STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY; KEVIN BENNETT, Associate Professor of Biology, Department of Biology, University of Hawai'i; and KATHLEEN COLE, Associate Professor of Biology, Department of Biology, University of Hawai'i, Complainants, and KRISTIN KUMASHIRO, Interim Dean of Natural Sciences, University of Hawai'i; and BOARD OF REGENTS OF THE UNIVERSITY OF HAWAI'I, Respondents.	CASE NO. CE-07-874 ORDER NO. 3163 ORDER GRANTING IN PART AND ORDERING FURTHER BRIEFING WITH RESPECT TO REMAINDER OF UNIVERSITY RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT AND/OR FOR SUMMARY JUDGMENT

ORDER GRANTING IN PART AND ORDERING FURTHER BRIEFING WITH RESPECT TO REMAINDER OF UNIVERSITY RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT AND/OR FOR SUMMARY JUDGMENT

The Hawaii Labor Relations Board (Board) issues this order granting in part and ordering further briefing with respect to the remainder of University Respondents'[1] Motion to Dismiss Prohibited Practice Complaint and/or for Summary Judgment filed on January 15, 2016 (Motion to Dismiss) with attached Memorandum in Support of Motion to Dismiss Prohibited Practice Complaint and/or for Summary Judgment (UH Memorandum), Declaration of Kristin

[1] The "University Respondents" are Kristin Kumashiro, Interim Dean of Natural Sciences, University of Hawai'i (Dr. Kumashiro or Interim Dean Kumashiro), and the Board of Regents of the University of Hawai'i (BOR). They shall be jointly referred to herein from time to time as University Respondents, UH and/or the University. Complainant University of Hawaii Professional Assembly shall be referred to herein from time to time as Union or UHPA, Complainant Dr. Kevin Bennett shall be referred to as Dr. Bennett, Dr. Kathleen Cole shall be referred to as Dr. Cole, and all three complainants shall collectively be referred to as the Complainants.

Kumashiro, Exhibit "A", Declaration of Mary Hoffman, Exhibits "B" - "H", Declaration of Brian Taylor, Exhibit "I", Declaration of Sarah Hirakami and Exhibits "J" - "R".[2]

I. Background.

On December 21, 2015, Complainants UHPA, Dr. Bennett and Dr. Cole filed their Prohibited Practice Complaint (Complaint) with the Board against the University Respondents.

The Complaint involves two separate disputes.[3] One dispute involves a letter of hire dated June 18, 2012 from Dr. William L. Ditto, Dean of the College of Natural Sciences (Dean Ditto), to Dr. Bennett, which was agreed to by Dr. Bennett on July 12, 2012 (Letter of Hire).[4] The second dispute involves the removal of Dr. Cole as the Chair of the Department of Biology at UH. The Complaint alleges breaches of the Unit 7 collective bargaining agreement as defined in Hawaii Revised Statutes (HRS) § 89-13(a)(8); violations of the duty to bargain as set forth in HRS § 89-13(a)(5); anti-union discrimination in violation of HRS § 89-13(a)(3); and violations of the statutory right of employees to collective action as set forth in HRS §§ 89-13(a)(l) and 89-3.

A. Dr. Bennett's Claims.

(1) Description of Dr. Bennett's Claims. Dr. Bennett's prohibited practice claims require the Board to determine whether a pre-hiring negotiation between Dr. William Ditto (Dean Ditto), Dean of UH's Biology Department, and a prospective Unit 7 employee (Dr. Bennett) culminating in the execution of the Letter of Hire without the involvement of the union[5] and the public employer,[6] is a collective bargaining activity such that contractual obligations arising out of said pre-hiring negotiations and the Letter of Hire are subject to the provisions of Chapter 89, HRS.

Prior to agreeing to join UH, Dr. Bennett was an assistant professor at Arizona State University. Among other things, the Letter of Hire provided that:

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2 Various memoranda and declarations were filed in opposition to and in support of the Motion to Dismiss. References to exhibits are based on the exhibit numbers assigned to the same by the parties.

3 Hawaii Revised Statutes (HRS) Section 89-14 provides that "[a]ny controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9." HRS Section 377-9(b) provides that "[o]nly one complaint shall issue against a person with respect to a single controversy." Although the University Respondents did not object, the Complaint alleges two separate controversies -- Dr. Bennett's claims regarding his letter of hire, and Dr. Cole's removal as department chair. Thus, these two separate claims raise separate and distinct issues. Without requiring UHPA, Dr. Bennett and Dr. Cole to file separate prohibited complaints, the Board shall treat each claim as separate and independent complaints.

4 A copy of the Letter of Hire is attached as Exhibit "A" to the Motion to Dismiss.

5 UHPA is the exclusive representative of Unit 7.

6 State of Hawaii/UH Board of Regents as the recognized "public employer" party in the CBA.

(a) Dr. Bennett would be hired effective as of January 1, 2013, as an associate professor (Rank I4, Position 83692) in the Department of Biology, and as Special Advisor to the Dean, and would receive two months of summer overload.

(b) His annual salary would be $105,000 (paid over 12 months).

(c) His probationary period would be three years, but he could "request [to] shorten or lengthen the probationary period."

(d) He was "expected to develop and maintain an active and productive research program" and "to enable [him] to startup a preclinical imaging facility, resources [would] be made available to enable [him] to order an Agilent DirectDrive 9.4T/16MRI/MRS system and a minimum of 250 square feet of suitable laboratory space to locate the preclinical imaging system with console/operator area and associated electronics" (the MRI Project). In addition, "the College of Natural Sciences will provide [him] with startup funds in the amount of $450,000 provided over a three-year period and sufficient wet lab space to startup [his] own research lab."

(e) Because he was also being hired to act as a Special Advisor to the Dean and as "the managing faculty of the new preclinical imaging facility [he] would be developing, [his] teaching role will be one course per academic year."[7] "To help [him] establish [his] research program," Dr. Bennett had no teaching responsibilities for the first year.

None of the parties provided the Board any evidence that any of the foregoing terms are or were, at any time, inconsistent with the terms of the collective bargaining agreement in effect at the time.[8] Neither Dr. Bennett nor UHPA alleged that any of the foregoing provisions were "breached" by UH except for UH's alleged obligation to acquire and provide adequate space for an MRI machine and related equipment.

There is no dispute that during the negotiation of the Letter of Hire and at the time the Letter of Hire was entered into, Dr. Bennett was not an employee of UH and not a member of UHPA. It is also undisputed that neither UHPA, on the one hand, nor the State of Hawaii, the UH President or the BOR, on the other, participated in the negotiation of, and did not sign, the Letter of Hire. In essence, the Letter of Hire was a private agreement negotiated

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[7] The normal academic load is "typically two courses per semester." *See*, Letter of Hire.

[8] The collective bargaining agreement dated January 16, 2010, and effective July 1, 2010 through June 20, 2015 (2010 CBA) was in effect at the time the Letter of Hire was negotiated and signed, and when Dr. Bennett started work at UH. *See*, Article XXX, 2010 CBA at p. 49. The parties to the 2010 CBA were the State of Hawaii, the UH President and the BOR, on the one hand, and UHPA, on the other. A "new" collective bargaining agreement dated June 27, 2014, and effective as of July 1, 2015 through June 30, 2017, was entered into between the State of Hawaii, the UH President and the BOR, on the one hand, and UHPA, on the other (2015 CBA). As with the 2010 CBA, neither party argued or alleged that any of the terms of the Letter of Hire are or were inconsistent with the 2015 CBA.

and entered into by Dr. Bennett and Dean Ditto of the UH Biology Department.[9] There is also no evidence (including any past practice or course of dealing) supporting UHPA's argument that (1) the State of Hawaii, the UH President and the BOR delegated to Dean Ditto the authority, or deputized him, to act on behalf of their behalf, or more importantly, (2) UHPA delegated to Dr. Bennett the authority, or deputized him, to act on behalf of UHPA, with regard to (in each case) collective bargaining matters.[10] At most, there is a showing that UH hired faculty through the use of letters of hire.

The MRI Project was cancelled by Dr. Kumashiro[11] on September 24, 2015, after the expiration of the 2010 CBA and during the term of the 2015 CBA. However, again, neither party submitted any evidence that any of the terms of the Letter of Hire are inconsistent with the terms of the 2015 CBA or that the cancellation of the MRI Project was in violation of any term of either the 2010 or 2015 CBA's. In fact, there is no dispute that the Letter of Hire does not refer to the 2010 CBA or any of its terms and conditions.

Dr. Bennett does not appear to dispute that the Letter of Hire is not a collective bargaining agreement. Instead, he argues that the Letter of Hire contains bargainable topics, such as wages, and the MRI Project (although not normally bargainable) becomes bargainable because it affects Dr. Bennett's conditions of employment. Based on this, UHPA and Dr. Bennett argue that all of the terms and conditions of the Letter of Hire are within the scope of collective bargaining as established by HRS § 89-9(a). UHPA and Dr. Bennett further argue that both Dr. Bennett and Dean Ditto were designated as authorized representatives of UHPA and the State of Hawaii, the UH President and the BOR, respectively, to negotiate the terms of the Letter of Hire. There is, however, no evidence that UHPA delegated any of this authority to Dr. Bennett (at the time, a non-member) and no evidence that either the State of Hawaii, UH President or the BOR delegated any authority to Dean Ditto to engage in collective bargaining activities.

Dr. Bennett seeks a declaratory ruling from the Board that, among other things:

(a) The Letter of Hire, "including terms establishing startup-funding, procurement of equipment or provision of space, . . . are within the scope of [collective] bargaining established by § 89-9(a) HRS."[12]

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[9] The Board does not address the enforceability of the Letter of Hire since it is not germane to its decision herein on Dr. Bennett's alleged prohibited practice claim.

[10] The Board notes that the 2010 and 2015 CBAs were signed by, among others, the Governor, members of the BOR, the UH President and various representatives of UHPA.

[11] Sometime during August 2015, Dr. Kumashiro was named Interim Dean of the College of Natural Sciences, replacing Dean Ditto.

[12] *See,* Paragraph a. on page 5 of the Complaint.

(b) "Collective bargaining parties, by agreement, may delegate negotiation of initial terms of hire of a member of Unit 7 . . . to faculty, their academic departments, and subordinate agents of the Public Employer, as has been done traditionally in Unit 7, without depriving initial terms of their bargainability."[13]

(c) "When initial terms of hire are negotiated between faculty, their academic departments, and subordinate agents of the Public Employer, pursuant to delegation, they are valid and enforceable contracts, binding on collective bargaining parties, to the same extent as any collective bargaining agreement."[14]

Dr. Bennett also seeks from the Board factual findings and legal conclusions that the Letter of Hire is valid and enforceable, Dr. Kumashiro was without authority under the CBA or law to cancel the MRI Project and that such cancellation was a willful violation within the meaning of HRS § 89-13(a), and UH's behavior with respect to the Letter of Hire and the cancellation of the MRI Project are "egregious and malicious" and justify special remedies against UH.

Finally, Dr. Bennett seeks orders from the Board to compel UH to (i) expedite the purchase and installation of an MRI machine for Dr. Bennett, (ii) pay for all expenses incurred by Dr. Bennett in this matter, (iii) provide Dr. Bennett additional "startup" funding for an MRI machine, (iv) pay Dr. Bennett's attorneys' fees, (v) pay interest on any award to Dr. Bennett, (vi) pay for a "master" to be appointed by this Board to monitor compliance with the Board's orders, (vii) post a notice of the sanctions imposed by this Board at certain designated places of the UH campuses, and (viii) provide other further relief as may be just and equitable.

(2) Motion to Dismiss Dr. Bennett's Claims. Regarding Dr. Bennett's claims, the Motion to Dismiss asserts that the Board lacks jurisdiction over his claims for the following reasons:

(a) The Letter of Hire is not a collective bargaining agreement subject to HRS chapter 89.

(b) Even if the Letter of Hire were to be construed by the Board as a collective bargaining agreement, Dr. Bennett failed to exhaust his contractual remedies.

(c) The Letter of Hire expired pursuant to the terms of the Unit 7 collective bargaining agreement and HRS § 89-6(e).

Furthermore, UH argues in its motion that it acted in good faith in attempting to purchase and install the MRI machine, and after the purchase was cancelled at Dr. Bennett's recommendation, it acted in good faith in discussing the possibility of purchasing an alternative MRI machine. UH further argues that the decision to purchase the million-dollar

[13] *See,* Paragraph c. on page 5 of the Complaint.
[14] *See,* Paragraph e. on page 6 of the Complaint.

MRI machine and renovate facilities is a management right and one that is subject to funding as well as the financial needs of the UH Biology Department, and that Dr. Bennett failed to mitigate damages, if any.

B. Dr. Cole's Claims.

(1) Description of Dr. Cole's Claims. Dr. Cole was and currently is an Associate Professor of Biology at UH. According to Dr. Cole, she accepted the Chair of the UH Biology Department subject to certain terms agreed to by Dr. Ditto, then the Dean of the UH College of Natural Sciences.

Dr. Ditto left UH for North Carolina State University and Dr. Kumashiro was named Interim Dean of the College of Natural Sciences as of August 21, 2015. Dr. Cole's Chair position was renewed in August 2015 by Dr. Kumashiro. However, on or about September 23, 2015, Dr. Kumashiro removed Dr. Cole as Chair of the Biology Department.

Based on the Board's review of the Complaint's prayer, it seems that Dr. Cole seeks a declaratory ruling from the Board that:

(a) The term of service of Dr. Cole's position as department Chair, including the specific terms and conditions attached to her service, are within the scope of collective bargaining under HRS § 89-9(a).[15]

(b) "Collective bargaining parties, by agreement, may delegate negotiation of . . . the terms of service of a department chair, to faculty, their academic departments, and subordinate agents of the Public Employer, as has been done traditionally in Unit 7, without depriving initial terms of their bargainability."[16]

(c) "When terms of service as chair are negotiated . . . pursuant to delegation, they are . . . binding on collective bargaining parties, to the same extent as any collective bargaining agreement."[17]

Dr. Cole also seeks from the Board factual findings and legal conclusions that Dr. Cole's terms of service as Chair of the Biology Department are valid and enforceable, Dr. Kumashiro was without authority under the CBA or law to remove Dr. Cole as Department Chair or remove her funding and that such removal of Dr. Cole as Department Chair was a willful violation within the meaning of HRS § 89-13(a), and UH's behavior with respect to the removal of Dr. Cole as Department Chair was "egregious and malicious" and justifies special remedies against UH.[18]

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15 *See,* Paragraph b. on page 5 of the Complaint.

16 *See,* Paragraph c. on page 5 of the Complaint.

17 *See,* Paragraph e. on page 6 of the Complaint.

18 Although UHPA and Dr. Cole argue that the "terms of service" as a department chair is, in effect, an

Dr. Cole further seeks orders from the Board to compel UH to (i) offer Dr. Cole reinstatement as Chair of the Biology Department and "restore the full value of her terms of service, including funding, and take such other actions as shall make her whole," (ii) pay for Dr. Cole's attorneys' fees and costs, (iii) pay interest on any award to Dr. Cole, (iv) pay for a "master" to be appointed by this Board to monitor compliance with the Board's orders, (v) post a notice of the sanctions imposed by this Board at certain designated places of the UH campuses, and (vi) other further relief as may be just and equitable.

(2) Motion to Dismiss Dr. Cole's Claims. Regarding Dr. Cole's claims, the Motion to Dismiss asserts that Dean Kumashiro had valid, non-retaliatory reasons for removing Dr. Cole as Chair of the Department of Biology and that Dr. Cole failed to mitigate damages, if any.

C. Motion to Dismiss Submissions and Hearing.

At the request of the parties and as set forth in the Notice of Further Revised Schedule dated January 19, 2016, oral arguments on Motion to Dismiss were set for February 4, 2016 and a briefing schedule was adopted.

On January 25, 2016, Complainants filed University of Hawaii Professional Assembly's Memorandum in Opposition to University Respondents' Motion to Dismiss Prohibited Practice Complaint and/or for Summary Judgment filed on January 15, 2016 (UHPA's Memo), together with the Declaration of Kevin Bennett, Ph.D., Declaration of Kathleen Cole, Ph.D., and the Declaration of James D. Kardash, Ph.D. (Dr. Kardash). Subsequently, on January 29, 2016, Complainants filed University of Hawaii Professional Assembly's Supplemental Citations to Propositions in its Memorandum of Opposition to University Respondents' Motion to Dismiss Prohibited Practice Complaint and/or for Summary Judgment.[19]

On February 1, 2016, UH filed with the Board the University Respondents' Reply Memorandum to UHPA's Memorandum in Opposition to University Respondents' Motion to Dismiss Prohibited Practice Complaint and/or for Summary Judgment filed January 15, 2016, together with the Declaration of Mary Hoffman and Exhibit "S," and the Declaration of Kristin Kumashiro and Exhibit "T."

On February 4, 2016, oral arguments on UH's Motion were held before the Board.

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enforceable contract and a part of the collective bargaining agreement, the central issue is whether Dr. Cole's removal as a department chair was in accordance with the terms and conditions of the 2010 CBA or the 2015 CBA. If the Board finds, for example, that Dr. Cole's removal was wrongful, then her "terms of service" would still be in effect; and if the board finds that Dr. Cole's removal was correct, then the issue of her "terms of service" would be irrelevant.

[19] On January 29, 2016, Complainants filed University of Hawaii Professional Assembly's Errata to Declarations of Kevin Bennett, Kathleen Cole, and James Kardash.

Pursuant to the Board's Order No. 3150 filed on February 22, 2016 (granting UHPA's informal request for leave to file a supplemental brief), (1) Complainants filed their Supplemental Brief on February 29, 2016 (Union Supplemental Brief), and (2) University Respondents filed their Supplemental Memorandum; Second Supplemental Declaration of Kristin Kumashiro; Exhibit "U" on March 7, 2016 (UH Supplemental Brief).

II. Standards of Review.

A. Motion to Dismiss.

The Board adheres to the legal standards set forth by the Hawaii appellate courts for motions to dismiss under the Hawaii Rules of Civil Procedure (HRCP) Rule 12(b).

In responding to an HRCP Rule 12(b) motion to dismiss based on lack of subject matter jurisdiction, "a party who seeks to invoke the jurisdiction of the court has the burden of proving the actual existence of subject matter jurisdiction." Thompson v. McCombe, 99 F.3d 352, 353 (9th Cir. 1996); Trentacosta v. Frontier Pac. Aircraft Indus. Inc., 813 F.2d 1553, 1559 (9th Cir. 1987). The question of jurisdiction is a question of law which is reviewed de novo under the right/wrong standard. Lingle v. Hawai'i Gov't Employees Ass'n, 107 Hawai'i 178, 182, 111 P.3d 587, 591 (2005). In considering a motion to dismiss for lack of subject matter jurisdiction, the Board is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Casumpang v. ILWU, Local 142, 94 Hawaii 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawaii 1, 7, 175 P.3d 111, 117 (App. 2007).

B. Motion for Summary Judgment.

HRCP Rule 56(b) provides that a party "may move with or without supporting affidavits for a summary judgment in the party's favor[.]" *Ralston v. Yim*, 129 Hawaii 46, 56, 292 P.3d 1276, 1286 (2013) (*Ralston*). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show, that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." Id. at 55 - 56, 292 P.3d at 1285 - 1286; *Querubin v. Thronas,* 107 Hawaii 48, 56, 109 P.3d 689, 697 (2005); *Thomas v. Kidani*, 126 Hawaii 125, 129, 267 P.3d 1230, 1234 (2011). Further, any doubt concerning the propriety of granting a motion for summary judgment should be resolved in favor of the non-moving party. *French v. Hawaii Pizza Hut, Inc.*, 105 Hawaii 462, 473, 99 P.3d 1046, 1057 (2004) (*French*).

Where the non-movant bears the burden of proof at trial, as is the case here, the Hawaii Supreme Court adopted the "burden shifting" paradigm: first, the moving party has the burden of producing support for its claim that (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions, and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law; once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. *French*, supra, 105 Hawaii at 470, 99 P.3d at 1054.

Thus, where the non-movant bears the burden of proof at trial, a movant may demonstrate that there is no genuine issue of material fact by either: (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the non-movant will be unable to carry his or her proof at trial. *Ralston*, supra, 129 Hawaii at 56-57, 292 P.3d at 1286 - 1287; *French*, supra, 105 Hawaii at 472, 99 P. 3d at 1056. However, "[w]hen a motion for summary judgment is made and supported as provided in [HRCP Rule 56], an adverse party may not rest upon the mere allegations or denials of his [or her] pleading, but his [or her] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he [or she] does not so respond, summary judgment, if appropriate, shall be entered against him [or her]." *Foronda v. Hawaii International Boxing Club*, 96 Hawaii 51 , 58, 25 P.3d, 826, 833 (2001); *Tri-S Corp. v. Western World Insurance Co.*, 110 Hawaii 473, 494 n.9, 135 P.3d 82, 103 n. 9 (2006).

Finally, when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but his or her response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against him or her. *Foronda v. Hawaii International Boxing Club,* 96 Haw. 51, 58, 25 P.3d, 826, 833 (2001); *Tri-S Corp. v. Western World Insurance Co.*, 110 Haw. 473, 494 n. 9, 135 P.3d 82, 103 n. 9 (2006).

C. Applicable Standard. Since matters outside of the pleadings were submitted by the parties (i.e., declarations and exhibits) and are being considered by the Board, the Motion to Dismiss shall be treated as a motion for summary judgment, and the applicable standard to be applied to the Motion to Dismiss is the summary judgment standard outlined immediately above.

III. Discussion, Conclusions of Law and Order.

If it should be determined that any of findings of fact or conclusions of law should have been set forth as conclusions of law or findings of fact, respectively, then they are be deemed to be such.

A. Motion to Dismiss Dr. Bennett's Claims.

University Respondents argue that the Board does not have subject matter jurisdiction over Dr. Bennett's claims. With respect to the subject matter jurisdiction of this Board, the Hawaii Supreme Court held that the Board's jurisdiction is limited to issues related to collective bargaining and prohibited practice controversies. *UPW v. Abercrombie,* 133 Haw. 188, 205 (2014). Thus, in addressing Dr. Bennett's claims, the first issue is whether Dr. Bennett's claim for breach of the Letter of Hire can be litigated before the Board as a collective bargaining dispute.

In the Motion to Dismiss, University Respondents argue that the Letter of Hire is not a collective bargaining agreement,[20] and as a consequence, the Board lacks jurisdiction over the Letter of Hire. University Respondents point out that Dr. Bennett is not without recourse and that the proper forum to decide Dr. Bennett's breach of contract claim is elsewhere, e.g., the civil courts. There is no dispute that the Letter of Hire was (1) entered into when the 2010 CBA was in effect, (2) the parties to the 2010 CBA were not involved in the negotiation and signing of the Letter of Hire and (3) the terms of the Letter of Hire do not mention or incorporate, and are not in conflict with, the terms of the 2010 CBA. Further, in outlining the duties of a dean of a college at UH (which includes the recruitment of faculty), it is clear that a dean does not have any authority to bargain collectively on behalf of UH, the BOR, the Governor or the UH President.[21]

In response, Dr. Bennett and UHPA allege that the Letter of Hire contains a bargainable topic (i.e., wages), and although UHPA admits that the MRI-related terms in the Letter of Hire are not wages, UHPA argues that the MRI-related obligations are "conditions of employment" and are, therefore, collective bargaining topics along with the wages.[22] UHPA further argues, "[i]f the MRI-related items are terms and conditions of employment, then the Board can reach and interpret the letters of hire to that extent."[23] Further, citing to *Univ. of Hawaii Prof'l Assembly v. Cayteno*, 183 F.3d 1096 (9th Cir. 1999) (Cayetano Case), UHPA and Dr. Bennett argue that "a labor contract can protect past practice of the parties; their course of dealing can create a contractual obligation."[24] UHPA and Dr. Bennett then conclude that,

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[20] The Board includes in its discussion of whether the Letter of Hire is a collective bargaining agreement allegations or assertions that the Letter of Hire supplemented, amended or otherwise changed the 2010 CBA or the 2015 CBA.

[21] *See*, Declaration of Kristin Kumashiro dated January 15, 2016, at Para. 30, and Declaration of Brian Taylor, PH.D. dated January 15, 2016, at Para. 6, both of which were attached to the Motion to Dismiss.

[22] *See,* UHPA's Memorandum in Opposition to University Respondents' Motion to Dismiss Prohibited Practice Complaint and/or for Summary Judgment filed on January 15, 2016, at pages 10 – 11.

[23] *Id.* at page 13.

[24] Union Supplemental Brief at p. 4. As discussed in more detail below, the Board notes that in the Cayetano Case, the U.S. District Court and the Ninth Circuit Court were dealing with how a collective bargaining agreement should be interpreted and construed ("i]n *construing* a collective bargaining agreement, not only the collective bargaining agreement is considered, but also past interpretation and past practices are probative"). Cayetano Case,

because faculty are normally hired pursuant to a letter of hire and because such letters of hire touch upon bargainable issues, all letters of hire should be considered to be collective bargaining agreements.

In deciding this case, the Board finds that the only act of collective bargaining engaged in by the public employer (State of Hawaii/BOR/UH president) and UHPA was the negotiation and execution of the 2010 CBA, and the public employer and UHPA were not involved in any way in the negotiation and execution of the Letter of Hire. Thus, it is not surprising that the Letter of Hire does not mention or in any way recognizes the 2010 CBA because it was a private contractual arrangement irrespective of the 2010 CBA.

Therefore, the Board finds and determines that the Letter of Hire is not a collective bargaining matter governed by Chapter 89 and that the Board does not have subject matter jurisdiction over the Letter of Hire for each of the following reasons:

(1) The Letter of Hire is not a collective bargaining agreement and therefore the Board has no subject matter jurisdiction over Dr. Bennett's claims. HRS § 89-9(a), and the defined terms contained in HRS § 89-2, require a collective bargaining agreement be negotiated and entered into between two parties, the "employer" and the "exclusive representative," who acts on behalf of all employees in an appropriate bargaining unit. In this case, all collectively bargained contracts for Unit 7 employees are to be negotiated by and entered into between UHPA, as the "exclusive representative," and the State of Hawaii, the BOR and the President of UH, as the "employer." Here, the Letter of Hire is not a collective bargaining agreement for the following reasons, each of which defeats Dr. Bennett's claims:

(a) UHPA was not a party to the Letter of Hire, nor is there any evidence to support Dr. Bennett and UHPA's delegation theory. Dr. Bennett and UHPA do not dispute that UHPA was not a signatory party to the Letter of Hire. Instead, they suggest that UHPA delegated to Dr. Bennett its authority as the exclusive representative to negotiate, amend or add new terms to the 2010 CBA. However, Dr. Bennett and UHPA made no attempt in its opposition to the Motion to Dismiss or in the Union Supplement Brief to factually establish a delegation of UHPA's authority to collectively bargain to Dr. Bennett. Tellingly, Dr. Bennett's declaration did not address this issue, and Dr. Kardash[25] acknowledges in his declaration that "[i]n Unit 7 practice, UHPA has never signed off [on] . . . letters of hire" and that negotiations have been conducted "without supervision or acknowledgement by the union."[26] Either Dr.

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183 F.3d at 1102. Here, UHPA and Dr. Bennett are not asking the Board to construe a term or provision of the 2010 CBA, but instead seek a Board order finding that the Letter of Hire is a collective bargaining agreement, i.e., a part of the 2010 CBA. Thus, the holding in the Cayetano Case is not applicable.

25 Dr. Kardash is the Associate Executive Director for UHPA and has been employed by UHPA since 1978.

26 *See,* Declaration of James D. Kardash, Ph.D., at Paragraph 15. Dr. Kardash's Declaration is attached to UHPA's Memorandum in Opposition. The Board notes that the University Respondents denied that Dr. Bennett was delegated any authority to bargain collectively by any of the parties to the 2010 CBA and the 2015 CBA. Neither Dr. Bennett nor UHPA provided that Board with any "specific facts showing that there is a genuine issue for trial" and summary judgment should be entered against them. *Foronda v. Hawaii International Boxing Club, supra*, 96 Hawaii at 58; and *Tri-S Corp. v. Western World Insurance Co., supra*, 110 Hawaii at 494 n.9. Other than

Bennett or Dr. Kardash could have resolved this issue by clearly and unequivocally stating that Dr. Bennett was, in fact, delegated the authority to negotiate an amendment, supplement or other change to the collective bargaining agreement on behalf of UHPA. Tellingly, neither did, and the Board finds that there was no such delegation[27] and the Letter of Hire could not be a collective bargaining agreement.

(b) The Employer (State of Hawaii/UH BOR) did not sign the Letter of Hire and Dean Ditto was not authorized by the public employer to collectively bargain. Dr. Bennett and UHPA do not dispute that the employer of Unit 7 workers (State of Hawaii/BOR/UH President) was not a signatory party to the Letter of Hire. Instead, Dr. Bennett and UHPA contend that UH delegated its authority to collectively bargain to Dean Ditto, but they failed to provide the Board with specific facts or evidence to support its "delegation of authority" theory, i.e., that Dean Ditto was authorized to engage in bargaining activities or to negotiate, amend or add new terms to the 2010 CBA or the 2015 CBA. In fact, there are no facts to show that the BOR, the Governor or the UH President (the public employer in this case) delegated any collective bargaining authority to Dean Ditto or any other dean in the UH system.[28]

Moreover, UH is not an administrative or executive agency, but is, instead, a constitutionally independent corporation administered by the BOR.[29] Dean Ditto was employed by UH and not by the State of Hawaii. Since Dean Ditto was not an employee or representative of the State of Hawaii, it is even clearer that the Governor could not, and did not, delegate the authority to, or otherwise authorize, Dean Ditto collectively bargain on behalf of the State of Hawaii. Consequently, Dean Ditto, even if authorized to act on behalf of the BOR and the UH President in collective bargaining matters, was not so authorized by the State of Hawaii.[30] Therefore, Dean Ditto, in signing the Letter of Hire, was not, and could not, engage in

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argument and conjecture, no specific facts were provided by both Dr. Bennett and UHPA regarding the delegation of collective bargaining authority by UHPA to Dr. Bennett.

[27] If Dr. Bennett was not authorized to act on behalf of UHPA, even if Dean Ditto was authorized to act on behalf of the BOR, the State of Hawaii and the President of UH, there could be no amendment, supplementation or change to the CBA because UHPA had not agreed.

[28] The Board notes that part of the publicly available policies adopted by the BOR is Policy RP 9.203, provides in Section IV that "[t]here is no policy specific delegation of authority" in collective bargaining situations. While not determinative and not considered by the Board, the Board does caution the parties regarding factual statements regarding the authorization of employees to engage in collective bargaining activities.

[29] Constitution of the State of Hawaii Article X, Sections 5 and 6; and Att. Gen. Op. 61-84.

[30] For purposes of negotiating any collective bargaining agreement, it is clear that the "employer" for Unit 7 is the governor (3 votes), BOR (with two votes) and the UH President (with one vote). HRS Section 89-6(d)(4). HRS Section 89A-2 provides that the office of collective bargaining and managed competition "conduct negotiations with the exclusive representatives of each employee organization and designate employer spokespersons for each negotiation." If the Board were to agree with UHPA and Dr. Bennett's position, then its ruling would run afoul of the foregoing statutory provisions. Dean Ditto was not part of the office of collective bargaining and managed competition, and there is nothing provided by any of the parties which remotely suggests that Dean Ditto had been appointed as a spokesperson for any collective bargaining negotiations. Thus, Dean Ditto was clearly not authorized to act on behalf of the State of Hawaii in collective bargaining matters.

any collective bargaining activities on behalf of the "public employer," which in this case included the Governor, the BOR and the UH President.[31]

Based on the foregoing, the Board rejects UHPA and Dr. Bennett's argument that the State of Hawaii and BOR delegated to Dr. Ditto the authority to renegotiate the terms of the 2010 CBA on behalf the public employer. Since Dean Ditto was not so authorized, the Letter of Hire could not be a collective bargaining agreement.

(c) HPERB's Decision 63 supports the Board's determination that the Letter of Hire is not a collective bargaining agreement. UHPA and Dr. Bennett argue that the Hawaii Public Employment Relations Board's (HPERB) decision in *In the Matter of Hawaii Government Employees Association, Local 152, HGEA/AFSCME, AFL-CIO and George Ariyoshi, Governor, et al.*, Decision 63, I HPERB 570 (1975) (Decision 63), supports their argument that the Letter of Hire is a collective bargaining agreement.[32] In effect, UHPA and Dr. Bennett argue that "HGEA, in Decision 63, demanded bargaining, and the Board upheld its right to bargain in every respect. In this case, the fact that UHPA had not heretofore sought bargaining over letters of hire, does not mean that it could not do so now, or in the future."[33]

In Decision 63, HPERB was dealing with individual contracts of hire between the State of Hawaii and psychiatrists. The collective bargaining agreement provided in Article III that:

> "If there is any conflict between the provisions of this agreement and any of the rules and regulations of any civil service or other personnel regulations applicable to employees or any contracts between the employer and the employees, the terms of this agreement shall prevail; *provided that this Article shall not apply to personal services (individual) contracts.* (Italics in original.)"[34]

Thus, HPERB in Decision No. 63 was faced with a collective bargaining agreement that specifically recognized the existence of the individual contracts of hire that were the subject of dispute. Further, unlike the Letter of Hire, the individual contracts in question in Decision 63 had several provisions which mentioned or incorporated provisions of the collective bargaining agreement, and most importantly, changed provisions of the collective bargaining agreement (e.g., the grievance provisions).[35] Based on the provisions of both the

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31 *Id.*

32 Union Supplemental Brief at pp. 14-15.

33 *Id.*

34 Decision 63, I HPERB at 573.

35 Decision 63, I HPERB at 575-576.

individual contracts and the collective bargaining agreement, HPERB ultimately found that HGEA had not waived its right to negotiate bargainable matters and that the State of Hawaii's attempt to include provisions in the individual contracts which conflict with the collective bargaining agreement was a prohibited practice as follows:

> "The individual agreements contain many provisions intended to mirror provisions in the unit 13 contract. However, these provisions are not identical to the unit 13 contract. The Board is of the opinion that said provisions are more than a clarification of the unit 13 contract and *constitute a unilateral imposition of terms and conditions of employment which are negotiable under Section 89-9(a), HRS. Additionally, the Board points out that such unilateral clarifications of how the unit 13 contract applies to the subject individual contracts are not allowed under the law. Section 89-9(a), HRS, requires negotiations on any questions arising under collective bargaining agreements.* (Italics added.)"[36]

However, HPERB then went on to note that:

> "In so holding, the Board is not unmindful of the intent and purpose of the law in making such individual contracts, outside of civil service, possible. Thus, the Board would have been inclined to agree with the employer's position in this case if the individual contracts had contained no more than an undertaking by the employer to hire a named psychiatrist and the undertaking of the psychiatrist to work for the employer. T*he Board believes that if a starting salary and commencement and termination date had been in the contract, it still, in the view of the provisions of Sections 334-4 and 78-1, HRS, would not have regarded the individual contracts as anything but contracts of hire and would not have found the employer guilty of a prohibited practice. J.I. Case Company v. NLRB*, 321 U.S. 332, 14 LRRM 501 (1944), However, the employer, in its effort to 'clarify' the applicability of the unit 13 contract to the psychiatrists through unilaterally drawn up individual contracts went too far and did commit the prohibited practice complained of. (Italics added.)"[37]

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36 Decision 63, I HPERB at 579.

37 *Id.*

Contrary to Dr. Bennett and UHPA's assertion, Decision 63 does not support their arguments. In fact, Decision 63 supports the University Respondents' position and the Board's conclusions in this case. The Letter of Hire, as noted numerous times above, did not mention the 2010 CBA, did not conflict with the terms of the 2010 CBA and was not signed by the original parties to the 2010 CBA. Thus, as noted above in Decision 63, the mere fact that the Letter of Hire contained an agreement to hire, salary, a commencement date, provisions regarding tenure and probationary period (which did not conflict with the 2010 CBA) did not create a collective bargaining agreement, and HPERB, if faced with this issue, "would not have regarded the [Letter of Hire] as anything but [a contract] of hire and would not have found the employer guilty of a prohibited practice."

Thus, the Board's determination in this case is entirely consistent with, and supported by, Decision 63, and the past practice of the parties not to treat such contracts of hire as subject to collective bargaining.[38]

(2) The Letter of Hire did not, and could not, amend or supplement the 2010 CBA. 2010 CBA Article XXVII, Entirety and Modification, provides that the 2010 CBA "contains the entire agreement of the parties. No provision or term of this Agreement may be amended, modified, changed, altered, or waived except by written document executed by the parties hereto." The Letter of Hire does not mention the 2010 CBA, does not conflict with the terms of the 2010 CBA and is not signed by UHPA or the employer (State of Hawaii, the UH President and the BOR). Since Dr. Bennett and UHPA cannot show that the Letter of Hire was signed by all of the parties to the 2010 CBA, they cannot claim that the Letter of Hire is an amendment to the 2010 CBA.[39]

Based on the foregoing, the Letter of Hire did not amend or supplement the 2010 and 2015 CBAs simply because (a) none of the parties to the collective bargaining agreements signed the Letter of Hire and (b) neither Dr. Bennett nor Dean Ditto were authorized to negotiate and enter into an agreement which supplements or amends either collective bargaining agreement.

(3) Treating the Letter of Hire as a collective bargaining agreement would impermissibly interfere with the University Respondents' management rights. HRS Section 89-9(d)(2) provides that neither a public employer or an exclusive representative may agree with a proposal "which would interfere with the rights and obligations of a public employer to ... hire, promote, transfer, assign, and retain employees in positions." In addition, 2010 CBA Article

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[38] The approach outlined in Decision 63 is consistent with the en banc Ninth Circuit Court decision in *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 693 (Ninth Cir. 2001) (*en banc*), discussed below, and the holding in the Hanneman Case, discussed above. In exercising its management rights (hiring), merely because the Letter of Hire touched upon a bargainable topic (e.g., wages) did not turn it into a bargainable agreement.

[39] The Board also finds that the Letter of Hire does not amend or supplement the 2015 CBA. Clearly, any claim that the Letter of Hire amended or supplemented the 2015 CBA is unsupportable. The 2015 CBA does not mention the Letter of Hire, and does not otherwise refer to its terms. Therefore, the Letter of Hire is clearly not part of the 2015 CBA since it is simply not addressed therein. *See*, 2015 CBA Article XXVII which provides that the 2015 "contains the entire agreement of the parties." Thus, unless referred to in the 2015 CBA, the Letter of Hire is not part of the "entire agreement of the parties."

XXV provides that the "Employer reserves and retains, solely and exclusively, all management rights, powers, and authority," which includes the right to hire faculty.

Merely because the Letter of Hire touched upon or affected a bargainable subject (i.e., starting salary, probationary period, tenure, equipment and facilities) does not mean that the Letter of Hire is a bargainable agreement. This is simply because UH was exercising its management right to hire faculty, and as long as it did not attempt to change or amend any terms of the 2010 CBA, it was free to do so upon terms and conditions acceptable to it and the prospective employee. *See*, *United Pub. Workers, Local 646 v. Hanneman*, 106 Hawaii 359, 364 (2005) (Hanneman Case), where the Hawaii Supreme Court held that:

> "[I]n reading HRS Sections 89-9(a), (c) and (d) together, parties are *permitted and encouraged to negotiate all matters affecting wages, hours and conditions of employment as long as the negotiations do not infringe upon an employer's management rights under section 89-9(d).* In other words, the right to negotiate wages, hours and conditions of employment is subject to, *not* balanced against, management rights. Accordingly, in light of the plain language of HRS Section 89-9(d), we hold that the HLRB erred in concluding that the City's proposed transfer was subject to collective bargaining under HRS Section 89-9(a). (Italics added)"

The Board reads the Hanneman Case as supporting the proposition that, if a matter falls within the employer's management rights, it is not bargainable even if it may affect or touch upon a bargainable topic. Thus, to the extent that *Hawai'i Prof'l Assembly v. Tomasu*, 79 Hawai'i 154, has been read to require that all matters *affecting* wages, hours or working conditions must be bargained, the Hanneman Case clarified the situation and stated that all parties are encouraged to negotiate "as long as the negotiations do not infringe upon an employer's management rights under section 89-9(d)." In other words, if a public employer is exercising a management right, even if a bargainable topic may be affected, it is "subject to, not balanced against, management rights." Therefore, since the hiring of faculty is a management right pursuant to HRS Section 89-9(d)(3), the Board finds that the Letter of Hire is not the subject of collective bargaining, and therefore, is not subject to Chapter 89. *See*, Hanneman Case, *Id.*

(4) The Board is not authorized to amend or supplement the 2010 CBA. If the Board were to accept UHPA's arguments and find that the Letter of Hire is a collective bargaining agreement which amends or supplements the 2010 CBA, such a finding would be tantamount to the Board adding to or supplementing the terms of the 2010 CBA without the agreement of the parties. UHPA and Dr. Bennett have provided the Board with no definitive legal support for the authority of the Board to do so.

Citing the Cayteno Case, UHPA and Dr. Bennett argue that "a labor contract can protect past practice of the parties; their course of dealing can create a contractual

obligation."[40] UHPA and Dr. Bennett then conclude that, because faculty are normally hired pursuant to a letter of hire and because such letters of hire touch upon bargainable issues (e.g., wages), all letters of hire should be considered to be collective bargaining agreements. The Cayetano Case does not support their position.

In the Cayetano Case, UHPA argued that Act 355 allowing for a payroll lag "impaired the obligations of the employees' collective bargaining agreement in violation of the Contract Clause of the United States Constitution."[41] While the collective bargaining agreement in question addressed the issue of wages, it did not make "specific mention of the dates on which Plaintiffs are to be paid."[42] In addressing the issue of a "missing" term (i.e., payment dates), the Ninth Circuit Court stated that:

> "We agree with the district court that even in the absence of any explicit terms in the collective bargaining agreement regarding specific pay days, '*it is likely that the timing of the payment of each paycheck is included in the collective bargaining agreement.*' For over twenty-five years, the State and its employees had a course of dealing under which it was understood that employees would be paid on the fifteenth and last days of every month. A course of dealing can create contractual expectations. (Cites omitted; italics added.)"[43]

The Ninth Circuit Court then concluded that "[t]he District Court's ruling is consistent with the law on the *interpretation of collective bargaining agreements. In construing a collective bargaining agreement, not only the language of the agreement is considered, but also past interpretations and past practices are probative.* (Italics added.)"[44] Using the past practice of the parties, the Ninth Circuit Court determined that payments were made on certain dates, which Act 355 sought to change. Thus, past practice provided the courts with a method to construe the wage terms of the collective bargaining agreement and to provide a missing term, i.e., the payment dates.

This is not the case here. In this case, UHPA and Dr. Bennett argue that

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40 Union Supplemental Brief at p. 4. As discussed in more detail below, the Board notes that in the Cayetano Case, the U.S. District Court and the Ninth Circuit Court were dealing how a collective bargaining agreement should be interpreted and construed ("i]n *construing* a collective bargaining agreement, not only the collective bargaining agreement is considered, but also past interpretation and past practices are probative"). Cayetano Case, 183 F.3d at 1102. Here, UHPA and Dr. Bennett are not asking the Board to construe a term or provision of the 2010 CBA, but instead seek a Board order finding that the Letter of Hire is a collective bargaining agreement, i.e., a part of the 2010 CBA. Thus, the holding in the Cayetano Case is not applicable.

41 Cayetano Case, 183 F.3d at 1099.

42 Cayetano Case, 183 F.3d at 1102.

43 *Id.*

44 *Id.*

past practice can *create* a collective bargaining contract, and not merely assist in interpreting an existing collective bargaining contract. In the Cayetano Case, the pay dates were "missing" and past practice was used to provide the "missing" term in order to complete the collective bargaining agreement provisions on wages. In this case, there is no dispute that UH's faculty hiring practices (i.e., use of letters of hire) are not being used by Dr. Bennett and UHPA to assist the Board to construe the terms of 2010 CBA and the 2015 CBA by providing a missing term.[45] In fact, the Board is not being asked to construe or interpret any particular term of either the 2010 CBA or the 2015 CBA. Instead, UHPA and Dr. Bennett ask that the Board create a "new" collective bargaining agreement where none previously existed.[46]

Furthermore, in *Malahoff v. Saito*, 111 Hawai'i 168 (2006) (Malahoff Case), the pay dates issue was addressed by the Hawaii Supreme Court. Unlike the United States District Court and the Ninth Circuit Court, the Hawaii Supreme Court held that, since "Plaintiffs have also failed to provide this court with their collective bargaining agreement to support their contention that pay dates are bargainable and, in fact admit that pay dates [were] not specifically incorporated into the contract," it rejected "the Plaintiffs' contention that, because pay dates have never been specified in any statute, the Act 355 amendment to unilaterally alter the 'traditional practice' of being paid on the fifteenth day and the last day of the month violates their right to collectively bargain pay periods."[47] In effect, the holding of the Cayetano Case (i.e., past practice may create a collective bargaining obligation) appears to have been rejected by the Malahoff Case Court.

Similarly, under the circumstances of this case, the Board rejects Dr. Bennett and UHPA's argument that "past practice" turned the Letter of Hire into a bargainable topic. Thus, HRS Chapter 89 is not applicable to the Letter of Hire, and the Board does not have jurisdiction over the Letter even if it affects or touches upon a bargainable topic (e.g., wages).

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[45] The Board also notes that the Cayetano Case did not involve contracts between an individual (here, Dr. Bennett) and the State of Hawaii. This case involves purely private agreement negotiated in private by an individual prospective individual and UH.

[46] Board notes that, after the Ninth Circuit Court issued its decision in the Cayetano Case, the U.S. District Court issued a decision which dismissed UHPA's claims and dissolved the preliminary injunction on the basis that the collective bargaining agreement in effect at the time had expired and held that "[t]he only question before this Court is whether there are still enforceable contract rights between the parties. The Court finds the answer to that question is no." *University of Haw. Prof'l Assembly v. Cayetano*, 125 F.Supp. 2d 1237, 1242-1243 (USDC Haw. 2000) (Cayetano Case 2). That is the case here. The Letter of Hire was negotiated and entered into in 2013, when the 2010 CBA was in effect and which expired on June 30, 2015. The 2015 CBA did not mention nor address the Letter of Hire. Thus, the Letter of Hire, even if it was part of the 2010 CBA, also expired. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 206-207, 198, 115 L.Ed.2d 177, 111 S.Ct. 2215 (1991) ("[a]n expired contract has by its own terms released all parties from their respective contractual obligations ... Although after expiration most terms and conditions of employment are not subject to unilateral change, in order to protect the statutory right to bargain, those terms and conditions no longer have force by virtue of the contract"). The Litton Financial Case was cited in Cayetano Case 2, 125 F.Supp.2d at 1242, with approval.

[47] Malahoff Case, 111 Hawai'i at 188.

(5) Unilateral alteration doctrine is not applicable. Prior to the filing of the Union Supplemental Brief, both UHPA and Dr. Bennett took the position that the Letter of Hire was a collectively bargained for agreement based on their delegation theory. After oral arguments, UHPA and Dr. Bennett now argue that the University Respondents committed a prohibited practice because of their unilateral refusal to bargain over the terms of the Letter of Hire (or other letters of hire) as follows:

> "This case falls squarely within the doctrine of 'unilateral change of bargainable past practice is a *per se* refusal to bargain'. The public employer has engaged in a decades-long past practice of issues, and honoring, hire letters, having issued perhaps 16,000 of them. This is the first time, since the inception of Chapter 89 in 1970, that the exclusive representative has needed to complain about a violation of this practice. Now, after all this time, the public employer, without bargaining and without even notice to the exclusive representative, arrogates to itself the authority to alter the long-standing past practice. The public employer now declares that it not only has the sole ability to set initial terms and conditions of employment, it has the unilateral authority to ignore or repudiate obligations in a letter of hire, even ones that are plainly bargainable. The public employer wishes to characterize letter of hire as some kind of magical agreement, that escape the reach of Chapter 89, even though this Board has held exactly to the contrary in Decision 63, and has repeatedly repudiated attempts to alter past practices without bargaining. The effects of the unilateral change in policy this [in] case seriously affect terms and conditions of employment [of] essentially every member of Unit 07. This sort of behavior is what this Board, and courts at every level, have struck down time and time again."[48]

The "past practice" of UH (not necessarily the State of Hawaii/BOR/UH President) was to allow mid-level UH administrators to hire faculty pursuant to private letters or contracts of hire. This "past practice" is purely a management right. UHPA, however, mistakenly takes UH's past practice and converts it into a past practice of the public employer in order to "create" a collective bargaining issue. As stated above, Dr. Bennett and UHPA have failed to present any evidence of the public employer's agreement to the Letter of Hire or its delegation of authority to Dean Ditto to negotiate and enter into the Letter of Hire. The Letter of Hire is purely a private contract of hire which did not address the 2010 CBA and therefore is not a collective bargaining agreement. *See,* Decision 63, the Hanneman Case and the Malahoff Case.

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[48] Union Supplement Brief at p. 20.

If anything, Dr. Bennett and UHPA's actions are viewed by the Board as attempts to unilaterally modify or change the 2010 CBA by including the terms of the Letter of Hire as part of the 2010 CBA. Rather than treating the Letter of Hire as a private agreement, they want the Board to hold that it is a collective bargaining agreement that may be enforced using the grievance procedures of the collective bargaining agreement or by the Board in a prohibited practice agreement. This is improper and the Board will not do so.

In addition, if the Board were to accept UHPA and Dr. Bennett's newest argument, the Board must ignore Decision 63 and court decisions which have addressed analogous situations. The Board notes that Dr. Bennett and UHPA's position also ignores the fact that both sides recognize the process of hiring new faculty has been in place for a number of decades, and that both sides should have incorporated into their process the legal requirements regarding the maintenance of the line between private agreements and collective bargaining agreements. In this situation, it appears to the Board that the University Respondents attempted to recognize and honor that "line," and UHPA and Dr. Bennett have not. Thus, reliance of "past practice" in this case, does not advance UHPA and Dr. Bennett's position. In fact, it argues against their position -- as articulated in Decision 63, the Board will treat private contracts of hire (like the Letter of Hire) as purely private contracts and not as collective bargaining agreements, even though they may touch upon bargainable topics as long as such private contracts do not change or conflict with provisions of the collective bargaining agreement. This is the past practice, and both UHPA and Dr. Bennett have failed to provide any evidence to the contrary.[49]

(6) The Board does not have subject matter jurisdiction merely because the Letter of Hire may touch upon bargainable terms or topics. UHPA and Dr. Bennett also argued that the Board has jurisdiction because the Letter of Hire contains bargainable terms or topics. Assuming for the purposes of the Motion to Dismiss that the Letter of Hire contains bargainable terms or topics (without deciding), the Board still finds that their position is without merit.

As with the issue of delegation, neither UHPA nor Dr. Bennett provided the Board with any evidence that the parties intended the Letter of Hire to be subject to the 2010 CBA, and more importantly, to be enforced in accordance with the grievance procedures outlined in the 2010 CBA. In fact, none of the supporting declarations provided by UHPA and Dr. Bennett in opposition to the Motion to Dismiss state that either of them intended the Letter of Hire to be a subject of or otherwise a part of the 2010 and 2015 CBAs or that it would be enforceable in accordance with the grievance procedures set forth therein. In effect, there was a

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[49] The Board also finds that the Letter of Hire does not amend or supplement the 2015 CBA. The Letter of Hire was not signed during the term of the 2015 CBA, and it can be considered as a collective bargaining agreement incorporated into the 2015 CBA only if it was executed during the term of the 2015 CBA. In this case, there is nothing to show that the parties intended the 2015 CBA have retroactive effect. In addition, clearly, any claim that the Letter of Hire amended or supplemented the 2015 CBA is unsupportable. The 2015 CBA does not mention the Letter of Hire, and does not otherwise refer to its terms. Therefore, the Letter of Hire is clearly not part of the 2015 CBA since it is simply not addressed therein. *See*, 2015 CBA Article XXVII which provides that the 2015 "contains the entire agreement of the parties." Thus, unless referred to in the 2015 CBA, the Letter of Hire is not part of the "entire agreement of the parties."

clear absence of any intent on the part of UHPA and Dr. Bennett that the Letter of Hire be part of any collective bargaining agreement. In addition, the Letter of Hire, in fact, contains no provisions for enforcing it. Further, nothing in the Letter of Hire (i) refers to or (ii) incorporates the terms of or (iii) makes it subject to the terms of, the 2010 CBA or 2015 CBA. The Letter of Hire is purely a private agreement for Dr. Bennett's hiring.[50]

At most, the Letter of Hire touches upon bargainable terms or topics (e.g., wages). However, this is not sufficient to convert a private agreement (i.e., the Letter of Hire) into a collective bargaining agreement (i.e., that it is part of the 2010 or 2015 CBAs) such that the Board has subject matter jurisdiction. Thus, the Board finds and determines that merely because a private agreement touches upon a bargainable term or topic, a private agreement, without more, is not part of the collective bargaining agreement. *See*, Decision 63; the Malahoff Case; the Hanneman Case; and *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 693 (Ninth Cir. 2001) (*en banc*).

As an example, in *Cramer*, the court dealt with the issue of whether state law should be preempted by Section 301of the Labor Management Relations Act (LMRA) such that the NLRB would have exclusive jurisdiction over the dispute. While this is the "flip side" of the question addressed here, it is instructive. After considering past Ninth Circuit cases, the Ninth Circuit (en banc) addressed prior Ninth Circuit cases extending the reach of the preemption doctrine under LMRA and held:

> "To the extent that our prior cases held or implied that preemption was proper because of the mere possibility that the subject matter of the claim was a proper subject of the collective bargaining process, whether or not specifically discussed in the CBA, *we today hold that such statements to be an incorrect articulation of the Section 301 preemption principles. A state law claim is not preempted under Section 301 unless it necessarily requires the court to interpret an existing provision of a CBA that can reasonably said to be relevant to the resolution of the dispute.* (Italics added.)"[51]

In this context, the Board's jurisdictional reach is limited to collective bargaining and prohibited practices. Here, there are no collective bargaining issues or prohibited practices issues that a court, for example, faced with the issue of enforcing the Letter of Hire, would need to determine.[52] In fact, it is clear that the Ninth Circuit has adopted the position that

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[50] The Board notes that HRS Section 89-9(d)((3) provides that "[t]he employer and exclusive representative shall *not* agree to any proposal ... which would interfere with the rights and obligations of the public employer to: (3) *[h]ire*, promote, transfer, assign, and retain employees in positions. (Italics added.)" Thus, the Board, absent definitive factual and legal bases to do so, should not make a private employment agreement subject to a collective bargaining agreement. Such a position may impede a public employer in its hiring practices.

[51] *Id.*

[52] Although this issue was never raised in the pleadings and oral argument of the parties, the ultimate remedy sought by UHPA is an order from the Board to compel UH to expedite the purchase and installation of an MRI

there is no preemption under Section 301 of LMRA unless the "claims directly conflicted with the terms of the CBA."[53] Here, UHPA and Dr. Bennett failed to demonstrate that any of the provisions of the Letter of Hire conflict with any provision of the 2010 CBA or 2015 CBA. UHPA and Dr. Bennett also failed to demonstrate that the Board would have to construe or interpret any provision of the CBA in connection with the enforceability of the Letter of Hire. In effect, UHPA and Dr. Bennett are arguing that the Board should rule that the Letter of Hire is part of the CBA, and then determine whether it is enforceable. This argument presumes that the Board has authority to do so. As in the federal cases, the Board declines to undertake jurisdiction simply because the Letter of Hire is a private agreement which may touch upon, but does not implicate or conflict with the terms and provisions of, the 2010 CBA or the 2015 CBA.[54]

Given the foregoing, the Board agrees with the position taken by HPERB in Decision 63, and the Ninth Circuit in *Cramer*, and holds that merely because the Letter of Intent touches upon bargainable terms or topics does not, without more, allow the Board to undertake jurisdiction pursuant to HRS Chapter 89, and specifically HRS Section 89-14, in this prohibited practice case.

(7) The 2010 CBA expired and cannot serve as a basis for subject matter jurisdiction. There is no dispute that the 2010 CBA expired, and it is the 2010 CBA that must be the basis of Dr. Bennett's assertion that the Board has subject matter jurisdiction simply because the 2015 CBA does not mention or otherwise incorporate the Letter of Hire as part of its terms and was not in effect at the time the Letter of Hire was negotiated and executed. Once the 2010 CBA expired, even if the Letter of Hire was somehow incorporated into or became a part of the 2010 CBA, all collective bargaining rights with regard to the Letter of Hire also expired. *Office*

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machine for Dr. Bennett. It is questionable whether such injunctive relief is within the power of this Board to grant, but it is most certain that this Board does not have the power to enforce such an order. HRS § 377-9(e) and the Board's rules (*see,* HAR § 12-42-51) limit our ability to enforce such an order and leaves such matters to the circuit court. The Board is empowered to file a petition with the circuit court to seek enforcement of an order, including an order for injunctive relief, but the Board cannot take such matters into "its own hands" as requested by UHPA.

53 *Green v. Bimbo Bakeries United States*, 77 F.Supp.3d 980, 987-988 (USDC N.D. Calif. 2015).

54 *Green v. Bimbo Bakeries United States*, *Id.*, where the Court stated in 77 F.Supp.3d at p. 988 that:

> "Simply put, Defendant has filed to show that Plaintiff's claims require the Court to construe or interpret any terms of the CBA. While Defendant asserts that 'seniority' has difference meanings in various sections of the CBA, Defendant fails to identify any instance where the meaning of 'seniority' is in dispute for purposes of Plaintiff's claims. Defendant also argues that Plaintiffs' claims implicate the rights of other union members because another employee would have been laid off in Plaintiff's stead. Defendant files to explain the relevance of this hypothetical. Conjecture regarding the secondary effects of a plaintiff's claims is insufficient to warrant preemption under Section 301. *See* Cramer, 255 F.3d at 691-92. The Court concludes that Plaintiff's claims are not preempted under Section 301 of LMRA."

Similarly, the Board concludes that it has no subject matter jurisdiction under HRS Chapter 89 simply because there are no collective bargaining or prohibited practice issues raised by UHPA and Dr. Bennett regarding the Letter of Hire.

and Professional Employees Insurance Trust Fund v. Laborers Fund Administrative Office, Inc., 783 F.2d 919, 921 (9th Cir. 1986) ("Ninth Circuit cases foreclose us from finding that the district court had subject matter jurisdiction over that part of OPEIT's claim based on the expired CBA").[55]

(8) As a matter of policy, the Board declines to take jurisdiction over the Letter of Hire in the absence of a clear and definitive basis for subject matter jurisdiction. Finally and perhaps most importantly, although UHPA argues that this is a "case of first impression" [56] and that "the University of Hawaii is a unique institution, and that it takes creativity, subtlety, and judgment to apply concepts derived from an industrial context in an academic setting,"[57] the "stretch" of creativity in approach asked for by UHPA is, in addition to being unsupported by the law, risky and potentially harmful to the collective bargaining process in Hawaii.

Troubling to the Board if UHPA's position were adopted is the question: When in the recruitment process of a future employee does the collective bargaining process begin? In this case, UHPA argues that the collective bargaining process begins in the recruitment process and includes the negotiations that led to the Letter of Hire. If the Board accepts UHPA's argument, does a ruling in favor of UHPA in this case also mean that a public sector worker-recruitment fair may be a collective bargaining activity governed by Chapter 89 and any contract or commitment to hire that results from the worker-recruitment fair then becomes an amendment to an existing collective bargaining agreement? And if so, what types of collective bargaining responsibilities and obligations are assumed by the union and the employer during these recruitment activities?

For example, if the recruitment of Dr. Bennett and the negotiation of the terms of the Letter of Hire are deemed to be collective bargaining activities under Chapter 89, should the union's duty of fair representation attach from the point in time that Dr. Bennett's recruitment by UH begins? If the Board accepts UHPA's "delegation" argument and holds that letters of hire are part of the collective bargaining agreement, should not UHPA also have a duty to fairly represent Dr. Bennett from the time he was first contacted by UH?

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55 The 2015 CBA does not provide the Board with subject matter jurisdiction simply because it was not in effect at the time the Letter of Hire was signed, and more importantly, there is no provision of the 2015 CBA which evidences that it was to have retroactive effect. In fact, the 2015 CBA specifically provided that it was take effect at a future date. This is unlike the collective bargaining agreement addressed in the Cayetano Case, *supra*, 183 F.3d at 1100, where the court noted that the "new" collective bargaining agreement provided that it was to have retroactive effect without further discussion. *See, also,* Cayetano Case 2, which held that, on the basis that the collective bargaining agreement in effect at the time had expired, "[t]he only question before this Court is whether there are still enforceable contract rights between the parties. The Court finds the answer to that question is no." Cayetano Case 2, *supra*, 125 F.Supp. 2d at 1242-1243).

56 *See,* UHPA's Memo in Opposition, at page 2.

57 *Id.* The Board notes that, in light of UHPA's position that this is a case of first impression, and there is a genuine dispute over the effect of the Letter of Hire, there can be no finding of "willfulness" or that the University Respondents' are attempting to unilaterally change a past bargainable matter resulting in a *per se* prohibited practice.

The Board concludes that collective bargaining should never be conducted or viewed as a "one-way street." If the State of Hawaii, the BOR and the UH President (through Dean Ditto) are bargaining collectively with Dr. Bennett (as UHPA's authorized representative), then UHPA's duty to its member (Dr. Bennett) to bargain with the public employer also arises, and UHPA's duties include its duty of fair representation. In other words UHPA's duties and obligations include "protecting" Dr. Bennett by, at the very least, engaging in the negotiations and representing his interests fairly and vigorously. Thus, the natural, but perhaps unintended, consequence of the Board ruling in UHPA's favor is UHPA having the duty to involve itself in every negotiation with faculty applicants over the terms of a letter of hire. If UHPA does not "show up" in the recruitment of faculty, it could be argued that UHPA breached its duty of fair representation.

Further, UPHA should not be allowed to "pick and choose" when it will become involved and when it will not become involved in the hiring process. Either it is involved with the negotiation of all letters of hire from the beginning or it does not become involved at all. Here, UHPA rejects the notion that its duty of fair representation starts from the time a potential faculty member is being recruited. Yet, it argues that a contract for hire (like the Letter of Hire) is a collective bargaining agreement subject to HRS Chapter 89. These two positions cannot be reconciled by UHPA or by the Board. By definition, a collection bargaining agreement is entered into between a public employer and the exclusive representative. In negotiating and entering into a collective bargaining agreement, the exclusive representative has duties and obligations, which it cannot breach in representing its members. Here UHPA argues that the Letter of Hire is a collective bargaining agreement and that Dr. Bennett was delegated the authority to act on behalf of UHPA, but it rejects the notion that, as a consequence, it has certain concomitant duties and obligations from the very beginning. Instead, UHPA argues that it need become involved only after there is a problem or issue arising with a contract of hire. The Board disagrees with, and rejects, Dr. Bennett and UHPA's argument -- either UHPA is involved (and has duties which arise) from the beginning or it should not be involved at all.

Needless to say, UHPA advocates for a path proceeding down a "slippery slope" that is fraught with unforeseen problems and consequences. In the Board's opinion, UHPA proposes to expand the range of activities under collective bargaining without fully evaluating the practical and legal impact its position has upon the parties (and their respective duties and obligations), and whether it is conducive to promoting effective collective bargaining.

Questions were raised during the hearing on the Motion to Dismiss regarding the Hawaii Government Employees Association (HGEA) practice of representing athletic coaches as part of collective bargaining negotiations with UH. According to the University Respondents (and undisputed by UHPA and Dr. Bennett), unlike Dr. Bennett's situation, coaching contracts are negotiated and finalized in two steps. An Athletic coach is first recruited and hired pursuant to a letter of hire. Once the coach is a UH employee and a member of HGEA, the public employer (the BOR, the State of Hawaii and the UH President) then negotiates with HGEA, which is acting on behalf of the coach. The final coaching contract, because it contains provisions which address and modify the collective bargaining agreement

then in effect, is then signed by the public employer, the exclusive representative and the coach. This is "true" collective bargaining.

If UHPA were to follow the same procedure used by HGEA for UH athletic coaches, Dr. Bennett's ultimate contract would properly be before this Board as a collective bargaining issue in dispute pursuant to Chapter 89. Unfortunately, this was not the case for Dr. Bennett.[58] Consequently, in this particular case, as a matter of policy, the Board rejects Dr. Bennett and UHPA's position that the Letter of Hire is a collective bargaining agreement.

In conclusion, for each (and all) of the reasons set forth above, the Board finds that the Letter of Hire is not a collective bargaining agreement and that the Board lacks subject matter jurisdiction over Dr. Bennett's claim. Therefore, the Motion to Dismiss shall be granted with respect to all of Dr. Bennett's claims and all of UHPA's claims relating to or based upon Dr. Bennett's claims.[59]

B. Motion to Dismiss Dr. Cole's Claims.

Regarding Dr. Cole's claims, University Respondents argue that Interim Dean Kumashiro had valid, non-retaliatory reasons for removing Dr. Cole as Chair of the Department of Biology and that she failed to mitigate damages, if any. The Board finds that there are questions of fact that require further evidence and a full hearing to determine the merits of Dr. Cole's claim.[60]

Unlike Dr. Bennett's case, the University Respondents are not questioning the Board's subject matter jurisdiction over Dr. Cole's claim. She was a UH employee subject to the terms of the CBA and a member of UHPA at the time she was removed as the Chair of the Biology Department.[61] Also, the CBA contains specific terms and conditions regarding the

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58 Dr. Kardash recognizes in his declaration the different process utilized by HGEA for letters of hire for UH athletic coaches. In recognizing the different procedure used by HGEA, he states that "[i]t is possible that UHPA may henceforth need to bargain procedures, standards, or terms" regarding the handling of letters of hire for new UH faculty members. Thus, this is further support of the Board's position that the Letter of Hire at UH was, and always has been, treated as a private agreement and not a collective bargaining agreement.

59 Since the Board is ruling that it has no subject matter jurisdiction over Dr. Bennett's claims, the exhaustion of contractual remedies requirement is not applicable. This is simply because (1) 2010 CBA Section XXIV.C. provided that "no grievance may be arbitrated unless it involves an alleged violation of a specific term or provision of this Agreement" and no such allegation has been made and (2) 2010 CBA Section XXIV.C.3(a) provided that "[t]he Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the terms of this Agreement." To render a decision in favor of UHPA, an arbitrator may violate one or both of these provisions. The 2015 CBA has the same provisions as the 2010 CBA.

60 Since Dr. Cole's claims revolve around her removal as department chair, the Board does not reach the issue of whether her "terms of service" are an enforceable contract and a part of the 2010 CBA and/or the 2015 CBA. Given, however, the Board's analysis of Dr. Bennett's claims, the Board notes that it is unlikely that a separate private agreement would be deemed to be a part of a collective bargaining agreement. The only relevant issue is whether the University Respondents removed Dr. Cole as a department chair.

61 The Board notes that Dr. Cole and UHPA initiated, and then apparently suspended, the dispute resolution

appointment for academic chairs[62] and grievance procedures involving the termination of an employment agreement because of performance issues.[63] There are stronger grounds for a finding that Dr. Cole's claims are collective bargaining issues that trigger our attention under Chapter 89.

Since Dr. Cole's removal as a department chair is the subject of the 2015 CBA, the Board is faced with the issue of whether her removal should be grieved in accordance with the applicable provisions of the 2015 CBA. While Dr. Cole was not suspended or discharged as a faculty member, she was disciplined for her actions or omissions as a department chair. It is unclear, at this point, whether 2015 CBA Section XVIII.C (Other Disciplinary Actions) is applicable.[64] Since most of the discussion and arguments focused on Dr. Bennett's claims, the parties have not fully briefed this issue and whether Dr. Cole's claims should be subject to the exhaustion requirement. Thus, the Board orders that the Motion to Dismiss with respect to Dr. Cole's claims will be taken under advisement, subject to the parties submitting to the Board supplemental briefs as set forth below regarding the issues discussed herein.

C. Order.

For each the reasons set forth above, the Board hereby grants the Motion to Dismiss with respect to all of Dr. Bennett's claims and all of UHPA's claims relating to or based upon Dr. Bennett's claims, and all of said claims are hereby dismissed.[65] Based on the foregoing, this case is deemed to be closed as to UHPA's (to the extent its claims relate to Dr. Bennett) and Dr. Bennett's claims.

Based on the above, the Board takes the Motion to Dismiss under advisement with respect to Dr. Cole's claims, subject to the parties submitting to the Board supplemental briefs regarding the specific issues discussed in Section III.B immediately above. The parties'

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procedures outlined in the 2015 CBA.

62 *See,* Article XXIII, Appointment, Duties, and Compensation for Academic Chairs, at page 47 of the CBA.

63 *See,* Article XXIV, Grievance Procedure, Section C.2.d. at pages 49 and 50 of the CBA.

64 2015 CBA Section XVIII.C provides that "[o]ther disciplinary actions which do not involve suspension or discharge may be the subject of a grievance at the level of the Chancellor, appropriate Vice President, their successors in office, or their respective designee (Step 1 of the Grievance Procedure)." While the Board does not reach the grievance issue, the Board notes that 2015 CBA Section XXIV.C.1 provides that a Step 1 grievance must be filed within 20 calendar days (individual grievances) or 45 calendar days (class grievances) of the date on which UHPA or faculty member knew or should have known of the alleged violation. Without deciding, the Board notes that this case was filed on December 21, 2015. Thus, even if applicable, the time limitations for the filing of a grievance for both Dr. Bennett and Dr. Cole may have passed, and neither may pursue a grievance pursuant to the 2015 CBA.

65 To the extent that facts and/or evidence was considered by the Board, the dismissal of Dr. Bennett's claims shall be treated as the granting of UH's Motion for summary judgment.

briefs shall be due by the close of business (4:30 p.m.) on June 14, 2016. If the Board determines further oral argument is necessary, it will schedule said argument.

DATED: Honolulu, Hawaii, May 25, 2016.

HAWAII LABOR RELATIONS BOARD

KERRY M. KOMATSUBARA, Chair

ROCK B. LEY, Member

Dissenting Opinion of Sesnita A.D. Moepono, Board Member

I respectfully dissent from the Board's decision granting Respondents' Motion to Dismiss and finding that the Board lacks jurisdiction over the complaint allegations regarding Bennett's letter of hire and Cole's letter of agreement because such agreements are independent contracts not amendments or supplements to the collective bargaining agreement (CBA).

I. Respondents Motion to Dismiss Prohibited Practice Complaint

Respondents KRISTIN KUMASHIRO (KUMASHIRO), Interim Dean of Natural Sciences, University of Hawaii and BOARD OF REGENTS OF THE UNIVERSITY OF HAWAII (UNIVERSITY or BOR) (and collectively referred to as Respondents) filed University Respondents' Motion to Dismiss Prohibited Practice Complaint and/or for Summary Judgment on January 15, 2016 (Motion to Dismiss) which states:

> University Respondents assert that the Hawaii Labor Relations Board (Board) lacks jurisdiction over the Complaint; that the letter of hire to Dr. Bennett is not a collective bargaining agreement subject to chapter 89, Hawaii Revised Statutes (HRS); that even if the letter of hire could be construed as a collective bargaining agreement, Complainants failed to exhaust their contractual remedies; that the letter expired pursuant to the terms of the Unit 7 collective bargaining agreement and Haw. Rev. Stat. § 89-6(e); that the University acted in good faith in purchasing and attempting to install Dr. Bennett's Agilent Direct Drive machine, and later acted in good faith in discussing the possibility of purchasing another machine; that the decision to purchase million-dollar equipment and modify facilities is a management right and one that is subject to funding as well as the financial needs of the Department; that Interim Dean Kumashiro had

valid, non-retaliatory reasons for removing Dr. Cole as Chair of the Department of Biology; that Complainants failed to mitigate damages, if any; and that Complainants are not entitled under the law to the relief requested in the Complaint. Id. at 2.

II. Prohibited Practice Complaint (Complaint)

The Complaint was filed with the Board on December 21, 2015 by the University of Hawaii Professional Assembly on behalf of Complainants UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA), KEVIN BENNETT (BENNETT), and KATHLEEN COLE (COLE) (collectively Complainants).

Bennett Allegations:

The Complaint, alleges, *inter alia* that regarding Bennett:

> 13. UH recruited Bennett away from Arizona State University, in early 2013, into a tenure-track position, to pursue his specialty and establish an MRI center in the UH Manoa College of Natural Sciences. As a condition of hire, UH was to provide Bennett with an MRI machine, as memorialized in Bennett's hire letter. UH duly ordered the MRI machine, but was unable to take timely delivery of it, due to UH's inability to provide space to house it. By about October, 2014, UH still had been unable to house the machine, but the vendor had decided to cease production of the MRI machines. Bennett then travelled to England, identified a substitute MRI machine from another vendor, UH agreed on the substitution, UH negotiated an end to the first purchase contract, and UH undertook a second purchase contract with the new vendor. The new machine would be easier to house. Two-and-one-half years after Bennett's hire, by July, 2015, UH and Bennett were ready to purchase and install the new MRI machine.
>
> 14. Getting the project to the verge of success required the efforts not only of Bennett, but of numerous persons and entities within UH, including Dean Bill Ditto of the UHM College of Natural Sciences, the Office of General Counsel, UH Vice President for Administration Jan Gouveia, and their staffs, and many other persons, including campus planners and other faculty members of Unit 7. Significant official and professional efforts were expended by UH officials and personnel in an effort to overcome internal obstacles, fulfill the contract of hire, and commission an MRI center at UH Manoa.
>
> 15. Bennett, in reliance on the terms of his letter of hire, had relocated his family to Hawaii, pursued his course of research, albeit with inconvenient out-of-state equipment borrowed at a cost, engaged graduate students to expand MRI research, and amply fulfilled all teaching obligations. He also applied for tenure, and, in recognition of the quality and significance of his work, was granted tenure by UH. Also, Bennett continually expended efforts, in collaboration with UH, to establish the desired MRI center at UHM.

16. In August, 2015, Dr. Kristin Kumashiro was named Interim Dean of the College of Natural Sciences, replacing Dean Ditto. A Dean is a junior manager, and is not a member of bargaining Unit 7.

17. About five weeks into her interim position, on or about September 24, 2015, Interim Dean Kumashiro informed Bennett that she was cancelling the MRI project. Interim Dean Kumashiro indicated that funds were available to purchase the system, but that she would not release them because she had decided to support other projects.

18. The cancellation of the MRI project by Interim Dean Kumashiro was not agreed to by Bennett, nor by UHPA.

19. The cancellation of the MRI project by Interim Dean Kumashiro constitutes a catastrophic impact on Bennett's career, through loss of promised and prospective research opportunities at the core of why he was recruited and chose UH, and loss of likely and prospective grants from government and foundations. The cancellation also has a significant negative impact on graduate students, and more than 20 faculty throughout the UH system, who have undertaken courses of action based on the presumed presence of the MRI resource, or who anticipated taking such actions, which will now need to be cancelled. The cancellation of the MRI project furthermore constitutes an embarrassment to the UH among federal and foundation grantors.

Violation of Haw. Rev. Stat. § 89-13(a)(8)

The Complaint alleges that the cancellation of the MRI project constitutes a violation of Haw. Rev. Stat. § 89-13(a)(8)

20. The cancellation of the MRI project by Interim Dean Kumashiro constitutes a breach of the terms of Bennett's letter of hire, as initially agreed and as ratified and amended by an extensive course of conduct, being over two-and-one-half years of collaboration between numerous UH officials aforesaid, and Bennett, and thus constitutes a breach of a collective bargaining agreement within the meaning of Haw. Rev. Stat. § 89-13(a)(8).

Violation of Haw. Rev. Stat. § 89-13(a)(5)

The Complaint further alleges that the cancellation of the MRI project constitutes a violation of Haw. Rev. Stat. § 89-13(a)(5) as follows:

21. The cancellation of the MRI project by Interim Dean Kumashiro constitutes a unilateral implementation of varied terms and conditions of employment, without bargaining, and thus constitutes a violation of the duty to bargain within the meaning of Haw. Rev. Stat. § 89-13(a)(5).

Extraordinary Remedies:

The Complaint further alleges that the cancellation of the MRI project was undertaken with improper motive and animus constituting an aggravating factor justifying extraordinary remedies by the Board as follows:

22. The cancellation of the MRI project by Interim Dean Kumashiro was undertaken with improper motive and animus, such as would, in a proper forum, constitute tortious breach of contract, tortious interference with contract, or tortious interference with prospective advantage; in the context of Chapter 89, such improper motive and animus constitutes an aggravating factor, justifying extraordinary remedies by the Board.

Cole Allegations:

The Complaint sets forth the following allegations regarding Cole:

23. Former Chair Cole had been a member of Unit 7 for many years, and then was selected to be chair by her peers in the Department of Biology, which selection was duly ratified by former Dean Ditto.

24. A department chair is a position within Unit 7. Under the Unit 7 collective bargaining agreement, as well as long-settled practices of faculty self-governance, chairs are not mere appointees of management, but are elected by the faculty to represent the faculty's interests to management, and may not be lightly removed.

25. Chair Cole, as part of her agreement to serve as chair, because service as chair takes considerable time away from research and obtaining grants, negotiated as one of the supplemental terms and conditions of her service as chair, a package of support monies, by which she would be able to continue some research and support graduate students during her term as chair. As of August, 2015, Chair Cole had been renewed in her position, and the terms and conditions of her service as chair had been honored.

26. In August, 2015, as noted above, Dr. Kristin Kumashiro was named Interim Dean of the College of Natural Sciences, replacing Dean Ditto.

27. As chair, Cole, in meetings with Interim Dean Kumashiro, advocated for Bennett and in favor of maintaining his terms and conditions of employment. Cole also advocated for the interests of the Department of Biology, during space planning for a new building. Both activities are properly within the role of a department chair.

28. About five weeks into her position, on or about September 23, 2015,

Interim Dean Kumashiro removed Cole as chair, in part because of her defense of Bennett, and in part because of her advocacy of the interests of the Biology faculty in space planning.

29. The removal of Cole as chair was not agreed to by Cole or by UHPA.

30. The removal of Cole as chair caused two major results:

a. Cole lost her position and authority as chair of Biology, in violation of the will of the Unit 7 faculty in her department; and

b. Cole lost her package of support monies. In consequence of her loss of the package of support monies, Cole's graduate students lost support for their research, and Cole lost her ability to direct and fund their research, at least for some time.

Violation of Haw. Rev. Stat. § 89-13(a)(8)

The Complaint alleges that the removal of Cole as chair constitutes a violation of Haw. Rev. Stat. § 89-13(a)(8):

31. The removal of Cole as chair constitutes a breach of a collective bargaining agreement within the meaning of Haw. Rev. Stat. § 89-13(a)(8).

Violation of Haw. Rev. Stat. § 89-13(a)(1), (3)

The Complaint alleges that the removal of Cole constitutes a violation of Haw. Rev. Stat. § 89-13(a)(1), (3):

32. The removal of Cole as chair constitutes anti-union discrimination in violation of Haw. Rev. Stat. § 89-13(a)(3), or the statutory right of employees to collective action, in violation of Haw. Rev. Stat. § 89-13(a)(1) and<u>id.</u> § 89-3.

Violation of Haw. Rev. Stat. § 89-13(a)(5)

The Complaint alleges that the removal of Cole constitutes a violation of Haw. Rev. Stat. § 89-13(a)(5):

33. The removal of Cole as chair constitutes a unilateral implementation of varied terms and conditions of employment, without bargaining, and thus constitutes a violation of the duty to bargain within the meaning of Haw. Rev. Stat. § 89-13(a)(5).

Extraordinary Remedies:

The Complaint further alleges that the removal of Cole was undertaken

with improper motive and animus constituting an aggravating factor justifying extraordinary remedies by the Board as follows:

> 34. The removal of Cole as chair, by Interim Dean Kumashiro, was undertaken with improper motive and animus, such as would, in a proper forum, constitute tortious breach of contract, or tortious interference with contract; in the context of Chapter 89, such improper motive and animus constitutes an aggravating factor, justifying extraordinary remedies by the Board.

III. Finding of Facts

The following Findings of Fact are made for the purpose of this Dissent.

1. UHPA is and has been, at all times relevant, the exclusive representative of Unit 7, as provided in Haw. Rev. Stat. § 89-6(a)[1].

2. Except for the period before his acceptance of the letter of hire, Kevin Bennett, Ph.D. is and has been, at all times relevant, a public employee, as defined in Haw. Rev. Stat. § 89-2, [2]an Associate Professor of Biology, at University of Hawaii – Manoa (UH MANOA), and has been a member of Unit 7. His specialty is magnetic resonance imaging ("MRI").

3. Kathleen Cole, Ph.D. is and has been, at all times relevant, an Associate Professor of Biology, at UH Manoa, and a member of Unit 7, as provided in Haw. Rev. Stat. § 89-6(a), and was Chair of the Department of Biology.

4. The BOR is and has been, at all times relevant, the public employer, as provided in Haw. Rev. Stat. § 89-2,[3] of Bargaining Unit 7.

5. UHPA and the BOR were parties to a collective bargaining agreement, effective July 1, 2009 – June 30, 2015 (2009-2015 CBA), and are currently parties to a collective bargaining agreement, effective, July 1, 2015 – June 30, 2017 (2015-2017 CBA)

6. Dr. William Ditto (DITTO) was and at all times relevant the Dean of the Colleges of Arts and Sciences and College of Natural Sciences, UH Manoa, until July 31, 2015.

7. Ditto sent a letter dated June 18, 2012 to Bennett that included terms and conditions of employment, attached as Exhibit A, Respondents' Motion to Dismiss (letter of hire) and as stated in relevant part below:

> It is my pleasure to offer you a tenure-track position as an Associate Professor (Rank I4, Position 83692) in the Department of Biology starting January 1, 2013. This nine-month instructional position in the College of Natural Sciences will provide an annual salary of $105,000 (paid over 12 months). The

normal probationary period for tenure at this rank is three years, but you may request to shorten or lengthen this probationary period. The on-duty period for the Spring semester of the 2012-2013 academic year is January 2, 2013 (Tentative) - May 13, 2013.

Additionally, you will be appointed Special Advisor to the Dean and will receive two months of summer overload.

Teaching responsibilities in the Department of Biology are typically two courses per semester. In your role as special advisor to the Dean and as the managing faculty of the new preclinical imaging facility you will be developing, your teaching role will be one course per academic year. Naturally, teaching duties vary as the needs of the department change. The Department Chair is responsible for making your teaching assignments. To help you establish your research program you will have no teaching responsibilities for your first year. The following year your teaching load will consist of one course per academic year as long as you are in your role as special advisor to the Dean. Since excellence in instruction is one of the criteria for tenure and promotion, I would encourage you to attend some of the workshops and seminars offered by the University.

You will be expected to develop and maintain an active and productive research program. To enable you to startup a preclinical imaging facility, resources will be made available to enable you to order an Agilent DirectDrive 9.4T/16MRI/MRS system and a minimum of 250 square feet of suitable laboratory space to locate the preclinical imaging system with console/operator area and associated electronics. To assist you, the College of Natural Sciences will also provide you with startup funds in the amount of $450,000 provided over a three-year period and sufficient wet lab space to startup your own research lab. After the third year, any remaining balance may be carried forward with a written request for up to one additional year. Afterwards, any remaining balance will revert back to the College of Natural Sciences.

Allowable relocation expenses will be reimbursed up to $8,000, including coach airfare for yourself and your immediate family members. Receipts will be required for reimbursement.

In compliance with the Immigration Reform and Control Act of 1986, you will be required to complete, within three working days of employment, the Employment Eligibility Verification (Form 1-9) supported by the appropriate documentation to establish both your identity and employment authorization. We appreciate your cooperation in this matter.

Enclosed is an Invention Disclosure and Assignment Agreement form, which all prospective faculty are required to sign. Please refer to the websites listed in the memo for complete policies and procedures. Please indicate your

willingness to accept these terms by signing and dating below. This offer is open until July 13, 2012.

8. Respondents admit in their Answer that the University did contract to purchase Dr. Bennett's very expensive Agilent DirectDrive NMRS/MRI System as a "sole source" procurement, along with delivery, installation, and training services, for a total order amount of one million sixty-six thousand dollars ($1,066,000.00).

9. Respondents also admit in their Answer that there were discussions on potentially acquiring a different type of MRI machine, and the University is still currently open to that idea with the primary obstacle being one of funding, and subject to a prudent plan for use and cost recovery.

10. Respondents expended great efforts and resources in attempting to install an Agilent DirectDrive NMRS/MRI System.

11. Dr. Bennett was granted tenure after approximately only one year of service at the UH Manoa.

12. On August 15, 2015, Kumashiro started her job as interim Dean of the College of Natural Sciences at UH Manoa.

13. On or about September 25, 2015, Kumashiro notified Bennett that the college could not purchase another MRI machine at that time.

14. The University has paid for Bennett and his research assistants to travel to Arizona to utilize the MRI machine at Arizona State University in the absence of a similar MRI machine at the University.
15. Kumashiro sent a letter, dated October 2, 2015, to Cole memorializing the discussion and outcome of their meeting on September 23, 2015. The letter informed Cole that her appointment as Biology's Department Chair ended on September 24, 2015; because her appointment period as Chair was from 6/15/2015 to 6/14/2016, that she will remain on an 11-month salary and continue to receive a stipend of $300 until June 14, 2016; and that she will return to a regular teaching load in September 2016, per the Biology Department's workload policy.

16. Kristeen Hanselman, UHPA Executive Director, sent a letter dated October 20, 2015 to Chancellor Robert Bley-Vroman, Ph.D., University of Hawaii at Manoa requesting that informal discussions commence, as found in Article XXIV, Grievance Procedure, B. General of both the 2009-2015 CBA and the 2015-17 CBA, regarding the purchase of an MRI for Dr. Kevin Bennett in the UH Manoa Biology Department. Such informal attempts may result in resolving this matter which would preclude the filing of a formal grievance.

17. UHPA has submitted letters on behalf of both Bennett and Cole requesting informal discussions pursuant to Article XXIV of both the 2009-15 and 2015-17 CBAs.

IV. CONCLUSIONS OF LAW

The following Conclusions of Law are made for the purpose of this Dissent. If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be deemed as such.

1. The Legislature declared its intent for Haw. Rev. Chapter 89 (Chapter 89) in Haw. Rev. Stat. § 89-1(b).

> (b) The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are best effectuated by:
>
> (1) Recognizing the right of public employees to organize for the purpose of collective bargaining;
>
> (2) Requiring public employers to negotiate with and enter into written agreements with exclusive representatives on matters of wages, hours, and other conditions of employment, while, at the same time, maintaining the merit principle pursuant to Haw. Rev. Stat. § 76-1; and
>
> (3) Creating a labor relations board to administer the provisions of chapters 89 and 377.

Haw. Rev. Stat. § 89-(3) provides.

> **Rights of employees.** Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in Haw. Rev. Stat. § 89-4. (Emphasis added)

2. With respect to the powers of the Board, Haw. Rev. Stat. § 89-(5)(i) provides in part:

In addition to the powers and functions provided in other sections of this chapter, the board shall:

* * *

(3) Resolve controversies under this chapter;

(4) Conduct proceedings on complaints of prohibited practices by employers, and employee organizations and take such actions with respect thereto as it deems necessary and proper;

(5) Hold such hearings and make such inquiries, as it deems necessary, to carry out properly its functions and powers, and for the purpose of such hearings and inquiries, administer oaths and affirmations, examine witnesses and documents, take testimony and receive evidence, compel attendance of witnesses and the production of documents by the issuance of subpoenas, and delegate such powers to any member of the board or any person appointed by the board for the performance of its functions;

* * *

3. Haw. Rev. Stat. § 89-8(a) provides in pertinent part as follows:

> (a) The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership. . . . .

4. Haw. Rev. Stat. § 89-13 provides in pertinent part as follows:

Haw. Rev. Stat. § 89-13 **Prohibited practices; evidence of bad faith.** (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

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(3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;

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(5) Refuse to bargain collectively in good faith with the exclusive representative as required in Haw. Rev. Stat. § 89-9;

(6) Refuse to participate in good faith in the mediation and arbitration procedures set forth in Haw. Rev. Stat. § 89-11;

(7) Refuse or fail to comply with any provision of this chapter;

(8) Violate the terms of a collective bargaining agreement;

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5. Haw. Rev. Stat. § 89-14 provides as follows:

Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9; provided that the board shall have exclusive original jurisdiction over such a controversy except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section 89-12(c) or (2) the judicial review of decisions or orders of the board in prohibited practice controversies in accordance with section 377-9. All references in section 377-9 to "labor organization" shall include employee organization. (Emphasis added)

6. Haw. Rev. Stat. § 377-9(a) provides as follows:

Any controversy concerning unfair labor practices may be submitted to the board in the manner and with the effect provided in this chapter, but nothing herein shall prevent the pursuit of relief in courts of competent jurisdiction.

7. Standards of Review

"Under HRCP Rule 56(b), a party may move with or without supporting affidavits for a summary judgment in the party's favor[.]" Ralston v. Yim, 129 Haw. 46, 56, 292 P.3d 1276, 1286 (2013) (Ralston). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show, that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is [56] material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we [the court] must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." Id. at 55-56, 292 P.3d at 1285-86; First Ins. Co. of Hawaii, Ltd. v. A&B Props., 126 Haw. 406, 413, 271 P.3d 1165, 1172 (2012); Nuuanu Valley Ass'n v. City & Cnty. of Honolulu, 119 Haw. 90, 96, 194 P.3d 531, 537 (2008)

For cases in which the non-movant bears the burden of proof at trial, the Hawai 'i Supreme Court has adopted a burden-shifting paradigm: first, the moving party has the burden of producing support for its claim that (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions, and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law; once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. Second, the moving party bears the ultimate burden of persuasion. Only when the moving party satisfies its burden of production does the burden shift to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving party is entitled to summary judgment as a matter of law. French v. Haw. Pizza Hut, Inc., 105 Haw. 462, 470, 99 P.3d 1046, 1054 (2004).

Thus, where the non-movant bears the burden of proof at trial, a movant may demonstrate that there is no genuine issue of material fact by either: (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the non-movant will be unable to carry his or her proof at trial. Ralston, 129 Haw. at 56-57, 292 P.3d at 1286-87; French, 105 Haw. at 472, 99 P.3d at 1056.

Finally, "[w]hen a motion for summary judgment is made and supported as provided in [HRCP Rule 56], an adverse party may not rest upon the mere allegations or denials of his [or her] pleading, but his [or her] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he [or she] does not so respond, summary judgment, if appropriate, shall be entered against him [or her]." Foronda v. Haw. Int'l Boxing Club, 96 Haw. 51, 58, 25 P.3d 826, 833 (2001); Tri-S Corp. v. W. World Ins. Co., 110 Haw. 473, 494 n.9, 135 P.3d 82, 103 n.9 (2006).

V. DISCUSSION

Contrary to Respondents' position, this dissenting member finds that the essence of this complaint is not the limited issue of whether the letter of hire and the letter of agreement are independent contracts or amendments or supplements to the CBA. Rather, the complaint allegations focus on the issue of whether the Employer engaged in prohibited practices in violation of Chapter 89 by unilaterally changing the terms of employment in these independent

contracts and/or violating the CBA and that independent contracts can affect rights found under Chapter 89.

In rejecting Respondents' arguments as stated above and the Board's majority decision embracing those arguments, this dissenting member concludes that:

(a) Respondents' main assertion and the Board's majority decision are misplaced.

(b) Independent contracts, between an employer and employee, can affect an employee's collective bargaining rights and an employer can commit a prohibited practice by unilaterally changing an employee's wages, hours or other conditions contained in an independent contract.

(c) The Board has jurisdiction over this prohibited practice complaint.

(d) Based on the record presented thus far, there is no showing that Complainants have failed to exhaust their contractual remedies, specifically the grievance procedures contained in Article XXIV of the CBA.

A. Respondents' main assertion and the Board's majority decision are misplaced.

In support of their assertion, Respondents cite Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) (Caterpillar) and the Board majority cites Cramer v. Consol. Freightways, Inc., 255 F.3d 683 (9th Cir. 2001) (Cramer) in support of their respective positions. Both cases are similar because they involved situations in which the plaintiffs brought a complaint in state court based on state law and did not invoke a right created by a collective bargaining agreement. The defendants raised the preemption defense under § 301 (§301) of the federal Labor Management Relations Act (LMRA). The defendants in these cases specifically argued that the claims filed in state court should be removed to federal court because the claims arose out of a collective bargaining agreement implicating federal labor laws. The SCOTUS and the 9th Circuit Court found that the claims at issue in both cases did not arise out of a collective bargaining agreement; and therefore, denied the defendants' motions for removal based on § 301 preemption.

This dissenting member further notes that in both the Caterpillar and Cramer decisions, the courts, in addressing the history and intent of § 301, noted that if the claims in their cases had been intertwined with the CBA and interpretation of the CBA was required, then § 301 would have applied. In Caterpillar, the plaintiffs' claims were based on Caterpillar, Inc.'s breach of individual employment contracts that were entered into prior to a collective bargaining agreement being in effect; and further, the plaintiffs were in management positions, which would not have been covered under a collective bargaining agreement. In Cramer, the plaintiffs filed a claim alleging a constitutional violation of their right to privacy, which did not involve a collective bargaining agreement. Accordingly, both cases involve significant factual distinctions from this case because of the lack of relationship between the state claims at issue in those cases and a collective bargaining agreement and/or applicable the federal collective bargaining laws.

Therefore, these decisions are not dispositive of the present case and do not control the jurisdiction of the board in this case.

The Board majority argues in part that

> ... the Board's jurisdictional reach is limited to collective bargaining and prohibited practices. Here, there are no collective bargaining issues or prohibited practices issues that a court, for example, faced with the issue of enforcing the Letter of Hire, would need to determine.[52] In fact, it is clear that the Ninth Circuit has adopted the position that there is no preemption under Section 301 of LMRA *(Labor Management Relations Act)* unless the "claims directly conflicted with the terms of the CBA." [53] Here, UHPA and Dr. Bennett failed to demonstrate that any of the provisions of the Letter of Hire conflict with any provision of the 2010 CBA or 2015 CBA. ... As in the federal cases, the Board declines to undertake jurisdiction simply because the Letter of Hire is a private agreement which may touch upon, but does not implicate or conflict with the terms and provisions of, the 2010 CBA or the 2015 CBA.

I disagree unlike Caterpillar and Cramer, the Complainants have invoked a right created by a collective-bargaining agreement and allegations in the complaint before the board are "intertwined with the CBA and the interpretation of the CBA is required" to resolve the case. This case was brought under Chapter 89 and presents the reverse situation than in Caterpillar and Cramer. The allegations brought to the Board involve claims arising out of the state public employment relations law, rather than other state court claims, such as contract law or constitutional claims. The Respondents have artfully distracted the Board majority from the main issue in the Complaint, namely the resolution of prohibited practices. Moreover, I will show through the following cases that the U.S. Supreme Court has ruled that independent contracts can affect an employee's collective bargaining rights and that the employer can commit a prohibited practice. Therefore, this Board has statutory exclusive original jurisdiction. Finally, the adjudicatory body that will ultimately hear this case will have to have original jurisdiction over state collective bargaining laws.

> Independent contracts, between an employer and employee, can affect an employee's collective bargaining rights and an employer can commit a prohibited practice by unilaterally changing an employee's wages, hours or other conditions contained in an independent contract.

In opposing the Respondents' Motion to Dismiss argument and the majority decision's finding that independent contracts unsigned by the Employer and the Exclusive Representative cannot affect a collective bargaining agreement or collective bargaining rights. This dissenting member finds, that based on federal court decisions interpreting the National Labor Relations Act[4] and state court decisions interpreting state public employment relations laws, that independent contracts of hire can exist independently of a collective bargaining agreement, provided that such contracts are not used to diminish or defeat a collective bargaining agreement and/or the statutory collective bargaining rights of the employer or the exclusive representative. However, when an independent contract of hire diminishes or defeats a term in a collective bargaining agreement, then a prohibited practice can occur as shown below.

1. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) (J.I. Case)

J.I. Case is the seminal decision for the proposition that independent contracts between the employer and the employee, can exist outside of a CBA but cannot defeat or diminish a CBA and/or collective bargaining law. The Supreme Court of the United States (SCOTUS) also found that independent contracts can have claims based on collective bargaining law and contract law.

In J.I. Case, from 1937, the petitioner company offered each employee at its Rock Island, Illinois plant an individual contract of employment. In that contract, the company agreed to: furnish employment as steadily as conditions permitted; pay a specified rate, which was subject to company redetermination if the job changed; and to maintain certain hospital facilities. Conversely, the employee agreed to: accept the provisions; serve faithfully and honestly for the term; comply with factory rules; and that no payment would be given for defective work. About 75% of the employees accepted and worked under these agreements. Id. at 333. A union was certified and elected to become the exclusive representative of the employees. The company refused to bargain with the union regarding any matters contained in the individual employment contracts. The NLRB held that the company had violated the National Labor Relations Act by refusing to bargain collectively. On appeal from that decision, the SCOTUS held that while individual contracts were not prohibited in all circumstances, such contracts could not waive any benefits to which an employee was entitled under a collective bargaining agreement, nor be used to diminish any employer's duty to bargain with a properly elected union. Id. at 337-39.

In so ruling, SCOTUS explained the purpose and relationship of the collective bargaining agreement and the individual employment contract, stating:

> Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Id. at 334-35, 64 S. Ct. at 579.
>
> After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring. This hiring may be by writing or by word of mouth or may be implied from conduct. In the sense of contracts of hiring, individual contracts between the employer and employee are not

forbidden, but indeed are necessitated by the collective bargaining procedure. (Emphasis added) J.I. Case Co., 321 U.S. at 334-36, 64 S. Ct. at 579.

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Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." Nat'l Licorice Co. v. NLRB, 309 U.S. 350, 364 (1940). Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility. Id. at 337, 64 S. Ct. at 580.

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It also is urged that such individual contracts may embody matters that are not necessarily included within the statutory scope of collective bargaining, such as stock purchase, group insurance, hospitalization, or medical attention. We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice. (Emphasis added) Nat'l Licorice Co., 309 U.S. at 339, 64 S. Ct. at 581.

2. Unilateral Changes by the Employer to Negotiable Items in an Independent Contract Can Constitute a Failure to Bargain in Good Faith.

Particularly compelling for the issue of whether the employer has a duty to negotiate in good faith with the union regarding a term of employment contained in an individual contract of hire is Appeal ofWhite Mtns. RegionalSch. Bd., 125 N.H. 790, 485 A.2d 1042, 122 L.R.R.M. (BNA) 2026, No. 83-374, 1984 N.H. LEXIS 324 (Dec. 31, 1984) (White Mountains). This decision was written by J. Souter, a former SCOTUS Justice, during the time that he served on the New Hampshire Supreme Court. White Mountains was an appeal from a New Hampshire public employee relations board decision holding that the district violated its duty to negotiate in good faith with the union under the state public employees labor relations law regarding a term of employment when the district reduced the hours of "cooks and related workers" contained in their individual employment contracts. The court affirmed the finding. Similar to this case, in White Mountains, there were two existing collective bargaining agreements covering employees during the period at issue, and each employee was given an individual contract providing for certain terms of employment, including the number of hours to be worked each day by the

employee for which the employer was to pay. In the decision, J. Souter provided the context for the decision, the reasoning underlying the decision, and the holding as follows:

> In May 1981, the district entered into a series of contracts with individual cooks represented by the association. These contracts provided for certain terms of employment during the school year beginning in September 1981 and ending in June 1982. Each contract set the number of hours to be worked each day by the employee and paid for by the district. The numbers varied among the contracts, from five to seven and one-half hours.
>
> Though none of the contracts referred to sources of funds to pay the employees, officials of the district assumed that there would be funding at a certain level from the national government under the Child Nutrition Act of 1966, 42 U.S.C.A. §§ 1771-1789 (West 1978 & Supp. 1984). Late in the spring of 1981, however, the district learned that such funding would fall below expectations. From June through October officials of the district met with employee members of the bargaining unit and with the school board to determine how to reduce expenditures to stay within reduced income. The district eliminated some positions, which are not in issue here, and late in October 1981 it notified four cooks that the number of hours to be worked each day would be reduced from the levels provided in their individual contracts.
>
> In February 1982, the association filed the present complaint of unfair labor practices with the board. The board concluded that the action by the district in reducing hours was tantamount to a refusal "to negotiate in good faith with the exclusive representative of . . . [the] bargaining unit" about a term of employment, within the meaning of RSA 273-A:5, I(e) and 3, I. Consequently[,] the board ordered a restoration of work to the respective contractual levels, with back pay for the hours of employment wrongfully refused. One member of the board dissented on the ground that determination of hours to be worked fell within managerial policy, free from the obligation to bargain. See RSA 273-A:1, XI. He therefore saw the district's action solely as a violation of individual employment contracts.
>
> The board's decision is best approached by noting first what the board did not decide. The board did not decide that it had jurisdiction to adjudicate disputes under the individual employment contracts. It did not find that those contracts had somehow become incorporated into the collective bargaining agreement, and it did not find that the district had violated the collective bargaining agreement in any way.
>
> What the board did decide was that the provisions of the individual contracts setting hours to be worked were provisions of terms of employment within the meaning of RSA 273-A:1, XI. The board then applied RSA 273-A:3, I, which provides that terms of employment are subjects of mandated collective bargaining.

> More specifically, the board applied the statute by following Appeal of Watson, 122 N.H. 664, 448 A.2d 417 (1982). There we held that even when a term of employment has been set by some practice or agreement quite independent of a collective bargaining agreement, an employer may not change that term unilaterally, without bargaining about the change.
>
> Hence in this case the board found that once the schedules of hours had been set by the individual contracts, they could not be changed unilaterally, without bargaining. The board held that when the district reduced hours without bargaining about the reduction, it had refused to negotiate, or bargain collectively, which is an unfair or prohibited practice under RSA 273-A:5, I(e). Id. at 791-93, 485 A.2d at 1045

It is interesting to note that similar to the Respondents' position that the lack of funds precludes fulfilling the terms regarding the MRI facility, the White Mountains defendants claimed that the loss of federal funding was a "legitimate" reason to take unilateral action to break those contracts. The court disagreed finding:

There is no basis in the record to suggest that the board abused its discretion in rejecting this argument. See N.H. Rev. Stat. Ann. § 541:13. The fact is that the district did not have to bind itself unconditionally to employ the cooks for a certain number of hours, but it did. Having done so the district could still have limited its contractual liability by reference to receipt of federal funds, but it did not. Since it did not, the district had contractual obligations that it could have attempted to honor by seeking to raise income from taxation to pay for the shortfall in federal funds. The board committed no error, therefore, where it impliedly found that an increased but not impossible burden under the individual contracts was not a "legitimate" reason to take unilateral action to break those contracts. Id.

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> The district claims that the board erred in finding that it had refused to bargain about the specific reductions, citing its consultation with employee members of the association. There is no question that the board's representative did consult with the employees about the problems created by the diminished flow of funds. The statute, however, obligated the district to bargain with the exclusive representative of the bargaining unit. N.H. Rev. Stat. Ann. § 273-A:3, I. However[,] we may characterize the consultation with the affected employees, it does not appear from the record that those employees were a bargaining committee of the association as the exclusive bargaining representative. Therefore[,] the board was warranted in concluding that communication with the affected employees was not bargaining with the exclusive bargaining representatives of the unit.

Since the record discloses no error, the board's decision must be affirmed. Id.

Hence, based on the White Mountains holding and reasoning, even a term, such as an

MRI facility, contained in an individual employment contract can be deemed a term and condition of employment that cannot be unilaterally changed without bargaining and a failure to do so is a failure to bargain in good faith. For example, in Bennett's claims, questions arise from the cancellation of the MRI facility regarding and the affects the cancellation may have on Bennett's terms of employment, such as hours of work since he now is required to fly to Arizona to conduct his research and the number of classes he is required to teach per year. Further, the refusal to bargain in good faith claim can be based on this individual employment contract without that contract being deemed part of the collective bargaining agreement or in violation of the collective bargaining agreement. Finally, a defense regarding lack of funding is not a legitimate reason to break an agreement.

3. Hawaii Gov't Emp. Ass'n., Local 152, AFL-CIO v. Ariyoshi, Board Decision No. 63, Board Case No. CE-13-141 HPERB 570 (1975) (Decision 63)

   Hawaii Public Employment Relations Board (HPERB) Found A Failure to Bargain in an Independent Contract case.

This dissenting member notes that Decision 63 supports this dissenting member's position that items in an individual employment contract may be subject to negotiation and a failure to do so may constitute a Chapter 89 prohibited practice for failure to bargain in good faith. This decision involved personal service contracts like those at issue in J. I. Case and White Mountains between the state and the psychiatrists, who were members of bargaining unit 13 and represented by HGEA as their exclusive representative. On March 25, 1975, the Hawaii Government Employees' Association, Local 152, HGEA/AFSCME, AFL-CIO (HGEA) filed a prohibited practice complaint against the Governor, Director of Health and the Director of Personnel Services. The complaint alleged, *inter alia,* the employer violated 89-13(a)(1), (5) and (7), HRS. In ruling on the complaint, the Board initially held that the existence of personal service contracts does not constitute a waiver by the exclusive representative of any statutory right to negotiate terms and conditions of employment, stating:

In its opening statement, the employer asserts that the individual contracts are contracts of hire, the terms of which need not be negotiated with the HGEA.

It is interesting to note the similarities of the positions held by the State in Decision No. 63 and Respondents in this case.

> ... While acknowledging that HGEA was the exclusive representative of the psychiatrists, the State insisted: (1) that the personal services contracts were between the State and the individual psychiatrists, not between the State and the HGEA, and thus each psychiatrist could represent himself or be represented by HGEA, or by any other party of his choosing; (2) that since the contracts were between the State and the individual psychiatrists, the State could not be compelled to negotiate with HGEA on the terms and conditions of employment of the psychiatrists; and (3) that since the personal services contracts were contracts of hire, the State could unilaterally set the wages, hours, and other terms

and conditions of employment of each psychiatrist. Id. at 574-575.

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> The question which next arises is whether the HGEA possesses a statutory right to negotiate the terms and conditions of employment of the DOH psychiatrists in unit 13.
>
> It is axiomatic, in a general sense, that the HGEA does possess such a right under Haw. Rev. Stat. § 89-9. The employees are members of unit 13 and the HGEA is the exclusive representative of all employees in said unit. In large measure, it has negotiated for them in the unit 13 contract. The unique factual situation presented here, of course, raises the question of whether the HGEA has a right to negotiate any of the terms and conditions which found their way into the individual person services contracts. Id.

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> The Board is of the opinion that the unilateral establishment of terms and conditions of the individual contracts with respect to mandatory subjects of negotiation/does constitute a prohibited practice. In so holding, the Board is not unmindful of the intent and purpose of the law in making such individual contracts, outside of civil service, possible. Thus, the Board would have been inclined to agree with the employer's position in this case if the individual contracts had contained no more than an undertaking by the employer to hire a named psychiatrist and the undertaking of the psychiatrist to work for the employer. The Board also believes that if a starting salary and a commencement and termination date had been in the contract, it still, in view of the provisions of Haw. Rev. Stat. § 334-4 and 784, HRS, would not have regarded the subject individual contracts as anything but contracts of hire and would not have found the employer guilty of a prohibited practice. J.I. Case Co., 321 U.S. 332. However, the employer, in its effort to "clarify" the applicability of the unit 13 contract to the psychiatrists through unilaterally drawn up individual contracts went too far and did commit the prohibited practices complained of. Id. at 579.

Accordingly, the Board rendered the following order:

> The Board is loathe to void the subject individual contracts in their entirety. However, it is of the opinion that the employer should be and hereby is ordered to (1) cease and desist from refusing to negotiate terms and conditions of employment for the subject psychiatrists; (2) not use the individual contracts, or any terms thereof, to defeat the purposes of Chapter 89, HRS. Id. at 580.

Based on the guidance set forth in Decision 63, this dissenting member finds that because the Bennett letter of hire similarly went beyond far establishing the salary and commencement and termination date of employment that the letter of hire may contain terms and conditions of employment, which require good faith negotiation. Accordingly, the Respondents' unilateral action in altering the terms of that letter of hire when Bennett was a unit member may constitute a failure to bargain in good faith in violation of Haw. Rev. Stat. § 89-

13(a)(5) as well as Respondents' actions taken with Cole's letter of agreement.

In addition, based on the above-discussed cases, this dissenting member is unable to find that "it appears beyond doubt that the complainants can prove no set of facts in support of their claim entitling them to relief" regarding the issues of whether Respondents made the unilateral changes made by the Employer to the letters of hire or agreement, which affected Bennett or Cole's hours, wages or terms of employment (working conditions), thereby engaging in prohibited practices require a full hearing on the merits.

B. The Board has jurisdiction over this prohibited practice complaint.

In furtherance of this dissenting member's decision, I feel compelled to respond to the majority's opinion regarding the Board's jurisdiction.

First, based on the standards set forth in Hawaii Supreme Court's (SCOH) decisions discussed below, this dissenting member finds that the allegations of the complaint in this case are sufficient to plead prohibited practices enabling the Board to find that it has "exclusive original jurisdiction" over this case.

1. Hawai'i Gov't Emples. Ass'n, AFSCME Local 152 v. Lingle, 124 Haw. 197, 239 P.3d 1 (2010) (HGEA)

In HGEA, the issue was whether the allegations in that case were sufficient to provide the Board with "exclusive original jurisdiction" over the complaint. Initially, the SCOH held based on the legislative history, that Haw. Rev. Stat. § 89-14[5] provides the Board with "exclusive original jurisdiction" over matters brought under Chapter 89. The SCOH then turned to the issue of whether the allegations in that case were sufficient for the HLRB to have "exclusive original jurisdiction" over the statutory claims raised in that complaint. In determining that the Board had "exclusive original jurisdiction" over such claims, the SCOH reasoned that express use of the words "prohibited practice" is not required if a prohibited practice can be logically inferred from a liberal construction of the pleading, stating:

> Viewing the assertions made by HGEA in its first amended complaint in light of Haw. Rev. Stat. § 89-13(a), it appears that HGEA alleges that Lingle essentially engaged in a "prohibited practice" when she unilaterally imposed furloughs. See id. For example, Haw. Rev. Stat. § 89-13(a)(5) mandates that "[i]t shall be a prohibited practice for a public employer . . . willfully to . . . [r]efuse to bargain collectively in good faith with the exclusive representative as required in [HRS §] 89-9[,]" while paragraph 5 of HGEA's complaint alleges that "[t]he Governor does not have the implied right to unilaterally impose furloughs pursuant to Haw. Rev. Stat. § 89-9(d)" thereby "circumvent[ing] the collective bargaining process" because "[f]urloughs reduce employee hours and wages and affect terms and conditions of employment and, therefore, are a mandatory subject of collective bargaining negotiation protected by Article XIII, Section 2 of the Hawaii State Constitution and as prescribed by Haw. Rev. Stat. § 89-9(a)." (Brackets added.) Pertinent statutes clearly provide that the HLRB has jurisdiction to "[r]esolve

controversies under [Chapter 89.]" Haw. Rev. Stat. § 89-5(i)(3) (Supp. 2005) (brackets added); see Haw. Rev. Stat. § 89-5(a) (brackets added); Haw. Rev. Stat. § 89-5(i)(4) (brackets added); see also Haw. Rev. Stat. § 89-1(b)(3) ("The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are best effectuated by . . . [c]reating a labor relations board to administer the provisions of [HRS] chapters 89 and 377."). Haw. Rev. Stat. § 89-14 provides that the HLRB "shall have exclusive original jurisdiction over" "[a]ny controversy concerning prohibited practices." Although HGEA's complaint does not expressly use the words "prohibited practice," a prohibited practice can be logically inferred therefrom because HGEA's complaint essentially alleges, among other things, that Lingle "[r]efuse[d] to bargain collectively in good faith with the exclusive representative as required in [HRS] Haw. Rev. Stat. § 89-9 mandates that it "shall be a prohibited practice for a public employer . . . [to] wil[l]fully . . . [r]efuse" to bargain collectively as such. (Emphasis added); see Au v. Au, 63 Haw. 210, 221, 626 P.2d 173, 181 (1981) ("Generally, pleadings should be construed liberally and not technically."); see also Hawai'i Rules of Civil Procedure (HRCP) Rule 8(a) (instructing that a "pleading which sets forth a claim for relief . . . shall contain" among other things "a short and plain statement of the claim showing that the pleader is entitled to relief"), 8(f) ("All pleadings shall be so construed as to do substantial justice."). As such, the HLRB has exclusive original jurisdiction over the statutory claims raised in HGEA's complaint. See Haw. Rev. Stat. § 89-14; Haw. Rev. Stat. § 89-13(a); see also, e.g., H. Stand. Comm. Rep. No. 134-82, in 1982 House Journal, at 943. Id. at 205-206, 239 P.3d at 9-10.

2. In United Pub. Workers v. Abercrombie, 133 Haw. 188, 325 P.3d 600 (2014) (UPW)

In the subsequent UPW decision the union filed a complaint in the circuit court alleging retaliation under the Hawaii Whistleblowers' Protection Act, HRS Chapter 378, (HWPA) and other constitutional protections. The issue presented was whether retaliation claims originally cognizable in the circuit courts should be stayed pending resolution of issues placed within the special competence of the Board under Chapter 89. The SCOH held that even where the retaliation claims are cognizable in the circuit court under the primary jurisdiction doctrine, the HLRB still retains and must resolve the prohibited practice claims intertwined with the HWPA and constitutional claims based on its exclusive original jurisdiction. In so ruling, the SCOH restated the principles set forth in HGEA and another case Haw. State Teachers Ass'n v. Abercrombie, 126 Haw. 318, 271 P.3d 613 (2012) (HSTA), which further applied and affirmed the principles set forth in HGEA and then clarified the interplay and distinctions among "exclusive original," "primary," and "concurrent" jurisdictions. The SCOH initially explained the HGEA and HSTA decisions as follows:

In HGEA, the plaintiffs based their request for relief on HRS Chapter 89 and the constitutional right to collective bargaining under article XIII, section 2 of Hawaii

> Constitution. 124 Haw. at 200, 239 P.3d at 4. We concluded that although the plaintiffs' complaint did not expressly use the words "prohibited practice," a prohibited practice could be logically inferred because the plaintiffs' complaint essentially alleged that in instituting a unilateral statewide furlough plan, Defendant Lingle had committed a prohibited [196] practice when she refused to bargain collectively in good faith as required by Chapter 89. Accordingly, we held that the HLRB had exclusive jurisdiction over the plaintiffs' claims pursuant to Haw. Rev. Stat. § 89-14.
>
> Unlike the plaintiffs in HGEA, the plaintiffs in HSTA deleted all references to Chapter 89 in their complaint and based their request for relief solely on the constitutional right to collective bargaining under article XIII, section 2 of the Hawaii constitution. Haw. State Teachers Ass'n, 126 Haw. at 322, 271 P.3d at 617. Nonetheless, we reiterated our holding in HGEA and emphasized that the legislative purpose of having the administrative agency with expertise in these matters decide them in the first instance is "frustrated if the HLRB's jurisdiction can be defeated by characterizing issues that fall within the scope of Chapter 89 as constitutional claims and then addressing them directly to the circuit court." Id. (citing Hawai'i Gov't Emples. Ass'n, AFSCME Local 152 v. Lingle, 124 Haw. 197, 208 (2010)).

Id. at 195-96, 271 P.3d at 607-08.

The SCOH then proceeded to hold that while allegations can provide a basis for both a prohibited practice claim, HWPA claims, and the civil service laws, HRS Chapter 76, the Board not only has jurisdiction over the Haw. Rev. Stat. § 89-13 prohibited practice claims but is required under this jurisdiction to render the initial pass on the case:

> The retaliation allegations in UPW's complaint provide a basis for both a prohibited practice claim and claims under the HWPA and Free Speech Clause; however, one issue is determinative of all these claims, namely, whether Defendants' decision to lay off government employees was motivated by the [202] Furlough Lawsuit. Thus, the question of whether Defendants violated the HWPA and Free Speech Clause are inextricably intertwined with the question of whether Defendants engaged in a Haw. Rev. Stat. § 89-13(a)(4) prohibited practice. Under these circumstances, we conclude that the HLRB must be the first to pass on the motivations for Defendants' decision to implement the layoffs. Cf. United Pub. Workers, AFSCME, Local 646, AFL-CIO v. Haw. Labor Rels. Bd., 131 Haw. 142, 315 P.3d 768, 777 (App. Ct. 2013) ("The HLRB's jurisdiction clearly extends to determining whether, in a particular instance, specified employer conduct constitutes a 'prohibited practice' under HRS § 89-13."). Id. at 201-02, 315 P.3d at 613-14.

Unlike the HGEA and HSTA complaints, this dissenting member finds that the complaint in this case on its face specifically alleges that the Respondents engaged in various "prohibited practices" under Chapter 89, as discussed more fully below in Section II of this

dissent. Accordingly, no inference is required to establish the Board's "exclusive original jurisdiction" regarding the claims in this case. Applying the appropriate motion to dismiss standards requiring that the allegations of the complaint "must be accepted as true and construed in the light most favorable to the [complainant]," this dissenting member concludes that the complaint allegations are sufficient to establish the Board's subject matter jurisdiction over the prohibited practice allegations under Chapter 89. In fact, this dissenting member notes that even Respondents acknowledge on page 2 of the Memorandum of Support, Motion to Dismiss that the complaint alleges various Chapter 89 violations and therefore there is no failure to state a claim.

The Complaint alleges "matters brought under Chapter 89" specifically breaches of the Unit 7 collective bargaining agreement (CBA or Agreement) within the meaning of Hawai'i Revised Statutes (HRS)Haw. Rev. Stat. § 89-13(a)(8); violations of the duty to bargain within the meaning of Haw. Rev. Stat. § 89-13(a)(5); anti-union discrimination in violation of Haw. Rev. Stat. § 89-13(a)(3), and the statutory right of employees to collective action, in violation of Haw. Rev. Stat. §§ 89-13(a)(l), 89-3.

Further, the reasoning set forth in the two cases discussed above supports the proposition that the Board's "exclusive original jurisdiction" over any prohibited practice claims under Chapter 89 arising out of the facts of the Bennett and Cole decisions exists regardless of whether UHPA could file a claim under Article XIII of the Hawaii State Constitution, or whether Bennett or Cole, as individuals, could file a contract claim in circuit court against Respondents. Consequently, the Board's jurisdiction over prohibited practice claims under Haw. Rev. Stat. § 89-13 is not defeated or removed because there are other potential state court claims arising out of the facts of this case.

Finally, this dissenting member poses the question: if the Board does not have jurisdiction over the allegations pled in this complaint, then what other forum has the appropriate jurisdiction to consider the claims brought under HRS Chapters 89 and 377. If this case goes on appeal to a circuit court, that court will be required to decide the issues of whether it has jurisdiction, the type of jurisdiction, and the Board's jurisdiction. The losing party may appeal, resulting in the passage of many years before a final decision is rendered. In the meanwhile, the prohibited practices alleged in this case will remain unresolved.

C. Based on the record presented thus far, there is no showing that Complainants have failed to exhaust their contractual remedies.

Finally, Respondents also argue, in the alternative, that if the Board finds jurisdiction over the complaint, then Complainants have not exhausted their contractual remedies, namely the formal grievance process under the collective bargaining agreement, and therefore, the Complaint must be dismissed. This dissenting member turns to examining the existence of subject matter jurisdiction in fact to make a determination on this issue. A review of the evidence in the record shows the following:

a. *see* Findings of Fact No. 16

b. Paragraph 29, Declaration of Dr. Kumashiro dated January 15, 2016 and filed with Respondents' Motion to Dismiss implies that no formal grievances have been filed by any

of the Complainants but acknowledging UHPA's request for informal discussion pursuant to Article XXIV.

Neither Dr. Bennett, Dr. Cole, nor UHPA have filed formal grievances regarding any of the matters alleged in the prohibited practice complaint filed in CE-07-874, however, the UHPA has submitted letters on behalf of both Dr. Bennett and Dr. Cole requesting informal discussions pursuant to Section 1, Paragraph B, Article XXIV of the collective bargaining agreement.

c. Pertinent parts of Article XXIV, Grievance Process under the existing collective bargaining agreement for the period 2015-2017[6], are as follows.

> **ARTICLE XXIV, GRIEVANCE PROCEDURE**[7]
>
> A. DEFINITION
>
> A grievance is a complaint by a Faculty Member or the Union concerning the interpretation and application of the express terms of this Agreement. All matters under this Article, including investigations, shall be considered confidential. Information pertaining to the decision of an Arbitrator may be subject to disclosure under the provisions of Section 92F, Hawaii Revised Statutes.
>
> B. GENERAL
>
> 1. Faculty Members are encouraged to work out grievances with their immediate superiors on an informal basis, including voluntary mediation, without resort to the formal Grievance Procedure, whenever possible. If it is not possible to resolve the grievance informally, and the Faculty Member desires to pursue the matter, the procedures under Paragraph C. below shall apply.
>
> 2. Any information pertaining to the grievance in the possession of the Employer needed by the grievant or the Union in behalf of the grievant to investigate and process a grievance shall be provided to them on request within seven (7) working days.

An examination of the above-reference evidence shows that the record presents sufficient facts to show that there exists an interpretive issue regarding whether the grievance procedure set forth in Section 1, Paragraph B, Article XXIV of the collective bargaining agreement (B1) has been satisfied by the Complainants. More specifically, those issues include: 1) what is required by the B1 provision stating that: "Faculty Members are encouraged to work out grievances with their immediate superiors on an informal basis, including voluntary mediation, without resort to the formal Grievance Procedure, whenever possible. If it is not possible to resolve the grievance informally, and the Faculty Member desires to pursue the matter, the procedures under Paragraph C. below shall apply." 2) whether UHPA met this requirement; and 3) what steps, if any, has the Employer taken to work out these grievances on an informal basis.

This dissenting member finds significant the second sentence in section B1 providing, "If it is not possible to resolve the grievance informally, and the Faculty Member desires to pursue the matter, the procedures under Paragraph C. below shall apply." This sentence appears to contain two requirements (1) requiring the Faculty Member to ascertain whether it is not possible to resolve the grievance informally and (2) requiring the Faculty Member to desire to pursue the matter under Paragraph C of Article XXIV.

It is axiomatic that both Bennett and Cole have requested informal discussions under B1 thereby attempting to ascertain whether it is not possible to resolve the grievance informally. What is not evident from the record and requires further clarification are the facts regarding the procedure or actions taken by Respondents following the UH's receipt of UHPA's request to proceed to the informal discussions required under B1. It is the dissenting member's opinion, UHPA has complied with the first part of Article XXIV, in particularly, B1. Accordingly, if UHPA has complied, what is the obligation on the employer and does a failure to comply with this obligation constitute a failure to bargain in good faith under Haw. Rev. Stat. § 89-13(a)(5) or an "interfere...in the existence or administration of any employee organization[.]" under Haw. Rev. Stat. § 89-13(a)(2). This dissenting member finds that the lack of sufficient evidence on these issues precludes the determination that Complainants failed to exhaust the grievance process requiring these issues be addressed during a hearing on the merits

DISSENTING DECISION

For the reasons stated above, I find that

(1) Bennett's letter of hire and Cole's letter of agreement are independent contracts that can exist outside of the collective bargaining agreement as long as they do not diminish or defeat a collective bargaining agreement. Therefore, a prohibited practice can arise out of a unilateral change to a term(s) of an independent contract if the change affects the employee's rights under the collective bargaining agreement;

(2) the Board has exclusive original jurisdiction over prohibited practices under HRS Chapters 89 and 377; and

(3) the Complainants did not fail to exhaust their contractual remedies based on the evidence.

Therefore, Respondents' Motion to Dismiss should be denied.

Sesnita A.D. Moepono

SESNITA A.D. MOEPONO, Member

UHPA, et al. v. BOR
CASE NO. CE-07-874
ORDER GRANTING IN PART AND ORDERING FURTHER BRIEFING WITH RESPECT TO REMAINDER OF UNIVERSITY RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT AND/OR FOR SUMMARY JUDGMENT
ORDER NO.

Copies sent to:

T. Anthony Gill, Esq., Attorney for Complainants
Sarah Hirakami, Esq., Associate General Counsel for UH Respondents

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[1] id. § 89-6 **Appropriate bargaining units.** (a) states in relevant part:

Id. Appropriate bargaining units: (a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:
***
(7) Faculty of the University of Hawaii and the community college system[.]

[2] Haw. Rev. Stat. § 89-2 **Definitions.** provides in relevant part:

Haw. Rev. Stat. § 89-2 **Definitions.** As used in this chapter:
***
"Employee" or "public employee" means any person employed by a public employer, except elected and appointed officials and other employees are excluded for coverage in section [Haw. Rev. Stat. § 89-6(f)].

[3] Haw. Rev. Stat. § 89-2 **Definitions.** provides in relevant part:
Haw. Rev. Stat. § 89-2 Definitions. As used in this chapter:
***
"Employer" or "public employer" means…the board of regents in the case of the University of Hawaii, and any individual who represents one of these employers or acts in the interest in dealing with public employees…

[4] In Poe v. Haw. Labor Rels. Bd., 105 Haw. 97, 101, 94 P.3d 652, 656 (2004), the SCOH noted that the SCOH has used federal precedent to guide its interpretation of state public employment law.

[5] Haw. Rev. Stat. § 89-14 states:

> Haw. Rev. Stat. § 89-14 states in relevant:
>
> > Haw. Rev. Stat. § 89-14 **Prevention of prohibited practices.** Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in Haw. Rev. Stat. § 377-9; provided that the board shall have exclusive original jurisdiction over such a controversy except that nothing herein shall preclude (1) the institution of appropriate proceedings in circuit court pursuant to section [89-12(c)] or (2) the judicial review of

decisions or orders of the board in prohibited practice controversies in accordance with Haw. Rev. Stat. § 377-9.

[6] Article XXIV is identical in the 2009-2015 and 2015-2017 Collective Bargaining Agreements

[7] 2015-2017 Agreement between the University of Professional Assembly and the Board of Regents of the University of Hawaii at 47-48 (2015)