

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

PROHIBITED PRACTICE COMPLAINT

CASE NO. _____

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

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

2. **COMPLAINANT**

- a. Name, address and telephone number.

Hawaii State Teachers Association
1200 Ala Kapuna Street
Honolulu, Hawaii 96819

833-2711

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

Herbert Takahashi, Esq.
Rebecca L. Covert, Esq.
Davina W. Lam, Esq
Takahashi and Covert
345 Queen Street, Room 506
Honolulu, Hawaii 96813
526-3003

3. RESPONDENT (Public Employer and/or Employee Organization or its Agents Against Whom Complaint is Filed)

a. Name, address and telephone number.

Complainant incorporates by reference Attachment A.

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

Complainant incorporates by reference Attachment A.

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

Teachers and other personnel of the Department of Education in bargaining unit 5.

5. ALLEGATIONS

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

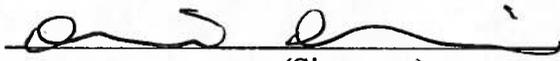
Complainant incorporates by reference Attachment B.

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

Complainant incorporates by reference Attachment B.

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

Herbert Takahashi, being first duly sworn on oath, deposes and says: that _____ is the Petitioner above named, or is the representative, and that he has read the above Complaint consisting of this and 34 additional page(s), and is familiar with the facts alleged therein, which facts he knows to be true, except as to those matters alleged on information and belief, which matters he believes to be true.


(Signature)

Attorney for Complainant
(Title)

Subscribed and sworn to before me
this 8th day of July, 2011.

Notary Public Certification

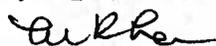
Louise R. Lee First Circuit

Prohibited Practice Complaint

L.S. Louise R. Lee
Notary Public, First Circuit
State of Hawaii

No. of Pages 31 Date of Document undated

My Commission expires: 2/8/2012

Notary Signature


Date
7/8/2011

Attachment A

3. Respondents (or Defendants) against whom complaint is filed

1. Neil Abercrombie, Governor
State of Hawaii
Hawaii State Capitol
415 S. Beretania Street
Honolulu, Hawaii 96813
Phone No. 586-0034
2. Kalbert Young, Director
Department of Budget and Finance
State of Hawaii
P.O. Box 0150
250 S. Hotel Street, #305
Honolulu, Hawaii 96810-0150
Phone No. 586-1518
3. Neil Dietz
State Chief Negotiator
Office of Collective Bargaining
235 So. Beretania Street, Room 1201
Honolulu, Hawaii 96813
Phone No. 587-6893
4. Kathryn Matayoshi, Superintendent
Department of Education
State of Hawaii
P.O. Box 2360
Honolulu, Hawaii 96804-2360
Phone No. 586-3310
5. Donald G. Horner
Chairperson of the Board of Education
P.O. Box 2360
Honolulu, Hawaii 96804
Phone No. 586-3349
6. James D. Williams
Board of Education Member
Human Resources Committee
P.O. Box 2360
Honolulu, Hawaii 96804
Phone No. 586-3349

ATTACHMENT B

COMES NOW the Hawaii State Teachers Association, hereafter "HSTA," "Association," or "Complainant," and respectfully states as follows regarding its statement of relevant facts and allegations to the complaint herein:

I. JURISDICTION AND VENUE

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.

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.

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.

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.

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.

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.

II. PARTIES

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.

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.

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.

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.

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.

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) (1), HRS.

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.

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.

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.

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.

III.

STATEMENT OF RELEVANT FACTS

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.

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.

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.

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.

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.

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.

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 fail 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).

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.

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.

a. 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).

b. 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.

c. 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).

d. 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.

e. 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.

f. 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.

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.

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.

a. 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.

b. 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.

c. 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.

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.

a. 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.

b. 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."

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

a. 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.”

b. 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.”

c. 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.

d. 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.”

e. 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.

f. 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.

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 non-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).

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.”

a. 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 re-negotiate. 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.

b. 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).

c. 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.

d. 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).

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.

a. 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.

b. 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.

c. 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.

d. 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.

e. 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.

f. 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 VI.CC.1.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.

g. 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.

h. 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.

i. 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 12

on 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.

j. 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.

k. 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.

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.”

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.

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.

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.

46. On June 17, 2011 Respondents Dietz, Matayoshi, Horner, 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.

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.

a. 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.

b. 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.

c. 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.

d. 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.

e. 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.

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.

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%.”

a. 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 (hawaii.doe.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.”

b. 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.

c. 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.

d. 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.

e. 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.

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.

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.”

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).

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:

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

- b. Establishing directed leave without pay (DLWOP) dates on dates not mutually agreed to in multi-track and other schools;
- c. Eliminating two of the four school planning/collaboration days contrary to Appendix XIII of the collective bargaining agreement;
- d. Increasing the hours of work of teachers contrary to the provisions of Article VI of the collective bargaining agreement; and
- e. Engaging in other acts and deeds to be established during the proceedings herein.

IV.

COUNT I – “STATEWIDE GOVERNMENTAL POLICY”

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

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.

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.”

57. In United Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi, 101 Hawai’i 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 Hawai'i at 54, 62 P.3d at 197.

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).

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, Horner, 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.

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:

<u>Program I.D.</u>	<u>FY 2011-2012</u>	<u>FY 2012-2013</u>
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).

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 preempted by Section 89-19, HRS.

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).

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 the parity agreement interferes with, restrains, and coerces the right to untrammelled 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, 4 NJPER 4130 (1978).

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).

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.

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.

a. 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.

b. 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.

c. 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.

V.

COUNT II – “TAKE IT OR LEAVE IT”

67. The allegations contained in paragraphs 1 through 66 are restated, re-alleged, and fully incorporated herein.

68. The requirement that the parties “negotiate in good faith with respect to wages, hours and other terms and conditions of employment” is a basic and essential requirement of collective bargaining. As succinctly stated by our Supreme Court in Bd. of Educ. v. Haw. Pub. Emp. Rel. Bd., 56 Haw. 85, 87, 528 P.2d 809, 811 (1974):

In our opinion the law on collective bargaining in public employment, without ambiguity, clearly requires both the public employer and the exclusive representative of the public employees to bargain (negotiate) collectively in good faith. The need for good faith bargaining or negotiation is fundamental in bringing to fruition the legislatively declared policy ‘to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government.’ Thus, the proper construction of HRS § 89-2(12) is that ‘impasse’ means failure of a public employer and an exclusive representative to achieve agreement in the course of good-faith negotiations (bargaining).

We cannot subscribe to appellant's construction of HRS § 89-2(12) that “impasse” ‘could be the failure of a public employer and an exclusive representative to achieve agreement without good-faith bargaining or negotiation.’ Such a construction would totally destroy the efficacy of the law on ‘collective bargaining in public employment’ and give to public employees the power to strike arbitrarily and capriciously.

We are of the further opinion that the Hawaii Public Employment Relations Board (HPERB), on its own motion, under the provisions of HRS § 89-11(b), can declare that an impasse exists only after it initially reaches a determination that, at the very least, the party contending that an impasse exists (be it the public employer or the exclusive representative of the public employees) has been bargaining in good faith. (Emphasis added).

69. The Hawaii Labor Relations Board and our Supreme Court have long recognized that a “take-it-or-leave-it” proposition to obtain acceptance of key provisions of a collective bargaining agreement from a union constitutes bad faith bargaining by an employer. Del Monte Fresh Produce (Hawaii), Inc. v. Int’l Longshore and Warehouse Union, Local 142, AFL-CIO, 112 Hawai’i 489, 146 P.3d 1066 (2006).

70. As a review of the course of bargaining in this case indicates at each critical stage of the collective bargaining process Respondents chose a “take it or leave it” approach and engaged in a pattern of conduct indicating “bad faith” to achieve acceptance of the five percent reduction in wages and a decrease in employer contributions for health benefits to 50% of premiums by bargaining unit 5 employees before the legislature adjourned, and before the expiration of the existing collective bargaining agreement.

a. In order to obtain a tentative agreement on salary reductions and a decrease in employer contributions for health benefits before the legislature adjourned Respondent Dietz stated that April 27, 2011 was “make or break time,” and if HSTA did not take the proposed cuts of 5% in salaries and 50% split on premium rates lawmakers working on the State Budget may impose deeper cuts of 10% and “nasty things can happen to your working conditions.” Respondent Williams said that an agreement was needed at this time, otherwise, “it will all go off the table.” Dietz refused to modify the proposal of April 27, 2011, and when asked for more time he swore, hit the table with his notebook and threatened to leave the room.

b. After meeting for approximately 3 hours on May 2, 2011, 2 hours on May 3, 2011, 3 hours on May 4, 2011, 2.5 hours on May 10, 2011, and 1 hour on May 11, 2011, and about an hour on June 3, 2011, inclusive of caucuses, Respondents submitted a “formal settlement offer of May 18, 2011” which withdrew various open items from the table, reneged on items previously agreed to, and prematurely declared an impasse on June 3, 2011. This was followed by a last, best and final settlement offer dated June 9, 2011 which Respondents said would expire on June 16, 2011 at 4:30 p.m.

c. The day after the last, best, and final settlement offer expired, Respondents met with HSTA staff and the president to modify its provisions and to advise the president of HSTA (on June 17, 2011) that if the Association did not accept the five percent reduction in wages and the decrease in employer contributions for health benefits before the expiration of the agreement on June 30, 2011 there would be layoffs of 800 Code 5 and Code W teachers who are in the bargaining unit. The threat of layoffs prompted the HSTA president to present the modified expired “settlement” of June 9, 2011 to the full negotiating committee, and the Board of Directors for approval or rejection.

71. By the aforementioned conduct Respondents breached the duty to bargain in good faith contrary to the requirements of Section 89-9 (a), HRS, and thereby committed prohibited practices in violation of Section 89-13 (a) (7), HRS.

72. The use of threats by Respondents to obtain acceptance of their demands, including the threats of a ten percent wage cut, the imposition of “nasty” working conditions, and the layoff of 800 teachers interferes, restrains, and coerces employees in the exercise of their statutory rights guaranteed by HRS chapter 89 (and Article II of the collective bargaining agreement), and constitutes prohibited practices in violation of Sections 89-3 and 89-13 (a) (1), (7), and (8), HRS. Such conduct is inherently destructive of employee rights because it jeopardizes the position of the bargaining representative, diminishes the bargaining representative’s capacity to effectively represent employees in the bargaining unit, and penalizes or deters protected activities by public employees.

VI.

COUNT III - REPUDIATION AND UNLAWFUL DISCRIMINATION

73. The allegations contained in paragraphs 1 through 72 are restated, re-alleged, and fully incorporated herein.

74. It is axiomatic that an employer may not refuse to honor an agreement which is a by-product of collective bargaining. H.J. Heinz Co. v. N.L.R.B., 311 U.S. 514 (1941); N.L.R.B. v. Strong Roofing & Insulating Co., 393 U.S. 357 (1969).

75. In the present instance Respondents agreed on April 27, 2011 that the five percent salary reduction and the reduction in employer contributions to pay for health benefits to 50% (instead of 60%) of premiums would be a “tentative agreement,” to be made a part of the “final comprehensive settlement,” which could only be implemented if it were approved by the HSTA board of directors and ratified by the members of bargaining unit 5. In relevant portions the agreement clearly and unambiguously states:

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).

The foregoing terms and conditions are consistent with negotiating rules adopted in Article III.I of the collective bargaining agreement since February 9, 1972 and carried forward to June 30, 2011.

76. However, contrary to the express conditions and requirements of the agreement, upon being notified that the Board of Directors of HSTA (composed of bargaining unit 5 employees only) on June 21, 2011 had rejected the tentative agreements to reduce salaries by 5% and decrease employer contributions for health benefits from 60% to 50% of premiums, Respondents immediately repudiated and breached the April 27, 2011 agreement by proceeding to unilaterally implement said cuts in salary and employer contribution amounts for health benefit plans without employee approval or ratification.

77. The unilaterally implemented changes, which all bargaining unit employees were notified of by letter dated June 23, 2011 from Respondent Matayoshi, contained provisions for "Directed Leaves Without Pay" on dates which had not been "mutually agreed upon" as required by paragraph 2 of the April 27, 2011 tentative agreement, and provided for "employee" contributions for health care coverage and benefits which had not been the subject of negotiations and which were contrary to paragraph 4 of the April 27, 2011 tentative agreement.

78. Respondents' unilateral actions were undertaken in direct response to the unanimous vote of the board of directors taken on June 21, 2011, and was retaliatory and discriminatory in nature. These actions are contrary to the provisions of Sections 89-3, HRS, which prohibit any interference, restraint, or coercion for the exercise of protected concerted activities by public employees, and the implementation of wage reductions and decreases in employer contribution amounts are contrary to paragraphs 5 and 6 of the April 27, 2011 tentative agreement, and constitutes unlawful discrimination in terms and conditions of employment to discourage membership and participation in an employee organization in violation of Sections 89-3, and 89-13 (a) (1) and (3), HRS.

79. Courts and labor boards have consistently recognized that enforcement of rules establishing the procedure governing discussion and consideration of proposals for a new or amended agreement must be enforced whether those agreements were entered orally or in writing during the course of bargaining. See Local 3-7, Int'l Woodworkers of Am. v. DAW Forest Products Co., 833 F.2d 789 (9th Cir. 1987) (memorandum which outlines the agreed upon

procedure governing discussion and consideration of proposals for new working agreement is enforceable).

80. By the aforementioned conduct Respondents violated Section 89-10 (a), HRS, contravened the duty to bargain in good faith (from which is derived the duty to abide and honor an agreement which is a by-product of collective bargaining), and committed prohibited practices in violation of Section 89-13 (a) (3), (5), (7), and (8), HRS.

VII.

COUNT IV - DIRECT DEALING WITH EMPLOYEES

81. The allegations contained in paragraphs 1 through 80 are restated, re-alleged, and fully incorporated herein.

82. It is a fundamental principle of collective bargaining that an employer may not engage in "direct dealing" with employees and thereby circumvent the union as the "exclusive representative" of all employees in the bargaining unit as it relates to wages, hours, and other terms and conditions of employment. J.I. Case Co. v. N.L.R.B., 321 U.S. 332, 337-38 (1944); Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346-47 (1944); Medo Photo Supply Corp. v. N.L.R.B., 321 U.S. 678, 684 (1944).

83. The provisions of HRS chapter 89 were tailored to the private sector model of collective bargaining with certain key modifications. Under Section 89-3, HRS, public employees have a right to form, join, and assist an employee organization of their choice to negotiate on questions of wages, hours, and other terms and conditions of employment, and upon certification following an election conducted under Section 89-7, HRS, the employee organization which is certified as the exclusive bargaining representative has "the right to act for and negotiate agreements covering all employees in the unit" under Section 89-8 (a), HRS, and the employer is obligated to recognize the organization as the exclusive representative of all bargaining unit employees throughout the process of bargaining. Section 89-10 (a), HRS, also provides that no agreement is valid or enforceable without ratification by public employees. In addition, HRS chapter 89 does not contain an employer "free speech" provision which allows the employer to express any views, argument, or opinion as provided in 29 U.S.C. § 158 (c) (the private sector law).

84. In accordance with the foregoing provisions of HRS chapter 89 upon the certification of HSTA on May 21, 1971 complainant has negotiated sixteen successive collective

bargaining agreements through an established procedure and practice which entails (a) negotiating teams composed exclusively of teachers to negotiate a proposed agreement or changes, (b) a full negotiating committee (composed exclusively of teachers) to review and recommend to the board of directors approval or rejection of the proposed agreement or changes, (c) a board of directors (composed exclusively of teachers) to approve or reject proposed agreement or changes, and (d) a staff to prepare an agreement or changes (after approval by the board of directors) for employee review, discussion, and ratification without employer involvement. These procedures and practices have been established in accordance with Articles I and II of the collective bargaining agreement and is an established past practice and custom of the parties.

85. On and after June 21, 2011 Respondents undermined the established procedure for union recognition and bargaining by sending to 12,486 bargaining unit 5 employees the terms and provisions of a “tentative agreement” which had been rejected by the negotiating team and negotiating committee on June 20, 2011, and unanimously by the board of directors on June 21, 2011, and could not be subject to ratification by bargaining unit 5 employees. This was an unprecedented act by a public employer.

86. The June 23, 2011 letter and transmittal failed to provide an accurate account of the bargaining process or the tentative agreements which had been rejected, unilaterally implemented new terms and conditions of employment, and informed employees that the employer would prepare the terms of the new agreement for distribution to employees.

87. On and after June 23, 2011 Respondents have been urging teachers in the bargaining unit to by-pass the Association, and vote to ratify the terms of an unapproved and rejected collective bargaining agreement, and has refused to negotiate further with HSTA.

88. The Hawaii Labor Relations Board (HLRB or Board) has also consistently held that “direct dealing” with employees interferes with the role of the exclusive representative and undermines the collective bargaining process contemplated under HRS chapter 89. State of Hawaii Org. of Police Officers (SHOPO) and Linda Crockett Lingle, 5 HLRB 597, 609 (1996); Linda Lingle and United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 650, 671 (1996); United Public Workers, AFSCME, Local 646, AFL-CIO and Glenn Okimoto, 6 HLRB 319, 333 (2003).

89. By the aforementioned and other conduct to be established at a hearing in this case Respondents have interfered, restrained, and coerced employees in the exercise of their rights guaranteed by Section 89-3, HRS, infringed the right of union recognition as provided by Section 89-8 (a), HRS, and Article I of the collective bargaining agreement, and violated the provisions on employee ratification as set forth by Section 89-10 (a), HRS, and thereby committed prohibited practices contrary to Section 89-13 (a) (1), (3), (7), and (8), HRS.

VIII.

COUNT V - BREACH OF THE DUTY TO BARGAIN

90. The allegations contained in paragraphs 1 through 89 are restated, re-alleged, and fully incorporated herein.

91. An employer is required by HRS chapter 89 under the duty to bargain in good faith (a) to vest their negotiators with sufficient authority to carry on meaningful bargaining, (b) to refrain from unilaterally implementing changes in wages, hours, and terms and conditions of employment during the course of a collective bargaining relationship, (c) to supply the union, upon request, sufficient information to enable it to understand and intelligently discuss the issues raised in bargaining, (d) to refrain from bargaining directly with employees, and (e) to meet and confer. Labor boards and courts have held that violations of these basic requirements constitute a per se violation of the duty under Section 89-9 (a), HRS, and constitutes prohibited practices in violation of Section 89-13 (a) (1), (5), and (7), HRS.

92. In the present case Respondent Abercrombie who was elected on November 2, 2010 and installed into office on December 6, 2010 declined to vest authority to conduct meaningful negotiations with HSTA as required by Section 89-6 (d), HRS, until on or about April 14, 2011. After the April 27, 2011 "tentative agreement" was entered Respondent Abercrombie and Respondent Young declined to authorize any further bargaining over the five percent salary reduction and the decrease in employer contributions for health benefits by any of the other Respondents. Furthermore, after April 27, 2011 Respondent Williams was out of the state and country for a considerable period, and Respondents Matayoshi, Horner, and Williams were without authority to negotiate any modification or change to the statewide governmental policy established by Respondent Abercrombie or to negotiate in good faith over the language on proposed changes to Article XVIII or Appendix XVIII.

93. On and after June 3, 2011 when Respondents prematurely declared an impasse in bargaining Respondents Matayoshi, Horner, Dietz, and Williams refused to recognize the HSTA bargaining team, declined to provide information needed by the Association on open items for negotiations, by-passed the established practice and procedure for the conduct of negotiations through the negotiating team and ratification by the board of directors, made unilateral changes to the last, best, and final offer of the employer which had expired, and commenced implementing numerous changes in wages, hours, and other terms and conditions of employment, including but not limited to the five percent reduction in salaries, the establishment of employee contribution amounts, the designation of the dates of directed leaves without pay and actual implementation of those dates in multi-track schools and elsewhere (in the absence of mutual agreement with HSTA), changes in the amount of the callback pay and other compensation associated with implementing the "Race to the Top" program contrary to Appendix XIII of the collective bargaining agreement, and increased the work day contrary to Article VI of the collective bargaining agreement.

94. The free flow of information is such a vital aspect of the collective bargaining process that an employer commits an unfair labor (or prohibited) practice when it fails to provide to a bargaining representative of employees information it needs to perform its duties. N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149 (1956).

95. Nearly forty-nine years ago the U.S. Supreme Court held in N.L.R.B. v. Katz, 369 U.S. 736 (1962), that a unilateral change in wages, hours, and other terms and conditions of employment by an employer constitutes a refusal to bargain in violation of Section 8 (a) (5) of the Labor Management Relations Act. The Katz doctrine was adopted and applied by the Hawaii Supreme Court in Univ. of Hawaii Prof'l Assembly v. Tomasu, 79 Hawai'i 154, 159, 900 P.2d 161, 166 (1995), where the University's unilateral adoption of a policy implementing the Drug Free Workplace Act was found to violate Section 89-13 (a) (5), HRS. The Katz doctrine adopted in Tomasu, 79 Hawai'i at 159, 900 P.2d at 166, is now well established in approximately twenty two (22) other states where public sector collective bargaining exists.

96. By the aforementioned and other conduct to be established during the course of these proceedings Respondents have breached their duty to bargain in good faith contrary to Section 89-9 (a), HRS, and have committed prohibited practices in violation of Section 89-13 (a) (1), (5), (7), and (8), HRS.

IX.
PRAYER FOR RELIEF

WHEREFORE, complainant requests the Board pursuant to Section 377-9 (d), HRS (and the Court pursuant to Section 377-9 (f), HRS, and Section 380-14, HRS), to grant to public employees in bargaining unit 5 and HSTA appropriate relief against Respondents, their agents, representatives, employees (acting under their direction or control), assigns, and other persons acting in their interest in dealing with public employees, individually and collectively as follows:

(1) Interlocutory relief enjoining Respondents from implementing the statewide governmental policy to reduce wages and salaries by five percent and to decrease employer contributions for health benefits to 50% of premium costs, from engaging in “take-it-or-leave it” bargaining, from making threats of wage cuts, nasty working conditions or layoffs, from repudiating and breaching the negotiating rules and agreements, from engaging in direct dealing with employees, from refusing to meet and confer or to engage in further bargaining, from refusing to vest negotiators with sufficient authority to carry on meaningful remedies, from making unilateral changes in wages, hours, and other working conditions, from engaging in retaliatory and discriminatory acts to discourage membership and participation in an employee organization, from refusing to supply to the union, upon request, sufficient information to enable it to understand and intelligently discuss the issues raised during bargaining, and from refusing to comply with the terms and provisions of the collective bargaining agreement;

(2) Injunctive relief and cease and desist orders to restore the status quo ante existing on June 30, 2011, to compel Respondents to meet and confer, and to cease and desist from interfering, restraining, or coercing employees from the free exercise of their rights guaranteed under HRS chapter 89, and to enjoin Respondents and all persons acting in their interest from failing to comply with the interlocutory relief requested and prayed for herein in item (1);

(3) To render declaratory relief in favor of complainant sustaining counts I through V of the prohibited practice complaint (as well as the constitutional challenges presented in count I);

(4) To invalidate statutes and legislation which as applied in this case withdraws core subjects of collective bargaining, that is, wages, hours, and terms and conditions

of employment from the process of collective bargaining, and/or which impinges on public employee rights to organize for the purpose of collective bargaining;

(5) To order Respondents to take affirmative action, including reinstatement of employees and make whole orders in favor of employees making them whole, including back pay with interest, costs, and attorney's fees;

(6) To order Respondents to pay civil penalties of \$10,000 per violation for willfully or repeatedly committing prohibited practices that interfere with statutory rights of employees or discriminates against employees for the exercise of protected conduct during bargaining and threats of loss of wages, benefits, and jobs; and

(7) To order such remedies which are considered just and appropriate under the circumstances presented in this case.