATOR, in Case No. I-06-146[4], which declared the date of impasse with respect to Bargaining Unit 06 to be February 1, 2013, in accordance with HRS § 89-11(c)(2) (Statutory Impasse). HRS § 89-11(c) provides in relevant part:

> An impasse over the terms of an initial or renewed agreement and the date of impasse shall be as follows:
>
> * * *
>
> (2) If neither party gives written notice of an impasse and there are unresolved issues on January 31 of a year in which the agreement is due to expire, the board shall declare on January 31 that an impasse exists and February 1 shall be the date of impasse.

Pursuant to HRS § 89-11(e)(1), Order No. 2881 also appointed Federal Mediator Carol Catanzariti to assist the parties in the voluntary resolution of the impasse.

On or about **February 2, 2013**, the parties agreed to "Ground Rules" regarding negotiations, which included the following, in relevant part:

> 5. When a complete set of proposals for negotiations is completed and accepted by both parties, no additions may be included unless approved by both parties.
>
> * * *
>
> 7. There shall be no discussions on items not submitted as a proposal.
>
> * * *
>
> 11. All items agreed to are agreed to tentatively pending final disposition of all items being negotiated.
>
> 12. All tentative agreements shall be in written form.
>
> * * *
>
> 14. Off record discussions that result in amended or counter proposals shall be considered off record until the Union and the Employer negotiate the amended or counter proposals on the record. Amended or counter proposals that result from off record discussions that have not been negotiated on record shall not be considered as a pending proposal at impasse.

On **February 28, 2013**, the Board received a MEMORANDUM OF AGREEMENT (MOA), Alternate Impasse Procedure for Unit 6, dated February 28, 2013, entered into by the parties. The MOA provided in part:

> 1. The parties agree to extend the twenty (20) day statutory period for mediation until April 15, 2013.
>
> 2. If the parties are unable to reach a voluntary resolution on a successor agreement during this extended mediation period, and unless there is a mutual agreement on a subsequent alternate impasse procedure, the appropriate statutory impasse provisions after mediation, specifically Hawaii Revised Statutes (HRS), Chapter 89-11(e) (2) Arbitration, shall apply effective April 16, 2013.
>
> 3. The time frames provided in this Memorandum of Agreement may be modified by mutual agreement of the parties.

On or around **April 9, 2013**, the Employer submitted to HGEA a settlement offer entitled EMPLOYER'S SETTLEMENT OFFER TO HGEA BU 06:

The Employer submits this comprehensive settlement offer to HGEA Bargaining Unit 06 (BU 06) as a package. Should the parties not reach agreement, the Employer is not bound by the terms offered in this package, and may revert to its proposals and/or amendments thereto.

**Duration (Article 33):**

July 1, 2013 – June 30, 2015

**Salaries (Article 30):**

- Effective 7/1/13, a three and two-tenths percent (3.2%) across-the-board increase of the applicable Educational Officer's salary schedule.
- Effective 7/1/14, a two-step adjustment on the applicable salary range of the applicable Educational Officer's salary schedule, not to exceed the maximum step of the employee's salary range.
- Effective 7/1/15, a three and two-tenths percent (3.2%) across-the-board increase of the applicable Educational Officer's salary schedule.
- Effective 7/1/16, a two-step adjustment on the applicable salary range of the applicable Educational Officer's salary schedule, not to exceed the maximum step of the employee's salary range.
- Eligibility for Pay Increases:

  Effective with the 7/1/13 across-the-board increase, and continuing thereafter for all future pay increases, Educational Officers rated "satisfactory" if rated on the PEP-SL, "basic" if rated on the CESSA[5] 5-year summative evaluation, or "expected progress" if rated on the CESSA annual interim instrument, shall be eligible for pay increases. Pay increases include salary schedule/across-the-board increases, step movements, and annual increments.

**EUTF (Article 31):**

EUTF – Employer shall pay a specific dollar amount equivalent to sixty percent (60%) of the premium rates for the benchmark health benefit plan (HMSA 75-25 plan), plus sixty percent (60%) of all administrative fees.

**Work Year and Vacation (Article 25):**

- Effective 7/1/13, a ninety (90) day (720 hours) vacation cap for 12 month Educational Officers, regardless of hire date.
- Effective 7/1/16, a seventy-five (75) day (600 hours) vacation cap for 12 month Educational Officers, regardless of hire date.

- For those employees who have accrued 75 or more days of vacation (600 hours) as of 7/1/13, those employees who have less than "x" (TBD) days over the cap shall use the excess vacation time over a period of "y" (TBD) years. For those employees who have "x" (TBD) days or more over the cap they shall use a minimum of "x" (TBD) days over a period of "y" (TBD) years. Upon expiration of the "y" (TBD) years, any vacation accrual in excess of the "x" (TBD) days will be paid out.

**Alcohol and Controlled Substance Testing (New Article)**

**Reasonable suspicion alcohol and controlled substance tests**

**Implementation of CESSA for 2013-14 and Thereafter (New Article)**

- Continued collaboration by the parties regarding implementation of the CESSA for 2013-14 and thereafter, including development of financial recognition for school level educational officers who attain a "highly effective" [sic]

**MOU regarding School Level Staffing and Responsibilities**

The Employer offers to enter into a memorandum of understanding (MOU) to provide for the employer and the union to commission, and jointly fund, a study to analyze staffing and responsibilities of school level and other Educational Officers. The purpose of the study is to analyze school leaders' responsibilities to ensure sufficient capacity for realizing student achievement, safety, staff development, and other strategic goals and objectives. The parties commit to form and initiate the study within twelve months from entering the MOU.

This settlement offer is comprehensive. If BU 06 tentatively agrees to this settlement offer, the Employer will withdraw all other outstanding employer proposals. If BU 06 does not tentatively agree to this settlement offer, the offer will expire and the Employer is not bound by the terms offered in this package, and may revert to its proposal and/or amendments thereto.

On or about April 9, 2013, the Employer submitted to the HGEA "EMPLOYER'S AMENDED SETTLEMENT OFFER TO HGEA BU 06":

The Employer submits this AMENDED comprehensive settlement offer to HGEA Bargaining Unit 06 (BU 06) as a package. Should the parties not reach agreement, the Employer is not bound by the terms offered in this package, and may revert to its proposals and/or amendments thereto.

**Duration (Article 33):**

- July 1, 2013 – June 30, 2017

**Salaries (Article 30):**

- Effective 7/1/13, a three and two-tenths percent (3.2%) across-the-board increase of the applicable Educational Officer's salary schedule.
- Effective 7/1/14, a two-step adjustment on the applicable salary range of the applicable Educational Officer's salary schedule, not to exceed the maximum step of the employee's salary range.
- Effective 7/1/15, a three and two-tenths percent (3.2%) across-the-board increase of the applicable Educational Officer's salary schedule.
- Effective 7/1/16, a two-step adjustment on the applicable salary range of the applicable Educational Officer's salary schedule, not to exceed the maximum step of the employee's salary range.
- Eligibility for Pay Increases:

  Effective with the 7/1/13 across-the-board increase, and continuing thereafter for all future pay increases, Educational Officers rated "satisfactory" if rated on the PEP-SL, "basic" if rated on the CESSA 5-year summative evaluation, or "expected progress" if rated on the CESSA annual interim instrument, shall be eligible for pay increases. Pay increases include salary schedule/across-the-board increases, step movements, and annual increments.

**EUTF (Article 31):**

- EUTF – Employer shall pay a specific dollar amount equivalent to sixty percent (60%) of the premium rates for the benchmark health benefit plan (HMSA 75-25 plan), plus sixty percent (60%) of all administrative fees.

**Work Year and Vacation (Article 25):**

- Effective 7/1/13, a ninety (90) day (720 hours) vacation cap for 12 month Educational Officers, regardless of hire date.
- Effective 7/1/16, a seventy-five (75) day (600 hours) vacation cap for 12 month Educational Officers, regardless of hire date.
- For those employees who have accrued 75 or more days of vacation (600 hours) as of 7/1/13, those employees who have less than "x" (TBD) days over the cap shall use the excess vacation time over a period of "y" (TBD) years. For those employees who have "x" (TBD) days or more over the cap they shall use a minimum of "x" (TBD) days over a period of "y" (TBD) years. Upon expiration of the "y" (TBD) years, any vacation accrual in excess of the "x" (TBD) days will be paid out.

**Alcohol and Controlled Substance Testing (New Article)**

- Reasonable suspicion alcohol and controlled substances tests.

- Applicable during regular school hours and scheduled school activities.

**Implementation of CESSA for 2013-14 and Thereafter (New Article)**

- Continued collaboration by the parties regarding implementation of the CESSA for 2013-14 and thereafter, including development of financial recognition for school level Educational Officers who attain a "highly effective" rating.
- Employer agrees to develop an appeals process for Educational Officers to appeal their evaluation rating.

**MOU regarding School Level Staffing and Responsibilities**

The Employer offers to enter into a Memorandum of Understanding (MOU) to memorialize that the employer will commission and fund a study to analyze staffing and responsibilities of school level and other Educational Officers. The purpose of the study is to analyze school leaders' responsibilities to ensure sufficient capacity for realizing student achievement, safety, staff development, and other strategic goals and objectives. The Employer agrees to initiate this study within three months of entering into the MOU and complete the study within fifteen months thereafter.

**SARSA**

The Employer agrees to complete the revisions to the School Administrator Recruitment Selection and Appointment ("SARSA") by January 2014 for immediate distribution to the Union for review. This commitment will be memorialized by way of letter of understanding with HGEA.

**School Code**

The Employer agrees [sic] complete the School Code Draft, with the 5000 Series being the first priority of completion, no later than June 2014 for review by the union, and for inclusion into the Standard Practices (SPs). This commitment will be memorialized by way of letter of understanding with HGEA.

This settlement offer is comprehensive. If BU 06 tentatively agrees to this settlement offer, the Employer will withdraw all other outstanding employer proposals. If BU 06 does not tentatively agree to this settlement offer, the offer will expire and the Employer is not bound by the terms offered in this package, and may revert to its proposal and/or amendments thereto.

On or about April 12, 2013, the HGEA presented to the Employer its "Bargaining Unit 06 – Amended Proposed Settlement Package – Counter," which proposed:

> The following in chronological order is the proposal package for Bargaining Unit 6. Unless presented in this package, all language to the agreement will remain unchanged and the Union shall not be bound by terms offered in this package should there be no agreement between the parties:
>
> 1. Completion of the School Code Draft with the 5000 Series being the first priority of completion no later than June 2014 for review by the Union:

***The School Code as an essential element to the success of the School Administrator by providing the knowledge needed to carry out personnel management functions and programs in a manner that is consistent and aligned throughout the Department of Education. The 5000 Series in particular is intended to assure that employees are treated in a comparable manner and is predicated on the philosophy that there should be standard and uniformly applied policies and procedures throughout the State, unless a cogent reason exists for exception. It is a living document subject to revision due to changes in departmental programs and practices, negotiated labor agreements and amendments to federal and State statutes. While the Union acknowledges that revisions are necessitated, the untimeliness of the revisions has negatively impacted Schools and employees.***

2. Completion of the revisions to the School Administrator Recruitment Selection and Appointment ("SARSA") by January 2014 and immediate distribution to the Union for review. ***Similarly to the importance of the revision of the School Code, it is imperative that the selection and appointment of school administrators be fair and equitable while aligned with the intent of Article 11 of the Collective Bargaining Agreement. Article 11 requires the parties to work collaboratively to develop procedures to implement provisions of the Collective Bargaining Agreement and to date the update of the SARSA has not been completed and finalized.***

3. Vice Principal required as basic staff for every school with 250 or more students to be achieved incrementally over the duration of this 4 year Agreement: ***Appropriate staffing to achieve expectations and initiatives of the Department for the benefit of Student achievement is essential. Basic staffing for Schools of 250 students or more must include a Vice Principal.***

4. Article 14 Representation: ***With the litigious nature of today's society, Educational Officers who serve as school administrators are having to face suits, legal mandates, civil rights and EEOC investigations, influx of grievances, and other related matters- the support embedded in the amended change of this article serves to assist school administrators to cope, at the earliest stages, with the flood of suits, legal actions and legal implications.***

5. Article 25 [sic] Salaries: ***The work of the Educational officer grows every day in its complexity and demands. This proposal serves to attract highly qualified candidates, retain highly experienced Educational officers and makes strides to assure appropriate compensation of the Educational Officer now and in the future.***

Effective July 1, 2013:
Educational Officers shall receive an across the board increase of 5%.

Effective July 1, 2014:
Educational Officers shall receive an across the board increase of 4%.

Effective July 1, 2015:
Educational Officers shall receive an across the board increase of 4%.

Effective July 1, 2016:
Educational Officers shall receive an across the board increase of 5%.

6. Article 31 Hawaii Employer-Union Benefits trust [sic] Fund. ***The Employer shall pay 60% of the Educational Officers chosen plan and 100% of Administrative fees.***

7. Article Duration: Union proposes a four (4) years agreement.

On or about April 12, 2013, the Employer submitted to HGEA another offer entitled EMPLOYER'S SECOND AMENDED SETTLEMENT OFFER TO HGEA BU 06 April 12, 2013:

The Employer submits this SECOND AMENDED comprehensive settlement offer to HGEA Bargaining Unit 06 (BU 06) as a package. Should the parties not reach agreement, the Employer is not bound by the terms offered in this package, and may revert to its proposals and/or amendments thereto.

**Duration (Article 33):**
- July 1, 2013 – June 30, 2017

**Salaries (Article 30):**
- Effective 7/1/13, a three and two-tenths percent (3.2%) across-the-board increase of the applicable Educational Officer's salary schedule.
- Effective 7/1/14, the bottom two steps of the salary schedule shall be eliminated and the employees on those two bottom steps shall move up to step 3.
- Also effective 7/1/14, a three percent (3%) across-the-board increase of the applicable Educational Officer's salary schedule.
- Effective 7/1/15, a three and two-tenths percent (3.2%) across-the-board increase of the applicable Educational Officer's salary schedule.
- Effective 7/1/16, the bottom two steps of the salary schedule shall be eliminated and the employees on those two bottom steps shall move up to step 3.

- Also effective 7/1/16, a three percent (3%) across-the-board increase of the applicable Educational Officer's salary schedule.
- Eligibility for Pay Increases:
  The pay increase effective 7/1/13 will not be affected by the employee's performance evaluation rating.

  Effective with the 7/1/14 across-the-board increase, and continuing thereafter for all future pay increases, Educational Officers rated "satisfactory" or higher if rated on the PEP-SL shall be eligible for pay increases.

  Effective with the 7/1/15 across-the-board increase, and continuing thereafter for all future pay increases, Educational Officers rated "basic" or higher if rated on the CESSA 5-year summative evaluation, or "expected progress" or higher if rated on the CESSA annual interim instrument, shall be eligible for pay increases.

  Pay increases include salary schedule/across-the-board increases, step movements, and annual increments.

**EUTF (Article 31):**
- EUTF – Employer shall pay a specific dollar amount equivalent to sixty percent (60%) of the premium rates for the benchmark health benefit plan (HMSA 75-25 plan), plus sixty percent (60%) of all administrative fees.

**Work Year and Vacation (Article 25):**
- Effective 7/1/13, a ninety (90) day (720 hours) vacation cap for 12 month Educational Officers, regardless of hire date.
- Effective 7/1/16, a seventy-five (75) day (600 hours) vacation cap for 12 month Educational Officers, regardless of hire date.
- For those employees who have accrued 75 or more days of vacation (600 hours) as of 7/1/13, those employees who have less than "X" (TBD) days over the cap shall use the excess vacation time over a period of "Y" (TBD) years. For those employees who have "X" (TBD) days or more over the cap they shall use a minimum of "x" (TBD) days over a period of "Y"(TBD) years. Upon expiration of the "Y" (TBD) years, any vacation accrual in excess of the "X" (TBD) days will be paid out.
- If application for vacation is unreasonably denied by the Employer, the employee will not lose the vacation leave.

**Alcohol and Controlled Substance Testing (New Article):**
- Reasonable suspicion alcohol and controlled substances tests.
- Applicable during regular school hours and scheduled school activities.

**Implementation of CESSA for 2013-14 and Thereafter (New Article):**

- Continued collaboration by the parties regarding implementation of the CESSA for 2013-14 and thereafter, including development of financial recognition for school level Educational Officers who attain a "highly effective" rating.
- Employer agrees to develop an appeals process for Educational Officers to appeal their evaluation rating.

**MOU regarding School Level Staffing and Responsibilities**
The Employer offers to enter into a Memorandum of Understanding (MOU) to memorialize that the employer will commission and fund a study to analyze staffing and responsibilities of school level and other Educational Officers. The purpose of the study is to analyze school leaders' responsibilities to ensure sufficient capacity for realizing student achievement, safety, staff development, and other strategic goals and objectives. The Employer agrees to initiate this study within three months of entering into the MOU and complete the study within fifteen months thereafter.

**SARSA**
The Employer agrees to complete the revisions to the School Administrator Recruitment Selection and Appointment ("SARSA") by January 2014 for immediate distribution to the Union for review. This commitment will be memorialized by way of letter of understanding with HGEA.

**School Code**
The Employer agrees [sic] complete the School Code Draft, with the 5000 Series being the first priority of completion, no later than June 2014 for review by the union, and for inclusion into the Standard Practices (SPs). This commitment will be memorialized by way of letter of understanding with HGEA.

This settlement offer is comprehensive. If BU 06 tentatively agrees to this settlement offer, the Employer will withdraw all other outstanding employer proposals. If BU 06 does not tentatively agree to this settlement offer, the offer will expire and the Employer is not bound by the terms offered in this package, and may revert to its proposal and/or amendments thereto.

By letter dated April 26, 2013, HGEA informed the Board in Case No. I-06-146 that the parties were at impasse in contract negotiations for a successor collective bargaining agreement, and had been unable to select a neutral third member to chair the interest arbitration panel. HGEA requested a list from the American Arbitration Association (AAA) of out-of-state arbitrators who are experienced in interest arbitration proceedings and are available in the months of June and July of 2013.

On April 26, 2013, the Board, pursuant to HRS § 89-11(e)(2)(A), sent a letter to the AAA requesting a list of five qualified arbitrators.

On May 7, 2013, the Board received a copy of electronic mail for Case No. I-06-164, from the AAA to the parties, providing the parties with a list of potential interest arbitrators.

On July 8, 2013, the Board received correspondence from HGEA, notifying the Board of the parties' selection, utilizing the "strike" method, of the neutral interest arbitrator for Bargaining Units 06 and 13. The Board previously received copies of correspondence between the parties indicating their selections of party representatives to the panels.

On July 9, 2013, the Board issued Order No. 2928 in Case No. I-06-146, Order Appointing Arbitration Panel and Neutral Arbitrator and Chairperson.

On July 12, 2013, the Board received correspondence from HGEA indicating that the previously-selected neutral interest arbitrator for Case No. I-06-146 advised the parties that unless the arbitration is held in Cleveland, Ohio, he would decline the appointment. HGEA requested that the Board ask the AAA for a list of out-of-state interest arbitrators who are experienced, available during the months of August, September, and October of 2013, and willing to travel to the State of Hawaii. By letter dated July 15, 2013, the Board requested such a list of arbitrators from the AAA.

On July 23, 2013, via electronic mail, the AAA provided the parties a second list of potential interest arbitrators.

On August 14, 2013, the Board received correspondence from HGEA that the parties, utilizing the "strike" method, selected Richard N. Block as the neutral arbitrator and chair of the arbitration panel in Case No. I-06-146.

On August 15, 2013, the Board issued Order No. 2938 in Case No. I-06-146, ORDER APPOINTING NEUTRAL ARBITRATOR AND CHAIRPERSON, appointing Richard N. Block as the neutral arbitrator and chair of the arbitration panel and, based upon correspondence from the parties, appointing Leiomalama Desha as the panel member selected by HGEA, and Annette Anderson as the panel member selected by the Employer. Order No. 2938 further provided that the panel shall have the powers conferred by law and shall follow the arbitration procedures provided for in HRS § 89-11 or an alternate impasse procedure as provided by HRS § 89-11(a).

On or about October 11, 2013, and pursuant to HRS § 89-11(e)(2)(B), the parties submitted to the Interest Arbitration Panel their final positions, which included all provisions in the existing collective bargaining agreement not being modified, all provisions already agreed to in negotiations, and all further provisions which each party is proposing for inclusion in the final agreement.

The Employer's Statement of Final Position included, in relevant part, the following proposals:

**ARTICLE 11 – APPOINTMENTS**

A. All appointments shall be based on requirements of the position and experience and qualification of the ~~educational officer~~ candidate.

1. School Level Educational Officer Vacancy

a. To fill any school level educational officer vacancy, priority shall be given to ~~educational officers with tenure in that class who wish to move to that position trough a lateral transfer or voluntary demotion; second, to educational officers with tenure as principals in other classes; third, to educational officers with tenure as vice principals; fourth, to other~~ qualified ~~educational officers~~ candidates as determined by the Superintendent.

b. ~~For school level educational officer position, all educational officers shall be considered for appointments in accordance with the procedure developed and agreed to by the Board and the Union.~~

c. ~~If there is no qualified candidate for a vacant school level position, the vacant position may be filled on a temporary assignment condition not to exceed the current school year.~~

2. State and District Educational Officer Vacancy

All vacancies for State and District level educational officer positions shall be advertised as follows:

a. All vacancies ~~If the vacancy is advertised during the period from June 1 to August 31 it~~] shall be advertised for [~~thirty (30)~~] fifteen (15) days prior to selection.

b. ~~If the vacancy is advertised during the period from September 1 to May 31 it shall be advertised for ten (10) twenty (20) days prior to selection.~~

[c] b. Priority for appointments shall be given to qualified ~~and tenured educational officers in that class who wish to move to that position through lateral transfer or a voluntary demotion and second to all other qualified educational officers with tenure~~ candidates as determined by the Superintendent.

B. All appointments of tenured educational officers shall be permanent, except in cases where an educational officer is "vicing", is on probation, is in a temporary position, or is otherwise appointed specifically for a limited term.

C. If temporary or probational appointees are not converted to permanent appointees in accordance with established procedures, they shall be returned to the positions they held prior to their temporary or probational appointments. ~~In the event the last clear positions they held have been abolished, then Section D shall apply.~~

D. ~~Department procedure to implement provisions of this agreement shall be developed collaboratively by the Board and the Union.~~

**ARTICLE 25 – COMPENSATION**

**A. Vacation.**

* * *

**12-month Principals:**

* * *

3. **Unused annual vacation days shall be automatically accumulated for succeeding years, except:**

   a) **Effective July 1, 2013, the total recorded accumulation shall in no event be more than 90 working days (720 hours);**

   b) **Not more than 15 days a year may be accumulated.**

4. **Effective the date of the arbitration decision, a 12-month principal whose accumulated vacation credit exceeds the applicable accumulation of working days in paragraph 3. a) above will have until 12/31/16 to use the accumulated excess vacation or it shall be forfeited.**

5. **A 12-month principal whose accumulated vacation credit exceeds the applicable accumulation of working days in paragraph 3. a) or 3. b) above may be paid salary in lieu of vacation if, upon investigation by the employer, it is found that the excess resulted from administrative orders and/or employer directives.**

* * *

**ARTICLE 30 – SALARIES**

***Delete existing language in its entirety and replace with the following:***

**Preamble:**

**In as much as the Employer and the Union agree to create an implementation**

plan for financial recognition for the professional accomplishment of school level educators who attain a rating of "highly effective" in accordance with Board of Education Policy 5200, the compensation and longevity steps shall be as follows:

A. The 10-Month Educational Officers' salary schedule in effect on June 30, 2009 shall be designated as Salary Schedule A.

B. The 12-Month Principals' salary schedule in effect on June 30, 2009 shall be designated as Salary Schedule B.

C. The 12-Month State and District Educational Officers' salary schedule in effect on June 30, 2009 shall be designated as Salary Schedule C.

D. Subject to the approval of the respective legislative bodies and effective July 1, 2013:

1. Following paragraphs A, B, and C above, Employees shall be placed on the corresponding pay range and step of Salary Schedules A, B, and C.

2. Effective July 1, 2013, step 1 and step 26 of Salary Schedules A, B, and C shall be eliminated. Also effective July 1, 2013, those employees who were on step 1 shall move to step 2 and those employees who were on step 26 shall continue to receive their pay but no employee shall move up to former step 26. Copies of these amended salary schedules reflecting steps 2 through 25 are attached hereto as Exhibits A, B, and C.

3. Effective July 1, 2013, employees shall receive a one step adjustment on their applicable salary range of Exhibits A, B, and C. Those employees who moved pursuant to the preceding paragraph from step 1 to step 2, and those who were on steps 25 and 26 shall not move another step effective July 1, 2013.

4. Effective January 1, 2014, employees shall receive a one step adjustment on their applicable salary range of Exhibits A, B, and C. Those who were on step 25 and former step 26 shall not move another step effective January 1, 2014.

5. The amended salary schedules designated as Exhibits A, B, and C shall be effective for the period July 1, 2013 to and including June 30, 2014. An employee shall not be entitled to more than two step movements per year.

6. Employees not administratively assigned to a salary

schedule shall continue to receive their basic rate of pay as of June 30, 2013.

E. Subject to the approval of the respective legislative bodies and effective July 1, 2014:

1. Effective July 1, 2014, step 2 and step 25 of the salary schedules designated as Exhibits A, B, and C shall be eliminated. Also effective July 1, 2014, those employees who were on step 2 shall move to step 3 and those employees who were on step 25 shall continue to receive their pay but no employee shall move up to former step 25.

2. Effective July 1, 2014, the salary schedules designated as Exhibits A, B, and C shall be amended to reflect steps 3 through 24, and shall be further amended to reflect a three and two-tenths (3.2%) across-the-board increase. Copies of these amended salary schedules are attached hereto as Exhibits D, E, and F. The salary schedules designated as Exhibits D, E, and F shall be effective for the period July 1, 2014 to and including June 30, 2015.

3. Employees not administratively assigned to a salary schedule shall receive a three and two-tenths (3.2%) across-the-board increase effective July 1, 2014.

F. Subject to the approval of the respective legislative bodies and effective July 1, 2015:

1. Effective July 1, 2015, step 3 and step 24 of the salary schedules designated as Exhibits D, E, and F shall be eliminated. Also effective July 1, 2015, those employees who were on step 3 shall move to step 4 and those employees who were on step 24 shall continue to receive their pay but no employee shall move up to former step 24. Copies of these amended salary schedules reflecting steps 4 through 23 are attached hereto as Exhibits G, H, and I.

2. Effective July 1, 2015, employees shall receive a one step adjustment on their applicable salary range of Exhibits G, H, and I. Those employees who moved pursuant to the preceding paragraph from step 3 to step 4 and those who were on steps 23 and 24 shall not move another step effective July 1, 2015.

3. Effective January 1, 2016, employees shall receive a one step adjustment on their applicable salary range of Exhibits G, H, and I.

Those who were on step 23 and former step 24 shall not move another step effective January 1, 2016.

4. The salary schedules designated as Exhibits G, H, and I shall be effective for the period July 1, 2015 to and including June 30, 2016.

5. Employees not administratively assigned to a salary schedule shall continue to receive their basic rate of pay as of June 30, 2015.

G. Subject to the approval of the respective legislative bodies and effective July 1, 2016:

1. Effective July 1, 2016, step 4 and step 23 of the salary schedules designated as Exhibits G, H, and I shall be eliminated. Also effective July 1, 2016, those employees who were on step 4 shall move to step 5 and those employees who were on step 23 shall continue to receive their pay but no employee shall move up to former step 23.

2. Effective July 1, 2016, the salary schedules designated as Exhibits G, H, and I shall be amended to reflect steps 5 to 22, and shall be further amended to reflect a three and two-tenths (3.2%) across-the-board increase. Copies of these amended salary schedules are attached hereto as Exhibits J, K, and L. The salary schedules designated as Exhibits J, K, and L shall be effective for the period of July 1, 2016 to and including June 30, 2017.

3. Employees not administratively assigned to a salary schedule shall receive a three and two-tenths (3.2%) across-the-board increase effective July 1, 2016.

H. Eligibility for Pay Increases:

1. Pay increases effective July 1, 2013 will not be affected by the employee's performance evaluation rating in school year 2012-13.

2. Effective with the July 1, 2014 pay increase, and continuing thereafter for all future pay increases, Educational Officers will need to receive an overall rating of "Satisfactory" (or its equivalent) or higher on their performance evaluation in order to be eligible for any pay increase.

3. Effective with the July 1, 2015 pay increase, and continuing thereafter for all future pay increases, principals who receive an overall performance evaluation rating of "Basic" or higher if rated

on the Comprehensive Evaluation System for School Administrators (CESSA) 5-year summative evaluation, or "Expected Progress" or higher if rated on the CESSA annual interim Instrument, shall be eligible for pay increases.

4. Any Educational Officer who does not qualify for a pay increase as a result of receiving an overall performance rating less than "Satisfactory," "Basic," or "Expected Progress" shall receive the appropriate compensation at the start of the school year after achieving a performance evaluation rating of "Satisfactory," "Basic," or "Expected Progress." The pay increases shall not be retroactive.

5. Pay Increases include salary schedule/across-the-board increases, step movements, and annual increments.

Article 33 – DURATION

This BU 6 Agreement shall become effective ~~as of [July 1, 2011]~~ July 1, 2013 and shall remain in full force an effect to and including ~~[June 30, 2013]~~ June 30, 2017. It shall be renewed thereafter with respect to the subject matter covered, in accordance with statutes unless either party gives written notice to the other party of its desire to ~~amend~~, modify, amend, or terminate the Unit 6 Agreement~~, and such written notice is given no later than Tuesday, May 15, 2012. After such written notice is given the parties shall exchange their specific written proposals, if any, no later than [Monday, June 18, 2012] Negotiations for a new Agreement shall commence on a mutually agreeable date following the exchange of written proposals, as applicable.~~

Notices and proposals shall be in writing and shall be presented to the other party between June 15 and June 30, 2016. When the notice is given, negotiations for a new Unit 6 Agreement shall commence on a mutually agreeable date following the exchange of the written proposals.

**NEW ARTICLE – ALCOHOL AND CONTROLLED SUBSTANCE TESTING**

The Employer and Union agree that the Employer may conduct reasonable suspicion alcohol and controlled substance tests on all Educational Officers.

This Article is intended to help keep the workplace free from the hazards resulting from the use of alcohol and controlled substances. The workplace shall be free from the risks posed by the use of alcohol and controlled substances for the safety of the students, public and the Employees. Employees are expected to report to work in a physical and mental condition consistent with this agreement

which enables them to perform their duties in a safe and productive manner. Employees subject to alcohol and 12 controlled substance tests and who are subject to disciplinary action shall be afforded "due process" as provided in the collective bargaining agreement.

Reasonable suspicion alcohol and controlled substance testing shall be applicable during regular school hours and scheduled school activities.

**NEW ARTICLE – COMPREHENSIVE EVALUATION AND SUPPORT SYSTEM**

The Employer shall implement a statewide comprehensive evaluation and support system for school level educational officers beginning with the 2013-14 school year and continuing thereafter in accordance with Board of Education Policy 2055.

The new evaluation and support system for principals is the *Comprehensive Evaluation System for School Administrators (CESSA).* The Employer and Union will continue to work together and collaborate to create an Implementation plan for such evaluation system, which includes systems of support for the professional development and growth of the school level educational officers as well as the authority, resources and means to effect changes to achieve the overall purposes of public education and the goals of the department. The parties will focus on and study the pilot program utilized in select schools during school year 2012-13. In addition, the parties will create an implementation plan for financial recognition for the professional accomplishment of school level educational officers who attain a rating of "highly effective" in accordance with Board of Education Policy 5200.

To the extent there is a need to bargain the effects of the evaluation, support system, and/or alternate forms of compensation, the parties agree to do so in an expeditious and productive manner.

The HGEA's Final Position included a list of all articles not being modified, which included the following:

Article 1 – Recognition
Article 2 – Non-Discrimination
Article 3 – Conflict
Article 4 – Maintenance of Rights, Benefits and Privileges
Article 5 – Union Representation Rights
Article 6 – Rights of the Employer
Article 7 – No Strikes or Lockouts
Article 8 – Personnel Policy Changes
Article 9 – Faculty and Staff
Article 10 – Students

Article 11 – Appointment
Article 12 – Tenure
Article 13 – Personnel Information
Article 14 – Representation
Article 15 – Grievance Procedure
Article 16 – Layoff
Article 17 – Educational Officers Governance
Article 18 – Career Development
Article 19 – Temporary Assignment
Article 20 – Professional Development
Article 21 – Surveys and Questionnaires
Article 22 – Leave for Jury or Witness Duty
Article 23 – Administrators Conference
Article 24 – Travel
Article 25 – Compensation
Article 26 – Meals
Article 27 – Parking
Article 28 – Safety and Health
Article 29 – Miscellaneous
Article 32 – Entirety Clause

The HGEA's Final Position also included a list of all articles agreed to in negotiations, which included the following:

> PART II. UNIT 6 AGREEMENT
> ARTICLES AGREED TO IN NEGOTIATIONS
>
> The parties have reached agreement on the issue of the SARSA. The parties have agreed that the Employer's SARSA final draft shall be presented to the Union no later than January 1, 2014. The parties have further agreed that final completion of the SARSA shall be no later than April 4, 2014, subject to completion of negotiations.
>
> The parties have reached agreement on the issue of the School Code. The parties have agreed that the Employer's School Code 5000 Series shall be presented to the Union no later than October 31, 2014. The parties have further agreed that final completion of the School Code 5000 series shall be no later than December 31, 2014, subject to completion of negotiations.

The HGEA's Final Position also included a list of unresolved articles which included the following:

**ARTICLE 30 – SALARIES**

A. Subject to the approval of the respective legislative bodies and effective July 1, 2013:

1. The salary schedule in effect on June 30, 2009 for 10-month Educational Officers (Vice Principals) shall be amended to reflect an across-the-board increase of twelve percent (12.00%) and such amended salary schedule shall be designated as Exhibit A.

2. The salary schedule in effect on June 30, 2009 for 12-month Educational Officers (Principals) shall be amended to reflect an across-the-board increase of twelve percent (12.00%) and such amended salary schedule shall be designated as Exhibit B.

3. The salary schedule in effect on June 30, 2009 for 12-month Educational officers (State and District) shall be amended to reflect an across-the-board increase of twelve percent (12.00%) and such amended salary schedule shall be designated as Exhibit C.

4. Following A.1., A.2. and A.3 above, employees shall be placed on the corresponding salary range and step on Exhibit A for 10-month Educational Officers (Vice Principals), Exhibit B for 12-month Educational Officers (Principals) and Exhibit C for 12-month Educational Officers (State and District), provided that employees whose basic rate of pay on June 30, 2009 exceeds the maximum step of their respective salary schedule shall receive a twelve percent (12%) increase.

B. Subject to the approval of the respective legislative bodies and effective July 1, 2014:

1. The salary schedule for 10-month Educational Officers (Vice Principals) Exhibit A shall be amended to add new steps 27, 28 and 29. Step 27 shall be 1.3% more than step 26, step 28 shall be 1.3% more than step 27 and step 29 shall be 1.3% more than step 28. Such amended schedule shall be designated as Exhibit D.

2. The salary schedule for 12-month Educational Officers (Principals) Exhibit B shall be amended to add new steps 27, 28 and 29. Step 27 shall be 1.3% more than step 26, step 28 shall be 1.3% more than step 27 and step 29 shall be 1.3% more than step 28. Such amended schedule shall be designated as Exhibit E.

3. The salary schedule for 12-month Educational Officers (State and District) Exhibit C shall be amended to add new steps 27, 28 and 29. Step 27 shall be 1.3% more than step 26, step 28 shall be 1.3% more than step 27 and step 29 shall be 1.3% more than step 28. Such amended schedule shall be designated as Exhibit F.

4. Following B.1., B.2 and 8.3 above, employees shall receive a three-step adjustment on their applicable salary range on Exhibit D for 10-month Educational Officers (Vice Principals), Exhibit E for 12-month Educational Officers (Principals) and Exhibit F for 12-month Educational Officers (State and District).

5. Following B.4 above, Exhibits D for 10-month Educational Officers (Vice Principals) shall be amended to eliminate steps 1, 2 and 3 and the remaining steps shall be renumbered and such amended schedule shall be designated as Exhibit G.

6. Following B.4 above, Exhibit E for 12-month Educational Officers (Principals) shall be amended to eliminate steps 1, 2 and 3 and the remaining steps shall be renumbered and such amended schedule shall be designated as Exhibit H.

7. Following B.4 above, Exhibit F for 12-month Educational Officers (State and District) shall be amended to eliminate steps 1, 2 and 3 and the remaining steps shall be renumbered and such amended schedule shall be designated as Exhibit I.

C. Subject to the approval of the respective legislative bodies and effective July 1, 2015:

5. The salary schedule in effect on June 30, 2009 for 10-month Educational Officers (Vice Principals) Exhibit G shall be amended to reflect an across-the- board increase of twelve percent (12.00%) and such amended salary schedule shall be designated as Exhibit J.

6. The salary schedule in effect on June 30, 2009 for 12-month Educational Officers (Principals) Exhibit H shall be amended to reflect an across-the-board increase of twelve percent (12.00%) and such amended salary schedule shall be designated as Exhibit K.

7. The salary schedule in effect on June 30, 2009 for 12-month Educational officers (State and District) Exhibit I shall be amended to reflect an across-the-board increase of twelve percent (12.00%) and such amended salary schedule shall be designated as Exhibit L.

8. Following C.1., C.2. and C.3 above, employees shall be placed on the corresponding salary range and step on Exhibit J for 10-month Educational Officers (Vice Principals), Exhibit K for 12-month Educational Officers (Principals) and Exhibit L for 12-month Educational Officers (State and District), provided that employees whose basic rate of pay on June 30, 2013 exceeds the maximum step of their respective salary schedule shall receive a twelve percent (12%) increase.

D. Subject to the approval of the respective legislative bodies and effective July 1, 2016:

1. The salary schedule for 10-month Educational Officers (Vice Principals) Exhibit K shall be amended to add new steps 27, 28 and 29. Step 27 shall be 1.3% more than step 26, step 28 shall be 1.3% more than step 27 and step 29 shall be 1.3% more than step 28. Such amended schedule shall be designated as Exhibit N.

2. The salary schedule for 12-month Educational Officers (Principals) Exhibit L shall be amended to add new steps 27, 28 and 29. Step 27 shall be 1.3% more than step 26, step 28 shall be 1.3% more than step 27 and step 29 shall be 1.3% more than step 28. Such amended schedule shall be designated as Exhibit O.

3. The salary schedule for 12-month Educational Officers (State and District) Exhibit M shall be amended to add new steps 27, 28 and 29. Step 27 shall be 1.3% more than step 26, step 28 shall be 1.3% more than step 27 and step 29 shall be 1.3% more than step 28. Such amended schedule shall be designated as Exhibit P.

4. Following D.1., D.2 and D.3 above, employees shall receive a three-step adjustment on their applicable salary range on Exhibit N for 10-month Educational Officers (Vice Principals), Exhibit O for 12-month Educational Officers (Principals) and Exhibit P for 12-month Educational Officers (State and District).

5. Following D.4 above, Exhibits [sic] N for 10-month Educational Officers (Vice Principals) shall be amended to eliminate steps 1, 2 and 3 and such amended schedule shall be designated as Exhibit Q.

6. Following D.4 above, Exhibit 0 for 12-month Educational Officers (Principals) shall be amended to eliminate steps 1, 2 and 3 and such amended schedule shall be designated as Exhibit R.

7. Following D.4 above, Exhibit 0 for 12-month Educational Officers (State and District) shall be amended to eliminate steps 1, 2 and 3 and such amended schedule shall be designated as Exhibit S.

8. Following D.5, D.6 and D.7 above employees shall be placed on the corresponding salary range and step.

## ARTICLE 31 – HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND (This provision is not to be decided by the arbitration panel)

(Replace existing language with the following)

Subject to the applicable provisions of Chapters 87A and 89, Hawaii Revised Statutes, the Employer shall pay the following monthly contributions which include the cost of the Hawaii Employer-Union Health Benefits Trust Fund (Trust Fund) administrative fees to the Trust Fund as follows:

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

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

C. Effective July 1, 2013:

1. Effective July 1, 2013 for plan year 2013-2014 for each Employee-Beneficiary with or without dependent-beneficiaries enrolled in the following Trust Fund health benefit plan:

| BENEFIT PLAN | MONTHLY CONTRIBUTION (100% of Premium Rates plus Administrative Fees) | |
|---|---|---|
| | Single | Family |
| a. Medical (PPO) (drug & chiro) | $____ | $____ |
| b. Medical (HMO) (drug & chiro) | $____ | $____ |
| c. Dental | $____ | $____ |
| d. Vision | $____ | $____ |
| e. Dual coverage medical | $____ | $____ |
| f. Dual coverage dental | $____ | $____ |
| g. Dual coverage vision | $____ | $____ |
| h. Stand Alone Prescription Drug | $____ | $____ |

2. For each Employee-Beneficiary enrolled in the Trust Fund group life insurance plan, the employer shall pay $ _____ per month which represents one hundred percent (100%) of the premium and administrative fees.

D. Effective July 1, 2014:

1. Effective July 1, 2014 for plan year 2014-2015 for each Employee-Beneficiary with or without dependent-beneficiaries enrolled in the following Trust Fund health benefit plan:

| BENEFIT PLAN | | MONTHLY CONTRIBUTION (100% of Premium Rates plus Administrative Fees) | |
|---|---|---|---|
| | | Single | Family |
| i. | Medical (PPO) (drug & chiro) | $ _____ | $ _____ |
| j. | Medical (HMO) (drug & chiro) | $ _____ | $ _____ |
| k. | Dental | $ _____ | $ _____ |
| l. | Vision | $ _____ | $ _____ |
| m. | Dual coverage medical | $ _____ | $ _____ |
| n. | Dual coverage dental | $ _____ | $ _____ |
| o. | Dual coverage vision | $ _____ | $ _____ |
| p. | Stand Alone Prescription Drug | $ _____ | $ _____ |

2. For each Employee-Beneficiary enrolled in the Trust Fund group life insurance plan, the employer shall pay $ _____ per month which represents one hundred percent (100%) of the premium and administrative fees.

## ARTICLE 33 – DURATION

This Agreement shall become effective as of ~~July 1, 2011~~ July 1, 2013 and shall remain in effect to and including ~~June 30, 2013~~ June 30, 2017. It shall be renewed thereafter with respect to the subject matter covered, in accordance with statutes unless either party gives written notice to the other party of its desire to amend, modify or terminate the Agreement, and such written notice is given no later than ~~May 15,~~ 2012 May 17, 2016. After such written notice is given the parties shall exchange their specific written proposals, if any, no later than ~~Monday, June 18, 2012~~ June 14, 2016. Negotiations for a new Agreement shall commence on a mutually agreeable date following the exchange of written proposals, as applicable. In the event that an agreement cannot be reached on a new Agreement, the current language of the Agreement shall continue in force and effect until the collective bargaining process is resolved as provided by law.

The Interest Arbitration proceeding commenced during the week of October 21, 2013, and then was suspended on October 25, 2013, pending the Board's decision on the instant Complaint.

## II. LEGAL STANDARD

### A. Motions to Dismiss

In considering a motion to dismiss, the Board's consideration is strictly limited to the allegations of the Complaint, which are deemed to be true. See County of Kauai v. Baptiste, 115 Hawai'i 15, 24, 165 P.3d 916, 925 (2007) (citing In re Estate of Rogers, 103 Hawai'i 275, 280-81, 82 P.3d 1190, 1195-96 (2003), *reconsideration denied*, 115 Hawai'i 231, 116 P.3d 991). Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. Id.

Additionally, when considering a motion to dismiss, the Board may review any evidence, such as affidavit and testimony, to resolve factual disputes concerning the existence of jurisdiction. Yamane v. Pohlson, 111 Hawai'i 74, 81, 137 P.3d 980, 9987 (2006) (citing McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1350, at 213 (1990)).

A court is not required to accept conclusory allegations on the legal effect of the events alleged. Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985). "Dismissal is warranted only if the claim is clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983) (internal quotation marks and citation omitted).

### B. Motions for Summary Judgment

Summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any (hereinafter, "relevant materials"), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. GECC Financial Corp. v. Jaffarian, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (Haw. App. 1995), *aff'd* 80 Hawai'i 118, 905 P.2d 624.

The burden is on the party moving for summary judgment to show the absence of any genuine issues as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. Id.

A non-movant may not rest upon the allegations in the complaint, but must produce evidence which would be admissible at trial to make out the requisite issue of material fact. Tri-S Corp. v. Western World Ins. Co., 110 Hawai'i 473, 494, 135 P.3d 82, 103 (2006).

## III. DISCUSSION

The gravamen of the Complaint involves the question of whether the Employer's proposals submitted to the Interest Arbitration Panel as part of the Employer's Final Position are required to have first been presented to HGEA and bargained over, and its related question of

whether such proposals may be different from or less favorable than proposals previously presented to HGEA and subject to negotiations. The Board concludes that such questions are primarily legal in nature and that there are no material facts in dispute, and that disposition of the Complaint via Respondents' Motion to Dismiss or in the Alternative for Summary Judgment is appropriate.

A. The Plain, Unambiguous Language of HRS § 89-11(e)(2)(B)

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 Hawai'i 198, 208, 124 P.3d 943, 953 (2005). The Board, however, will depart from the plain meaning of a statute to avoid inconsistency, contradiction, and illogicality. See Kinkaid v. Board of Review, 106 Hawai'i 318, 323, 104 P.3d 905, 910 (2004).

Here, HRS § 89-11 provides in relevant part (emphases added):

**§ 89-11. Resolution of disputes; impasses**

(a) A public employer and an exclusive representative may enter, at any time, into a written agreement setting forth an alternate impasse procedure culminating in an arbitration decision pursuant to subsection (f), to be invoked in the event of an impasse over the terms of an initial or renewed agreement. The alternate impasse procedure shall specify whether the parties desire an arbitrator or arbitration panel, how the neutral arbitrator is to be selected or the name of the person whom the parties desire to be appointed as the neutral arbitrator, and other details regarding the issuance of an arbitration decision. When an impasse exists, the parties shall notify the board if they have agreed on an alternate impasse procedure. The board shall permit the parties to proceed with their procedure and assist at times and to the extent requested by the parties in their procedure. In the absence of an alternate impasse procedure, the board shall assist in the resolution of the impasse at times and in the manner prescribed in subsection (d) or (e), as the case may be. If the parties subsequently agree on an alternate impasse procedure, the parties shall notify the board. The board shall immediately discontinue the procedures initiated pursuant to subsection (d) or (e) and permit the parties to proceed with their procedure.

• • •

(c) An impasse over the terms of an initial or renewed agreement and the date of impasse shall be as follows:

(1) More than ninety days after written notice by either party to initiate negotiations, either party may give written notice to the board that an impasse exists. The date on which the board receives notice shall be the date of impasse; and

(2) **If neither party gives written notice of an impasse and there are unresolved issues on January 31 of a year in which the agreement is due to expire, the board shall declare on January 31 that an impasse exists and February 1 shall be the date of impasse.**

* * *

(e) **If an impasse exists between a public employer and the exclusive representative of . . . bargaining unit (6), educational officers and other personnel of the department of education under the same salary schedule . . . the board shall assist in the resolution of the impasse as follows:**

(1) **Mediation. During the first twenty days after the date of impasse, the board shall immediately appoint a mediator, representative of the public from a list of qualified persons maintained by the board, to assist the parties in a voluntary resolution of the impasse.**

(2) **Arbitration. If the impasse continues twenty days after the date of impasse, the board shall immediately notify the employer and the exclusive representative that the impasse shall be submitted to a three-member arbitration panel who shall follow the arbitration procedure provided herein.**

(A) **Arbitration panel. Two members of the arbitration panel shall be selected by the parties; one shall be selected by the employer and one shall be selected by the exclusive representative. The neutral third member of the arbitration panel, who shall chair the arbitration panel, shall be selected by mutual agreement of the parties. In the event that the parties fail to select the neutral third member of the arbitration panel within thirty days from the date of impasse, the board shall request the American Arbitration Association, or its successor in function, to furnish a list of five qualified arbitrators from which the neutral arbitrator shall be selected. Within five days after receipt of such list, the parties shall alternately strike names from the list until a single name is left, who shall be immediately appointed by the board as the neutral arbitrator and chairperson of the arbitration panel.**

(B) **Final positions. Upon the selection and appointment of the arbitration panel, each party shall submit to the panel, in writing, with copy to the other party, a final position which shall include all provisions in any existing collective bargaining agreement not being**

**modified, all provisions already agreed to in negotiations, and all further provisions which each party is proposing for inclusion in the final agreement.**

(C) Arbitration hearing. Within one hundred twenty days of its appointment, the arbitration panel shall commence a hearing at which time the parties may submit either in writing or through oral testimony, all information or data supporting their respective final positions. The arbitrator, or the chairperson of the arbitration panel together with the other two members, are encouraged to assist the parties in a voluntary resolution of the impasse through mediation, to the extent practicable throughout the entire arbitration period until the date the panel is required to issue its arbitration decision.

(D) Arbitration decision. Within thirty days after the conclusion of the hearing, a majority of the arbitration panel shall reach a decision pursuant to subsection (f) on all provisions that each party proposed in its respective final position for inclusion in the final agreement and transmit a preliminary draft of its decision to the parties. The parties shall review the preliminary draft for completeness, technical correctness, and clarity and may mutually submit to the panel any desired changes or adjustments that shall be incorporated in the final draft of its decision. Within fifteen days after the transmittal of the preliminary draft, a majority of the arbitration panel shall issue the arbitration decision.

Accordingly, the plain and unambiguous language of HRS § 89-11(e)(2)(B) provides that "[u]pon the selection and appointment of the arbitration panel, each party shall submit to the panel, in writing, with copy to the other party, a final position which shall include all provisions in any existing collective bargaining agreement not being modified, all provisions already agreed to in negotiations, and all further provisions which each party is proposing for inclusion in the final agreement" (emphasis added). Nothing in the plain language of the statute requires that the proposals in a party's final position be identical to the last set of proposals presented by either party prior to the interest arbitration. There is nothing in the plain language that prohibits a party from withdrawing previous proposals or modifying any of its proposals.

Chapter 89, HRS, obligates the parties to negotiate in good faith with respect to wages, hours, and terms and conditions of employment. However, the final positions of the parties that are submitted to an interest arbitration panel are just that – part of an interest arbitration proceeding, which is invoked when the parties are unable to arrive at an agreement. In turn, impasse is defined in HRS § 89-2 as a "failure of a public employer and an exclusive representative to achieve agreement in the course of collective bargaining" and includes any

declaration of impasse under § 89-11. Accordingly, interest arbitration is not, itself, negotiations, but rather a process that occurs after the parties ***fail to negotiate*** a contract (see 51A C.J.S., *Labor Relations* § 579 (2010)). The parties' failure to come to an agreement is resolved by an arbitrator or, as in this case, an arbitration panel that has the power to set the terms and conditions of a new binding agreement.

Arbitration is defined in HRS § 89-2 as meaning "the procedure whereby parties involved in an impasse submit their difference to a third party, whether a single arbitrator or an arbitration panel, for an arbitration decision. It may include mediation whereby the neutral third party is authorized to assist the parties in a voluntary resolution of the impasse." "Mediation" means assistance by a neutral third party to resolve an impasse between the public employer and the exclusive representative through interpretation, suggestion, and advice.

As argued by Respondents, HGEA cites to no authority for the proposition that the post-bargaining Final Position must precisely mirror proposals presented during bargaining.

Complainant's case citations regarding a party's obligation to negotiate, regressive bargaining, and bargaining to impasse involve actual negotiations between parties over a new or renewed agreement, and therefore are not on point because, as discussed above, interest arbitration is not, itself, part of the parties' negotiations. While there does not appear to be applicable case law specifically involving interest arbitration proceedings, as discussed above, interest arbitration pursuant to HRS § 89-11(e) is a creation of the legislature, and the Board is limited to the plain and unambiguous language of the statute.

Additionally, the "impasse" in the present case was a "statutory" impasse. In the absence of a declaration of impasse by either party, the Board was required by statute to declare on January 31, 2013, that the date of "impasse" shall be February 1, 2013. Conceivably, parties may not yet have had the opportunity to meet and bargain at all prior to the statutory date of impasse, and may have only limited opportunity to bargain prior to the interest arbitration proceeding. In the present case, the parties did not have their first meeting until January 18, 2013. The parties entered into an alternate impasse procedure and continued to bargain by exchanging settlement offers.

Furthermore, both the Employer and HGEA included "non-binding" language clauses in their respective proposals during negotiations, asserting that the party will not be bound by the proposals if the parties ultimately fail to reach an agreement. Requiring the parties' existing proposals to be submitted to the Interest Arbitration Panel as their final positions would essentially nullify the intent of the parties.

There is no dispute that Respondents were required to "open" the articles of the expiring collective bargaining agreement at issue here, pursuant to Article 33 (see Page 5 of Respondents' Motion to Dismiss or in the Alternative for Summary Judgment, and Exhibit 1 of Exhibit A attached thereto), or that Respondents did "open" those articles – Article 11 (Appointments), Article 25 (Compensation), and Article 30 (Salaries). Further, this position by Respondents was not disputed by Complainant in its Memorandum in Opposition.

With respect to Article 11 specifically, Respondents argued in their Motion to Dismiss or in the Alternative for Summary Judgment that summary judgment was appropriate because the Employer sufficiently "opened" Article 11 (see Page 8 of Respondents' Motion to Dismiss). Complainant alleged in the Complaint and argued at hearing that the Employer's proposal regarding Article 11 in its Final Position before the Interest Arbitration Panel was directly contrary to Matayoshi's October 9, 2013 agreement with HGEA to a time line to collaboratively revise the implementation procedures known as SARSA before the May 2014 recruiting season. At oral argument, counsel for HGEA clarified that the agreement was an "oral" agreement with Matayoshi.[6] However, HGEA did not present opposing affidavits or declarations on this issue (Hawaii Administrative Rules (HAR) § 12-42-8(g)(3)(C)(iii) requires answering affidavits[7], if any, be filed within five days after service of a motion, unless the Board directs otherwise). A non-movant may not rest upon the allegations in the complaint, but must produce evidence which would be admissible at trial to make out the requisite issue of material fact. Tri-S Corp. v. Western World Ins. Co., 110 Hawai'i 473, 494, 135 P.3d 82, 103 (2006).

Finally, Complainant argues that the Employer's Final Position violates the parties' "Ground Rules" entered into on February 2, 2013 (a copy of the "Ground Rules" was attached to the Declaration of Irene Pu'uohau). However, as discussed above, interest arbitration is not, itself, part of negotiations, and thus the Board finds the "Ground Rules" would not be applicable to the parties' Final Position statements. Furthermore, the parties also entered into an alternate impasse procedure on February 28, 2013, that provided in relevant part, "[i]f the parties are unable to reach a voluntary resolution on a successor agreement during this extended mediation period, and unless there is a mutual agreement on a subsequent alternate impasse procedure, the appropriate statutory impasse provisions after mediation, specifically [HRS] Chapter 89-11(e)(2) Arbitration, shall apply effective April 16, 2013" (emphasis added). In short, the alternate impasse procedure provided that, in the absence of a voluntary resolution or subsequent alternate impasse procedure, the provisions of § 89-11(e)(2) would control. As discussed above, § 89-11(e)(2) does not, by its plain and unambiguous language, prohibit the Employer's Final Position statement at issue here.

For the reasons discussed above, the Board concludes that Respondents are entitled to dismissal or in the alternative to summary judgment. Accordingly, the Board grants Respondents' Motion to Dismiss, or in the Alternative for Summary Judgment.

B. Statutory History

Assuming solely for the sake of argument that the language of HRS § 89-11(e)(2)(B) is not plain and unambiguous, the Board would nevertheless grant Respondents' Motion to Dismiss or in the Alternative for Summary Judgment based upon the legislative history of the statute.

1. 1970 Session Laws of Hawaii, Act 171

The Fifth Hawaii State Legislature, Regular Session of 1970, adopted S.B. No. 1696-70, enacted as 1970 Haw. Sess. L. Act 171 (Act 171). Act 171, sec. 2, at 307-322, created Chapter 89, HRS, Collective Bargaining in Public Employment. Conference Committee Report (Conf. Comm. Rep.) No. 25-70 stated, regarding the purpose of the bill, "[i]t is also the intent of the bill to provide adequate means for preventing controversies between public agencies and public

employees and for resolving these controversies when they occur." Conf. Comm. Rep No. 25-70 on S.B. 1696-70 (Haw. 1970), in 1970 Senate Journal at 1022, 1970 House Journal at 1262. Senate Standing Committee Report (Sen. Stand. Comm. Rep.) No. 745-70 further explained the public interest involved with this legislation, stating:

> Your Committee feels that it is imperative and it is in the public interest that positive legislation should be enacted to harness and direct the energies of public employees, to promote harmonious and cooperative relations between government and its employees, and to protect the public by assuring effective and orderly operations of government.

Sen. Stand. Comm. Rep. No. 745-70 (Haw. 1970), in 1970 Senate Journal at 1331.

In sec. 2, "Sec. -2," of Act 171, "impasse" was defined as "failure of a public employer and an exclusive representative to achieve agreement in the course of negotiations." 1970 Haw. Sess. L. Act 171, sec. 2, at 309. Act 171, sec. 2, "Sec. -11," "Resolution of disputes; grievances; impasses" created the original impasse procedure. The procedure provided that, in the absence of a written agreement between the public employer and the exclusive representative setting forth an impasse procedure, either party could request assistance from the Hawaii Public Employment Relations Board (HPERB)[8]; or HPERB, on its own motion, could determine that an impasse existed on any matter in a dispute and render assistance. 1970 Haw. Sess. L., Act 171, sec. 2, "Sec. -11," at 317-19. The assistance enumerated in the Act included, among other things: (1) mediation or voluntary resolution of the impasse; (2) fact-finding[9], if the dispute continued for more than 15 days after the impasse; and (3) mutual agreement by the parties to submit remaining differences to arbitration, which shall result in a final and binding decision.

2. 1978 Session laws of Hawaii, Act 108

In 1978, HRS § 89-11 was amended (via Act 108, H.B. No. 1815-78) to add compulsory arbitration procedures for resolving disputes over the terms of an initial or renewed agreement involving Bargaining Unit 11 (firefighters).[10] HRS § 89-11 provided in relevant part:

> (d) Notwithstanding any other law to the contrary, if a dispute between a public employer and the exclusive representative of optional appropriate bargaining unit (11), firefighters, exists over the terms of an initial or renewed agreement, the board shall assist in the voluntary resolution of the impasse by appointing a mediator within three days after the date of impasse. If the dispute continues to exist fifteen working days after the date of impasse, the dispute shall be submitted to arbitration proceedings as provided herein.
>
> * * *
>
> Upon the selection and appointment of the arbitration panel, each party shall submit to the panel, in writing, with copy to the other party, a complete final offer which shall constitute a complete agreement and shall include all provisions in any existing collective bargaining

> agreement not being modified, all provisions already agreed to in negotiations, and all further provisions it is proposing for inclusion in the final agreement (emphasis added).
>
> Within twenty calendar days of its appointment, the arbitration panel shall commence a hearing at which time the parties may submit either in writing or through oral testimony, all information or data supporting their respective final offers. Nothing in this section shall be construed to prohibit the parties from reaching a voluntary settlement on the unresolved issues, with or without the assistance of a mediator, at any time prior to the conclusion of the hearing conducted by the arbitration panel.
>
> Within thirty calendar days after the conclusion of the hearing, a majority of the arbitration panel shall select the most reasonable of the complete final offers submitted by the parties and shall issue a final and binding decision incorporating that offer without modification (emphasis added).

1978 Haw. Sess. L., Act 108, sec. 1, at 187-88.

The purpose of the compulsory arbitration procedure provided for in Act 108 was described in Stand. Com. Rep. No. 248-78:

> This bill provides for final-offer whole package arbitration as the method of impasse resolution. The approach requires the arbitrator to select the most reasonable of the final offers submitted to him [or her] by the parties, and to issue a decision incorporating that offer without modification . . . .
>
> * * *
>
> . . . More than any alternative mechanism, final-offer arbitration induces negotiated agreement because the very process generates the risk of failing to negotiate and losing everything in a decision which is final and binding upon both parties. The arbitrator is not free to "invent" an arbitration award but rather must select either the final offer submitted by the union or the one submitted by the employer. In any other form of arbitration, the parties, knowing full well that the arbitrator is likely to decide somewhere between the union's position and the employer's position, simply do not negotiate in good faith and cling to outrageous positions. With final-offer arbitration, the party that maintains an unreasonable position is in trouble; the prospect of losing everything forces [the party] to negotiate.

Stand. Com. Rep. No. 248-78, 1978 House Journal at 1493-94 (emphasis added).

As shown below, the subsequent amendments to the statute show an intent by the Legislature to move away from the selection of one party's complete final offer, and instead permit the interest arbitration panel greater latitude in fashioning an award.

3. 1984 Session Laws of Hawaii, Acts 254 and 219

In 1984, HRS § 89-11 was amended to "allow the arbitration panel to fashion a decision that it deems appropriate and not be limited to selecting one or the other of the final offers of the parties as the basis for its decision" (Conf. Com. Rep. No. 76-84, in 1984 Senate Journal at 950).

Act 251 amended HRS § 89-11 to provide in relevant part:

> Upon the selection and appointment of the arbitration panel, each party shall submit to the panel, in writing, with copy to the other party, a final offer which shall include all provisions in any existing collective bargaining agreement not being modified, all provisions already agreed to in negotiations, and all further provisions other than those relating to contributions by the State and respective counties to the Hawaii public employees health fund which each party is proposing for inclusion in the final agreement.

1985 Haw. Sess. L., Act 251 (S.B. No. 878), sec 2, at 568.

Also in 1984, Act 219 (S.B. No. 1115) added bargaining unit (12) (police officers) as a bargaining unit subject to compulsory interest arbitration, and amended HRS § 89-11 to provide in relevant part:

> Within thirty calendar days after the conclusion of the hearing, a majority of the arbitration panel shall issue a final and binding decision (emphasis added).

(1984 Haw. Sess. L., Act 219, sec. 1, at 444). The intent of the amendment, as discussed in Conf. Com. Rep. No. 76-84 on S.B. No. 1115 (1984 Senate Journal at 950), included the following:

> [T]he present law is amended to allow the arbitration panel to fashion a decision that it deems appropriate and not be limited to selecting one or the other of the final offers of the parties as the basis for its decision (emphasis added).

Also, Stand. Com. Rep. No. 303-84 (1984 Senate Journal at 1130) provides the following:

> Your Committee is concerned that the present law requiring the arbitration panel to select one or the other final offer is too limited and believes that more equitable settlements could be reached if the arbitration panel is allowed greater latitude in fashioning a final and

binding decision (emphasis added). Accordingly, your Committee has amended the bill by deleting the requirement that the arbitration panel must select the most reasonable of the complete final offers submitted by the parties and requiring instead that the arbitration panel issue a final and binding decision.

4. 1995 Session Laws of Hawaii, Acts 208 and 202

In 1995, Act 208 (S.B. 1218) expanded the list of bargaining units that are subject to mandatory interest arbitration:

> (d) If a dispute between a public employer and the exclusive representative of appropriate bargaining unit (2), supervisory employees in blue collar positions; appropriate bargaining unit (3), nonsupervisory employees in white collar positions; appropriate bargaining unit (4), supervisory employees in white collar position; appropriate bargaining unit (6), educational officers and other personnel of the department of education under the same salary schedule; appropriate bargaining unit (8), personnel of the University of Hawaii and the community college system, other than faculty; optional appropriate bargaining unit (9), registered professional nurses; optional appropriate bargaining unit (11), firefighters; optional appropriate bargaining unit (12), police officers; or optional appropriate bargaining unit (13), professional and scientific employees, other than registered professional nurses, exists over the terms of an initial or renewed agreement more than ninety days after written notification by either party to initiate negotiations, either party may give written notice to the board that an impasse exists and the board shall assist in the voluntary resolution of the impasse by appointing a mediator within three days after the date of impasse. If the dispute continues to exist fifteen working days after the date of impasse, the dispute shall be submitted to arbitration proceedings as provided herein.

1995 Haw. Sess. L., Act 208, at 395-96.

Act 202 (H.B. 1586) of that same year added "optional appropriate bargaining unit (10), institutional, health, and correctional workers" to the list of bargaining units subject to mandatory interest arbitration (1995 Haw. Sess. L., Act 202, at 382).

5. 2000 Hawaii Session Laws, Act 253

In 2000 the Legislature amended HRS § 89-11 as part of Act 253 (S.B. No. 2859) (commonly referred to as the "civil service reform act"). Act 253 created "statutory" impasse by adding the following provision to § 89-11:

> (c) An impasse over the terms of an initial or renewed agreement and the date of impasse shall be as follows:

(1) More than ninety days after written notice by either party to initiate negotiations, either party may give written notice to the board that an impasse exists. The date on which the board receives notice shall be the date of impasse;

(2) If neither party gives written notice of an impasse and there are unresolved issues on April 15 of an even-numbered year, the board shall declare on April 15 that an impasse exists and April 16 shall be the date of impasse.

(Act 253, sec. 100). Conf. Comm. Rep. No. 115 on S.B. No. 2859 stated that the purpose of establishing "a calendar-driven impasse procedure, beginning on April 16 of an even-numbered year," was "as a means of achieving timely submission of cost items to the respective legislative body." Conf. Comm. Rep. No. 115 on S.B. 2859 (Haw. 2000), in 2000 Senate Journal, at 788, 2000 House Journal at 910.

Act 253 also amended § 89-11 to provide that a public employer and an exclusive representative may enter at any time into a written agreement setting forth an alternate impasse procedure culminating in an arbitration decision pursuant to subsection (f), and that in the absence of an alternate impasse procedure, the board shall assist in the resolution of the impasse as prescribed in subsection (d) (governing bargaining units (1), (5), and (7)) or subsection (e) (governing bargaining units (2), (3), (4), (6), (8), (9), (10), (11), (12), and (13)), as the case may be (Act 253, sec. 100). Paragraph (e) of § 89-11, as amended, provided in relevant part:

. . . [T]he board shall assist in the resolution of the impasse as follows:

(1) Mediation. During the first twenty days after the date of impasse, the board shall immediately appoint a mediator, representative of the public from a list of qualified persons maintained by the board, to assist the parties in a voluntary resolution of the impasse.

(2) Arbitration. If the impasse continues twenty days after the date of impasse, the board shall immediately notify the employer and the exclusive representative that the impasse shall be submitted to a three-member arbitration panel who shall follow the arbitration procedure provided herein.

(A) Arbitration panel. Two members of the arbitration panel shall be selected by the parties; one shall be selected by the employer and one shall be selected by the exclusive representative. The neutral third member of the arbitration panel who shall chair the arbitration panel, shall be selected by mutual agreement of the parties. In the event that the parties fail to select the neutral third member of the arbitration panel within thirty days from the date of impasse, the board shall request the American Arbitration Association, or its successor in function, to furnish a list of five

qualified arbitrators from which the neutral arbitrator shall be selected. Within five days after receipt of such list, the parties shall alternately strike names from the list until a single name is left, who shall be immediately appointed by the board as the neutral arbitrator and chairperson of the arbitration panel.

(B) Final positions. Upon the selection and appointment of the arbitration panel, each party shall submit to the panel, in writing, with copy to the other party, a final position which shall include all provisions in any existing collective bargaining agreement not being modified, all provisions already agreed to in negotiations, and all further provisions which each party is proposing for inclusion in the final agreement. (Emphases added).

(C) Arbitration hearing. Within one hundred twenty days of its appointment, the arbitration panel shall commence a hearing at which time the parties may submit either in writing or through oral testimony, all information or data supporting their respective final positions (emphasis added). The arbitrator, or the chairperson of the arbitration panel together with the other two members, are encouraged to assist the parties in a voluntary resolution of the impasse through mediation, to the extent practicable throughout the entire arbitration period until the date the panel is required to issue its arbitration decision (emphasis added).

(D) Arbitration decision. Within thirty days after the conclusion of the hearing, a majority of the arbitration panel shall reach a decision pursuant to subsection (f) on all provisions that each party proposed in its respective final position for inclusion in the final agreement and transmit a preliminary draft of its decision to the parties (emphasis added). The parties shall review the preliminary draft for completeness, technical correctness, and clarity and may mutually submit to the panel any desired changes or adjustments that shall be incorporated in the final draft of its decision. Within fifteen days after the transmittal of the preliminary draft, a majority of the arbitration panel shall issue the arbitration decision.

(2000 Haw. Sess. L., Act 253, sec. 100, at 900-01).

Thus, Act 253's revisions to § 89-11 included the replacement of the term "final offer" with the term "final positions" in paragraph (e). No explanation for this change was provided in the accompanying committee reports.

6. 2001 Hawaii Session Laws, Act 90

In 2001, the Legislature amended HRS § 89-11, in relevant part, to remove bargaining units (2), (3), (4), (6), (8), (9) and (13) from the list of bargaining units subject to mandatory interest arbitration. (2001 Haw. Sess. L., Act 90, secs. 6 and 9).

7. 2002 Hawaii Session Laws, Act 189 and Act 232

Act 189 amended HRS § 89-11 to include bargaining unit (9), registered professional nurses, to the list of bargaining units subject to mandatory interest arbitration. (2002 Haw. Sess. L., Act 189, sec. 1).

Act 232 amended the date of statutory impasse provided for in HRS § 89-11(c)(2) to read, "[i]f neither party gives written notice of an impasse and there are unresolved issues on January 31 of a year in which the agreement is due to expire, the board shall declare on January 31, that an impasse exists and February 1 shall be the date of impasse." 2002 Haw. Sess. L., Act 232, sec. 3, at 923.

8. 2003 Hawaii Session Laws, First Special Session, Act 6

Act 6 of the Legislature's First Special Session of 2003 amended HRS § 89-11 to once again include bargaining units (2), (3), (4), (6), (8), and (13) in the list of bargaining units subject to mandatory interest arbitration.

As discussed above, by 1984, the Legislature articulated its intent to permit the interest arbitration panel greater latitude in fashioning an award. By 2000, the Legislature substituted the term "final positions" in place of the original term "final offer," although the Legislature did not specifically articulate a reason for this change.

Additionally, as discussed earlier, "statutory" impasse was declared by the Board pursuant to HRS § 89-11(c)(2). In the absence of a declaration of impasse by either party, the Board was required by statute to declare on January 31, 2013, that the date of "impasse" shall be February 1, 2013. Conceivably, the parties may not yet have had adequate opportunity to meet and negotiate prior to the statutory date of impasse, and may have only limited opportunities to negotiate prior to the interest arbitration proceeding. In the present case, the parties did not have their first meeting until January 18, 2013.

Furthermore, as also discussed earlier, both the Employer and HGEA included "non-binding" language clauses in their respective proposals during negotiations, asserting that the party will not be bound by the proposals if the parties ultimately fail to reach an agreement. Requiring only the parties' final proposals to be submitted to the Interest Arbitration Panel would essentially nullify the intent of the parties.

The Board concludes, therefore, that currently there is no statutory requirement that a proposal be presented to the other party and bargained over to impasse prior to submission to the

interest arbitration panel, nor is there a statutory prohibition against presenting to the interest arbitration panel proposals that may be different from or less favorable than proposals previously presented to the other party and negotiated over. The articles at issue here, that Employer submitted to the arbitration panel in its Final Position statement, were "opened," pursuant to Article 33 of the expiring collective bargaining agreement, by letter dated June 18, 2012.

The Board notes, however, that the burden is on each of the parties to "submit either in writing or through oral testimony, all information or data supporting their respective final positions" (HRS § 89-11(e)(2)(C)). Further, as required by § 89-11(e)(2)(D), the panel will reach a decision on all provisions in each party's respective final position pursuant to the provisions of subsection (f), which includes "[s]uch other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours, and conditions or employment through voluntary collective bargaining, mediation, arbitration, or otherwise between the parties, in the public service or in private employment" (HRS § 89-11(f)(10)). In short, the interest arbitration panel is the body empowered to determine whether a particular proposal submitted to it is appropriate for inclusion in the collective bargaining agreement. The arbitrator, or the chairperson of the arbitration panel together with the other two members, are encouraged to assist the parties in a voluntary resolution of the impasse through mediation, to the extent practicable throughout the entire arbitration period until the date the panel is required to issue its arbitration decision.

## IV. CONCLUSION

The Board concludes that HRS § 89-11(e)(2)(B) does not, by its plain and unambiguous language, prohibit introduction to the interest arbitration panel of the Employer's Final Position statement at issue here. Additionally, the legislative history of HRS § 89-11 indicates an intent by the Legislature to allow the arbitration panel "greater latitude" in fashioning a final and binding decision that it deems appropriate, and not be limited to selecting one or the other of the final offers of the parties. Furthermore, the arbitration panel has the authority and duty to "reach a decision . . . on all provisions that each party proposed in its respective final position for inclusion in the final agreement." (HRS § 89-11(e)(2)(D)).

The Board therefore concludes that the actions complained of in the Complaint do not constitute a prohibited practice pursuant to HRS § 89-13(a)(5) (refusal to bargain collectively in good faith with the exclusive representative as required in section 89-9); § 89-13(a)(6) (refusal to participate in good faith in the mediation and arbitration procedures set forth in section 89-11; or § 89-11(a)(7) (refusal or failure to comply with any provision of chapter 89).

Accordingly, the Board holds that Respondents are entitled to dismissal of the Complaint or in the alternative to summary judgment, and therefore, the Board hereby grants Respondents' Motion to Dismiss or in the Alternative for Summary Judgment.

DATED: Honolulu, Hawaii, January 17, 2014.

HAWAII LABOR RELATIONS BOARD

JAMES B. NICHOLSON, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

Copies sent to:

Charles A. Price, Esq.
Richard H. Thomason, Deputy Attorney General

[1] The Complaint alleges violation of "HRS Section 89-13(5), (6), and (7)"; however, the Board assumes that this was a typographical error and that the Complainant intended to cite to HRS § 89-13(a)(5), (6), and (7). HRS 89-13(a) provides in relevant part:

> (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> • • •
>
> (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
>
> (6) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11; [or]
>
> (7) Refuse or fail to comply with any provision of this chapter[.]

[2] "Interest arbitration, unlike grievance arbitration, focuses on what the terms of a new agreement should be, rather than the meaning of the terms of the old agreement. Thus, the arbitrator is not acting as a judicial officer, construing the terms of an existing agreement and applying them to a particular set of facts. Rather, he [or she] is acting as a legislator, fashioning new contractual obligations." Local 58, IBEW, AFL-CIO v. Southeastern Michigan Chapter, National Electrical Contractors, Ass'n., Inc., 43 F.3d 1026, 1030 (6th Cir. 1995). Grievance arbitration involves interpreting an existing contract to determine whether its conditions have been breached; interest arbitration involves referring a dispute created by the failure of the parties to negotiate a new contract to an arbitration panel to establish the terms and conditions of a future employment contract. 51A C.J.S. *Labor Relations* § 579. Interest arbitration is sometimes known as "compulsory arbitration." Id.

[3] On November 12, 2013, Complainant filed an ERRATA TO COMPLAINANT'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, FILED OCTOBER 31, 2013, to correct the last sentence on Page 2.

[4] The Hawaii Supreme Court validated the practice of taking judicial notice of a court's own records in State v. Akana, 68 Haw. 164, 165, 706 P.2d 1300, 1302 (1985). Copies of the relevant documents in Case No. I-06-146 are also attached as exhibits to Respondents' Motion to Dismiss.

[5] "CESSA" is the "Comprehensive Evaluation System for School Administrators."

[6] The Board notes that an informal "oral" agreement would appear to violate the parties' "Ground Rules." Furthermore, pursuant to HRS § 89-6(d), any decision reached by the employer group requires a simple majority, with the governor having three votes, the board of education having two votes, and the superintendent of education having one vote.

[7] It is the Board's practice to also accept a declaration in lieu of affidavit, similar to Rule 52 of the Hawaii Rules of Appellate Procedure.

[8] The HPERB was later replaced statutorily by the Board (Act 251, 1985 Haw. Sess. L.).

[9] The fact-finding board, in addition to powers delegated to it by the HPERB, had the power to make recommendations for the resolution of the dispute (1970 Haw. Sess. L., Act 171, sec. 2, "Sec. -11," at 318).

[10] In August of 1977, as a result of an impasse in bargaining involving firefighters, the HPERB concluded that a firefighters' strike would present an imminent or present danger to the health and safety of the public, and as part of its order, required that, in the event of a strike, trained incumbents of Unit 11 positions provide the minimum manning necessary to remove the danger to public health and safety. The Legislature noted, "[i]n effect, the HPERB order effectively canceled the firefighters' right to lawfully strike, and in so doing, left the firefighters with no bargaining position. Your Committee believes that their right to bargain collectively should not be abridged and recommends the adoption of the procedures established in this bill as a viable alternative to strike action" (emphasis added). Stand. Com. Rep. No. 248-78, in 1978 House Journal, at 1494.

**SIGNATURES**

April 17, 2014

Richard N. Block, Panel Chair

April 17, 2014

Annette Anderson, Employer Member*

April 17, 2014

Irene L.A. Pu'uohau, Union Member**

*Ms. Anderson concurs on Issues 2, 3, 4. Ms. Anderson dissents on Issue 1, 5, and 6.

**Ms. Pu'uohau concurs on Issues 1, 2, 3, 4, 5, and 6.



Exhibit 9

American Arbitration Association, or its successor in function, to furnish a list of five qualified arbitrators from which the neutral arbitrator shall be selected. Within five days after receipt of the list, the parties shall alternately strike names from the list until a single name is left, who shall be immediately appointed by the board as the neutral arbitrator and chairperson of the arbitration panel.

(B) Final positions. Upon the selection and appointment of the arbitration panel, each party shall submit to the panel, in writing, with copy to the other party, a final position [~~which~~] that shall include all provisions in any existing collective bargaining agreement not being modified, all provisions already agreed to in negotiations, and all further provisions which each party is proposing for inclusion in the final agreement[~~.~~]; provided that such further provisions shall be limited to those specific proposals that were submitted in writing to the other party and were the subject of collective

bargaining between the parties up to the time of the impasse, including those specific proposals that the parties have decided to include through a written mutual agreement. The arbitration panel shall decide whether final positions are compliant with this provision and which proposals may be considered for inclusion in the final agreement.

(C) Arbitration hearing. Within one hundred twenty days of its appointment, the arbitration panel shall commence a hearing at which time the parties may submit either in writing or through oral testimony, all information or data supporting their respective final positions. The arbitrator, or the chairperson of the arbitration panel together with the other two members, are encouraged to assist the parties in a voluntary resolution of the impasse through mediation, to the extent practicable throughout the entire arbitration period until the date the panel is required to issue its arbitration decision.

STAND. COM. REP. NO. 3380

Honolulu, Hawaii

RE: H.B. No. 1977
H.D. 2
S.D. 1

Honorable Donna Mercado Kim
President of the Senate
Twenty-Seventh State Legislature
Regular Session of 2014
State of Hawaii

Madam:

Your Committee on Ways and Means, to which was referred H.B. No. 1977, H.D. 2, S.D. 1, entitled:

"A BILL FOR AN ACT RELATING TO COLLECTIVE BARGAINING,"

begs leave to report as follows:

The purpose and intent of this measure is to clarify what proposals can be included in a party's final position submission to a public sector collective bargaining arbitration panel.

Specifically, the measure limits the types of proposals that can be included in a public employer's and exclusive representative's final positions submitted for arbitration to the specific proposals that were previously exchanged in writing between the parties and were the subject of collective bargaining between the parties up to the time of impasse.

Your Committee received written comments in support of this measure from the Hawaii Government Employees Association and United Public Workers. Written comments in opposition were received from the Department of Budget and Finance, Office of Collective Bargaining, and the City and County of Honolulu Department of Human Resources.

Your Committee finds that the current law regarding what may be included in a party's final position for the arbitration of a collective bargaining agreement is vague and unclear. This measure clarifies that the final positions submitted by the parties shall only include those proposals previously exchanged in writing between the parties and that were the subject

of collective bargaining up to the time of impasse. Your Committee believes that this measure will prevent arbitration hearings from being unnecessarily extended, contain costs, and ensure that collective bargaining is conducted in good faith.

As affirmed by the record of votes of the members of your Committee on Ways and Means that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 1977, H.D. 2, S.D. 1, and recommends that it pass Third Reading.

Respectfully submitted on behalf of the members of the Committee on Ways and Means,

DAVID Y. IGE, Chair

STAND. COM. REP. NO 3044

Honolulu, Hawaii

RE: H.B. No. 1977
H.D. 2
S.D. 1

Honorable Donna Mercado Kim
President of the Senate
Twenty-Seventh State Legislature
Regular Session of 2014
State of Hawaii

Madam:

Your Committee on Judiciary and Labor, to which was referred H.B. No. 1977, H.D. 2, entitled:

"A BILL FOR AN ACT RELATING TO COLLECTIVE BARGAINING,"

begs leave to report as follows:

The purpose and intent of this measure is to amend the collective bargaining laws to:

(1) Require parties in arbitration to include in their final positions only those proposals that were previously submitted in writing before impasse and about which an impasse in collective bargaining has been reached; and

(2) Authorize the arbitration panel to decide whether final positions comply with all requirements and which proposals may be considered for inclusion in the final agreement.

Your Committee received testimony in support of this measure from the Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO; Hawaii Fire Fighters Association, Local 1463, IAFF, AFL-CIO; and University of Hawaii Professional Assembly. Your Committee received testimony in opposition to this measure from the Department of Budget and Finance, Department of Education, Office of Collective Bargaining, and Department of Human Resources of the City and County of Honolulu.

Exhibit 10C - 000001

Your Committee finds that this measure clarifies the procedures for final positions in arbitration proceedings by requiring parties in arbitration in include in their final positions only those proposals that were previously submitted in writing before impasse and about which an impasse in collective bargaining has been reached. Furthermore, the Hawaii Government Employees Association testified that this measure creates a cost-effective dispute resolution mechanism to determine whether final positions can be included in the final agreement by authorizing the arbitration panel, rather than the Hawaii Labor Relations Board, to make such a determination.

Your Committee has amended this measure by adopting the language suggested by the Hawaii Government Employees Association to:

(1) Delete language that requires parties in arbitration to include in their final positions only those proposals that were previously submitted in writing before impasse and about which an impasse in collective bargaining has been reached, and insert language that allows the inclusion of all further provisions in a final position if such further provisions are limited to those specific proposals that were submitted in writing to the other party and were the subject of collective bargaining between the parties up to the time of the impasse, including specific proposals that the parties have decided to include through a written mutual agreement;

(2) Change the effective date from July 1, 2030, to July 1, 2014; and

(3) Make technical, nonsubstantive amendments for the purposes of clarity and consistency.

As affirmed by the record of votes of the members of your Committee on Judiciary and Labor that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 1977, H.D. 2, as amended herein, and recommends that it pass Second Reading in the form attached hereto as H.B. No. 1977, H.D. 2, S.D. 1, and be referred to the Committee on Ways and Means.

Respectfully submitted on behalf of the members of the Committee on Judiciary and Labor,

CLAYTON HEE, Chair

Exhibit 10C - 000002

STAND. COM. REP. NO. 800-14

Honolulu, Hawaii
, 2014

RE: H.B. No. 1977
H.D. 2

Honorable Joseph M. Souki
Speaker, House of Representatives
Twenty-Seventh State Legislature
Regular Session of 2014
State of Hawaii

Sir:

Your Committee on Finance, to which was referred H.B. No. 1977, H.D. 1, entitled:

"A BILL FOR AN ACT RELATING TO COLLECTIVE BARGAINING,"

begs leave to report as follows:

The purpose of this measure is to amend resolution procedures for an impasse in collective bargaining between a public employer and the exclusive representative of a bargaining unit by requiring that final positions submitted to arbitration include only proposals that are the subject of the impasse and granting the arbitration panel the authority to determine if final positions submitted comply with statutory requirements.

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO; Hawaii Fire Fighters Association; and United Public Workers, AFSCME Local 646, AFL-CIO provided testimony in support of this measure. The Department of the Attorney General, Department of Budget and Finance, Office of Collective Bargaining, Department of Education, City and County of Honolulu Department of Human Resources, and University of Hawaii provided testimony in opposition to this measure.

Your Committee has amended this measure by changing its effective date to July 1, 2030, for the purpose of facilitating further discussion.

As affirmed by the record of votes of the members of your Committee on Finance that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 1977, H.D. 1, as amended herein, and recommends

Exhibit 10D - 000001

that it pass Third Reading in the form attached hereto as H.B. No. 1977, H.D. 2.

Respectfully submitted on behalf of the members of the Committee on Finance,

SYLVIA LUKE, Chair

STAND. COM. REP. NO. 43-14

Honolulu, Hawaii
, 2014

RE: H.B. No. 1977
H.D. 1

Honorable Joseph M. Souki
Speaker, House of Representatives
Twenty-Seventh State Legislature
Regular Session of 2014
State of Hawaii

Sir:

Your Committee on Labor & Public Employment, to which was referred H.B. No. 1977 entitled:

"A BILL FOR AN ACT RELATING TO COLLECTIVE BARGAINING,"

begs leave to report as follows:

The purpose of this measure is to amend resolution procedures for an impasse between a public employer and the exclusive representative of a bargaining unit by requiring, under certain circumstances, that provisions of the final positions submitted in a collective bargaining arbitration include only proposals that were submitted before impasse.

The Office of Collective Bargaining, Department of the Attorney General, Department of Budget and Finance, Department of Education, University of Hawaii, and the Department of Human Resources of the City and County of Honolulu provided testimony in opposition to this measure. The Hawaii Labor Relations Board and Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO provided comments.

Your Committee has amended this measure by specifying that:

(1) The final positions submitted by each party shall include only those specific proposals that have been previously submitted in writing before impasse and about which an impasse in bargaining has been reached;

Exhibit 10E - 000001

(2) Under certain circumstances, the parties at impasse are strictly prohibited from including positions that were not previously submitted in writing before impasse and about which an impasse has not been reached; and

(3) The arbitration panel shall decide whether the final positions submitted are compliant with statutory requirements and which proposals may be considered in the final agreement.

As affirmed by the record of votes of the members of your Committee on Labor & Public Employment that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 1977, as amended herein, and recommends that it pass Second Reading in the form attached hereto as H.B. No. 1977, H.D. 1, and be referred to the Committee on Finance.

Respectfully submitted on behalf of the members of the Committee on Labor & Public Employment,

MARK M. NAKASHIMA, Chair

Support

HAWAII FIRE FIGHTERS ASSOCIATION
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 1463, AFL-CIO
1018 PALM DRIVE, HONOLULU, HAWAII 96814-1929
TELEPHONE (808) 949-1568 FAX: (808) 952-6003
WEBSITE: www.hawaiifirefighters.org

LATE

HOUSE OF REPRESENTATIVES
THE TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2014
February 12, 2014

Committee on Finance

Testimony by
Hawaii Fire Fighters Association

H.B. No. 1977, H.D. 1 Relating to Collective Bargaining

My name is Robert H. Lee and I am the President of the Hawaii Fire Fighters Association (HFFA), Local 1463, IAFF, AFL-CIO. The HFFA represents approximately 2,100 active-duty professional fire fighters throughout the State. HFFA supports H.B. No. 1977, H.D. 1, which amends Section 89-11 to provide that the final positions in collective bargaining arbitration include only proposals that were submitted before impasse and provides the arbitration panels with the authority to determine if the final positions submitted are compliant with statutory requirements.

House Bill No. 1977, H.D. 1, provides both the employee representatives and employers assurances that final proposals submitted by the parties to the arbitration panel be limited to written proposals previously submitted in writing prior to impasse. The caveat which provides the arbitration panel with the authority to determine if final provisions are compliant with Section 89-11, is a balanced approach for both the employers and exclusive employee representatives.

Thank you for your support.

Exhibit 11A

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel 808 543 0011 • Fax 808 528 0922

AFSCME
LOCAL 152, AFL-CIO

The Twenty-Seventh Legislature, State of Hawaii
House of Representatives
Committee on Labor & Public Employment

Testimony by
Hawaii Government Employees Association
January 28, 2014

**H.B. 1977 – RELATING TO COLLECTIVE BARGAINING**

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO supports the intent of H.B. 1977, which amends a provision of the final positions in a collective bargaining arbitration, but respectfully requests an amendment to the bill language, which adds clarification and a dispute resolution mechanism. We request the proposed language, below, replace the current language contained in H.B. 1977, in a House Draft 1:

(A) Final positions. Upon the selection and appointment of the arbitration panel, each party shall submit to the panel, in writing, with copy to the other party, a final position which shall include all provisions in any existing collective bargaining agreement not being modified, all provisions already agreed to in negotiations, and all further provisions which each party is proposing for inclusion in the final agreement. The final positions submitted by each party to the arbitration panel shall include only those specific proposals that have been previously submitted in writing before impasse and about which an impasse in bargaining has been reached. Absent agreement by the parties or lack of objection, the parties are strictly prohibited from including in their final positions any proposals that were not previously submitted in writing before impasse and about which an impasse in bargaining has not been reached . The arbitration panel shall decide whether final positions are compliant with this provision and which proposals may be considered for inclusion in the final agreement.

As currently written, Ch. 89-11(e), Hawaii Revised Statues, regarding the Employer and the Exclusive Representative's final positions in an arbitration proceeding, is vague and unclear. The purpose of H.B. 1977 and the intent behind our suggested amendments is to clarify that the final positions submitted by both the Employer and the Exclusive Representative shall include only proposals that were previously submitted prior to impasse. The amendment also creates a cost-effective dispute resolution mechanism to determine whether final positions can be included in the final agreement by determination of the arbitration panel, versus awaiting a decision from a potentially lengthy Hawaii Labor Relations hearing. Adoption of this proposed amendment to Ch. 89, HRS is a cost containment measure since arbitration hearings will not be unduly and unexpectedly lengthened, mutually beneficial to both the Employer and the Exclusive Representative and ensures collective bargaining is conducted in good faith.

Thank you for the opportunity to testify in support of H.B. 1977, with the requested amended language.

Respectfully submitted,

Randy Perreira
Executive Director

888 MILILANI STREET, SUITE 601 HONOLULU, HAWAII 96813-2991

Exhibit 11B

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808 543 0011 • Fax: 808 528 0922

LATE

**The Twenty-Seventh Legislature, State of Hawaii**
**House of Representatives**
**Committee on Finance**

**Testimony by**
**Hawaii Government Employees Association**
**February 12, 2014**

**H.B. 1977, H.D. 1 – RELATING TO COLLECTIVE BARGAINING**

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO strongly supports the purpose and intent of H.B. 1977, H.D. 1, which amends a provision of the final positions in a collective bargaining arbitration.

As currently written, Ch. 89-11(e), Hawaii Revised Statues, regarding the Employer and the Exclusive Representative's final positions in an arbitration proceeding, is vague and unclear. The purpose of H.B. 1977 is to clarify that the final positions submitted by both the Employer and the Exclusive Representative shall include only proposals that were previously submitted prior to impasse. This amendment creates a cost-effective dispute resolution mechanism to determine whether final positions can be included in the final agreement by determination of the arbitration panel, versus awaiting a decision from a potentially lengthy Hawaii Labor Relations hearing. Adoption of this proposed amendment to Ch. 89, HRS is a cost containment measure since arbitration hearings will not be unduly and unexpectedly lengthened, mutually beneficial to both the Employer and the Exclusive Representative and ensures collective bargaining is conducted in good faith.

Thank you for the opportunity to testify in strong support of H.B. 1977, H.D. 1, as written.

Respectfully submitted,

Randy Perreira
Executive Director

888 MILILANI STREET, SUITE 601 HONOLULU, HAWAII 96813-2991

Exhibit 11C

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808 543 0011 • Fax: 808 528 0922

AFSCME
LOCAL 152, AFL-CIO

The Twenty-Seventh Legislature, State of Hawaii
The Senate
Committee on Judiciary and Labor

Testimony by
Hawaii Government Employees Association
March 18, 2014

H.B. 1977, H.D. 2 – RELATING TO COLLECTIVE BARGAINING

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO strongly supports the purpose and intent of H.B. 1977, H.D. 2, which amends a provision of the final positions in a collective bargaining arbitration, but respectfully requests two amendments to the current draft of the bill. We request the proposed language, below, replace the current language contained in H.B. 1977, H.D. 2, in addition to an effective date of July 1, 2014, in a Senate Draft:

> (B) Final positions. Upon the selection and appointment of the arbitration panel, each party shall submit to the panel, in writing, with copy to the other party, a final position ~~which~~ that shall include all provisions in any existing collective bargaining agreement not being modified, all provisions already agreed to in negotiations, and all further provisions which each party is proposing for inclusion in the final agreement. ~~Absent agreement by the parties, lack of objection, or good cause, the parties are prohibited from including in their final positions any proposals that were not previously submitted in writing before impasse and about which an impasse in bargaining has not been reached.~~ It is provided that such further provisions shall be limited to those specific proposals which were submitted in writing to the other party and were the subject of collective bargaining between the parties up to the time of the impasse, including those specific proposals which the parties have decided to include through a written mutual agreement. The arbitration panel shall decide whether final positions are compliant with this provision and which proposals may be considered for inclusion in the final agreement.

As currently written, Ch. 89-11(e), Hawaii Revised Statues, regarding the Employer and the Exclusive Representative's final positions in an arbitration proceeding, is vague and unclear. The purpose of S.B. 2259 and the intent behind our suggested amendment is to clarify that the final positions submitted by both the Employer and the Exclusive Representative shall include only proposals that were previously exchanged in writing. This amendment creates a cost-effective dispute resolution mechanism to determine whether final positions can be included in the final agreement by determination of the arbitration panel, versus awaiting a decision from a potentially lengthy Hawaii Labor Relations hearing. Adoption of this proposed amendment to Ch. 89, HRS is a cost containment measure since arbitration hearings will not be unduly and unexpectedly lengthened, mutually beneficial to both the Employer and the Exclusive Representative and ensures collective bargaining is conducted in good faith.

Thank you for the opportunity to testify in support of H.B. 1977, H.D. 2 with the requested amended language.

Respectfully submitted,

Wilbert Holck, Jr.
Deputy Executive Director

888 MILILANI STREET, SUITE 601 HONOLULU, HAWAII 96813-2991

Exhibit 11D

AFSCME
LOCAL 152, AFL-CIO

888 Mililani Street, Suite 601
Honolulu, Hawai'i 96813-2991

Telephone: 808.543.0000
Facsimile: 808.528.4059

www.hgea.org

**The Twenty-Seventh Legislature, State of Hawaii**
**The Senate**
**Committee on Ways and Means**

**Testimony by**
**Hawaii Government Employees Association**

**March 27, 2014**

**H.B. 1977, H.D. 2, S.D. 1 – RELATING TO COLLECTIVE BARGAINING**

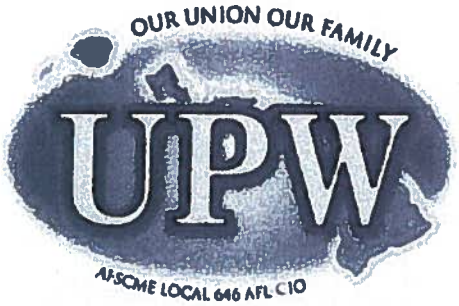
The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO strongly supports the purpose and intent of H.B. 1977, H.D. 2, S.D. 1, which amends a provision of the final positions in a collective bargaining arbitration. We respectfully request and urge the Committee to pass this current version, as written in the S.D. 1, which is compromise language to the original measure.

As currently written, Ch. 89-11(e), Hawaii Revised Statues, regarding the Employer and the Exclusive Representative's final positions in an arbitration proceeding, is vague and unclear. The purpose of H.B. 1977, H.D. 2, S.D. 1 and the intent behind the current version of the bill is to clarify that the final positions submitted by both the Employer and the Exclusive Representative shall include only proposals that were previously exchanged in writing. This amendment creates a cost-effective dispute resolution mechanism to determine whether final positions can be included in the final agreement by determination of the arbitration panel, versus awaiting a decision from a potentially lengthy Hawaii Labor Relations hearing. Adoption of this proposed amendment to Ch. 89, HRS is a cost containment measure since arbitration hearings will not be unduly and unexpectedly lengthened, mutually beneficial to both the Employer and the Exclusive Representative and ensures collective bargaining is conducted in good faith.

Thank you for the opportunity to testify in support of H.B. 1977, H.D. 2, S.D. 1.

Respectfully submitted,

Wilbert Holck
Deputy Executive Director




THE HAWAII HOUSE OF REPRESENTATIVES
The Twenty-Seventh Legislature
Regular Session of 2014

COMMITTEE ON FINANCE
The Honorable Rep. Sylvia Luke, Chair
The Honorable Rep. Aaron Ling Johanson, Vice Chair
The Honorable Rep. Scott Y. Nishimoto, Vice Chair

DATE OF HEARING: Wednesday, February 12, 2014
TIME OF HEARING: 2:00 PM
PLACE OF HEARING: Conference Room 308

## TESTIMONY ON HB1977 HD1 RELATING TO COLLECTIVE BARGAINING

By DAYTON M. NAKANELUA,
State Director of the United Public Workers, AFSCME Local 646, AFL-CIO

My name is Dayton M. Nakanelua and I am the State Director of the United Public Workers, AFSCME, Local 646, AFL-CIO (UPW). The UPW is the exclusive representative for approximately 14,000 public employees, which include blue collar, non-supervisory employees in Bargaining Unit 01 and institutional, health and correctional employees in Bargaining Unit 10, in the State of Hawaii and various counties. The UPW also represents about 1,500 members of the private sector.

The UPW supports HB1977 SD1 to amend a provision of the final position in the collective bargaining arbitration to include only proposals that were submitted before impasse and provides the arbitration panel with authority to determine if final positions submitted are compliant with statutory requirements.

Thank you for the opportunity to testify on this measure.

Exhibit 11F

Senate Committee on Judiciary and Labor
Tuesday, March 18, 2014
10:00 a.m.

**H.B. 1977, H.D. 2, Relating to Collective Bargaining.**

Dear Committee Chair Hee and Committee Members:

The University of Hawaii Professional Assembly (UHPA) supports the passage of H.B. 1977, H.D. 2 with the recommended changes presented in the testimony of the Hawaii Government Employees Association. If interest arbitration is to work, the parties need a set of procedures that requires a complete effort at negotiating all of the items that the union and the employer wish to address in the contract prior to those issues going before an interest arbitrator should there be an impasse. The position of the various public employers, including the Governor's Office, to allow an entirely new set of proposals to be constructed as a result of an impasse promotes "sand bagging" and surface bargaining prior to interest arbitration. There is nothing in such an interest arbitration procedure that would encourage settlement prior to impasse. Further, "last, best, and final offers" can only come after good-faith bargaining and they should be the basis by which proposals are set forth before the interest arbitration panel. This is the accept standard by which interest arbitrations in the both the public and private sectors are conducted.

Respectfully submitted,

J.N. Musto, Ph.D.
Executive Director and Chief Negotiator

UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY

1017 Palm Drive • Honolulu, Hawaii 96814-1928
Telephone: (808) 593-2157 • Facsimile: (808) 593-2160
Web Page: http://www.uhpa.org

Exhibit 11G

Oppose

# TESTIMONY OF
# THE DEPARTMENT OF THE ATTORNEY GENERAL
# TWENTY-SEVENTH LEGISLATURE, 2014

**ON THE FOLLOWING MEASURE:**
H.B. NO. 1977, RELATING TO COLLECTIVE BARGAINING.

**BEFORE THE:**
HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT

**DATE:** Tuesday, January 28, 2014 **TIME:** 8:45 a.m.

**LOCATION:** State Capitol, Room 309

**TESTIFIER(S):** David M. Louie, Attorney General, or
Richard H. Thomason, Deputy Attorney General

---

Chair Nakashima and Members of the Committee:

The Department of the Attorney General opposes this bill for the same reasons set forth in the testimony of the Chief Negotiator of the Office of Collective Bargaining. That is, the new wording on page 3, lines 19-22, and page 4, lines 1-2, of this bill, would fundamentally change the process of collective bargaining. This bill would create a disincentive to engage in joint decision-making. Joint decision-making, as described in section 89-1, Hawaii Revised Statutes (HRS), is a process that allows the parties to "become more responsive and better able to exchange ideas and information."

Furthermore, we oppose this bill for the additional reason that the "for good cause" wording contained in the proposed amendment is sufficiently ambiguous to almost certainly increase the potential for litigation arising while interest arbitrations are in progress, resulting not only in delays in the arbitrations themselves, but also consequent delays in legislative funding of arbitration awards.

Indeed, the State and the Hawaii Government Employees Association (HGEA) experienced such a situation a few months ago during interest arbitration involving Unit 6. During the middle of arbitration, in HGEA v. State of Hawaii, Case No. CE-06-831, HGEA filed a complaint with the Hawaii Labor Relations Board (HLRB) demanding that the Board order the panel not to consider certain employer proposals premised upon the argument that section 89-11, HRS, 'plainly' prohibits submitting any proposal to the panel which was not previously submitted and discussed by the parties prior to impasse. Attached is a copy of the HLRB Order No. 2956 (Order) granting the employer's motion to dismiss HGEA's complaint on

the basis that section 89-11, HRS, clearly and unambiguously does not contain any such requirement. Order at 43.

The lesson to be learned from this example is that even in circumstances where the statute is plain and unambiguous to an objective tribunal, litigation is nevertheless an ever-present possibility, a possibility that will only be increased if the statute is amended to permit a party to seek exceptions for "just cause," a term which is both ambiguous and unclear.

Accordingly, we respectfully request that your Committee not pass this bill.

# TESTIMONY OF
# THE DEPARTMENT OF THE ATTORNEY GENERAL
# TWENTY-SEVENTH LEGISLATURE, 2014

**ON THE FOLLOWING MEASURE:**
H.B. NO. 1977, H.D. 1, RELATING TO COLLECTIVE BARGAINING.

**BEFORE THE:**
HOUSE COMMITTEE ON FINANCE

**DATE:** Wednesday, February 12, 2014 **TIME:** 2:00 p.m.

**LOCATION:** State Capitol, Room 308

**TESTIFIER(S):** David M. Louie, Attorney General, or
Richard H. Thomason, Deputy Attorney General

---

Chair Luke and Members of the Committee:

The Department of the Attorney General opposes this bill for the same reasons set forth in the testimony of the Chief Negotiator of the Office of Collective Bargaining. That is, the new wording on page 3, lines 19-22, and page 4, lines 1-6, of this bill, would fundamentally change the current process of collective bargaining, and not for the better. Inded, this bill would create a disincentive to engage in meaningful bargaining, not the other way around.

Furthermore, in previous testimony presented to the Committee on Labor & Public Employment (see attached), the Hawaii Government Employees Association (HGEA) stated as follows:

> As currently written, Ch. 89-11(e), Hawaii Revised Statutes, regarding the Employer and the Exclusive Representative's final positions in an arbitration proceeding, is vague and unclear. The purpose of H.B. 1977 and the intent behind our suggested amendments is to clarify that the final positions submitted by both the Employer and the Exclusive Representative shall include only proposals that were previously submitted prior to impasse. The amendment also creates a cost-effective dispute resolution mechanism to determine whether final positions can be included in the agreement by determination of the arbitration panel, versus awaiting a decision from a potentially lengthy Hawaii Labor Relations [sic] hearing. (Emphasis added)

In reality, section 89-11, Hawaii Revised Statutes (HRS), is neither vague nor ambiguious in the least. On the contrary, in the barely months old case of HGEA v. State of Hawaii, Case No. CE-06-831, the union filed a complaint with the Hawaii Labor Relations Board (HLRB) demanding that the Board order the panel not to consider certain employer

proposals premised upon the argument that section 89-11, HRS, currently "plainly and unambiguously" prohibits submitting any proposal to the panel which was not previously submitted and discussed by the parties prior to impasse. Attached is a copy of the HLRB Order No. 2956 (Order) granting the employer's motion to dismiss HGEA's complaint on the basis that section 89-11, HRS, "plainly and unambiguously" does not contain any such requirement. Order at 33, 35 and 43.

Moreover, the HLRB's Order (which has the force and effect of law) further clarifies that section 89-11, HRS, already provides that the arbitration panel has the authority and duty to determine whether final positions can be included in an agreement. Order at 43.

In other words, this bill will achieve neither of the goals suggested by HGEA. Instead, what this bill will achieve is the creation of future interest arbitrations where each side will rountinely open up every article of every collective bargaining agreement for proposed amendment and then argue furiously over which of those proposals can and should be accepted by the arbitration panel. This is not progress. Indeed, members of your Committee are encouraged to review the legislative history of section 89-11, HRS, as examined in detail in HLRB Order 2956 before voting on this bill. Order at 35 – 43.

For all of the above reasons, we respectfully request that your Committee not pass this bill.

NEIL ABERCROMBIE
GOVERNOR

NEIL DIETZ
CHIEF NEGOTIATOR

STATE OF HAWAII
OFFICE OF COLLECTIVE BARGAINING
EXECUTIVE OFFICE OF THE GOVERNOR
235 S. BERETANIA STREET, SUITE 1201
HONOLULU, HAWAII 96813-2437

January 26, 2014

To: Rep. Mark Nakashima, Chair
Committee on Labor and Public Employment

From: Neil Dietz, Chief Negotiator

RE: HB 1977

The Office of Collective Bargaining respectfully enters this testimony in opposition to House Bill 1977 as proposed.

The single sentence HB1977 proposes as an addition to Chapter 89 would fundamentally change the process of collective bargaining to the detriment of the Legislature's purpose in establishing public sector collective bargaining. Chapter 89-1, states that "The legislature finds that joint decision-making is the modern way of administering government." Adding the proposed language of HB1977 to Chapter 89 harms this worthy intent of the legislature.

To illustrate this harm, please remember the process of public sector collective bargaining. Hawaii's public sector collective bargaining agreements routinely require parties to exchange initial proposals for negotiations one year prior to the expiration of a collective bargaining agreement. Typically this would occur in May-June of an even numbered year. Ideally, negotiations would then commence. However, if no agreement is reached between labor and management, the Hawaii Labor Relations Board is required to declare that an impasse exists no later than February 1 of an odd-numbered year. Please note that this declaration of impasse is statutorily required and has no bearing on whether or not the parties actually are at impasse or whether or not the parties have even met to negotiate. At the time the "statutory" impasse is declared, the process culminating in arbitration begins. The arbitration would begin approximately a year after initial proposals were exchanged between the parties.

When approaching arbitration, each party currently must consider and weigh what they want an arbitrator to consider. And for each party, there may be "risk" in taking a specific position to arbitration. It is this "risk" that creates pressure during negotiations leading to compromise, and optimally, resolution by agreement. HB1977 negates that "risk" factor. There may be no need to negotiate and compromise. Either or both parties can look at initial proposals and say "This is the worst that can happen. We can do better in arbitration."

And when that happens, there is no "joint decision-making" as expressed by the legislature in Chapter 89-1. What is left is decision making by an arbitrator with no accountability to the citizens of the State of Hawaii or the union members of a collective bargaining unit. Instead of fostering good faith negotiations, HB1977 discourages negotiation and compromise.

In addition, as the Hawaii Labor Relations Board noted in its January 17, 2014 ruling in Case Number CE-06-831: "...interest arbitration is not, itself, negotiations, but rather a process that occurs after the parties fail to negotiate a contract." To tie the parties to ***negotiation proposals*** as ***arbitration positions*** ignores the differences between the separate and distinct processes.

And finally, arbitrators and arbitration panels currently already have wide discretion in considering positions submitted by the parties and the decisions rendered regarding those positions.

Therefore, the Office of Collective Bargaining respectfully opposes HB1977 and requests your Committee to not pass HB1977.

NEIL ABERCROMBIE
GOVERNOR

NEIL DIETZ
CHIEF NEGOTIATOR

STATE OF HAWAII
OFFICE OF COLLECTIVE BARGAINING
EXECUTIVE OFFICE OF THE GOVERNOR
235 S. BERETANIA STREET, SUITE 1201
HONOLULU, HAWAII 96813-2437

March 17, 2014

To: Sen. Clayton Hee, Chair
Committee on Judiciary and Labor

From: Neil Dietz, Chief Negotiator

RE: HB 1977 HD2

The Office of Collective Bargaining respectfully enters this testimony in opposition to House Bill 1977 HD2 as proposed.

The three sentences HB1977 HD2 proposes as an addition to Chapter 89 would fundamentally change the process of collective bargaining to the detriment of the Legislature's purpose in establishing public sector collective bargaining. Chapter 89-1, states that "The legislature finds that joint decision-making is the modern way of administering government." Adding the proposed language of HB1977 to Chapter 89 harms this worthy intent of the legislature.

To illustrate this harm, please remember the process of public sector collective bargaining. Hawaii's public sector collective bargaining agreements routinely require parties to exchange initial proposals for negotiations one year prior to the expiration of a collective bargaining agreement. Typically this would occur in May-June of an even numbered year. Ideally, negotiations would then commence. However, if no agreement is reached between labor and management, the Hawaii Labor Relations Board is required to declare that an impasse exists no later than February 1 of an odd-numbered year. Please note that this declaration of impasse is statutorily required and has no bearing on whether or not the parties actually are at impasse or whether or not the parties have even met to negotiate. At the time the "statutory" impasse is declared, the process culminating in arbitration begins. The arbitration would begin approximately a year after initial proposals were exchanged between the parties.

When approaching arbitration, each party currently must consider and weigh what they want an arbitrator to consider. And for each party, there may be "risk" in taking a specific position to arbitration. It is this "risk" that creates pressure during negotiations leading to compromise, and optimally, resolution by agreement. HB1977 HD2 negates that "risk" factor. There may be no need to negotiate and compromise. Either or both parties can look at initial proposals and say "This is the worst that can happen. We can do better in arbitration."

And when that happens, there is no "joint decision-making" as expressed by the legislature in Chapter 89-1. What is left is decision making by an arbitrator with no accountability to the citizens of the State of Hawaii or the union members of a collective bargaining unit. Instead of fostering good faith negotiations, HB1977 HD2 discourages negotiation and compromise.

In addition, as the Hawaii Labor Relations Board noted in its January 17, 2014 ruling in Case Number CE-06-831: "...interest arbitration is not, itself, negotiations, but rather a process that occurs after the parties fail to negotiate a contract." To tie the parties to ***negotiation proposals*** as ***arbitration positions*** ignores the differences between the separate and distinct processes.

And finally, arbitrators and arbitration panels currently have wide discretion in considering positions submitted by the parties and the decisions rendered regarding those positions.

Therefore, the Office of Collective Bargaining respectfully opposes HB1977 HD2 and requests your Committee to not pass HB1977 HD2.

NEIL ABERCROMBIE
GOVERNOR

NEIL DIETZ
CHIEF NEGOTIATOR

STATE OF HAWAII
OFFICE OF COLLECTIVE BARGAINING
EXECUTIVE OFFICE OF THE GOVERNOR
235 S. BERETANIA STREET, SUITE 1201
HONOLULU, HAWAII 96813-2437

March 27, 2014

To: Sen. David Ige, Chair
Committee on Ways and Means

From: Neil Dietz, Chief Negotiator

RE: HB 1977 HD2 SD1

The Office of Collective Bargaining respectfully enters this testimony in opposition to House Bill 1977 HD2 SD1 as proposed. The obvious result of this bill will be to require the parties, especially the employer, to draft initial contract proposals not with a goal of negotiations, but with the goal of arbitration. This will be a disincentive for good faith negotiations and an incentive to move into arbitration. ***Any incentive to move into arbitration is an incentive to increase collective bargaining costs to the detriment of the taxpayers of the State of Hawaii.***

The three sentences HB1977 HD2 SD1 proposes as an addition to Chapter 89 would fundamentally change the process of collective bargaining to the detriment of the Legislature's purpose in establishing public sector collective bargaining. Chapter 89-1, states that "The legislature finds that joint decision-making is the modern way of administering government." Adding the proposed language of HB1977 to Chapter 89 harms this worthy intent of the legislature.

To illustrate this harm, please remember the process of public sector collective bargaining. Hawaii's public sector collective bargaining agreements routinely require parties to exchange initial proposals for negotiations one year prior to the expiration of a collective bargaining agreement. Typically this would occur in May-June of an even numbered year. Ideally, negotiations would then commence. However, if no agreement is reached between labor and management, the Hawaii Labor Relations Board is required to declare that an impasse exists no later than February 1 of an odd-numbered year. Please note that this declaration of impasse is statutorily required and has no bearing on whether or not the parties actually are at impasse or whether or not the parties have even met to negotiate. At the time

the "statutory" impasse is declared, the process culminating in arbitration begins. The arbitration would begin approximately a year after initial proposals were exchanged between the parties.

When approaching arbitration, each party currently must consider and weigh what they want an arbitrator to consider. And for each party, there may be "risk" in taking a specific position to arbitration. It is this "risk" that creates pressure during negotiations leading to compromise, and optimally, resolution by agreement. HB1977 HD2 SD1 negates that "risk" factor. There may be no need to negotiate and compromise. Either or both parties can look at initial proposals and say "This is the worst that can happen. We can do better in arbitration."

And when that happens, there is no "joint decision-making" as expressed by the legislature in Chapter 89-1. What is left is decision making by an arbitrator with no accountability to the citizens of the State of Hawaii or the union members of a collective bargaining unit. Instead of fostering good faith negotiations, HB1977 HD2 SD1 discourages negotiation and compromise.

In addition, as the Hawaii Labor Relations Board noted in its January 17, 2014 ruling in Case Number CE-06-831: "...interest arbitration is not, itself, negotiations, but rather a process that occurs after the parties fail to negotiate a contract." To tie the parties to ***negotiation proposals*** as ***arbitration positions*** ignores the differences between the separate and distinct processes.

And finally, arbitrators and arbitration panels currently have wide discretion in considering positions submitted by the parties and the decisions rendered regarding those positions.

Therefore, the Office of Collective Bargaining respectfully opposes HB1977 HD2 SD1 and requests your Committee to not pass HB1977 HD2 SD1.

**UNIVERSITY OF HAWAI'I SYSTEM**
Legislative Testimony

Testimony Presented Before the
House Committee on Finance
Wednesday, February 12, 2014 at 2:00 p.m.
By
Dr. Joanne Itano
Executive Vice President for Academic Affairs
University of Hawai'i

HB 1977 HD1 – RELATING TO COLLECTIVE BARGAINING

Chair Luke, Vice Chairs Nishimoto and Johanson, and Members of the House Committee on Finance, I am submitting written testimony on behalf of the University of Hawai'i regarding House Bill 1977 HD1, – Relating to Collective Bargaining which proposes to amend HRS, §89-11(e) and the provision regarding final positions in a collective bargaining arbitration to be restricted to only those specific proposals that have been previously submitted in writing before impasse; and provides the arbitration panel with the authority to determine if final positions submitted are compliant with statutory requirements.

The University of Hawai'i **opposes** the passage of HB 1977 HD1.

The University of Hawai'i recognizes and acknowledges a recent ruling issued by the Hawai'i Labor Relations Board (HLRB) that addressed this matter. We believe that the proposed language is unnecessary since the law also allows the parties to negotiate such understandings during negotiations. The University of Hawai'i also acknowledges the impact the recent HLRB decision will have over our negotiations with the exclusive bargaining representatives and are prepared to adjust our approach in light of the decision.

Based on the above, we respectfully request that this measure be held. Thank you for the opportunity to testify on this bill.

Exhibit 12F

DEPARTMENT OF HUMAN RESOURCES

**CITY AND COUNTY OF HONOLULU**

650 SOUTH KING STREET 10TH FLOOR • HONOLULU, HAWAII 96813
TELEPHONE: (808) 768-8500 • FAX: (808) 768-5563 • INTERNET: www.honolulu.gov/hr

KIRK CALDWELL
MAYOR

CAROLEE C. KUBO
DIRECTOR

NOEL T. ONO
ASSISTANT DIRECTOR

March 18, 2014

The Honorable Clayton Hee, Chair
and Members of the Committee
on Judiciary & Labor
The Senate
State Capitol, Room 016
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Hee and Members of the Committee:

SUBJECT: House Bill No. 1977, HD2
Relating to Collective Bargaining

The Department of Human Resources, City & County of Honolulu, opposes H.B. 1977, HD2, which seeks to restrict the final position in a collective bargaining arbitration to include only proposals that were submitted before impasse. Since impasse occurs early in the collective bargaining process, as early as 90 days after written notice to initiate negotiations, the passage of this bill will create a rigid system which may preclude necessary changes to a party's contract proposals caused by unforeseen factors, such as a drastic change in our economy. Many times, the parties have not begun to meet at the negotiations table when impasse is declared. Moreover, the parties may proceed to arbitration years after impasse is declared. Based on the foregoing reasons, the City & County of Honolulu again respectfully opposes H.B. 1977, HD2 and respectfully requests that the matter be deferred.

Thank you for giving us the opportunity to testify on this matter.

Sincerely,

Carolee C. Kubo
Director

Exhibit 12G

DEPARTMENT OF HUMAN RESOURCES

**CITY AND COUNTY OF HONOLULU**

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LATE

KIRK CALDWELL
MAYOR

CAROLEE C. KUBO
DIRECTOR

NOEL T. ONO
ASSISTANT DIRECTOR

March 28, 2014

The Honorable David Y. Ige, Chair
and Members of the
Committee on Ways and Means
State Senate
State Capitol, Room 211
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Ige and Members of the Committee:

SUBJECT: House Bill No. 1977, HD2, SD1
Relating to Collective Bargaining

The Department of Human Resources, City & County of Honolulu, opposes H.B. 1977, HD2, SD1, which seeks to restrict the final position in a collective bargaining arbitration to include only proposals that were submitted before impasse. Since impasse occurs early in the collective bargaining process, as early as 90 days after written notice to initiate negotiations, the passage of this bill will create a rigid system which may preclude necessary changes to a party's contract proposals caused by unforeseen factors, such as a drastic change in our economy. Many times, the parties have not begun to meet at the negotiations table when impasse is declared. Moreover, the parties may proceed to arbitration years after impasse is declared.

Based on the foregoing reasons, the City & County of Honolulu again respectfully opposes H.B. 1977, HD2, SD1, and respectfully request that the matter be deferred.

We thank you for giving us the opportunity to testify on this matter.

Sincerely,

Carolee C. Kubo

Carolee C. Kubo
Director

Exhibit 12H

WRITTEN ONLY

TESTIMONY BY KALBERT K. YOUNG
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE SENATE COMMITTEE ON WAYS AND MEANS
ON
HOUSE BILL NO. 1977, H.D. 2, S.D. 1

March 28, 2014

RELATING TO COLLECTIVE BARGAINING

This measure amends Section 89-11, HRS, to limit final positions for arbitration to specific proposals that were previously submitted in writing up to the time of the impasse unless there is written mutual agreement by the parties.

The Department of Budget and Finance opposes this measure. The Hawaii Labor Relations Board (HLRB) recently ruled in favor of the employer in Case CE-06-831 in which the Hawaii Government Employees Association (HGEA) sought to prohibit certain proposals in the employer's final position which were different from proposals that were previously submitted before impasse. This bill would amend Chapter 89 to be even more restrictive than the rulings that HGEA sought to implement through HLRB.

In their decision, HLRB cited the legislative history of Section 89-11 to allow arbitration panels "greater latitude: in fashioning a final and binding decision that it deems appropriate, and not be limited to selecting one or the other of the final offers of the parties. Furthermore, the arbitration panel has the authority and duty to "reach a decision . . . on all provisions that each party proposed in its respective final position for inclusion in the final agreement." This bill would restrict the flexibility of the arbitration process to deliberate what an arbitration panel would consider reasonable compromises to either party's position.

We believe arbitration panels should be permitted to consider final positions which take into account the most recent circumstances of the parties. Under Section 89-11 a party could declare impasse as early as September at which time, the Executive Budget is still being formulated and it is more than nine months until the contract period begins. Additionally, arbitration hearings have not been held in recent times until well after the expiration of the contracts. During this time between possible impasse dates, or even the statutory impasse date of February 1, and the arbitration hearings, the State has seen significant shifts in its fiscal position due to revisions in Council on Revenues revenue estimates and other budgetary issues that come to fore during the legislative session.

We believe giving the parties' flexibility in determining their final positions allows arbitrators to best consider the timeliest recommendations of the parties and provides an incentive for the parties to continue to negotiate to avoid arbitration. This measure would offer negative consequences for both parties and severely limit flexibility of authority of arbitration panels to render decisions that more closely compromise either position.

**Date:** 01/28/2014

**Committee:** House Labor & Public Employment

| | |
|---|---|
| **Department:** | Education |
| **Person Testifying:** | Kathryn S. Matayoshi, Superintendent of Education |
| **Title of Bill:** | HB 1977 RELATING TO COLLECTIVE BARGAINING. |
| **Purpose of Bill:** | Amends a provision of the final position in a collective bargaining arbitration to include only proposals that were submitted before impasse. |

**Department's Position:**
The Department of Education respectfully opposes HB 1977 for the following reasons:

1) The requirement that each party's final positions submitted to the arbitration panel "shall include only those specific proposals that have been previously submitted in writing before impasse" will cause confusion. Often times during the bargaining process many different proposals are exchanged between the parties including variations on a single article, provision, or topic. The parties would not know which version of their proposals to submit to the arbitration panel, e.g., the initial proposal, modified proposals, new proposals, last best final proposals, etc.

2) The legislation may encourage the parties to forego continued negotiations. The existing requirement that parties shall engage in good faith bargaining would be in jeopardy because one or more parties could submit their initial proposals and refuse to bargain further knowing that such proposals would be submitted to the arbitration panel.

3) The recent Hawaii Labor Relations Board decision (January 17, 2014, Case Number CE-06-831) is contrary to this proposed legislation. Thus, currently parties are encouraged to continue to bargain in good faith with the goal of reaching a negotiated

agreement, knowing that if the matter proceeds to arbitration there is an unknown risk factor based upon proposals that have been "opened" by the parties during the negotiations process, yet without knowing the exact terms of the final positions. This risk factor is of benefit to all parties in that it encourages the parties to reach a negotiated agreement.

LATE

**Date:** 02/12/2014
**Time:** 02:00 PM
**Location:** Conference Room 308
**Committee:** House Finance

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| **Department:** | Education |
| **Person Testifying:** | Kathryn S. Matayoshi, Superintendent of Education |
| **Title of Bill:** | HB 1977 HD 1 RELATING TO COLLECTIVE BARGAINING. |
| **Purpose of Bill:** | Amends a provision of the final position in a collective bargaining arbitration to include only proposals that were submitted before impasse. |

**Department's Position:**
The Department of Education respectfully opposes H.B. No. 1977, H.D.1.

Even with the revised language following the hearing before the Committee on Labor & Public Employment on January 28, 2014, there remains serious concern with the proposed amendment to Chapter 89-11(e).

The revised language merely changes the phraseology from affirmatively requiring specific proposals in the final positions submitted to the arbitration panel ("shall include only those specific proposals…") to affirmatively prohibiting proposals not previously submitted in writing before impasse ("parties are prohibited from including…").

This prohibition wherein each party is "prohibited from including in their final positions any proposals that were not previously submitted in writing before impasse" will cause confusion and unintended limitations. Often times during the bargaining process many different proposals are exchanged between the parties including variations on a single article, provision, or topic. The parties may verbalize ideas, suggestions, and/or modifications with respect to proposals from either side or both. The manner in which proposals are transmitted and/or discussed prior to impasse also varies with the type of bargaining agreed upon. Whereas in the traditional form of bargaining, all proposals are transmitted in writing and very little discussion occurs at the bargaining table with respect to modifications or amendments, in other less formal models of negotiations, e.g., interest based bargaining, the parties are encouraged to have open and frank discussions at the bargaining table concerning interests and options. The proposed language would limit and restrict the final positions to only those proposals that had been reduced to writing, whereas without such restriction the parties would be permitted to submit to the arbitration panel final positions that encompass subjects opened and/or discussed during bargaining.

Requiring the arbitration panel to decide whether final positions comply with the statute and which proposals may be considered for inclusion in the "agreement" [sic] has the potential to unnecessarily burden the panel and present issues before it that may not be appropriate. For

example, if the panel were tasked with this role of compliance, it would be required to review all of the proposals exchanged by the parties during bargaining even if only certain issues were intended for consideration in a final arbitration decision.

The recent Hawaii Labor Relations Board decision (January 17, 2014, Case Number CE-06-831) is contrary to this proposed legislation. Thus, currently parties are encouraged to continue to bargain in good faith with the goal of reaching a negotiated agreement, knowing that if the matter proceeds to arbitration there is an unknown risk factor based upon proposals that have been "opened" by the parties during the negotiations process, yet without knowing the exact terms of the final positions. This risk factor is of benefit to all parties in that it encourages the parties to reach a negotiated agreement. With the proposed amendment, it may encourage parties to forego continued negotiations following submission of initial proposals knowing that such proposals would be submitted to the arbitration panel.

**Date:** 03/18/2014
**Time:** 10:00 AM
**Location:** 016
**Committee:** Senate Judiciary and Labor

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|---|---|
| **Department:** | Education |
| **Person Testifying:** | Kathryn S. Matayoshi, Superintendent of Education |
| **Title of Bill:** | HB 1977, HD2(hscr800-14) RELATING TO COLLECTIVE BARGAINING. |
| **Purpose of Bill:** | Amends a provision of the final position in a collective bargaining arbitration to include only proposals that were submitted before impasse. Provides the arbitration panel with authority to determine if final positions submitted are compliant with statutory requirements. Effective July 1, 2030. (HB1977 HD2) |

**Department's Position:**
The Department of Education respectfully opposes H.B. No. 1977, HD2.

This bill continues to prohibit proposals not previously submitted in writing before impasse. This prohibition wherein each party is "prohibited from including in their final positions any proposals that were not previously submitted in writing before impasse" will cause confusion and unintended limitations. Often times during the bargaining process many different proposals are exchanged between the parties including variations on a single article, provision, or topic. The parties may verbalize ideas, suggestions, and/or modifications with respect to proposals from either side or both. The manner in which proposals are transmitted and/or discussed prior to impasse also varies with the type of bargaining agreed upon. Whereas in the traditional form of bargaining, all proposals are transmitted in writing and very little discussion occurs at the bargaining table with respect to modifications or amendments, in other less formal models of negotiations, e.g., interest based bargaining, the parties are encouraged to have open and frank discussions at the bargaining table concerning interests and options. The proposed language would limit and restrict the final positions to only those proposals that had been reduced to writing, whereas without such restriction the parties would be permitted to submit to the arbitration panel final positions that encompass subjects opened and/or discussed during bargaining.

Further, requiring the arbitration panel to decide whether final positions comply with the statute and which proposals may be considered for inclusion in the "agreement" [sic] has the potential to
unnecessarily burden the panel and present issues before it that may not be appropriate. For example, if the panel were tasked with this role of compliance, it would be required to review all of the proposals exchanged by the parties during bargaining even if only certain issues were intended for consideration in a final arbitration decision.

Lastly, the recent Hawaii Labor Relations Board decision (January 17, 2014, Case Number

CE-06-831) is contrary to this proposed legislation. Thus, currently parties are encouraged to continue to bargain in good faith with the goal of reaching a negotiated agreement, knowing that if the matter proceeds to arbitration there is an unknown risk factor based upon proposals that have
been "opened" by the parties during the negotiations process, yet without knowing the exact terms of the final positions. This risk factor is of benefit to all parties in that it encourages the parties to reach a negotiated agreement. With the proposed amendment, it may encourage parties to forego continued negotiations following submission of initial proposals knowing that such proposals would be submitted to the arbitration panel.

Thank you for the consideration and the opportunity to testify on this measure.

No position

LATE





**STATE OF HAWAII**
**HAWAII LABOR RELATIONS BOARD**
830 PUNCHBOWL STREET, ROOM 434
HONOLULU, HAWAII 96813
TELEPHONE 586-8610/ FAX 586-8613
E-MAIL dlir.laborboard@hawaii.gov

January 27, 2014

To: The Honorable Mark M. Nakashima, Chair,
The Honorable Kyle T. Yamashita, Vice Chair,
Members of the House Committee on Labor & Public Employment

Date: Tuesday, January 28, 2014
Time: 08:45 a.m.
Place: Conference Room 309, State Capitol

From: Sesnita Moepono, Board Member
Hawaii Labor Relations Board (HLRB or Board)

**Re: H.B. No. 1977 Relating to Collective Bargaining**

## I. OVERVIEW OF PROPOSED LEGISLATION

This bill amends §89-11(e)(2)(B), Hawaii Revised Statutes (HRS), by requiring under certain circumstances that final positions submitted to an interest arbitration panel pursuant to impasse procedures "shall include only those specific proposals that have been previously submitted in writing before impasse."

## II. CURRENT LAW

HRS section 89-11(e)(2)(B) states:

> (B) Final positions. Upon the selection and appointment of the arbitration panel, each party shall submit to the panel, in writing, with copy to the other party, a final position which shall include all provisions in any existing collective bargaining agreement not being modified, all provisions already agreed to in negotiations, and all further provisions which each party is proposing for inclusion in the final agreement.

## III. COMMENTS

The HLRB takes no position on this bill. However, the Board has some questions regarding the proposed language and therefore, seeks legislative intent, since this bill addresses similar issues that were decided by a recent Board decision.

The new language states:

"Absent agreement by the parties, lack of objection, or good cause, the final positions submitted by each party to the arbitration panel shall include only those specific proposals that have been previously submitted in writing before impasse."

The bill requires that final positions include those specific proposals that have been previously submitted in writing before impasse, as long as there is no agreement by the parties, lack of objection, or good cause.

The following is a list of questions to which we seek legislative intent.

1. "agreement" – Does this mean written and oral agreements?
2. "by the parties" – Does this mean all parties who have voting rights under §89-6(d)?
3. "objection" – Where does a party file an objection and does the body with whom the objection is filed have the authority to make a decision regarding the objection?
4. "good cause" – How is this phrase defined? Who makes the decision that good cause exists?
5. If an objection or good cause is raised, then is it the legislature's intent to have the current law prevail?
6. "specific proposals" – How is this defined? Do the parties have to discuss the proposals in a formal negotiating session? If a party challenges the proposal as not being in compliance with this section, with whom does the party file the challenge?
7. "impasse" – Is it the legislature's intent to use the definition found in §89-2?

Thank you for allowing us the opportunity to testify on this bill and I am prepared to answer any questions.

# ACT 75 H.B. NO. 1977

A Bill for an Act Relating to Collective Bargaining.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. Section 89-11, Hawaii Revised Statutes, is amended by amending subsection (e) to read as follows:

"(e) If an impasse exists between a public employer and the exclusive representative of bargaining unit (2), supervisory employees in blue collar positions; bargaining unit (3), nonsupervisory employees in white collar positions; bargaining unit (4), supervisory employees in white collar positions; bargaining unit (6), educational officers and other personnel of the department of education under the same salary schedule; bargaining unit (8), personnel of the University of Hawaii and the community college system, other than faculty; bargaining unit (9), registered professional nurses; bargaining unit (10), institutional, health, and correctional workers; bargaining unit (11), firefighters; bargaining unit (12), police officers; bargaining unit (13), professional and scientific employees; or bargaining unit (14), state law enforcement officers and state and county ocean safety and water safety officers, the board shall assist in the resolution of the impasse as follows:

(1) Mediation. During the first twenty days after the date of impasse, the board shall immediately appoint a mediator, representative of the public from a list of qualified persons maintained by the board, to assist the parties in a voluntary resolution of the impasse.

(2) Arbitration. If the impasse continues twenty days after the date of impasse, the board shall immediately notify the employer and the exclusive representative that the impasse shall be submitted to a three-member arbitration panel who shall follow the arbitration procedure provided herein.

(A) Arbitration panel. Two members of the arbitration panel shall be selected by the parties; one shall be selected by the employer and one shall be selected by the exclusive representative. The neutral third member of the arbitration panel, who shall chair the arbitration panel, shall be selected by mutual agreement of the parties. In the event that the parties fail to select the neutral third member of the arbitration panel within thirty days from the date of impasse, the board shall request the American Arbitration Association, or its successor in function, to furnish a list of five qualified arbitrators from which the neutral arbitrator shall be selected. Within five days after receipt of the list, the parties shall alternately strike names from the list until a single name is left, who shall be immediately appointed by the board as the neutral arbitrator and chairperson of the arbitration panel.

(B) Final positions. Upon the selection and appointment of the arbitration panel, each party shall submit to the panel, in writing, with copy to the other party, a final position ~~[which]~~ that shall include all provisions in any existing collective bargaining agreement not being modified, all provisions already agreed to in negotiations, and all further provisions which each party is proposing for inclusion in the final agreement~~[.]~~; provided that such further provisions shall be limited to those specific proposals that were submitted in writing to the other party

and were the subject of collective bargaining between the parties up to the time of the impasse, including those specific proposals that the parties have decided to include through a written mutual agreement. The arbitration panel shall decide whether final positions are compliant with this provision and which proposals may be considered for inclusion in the final agreement.

(C) Arbitration hearing. Within one hundred twenty days of its appointment, the arbitration panel shall commence a hearing at which time the parties may submit either in writing or through oral testimony, all information or data supporting their respective final positions. The arbitrator, or the chairperson of the arbitration panel together with the other two members, are encouraged to assist the parties in a voluntary resolution of the impasse through mediation, to the extent practicable throughout the entire arbitration period until the date the panel is required to issue its arbitration decision.

(D) Arbitration decision. Within thirty days after the conclusion of the hearing, a majority of the arbitration panel shall reach a decision pursuant to subsection (f) on all provisions that each party proposed in its respective final position for inclusion in the final agreement and transmit a preliminary draft of its decision to the parties. The parties shall review the preliminary draft for completeness, technical correctness, and clarity and may mutually submit to the panel any desired changes or adjustments that shall be incorporated in the final draft of its decision. Within fifteen days after the transmittal of the preliminary draft, a majority of the arbitration panel shall issue the arbitration decision."

SECTION 2. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 3. This Act shall take effect on July 1, 2014.

(Became law on April 30, 2014, without the governor's signature, pursuant to Art. III, §16, State Constitution.)

## ACT 76 S.B. NO. 2768

A Bill for an Act Relating to Kindergarten.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. The legislature finds that many studies show the importance of early childhood education. A federal Department of Education study reports that all kindergarteners increase their knowledge and skills regardless of how much they knew prior to enrollment. Kindergarteners are expected to and often do leave kindergarten knowing how to read and write. First graders who did not go to kindergarten are typically behind their peers in their academic and social development and are more likely to fail a grade in elementary school. Despite these compelling findings, kindergarten attendance is not mandatory in the State.

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Hawaii's youth by mak

SECTION 2. S
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school kindergarten.] sh
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exempt under section 30

SECTION 3. Se
to read as follows:

"[§302A-1132] A
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year, shall attend either a
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(B) The princip
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other

## ARTICLE 47 – SALARIES

A. The salary schedule in effect on June 30, 2015 shall be designated as Exhibit A.

B. Subject to the approval of the respective legislative bodies and effective July 1, 2015:

1. The salary schedule designated as Exhibit A shall be amended to reflect a four percent (4%) increase and such amended schedule shall be designated as Exhibit B.

2. Following B.1. above, Employees shall be placed on the corresponding pay range and step of Exhibit B, provided that Employees whose basic rate of pay on June 30, 2015, falls between two steps or exceeds the maximum step of their pay range shall receive a four percent (4%) increase.

3. Employees not administratively assigned to the salary schedule shall receive a four percent (4%) pay increase.

C. Subject to the approval of the respective legislative bodies and effective July 1, 2016:

1. The salary schedule designated as Exhibit B shall be amended to reflect a four percent (4%) increase and such amended schedule shall be designated as Exhibit C.

2. Following C.1. above, Employees shall be placed on the corresponding pay range and step of Exhibit C, provided that Employees

**whose basic rate of pay on June 30, 2016, falls between two steps or exceeds the maximum step of their pay range shall receive a four percent (4%) increase.**

**3. Employees not administratively assigned to the salary schedule shall receive a four percent (4%) pay increase.**

**D. There shall be no step movements during the period July 1, 2015 to and including June 30, 2017.**

STATE OF HAWAI'I

IMPASSE ARBITRATION FOR BARGAINING UNIT 9

BEFORE ARBITRATORS LAWRENCE E. LITTLE, ESQ.;

LEE MATSUI; AND NORA NOMURA

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|---|---|
| In the Matter of<br><br>HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO,<br><br>Exclusive Representative,<br><br>and<br><br>DAVID Y. IGE, Governor, State of Hawaii; MARK RECKTENWALD, Chief Justice, the Judiciary, State of Hawaii; HARRY KIM, Mayor, County of Hawai'i; KIRK CALDWELL, Mayor, City and County of Honolulu; DEREK KAWAKAMI, County of Kaua'i; MICHAEL P. VICTORINO, County of Maui; and DR. LINDA ROSEN, Chief Executive Officer, Hawaii Health Systems Corporation,<br><br>Employers. | HLRB CASE NO.: 18-I-09-174<br>AAA CASE NO.: 01-18-0004-7237<br><br>CERTIFICATE OF SERVICE |

**CERTIFICATE OF SERVICE**

I hereby certify on this date a copy of the foregoing document was duly served upon the following parties via Electronic mail to:

LAWRENCE E. LITTLE
711 Governor Stevens Ave. SE
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NEUTRAL ARBITRATOR &
ARBITRATION CHAIRPERSON

**Via Electronic Mail**
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ATTORNEY FOR HGEA

**Via Electronic Mail**
aland3370@aol.com

DATED: Honolulu, Hawaii, April 25, 2019.

JAMES E. HALVORSON
MIRIAM P. LOUI
DENNIS K. FERM
HENRY S.H. KIM

Attorneys for Employer
STATE OF HAWAII