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HAWAII LABOR
RELATIONS BOARD

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII STATE TEACHERS ASSOCIATION, Complainant, and NEIL ABERCROMBIE, Governor, State of Hawaii; KALBERT YOUNG, Director, Department of Budget and Finance, NEIL DIETZ, State Chief Negotiator, Office of Collective Bargaining, KATHRYN MATAYOSHI, Superintendent, Department of Education, DONALD G. HORNER, Chairperson, and JAMES D. WILLIAMS, Board Member, Board of Education, State of Hawaii, Respondents.	CASE NOS. CE-05-781 NEIL ABERCROMBIE, KALBERT YOUNG, NEIL DIETZ, KATHRYN MATAYOSHI, DONALD G. HORNER and JAMES D. WILLIAMS'S ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED JULY 8, 2011; CERTIFICATE OF SERVICE

NEIL ABERCROMBIE, KALBERT YOUNG, NEIL DIETZ, KATHRYN MATAYOSHI, DONALD G. HORNER and JAMES D. WILLIAMS'S ANSWER TO PROHIBITED PRACTICE COMPLAINT FILED JULY 8, 2011

Respondents Neil Abercrombie, Governor, State of Hawaii; Kalbert Young, Director, Department of Budget and Finance, Neil Dietz, State Chief Negotiator, Office of Collective Bargaining, Kathryn Matayoshi, Superintendent, Department of Education, Donald G. Horner, Chairperson, and James D. Williams, Board Member, Board of Education, State of Hawaii's (hereinafter collectively "Respondents), by and through their attorneys, David M. Louie, Attorney General and Deputy Attorneys General James E. Halvorson, Jeffrey A. Keating, Maria C. Cook, Richard H. Thomason, and Deirdre Marie-Iha hereby answer the above-referenced Prohibited Practice Complaint ("Complaint"), filed with the Hawaii Labor Relations Board ("Board") by Complainant ("Complainant") as follows:

I. RESPONDENTS' PREAMBLE REGARDING THE HISTORY OF BARGAINING OVER THE NEW MASTER AGREEMENT WITH HSTA.

1. Since September 2010, the State of Hawaii, Board of Education, and Department of Education (hereinafter the "Employer") and the Hawaii State Teachers Association (hereinafter "HSTA") have engaged in collective bargaining as described more fully below. Initially, the focus was on certain matters required pursuant to the Race to the Top Grant, a highly competitive grant that the United States Department of Education awarded to the State of Hawaii in August 2010, in the approximate amount of seventy-five million dollars over four (4) years.

2. Commencing in late January 2011, negotiations focused solely on efforts to reach a new agreement to take effect July 1, 2011. As described more fully below, the parties had 16 formal bargaining sessions, three (3) meetings with the Governor, representatives of HSTA, and representatives of the Employer, two (2) meetings with representatives of HSTA and representatives of the Employer, and one (1) meeting with representatives of HSTA and the State's Director of Budget and Finance and other representatives of the Employer.

3. During the many months of bargaining, the Employer and HSTA exchanged extensive quantities of proposals and counterproposals, with the Employer alone developing over fifty (50) versions of various counterproposals and proposals. HSTA had 73 initial proposals and thereafter created numerous modifications and counterproposals, all of which were reviewed and

considered by the Employer negotiating team during the course of bargaining. The Employer submitted four (4) formal settlement offers to HSTA between March 31, 2011 and May 18, 2011, prior to transmitting its last, best, and final offer on June 9, 2011.

4. In approximately late March, 2011 and continuing thereafter, the Employer negotiating team began to emphasize to HSTA that time was of the essence, and that it was important for the parties to reach agreement as soon as possible. As more fully described below, there were many reasons for the urgent need to conclude negotiations, all of which were discussed with HSTA during this five-week period, including:

a. The legislature was in session and considering significant budget reductions.

b. The legislative session was about to end and budget recommendations were being made.

c. A new Board of Education would be appointed soon.

d. Reductions to the Employer's budget would take effect with the new fiscal year commencing July 1, 2011.

e. If the terms of a new agreement were to be implemented effective July 1, 2011, the HSTA membership would need to vote and ratify it well before July 1, 2011 in order for the Employer to take all of the steps necessary to comply with the new contract's terms.

f. The 2010-11 school year was close to ending, with a new school year starting in July (July 1 for multi-track year round schools and July 26 for other schools).

g. The school calendar would need to be modified so that the employees (and other stakeholders) were aware of the dates that the employees would take department directed leave without pay.

5. The HSTA negotiating team, as well as its Negotiator, President, and Executive Director, repeatedly informed the Employer beginning in late March, 2011 that many non-cost items would need to be agreed upon in order for HSTA to "sell" any sort of agreement incorporating anticipated labor savings to its membership. An essential part of a new 2011-13 Collective Bargaining Agreement ("2011 CBA"), namely a tentative agreement ("TA") involving a wage reduction and EUTF contribution formula, was reached and executed on April 27, 2011. Thereafter, the Employer continued negotiations with HSTA for another six (6) sessions and by June 3, 2011, the parties had executed 18 tentative agreements on non-cost

items, all of which were subjects proposed by HSTA. As more fully described below, an additional 10 tentative agreements on non-cost items were executed by the Employer on June 17, 2011, again pertaining to subjects proposed by HSTA.

6. Nevertheless, since the parties had still not reached a final agreement on a 2011 CBA, at the conclusion of the June 3, 2011 bargaining session, the Employer negotiating team orally acknowledged to HSTA that the parties had reached impasse. Thus negotiations had now reached "common law" impasse, in addition to the statutory impasse that occurred on February 1, 2011, pursuant to HRS Chapter 89-11.

7. On June 7, 2011, HSTA gave the Employer notice that it believed the Employer's declaration of impasse was premature, and declined to voluntarily participate in mediation as suggested by the Employer.

8. On June 9, 2011, the Employer again informed HSTA that the Employer believed the parties were at impasse and provided HSTA with its "Last Best and Final Settlement Offer" ("LBFO"), which incorporated the April 27, 2011 TA and all of the subsequent tentative agreements the parties had agreed to thereafter. A deadline of June 16, 2011 was given for acceptance of the LBFO. Also, by separate letter sent that day, the Employer provided HSTA with information regarding EUTF rates pursuant to HSTA's Request for Information.

9. On June 17, 2011, the day after the deadline had passed, a meeting occurred between representatives of the Employer and the HSTA, wherein an additional 10 tentative agreements were signed by the Employer and thus became part of the Employers' LBFO (hereinafter referred to as the "LBFO as modified"), with assurances by the HSTA representatives that the LBFO as modified would be presented to the HSTA Board of Directors the following week with a recommendation of acceptance. The parties did meet from approximately 8:30 a.m. until 2 p.m. after being informed by Wil Okabe and HSTA's Executive Director that the parties were "very close" to a final agreement, HSTA's President, Executive Director, and Negotiator met with Employer team members BOE Chairperson Horner, Board Member Williams, Neil Dietz and Superintendent Matayoshi. When the Employer team executed an additional 10 tentative agreements at HSTA's request, **they were informed by Wil Okabe that the parties now had an agreement that he would recommend to the HSTA Board of Directors for acceptance and submittal to the rank and file for a ratification vote**. *That agreement* constituted the "final comprehensive settlement" contemplated in the April 27, 2011

TA and consisted of the Employers' LBFO as modified. At the conclusion of this meeting Neil Dietz said to Wil Okabe: *"I am going to email the Governor to tell him we have reached an agreement that you will recommend to your Board. Is that absolutely correct?"* Okabe replied in the affirmative.

10. Despite Okabe's assurances and representations, and the fact that HSTA's By-Laws permitted Okabe to recommend acceptance of the LBFO as modified, on June 20, 2011, the HSTA Board of Directors, including Okabe, voted *unanimously* against permitting the HSTA membership to vote on ratification of the LBFO as modified. Okabe, as a member of HSTA's Board Of Directors, voted against the very LBFO as modified he promised to recommend. The HSTA Board's rejection of the LBFO as modified left no proposals on the "table" to be negotiated.

11. On June 21, 2011, representatives of HSTA informed representatives of the Employer that HSTA's Board of Directors had **rejected** the LBFO as modified **in its entirety** without offering any new proposals. Later that same day, in the absence of any new proposals from HSTA, the Employer transmitted to HSTA its notice of unilateral implementation of the LBFO as modified on July 1, 2011.

It is these objectively demonstrable facts and circumstances which most clearly distill Respondents' overall response to HSTA's claims.

II. RESPONDENTS' FIRST ELEVEN GENERAL DEFENSES TO HSTA'S COMPLAINT

FIRST DEFENSE:

The Prohibited Practice Complaint ("Complaint") fails to state a claim upon which relief can be granted.

SECOND DEFENSE:

The Board lacks jurisdiction over several of the allegations made in the Complaint.

THIRD DEFENSE:

The Complaint is untimely.

FOURTH DEFENSE:

The Complainant fails to plead sufficient facts to support Complainant's allegations regarding alleged violations of Section 89-13 (a) HRS, including but not limited to any evidence alleging willful conduct.

FIFTH DEFENSE:

Respondents acted in good faith at all relevant times.

SIXTH DEFENSE:

Complainant has failed to exhaust the remedies available under the collective bargaining agreement and administrative procedures.

SEVENTH DEFENSE:

The claims are barred by laches, waiver, estoppel, and unclean hands.

EIGHTH DEFENSE:

To the extent that HSTA is asserting (as it clearly does in allegation 60d of its complaint) that HGEA's "*favored nation's*" clause "*interferes, restrains, and coerces employees not represented by HGEA in the free exercise of rights guaranteed under HRS chapter 89*" HSTA has failed to name a necessary party.

NINTH DEFENSE:

Respondents assert both sovereign and qualified immunity.

TENTH DEFENSE

Many of HSTA's claims (for example, its assertion that the Legislature conspired to violate its rights) are non-justiciable under the political question doctrine or other aspects of non-justiciability.

ELEVENTH DEFENSE.

All averments in the Complaint are denied unless specifically admitted herein.

III. RESPONDENTS' SPECIFIC ANSWERS TO EACH OF HSTA'S ALLEGATIONS

The numbering of the paragraphs below corresponds to the numbering of paragraphs in the Complaint.

Allegation 1. *"This is a complaint for prohibited practices arising under Hawaii Revised Statutes (HRS) chapter 89 in connection with collective bargaining over wages, hours, and other terms and conditions of employment for the July 1, 2011 to June 30, 2013 agreement applicable to teachers and other personnel of the department of education, and a challenge to the constitutionality of a statewide governmental policy to unilaterally implement a five percent (5%) salary reduction, to decrease Employer contributions for health care benefits from sixty to fifty percent of premium rates, and to withdraw from the bargaining process core subjects of collective bargaining which impinge upon the constitutional rights of public employees."*

Answer: The Complaint speaks for itself. Respondents **deny** there is a statewide government "policy."

Allegation 2. *"HSTA brings this action in behalf of approximately 12,486 teachers and other personnel of the department of education, State of Hawaii, who are in bargaining unit 5 as set forth in Section 89-6 (a) (5), HRS."*

Answer: Respondents **deny** that HSTA has brought its Complaint "on behalf of" all members in Unit 5.

Allegation 3. *"Exclusive and original jurisdiction is conferred on the Hawaii Labor Relations Board by Section 89-14, HRS, to determine a controversy concerning prohibited practices arising under HRS chapter 89."*

Answer: Section 89-14, HRS, speaks for itself. Respondents **deny** HSTA's characterization of such statutes.

Allegation 4. *"The Hawaii Labor Relations Board is mandated to conduct proceedings on complaints of prohibited practices by Employers and take such action with respect thereto as it deems necessary and proper under Section 89-5 (i) (4), HRS, and to execute all of its responsibilities in a timely manner so as to facilitate and expedite the resolution of issues before it under Section 89-5 (i) (10), HRS."*

Answer: Sections 89-5(i) (4) and (10), HRS, speak for themselves. Respondents **deny** HSTA's characterization of such statutes.

Allegation 5. *"Any person aggrieved by a decision and order of the Hawaii Labor Relations Board may obtain judicial review of the Board's ruling by instituting a proceeding in the circuit court of the judicial circuit in which the person or party resides or transacts business under Sections 377-9 (f), and 91-14, HRS, and the circuit court has original jurisdiction to determine the constitutional questions in the controversy presented under Sections 603-21.5 (3), 603-21.9 (6), 632-1, 661-1, HRS, and other relevant statutory provisions."*

Answer: Sections 377-9(f), 91-14, 603-21.5(3), 603-21.9(6), 632-1, and 661-1, HRS, speak for themselves. Respondents **deny** HSTA's characterization of such statutes.

Allegation 6. *"The claims for relief alleged herein arose on the island of Oahu within the first judicial circuit where HSTA transacts its business, and venue for this action is proper under Sections 377-9 (f), and 603-36 (5), HRS."*

Answer: Respondents are without sufficient information or knowledge to respond to this allegation and therefore **deny** it.

Allegation 7. *"The HSTA is a non-profit corporation organized and duly chartered on or about December 8, 1970 by the State of Hawaii, and is an employee organization within the meaning of Section 89-2, HRS."*

Answer: Admitted.

Allegation 8. *"The employees represented by HSTA in whose behalf this complaint is filed have the right to organize for the purpose of collective bargaining through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, free from interference, restraint, or coercion under Section 89-3, HRS."*

Answer: Section 89-3, HRS speaks for itself. Respondents **deny** HSTA's characterization of such statutes.

Allegation 9. *"HSTA was duly certified as the exclusive bargaining representative of teachers and other personnel of the department of education on May 21, 1971, and at all relevant times herein has the exclusive right to act for and negotiate agreements covering all employees in the bargaining unit under Section 89-8 (a), HRS."*

Answer: Admitted.

Allegation 10. *"Respondent (or defendant) Neil Abercrombie, hereafter "Abercrombie," is the Governor of the State of Hawaii, and as the chief "executive" is responsible for the faithful execution of the laws under Article V, Section 5 of the State Constitution. Abercrombie was elected Governor on or about November 2, 2010."*

Answer: Admitted.

Allegation 11. *"Abercrombie is a public Employer within the meaning of Section 89-2, HRS, and is authorized to negotiate a collective bargaining agreement covering the period from July 1,2011 to June 30, 2013 under Section 89-6 (d), HRS."*

Answer: Sections 89-2 and 6(d), HRS speak for themselves. Respondents **deny** HSTA's characterization of such statutes.

Allegation 12. *"Respondent (or defendant) Kalbert Young, hereafter "Young," is the director of finance of the Department of Budget and Finance, State of Hawaii, an executive department and instrumentality of the state government under Section 26-4, HRS, and undertakes the preparation and execution of the executive budget of the state government under Section 26-8 (b)(l),HRS."*

Answer: Admitted.

Allegation 13. *"Respondent (or defendant) Neil Dietz, hereafter "Dietz," is the chief negotiator for the State of Hawaii, and represents the Governor on matters relating to collective bargaining pursuant to Section 89A-1 (b) and (c) (1), HRS, and under Section 89-6 (d), HRS. Dietz was appointed chief negotiator by Governor Abercrombie on or about February 8, 2011, and began serving in that capacity in March 2011."*

Answer: Admitted.

Allegation 14. *"Respondent (or defendant) Kathryn Matayoshi, hereafter "Matayoshi," is the superintendent of education and as an individual who represents the Board of Education in dealing with public employees, is a public Employer within the meaning of Section 89-2, HRS, and is authorized to negotiate collective bargaining agreements under Section 89-6 (d), HRS."*

Answer: Admitted.

Allegation 15. *"Respondent (or defendant) Donald J. Horner, hereafter "Horner," is the chairperson of the Board Education, is a public Employer within the meaning of Section 89-2,HRS, and is authorized to negotiate collective bargaining agreements under Section 89-6 (d),HRS. Horner began serving as a chairperson of the Board of Education on and after April 14, 2011."*

Answer: Respondents admit that Respondent Horner is the Chairperson of the Board of Education, began serving as the Chairperson on or after April 14, 2011, and served on the Employers' negotiations team as a representative of the BOE. All other allegations are **denied.**

Allegation 16. *"Respondent (or defendant) James D. Williams, hereafter "Williams," is a member of the Board of Education, is a public Employer within the meaning of Section 89-2, HRS, and is authorized to negotiate collective bargaining agreements under Section 89-6 (d), HRS. Williams began serving as a member of the Board of Education on or after April 14, 2011."*

Answer: Respondents admit only that Respondent Williams served on the Employers' negotiations team as a representative of the BOE and is a former Interim Director and President of HSTA. All other allegations are **denied.**

Allegation 17. *"The right to engage in collective bargaining in Hawaii was mandated by the framers of Hawaii's Constitution for private sector employees in 1950 and public sector employees in 1968."*

Answer: The State Constitution speaks for itself. Respondents **deny** HSTA's characterization of the Constitution.

Allegation 18. *"Hawaii is one of five states in the nation (including New York, Florida, Missouri, and New Jersey) which affords constitutional protection to the collective bargaining process."*

Answer: Admitted.

Allegation 19. *"The intent and object of the framers in 1968 was to extend to "public employees" those rights previously enjoyed by "persons in private employment" as recognized in 1950."*

Answer: **Denied.**

Allegation 20. *"In 1970 the legislature adopted HRS chapter 89 to recognize the rights of public employees, to establish the basic framework for the collective bargaining process, and to require public Employers to negotiate with and enter into written agreements with exclusive bargaining representatives on matters of wages, hours, and other terms and conditions of employment, and to afford public employees the right to ratify all agreements which are negotiated before they are enforceable or valid.*

Answer: HRS chapter 89 speaks for itself. Respondents **deny** HSTA's characterization of this statute.

Allegation 21. *"The statute grants to public employees the "right" to organize and join employee organizations, and to share in the decision-making process affecting wages and working conditions through duly elected and certified exclusive bargaining representatives in thirteen separate and independent bargaining units.*

Answer: HRS chapter 89 speaks for itself. Respondents **deny** HSTA's characterization of such statutes.

Allegation 22. *"The statute states that all agreements are subject to ratification by employees and approval of all cost items by the legislature thereafter under Section 89-10 (a), HRS, and provides that the requirements of HRS chapter 89 pre-empt all conflicting statutes concerning the subject matter under Section 89-19, HRS."*

Answer: Sections 89-10(a) and 19, HRS speak for themselves.

Allegation 23. *"Under HRS chapter 89 it is a prohibited practice for a public Employer, inter alia, to interfere, restrain, and coerce employees in the exercise of the right to freely engage in collective bargaining through an organization of their own choosing, and to engage in lawful concerted activities for mutual aid and protection (under Sections 89-3, 89-10 (a), and 89-13 (a) (1), HRS), to refuse to recognize the exclusive representative chosen by a majority of employees in each bargaining unit and the process of ratification (by employee vote) (under Sections 89-3, 89-6 (a) (6), 89-8 (a), 89-10 (a), and 89-13 (a) (7), HRS), to refuse and/or foil to negotiate in good faith over mandatory subjects, i.e., wages, hours, and other terms and conditions of employment (under Sections 89-3, 89-9 (a), and 89-13 (a) (a) (5) and (7), HRS), to refuse to vest their negotiators with sufficient authority to carry on meaningful bargaining (under Sections 89-6 (d), 89-9 (a), and 89-13 (a) (5) and (7), HRS), to discriminate against employees for engaging in protected activities, and to willfully violate the terms of a collective bargaining agreement (under Sections 89-10 (a) and 89-13 (a) (8), HRS)."*

Answer: Sections 89-3, 10(a), 13(a)(1), 6(a)(6), 8(a), 10(a), 13(a)(7), 9(a), , 13(a)(5) and (7), 6(d), 9(a), 13(a)(8), HRS, speak for themselves. Respondents **deny** HSTA's characterization of such statutes.

Allegation 24. *"On or about May 19, 1971 teachers and other personnel of the department of education formed, joined, and chose HSTA as their exclusive bargaining representative for the purpose of collective bargaining, and the Association was duly certified as the exclusive bargaining representative for bargaining unit 5 on May 21, 1971."*

Answer: Admitted.

Allegation 25. *"On or about February 9, 1972 and thereafter HSTA has negotiated approximately sixteen (16) successive collective bargaining agreements with representatives of the State of Hawaii under Section 89-6 (d), HRS, setting forth the wages, hours, and conditions of work of teachers and other personnel of the department of education."*

Answer: Admitted.

Allegation 25a. *"The initial agreement was entered on or about February 9, 1972 and covered the period from February 9, 1972 to August 31, 1974. The agreement requires the public Employer, inter alia, to recognize the Association as the exclusive bargaining representative for the purpose of collective bargaining (in Article I), to avoid any interference, restraint, or coercion of employees in the exercise of rights guaranteed in HRS chapter 89 (in Article II), to adhere to basic negotiating rules as part of the process of collective bargaining (in Article III), to abide by teaching conditions and hours (in Article VI), the work year as arbitrated (in Article XVI), and to pay increases in salaries (in Article XVII)."*

Answer: Articles I, II, III, VI, XVI and XVII of the original agreement speak for themselves. Respondents **deny** HSTA's characterization of such statutes.

Allegation 25b. *"In order to resolve the terms of the second collective bargaining agreement covering the period from March 1, 1975 to February 28, 1978 a strike was called and settled by an arbitration award which resolved the issues on hours of work (in Article VI), and the work year (in Article XVI). The agreement also carried forward provisions on Articles I, II, and III. The strike also prompted rulings by the labor board, the circuit court, and the Supreme Court on the requirement of good faith bargaining before an impasse occurs."*

Answer: The terms of the arbitration award speak for themselves. The strike was in 1973. All other allegations are **denied.**

Allegation 25c. *"In 1985 HSTA and the Employer negotiated over provisions for health benefits and contributions for bargaining unit 5 employees under chapters 87 and 89, HRS. In 2005 HSTA and the Employer negotiated provisions for health benefits and contributions for bargaining unit 5 employees under chapters 87D and 89, HRS (through a voluntary employees' beneficiary association trust of HSTA)."*

Answer: The terms of previous CBAs speak for themselves. All other allegations are **denied.**

Allegation 25d. *"The most current collective bargaining agreement covers the period from July 1, 2009 to June 30, 2011, and includes several supplemental agreements relating to furloughs and layoffs dated October 22, 2009 and April 1, 2010, and the collective bargaining agreement retains the health benefit plan and contributions under the voluntary employees' beneficiary association trust of HSTA."*

Answer: The 2009-11 bargaining agreement speaks for itself but "retains" nothing inasmuch as it has expired **and no party requested an extension.** All other allegations are **denied.**

Allegation 25e. *"These HSTA agreements are a product of bargaining engaged in by a negotiating team of teachers, the review and recommendation to accept or reject tentative agreements by a full negotiation committee (a larger group of teachers), the review and approval of any comprehensive agreement on all issues, including tentative agreements, the approval of the board of directors (composed of teachers only), and the review and ratification of the agreement by bargaining unit 5 employees through a process handled by the HSTA staff.*

Answer: **Denied.**

Allegation 25f. *"The parties to the collective bargaining process have historically recognized that a comprehensive agreement for teachers and other personnel includes provisions on wages, salaries, and benefits commensurate with changes in working conditions affected by law, provisions for faculty and student instructional time (hours of work), and provisions for employee health care benefits through health benefit plans provided by the HSTA under chapters 87 and 87D, HRS, in which employee and Employer contribution amounts are specified."*

Answer: All past agreements speak for themselves. HSTA's supposition as to what the parties of the collective bargaining process have historically "recognized" is **denied**.

Allegation 26. *"Upon expiration of a collective bargaining agreement the State of Hawaii is required to maintain the status quo pending bargaining in good faith over a new collective bargaining agreement, and has been ordered to avoid making unilateral changes to existing terms of a collective bargaining agreement previously."*

Answer: **Denied.**

Allegation 27. *"Before negotiations over the new July 1, 2011 to June 30, 2013 collective bargaining agreement commenced there were a number of developments affecting the wages, hours, and other terms and conditions of work of teachers and other personnel in the department of education."*

Answer: This allegation is too vague to permit an answer and therefore it is **denied.**

Allegation 27a. *"During the legislative session of 2010 lawmakers mandated an increase in student instructional hours and the work year for teachers in Act 167 without funding. See 2010 Hawaii Session Laws, Act 167, at 416-17. The enactment was amended thereafter in 2011 by Act 52 again without funding."*

Answer: Acts 167 and 52 speak for themselves. Respondents **deny** HSTA's characterization of such statutes.

Allegation 27b. *"The legislature also repealed HRS chapter 87D relating to voluntary employees' beneficiary association trusts, and ordered a transfer of health benefit plans from the HSTA voluntary employees' beneficiary association trust to the Employer-Union Health Benefits Trust Fund. See 2010 Hawaii Session Laws, Act 106, at 198-99. HSTA filed suit in circuit court on Act 106 in Civil No. 10-1-1966-09 KKS and obtained relief in the form of funding for teacher health care under Article XVI, Section 2 of the State Constitution to be used to maintain standard coverage for HSTA members at reasonable cost."*

Answer: The repeal of HRS Chapter 87D speaks for itself as do the results of HSTA's legal challenge to Act 106 (which was found to be both constitutional and not in violation of the now expired HSTA contract). Respondents **deny** HSTA's characterization of such statutes.

Allegation 27c. *"On May 27, 2010 the department of education submitted an application for a U.S. Department of Education's "Race to the Top" fund grant program. The grant application was approved on August 24, 2010."*

Answer: Respondents admit that the Department of Education applied for the $75 million dollar highly competitive Race to the Top federal grant and that it was subsequently awarded that grant. All other allegations are **denied.**

Allegation 28. *"Taking into account the impact of the foregoing changes and developments Respondents submitted a letter dated October 29, 2010 and the HSTA submitted its proposals on December 10, 2010 for a comprehensive agreement for teachers and other personnel to amend the existing agreement."*

Answer: The documents mentioned speak for themselves. Respondents' **deny** HSTA's characterization of the documents.

Allegation 28a. *"The October 29, 2010 submission by the Employer contained no specific proposals (at the time) to amend the terms of the existing collective bargaining agreement, focused on school reform issues through "Race to the Top," and on how to maximize the amount of student instructional hours and comply with 2010 Hawaii Session Laws, Act 167."*

Answer: The submission was submitted in "interest-based bargaining format" and speaks for itself. Respondents **deny** HSTA's characterization of the documents.

Allegation 28b. *"The December 10, 2010 submissions by HSTA consisted of a comprehensive set of proposals to amend the July 1, 2009 to June 30, 2011 collective bargaining agreement for the period from July 1, 2011 to June 30, 2013, including but not limited to items on student instructional hours and school days, the transfer of health benefit plans, retention of Employer contributions to prior levels, and provisions to address the impact of "Race to the Top.""*

Answer: The submission speaks for itself. Respondents' **deny** HSTA's characterization of the documents.

Allegation 29. *"From November 2010 through January 2011 preliminary discussions occurred regarding the impact of the "Race to the Top" on wages, hours, and working conditions, and explanations were provided on the HSTA comprehensive set of proposals submitted on December 10, 2010. There were no meetings or bargaining sessions in February 2011, and no specific proposals to amend the existing collective bargaining agreement were made by the Employer during this period."*

Answer: **Denied**. Negotiations regarding the master agreement occurred on January 27 and 28, 2011. Moreover, it is noteworthy that on March 20, 2011, HSTA negotiator Alvaro informed the Employer that HSTA did not wish to return to the bargaining table concerning Race to the Top until the master agreement negotiations concluded.

Allegation 30. *"Due largely to a transition from the administration of Linda Lingle to Neil Abercrombie (who was elected on November 2, 2010 on a program for "A New Day in Hawaii"), the delayed appointment of a chief negotiator, and the replacement of all members of the Board of Education on April 14, 2011, bargaining did not commence in earnest until on and after March 31, 2011."*

Answer: Respondents agree with HSTA's tacit acknowledgement that HSTA did not bargain in "earnest" before March 31, 2011. However, Respondents **deny** that they were not bargaining in "earnest" before March 31, 2011 or at any other time since that date. Complainant and Respondents all acknowledged on numerous occasions that time was of the essence for many reasons including the following:

a. If the terms of a new agreement were to be implemented effective July 1, 2011, the HSTA membership would need to vote and ratify it well before July 1, 2011 in order for the Employer to take all of the steps necessary to comply with the new contract's terms.

b. The 2010-11 school year was close to ending, with a new school year starting in July (July 1 for multi-track year round schools and July 26 for other schools).

c. The school calendar would need to be modified so that the employees (and other stakeholders) were aware of the dates that the employees would take department directed leave without pay.

Allegation 31. *"On or about March 31, 2011 and thereafter Respondent Abercrombie established a statewide governmental policy of "shared" sacrifices by all public employees in the State requiring a five percent (5%) salary reduction, and a decrease in Employer contributions from sixty to fifty percent of premium rates for health benefits effective July 1, 2011. HSTA first learned of the policy when a formal proposal was transmitted on March 31, 2011 from Respondent Dietz."*

Answer: **Denied**. The Governor "*established*" no such "*policy*." Moreover, Respondents **deny** HSTA's claim that the first time it heard of the Governor's preferences with regard to achieving labor savings was on March 31, 2011. On the contrary, the Governor spoke about this issue publicly as early as January 2011 and reiterated same in a meeting with various labor leaders held in his office on February 24, 2011. Both **Wil Okabe and Albert Nagasako** were present at this meeting. Lastly, the Employers' proposals for labor savings were orally presented to the HSTA bargaining team on March 30, 2011 whereupon HSTA requested that they be placed in writing.

Allegation 32. *"On April 6, 2011 Respondents Abercrombie, Dietz, and Young entered a tentative agreement with the Hawaii Government Employees Association (HGEA) for bargaining units 2, 3, 4, 6, 8, 9, and 13 to implement the statewide governmental policy."*

Answer: Respondents **admit** that the Employer reached a tentative CBA with HGEA on April 6, 2011. Respondents **deny** HSTA's mischaracterization of that tentative agreement as an "implementation" of a "statewide governmental policy." All other allegations are **denied.**

Allegation 33. *"In a key provision of the agreement with HGEA Respondents Abercrombie, Dietz, and Young provided "assurances" to bargaining unit 2, 3, 6, 8, 9 and 13 employees that "all public sector bargaining units shall be subject to a 5% wage reduction, supplemental paid time off and 50% split in premium rates," hereafter referred to as a favored nation's clause or parity provision."*

Answer: **Denied.** HGEA's so-called "*favored nations*" clause speaks for itself. This clause does not say, and has never said, as HSTA claims that, "*all public sector bargaining units shall be subject to a 5% wage reduction, supplemental paid time off and 50% split in premium rates.*" Rather, the clause was intended to provide exactly **the**

opposite, i.e., that if another union negotiated a CBA with more favorable terms, then HGEA would also receive those terms.

Allegation 34. *"On April 15, 2011 Respondents began to discuss the possibility of directed leaves without pay as one means of achieving the 5% salary reduction with HSTA."*

Answer: Respondents admit that the parties discussed, among other options temporarily suspending "paid non-instructional days" or imposing "*directed leaves without pay*" as possible options for achieving the 5% savings, however those discussions began on March 30, 2011 not April 15, 2011. All other allegations are **denied.**

Allegation 35. *"On April 21, 2011 Respondent Dietz transmitted a formal proposal to the United Public Workers, AFSCME, Local 646, AFL-CIO in bargaining units 1 and 10 based on the aforementioned statewide governmental policy."*

Answer: **Denied.** The proposal the Employer made to UPW during confidential negotiations speaks for itself. Respondents note that UPW's publication of the proposal to HSTA and HSTA's subsequent re-publication of same in its complaint is in **direct contravention** of the ground rules the Employer and UPW established for bargaining over the new Unit 1 and 10 agreements.

Allegation 36. *"On April 25, 2011 all HGEA represented bargaining units, except for registered nurses in bargaining unit 9, ratified the tentative agreement dated April 6, 2011 based, in part, on the aforementioned assurances provided by Respondents Abercrombie, Dietz, and Young."*

Answer: **Denied.**

Allegation 37. *"On and after April 26, 2011 Respondents Abercrombie, Young, and Dietz urged lawmakers to adopt its statewide governmental policy as part of the State Budget containing a provision "for labor cost savings" for $88.2 million for fiscal year 2011-2012 and $88.2 million for fiscal year 2012-2013."*

Answer: **Denied**. See answer to Allegation 31.

Allegation 38. *"On April 27, 2011 Respondent Dietz informed the HSTA negotiating committee that unless they agreed to accept a five percent wage reduction and a 50% split in premium rates lawmakers working on a State Budget may impose a 10% cut in wages."*

Answer: **Denied**. Respondent Dietz simply reiterated what HSTA's leadership, negotiating team and legal counsel were already aware of, namely that a current legislative budget proposal called for 10% cuts.

Allegation 38a. *"Respondent Dietz indicated that the Senate President expressed concerns about the rejection of the HGEA settlement proposal by the unit 9 registered nurses and wanted a 10% across the board cut. Dietz said that Respondent Abercrombie had obtained an extension of a few hours, but that it was "make or break it time." He further stated that if HSTA did not take the proposed cuts lots of "nasty things can happen to your working conditions.""*

Answer: **Denied**. Once again, Respondent Dietz admits that he stated that a Senate budget proposal contained a 10% across the board cut, that *"nasty things can happen if we let someone else control what happens"* and that *"we are in a better position if we reach an agreement on cost items"* or words generally to that effect. Those statements were made in a context where Respondent Dietz had **also** informed HSTA that the Governor had met with Senate and House leaders and personally asked them to hold off implementing any sort of 10% across the board budget cut because there were valid offers on the table with HSTA and UPW. At the time these statements were made to HSTA the legislature was in **fact in the middle of its budget reconciliation process** and Dietz duly informed HSTA of this fact as well and indicated that the parties were indeed now at a *"make it or break it point"* with the budget. In any event the Legislature is not a named Respondent nor is there any allegation that the named Respondents control the Legislature, a prerequisite if any action of the Legislature is to be imputed to Respondents. Accordingly, the budgetary actions of the Legislature are irrelevant to the instant Complaint.

Allegation 38b. *"Respondent Matayoshi said that if a 10% cut hit the department of education it would result in the elimination of whole programs or segments thereof, and these types of vertical cuts would mean the elimination of unit 5 positions. Respondent Dietz stated that in his opinion legislators would impose a 10% labor cost savings in the State Budget and again referred to his earlier remark regarding "other nasty things would happen to your working conditions.""*

Answer: **Denied** except that Respondent Matayoshi admits that she informed the union's team that 10% of the DOE's budget totaled approximately **$132 million** and that drastic cuts across the board would be necessary to achieve such savings.

Allegation 38c. *"Respondent Dietz presented and explained the specific proposal on April 27, 2011 to consist of a 1.5% salary cut and 7.5 days of directed leaves without pay (not to be referred to as furloughs) to achieve the 5% wage reduction, and the decrease of Employer contributions to 50% of premium rates for health benefits."*

Answer: Respondent Dietz admits that he presented and explained the April 27, 2011 proposal which consisted of a 1.5% salary cut (a reduction from the Employers' previous proposal of 2.7%) and 7.5 days of directed leaves without pay for 10-month employees and the 50/50 split on EUTF contributions. All other allegations are **denied.**

Allegation 38d. *"After a caucus Respondent Dietz said an agreement on the 5% labor cost savings was needed "now" because of the legislative deadline. Respondent Williams said that an agreement is needed at this time, otherwise, "it will all go off the table.""*

Answer: **Denied.**

Allegation 38e. *"Respondent Dietz refused to modify his proposal as requested by the HSTA to use monies returned to the general fund by the voluntary employees' beneficiary association trust, in the amount of $3.9 million, to maintain the standard of coverage benefits for its members in their health benefit plans with the Hawaii Employer-Union Health Benefits Trust Fund. Dietz insisted that he had no authority to negotiate over employee contribution amounts for health benefits in such a manner, and that he needed to achieve labor savings from all unions."*

Answer: Respondents admit that the HSTA negotiating team proposed that the Employer instead agree to use funds that had recently been returned to the **general fund** in the wake of certain VEBA litigation to fund HSTA's portion of any labor savings. Respondents admit that Dietz had no authority to accept HSTA's proposal because the Employer believed that a 50/50 split of employee contributions as opposed to raiding the general fund for the exclusive benefit of HSTA, was a preferable way to deal with the state's budget crisis on an equitable basis. All other allegations are **denied.**

Allegation 38f. *"When a member of HSTA negotiating team member requested more time to consider the economic concessions Respondent Dietz said "this is serious f-----g s----t," and hit the table with his notebook. He got up to leave and said if you don't accept this it will be 10% by the legislature. HSTA requested a recess at this point to confer and an HSTA representative sought to calm him down."*

Answer: **Denied**. Respondents admit that Dietz made his feelings quite well known to the HSTA team, but Dietz denies that he needed to be "*calmed down*" by anyone, much less an HSTA representative.

Allegation 39. *"Respondents' statements, conduct, and position on April 27, 2011 prompted the HSTA negotiating team to conditionally accept and to sign off on a tentative agreement which stated in relevant portions as follows:*

1. *Duration: 2 years (July 1, 2011 through June 30, 2013).*
2. *Wage Reduction: For the duration of the agreement, the teachers shall accept a temporary five percent (5%) salary reduction in the following manner:*
   a) *Effective July 1, 2011, through and including June 30, 2013, the teacher salary schedule shall be temporarily reduced by one and one-half percent (1 ½%);*

b) *Teachers shall accept Directed Leave Without Pay (DLWOP) on mutually agreed upon on-instruction dates for each year of this agreement as follows:*
10-month teachers: 7 ½ days
12-month teachers: 9 days

3. *Salary Incremental Step Movement: The parties agree to meet and consider the applicability of step movement within the salary schedule no later than March 1, 2012, or within ten (10) days after the Council on Revenues holds its first quarter meeting in 2012.*
4. *EUTF Contributions: Effective July 1, 2011 through June 30, 2013, the Employer shall pay a specific dollar amount equivalent to fifty percent (50%) of the premium rates established by the Hawaii Employer Union Health Benefits Trust Fund (EUTF) for the respective health benefit plan, including administrative fees. The parties shall meet and negotiate the EUTF contributions effective 7/1/2013; if the parties do not reach agreement, the procedure set forth in HRS Section 89-9(e) and Section 89-11(g) shall apply. Both parties will continue paying their respective amounts based on each paying 50% of the premium rates established by the Trust Fund Board plus 50% of the administrative fees until a resolution is reached, through negotiations or determination by the Legislature, as to contributions effective on and after 7/1/2013. (Emphasis added)"*

Answer: Respondents admit that HSTA's negotiation team is comprised of experienced and knowledgeable individuals who used their experience and knowledge to evaluate the situation faced by the parties. Respondents further admit that after due deliberation, these experienced and knowledgeable individuals voluntarily AGREED to accept and execute the Employer's April 27, 2011 tentative agreement as proposed. All other allegations are **denied**.

Allegation 40. *"The "conditions" on which the HSTA negotiating team accepted the April 27, 2011 tentative agreement were that the terms thereof could only be considered if it were part of "a final comprehensive settlement" to be negotiated in good faith, and that such a "final settlement" would be "subject to approval by the HSTA Board of Directors and ratification by its members.""*

Answer: **Denied**. The tentative agreement speaks for itself and plainly states that "*The final comprehensive settlement is subject to approval by the HSTA Board of Directors and ratification by its members*".

Allegation 40a. *"Respondent Dietz agreed that if the parties failed to reach an agreement on all remaining issues there would be no comprehensive settlement and the parties would have to renegotiate. He further agreed that the final settlement could only be implemented if there were approval by the HSTA board of directors and if approved by the board of directors subsequent ratification by the bargaining unit 5 employees, and that rejection by the board of directors would require the parties to re-negotiate the matters."*

Answer: **Denied.** The tentative agreement speaks for itself and does **not** state that rejection of the agreement by the HSTA Board of Directors would "require" the parties to re-negotiate the matters. More specifically, Dietz did not agree (nor *could* he have agreed), nor does the agreement state (nor *could* it validly state) that the Employer waived rights accorded to it by law, in the event that further bargaining proved fruitless and the parties reached impasse under the provisions of the newly amended statute (HRS 89-11) regarding same (amendments that HSTA submitted testimony in favor of).

Allegation 40b. "*Respondent Dietz worked jointly with an HSTA representative to formulate the following provisions of the tentative agreement reflecting the understanding and commitments:*

5. *Disposition on Non-Cost Items: As of this date the parties continue to work in good faith on a number of non-cost items. The parties agree that any tentative agreements reached heretofore may only be considered as part of the final comprehensive settlement.*
6. *Final Settlement: The final comprehensive settlement is subject to approval by the HSTA Board of Directors and ratification by its members. (Emphasis added).*

Answer: The documents speak for themselves. Respondents admit that the parties worked jointly in formulating the tentative agreement and that it validly and completely presented their mutual positions at the time they signed it.

Allegation 40c. "*On April 27, 2011 the conditional terms of the tentative agreement were initialed by the president of HSTA and by three of the Respondents in behalf of the Employer.*"

Answer: Admitted.

Allegation 40d. "*On April 29, 2011 the Senate and House Conference Committee working on the proposed State Budget reported out a measure in Section 96 which referred to labor cost savings "attributable to collective bargaining agreements" as follows:*

SECTION 96. Notwithstanding any provision to the contrary, the director of finance, with the approval of the governor, shall transfer into retirement benefit - state (BUF 741) $88.200.000 for fiscal year 2011-2012 and $88.200.000 for fiscal year 2012-2013 for labor savings attributable to collective bargaining agreements for all bargaining units and pursuant to any executive memoranda that results in salary savings for all employees not included under collective bargaining in respective state agencies; provided further that the governor shall submit a report to the legislature within five days of each transfer that shall include the date of the transfer, the amount of the transfer, the program ID from which funds are transferred, and the collective bargaining unit for which the transfer was made; and provided further that the governor shall submit to the legislature a summary report for all transfers by December 1 for the previous twelve-month period. (Emphasis added)."

Answer: The measure in Section 96 speaks for itself. Respondents **deny** HSTA's characterization of the document.

Allegation 41. *"After the tentative agreement was entered on April 27, 2011 the negotiating teams met and conferred and caucused on just six (6) occasions on May 2, 2011 (from approximately 3:50 p.m. to 7:00 p.m.), on May 3, 2011 (from approximately 3:16 p.m. to 5:00 p.m.), on May 4, 2011 (from approximately 2:12 p.m. to 5:00 p.m.), on May 10, 2011 (from approximately 1:30 p.m. to 4:00 p.m.), on May 11, 2011 (from approximately 1:00 p.m. to 2:00 p.m.), and June 3, 2011 (from approximately 1:50 p.m. to 3:00 p.m.) to resolve outstanding cost and non-cost items for a final comprehensive settlement."*

Answer: This paragraph contains a number of inaccuracies and is **denied.** In particular, no material cost items remained on the bargaining table and unresolved at the time the April 27, 2011 tentative agreement was signed by the parties. Moreover, after execution of the tentative agreement, the Employer agreed to literally **dozens** of non-cost and even new cost proposals later submitted by HSTA regarding matters that HSTA's bargaining team claimed were essential in order to ensure that the wage and benefit concessions were palatable to the union rank and file.

Specifically, the HSTA negotiating team, as well as its Chief Negotiator, President, and Executive Director, repeatedly informed the Employer beginning in late March, 2011 that many non-cost items would need to be agreed upon in order for HSTA to "sell" the anticipated labor savings and increased EUTF contribution package to its membership. Though the **critical** tentative agreement involving wage reduction and EUTF contribution was indeed executed on April 27, 2011, the Employer continued negotiations with HSTA for another six (6) sessions so that by June 3, 2011, the parties had agreed to and signed 18 tentative agreements on non-cost items proposed by HSTA but pursuant to HRS Section 89-11 they were still at impasse because they had not yet agreed to a new 2011 CBA.

Moreover, even after the initial impasse, an additional 10 previously negotiated tentative agreements on non-cost items were executed by the Employer on June 17, 2011, again pertaining to subjects proposed by HSTA but still had not reached final agreement on a new 2011 CBA.

Allegation 41a. *"At the May 2, 2011 and May 3, 2011 bargaining sessions the parties reviewed previously initialed tentative agreements, and exchanged and discussed their respective proposals and counter-proposals on open items."*

Answer: Respondents admit that on May 3, 2011, HSTA and the Employer engaged in further bargaining concerning the new master agreement. HSTA distributed to the Employer various written HSTA modified proposals and counterproposals. The Employer also distributed a counterproposal to the HSTA counterproposal. The packet

of HSTA proposals and counterproposals, for the first time, were labeled as "housekeeping," "priority," "withdrawn." However, the Employer, upon closer analysis realized that many of the proposals labeled as "housekeeping" actually contained substantive modifications from the previous versions and were not at all "housekeeping," and that some proposals that had been orally withdrawn at a previous bargaining session were included in HSTA's packet of proposals. All other allegations are **denied.**

Allegation 41b. *"At the May 4, 2011 bargaining session there were 8 tentative agreements which were initialed, 12 tentative agreements awaiting initials, 27 items on which HSTA was to respond, 11 items on which the Employer was to respond, and 14 items on which HSTA withdrew its proposals."*

Answer: **Denied.**

Allegation 41c. *"At the May 10, 2011 bargaining session HSTA submitted counter-proposals on seven items. A tentative agreement which was verbally entered on May 4, 2011 to renew and update Appendix XI on recruitment and retention of special education teachers was transmitted in writing for initials on May 10, 2011, which the Employer refused to sign."*

Answer: **Denied**

Allegation 41d. *"On May 11, 2011 HSTA submitted additional counter-proposals. There was no response from the Employer on the May 10, 2011 counter-proposals submitted by HSTA on seven items."*

Answer: **Denied.**

Allegation 41e. *"On May 18, 2011 Respondents transmitted a "formal settlement offer" containing several new Employer proposals and several Employer counter-proposals, including a proposal to modify Article XVIII and to eliminate provisions for health care benefits under Appendix XVIII regarding the HSTA Voluntary Employees' Beneficiary Association (VEBA) trust."*

Answer: Respondents admit that the Employer team submitted a "Formal Settlement Offer," the comprehensive terms of which speak for themselves. The letter stated that the Employers' negotiating team and the Governor desire to conclude negotiations on Friday, May 20, 2011, and asked for confirmation that HSTA's President and/or Executive Director be present to execute tentative agreements. The letter further stated the Employers' wish to avoid further counterproposals, unless minor issues or corrections were needed, explaining that with the 2010-11 school year almost complete, "*there is a need to reach a final agreement in order that [there can be] implementation by the beginning of the new fiscal year. Operationally, there are many things that need to be put into place, and some may require manual implementation and thus it is crucial to reach agreement now.*" The letter acknowledged that all parties have worked long and

hard and accomplished a lot, and that the enclosed Formal Settlement Offer contained many items that were initially proposed by HSTA in order that the HSTA members could be offered an acceptable package given the economic sacrifice being asked of all State employees. The Employer offered to meet with HSTA's negotiators or a small group the following day, May 19, to address any questions, so that negotiations could conclude in an expedited manner on Friday, May 20, 2011.

Allegation 41f. *"On May 26, 2011 HSTA submitted requests for information needed in connection with outstanding proposals (1) to renew or suspend a supplemental agreement on sabbatical leaves, (2) to renew, suspend, or change differential pay to fill hard to fill positions in Appendix X, (3) to modify provisions on student discipline in Article XI, (4) to amend preparation and instructional time provisions in Articles VI.C and Vl.CC.l.b, (5) to affect 12 month teacher differential pay, vacation, and sick leave (a new provision in Article VI), (6) to amend provisions on transfers, (7) to change provisions on teacher investigations and department directed leaves, and (8) to change inclusive practices for special education teachers."*

Answer: Respondents admit that HSTA responded to the Employer team's May 18, 2011 letter by refusing to attend the proposed meeting and then **seven days later** sending a duplicative request for information regarding old subjects of bargaining not subjects first brought up on May 18th and unrelated to the critical wage and health fund contribution formula issues. All other allegations are **denied.**

Allegation 41g. *"On June 1, 2011 HSTA submitted requests for information needed in connection with a proposed change to Article XVIII to eliminate the HSTA Voluntary Employees' Beneficiary Association (VEBA) Trust Fund as referred to in Appendix XVIII, as proposed for the first time on May 18, 2011."*

Answer: Respondents admit that HSTA requested information but deny that the requests were made in good faith or were related to the critical wage and EUTF contribution issues. All other allegations are **denied**.

Allegation 41h. *"On June 2, 2011 Respondents refused to provide the information requested on May 26, 2011 claiming it was untimely, and on June 3, 2011 provided partial responses to the information requests. Respondents failed to provide responses to the June 1, 2011 request for information."*

Answer: **Denied**. The information was provided on May 6 and June 9, 2011.

Allegation 41i. *"At the bargaining session of June 3, 2011 the Employer requested HSTA for their responses to the May 18, 2011 "formal settlement offer." Without receiving a response from HSTA Respondents announced an impasse and proposed to meet with a federal mediator on June 9, 2011. As of June 3, 2011 there were 8 tentative agreements which were initialed (unchanged since May 4, 2011), 15 verbal tentative agreements awaiting initials (compared to 12on May 4, 2011), 7 possible tentative agreements (based on responses from HSTA responses), 11 responses due from HSTA to counter-proposals from the Employer, 6 responses due from the Employer to the union's positions (compared to 11 as of May 4, 2011), and 14 withdrawn proposals from HSTA (compared to 15 on May 4, 2011). HSTA did not agree that an impasse had been reached."*

Answer: Respondents admit that at the conclusion of the June 3, 2011 bargaining session with the negotiations deadlocked and no new proposals from either party, the Employer negotiating team orally informed the HSTA negotiating team that the Employer declared that the negotiations were still at impasse. The Employer negotiating team believed the parties were deadlocked on the key wage and health fund issues, neither party had any new proposals on those issues and that further bargaining sessions would not result in a new CBA.

Allegation 41j. *"At no time did the parties negotiate or "mutually agree upon non-instructional dates for each year" when directed leaves without pay under paragraph 2 of the April 27, 2011 tentative agreement would be implemented."*

Answer: **Denied.**

Allegation 41k. *"On June 7, 2011 HSTA notified Respondents that it considered the declaration of impasse of June 3, 2011 premature. There were numerous tentative agreements unsigned by duly authorized Employer representatives, the Employer rescinded orally agreed to tentative agreements on certain items, and there were outstanding information requests on unresolved items affecting sabbatical leaves, differential pay for hard to fill positions, student discipline, preparation and instruction time, 12 month teacher vacation and sick leave, teacher transfers, teacher investigations and department directed leaves, inclusive practices for special education teachers, and critically important information on health benefit coverage and employee contribution amounts under Article XVIII and Appendix XVIII."*

Answer: Respondents admit that HSTA claimed that it considered the declaration of impasse to be premature and that HSTA refused to participate in mediation even though HSTA did not offer any new proposals on the critical cost items that would be essential to any new Collective Bargaining Agreement. All other allegations are **denied.**

Allegation 42. *"On June 9, 2011 Respondent Matayoshi transmitted to HSTA a "last, best, and final settlement offer" which modified a number of proposals presented on May 18, 2011 failed to include all tentative agreements verbally entered by the parties, excluded numerous items*

which remained opened as of June 3, 2011, contained certain regressive measures from those previously presented by the Employer, included provisions which were not agreed to by HSTA, and disregarded proposals and counter-proposals presented after the April 27, 2011 tentative agreement, including items about which there remained outstanding information requests. The letter stated that the "settlement offer will expire at 4:30 p.m. Thursday, June 16, 2011."

Answer: Respondents admit that on June 9, 2011, in an effort to reach agreement on a new CBA that would break the impasse in negotiations, the Employer sent the LBFO, the terms of which speak for themselves, to HSTA's bargaining team. By separate letter that same day, the Employer provided HSTA with information regarding EUTF rates pursuant to HSTA's Request for Information. At no time did anyone from HSTA contact the Employer to discuss the LBFO over the next **seven days or offer any counter proposal**. All other allegations are **denied**.

Allegation 43. *"On June 9, 2011 Respondent Matayoshi transmitted a letter on student instructional hours to HSTA's executive director. HSTA requested that the subject matter be negotiated through the regular bargaining process on June 10, 2011. There was no response to the HSTA's request until July 1, 2011."*

Answer: Respondents admit that the June 9, 2011 letter was sent and speaks for itself. All other allegations are **denied.**

Allegation 44. *"On June 14, 2011 a meeting was held with Respondent Abercrombie at which time HSTA representatives indicated a willingness to continue to negotiate, and asked for good faith bargaining by the Employer."*

Answer: Respondents admit that the meeting was held. All other allegations are **denied**.

Allegation 45. *"On June 16, 2011 Respondent Abercrombie sent a memorandum which instructed all state department directors to identify low priority programs for possible elimination, and other belt tightening steps to achieve savings."*

Answer: Admitted.

Allegation 46. *"On June 17, 2011 Respondents Dietz, Matayoshi, Homer, and Williams met with certain officials of HSTA (excluding teachers on the negotiation team). Respondents signed tentative agreements previously agreed to, signed "tentative agreements" not agreed to by HSTA, and stated a change to afford 100% Employer payment for life insurance. Respondent Matayoshi left for a budget meeting, and upon her return stated to HSTA president Wil Okabe that if HSTA did not accept the five percent cuts the department of education would need to cut 800 jobs including probationary teachers and Code 5 and Code W teachers."*

Answer: The parties did meet from approximately 8:30 a.m. until 2 p.m., but HSTA's statement as to what Respondent Matayoshi stated is inaccurate. On the contrary after being informed by Wil Okabe and HSTA's Executive Director that the parties were "very close" to an agreement, the parties agreed to meet on June 17, 2011, the day after the deadline for acceptance of the LBFO had passed. HSTA's President, Executive Director, and Negotiator met with Employer team members BOE Chairperson Horner, Board Member Williams, Neil Dietz and Superintendent Matayoshi. When the Employer team executed an additional 10 tentative agreements at HSTA's request, they were informed by Wil Okabe that the parties now had a final comprehensive settlement that he would recommend to the HSTA Board of Directors for acceptance and submittal to the rank and file for a ratification vote. *That agreement* consisted of the LBFO as modified.

At the conclusion of this meeting Neil Dietz said to Wil Okabe: "*I am going to email the Governor to tell him we have reached an agreement that you will recommend to your Board. Is that absolutely correct?*" **Okabe replied in the affirmative.**

See also Respondents additional answers below.

Allegation 47. "*Faced with the threat of job eliminations HSTA president Wil Okabe called a special meeting of the full negotiating committee for June 20, 2011 and a special meeting of the board of directors of HSTA for June 21,2011.*"

Answer: Respondents admit that Wil Okabe called the meetings in question but **deny** that they were called by Okabe because Respondent Matayoshi allegedly issued some imaginary "*threat*" of job eliminations unless HSTA accepted the 1.5% pay cut and 50/50 EUTF contribution. Indeed, this allegation makes **no sense at all** in light of the fact that the HSTA negotiations team had **already agreed** to recommend the 1.5% pay cut and 50/50 EUTF contribution to the HSTA Board of Directors back in April and further agreed to recommend the LBFO as modified on June 17, 2011. Consequently, the meeting with the HSTA Board was called because *that was what Okabe represented he would do* as a result of the April 27, 2011 TA and the June 17, 2011 meeting.

Allegation 47a. "*On June 20, 2011 the full negotiating committee voted not to recommend the last, best, and final offer of the Employer of June 9, 2011, as modified on June 17, 2011. The action of the full committee constituted protected concerted activity within the meaning of Section 89-3, HRS.*"

Answer: Respondents admit that:

1) Wil Okabe called a meeting of the HSTA Board of Directors as promised to the Employer team on June 17, 2011,

2) HSTA's By-Laws permitted Wil Okabe to recommend acceptance of the LBFO as modified despite what the so-called "full negotiations committee" recommended,

3) The HSTA Board of Directors voted *unanimously* against permitting the HSTA membership to vote on ratification of the LBFO as modified,

4) Wil Okabe is a member of HSTA's Board Of Directors and voted **against** the very final agreement reached between the negotiating teams that he promised to recommend, and

5) The HSTA Board's rejection of the LBFO as modified left NO PROPOSALS on the "table" to be negotiated.

All other allegations are **denied**.

Allegation 47b. *"On June 21, 2011 the board of directors of HSTA unanimously rejected the last, best, and final offer including the April 27, 2011 tentative agreement of the 5% salary reductions and the decrease in Employer contributions for health benefits from 60% to 50% of premiums. The action of the board of directors constituted protected concerted activity within the meaning of Section 89-3, HRS."*

Answer: Respondents admit that the HSTA Board of Directors (including Wil Okabe) voted against permitting the HSTA members to vote on whether to ratify the **Final Agreement**. All other allegations are **denied.**

Allegation 47c. *"On June 21, 2011 Respondent Matayoshi was informed of the decision and action of the board of directors. Respondents promptly decided to unilaterally implement the Employer's last, best, and final offer."*

Answer: **Denied**. The Employer implemented the LBFO as modified.

Allegation 47d. *"Upon receiving notice of actions taken by the board of directors of HSTA Respondents Matayoshi and Horner authorized the issuance of notice of personnel action forms to immediately implement the 5 percent salary cut and decrease in Employer contribution for health benefit coverage to all bargaining unit employees on June 21, 2011. The department had been preparing the forms weeks in advance of June 21, 2011."*

Answer: Respondents admit that DOE issued its notices of implementation following the continued impasse resulting from receipt of HSTA's decision to reject the LBFO as modified. HSTA's allegation that DOE had prepared its notices "*weeks in advance*" appears to acknowledge the obvious, namely: 1) that the HSTA negotiation team had agreed to the LBFO as modified and would **recommend same** to the HSTA Board of Directors, which DOE assumed was true, 2) that DOE was under severe time constraints, if no new CBA was agreed to, and 3) that DOE needed to be prepared for **all** contingencies, including the possibility of a continuing impasse in the event that HSTA's Board of Directors rejected the LBFO as modified.

Allegation 47e. *"Respondents Matayoshi and Horner prepared and signed a letter on June 21, 2011 addressed to HSTA, but not received by the Association until June 23, 2011, which stated that with the concurrence of Respondent Abercrombie the last, best, and final offer of Employer was being implemented. The action by Respondents was with full knowledge that the HSTA board of directors had voted to reject the tentative agreement."*

Answer: **Denied.** The June 23, 2011 letter speaks for itself.

Allegation 48. *"On June 23, 2011 HSTA notified Respondents of the rejection by the board of directors in writing, and requested the Employer to resume negotiations as soon as possible."*

Answer: **Denied.** Respondents admit that, **after rejecting every single existing proposal made by BOTH parties**, HSTA made a request to "re-open" negotiations. However, since HSTA: 1) failed to specify who was authorized to negotiate on the union's behalf, 2) failed to proffer **one single new proposal** of any kind, and 3) failed to even identify what general matters it wished to "discuss," HSTA's ostensible request was not meaningful.

Allegation 49. *"On June 23, 2011, without any prior notice to the HSTA Respondent Matayoshi sent directly to approximately 12,486 bargaining unit 5 employees notification that the State was unable to reach an agreement with HSTA, that effective July 1, 2011 the Employer was unilaterally implementing, inter alia, the 5% reduction in salaries through a 1.5% salary reduction and directed leave without pay for July 28, 29, 2011, October 10, 2011, December 16, 2011, January 3, 2012, March 9, 2012, May 25, 2012, June 22, 2012 (for one half day), and on June 29, 2012, and an increase in "the employee's share of the EUTF contribution for health benefits from 50% rather than 40%."*

Answer: **Denied.** Wil Okabe and Albert Nagasako were emailed copies of the letter in question on June 23, 2011. Respondents **deny** that the notice was sent by Matayoshi without prior notice to HSTA or that prior notice was even required.

Allegation 49a. *"Together with the letter Respondent Matayoshi enclosed a description which was referred to as "key elements" of the Employer's last best and final offer, which stated in relevant portions when the salary reduction would be reflected in employee paychecks as follows:*

> 2. *For the 12-month BU employees, the reduction will be reflected starting with their July 20. 2011 paychecks, and on the August 20. 2011 paycheck for the 10 month employees. An HSTA BU wage reduction calculator will be posted on the DOE website (hawaiidoe.org) no later than June 27, 2011, which will help compute your individual wage reduction. (Emphasis added).*

The document further stated: "Further information regarding changes to various articles in the 2009-11 Agreement will be distributed to the schools and employees soon after school

commences. We ask that you review these changes carefully. Some of the additional changes may or may not impact you."

Answer: The document speaks for itself. Respondents' **deny** HSTA's characterization of the documents.

Allegation 49b. *"The transmittal also included individualized "notification of personnel actions" dated June 21, 2011 which indicated that changes in pay and salary schedules for 12 month teachers would be effective July 1, 2011 and for 10 month teachers would be effective July 26, 2011."*

Answer: The document speaks for itself. Respondents **deny** HSTA's characterization of the document.

Allegation 49c. *"In her "key elements" Respondent Matayoshi also informed employees as follows on contribution amounts to be paid by employees (not Employer) for health benefits:*

> *(3) The employee's share of the EUTF contribution for health benefits will be 50% rather than the current 40%, with the exception of life insurance premiums which will be 100% covered by the Employer. (Emphasis added).*

The Employer neglected to accurately reflect the change in employee contribution amounts from June 30, 2011 to employee contribution amounts effective July 1, 2011, which represented a 107.6% to 109.5% increase for approximately 4,674 teachers enrolled in the HMSA 80-20 PPO medical and prescription drug plan (which is the prevalent plan for bargaining unit 5) with VSP vision and RSN chiropractic, a 36.9% to 37.1% increase for approximately 2,121 teachers enrolled in the Kaiser HMO comprehensive medical and prescription drug plan with VSP vision and RSN chiropractic, a 15.4% to 15.6% increase for approximately 3,407 teachers enrolled in the HMSA 90/10 PPO medical and prescription drug plan (which is the prevalent plan for State employees) with VSP vision and RSN chiropractic, a 26.3% increase for approximately 6,869 teachers enrolled in the HDS dental plan for singles or 2 parties, and a 107.9% increase for approximately 3,870 teachers enrolled in the HDS dental plan for families, a 9.9% increase for approximately 304 teachers enrolled in the HMSA supplemental medical, drug, vision and RSN chiropractic plan, and a 25.8% to 26.3% increase for approximately 353 teachers enrolled in the VSP Vision only Plan. Respondent Matayoshi also failed to indicate whether employees would be re-enrolled in health benefit plans and when the increases would be reflected in paychecks."

Answer: The document speaks for itself. Respondents **deny** HSTA's characterization of the document.

Allegation 49d. *"In her description of "key elements" Respondent Matayoshi indicated the specific dates on which "directed leaves without pay," would occur, i.e., July 28, 29, 2011, October 10, 2011, December 16, 2011, January 3, 2012, March 9, 2012, May 25, 2012, June 22, 2012 (for one half day), and on June 29, 2012, but neglected to inform employees that Employer*

had previously agreed to obtain "mutual" agreement from HSTA before the dates would be set by Employer. At no time was such mutual agreement requested or obtained from HSTA after April 27, 2011 and before the unilateral action taken by Respondent Matayoshi on June 23,2011. On and after June 23, 2011 Respondents unilaterally implemented further changes in "directed leaves without pay" on other dates in multi-track and other schools without mutual agreement."

Answer: The document speaks for itself. Respondents **deny** HSTA's characterization of the document.

Allegation 49e. *"In her description of "key elements" Respondent Matayoshi stated:*

> *"Two of the four school planning/collaboration days shall not be used for school years 2011-2012 and 2012-13."*

At no time did HSTA agree to the foregoing provision which amends Appendix XIII of collective bargaining agreement. This represents another unilateral change by Respondents."

Answer: The document speaks for itself. Respondents **deny** HSTA's characterization of the document.

Allegation 50. *"On June 23, 2011 Respondent Matayoshi sent a copy of the letter she sent to teachers on June 23, 2011 to the executive director of HGEA and the President of HSTA. The letter to the President of HSTA was not received until June 24, 2011, the same day teachers who received the Matayoshi letter began calling HSTA about the matter. There was no prior notice to HSTA that Respondent Matayoshi was taking this unprecedented course of action involving direct dealing, imposing unilateral changes, and implementing the parity provisions of the HGEA agreement."*

Answer: **Denied**. Wil Okabe and Albert Nagasako were emailed copies of the letter in question on June 23, 2011. The June 23, 2011 letter does not constitute "*direct dealing*" with the teachers by-passing the union with regard to matters "*under negotiation.*" DOE was doing nothing more or less than *notifying* its employees of the status of the negotiations and the consequences of HSTA's rejection of the LBFO as modified. The HSTA does not identify any request to negotiate in the challenged mailing that would constitute "*direct dealing*." HSTA further does not identify any reason why HSTA was entitled to some sort of "prior notice" of DOE's intentions to in inform it employees of either the implementation of the LSBO **Final Agreement** or the "parity provisions of the HGEA agreement."

Lastly, HSTA's reference to DOE's implementation of the Final Agreement as being "***unprecedented***" belies the fact that the Union's leadership testified in favor of the very amendments to the impasse procedure set forth in HRS Section 89-11 that HSTA is now objecting to.

Allegation 51. *"In a news release issued on or about June 24, 2011 Respondent Abercrombie said that he hopes teachers "will be given the opportunity to vote on the proposal so we can move the focus to preparing for the new school year and giving our children the best possible education." "*

Answer: The news release speaks for itself. Respondents' **deny** HSTA's characterization of the document.

Allegation 52. *"On July 1, 2011 Respondents refused to negotiate further with HSTA as requested by the Association on June 23, 2011, stating in relevant portions that the implementation of the last best and final offer concludes negotiations as follows:*

> *As reflected in our letter to HSTA dated June 21, 2011, we are moving forward with implementation of the Employer's Last, Best, and Final Settlement Offer of June 9,2011, plus the additional TAs executed by the Employer on June 17,2011. This implementation therefore concludes negotiations for the 2011-2013 Agreement. Consequently, we do not intend to resume negotiations as requested in your letter." (Emphasis added).*

Answer: The letter in question speaks for itself. Respondents **deny** HSTA's characterization of the document.

Allegation 53. *"On and after July 1, 2011 Respondents have unilaterally implemented multiple changes affecting wages, hours, and terms and conditions of employment without negotiations with HSTA including but not limited to the following:"*

Answer**: Denied**. The implementation speaks for itself. Respondents' **deny** HSTA's characterization of the implementation.

Allegation 53a. *"Recalling teachers to perform work without compensation paid pursuant to the terms of Article XVI (Work Year);"*

Answer: **Denied.**

Allegation 53b: *Establishing directed leave without pay (DLWOP) dates on dates not mutually agreed to in multi-track and other schools;"*

Answer: **Denied.**

Allegation 53c. *"Eliminating two of the four school planning/collaboration days contrary to Appendix XIII of the collective bargaining agreement;"*

Answer: **Denied.**

Allegation 53d. *"Increasing the hours of work of teachers contrary to the provisions of Article VI of the collective bargaining agreement; and"*

Answer: **Denied.**

Allegation 53e. *"Engaging in other acts and deeds to be established during the proceedings herein."*

Answer: **Denied.**

Allegation 54. *"The allegations contained in paragraphs 1 through 53 are restated, re-alleged, and fully incorporated herein."*

Answer: All responses to paragraphs 1 through 53 above are restated, re-alleged, and fully incorporated herein.

Allegation 55. *"Since the inception of collective bargaining in 1970 the role of the legislature is to approve or reject the cost items of collective bargaining agreements under Section 89-10 (b), HRS, after they have been negotiated and agreed to by the exclusive bargaining representative under Section 89-9 (a), HRS, with a majority vote of public Employers (in the executive branch) under Section 89-6 (d), HRS, and ratified by public employees under Section 89-10 (a), HRS."*

Answer: The statutes in question speak for themselves. Respondents' **deny** HSTA's characterization of the statutes.

Allegation 56. *"Under the statutory framework for collective bargaining in the public sector the legislature is not a party to the bargaining process, and its role is narrowly circumscribed "as provided by law" pursuant to Article XIII, Section 2 of the State Constitution. Thus, where the legislature decides to reject cost items in a negotiated agreement, Section 89-10 (b), HRS, states that "all cost items submitted shall be returned to the parties for further bargaining.""*

Answer: The statute and the State Constitution speak for themselves. Respondents' **deny** HSTA's characterization of the statutes.

Allegation 57. *"In United Public Workers. AFSCME. Local 646. AFL-CIO v. Yogi. 101 Hawaii 46, 62 P.3d 189 (2002), the Supreme Court invalidated a legislatively established wage freeze from 1999 to 2001 established in 1999 Hawaii Session Law, Act 100, § 2, at 368-69. The court held that the legislative action was contrary to the purpose and intent of Article XIII, Section 2 of the State Constitution.*

Here, the intent and object of the framers who adopted article XII, section 2 was to extend to public employees similar rights to collective bargaining previously adopted for private employees under article XII, section 1. (footnote omitted). Defendants' construction of article XII. section 2 would render that provision meaningless, because, if we follow the Defendants' reading of that provision to its logical conclusion, it would be possible for the legislature to establish a freeze in contractual terms on cost items not only for two years but for two decades. Surely, the framers did not contemplate such an absurd and unjust result, especially in light of the fact that their foremost intent in drafting this constitutional provision is to improve the standard of living of public employees, (footnote omitted). Accordingly, we reject Defendants' contention that the phrase "as provided by law" gave the legislature complete discretion to take away public employees' right to organize for the purpose of collective bargaining. Such reading is contrary to the underlying object and purpose of the constitutional provision." (Emphasis added).

101 Hawaii'i at 54, P.3d at 197.

Answer: The cited case speaks for itself. Respondents **deny** HSTA's characterization of the document.

Allegation 58. *In Malahoff v. Saito. 111 Hawai'i 168,187, 140 P.3d 401, 420 (2006), the Court indicated the limits of legislative involvement in the bargaining process under Yogi.*

> *Thus, Yogi stands for the proposition that the legislature has broad discretion in setting the parameters for collective bargaining as long as it does not impinge upon the constitutional rights of public employees to organize for the purpose of collective bargaining and to negotiate core subjects of collective bargaining, that is, wages, hours, and other conditions of employment." (Emphasis added).*

Answer: The cited case speaks for itself. Respondents **deny** HSTA's characterization of the document.

Allegation 59. *"In the present case Respondents Abercrombie and Young proposed to the legislature and obtained support for and acceptance of a statewide governmental policy (by the legislature) to reduce salaries of all public employees from July 1, 2011 to June 30, 2013 by not less than five percent, and to decrease Employer contributions to health care benefits to all public employees from 60% to 50% of premium rates established by the Hawaii Employer-Union Health Benefits Fund, and Respondents Abercrombie, Young, Dietz, Homer, Williams, and Matayoshi unlawfully and unilaterally implemented said policy in violation of the rights of public employees under Article XIII, Section 2 of the State Constitution and HRS chapter 89."*

Answer: **Denied**.

Allegation 60. *"In furtherance of their unlawful course of conduct Respondents, individually and in concert:*

a. Proposed to lawmakers and obtained tacit support for provisions to be included in the State Budget for labor cost savings consisting of not less than a 5% reduction in salaries, and reduction in Employer contribution amounts for health benefits for all bargaining units from July 1, 2011 to June 30, 2013.
b. Proposed to HGEA and entered into a collective bargaining agreement with HGEA for bargaining units 2, 3, 4, 6, 8, and 13 a five percent (5%) reduction in wages and a decrease in Employer contributions from 60% to 50% of premium rates for health benefits.
c. Assured the HGEA and bargaining units 2,3,4,6, 8, 9, and 13 employees that "all public sector bargaining units shall be subject to a 5% wage reduction, supplemental paid time off and 50% split in premium rates" from July 1, 2011 to June 30,2013.
d. Entered a favored nation's clause or parity provision which interferes, restrains, and coerces employees not represented by HGEA in the free exercise of rights guaranteed under HRS chapter 89.
e. Withdrew from the collective bargaining process negotiations over employee contribution amounts in light of the repeal of HRS chapter 87D on December 31, 2010 and a court order dated March 15, 2011 requiring funding to maintain standards of coverage for health benefits.
f. Informed bargaining unit 5 employees and their exclusive bargaining representatives that unless they agreed to accept a five percent wage reduction and a 50% split in premium rates by April 27, 2011 lawmakers working on the State Budget would impose a 10% cut in wages, and that "other nasty things would happen to your working conditions."
g. Adopted a "take it or leave it approach" throughout bargaining, and repeatedly engaged in unlawful threats of deeper cuts in wages and benefits, and layoffs of 800 bargaining unit employees in unit 5 if public employees and the HSTA declined to agree to implementation
of said statewide policy.
h. Implemented unilateral changes on and after June 21, 2011 in wages, hours, and other terms and conditions of employment after the HSTA board of directors rejected the April 27,2011 tentative agreement as authorized in paragraph 6 of said agreement.

i. Repudiated the terms and conditions of an April 27, 2011 agreement requiring approval by the Board of Directors of HSTA of a "final comprehensive settlement" of all issues being negotiated for the July 1, 2011 to June 30, 2013 agreement before implementing the substantive terms of a tentative agreement on salaries and amounts of Employer contributions for health benefits.

j. Signed, approved, and implemented the State Budget in Act 164 on June 23, 2011 which mandates labor cost savings in relevant portions as follows:

> *SECTION 33. Provided that of the general fund appropriations for retirement benefits payments (BUF 741-BUF 748), the following sums specified in fiscal biennium 2011-2013 shall be expended for the state*

Employer's share of the employees' retirement system's pension accumulation only as follows:

Program I.D.	*FY 2011-2012*	*FY 2012-2013*
BUF 741	*$171,388,684*	*$173,662,109*
BUF 745	*$181,970,000*	*$184,245,000*
BUF 748	*$81,275,000*	*$82,291,000;*

Provided that the amounts in BUF 741 accounts for amounts that shall be transferred in pursuant to section 96; provided further that unrequired balances may be transferred only to debt service payments (BUF 721-BUF 728) and health premium payments (BUF 761-BUF 768); provided further that the funds shall not be expended for any other purpose; and provided further that any unexpended funds shall lapse to the general fund.

* * *

SECTION 96. Notwithstanding any provision to the contrary, the director of finance, with the approval of the governor, shall transfer into retirement benefit -state (BUF 741) $88.200,000 for fiscal year 2011-2012 and $88.200.000 for fiscal year 2012-2013 for labor savings attributable to collective bargaining agreements for all bargaining units and pursuant to any executive memoranda that results in salary savings for all employees not included under collective bargaining in respective state agencies; provided further that the governor shall submit a report to the legislature within five days of each transfer that shall include the date of the transfer, the amount of the transfer, the program ID from which funds are transferred, and the collective bargaining unit for which the transfer was made; and provided further that the governor shall submit to the legislature a summary report for all transfers by December 1 for the previous twelve-month period. (Emphasis added).

k. Engaged in unlawful direct dealing with bargaining unit 5 employees to undermine and derogate the role of HSTA as the exclusive bargaining representative on and after June 21, 2011, after the HSTA board of directors composed of teachers engaged in protected activity, i.e., rejecting the settlement agreement.

l. Established unilaterally and without prior negotiations changes in the amounts of employee contributions for health benefit plans contrary to a memorandum of agreement initiated and approved by Respondent Abercrombie on December 23, 2010 for the period on and after March 1, 2011.

m. Implementing and complying with the parity provisions of the HGEA agreement by providing to the executive director of HGEA a copy of the June 23, 2011 letter which Matayoshi sent to the teachers.

n. Refused to resume negotiations and implemented multiple changes to wages, hours, and other terms and conditions of employees in bargaining unit 5 on and after July 1, 2011 (to be established during the course of hearings on this case)."

Answer: HSTA's blanket allegation is **denied,** as to all parts and sub-parts.

Allegation 61. *"The provisions of Act 164 (the State Budget) which require labor cost savings through wage and benefit cuts and reductions in Employer contributions for health benefits are in conflict with the provisions and requirements of HRS chapter 89, particularly with respect to the role of legislative bodies as set forth in Section 89-10 (b), HRS, and are pre-empted by Section 89-19, HRS."*

Answer: **Denied.**

Allegation 62. *"It is well recognized that "[r]espondent[s] cannot avoid its duty to bargain collectively with the certified exclusive representative of employees in the appropriate unit by adopting or following a company policy with respect to wages, hours and other terms and conditions of employment established by higher management." Hollywood Brands. Inc.. 142 NLRB 304, 315 (1963)."*

Answer: The cited case speaks for itself. Respondents **deny** HSTA's legal conclusions and points out that, under both the unique impasse procedures of HRS Section 89-11 and the ruling of federal courts and the NLRB, employers are permitted to implement last, best and final offers in the event of impasse.

Allegation 63. *"A parity provision to implement a uniform statewide policy which trespasses on the negotiating rights of a third party exclusive representative who is not a party to he parity agreement interferes with, restrains, and coerces the right to untrammeled bargaining for bargaining unit 5 employees. Local Union No. 1522. Int'l Ass'n of Firefighters v Connecticut State Bd. of Labor Relations. 319 A.2d 511 (Conn. 1973); Lewiston Firefighters Ass'n. Local 785. Int'l Ass'n of Firefighters. AFL-CIO v. City of Lewiston. 354 A.2d 154 (Me. 1976); Plainfield Patrolmen's Benevolent Ass'n. Local #19 and City of Plainfield. PERC No. 78-87,4NJPER4130(1978)."*

Answer: The cited cases speak for themselves and Respondents **deny** HSTA's erroneous legal conclusions.

Allegation 64. *"In as much as Respondents' conduct throughout negotiations has been motivated by bad faith adherence to and implementation of the aforementioned statewide policy, no bona fide impasse existed as claimed on June 3, 2011, and the unilateral implementation of changes in wages, hours, and terms and conditions of employment on and after June 21,2011 by Respondents violates Employer's duty under HRS chapter 89. See Minot School Committee v. Minot Educ. Ass'n. 717 A.2d 372 (Me. 1998)."*

Answer: The cited case speaks for itself and Respondents **deny** HSTA's erroneous legal conclusions.

Allegation 65. *"The statewide policy as proposed, adopted, and implemented by the Respondents violates Sections 89-3, 89-6 (a), 89-8 (a), 89-9 (a), 89-10 (a) and (b), HRS, and constitutes a prohibited practice in violation of Section 89-13 (a) (1), (3), (5), and (7), HRS, violates Articles I, II, and III of the collective bargaining agreement covering the period from*

July 1, 2009 to June 30, 2011, paragraphs 5 and 6 of the agreement dated April 27, 2011, and constitutes prohibited practices in violation of Section 89-13 (a) (1), (3), (5), (7), and (8), HRS."

Answer: **Denied.**

Allegation 66. *"The statewide governmental policy as initiated, promoted, adopted, and implemented by Respondents impinges upon the constitutional rights of public employees to organize for the purpose of collective bargaining and to negotiate core subjects of collective bargaining, that is wages, hours, and other terms and conditions of employment for bargaining unit 5 employees in violation of Article XIII, Section 2 of the State Constitution."*

Answer: **Denied.**

Allegation 66a. *The adoption and implementation of the State Budget provisions (Act 164 in sections 33 and 96) at the initiation and request of Respondents Abercrombie and Young to obtain "labor costs savings" for all bargaining units through 5% salary reductions and increases in employee contributions for health care coverage and benefit, changes in the structure of collective bargaining, and improperly involves legislative bodies into the bargaining process by making them parties to the collective bargaining process. The use of a parity provision in combination with the Budget and the take it or leave it approach of Respondents impinges on the right to engage in collective bargaining as provided by law.*

Answer: **Denied.**

Allegation 66b. *The withdrawal from the collective bargaining process of health care coverage, benefits, and contributions for teachers, who since 1985 have negotiated over health benefits, coverage, and contribution amounts through employee organization and VEBA plans by the adoption and implementation of 2010 Hawaii Session Laws, Act 106, at 198-99, and Section 87 (a) (10), HRS, further impinges on said rights of employees under Article XIII, Section 2 of the State constitution, and Respondents' refusal to bargain over these core subjects of collective bargaining impinges on public employee rights to negotiate mandatory subjects of collective bargaining as provided by Article XIII, Section 2 of the State Constitution.*

Answer: **Denied.**

Allegation 66c. *The adoption of unfunded mandates to increase faculty and student instructional time and to change the work year through the enactment of 2010 Hawaii Session Laws, Act 167, at 416-17, as amended in Act 52 (2011), and Respondents' refusal to negotiate adjustments in wages and salaries commensurate with the additional hours of work impinges on public employee rights to negotiate core subjects under Article XIII, Section 2 of the State Constitution.*

Answer: **Denied.**

Allegations 67-96.

Answer: The allegations in paragraphs 67 through 96 are largely repetitive restatements of prior allegations which have been specifically addressed above. Allegations 67 through 96 are hereby **denied**. Respondents further restate, reallege and incorporate by reference herein, the prior responses made by Respondents to allegations 67 through 96.

IV RESPONDENTS' TWELFTH DEFENSE

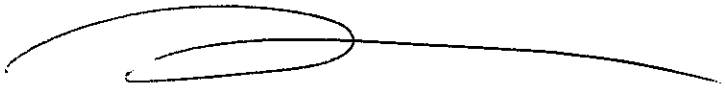
HSTA's claims are barred by the defense of bad faith bargaining conduct. HSTA has engaged in a consistent pattern and practice of bad faith bargaining and litigation over the past three years, involving several collective bargaining agreements and ensuing litigation, and this pattern and practice has been repeated and reinforced in HSTA's current negotiations. This pattern and practice has included, but is not limited to, HSTA's negotiations over random drug and alcohol testing of teachers for the 2007-2009 Master Agreement, and negotiations relating to the Education Laboratory Charter School for an agreement for the 2010-2011 time frame.

During negotiations regarding drug and alcohol testing, HSTA agreed to then-Governor Lingle's offer for raises in return for random/reasonable suspicion drug and alcohol testing applicable to all unit 5 members. The agreement containing the pay raises and the provisions regarding drug and alcohol testing was ratified by the teachers in May 2007. Subsequently, however, when it became necessary to develop and establish the process by which such testing would actually be implemented, HSTA refused to negotiate such procedures and denied that they had agreed to implement such testing procedures.

Similarly, during negotiations regarding the Education Laboratory Charter School, a tentative agreement was reached that did not include specific terms regarding a significant cost item concerning step and class increments which was subject to mandatory bargaining. Subsequently, HSTA attempted to insert step and class increments without negotiating such terms.

WHEREFORE, HAVING FULLY ANSWERED THE COMPLAINT, Respondents hereby request that the Complaint be dismissed, and that the Board order other relief as it deems just and proper.

DATED: Honolulu, Hawaii, July 21, 2011.



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STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII STATE TEACHERS ASSOCIATION, Complainant, and NEIL ABERCROMBIE, Governor, State of Hawaii; KALBERT YOUNG, Director, Department of Budget and Finance, NEIL DIETZ, State Chief Negotiator, Office of Collective Bargaining, KATHRYN MATAYOSHI, Superintendent, Department of Education, DONALD G. HORNER, Chairperson, and JAMES D. WILLIAMS, Board Member, Board of Education, State of Hawaii, Respondents.	CASE NOS. CE-05-781 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on July21, 2011, a copy of Neil Abercrombie, Kalbert Young, Neil Dietz, Kathryn Matayoshi, James D. Williams' Answer to Prohibited Practice Complaint filed July 8, 2011 was duly served by hand delivery, to the following party at their last known address:

HERBERT TAKAHASHI, ESQ.
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Attorney for Complainant

DATED: Honolulu, Hawaii, July 21, 2011.

JAMES E. HALVORSON
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