



**EFiled: May 11 2017 03:16PM HAST  
Transaction ID 60593973  
Case No. RA-05-238**

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS  
ASSOCIATION,

Petitioner,

and

DEPARTMENT OF EDUCATION, State of  
Hawaii,

Intervenor.

CASE NO. RA-05-238

DECISION NO. 488

FINAL DECISION ADOPTING  
PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, DECISION  
AND ORDER

FINAL DECISION ADOPTING PROPOSED  
FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

On February 28, 2017, the Hawaii Labor Relations Board (Board) filed Proposed Findings of Fact, Conclusions of Law, and Decision and Order (Proposed Findings and Conclusions) in the above-referenced case. The Proposed Findings and Conclusions provided for any person adversely affected by the Proposed Findings and Conclusions to file exceptions with the Board, pursuant to Hawaii Revised Statutes § 91-14 within ten days after service of a certified copy of this document, and that a hearing for presentation of oral arguments on any exceptions filed would be held on March 23, 2017.

On March 6, 2017, the Board issued Order No. 3237 Stipulation and Order to Reschedule Deadlines Related to HLRB's Proposed Findings of Fact, Conclusions of Law, and Decision and Order approving a stipulation and agreement between the parties that the deadline for filing of the exceptions be continued to April 10, 2017 and that a new hearing date be set by the Board on the oral arguments on any exceptions filed sometime after April 10, 2017.

On April 7, 2017, the Board issued a Notice of Rescheduled Deadline for Filing Exceptions and Setting the Hearing Date to Receive Oral Arguments on Proposed Findings of Fact, Conclusions of Law, and Decision and Order setting a new deadline of April 10, 2017 for the filing of the exceptions and a new hearing date for presentation of oral arguments on May 5, 2017. On that same date, the Board issued an Errata to Notice of Rescheduled Deadline for Filing Exceptions

and Setting the Hearing Date to Receive Oral Arguments on Proposed Findings of Fact, Conclusions of Law, and Decision and Order.

On April 10, 2017, the Hawaii State Teachers Association (HSTA) filed HSTA's Exceptions to Proposed Findings of Fact, Conclusions of Law, and Decision and Order Filed on February 28, 2017 and Legal Memorandum in Support of HSTA's Exceptions (HSTA's Exceptions).

On May 5, 2017, the Board held the hearing for the presentation of oral arguments, at which HSTA was given the opportunity to present further oral arguments in support of HSTA's Exceptions and Respondent was given the opportunity to present oral arguments in response.

Based on a full review of the record in this case, including a careful review of the HSTA Exceptions and Respondent's argument in response thereto, the Board finds such exceptions to be without merit and are overruled.

The Board hereby adopts the Proposed Findings of Fact, Conclusions of Law, and Decision and Order, filed on February 28, 2017 and attached hereto. This case is deemed to be closed.

DATED: Honolulu, Hawaii, May 11, 2017, 2017.

HAWAII LABOR RELATIONS BOARD



*Sesnita A. D. Moepono*  
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SESNITA A.D. MOEPOONO, Member

*J.N. Musto*  
\_\_\_\_\_  
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Case No. RA-05-238**

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS  
ASSOCIATION,

Petitioner,

and

DEPARTMENT OF EDUCATION, State of  
Hawaii,

Intervenor.

CASE NO. RA-05-238

PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
DECISION AND ORDER; NOTICE OF  
HEARING ON EXCEPTIONS

**PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND DECISION AND ORDER**

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

**I. FACTUAL AND PROCEDURAL BACKGROUND:**

**A. PROCEDURAL BACKGROUND**

On October 1, 2010, Petitioner HAWAII STATE TEACHERS ASSOCIATION (HSTA or Petitioner) filed a PETITION FOR CLARIFICATION OR AMENDMENT OF APPROPRIATE BARGAINING UNIT (Petition) with the Hawaii Labor Relations Board (Board). By its Petition, the HSTA, which is the exclusive representative of employees in Bargaining Unit 5 (Unit 5) (Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent), sought clarification that employees of the DEPARTMENT OF EDUCATION, STATE OF HAWAII (DOE, Department, or Intervenor) performing instructional, teaching, or support thereof to the Department's E-School are within Unit 5.

On October 7, 2010, the Board issued a NOTICE OF RECEIPT OF PETITION FOR CLARIFICATION OR AMENDMENT OF APPROPRIATE BARGAINING UNIT; NOTICE OF DEADLINE FOR FILING PETITIONS FOR INTERVENTION; AND NOTICE OF BOARD CONFERENCE providing for, among other things, a deadline of October 20, 2010 for the filing of a Petition for Intervention.

On October 20, 2010, the DOE filed a PETITION FOR INTERVENTION (DOE Petition) asserting its right in the subject proceeding as being the only employer of HSTA members and alleging that its interest is that of employer's rights in determining position allocations at schools in accordance with the weighted student formula, which may be impacted by this proceeding.

On October 28, 2010, the Board issued Order No. 2747 granting the DOE Petition.

On July 17, 2013, HSTA filed HSTA'S MOTION TO AMEND PETITION FOR CLARIFICATION OR AMENDMENT OF APPROPRIATE BARGAINING UNIT, which was granted by the Board on May 16, 2014 by Order No. 2979.

On May 15, 2014, HSTA filed an AMENDED PETITION FOR CLARIFICATION OR AMENDMENT OF APPROPRIATE BARGAINING UNIT (Amended Petition), requesting the following clarification:

HSTA seeks clarification that the following are within Unit 5:

Employees employed in Unit 5 positions of the Department of Education ("DOE"), employed by the DOE to teach online classes before or after regular DOE school hours at any DOE school, including but not limited to "E-School" and individual DOE schools.

Hearing on the merits was held on January 26 and 27, 2011, August 26 and 28, 2014, September 29, 2014, and November 19, 2014 with all parties afforded the opportunity to present evidence, including exhibits and testimony.

On June 15, 2015, the DOE filed INTERVENOR'S POST HEARING BRIEF, and HSTA filed HAWAII STATE TEACHERS ASSOCIATION'S MEMORANDUM OF FACT AND LAW.

On June 16, 2015, HSTA filed HSTA'S MOTION FOR THE BOARD TO ACCEPT HAWAII STATE TEACHERS ASSOCIATION'S AMENDED MEMORANDUM OF FACT AND LAW (HSTA Motion to Accept Amended Memorandum) and the HAWAII STATE TEACHERS ASSOCIATION'S AMENDED MEMORANDUM OF FACT AND LAW.

On June 20, 2015, the Board issued Order No. 3072 granting the HSTA Motion to Accept Amended Memorandum.

Based on a thorough review of the evidence and arguments presented, the Board issues the following Proposed Findings of Fact, Conclusions of Law, and Order in accordance with Hawaii Revised Statutes (HRS) § 91-11.<sup>i</sup>

## B. PROPOSED FINDINGS OF FACT

Petitioner HSTA is and was, for all times relevant, the “exclusive representative,” as defined in HRS § 89-2 of employees in Unit 5 (Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent).

Intervenor DOE is and was, for all times relevant, the “public employer,” as defined in HRS § 89-2 of employees in Unit 5.

HRS § 89-6(5) defines Unit 5 as “Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent . . .”

HSTA and DOE were, for all times relevant, parties to the Agreement Between The Hawaii State Teachers Association and The State of Hawaii Board of Education, in effect from July 1, 2009 through June 30, 2011 (CBA).

CBA ARTICLE I - RECOGNITION excludes “Part-Time Teachers (as defined by Section 89-6, HRS)[.]”

Full-time equivalency (FTE) for a teacher is equal to 35 hours per week; and a one-half of a FTE for a teacher is 17.5 hours per week.

The E-School has some full-time teaching positions, which are Unit 5 positions, and the teachers employed in those positions are in Unit 5.

The DOE, in addition, hires employees, who teach full-time at DOE schools during the regular school hours, and are accordingly, Unit 5 members to also teach online classes for credit (primarily through the E-School), outside of the regular school hours, as Part-Time Temporary Teachers (PTT). These PTT E-School positions do not have position numbers and are not positions covered by the Unit 5 CBA.

Revised Department Procedures, Certificated Personnel-5, Part-Time Temporary Teacher (Hourly) Employment Guidelines (PTT Guidelines), dated August 6, 1982 provides in Paragraph VI.C.3:

A regular teacher of the Department may be employed concurrently as a part-time temporary teacher provided such employment is beyond the normal school day and is not an extension of the employee's regular instructional services, duties and responsibilities. The employee is considered to be employed in two separate and unrelated jobs with each job providing its own benefits; thus, such an employee cannot apply benefits that accrue from his/her regular employment with the State to his/her part-time employment.

PTTs are employed on a temporary and no benefit basis. PTTs are limited to working 17 hours or less a week, are paid hourly under a pay plan separate from the compensation received by regular teachers under the Teacher's Salary Schedule, and not covered by the CBA. The PTT Guidelines generally provide in relevant part:

Part-time temporary teachers are employed on an hourly, non-contractual, no benefit basis not to exceed 17 hours per week. They are employed to provide instructional services in both supplementary and regular programs based on instructional objectives and available funding. As it may happen, part-time temporary teachers sometimes work together with regular salaried teachers on a regular basis for a part of the workday. Since both types of teachers are employed under separate pay plans it is essential that they are assigned duties and responsibilities that conform to their job classifications.

Regarding the hours of work, the PTT Guidelines provide in pertinent part:

C. Hours of Work

Hours of work per employee should not exceed 17 hours per week. The part-time temporary teacher's classification was intended for temporary part-time employment....

(Emphasis in original).

The DOE clarified that this limitation does not apply to salaried employees in section VI. PROGRAM PARAMETERS, of its PART-TIME TEMPORARY TEACHER PROGRAM, Certificated Employees (PTT Program), stating:

Personnel employed under the PTT program are restricted to not more than seventeen (17) hours per week of employment.

Employment as a PTT may be for only one program unless the total of 17 hours per week condition is not exceeded when employed in two programs. Exception to this condition is for only salaried employees.

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The Introduction of the PTT Program emphasizes the temporary and part-time nature of the employment, stating:

The Part-time Temporary Teacher (PTT) Program is an employment system for the hiring of non-regular certificated personnel for the numerous educational curricula of the Department of Education. Non-regular personnel are casual and temporary employees who generally provide Instructional support to students.

This program does not provide for job security commitments nor the standard employment benefits. Employment may be short-term or seasonal or throughout one school year at a time. The flexibility of this employment route enables schools and offices to obtain supplementary instructional services with minimum requirements and time constraints.

Over the years, the use of this employment avenue has increased with the addition of programs and services. It is not only practical but also economically feasible and effective in obtaining supplementary instructional resources. With the decentralization of decision-making in the context of shared management of schools and lump-sum budgeting, the guidelines for the employment of PTTs are delineated in this document for schools and offices choosing this employment option.

The PTT program mutually benefits the Department of Education and the employees who want to supplement their income or be employed part-time.

The PTT Guidelines further specifically provide that PTTs are not paid on the Teacher's Salary Schedule for regular teachers but are paid on an hourly basis. The PTT Guidelines provide in pertinent part, in Article VI:

A. Proper Use According to Job Classification

1. The Department of Education teacher compensation rates are categorized into three distinct groups of employees as follows:

<u>Group</u>	<u>Compensation Plan</u>
a. Regular Teachers ***	Teacher's Salary Schedule
c. Part-Time Temporary Teachers	Three Classes of Hourly Rates

Further, the PTT Guidelines provide in Article VII regarding PTT compensation:

- A. The Part-Time Temporary Teacher Pay Plan will be applied to all certificated non-regular hourly employees.
- B. Pay rates for Part-Time Temporary Teachers (academic) and Part-Time Teachers (non-academic) employed on an hourly basis shall be based on the most current per diem rates established for substitute teachers as follows:

Class I Per Diem Rate for Class I Substitute Teacher

Class II Per Diem Rate for Class II Substitute Teacher

Class III Per Diem Rate for Class III Substitute Teacher

Hourly rates shall be derived from per diem rates in accordance with the following formula:

\*Hourly rate = Per Diem rate ÷ 6 average working hours per day

\*NOTE: Hourly rate is based on student contact time exclusive of preparation time, lunch break, recess, etc.

DOE Regulation #5105 GENERAL CONDITIONS OF RECRUITMENT, SELECTION AND APPOINTMENT sets forth EMPLOYEE BENEFITS FOR PART-TIME TEMPORARY CERTIFICATED EMPLOYEES, and states in pertinent part:

A. Applicability

This regulation applies to non-salaried \*certificated employees of the Department who are employed to perform services on a weekly, daily, hourly or other non-salaried basis. This category of employees generally includes specialty instructors ....and other types of part-time temporary teachers.

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C. Concurrent Employment

In cases where a part-time temporary employee is also employed as a regular employee of the State, the employee is considered to be employed in two separate and unrelated jobs with each job providing its own benefits. Thus, such an employee cannot apply benefits that accrue from his/her regular employment with the State to his/her part-time employment....

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C. PROPOSED CONCLUSIONS OF LAW

1. Burden of Proof

HRS § 91-10(5) states:

(5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

Hawaii Administrative Rules (HAR) § 12-42-8(g)(16) of the Board's rules states:

(16) The charging party, in asserting a violation of chapter 89, HRS, or this chapter, shall have the burden of proving the allegations by a preponderance of the evidence. The party raising any subsequent issue shall have the burden of proving that issue by a preponderance of the evidence.

*See also:* Hawaii Gov't Emp. Ass'n, Local 152 v. Keller, Board Case No. CE-13-597, Decision No. 456, 6 HLRB 421, 429 (2005); United Public Workers, AFSCME, Local 646 v. Waihee, Board Case No. CE-01-122, Decision No. 309, 4 HLRB 742, 750 (1990) (Waihee). The

preponderance of the evidence is defined as “proof which leads the [trier of fact] to find that the existence of the contested fact is more probable than its existence.” Minnich v. Admin. Dir. of the Courts, 109 Hawaii 220, 228 (citing Masaki v. Gen. Motors Corp., 71 Haw. 1, 14, 780 P.2d 566, 574 (1989)); Coyle v. Compton, 85 Hawaii 197, 202-03 (1997) (citing Strong, McCormick on Evidence § 339, at 439 (4<sup>th</sup> ed. 1992)). Further, “the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles.” Waihee, 4 HLRB at 750.

The Board has further interpreted this section “to mean that the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles. Henceforth, if any party fails to present sufficient legal arguments with respect to any issue, the Board shall find that the party failed to carry its burden of proof and dispose of the issue accordingly.” State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982) (Sanderson). See also: State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-63, Decision No. 162, 3 HPERB 47, 65 (1982); Hawaii Gov’t Emp. Ass’n, AFSCME, Local 152, AFL-CIO v. Sasano, Board Case Nos. CE-03-222a, Decision No. 361, 5 HLRB 410, 421 (1994) (citing SHOPO v. Fasi, 3 HPERB 25, 46 (1982)).

## 2. Relevant Statutory Provisions

HRS § 89-5 (1)(1) provides:

### **§ 89-5 Hawaii labor relations board.**

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- (i) In addition to the powers and functions provided in other sections of this chapter, the board shall:
  - (1) Establish procedures for, investigate, and resolve, any dispute concerning the designation of an appropriate bargaining unit and the application of section 89-6 to specific employees and positions[.]

HRS § 89-6 (a)(1) provides:

**§ 89-6 Appropriate bargaining units.** (a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

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- (5) Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less

than twenty hours a week who are equal to one-half of a full-time equivalent[.]\*\*\*

(f) The following individuals shall not be included in any appropriate bargaining unit or be entitled to coverage under this chapter:

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(6) Part-time employees working less than twenty hours per week, except part-time employees included in unit (5)[.]

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(g) Where any controversy arises under this section, the board shall, pursuant to chapter 91, make an investigation and, after a hearing upon due notice, make a final determination on the applicability of this section to specific individuals, employees, or positions.

### 3. Requested Unit Clarification

The HSTA argues that the issue in this unit clarification proceeding involves whether the nature of E-School online teaching work is Unit 5 work and further asserts that the E-School teachers as PTTs is a “misclassification.” In support of this argument, HSTA relies on previous HLRB decisions for the position that in determining unit clarifications, the Board has examined the job descriptions, class specifications, and the primary services of functions of the positions in question compared to the positions in the unit identified for placement.

The Board disagrees with HSTA’s reliance upon these cases<sup>ii</sup> in support of its argument that the Board is compelled to address a misclassification of these E-School teachers as PTTs in this proceeding. The Board finds that a review of these cases shows that while the classification of the position at issue was considered in determining the requested unit clarification, the appropriateness of the classification was not an issue in those cases. Rather, the Board’s focus in those cases was on the appropriate assignment of a specific position or positions with designated position numbers to a certain bargaining unit based on a review of the duties and responsibilities of that position. In this case, based on the Findings of Fact set forth above, with the exception of those E-School teachers who may already be in Unit 5 positions, the other employees at issue teaching online are PTTs. PTTs have not been shown to be serving in a designated numbered position.

HRS § 89-6(f)(6) prohibits the inclusion of part-time employees working less than twenty hours per week from inclusion in any bargaining units or to be entitled to coverage under HRS Chapter 89, except for part-time employees included in Unit 5. HRS § 89-6(a)(5) further specifically provides for the following personnel to be members of Unit 5:

Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent.

(Emphasis added) Reading HRS §§ 89-6(f)(6) and 89-6(a)(5) together, the only personnel who are members of Unit 5 are: (1) teachers and other DOE personnel under the same pay schedule;<sup>iii</sup> and (2) “part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent.”<sup>iv</sup> (Emphasis added)”

The Board’s Findings of Fact set forth above, including that a full-time equivalent (FTE) for Unit 5 is equal to a person working 35 hours per week and a one-half FTE is a person working 17.5 hours per week, compel a conclusion that the DOE is correct that a PTT (who works not more than 17 hours per week) is not a Unit 5 member by definition with respect to that person’s PTT duties and position. In addition, the Board’s findings that PTTs are: not members of Unit 5; in a category of employees not subject to the CBA; and employed on a temporary, non-benefit basis, with hourly compensation separate from the Teacher’s Salary Schedule, and work limited to 17 hours or less per week, offer further support for this conclusion.

Under HRS § 89-5(i)(1), the scope of the Board’s authority regarding unit clarification does not extend to misclassification<sup>v</sup> but is limited to “any dispute concerning the designation of an appropriate bargaining unit and the application of section 89-6 to specific employees and positions.” (Emphasis added) Accordingly, the Board concludes that based on the Amended Petition, the issue within the context of the request for a unit clarification is limited to whether employees *employed in a Unit 5 position* to teach online classes before or after regular DOE school hours at any DOE school *are within Unit 5*.

After due consideration of the Amended Petition and the record, the Board rules that the answer to this question is “Yes” -- insofar as an employee is employed in a Unit 5 position to teach online classes, such employee is within Unit 5, “which merely restates the status quo.” Hawaii State Teachers Association, NEA v. Board of Education, State of Hawaii, Board Case No. DR-05-39, Board Decision No. 142, 2 HPERB 607, 634 (1981).

### PROPOSED ORDER

The RA petition for unit clarification is dismissed except as to the inclusion of all employees employed by the DOE to teach online classes in a Unit 5 position before or after regular DOE school hours at any DOE school, including but not limited to “E-School” and individual DOE schools, which merely restates the status quo.

FILING OF EXCEPTIONS

Any person adversely affected by the above Proposed Findings of Fact, Conclusions of Law, and Decision and Order may file exceptions with the Board, pursuant to HRS § 91-11, within ten days after service of a certified copy of this document. The exceptions shall specify which findings or conclusions are being excepted to with citations to the factual and legal authorities therefore.

NOTICE OF HEARING ON EXCEPTIONS

NOTICE IS HEREBY GIVEN that should any party file exceptions, a hearing for presentation of oral arguments on any exceptions filed will be held at 9:00 a.m. on March 23, 2017, in the Hawaii Labor Relations Board’s hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii 96813.

DATED: Honolulu, Hawaii, February 28, 2017.

HAWAII LABOR RELATIONS BOARD

  
SESNITA A.D. MOEPONO, Member

  
J.N. MUSTO, Member

Copies sent to:

Rebecca Covert, Esq.  
James E. Halvorson, Deputy Attorney General

<sup>1</sup> Hawaii Revised Statutes (HRS) § 91-11, states in pertinent part:

Examination of evidence by agency. Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a

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statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or portions thereof as may be cited by the parties.

Board Member J N. Musto did not participate in the hearings. Board Member Sesnita A.D. Moepono did not participate in the hearings held on January 26 and 27, 2011, but participated in the other four hearings. However, both Board members have thoroughly reviewed the record in this matter, including the files, transcripts, and exhibits. Accordingly, the Board issues these Proposed Findings of Fact, Conclusions of Law, and Decision and Order.

<sup>ii</sup> Those decisions include In re Dep't. of Education, 5 HLRB 378, Decision No. 356 (1994); In re Bd. of Regents, 5 HLRB 135 (1993); In re Bd. of Regents, 5 HLRB 216, Decision No. 342 (1993); In re Bd. of Regents, 5 HLRB 235, Decision No. 346; In re Bd. of Regents, 5 HLRB 455, Decision No. 364 (1995); In Re Bd. of Regents, 4 HLRB 734, 737, Decision No. 307 (1990); and In re Bd. of Regents, 4 HLRB 672, Decision No. 299 (1990).

<sup>iii</sup> Regarding the category of Unit 5 members in (1), PTTs are paid on an hourly basis and are not under the same pay schedule as “regular” teachers. Thus, PTTs cannot be included in Unit 5 under category (a) and the following discussion will focus on the category of Unit 5 members in (b).

<sup>iv</sup> HRS § 89-6(a)(5).

<sup>v</sup> HRS § 89-5(a) provides that the Board was created “to ensure that collective bargaining is conducted in accordance with this chapter....” Further, HRS § 89-9(d) specifically provides in pertinent part that “[e]xcluded from the subjects of negotiations are matters of classification, reclassifications....” Consequently, the Board has held that classification and reclassification are not covered by collective bargaining agreements. Univ. of Hawaii Prof'l Assembly v. Bd. of Regents, Board Case No. CE-07-21, Board Decision No. 67, 1 HPERB 598, 604 (1976).

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