TESTIMONY BY KALBERT K. YOUNG
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
ON
SENATE BILL NO. 2259, S.D. 1

March 11, 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 before impasse began unless there is agreement by the parties, lack of objection, or good cause. The bill is effective on July 1, 2050.

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.

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 10, 2014

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

From: Neil Dietz, Chief Negotiator

RE: SB 2259 SD1

The Office of Collective Bargaining respectfully enters this testimony in opposition to Senate Bill 2259 SD1as proposed.

The two sentences SB 2259 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 SB 2259 SD1 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. SB 2259 SD1 negates that "risk" factor. SB2259 SD1 may remove any 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, SB 2259 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 very 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. In fact, the whole thrust of an arbitration hearing is to determine which party can most successfully prosecute its final position before the arbitration panel.

Therefore, the Office of Collective Bargaining respectfully opposes SB 2259 SD1 and requests your Committee to not pass SB 2259 SD1.

Date: 03/11/2014
Time: 09:30 AM
Location: 309
Committee: House Labor & Public Employment

Department: Education

Person Testifying: Kathryn S. Matayoshi, Superintendent of Education

Title of Bill: SB 2259, SD1(sscr2798) RELATING TO COLLECTIVE BARGAINING.

Purpose of Bill: Prohibits parties in arbitration from including in their final positions any proposals that were not previously submitted in writing before impasse and about which an impasse in collective bargaining has not been reached. Authorizes the arbitration panel to decide whether final positions comply with all requirements and which proposals may be considered for inclusion in the final agreement. Effective 07/01/50. (SD1)

Department's Position:
The Department of Education respectfully opposes SB 2259, SD1 (SSCR2798).

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. e.g., 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.

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

ON THE FOLLOWING MEASURE:
S.B. NO. 2259, S.D. 1, RELATING TO COLLECTIVE BARGAINING.

LATE

BEFORE THE:
HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT

DATE: Tuesday, March 11, 2014 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 309

TESTIFIER(S): David M. Louie, Attorney General, or
James E. Halvorson, Deputy 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 1-6, 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.

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 11, 2014

The Honorable Mark Nakashima, Chair
and Members of the Committee
on Labor and Public Employment
House of Representatives
State Capitol, Room 406
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Nakashima and Members of the Committee:

SUBJECT: Senate Bill No. 2259, SD1
Relating to Collective Bargaining

The Department of Human Resources, City & County of Honolulu, opposes S.B. 2259, 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 S.B. 2259, 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

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

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

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

Testimony by
Hawaii Government Employees Association
March 10, 2014

S.B. 2259, S.D. 1 – RELATING TO
COLLECTIVE BARGAINING

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO strongly supports the purpose and intent of S.B. 2259, S.D. 1 which amends a provision of the final positions in a collective bargaining arbitration, but respectfully requests an amendment to the bill language. We request the proposed language, below, replace the current language contained in S.B. 2259, S.D. 1, in a House Draft 1:

> (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.

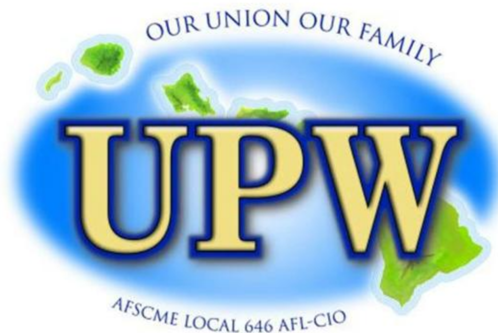
As currently written, Ch. 89-11(e), Hawaii Revised Statues, regarding the Employer and the Exclusive Representative's final positions in an arbitration proceeding, is vague and unclear. The purpose of S.B. 2259 and the intent behind our suggested amendment is to clarify that the final positions submitted 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 S.B. 2259, S.D. 1 with the requested amended language.

Respectfully submitted,

Randy Perreira
Executive Director

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



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

COMMITTEE ON LABOR AND PUBIC EMPLOYMENT
The Honorable Rep. Mark M. Nakashima, Chair
The Honorable Rep. Kyle T. Yamashita, Vice Chair

DATE OF HEARING: Tuesday, March 11, 2014
TIME OF HEARING: 9:30 a.m.
PLACE OF HEARING: Conference Room 309

TESTIMONY ON SB2259 SD1 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 the intent of SB2259 SD1, which prohibits parties in arbitration from including in their final positions any proposals that were not previously submitted in writing before impasse and about which an impasse in collective bargaining has not been reached. It also, authorizes the arbitration panel to decide whether final positions comply with all requirements and which proposals may be considered for inclusion in the final agreement.

Thank you for the opportunity to testify on this measure.

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

ON THE FOLLOWING MEASURE:
S.B. NO. 2259, S.D. 1, RELATING TO COLLECTIVE BARGAINING.

BEFORE THE:
HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT

LATE

DATE: Tuesday, March 11, 2014 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 309

TESTIFIER(S): David M. Louie, Attorney General, or
James E. Halvorson, Deputy 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 1-6, 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.

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.

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Complainant, and 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, Respondents.	CASE NO. CE-06-831 ORDER NO. 2956 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 do hereby certify that this is a full, true and correct copy of the original on file in this office.

Norm Ernstin

Hawaii Labor Relations Board

13.16047

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 forfeited. (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

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.

[~~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.

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 0.

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 0 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(c) 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. <u>1978 Session laws of Hawaii, Act 108</u>

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. <u>2001 Hawaii Session Laws, Act 90</u>

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. <u>2002 Hawaii Session Laws, Act 189 and Act 232</u>

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. <u>2003 Hawaii Session Laws, First Special Session, Act 6</u>

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 <u>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.</u>

IV. <u>CONCLUSION</u>

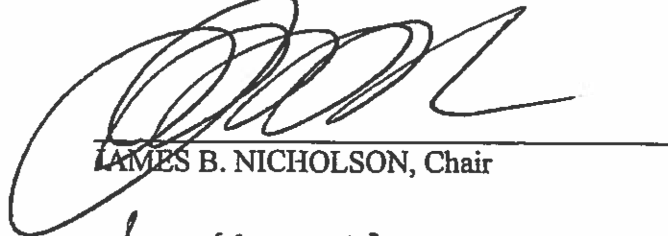
The Board concludes that HRS § 89-11(e)(2)(B) does not, by its plain and unambiguous language, prohibit introduction to the interest arbitration panel of the Employer's Final Position statement at issue here. Additionally, the legislative history of HRS § 89-11 indicates an intent by the Legislature 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.

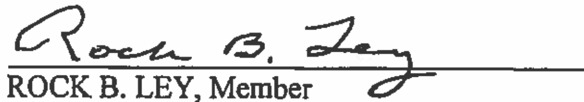
DATED: Honolulu, Hawaii, January 17, 2014.

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

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[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 he, 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.

TESTIMONY BY KALBERT K. YOUNG
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT
ON
SENATE BILL NO. 2259, S.D. 1

March 11, 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 before impasse began unless there is agreement by the parties, lack of objection, or good cause. The bill is effective on July 1, 2050.

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.