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Case No. 22-CE-07-968

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY,

Complainant(s),

and

BOARD OF REGENTS, University of
Hawaii,

Respondent(s).

CASE NO(S). 22-CE-07-968

DECISION NO. 522

FINDINGS OF FACT, CONCLUSIONS OF
LAW, DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

1. Introduction and Statement of the Case

The Hawaii Labor Relations Board (Board) has recognized that consultation and negotiation by public sector employers with public sector unions over matters affecting public sector employees under Hawaii Revised Statutes (HRS) § 89-9 are fundamental pieces of HRS Chapter 89 and its principles of harmonious and cooperative relations between government and its employees. *See, Hawaii Gov't Emp. Ass'n, AFSCME, Local 152, AFL-CIO v. Kawakami*, Board Case Nos. 20-CE-03-946 a, b, and c, Decision No 506, at *1 (June 23, 2021) (<https://labor.hawaii.gov/hlrb/files/2021/06/Decision-No.-506.pdf>) (*Kawakami*).

The Hawaii courts have held that while compliance with federal statutes is not a negotiable subject, the duty to bargain may apply where the employer has discretion under federal law, regulation, or administrative opinions in implementing the federal law. *Univ. of Hawaii Prof'l Assembly v. Tomasu*, 79 Hawaii 154, 158, 900 P.2d 161, 165 (1995) (*Tomasu*).

Title IX of the Education Amendments of 1972, 34 CFR Part 106 (Title IX), is the federal law prohibiting sex discrimination in any education program or activity receiving federal funds. The Violence Against Women's Act (VAWA) is the federal government's comprehensive approach to address four types of gender-based violence, sexual harassment, domestic violence, dating violence, and stalking.

In March 2022, because of the Trump Administration changes to the Title IX regulations and anticipated statutory changes by the Hawai'i State Legislature (Legislature), Respondent BOARD OF REGENTS, University of Hawai'i (BOR, UH, University, Employer, or Respondent) sought to update their Title IX Policy Executive Policy (EP) EP 1.204 (EP 1.204), revise their civil rights policy requiring nondiscrimination, equal opportunity and affirmative action EP 1.202 (EP 1.202), and adopt a new Administrative Procedure (AP) 1.202 (AP 1.202).

The dispute in this case arose out of UH's handling of the consultation process over the proposed UH Title IX Policies and whether, and to what extent, UH had a duty under HRS Chapter 89 to negotiate these proposed UH Title IX Policies implementing the federal Title IX and civil rights laws.

On June 28, 2022, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA, Union, or Complainant) filed this prohibited practice complaint (Complaint) alleging that the UH violated HRS § 89-13(a)(5) by wilfully refusing to bargain in good faith as required under HRS § 89-9 over certain subjects and procedures impacted by the proposed Title IX Policies and HRS § 89-13(a)(7) by wilfully refusing to completely and meaningfully consult as required by HRS § 89-9(c) over the proposed Title IX Policies and procedures that substantially affected the terms and conditions of employment of bargaining unit 7 (BU 7) members.

1.1. Issues

Based on the pleadings and the record in this case, the relevant issues are as follows:

1. Whether UH wilfully violated HRS § 89-13(a)(7) by failing to consult with UHPA, as required by HRS § 89-9(c), regarding the proposed Title IX Policies; and
2. Whether UH wilfully violated HRS § 89-13(a)(5) by refusing to bargain in good faith with the UHPA under HRS § 89-9 regarding the effects of the proposed Title IX Policies?

1.2. Statement of the Case

After the filing of the Complaint, UH filed a motion for partial dismissal of the Complaint (UH MPD), arguing that the HRS § 89-13(a)(5) allegations for refusal to bargain should be dismissed based on untimeliness and failure to state a claim upon which relief can be granted. UHPA opposed the Motion.

The Board held a pretrial conference on July 21, 2022 and hearings on the merits (HOM) on the Complaint on August 3, 4, 8, 11, 15, 16, and 26, 2022. At the August 3, 2022 HOM, the Board heard and orally denied the UH MPD.

During the HOMs, UHPA called Dwight Takeno (Takeno) and Wade Zukeran (Zukeran) as witnesses, and UH called Jennifer Rose (Rose) and Sarah Hirakami (Hirakami) as witnesses. During the pretrial conference and the HOMs, the Board admitted Board Exhibit 1, Joint Exhibits J-1 through J-29, UHPA Exhibits A-M, UH Exhibits 1-8, and took judicial notice of 2018 Haw. Sess. Laws Act 10, § 1, at 37-38 and the associated committee reports.

After the HOMs were concluded, the parties filed post-hearing briefs.

Based on the entire record, the Board makes the following findings of fact and conclusions of law and order concluding that UHPA failed to prove that UH committed the prohibited practices alleged.

Any conclusion of law that is improperly designated as a finding of fact is a conclusion of law; any finding of fact that is improperly designated as a conclusion of law is a finding of fact.

2. Background and Findings of Fact

2.1. Joint Stipulations of Fact

The parties stipulated to the following facts:

1. The United States Department of Labor is a Cabinet-level department of the United States government that was created by Congress in 1979 through passage of the Department of Education Organization Act (Public Law 96-88).
2. On May 5, 2022, the House and the Senate chambers of the Legislature adjourned.
3. June 23, 2022 marks the 50th Anniversary of the enactment of Title IX of the Education Amendments of 1972.
4. Neither Jan Gouveia (Gouveia) nor David Lassner (Lassner) attended any of the consultation meetings between the parties regarding these proposed Title IX Policies.

2.2. The Parties

During the relevant time, the parties were as follows.

2.2.1. UHPA

UHPA was the exclusive representative¹ for BU 7 (Faculty of the University of Hawai‘i and the community college system).²

Christian Fern (Fern) was the UHPA Executive Director, Takeno was the UHPA Associate Executive Director, and Zukeran was UHPA’s outside legal counsel.

2.2.2. BOR

BOR was a member of the employer group³ for the purpose of negotiating the relevant BU 7 collective bargaining agreement (CBA).

For the UH, Lassner was the President, Gouveia was the Vice-President for Administration, Erika Lacro was the Vice-President responsible for negotiations, Hiramami was the UH Director of Collective Bargaining and Labor Relations, and Rose was the UH Director of the Office of Institutional Equity,

2.3. BU 7 CBA

UHPA and BOR were parties to the relevant CBA, in effect from July 1, 2021 up to and including June 30, 2023.

2.4. Current Applicable Federal and State Laws

2.4.1. Title IX, 34 CFR Part 106

Title IX prohibits discrimination based on sex for any educational institution that receives federal financial assistance.

2.4.2. VAWA

The VAWA is the federal government’s comprehensive approach to address four types of gender-based violence: sexual harassment; domestic violence; dating violence; and stalking. UH incorporated VAWA into the August 2020 Title IX regulations.

2.5. Prior UH Sex Discrimination Policies

2.5.1. EP 1.202

EP⁴ 1.202, effective July 1991, is the current civil rights policy requiring nondiscrimination, equal opportunity, and affirmative action used by UH.

2.5.2. EP 1.204 Versions and Consultations

EP 1.204 is UH’s systemwide sex discrimination policy.

2.5.2.1. 2015 EP 1.204

In March 2015, UH issued interim EP 1.204, effective September 2015 to January 2020 (2015 EP 1.204), which addressed all forms of sex discrimination under state and federal law and covered employees, students, and third parties. This interim policy provided for, among other things, interim supportive measures,⁵ a preponderance of the evidence standard, and disciplinary measures.

2015 EP 1.204 went through an expedited consultation process that resulted in UHPA agreeing to implementation subject to future consultation, which UH complied with.

After being submitted to the Office of Civil Rights (OCR), U.S. Department of Education, the 2015 EP 1.204 was returned and changed by a voluntary agreement.

The Legislature created a task force to review UH Title IX and VAWA policies and oversee the UH affirmative consent policy. The task force report and proposed revisions to 2015 EP 1.204 were the basis for Act 208, 2016 Haw. Sess. Laws that imposed extensive mandates on the UH, including memorandums of understanding (MOUs) with the county police departments to strengthen collaboration between the UH administrative process and the criminal justice system.

2.5.2.2. 2020 EP 1.204

After the OCR changes, Hiramami requested consultation with UHPA on EP 1.204. After consultation, EP 1.204, effective January 2020 to August 2020 (January 2020 EP 1.204), was implemented.

On July 29, 2020, Hiramami requested consultation on EP 1.204 revisions based on Trump Administration regulations. Hiramami and UH legal counsel met with Fern and Tony Gill before implementing the August 2020 EP 1.204 (August 2020 EP 1.204) that included provisions for supportive measures, a preponderance of the evidence standard, a three-year statute of limitations, and mandated emergency removal and recordkeeping.

The August 2020 EP 1.204 is the Title IX policy currently in effect.

2.5.3. January 2022 AP 1.204 Revisions and Consultation

AP⁶ 1.204 provides the procedures for handling sexual harassment complaints.

On September 23, 2021, UH changed AP 1.204 (January 2022 AP 1.204) to remove the suppression section struck down by a court decision..

After Hirakami requested consultation on draft revision of EP 1.204 and received no response, UH implemented the January 2022 AP 1.204 currently in effect.

2.6. 2022 Consultation Over Revisions to the EP 1.202 and 1.204 and the Adoption of AP 1.202

Based on the Legislature’s intention to statutorily provide for EP 1.204, UH decided to implement proposed UH Title IX Policies by April 1, 2022.

Therefore, on March 12, 2022, Hirakami sent an email with the subject “UH’s consultation letter re: EP 1.202, EP.1.204, and AP 1.201” and a letter to Fern regarding “Consultation on Update to University of Hawai‘i’s Executive Policies EP 1.202 and EP 1.204, and Adoption of Administrative Policy AP 1.202” (Consultation Letter). In the Consultation Letter, Hirakami notified UHPA of the plan to implement revisions of EP 1.202 and EP 1.204 and adoption of AP 1.202 on April 1, 2022 with the reasons for and description of the specific changes. Hirakami informed UHPA that UH intended for the policies to be revised and adopted “on an interim basis for now, as we complete internal and external consultation processes[.]” Comparisons of the existing and revised draft EP 1.204 and EP 1.202 and copies of the draft AP 1.202 were attached to the Consultation Letter.

The proposed EP 1.204 made no substantive changes to the existing provisions regarding supportive measures; failure to comply with sanctions, remedies, or corrective actions; timely reporting; standard of review; emergency removal; and recordkeeping. The proposed EP 1.204 broadened the scope and jurisdiction of the policy to include sexual harassment, exploitation, or stalking; combine the supportive measures and the formal complaint of sexual harassment allegations; make definitions current with the law; add discriminatory prohibited practices examples; and provide for a 180-day filing deadline.

On March 22, 2022, Takeno acknowledged receipt of the UH Consultation Letter and requested clarification regarding implementation of the revisions on an interim basis. He further expressed concerns over UH’s “unilateral actions” and the impact on BU 7 members and on contractual and statutory requirements. Finally, Takeno informed Hirakami that UHPA was reviewing whether mandatory bargaining was required for these proposed updates and changes.

Hirakami offered Fern and Takeno a subject matter briefing on March 29, 2022 (UH Briefing) to provide information to the unions about the changes and respond to questions to facilitate meaningful dialogue for the purposes of consultation.

Prior to the UH Briefing, Hirakami and Takeno both requested phone calls.

After the Consultation Letter was sent, UH and UHPA met five times—March 29, 2022, April 6 and 12, 2022, and May 27 and 31, 2022.

Hirakami emailed Takeno the Zoom link for the March 29, 2022 meeting (UH Briefing). Rose, UH Director of the Office of Compliance for EEO, AA (affirmative action) and Title IX, Title VII expert Christine Chun (Chun), and the Title IX Coordinator for Honolulu Community College David Uranaka-Yamashiro (Uranaka-Yamashiro) represented UH. UH's Hirakami and Trisha Kimura (Kimura), and UHPA's Takeno and Zukeran attended.

At the UH Briefing, UH responded to the Union's questions about the revisions. Rose and Uranaka-Yamashiro gave a PowerPoint (PowerPoint) presentation explaining the revisions, including moving all sex and gender-based discrimination from EP 1.202 to EP 1.204. During and after the meeting, UH responded to Zukeran and Takeno's questions about the discretionary issues—burden of proof, statute of limitations, filing deadlines, the interim nature of the policy, and legislation incorporation. Rose gave the Legislature as the reason for the implementation timeline.

On March 31, 2022, Hirakami followed up with Takeno and transmitted the PowerPoint. Hirakami notified UHPA of an extension of the anticipated implementation date for the interim policies to mid-April so UHPA would have more time to review the policies and for union concerns and questions to be addressed.

Zukeran acknowledged that the proposed Title IX Policies did not change the scope of negotiable subjects for successor CBAs and that disciplinary actions were handled under the CBA grievance procedure in effect at the time under prior Title IX policies.

Nevertheless, by an April 1, 2022 email and letter to Hirakami (UHPA Demand Letter), Takeno formally demanded negotiations “over the impact on wages, hours, and terms and conditions of employment by the updates and adoption of the above-referenced UH Executive Policies and Administrative Procedures.” UHPA further demanded that UH cease and desist from unilaterally implementing the above-referenced policy until the UH fulfilled its contractual and statutory requirements. The Demand Letter specified a desired meeting via Zoom on Wednesday, April 6, 2022 at 10:00 a.m.

As Hirakami had no authority to initiate bargaining for BU 7, she notified UH legal counsel, Gouveia, and Lassner of UHPA's demand for bargaining.

On April 4, 2022, Hirakami responded by an email and letter to Takeno (UH Response to Demand) that UH does not “identify anything in the drafts that would be subject to mandatory bargaining.” However, Hirakami informed UHPA that UH agreed to the April 6, 2022 date to “meet and listen to the UHPA's concerns and its views on how the policies impact negotiable subjects.”

Hirakami notified Takeno and Zukeran that Chun would be joining the meeting because of her Title VII knowledge.

At the April 6 and 12, 2022 meetings, UHPA gathered information for spreadsheets addressing its concerns.

The purpose of the April 6, 2022 consultation meeting was to identify bargainable issues. Chun, Kimura, Hirakami, Rose, and Trisha Kim (Kim) from UH General Counsel's Office represented UH. Zukeran, and Takeno represented UHPA. Chun provided Title VII information. UHPA asked questions to determine whether the proposed policy changes were discretionary, and the parties discussed the impact of the proposed Title IX Policies. UHPA took the position that the Hawai'i Supreme Court's (HSC) Tomasu decision⁷ made a discretionary subject bargainable and that the statute of limitations, procedural questions regarding implementation of supportive measures and sanctions, and the preponderance of the evidence standard were negotiable subjects. In response to UHPA's question regarding UH's willingness to bargain, Hirakami informed UHPA that the issue required internal discussion.

After the meeting, Chun followed up by providing Title IX information to Zukeran and Takeno.

UH's internal discussions regarding the request for bargaining were conducted in two ways. Hirakami forwarded the UHPA Demand Letter to Gouveia, Lassner, and legal counsel. Hirakami also discussed UHPA's demand for bargaining with legal counsel, Chun, Rose, and others.

On April 10, 2022, Hirakami provided UH's formal response to Takeno (UH Response to Demand). Based on internal discussions, UH refused to bargain over permissive subjects and concluded that the proposed Title IX Policies would not impact mandatory subjects of bargaining. Hirakami set forth her understanding of UHPA's negotiable issues regarding discretionary policies under Tomasu, conflicts between the CBA and the policies, and UHPA seeking specific language providing for different applications for Faculty. She provided UH's specific reasons for denying negotiability of the statute of limitations, procedural questions on sanctions and corrective actions, and the conflict between "just cause" and "preponderance of the evidence standards. Despite UH declining to negotiate, Hirakami informed UHPA that UH wished to continue its duty of consultation with the Union.

On April 11, 2022, although disappointed with the UH Response, Takeno desired the meeting for "further discussion and dialogue to further elaborate UHPA's position on its demand for bargaining." Hirakami set up a meeting for the next day.

On April 12, 2022, Chun, Rose, Hirakami, UH Associate General Counsel Elisabeth Contrades (Contrades), Zukeran and Takeno met to consult. Hirakami stated her disagreement with Zukeran's interpretation of Tomasu that disciplinary actions were a mandatory subject of bargaining. The parties again addressed UHPA's concerns over the preponderance standard, the statute of limitations, the required record retention, supportive measures, the MOUs, the

disciplinary measures and CBA compliance, and the mid-April implementation date. Chun provided Zukeran with a copy of some requested regulations.

Zukeran followed up with an April 14, 2022 email to Hiramami transmitting three spreadsheets outlining UHPA's positions, suggested language, comments, and questions regarding the proposed Title IX Policies (UHPA Spreadsheets).

On April 14, 2022, Chun followed up with UHPA's request for legal citations and authorities.

After receipt of the UHPA Spreadsheets, Hiramami, UH legal counsel, Chun, and Rose met several times to internally review and prepare UH's response to the UHPA Spreadsheets (UH Response Spreadsheets).

On May 20, 2022, Hiramami notified Fern that UH attempted to respond to UHPA's questions and suggestions with their own attached spreadsheets (one each for EP 1.204, EP 1.202, and AP 1.202) (UH Response Spreadsheets). She further informed him of May 26 and 27, 2022 time slots held for further virtual meetings to "go over the attachments in a more interactive way". Hiramami offered to find additional times during the following week if neither of those dates worked and informed him that they hoped to wrap up discussions by mid-June.

Takeno emailed Hiramami their availability to meet on May 27, which Hiramami confirmed.

On May 25, 2022, Zukeran asked Hiramami for an understanding that "the Union's participation in these discussions is not a concession that any subject discussed at the Zoom meeting is permissive bargaining[.]" Hiramami replied that the Friday meeting was not considered "as a waiver by either side of its position."

During the May 27 and 31, 2022 meetings, UHPA sought information from UH regarding their refusal to bargain.

On May 27, 2022, Takeno, Sgan, and Zukeran attended the Zoom meeting with Rose, Contrades, Kimura, Hiramami, and Chun to discuss the proposed Title IX Policies with the focus on the UHPA and UH Response Spreadsheets. The Spreadsheets were reviewed section by section and line by line and comments were discussed. UHPA gave its concerns, explanations, and reasoning regarding the statute of limitations and mid-June implementation date. The discussions addressed EP 1.204, HRS § 89-9(d) permissive subjects, Tomasu, the HRS Chapter 89 amendments, HLRB orders, the nexus between off-campus conduct that falls within policies, effect of criminal charges on process, and the information shared with the police departments under MOUs.

At the meeting, Zukeran requested copies of the MOUs, which UH did not produce.

On May 27, 2022, Zukeran requested (Zukeran email) from Hirakami that Gouveia, Lassner, and any administrator who determined the mid-June date implementation date be invited to the May 31, 2022 meeting “to assist the Union in fully understanding the changes made to the Title IX Policy Amendments regarding the statute of limitations.” Hirakami passed on the invitation to Gouveia.

Gouveia and Lassner did not usually attend consultation meetings. Rose updated Gouveia on the consultation process in biweekly meetings.

On May 31, 2022, Hirakami, Chun, Rose, and UH legal counsel met with Takeno, Zukeran, and Sgan. The parties reviewed and discussed the spreadsheets until the last section of EP 1.204. The parties further discussed the issues of Board Order No. 3752 and disciplinary matters as permissive subjects of negotiations, the statute of limitations, the record retention requirement, and the mid-June implementation date due to the Legislature. UH responded to the Zukeran email at this meeting. Rose promised to check on how record retention was handled.

On May 31, 2022, Hirakami sent revised UH Response Spreadsheets to Rose, Chun, Takeno, Zukeran, Contrades, and Sgan, and suggested another virtual meeting for June 1. By the May 31, 2022 meeting, the parties were discussing without any progress because of their disagreements.

Despite UH’s response to UHPA’s concerns, Takeno wanted another meeting, and UHPA still wanted bargaining. However, later that day, Takeno communicated his unavailability until June 6 and requested other dates for the following week.

On May 31, 2022, Hirakami asked for assistance with a Doodle Poll to find a mutually agreeable time. On June 3, 2022, an Administrative & Fiscal Support Specialist from UH sent out the Doodle Poll.

Despite the Doodle Poll being sent to all the participants with a request that they complete it as soon as possible, Hirakami did not receive a reply from UHPA.

UH fulfilled UHPA’s request for copies of the complete federal law and citations being referenced and memoranda of understandings or agreements with other governmental entities regarding Title IX enforcement.

At a meeting with Rose, Hirakami found out that June 15th remained the target implementation date, and there were no changes to the policies..

Before closing consultation, Hirakami contacted Rose, legal counsel, Gouveia, Lassner, and Lacro regarding the consultation issues.

On June 15, 2022, Hirakami closed consultation by an email and letter notifying Fern that UH was wrapping up its consultation over the proposed Title IX Policies (Notice of Consultation Completion). Hirakami further assured UHPA that UH intended to fully honor every aspect of the CBA when implementing these reviewed policies and that Title IX coordinator training would include reminders of a BU 7 employee's CBA rights, including sanctions or discipline. Fern acknowledged receipt of the Notice. Despite formally closing consultation, Hirakami stated that UH remained open to further discussions with UHPA on any of these policies.

Takeno and Zukeran did not further contact Hirakami or respond to the Notice of Consultation Completion.

3. Analysis and Conclusions of Law

3.1. Witness Credibility

In assessing witnesses' credibility, the Board relied primarily on witness demeanor, the context and consistency of testimony, and the quality of the individual witness' recollections. The Board also considered if the evidence corroborated or refuted the testimony and the weight of this evidence. Finally, the Board looked at established or admitted facts, inherent probabilities, and reasonable inferences that can be drawn from the entire record. In making these assessments, the Board believed some, but not all the witness testimony. Most of the credibility determinations regarding the witnesses' testimony are incorporated into the findings of fact above.

While obviously more favorable to their positions on the issues, the Board generally found most of the witnesses to be straightforward and credible and accepted their testimony to the extent consistent with the findings of fact above.

Takeno was the only witness whose testimony was only partially credible and partially not credible. His testimony is credited to the extent it is consistent with the findings of fact above. Takeno's lack of credibility was based on his evasiveness and continual inability to recall facts, particularly about consultations or policies that occurred when he was a UH official.

While several witnesses attempted to present legal conclusions to the Board, the Board does not credit any witness' legal conclusions presented during their testimony, except as consistent with the conclusions of law set forth below. The Board does not conclude that a witness' presentation of legal conclusions shows a lack of credibility, but rather an expression of an opinion.

3.2. Standards of Review

3.2.1. Motion to Dismiss

The Board has well-established standards for motions to dismiss.

3.2.1.1. Motion to Dismiss for Lack of Subject Matter Jurisdiction

When considering a motion to dismiss for lack of subject matter jurisdiction, the contents of the complaint serve as the basis. The Board must accept the allegations of the complaint as true and view those allegations in the light most favorable to the complainant. Caspillo v. Dep't of Transportation, Board Case Nos. 17-CE-01-899 and 17-CU-01-355, Decision No. 509 at *6 (November 22, 2021) (<https://labor.hawaii.gov/hlrp/files/2021/11/Decision-No.-509.pdf>) (Caspillo).

Dismissal is improper unless it appears beyond doubt that the complainant can prove no set of facts in support of its claim, which would entitle the complainant to relief. In considering a motion to dismiss for lack of subject matter jurisdiction, the Board is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Parker v. Dep't of Pub. Safety, State of Hawai'i, Board Case No. 19-CE-10-923, Decision No. 502, at *54 (March 23, 2021) (<https://labor.hawaii.gov/hlrp/files/2021/03/Decision-No.-502.pdf>) (Parker).

The party seeking to invoke the Board's jurisdiction has the burden of establishing that jurisdiction exists. Caspillo, Decision No. 509, at *7 (citing Jones v. Lee, Board Case No. 21-CE-06-960, Order No. 3781, at *2 (July 16, 2021) (<https://labor.hawaii.gov/hlrp/files/2021/07/Order-No.-3781.pdf>)).

3.2.1.2. Motion to Dismiss for Failure to State a Claim

Dismissal of a complaint for failure to state a claim is warranted only if the claim is clearly without any merit and this want of merit leads to a finding that no law supports the claim or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that a complainant can prove no set of facts in support of its claim that would entitle the complainant to relief. Accordingly, the Board must view a complaint in a light most favorable to the complainant to determine whether the allegations in the complaint could warrant relief under any alternative theory. Tupola v. Univ. of Haw Prof'l Assembly, Board Case No. CU-07-330, Order No. 3054, at *17 (2016) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3054.pdf>).

When the Board considers a motion to dismiss for failure to state a claim, the Board is strictly limited to the allegations of the complaint, and the Board must deem these allegations to

be true. However, the Board is not required to accept conclusory allegations on the legal effect of the events alleged. *Id.* The Board may, however, consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment. *Id.* at *17-18. (citations omitted).

3.2.2. Burden of Proof

The Complainant has the burden of proving alleged violations of HRS Chapter 89 by a preponderance of the evidence. *See* HRS § 91-10(5) and Hawai‘i Administrative Rules (HAR) § 12-42-8(g)(16).⁸

Under the Board’s rules, any other party raising any other issue has the burden of proving that issue by a preponderance of the evidence. *See* HAR § 12-42-8(g)(16); *see also* Parker, Decision No. 502, at *30.

The preponderance of the evidence is proof which leads the factfinder to find that the existence of the contested fact is more probable than its nonexistence. *Id.* (citing Minnich v. Admin. Dir. of the Courts, 109 Hawai‘i 20, 228, 124 P.3d 965, 974 (1989)).

In addition, the Board interprets HAR § 12-42-8(g)(16) 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. If any party fails to present sufficient legal arguments with respect to any issue, the Board will find that the party failed to carry its burden of proof and dispose of the issue accordingly. *Id.* (citing State of Hawaii Org. of Police Officers v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-161.pdf>)).

3.3. UH’s Partial Motion to Dismiss

In the UH MPD, UH requested that the Board dismiss the allegations regarding the refusal to bargain and HRS § 89-13(a)(5) based on untimeliness and failure to state a claim upon which relief can be granted.

3.3.1. Untimeliness

The Board’s jurisdiction is governed by HRS Chapters 89 and 377. *See*, Parker, Decision No. 502, at *56. The Board’s determination of jurisdiction is made on a case-by-case basis. Univ. of Hawai‘i Prof’l Assembly v. Mortimer, Board Case No. CE-07-444, Order No. 1873, at *9 (May 31, 2000) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-1873.pdf>) (citing State of Hawai‘i Org. of Police Officers v. Lingle, Board Case No. CE-12-238, Decision No. 377, at *3 (May 31, 1996) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-377.pdf>)).

The HRS § 377-9(1) requirement that the Board may only consider unfair labor practices filed within 90 days of its occurrence is made applicable to HRS Chapter 89 prohibited practice complaints by HRS § 89-14.⁹ The Board’s administrative rules governing its proceedings further include this ninety-day limitation. HAR § 12-42-42(a).

In applying this requirement, the Board’s approach is well-established. The Board has construed the limitations period strictly and will not waive a defect of even a single day. Caspillo, Decision No. 509, at *7 (November 24, 2021) (citing Fitzgerald v. Ariyoshi, Board Case Nos. CE-10-175 and CU-10-43, Decision No. 175, at *21-22 (July 29, 1983) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-175.pdf>)). As the 90-day limit is jurisdictional and provided by statute, neither the Board nor the parties may waive this requirement. *Id.* (citing Hikalea v. Dep’t of Env. Serv., City and Cnty. of Honolulu, Board Case No. CE-01-808, Order No. 3023, at *6 (October 3, 2014) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3023.pdf>)). Finally, the 90-day period begins when the complainant knew or should have known that its rights were being violated. United Pub. Workers, AFSCME, Local 646 v. Okimoto, Board Case No. CE-01-515, Decision No. 443A, at *4 (June 26, 2006) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-443A.pdf>)).

While UH must demonstrate that UHPA can prove no set of facts in support of its claim which would entitle UHPA to relief, the burden is on the Complainant to establish jurisdiction to survive Respondent’s motion to dismiss. *See, e.g., Caspillo*, Decision No. 509, at *7.

In support of its motion to dismiss, UH asserted that a March 12, 2022 letter sent by UH informing UHPA of the proposed changes to EP 1.204 and the new AP 1.202 and the implementation of the revised policies on April 1, 2022, and that UH considered the matter to be subject only to consultation started the “clock” running on the filing of the Complaint.

UHPA, on the other hand, argued in support of the timeliness of its HRS § 89-13(a)(5) claim that the beginning of the limitations period began on or after April 10, 2022, when UHPA received a clear statement from UH that after reviewing its position after the parties’ communications, it refused to negotiate over the amended policies.

The Board resolves jurisdiction on a case-by-case basis. While acknowledging the cases cited by both parties, the Board determines that Decision No. 484 is not controlling of the timeliness of the refusal to bargain and HRS § 89-13(a)(5) claims in this case based on their factual distinctions. In Decision No. 484, the Board specifically found in resolving the timeliness issue in that case that “DOE clearly indicated, and HSTA understood, ‘its intention not to negotiate’ over the policy at issue in that case”, and further that “HSTA agreed with DOE’s position.” Haw. State Teachers Ass’n v. Bd. of Ed., Board Case No. CE-05-667, Decision No. 484, at *19 (September 7, 2018) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-484.pdf>)).

In resolving this issue, the Board accepts the following allegations of the Complaint as true and views those allegations in the light most favorable to the Complainant:

- By a letter, dated March 12, 2022, Hirakami informed UHPA of the updating of the EPs and the adoption of a new AP 1.202 that were expected to be implemented on April 1, 2022 and invited UHPA to meet with the UH experts to answer any questions or to provide further information.
- In a March 22, 2022 Letter, Takeno acknowledged receipt of Hirakami's letter and stated that UHPA was conducting an ongoing review of the proposed updates and sought clarification as to why and how UH would implement the Title IX policies and procedures on April 1, 2022 before any consultation had started.
- UH invited UHPA to participate in a March 29, 2022 meeting to provide an overview of the Title IX Policies that was attended by Hirakami, Rose, and Chun, and HGEA representatives, Takeno, and Zukeran.
- In a March 31, 2022 letter, Hirakami informed Takeno of the extension of the anticipated implementation date to mid-April to allow more time for discussion with the unions.
- In an April 1, 2022 letter, Takeno demanded bargaining over the proposed Title IX Policies and that the parties engage in negotiations on April 6, 2022 and that UH cease and desist from unilateral implementation of the policies.
- In an April 4, 2022 letter, Hirakami replied to Takeno's letter that UH reviewed the April 1, 2022 letter and the draft policies and "at this time we do not identify anything in the drafts that would be subject to mandatory bargaining." Hirakami further stated that UH would like to use the April 6, 2022 meeting to meet and listen to UHPA's concerns and its views on how the policies impact negotiable subjects.
- During the April 6, 2022 meeting, the parties discussed the Tomasu case, identified discretionary aspects of the Title IX Policies and areas for impact bargaining.
- At the end of the meeting, Takeno asked Hirakami whether UH was now willing to engage in impact bargaining over the discretionary aspects of the Title IX Policies.

- In an April 10, 2022 letter, Hirakami responded to Takeno’s impact bargaining demand that the UH does not believe that the policies will impact mandatory subjects of bargaining and that UH declined to negotiate over permissive subjects.

The Board acknowledges UHPA’s arguments that April 10, 2022 was the trigger date for timeliness because it was the first unambiguous statement that UH would not negotiate over the Title IX Policies. However, after deeming the allegations of the Complaint as true and viewing these allegations in the light most favorable to the Complainant, the Board finds that the limitations period in this case was triggered on April 4, 2022 when Hirakami responded to the UHPA Demand Letter. Although Hirakami framed her position was “at this time”, it was clear that UH could not identify anything in the drafts subject to mandatory bargaining. Despite the fact that UH agreed to further meet to discuss UHPA’s views regarding impact bargaining, the April 4, 2022 Response was UH’s clear indication, which UHPA should have understood, that that UH had no intention of bargaining over the proposed Title IX Policies.

Based on this April 4, 2022 trigger date, the 90-day limitations period ended on July 5, 2022.¹⁰ As the Complaint was filed on June 28, 2022, the Board finds that UHPA’s HRS § 89-13(a)(5) allegation was timely and should not be dismissed.

3.3.2. Failure to State A Claim

UH further contended that the failure to bargain allegation should be dismissed for failure to state a claim because the subject matters identified by UHPA are not subject to mandatory bargaining. In arguing that these subject matters were not negotiable, UH argued that there was no valid legal authority requiring mandatory bargaining over the subjects identified by UHPA, and the draft policies did not make any substantive changes to those subjects.

In opposing the UH MPD, UHPA asserted that under Tomasu that UH was required by HRS § 89-9 to engage in impact or effects bargaining where the public employer may exercise discretion on how best to implement the federal law.

The Complaint alleged that at the April 6, 2022 meeting, the parties discussed the Tomasu case and identified discretionary aspects of the Title IX Policies and areas for impact bargaining.

The Board recognized that in deeming the allegations of the Complaint to be true, it is not required to accept conclusory allegations on the legal effect of the events alleged. Viewing the allegations in the Complaint in the light most favorable to the Complainant, a set of facts exist that would potentially entitle UHPA to relief. The implementation of the proposed Title IX Policies could lead to the need for impact or effects bargaining. Whether such impact or effects bargaining applies in this case is a matter of fact that needed to be determined at a hearing on the

merits. Therefore, the Board could not find that it appeared beyond doubt that UHPA could provide a set of facts in support of its claim that would entitle UHPA to relief.

3.4. Whether UH Fulfilled its Obligation to Consult with UHPA Under HRS § 89-9(c) Over the Revisions to EP 1.202 and 1.204 and the Adoption of AP 1.202

The Board has noted that unlike with negotiations, HRS § 89-9(c) does not set out a process that must occur for a consultation to be valid. *See, e.g., Kawakami*, Decision No. 506, at *24. HRS § 89-9(c) speaks only to when consultations must occur, and not how. However, the Board in *HGEA v. Cayetano*, Board Case Nos. CE-02-387a, CE-03-387b, CE-04-387c, CE-09-387d, and CE-13-387e, Decision No. 394, at *32-33 (July 16, 1998) (<https://labor.hawaii.gov/hlrp/files/2020/10/Decision-No-394.pdf>) adopted the requirements for a valid consultation set forth by Arbitrator Ted. T. Tsukiyama (Kapolei Test) in an arbitration decision regarding consultation provisions contained in a collective bargaining agreement:

...(1) notice to the union, (2) of proposed personnel practices and policies of a major, substantial and critical nature, other than those requiring negotiations, (3) in reasonable completeness and detail, (4) requesting the opinion, [advice] or input of the Union thereto, (5) listening to, comparing views and deliberating together there on (i.e., “meaningful dialog”), and (6) without requirement of either side to concede or agree on any differences or conflicts arising or resulting from such consultation.

UHPA agreed that if the Title IX Policies were not negotiable, then elements 1, 2, and 4 of the Kapolei Test were satisfied by the UH Consultation Letter and that element 6 was not an issue. Therefore, UHPA argued that UH failed to satisfy elements 3 and 5.

Nonetheless, a review of the record shows that all elements of the Kapolei Test were met by UH in this case.

There appears to be no dispute that the UH Consultation Letter satisfied the first and second elements of notice to the Union of proposed policies of a major, substantial, and critical nature that do not require negotiations. The UH Consultation Letter was sent prior to UH’s intended April 1, 2022 implementation date and provided a summary of the specific changes to, the purpose of, and the reasons for each of the proposed amendments to the Title IX Policies. The attachments provided a comparison of the existing and draft EP 1.202 and 1.204 and the draft AP 1.202. Further, after the UH Consultation Letter was received by UHPA, UH offered the UH Briefing to provide further information and explanation of the specific changes to UHPA and obtain answers to their questions from the subject matter experts. The Board finds that the Consultation Letter with these attachments and the UH Briefing certainly provided the completeness and detail required by the Kapolei test.

UHPA argues that the Kapolei test element 3—the reasonable completeness and detail of UH’s provided Title IX Policies was not met based on: the numerous changes to EP 1.202 and EP 1.204; the highlight and characters that made reading the text difficult and changes impossible to locate; and the failure to use the Ramseyer or Word Track Changes format.

The Board does not find UHPA’s assertions compelling. There is nothing in the Kapolei test requiring use of the Ramseyer or Word Track Changes format, or that the changes must not be numerous, highlighted, or done using certain characters.

Regarding element 4, the UH Consultation Letter clearly requests UHPA’s input on the Title IX Policies stating, “[w]e welcome the input of the UHPA...we do have a short time frame to implement these revisions...but intend to do so on an interim basis for now, as we complete internal and external consultation processes.”

With the Board’s determination that elements (1) through (4) are met and with element (6) being that neither party has to concede or agree during the consultation, the critical remaining issue is element (5)—whether there was a “meaningful dialog” between the parties during the consultation process. The Board concludes that there was.

The proposed Title IX Policies made no substantive changes to supportive measure violations and sanctions, standard of review, timely reporting, emergency removal, and recordkeeping— all issues that had already been the subject of consultations for prior interim Title IX policies. In addition, UHPA acknowledged that the proposed Title IX Policies did not change the scope of negotiable subjects for the successor collective bargaining agreements and that any disciplinary actions were processed under the CBA grievance procedure in effect at the time of the prior Title IX policies.

Nevertheless, UH and the UHPA’s consultation process on the proposed Title IX Policies focused on these issues that had been subjects of prior consultations and on the discretionary issues of the statute of limitations, burden of proof, and implementation of supportive measures and potential sanctions and whether these discretionary issues were mandatory subjects of bargaining.

During the consultation process that occurred between the initiation on March 12, 2022 and the closing on June 15, 2022, UH provided numerous opportunities for UHPA to obtain information and provide its input regarding the proposed Title IX Policies.

Before, during, and after the UH Briefing, the UH Title IX experts provided requested information and responses to the Union’s questions about the proposed revisions to the Title IX Policies and the discretionary issues, including the UH PowerPoint and the various other consultation meetings.

Following the UH Briefing, UH extended the implementation date for the proposed Title IX Policies for a couple of weeks to allow for further discussion and response to the Union concerns.

During the April 6, 2022 through May 31, 2022 period, the parties consulted four additional times where the parties discussed previously consulted upon and other discretionary issues, and whether they were subject to mandatory negotiations.

Following the April 12, 2022 meeting, the parties exchanged the Spreadsheets providing Union input and UH responses regarding the proposed Title IX Policies. At the May 27 and 31, 2022 meetings, the UH and UHPA representatives discussed the Spreadsheets line by line and section by section, and UHPA was given the chance to raise its concerns and reasoning on the disputed issues.

Based on the record, there was no question that there was a meaningful dialogue between the parties. The major problem was that by the May 31, 2022 meeting, the parties had obviously reached a stalemate in the consultations. Despite Hiramami's efforts to set up another meeting in response to Takeno's request and UH continuing response to UHPA's information requests, UHPA failed to respond.

As UHPA failed to respond, Hiramami sent the Notice of Consultation Completion on June 15, 2022. Despite Hiramami leaving open further discussions upon request, UHPA still did not respond.

Based on this record, the Board concludes that element 4— a “meaningful dialog”— was met over the proposed Title IX Policies. Meaningful dialog does not require that either party concede to the other. Kawakami, Decision No. 506, *27. All that is required for consultation is that the employer inform the union of the new or modified policy and that a dialogue as to the merits and disadvantages of the proposed policy or policy change take place. Sage v. Bd. of Regents, Univ. of Hawai'i, Board Case No. CE-07-8, Decision No. 54, at *11 (September 3, 1974) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-54.pdf>) (citing Haw. Fed. of Tchr., Board Case No. CE-07-6, Decision No. 37 (October 9, 1973) (<https://labor.hawaii.gov/hlrp/files/2018/12/Decision-No-37.pdf>)).

As element 6 provides that neither party was required to concede or agree on the differences or conflicts arising or resulting from such conflicts, all the elements of the Kapolei test for a valid consultation were met in this case. Accordingly, UH complied with its duty to consult under HRS § 89-9(c) over the Title IX Policies.

Therefore, the Board rules that UH did not wilfully violate HRS § 89-13(a)(7) by failing to consult with UHPA, as required by HRS § 89-9(c).

3.5. Whether UH Was Required and Refused to Bargain in Good Faith with UHPA Regarding the Effects of the Revisions to EP 1.202 and 1.204 and the Adoption of AP 1.202

As the Board has previously noted HRS §89-9(b) sets forth the process through which a party can initiate or request to initiate negotiations. The requirements are that the party initiating negotiations “shall notify the other party in writing, setting forth the time and place of the meeting desired and the nature of the business to be discussed, sufficiently in advance of the meeting.”

The UHPA Demand Letter demanded negotiations over “the impact on wages, hours, and terms and conditions of employment by the updates and adoption of the above-referenced UH Executive Policies and Administrative Procedures.”

The Board finds, and UH does not appear to dispute, that the UHPA Demand Letter satisfied the technical requirements of HRS § 89-9(b) to the extent that the written notice notified UH in advance of the time and place of the meeting. However, the remaining issue is whether UHPA met the required notification of “the nature of the business to be discussed[.]”

HRS § 89-9(a) on its face requires that the employer and the exclusive representative “shall negotiate in good faith with respect to wages, hours, . . . and other terms and conditions of employment which are subject to collective bargaining[.]” Accordingly, UHPA’s Demand Letter simply incorporated the statutory language of this provision.

The Board has not previously interpreted the “notice of the nature of the business to be discussed[.]” and acknowledges that there is no guidance in the statute.

However, the Board concludes that the burden is on the union to make its bargaining wishes known and must do more than simply suggest a meeting without specifying the subjects of the meeting. *See, e.g., AT Sys. West, Inc. v. NLRB*, 294 F.3d 135, 139 (D.C. Cir. 2002). The Board finds that the purpose of this statutory requirement is to provide the other party with notice of the specific subjects that the Union wishes to negotiate and that a simple recitation of the statutory language does not provide the specificity required for adequate notice.

The Board further notes that this notice requirement is particularly significant in this case where there have already been extensive consultations both on prior versions of the Title IX Policies and on these proposed Title IX Policies on the subjects that UHPA had deemed negotiable—the statute of limitations, supportive measures and sanctions, preponderance of the evidence standard. Given these circumstances, the UH Demand Letter’s inclusion of essentially boiler plate language simply did not provide UH with sufficient notice of the nature of business to be discussed.

As the UHPA Demand Letter failed to provide the proper notice required by HRS § 89-9(a) of the “nature of the business to be discussed”, UH was not obligated to bargain.

Regardless of UH’s lack of obligation, the Board notes that negotiations over the proposed Title IX Policies effectively did take place based on the circumstances. After receiving the Demand Letter, Hirakami responded that although UH could not identify anything on the proposed Title IX Policies that were mandatory subjects of bargaining, the UH agreed to meet at the date and time specified by UHPA to meet and listen to UHPA’s concerns and views on how the policies impacted negotiable subjects. The parties did meet on April 6, 2022—as demanded by UHPA, and had three additional meetings—on April 12, 2022, May 27, 2022, and May 31, 2022—to discuss the subjects that UHPA asserted were negotiable. After the April 12, 2022, they also exchanged the Spreadsheets providing their respective positions on the negotiable subjects that were discussed at the May meetings. By the May 31, 2022 meeting, the discussions were not progressing because of their disagreements. Despite UH continuing to provide information and Hirakami’s efforts to set up another meeting, UHPA failed to respond.

Accordingly, the Board holds that UH did not wilfully violate HRS § 89-13(a)(5) by refusing to bargain in good faith as required by HRS § 89-9.

4. Order

For the reasons set forth above, the Board dismisses this prohibited practice complaint. This case is closed.

DATED: Honolulu, Hawai‘i, _____ April 29, 2024 _____.

HAWAI‘I LABOR RELATIONS BOARD



Mary R. Oshiro
MARY R. OSHIRO, Chair

SENITA A.D. MOEPONO
SENITA A.D. MOEPONO, Member

Copies sent to:

David A. Sgan, Esq.

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¹ HRS § 89-2 provides in relevant part:

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

² HRS § 89-6 (a) provides in relevant part:

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

(7) Faculty of the University of Hawai‘i and the community college system[.]

³ HRS § 89-6(d) provides in relevant part:

(d) For the purpose of negotiating a collective bargaining agreement, the public employer of an appropriate bargaining unit shall mean the governor together with the following employers:

(4) For bargaining units (7) and (8), the governor shall have three votes, the board of regents of the University of Hawai‘i shall have two votes, and the president of the University of Hawai‘i shall have one vote.

⁴ Under EP 2.201, the Office of the President issues EPs as express statements providing UH administration and staff with directions for implementation of federal and state statutes and regulations and BOR policies.

⁵ Supportive measures are temporary, non-punitive measures designed to create or increase safety of the student in accessing their education during the time of an allegation report, a formal complaint, or during the pendency of an investigation or after that may be the subject of another violation.

⁶ APs are procedures describing how a federal or state statute or BOR EP is implemented.

⁷ Univ. of Hawai‘i Prof’l Assembly v. Tomasu, 79 Hawai‘i 154, 900 P.2d 161 (1995).

⁸ The current Board’s administrative rules HAR Chapter 12-43 became effective on October 21, 2022. As this prohibited practice case was initiated and pending prior to the October 21, 2022 effective date of the current rules, the Board’s prior administrative rules HAR Chapter 12-42 applied. *See* Board Order No. 3915 (November 14, 2022).

⁹ HRS § 89-14 provides, in relevant part:

§ 89-14 Prevention of prohibited practices. Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9[.]

¹⁰ The 90-day limitations period actually ended on Sunday, July 3, 2022. HAR § 12-42-8(c) provides in relevant part:

(c) In computing any period of time prescribed or allowed by these rules or by order of the board, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a holiday, in which event the

period runs until the end of the next day which is not a Saturday, a Sunday, or a holiday...As used in this section, "holiday" shall mean any day designated as such pursuant to section 9-1, HRS.

HRS § 8-1 provides, in relevant part:

§ 8-1. Holidays designated. The following days of each year are set apart and established as state holidays:

The fourth day in July, Independence Day[.]

Based on HAR § 12-42-9(c), as the limitations period ended on a Sunday, the period ran until the end of the next days, which was not a holiday. As Monday was July 4, 2022, under HRS § 8-1, the period ran until Tuesday, July 5, 2022