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

UNIVERSITY RESPONDENTS’ MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT AND/OR FOR SUMMARY JUDGMENT;
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT AND/OR FOR SUMMARY JUDGMENT;
DECLARATION OF KRISTIN KUMASHIRO; EXHIBIT “A”;
DECLARATION OF MARY HOFFMAN; EXHIBITS “B” – “H”; DECLARATION OF BRIAN TAYLOR; EXHIBIT “I”;
DECLARATION OF SARAH HIRAKAMI; EXHIBITS “J” – “R”; AND CERTIFICATE OF SERVICE

Oral Argument:
Date: January 27, 2016
Time: 1:30 p.m.

Status Conference:
Date: February 4, 2016
Time: 9:00 a.m.
UNIVERSITY RESPONDENTS' MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT AND/OR FOR SUMMARY JUDGMENT

Respondents KRISTIN KUMASHIRO, Interim Dean of Natural Sciences, University of Hawai‘i (University) and BOARD OF REGENTS, UNIVERSITY OF HAWAI‘I (BOR), collectively "University Respondents," pursuant to Hawai‘i Administrative Rules (HAR) § 12-42-8(g)(3), and Hawai‘i Rules of Civil Procedure (HRCP) Rules 12 and 56, hereby move for dismissal of the Prohibited Practice Complaint (Complaint) filed by Complainants UNIVERISTY OF HAWAI PROFESSIONAL ASSEMBLY (UHPA), KEVIN BENNETT (Bennett), and KATHLEEN COLE (Cole), collectively "Complainants," on December 21, 2015.

University Respondents assert that the Hawai‘i 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, Hawai‘i 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 HRS §89-6(e); that the University acted in good faith in purchasing and attempting to install Dr. Bennett’s Agilent DirectDrive 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.
This Motion is supported by the attached memorandum in support of motion, Declaration of Sarah Hirakami, Declaration of Kristin Kumashiro, Declaration of Mary Hoffman, Declaration of Brian Taylor, and Exhibits “A” – “R.”

DATED: Honolulu, Hawai‘i, _________________, 2016.

_____________________________________________
CARRIE K. S. OKINAGA
GARY Y. TAKEUCHI
SARAH HIRAKAMI
Attorneys for University Respondents
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STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of

UNIVERSITY OF HAWAI‘I
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

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS PROHIBITED
PRACTICE COMPLAINT AND/OR FOR
SUMMARY JUDGMENT

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
PROHIBITED PRACTICE COMPLAINT AND/OR FOR SUMMARY JUDGMENT

On December 21, 2015, Complainants UNIVERSITY OF HAWAI‘I PROFESSIONAL
ASSEMBLY (UHPA), KEVIN BENNETT (Bennett), and KATHLEEN COLE (Cole),
collectively “Complainants,” filed their Prohibited Practice Complaint (Complaint) with the
Hawai‘i Labor Relations Board (Board or HLRB) against Respondents KRISTIN
KUMASHIRO, Interim Dean of Natural Sciences, University of Hawai‘i (University or UH) and
BOARD OF REGENTS, UNIVERSITY OF HAWAI’I (BOR), collectively “University Respondents.” The Complaint involves a letter of hire to Dr. Bennett, and the removal of Dr. Cole as the Chair of the Department of Biology. The Complaint alleges breaches of the Unit 7 collective bargaining agreement (CBA or Agreement) within the meaning of Hawai‘i Revised Statutes (HRS) § 89-13(a)(8); violations of the duty to bargain within the meaning of HRS § 89-13(a)(5); anti-union discrimination in violation of HRS § 89-13(a)(3), and the statutory right of employees to collective action, in violation of HRS § 89-13(a)(1) and 89-3. Specifically, the Complaint alleges:

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 HRS § 89-13 (a)(8).

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 HRS § 89-13 (a)(5).

***

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

32. The removal of Cole as chair constitutes anti-union discrimination in violation of HRS § 89-13 (a)(3), or the statutory right of employees to collective action, in violation of HRS § 89-13 (a)(1) and§ 89-3 (right to concerted activities).

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 HRS § 89-13(a)(5).

For the reasons discussed below, University Respondents assert that the Board lacks jurisdiction over the Complaint; that the letter of hire to Dr. Bennett is not a collective bargaining agreement subject to HRS chapter 89; 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 HRS §89-6(e); that the University acted in good faith in purchasing and attempting to install Dr. Bennett’s Agilent DirectDrive machine, and later acted in good faith in discussing the possibility of purchasing another machine; that the decision to purchase million-dollar equipment and renovate 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.

I. FACTUAL BACKGROUND

The undisputed facts in the Complaint that are that UHPA is and has been at all relevant times the exclusive representative of Unit 7; that Dr. Bennett is an Associate Professor of Biology at UH Mānoa, and a member of Unit 7, and his specialty is magnetic resonance imaging (MRI); Dr. Cole is an Associate Professor of Biology at UH Mānoa, a member of Unit 7, and formerly the Chair of the Department of Biology; and that Kristin Kumashiro is the Interim Dean of the College of Natural Sciences at UH Mānoa.

Further alleged facts that are not in dispute are that the University ordered the Agilent
DirectDrive 9.4T/16MRI/MRS System machine; that the University was unable to house the Agilent MRI machine despite significant efforts expended by University officials; that the vendor decided to cease production of MRI machines; and that the University negotiated a cancellation of the Agilent purchase order. Also not in dispute is the fact that Dr. Bennett was granted tenure by the University; that Kristin Kumashiro was named Interim Dean of the College of Natural Sciences in August of 2015, replacing former Dean William Ditto (Ditto); and that Dr. Cole is a member of Unit 7.

A. Dr. Kevin Bennett

Prior to joining the University as its Dean of the College of Natural Sciences effective July 1, 2011, former Dean Ditto was the founding director of the School of Biological and Health Systems Engineering at Arizona State University (see Declaration of Kristin Kumashiro (Kumashiro Declaration)). Former Dean Ditto has since left the University and is currently at North Carolina State University (see Kumashiro Declaration).

Prior to coming to the University, Dr. Bennett was an assistant professor at Arizona State University, in the School of Biological and Health Systems Engineering for which former Dean Ditto was the founding director (see Kumashiro Declaration).

The gravamen of the Complaint involves a letter of hire to Dr. Bennett issued by former Dean Ditto, dated June 18, 2012. A copy of the letter is attached as Exhibit “A” to the Kumashiro Declaration. The letter provided (emphasis added):

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 member. 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 Verification (Form I-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.

The letter of hire was signed by former Dean Ditto, and signed and dated July 12, 2012, by Dr. Bennett.

B. The Agilent DirectDrive Machine

On September 18, 2012, former Dean Ditto requested on behalf of Dr. Bennett that the University purchase the Agilent DirectDrive 2 MRS/MRI System as a “sole source” purchase for the amount of $1,066,000.00 (one million sixty-six thousand dollars) (see Exh. “B” attached to the Declaration of Mary Hoffman). Pursuant to Hawai‘i Administrative Rules (HAR) § 3-122-81(c), “[j]ustification for a sole source purchase must establish that the good, service, or construction has a unique feature, characteristic, or capability essential to the agency to accomplish its work and is available from only one supplier or source.” In this case, the justification for the sole source purchase was that “Agilent Technologies, Inc. is the ONLY distributor of the Agilent DirectDrive 2 MRS/MRI System” (id.). The justification further provided that “[t]he only competing company for small animal MRI is Bruker”; however, “Bruker does not sell small-bore systems similar to the Agilent system. The 9.4T Biospin system by Bruker is much larger (35 cm bore) which requires a larger building. Bruker also sells lower field (3T and 7T) Biospin small animal systems but these systems do not allow for the resolution and sensitivity that is required for our studies” (id.). The request to purchase the Agilent machine was forwarded for approval by former University President M.R.C. Greenwood (id.).

On or around October 18, 2012, the University issued a purchase order for the sole source purchase of the Agilent machine for the total cost of $1,066,000.00, which included
$1,000,000.00 for Agilent to furnish, deliver, install, and provide training for the machine; $41,000.00 for local tax; and $25,000.00 for freight (see Exh. "C" attached to the Hoffman Declaration). Incorporated into the purchase order was the Agilent price quote, which included the provision that "[t]he DirectDrive 2 9.4T/16 system quoted herein is NOT available from any other vendor. In fact, Agilent Technologies is the ONLY MRI manufacturer in the world that offers a 9.4 Tesla 16cm bore MRI system." (Id.). As identified in the synopsis of the purchase order dated October 18, 2012, "Special and Revolving funds will be utilized for this purchase.” Id.

Because of the special requirements of the Agilent machine, the University expended approximately $114,000 so far out of approximately $326,118 in design costs alone toward renovation design of existing facilities, which did not include the actual construction costs that would later occur (see Hoffman Declaration). Initially, a site at the John A. Burns School of Medicine (JABSOM) was identified as a possible location for the machine; however, that proved to be unfeasible (id.). The University then identified a location in the Biomedical Sciences Building, Court A, Room A101 (id.). Leo A Daly, the architecture, planning, engineering, interior design, and program management firm selected for the design project, identified architecture, mechanical systems, and electrical systems inadequacies that would need to be addressed before the machine could be housed, based upon the "Agilent Horizontal Imaging Site Planning Guide' by Agilent Technologies, Inc. 2011 as edited by Kevin Bennett 26 November, 2013[.]”. See Exh. "D" attached to the Hoffman Declaration. Required renovations include, but are not limited to, demolition of a portion of concrete slab floor; construction of reinforced concrete floor to support added structural load; replacement of existing doors; construction of walls, ceiling, and doors; duct penetration to exterior A/C units and provision for
quench pipe routing; provision of a new air conditioning system as the cooling load for the Agilent machine exceeds the load that can be supported by the existing system; provision of a reheat system to maintain design room temperature and relative humidity; a new electrical system to accommodate the machine’s electrical load, including a separate room to house the step-down transformer and panelboards; a new telecommunications system for telephone and data outlet requirements within the renovated space; and new fire alarm and smoke detectors. Id. Leo A Daly estimated a budget estimate for the eventual renovation costs of $476,998.00 as of June 30, 2014. Id.

At all relevant times, the University has paid for Dr. Bennett and his research assistants to travel to Arizona to utilize the MRI machine at Arizona State University (see Kumashiro and Hoffman Declarations).

By letter dated October 31, 2013, Agilent notified its customers that in response to certain market conditions, it modified its business model and would no longer be accepting order for pre-clinical MR Imaging systems, effective November 1, 2013 (see Exh. “E” attached to the Hoffman Declaration).

On or about December 3, 2014, Dr. Bennett sent an email to Mary Hoffman (Hoffman), Director of Operations for the College of Natural Sciences, stating (emphases added):

Agilent sent us the attached letter about the MRI.

**They will not be supporting MRI after June, so all of our service etc. will be handled by a third party.**

With this letter they are asking us to pay for the scanner by June.

Steve suggested you might be able to help us resolve this. I think the best solution is to have the contract amicably cancelled, with no charge to us. They didn’t want to do that last time. I think we need someone in procurement
or general counsel to read the contract and back up a decision on this. Obviously them going out of business does not bode well for the university in terms of having an expensive, state-of-the-art machine in operation for a long time.

Could you please let me know if you have any ideas about who we could contact here who can get stuff done?

Thanks a lot for any help.

See Exh. “F” attached to the Hoffman Declaration. Additionally, further concerns were raised by Agilent’s letter dated March 2, 2015 [sic], which Hoffman received sometime in December of 2014, and which provided in relevant part:

Additionally, as Agilent is shutting down the NMR business, we will be unable to guarantee the appropriate resources for installation due to staff attrition, parts availability and support resources should the Systems not be available for installation and acceptance at the University site by July 2014. . . .

(Exh. “G” attached to the Hoffman Declaration). Thereafter, the University attempted to cancel the Agilent purchase order (Hoffman Declaration). Ultimately, Jan Gouveia, the University’s Vice President for Administration, was able to negotiate with Agilent a memorandum of cancellation and settlement agreement, effective May 31, 2015, by which the purchase order would be cancelled and the University would pay a five hundred thousand dollar ($500,000.00) cancellation fee (see Exh. “H” attached to the Hoffman Declaration). Vice President Gouveia was able to negotiate an off-set of the cancellation fee on a dollar for dollar basis for every purchase order issued by the University for an Agilent product or instrumentation at the list price prior to July 31, 2015.

C. Subsequent Discussions

The University has since discussed the possibility of acquiring another MRI machine, and
is still open to that idea, with the primary obstacle being one of funding, and subject to a prudent plan for use and cost recovery (see Kumashiro Declaration and Declaration of Brian Taylor (Taylor Declaration)). The University, however, has not agreed to another purchase or entered into any other purchase contract, and another machine would still require modifications to existing facilities before a machine would be ready to be housed (see Hoffman Declaration).

The College of Natural Sciences has major budget problems, as discussed below. Accordingly, on or around September 25, 2015, Interim Dean Kumashiro notified Dr. Bennett that the College could not purchase an MRI machine at that time. This was based upon the budget problems of the College. (See Kumashiro Declaration). However, as part of the University’s exploration into the possibility of acquiring another MRI machine at a future time, Dr. Bennett; Interim Dean Kumashiro; Mary Hoffman; Andrew Taylor (Acting Chair Taylor), the Chair of the Department of Biology; and Brian Taylor, Interim Vice Chancellor for Research (Interim Vice Chancellor Taylor), met on October 7, 2015, and discussed possible sources of funding that could enable the University to purchase another machine. The group discussed the possibility of a loan, alongside the revolving fund, and other options, much of which hinged on a business plan to be provided by Dr. Bennett (see Kumashiro, Hoffman, and Taylor Declarations). A business plan would include details such as the expected user base for an MRI machine; recurring costs such as service contracts, consumables, utilities, and personnel costs (i.e., salaries of technician(s) required); the expected number of hours per month the machine would be in use, and by whom; the fees anticipated to be charged for such usage; etc. Id. At the meeting, Dr. Bennett indicated he could submit the business plan “within one to two weeks.” Id. However, to date, no business plan has been submitted. Id.

Additionally, Interim Vice Chancellor Taylor had held open for Dr. Bennett one of only
three available slots to apply for federal funds to augment the approximately $500,000 in funds his office had previously provided towards acquisition of an MRI machine. See Taylor Declaration and Exhibit "I" attached thereto. A successful grant would have enabled the College of Natural Sciences to purchase an MRI in 2016. Id. Additionally, Interim Dean Kumashiro and her staff had offered to assist Dr. Bennett in preparation of a grant proposal, and the College of Natural Sciences had a positive track record of success, as both of the college's proposals the previous year were funded. Id.; see also, Kumashiro Declaration. Interim Dean Kumashiro was the Principal Investigator (PI) of one of the two proposals that were funded, and therefore, had direct experience and success with this grant program (Kumashiro Declaration). Interim Vice Chancellor Taylor explained that “[w]e are doing our best in a difficult financial situation to work with you to obtain an MRI instrument, and would appreciate your assistance and cooperation.” Exh. I. However, Dr. Bennett declined to assist and cooperate.

D. Budget Atmosphere of the College of Natural Sciences and the University

The following is a description of how the budget deficit impacted the faculty, staff, and students of the College of Natural Sciences (College), and factors that were considered regarding use of funds for the purchase of an MRI machine. See Hoffman Declaration. Mary Hoffman is currently the Director of Operations for the College; she started at the College in June of 2014. Id. Hoffman’s primary duties include serving as Chief Administrative Services Officer, and is responsible for the management and administration of areas including, but not limited to, accounting, finance, human resources, organization and facilities management. Id.

1. Sources of funds

State funds to support the teaching, research and outreach missions of the College of
Natural Sciences comes in three forms: (1) General Funds (GF) which are state appropriated; Tuition Funds (TF); and (3) Research, Training, and Revolving Funds (RTRF, sometimes referred to as Return of Research Funds), which are monies refunded to the University through grants and contracts for facilities and administrative costs. The College uses GF and TF mainly to support faculty and staff salaries, and to support the teaching and outreach functions of the College, while RTRF mainly supports the research function. Id.

2. **General Funds and Tuition Funds**

The budget projection for GF and TF in mid-August of 2014 determined that the College had a structural deficit of $4.0 million. The College ended the year with a $2.5 million deficit only because it utilized $1.3 million in other funds that were not intended to support “normal” academic year operations and because of some one-time funds that were provided to the College. Id.

3. **RTRF Funds**

The balance in RTRF according to the University’s accounting system in August 2014 was about $3.4 million. However, this did not reflect unspent commitments including start-up packages, return to departments, cost sharing, and miscellaneous commitments. Determining the true available funds in RTRF is not as straightforward as working with GF and TF because the latter are generally on-going, recurring allocations and expenses, whereas with RTRF, most items are “one-time.” Start-up packages vary in amounts and are often provided incrementally over several years, and determining how much will be spent in a given year is a bit of guess work. It was unclear to Hoffman how much of the balance in RTRF was committed as start-up, return to departments, or other activities. Hoffman notes that spending had dramatically increased from $1.8 million in Fiscal Year (FY) 2013 to $3 million in FY 2014. By about July
2014, Hoffman had a sense that the College was over-committed, but did not know to what extent, or when or even if it would ever be realized on the College’s financial statements because sometimes the problem can be masked by unspent (but committed) funds. Of particular concern to Hoffman was the cost of an MRI and associated facilities, evidenced by Hoffman’s inquiries to the Chancellor’s Office of Finance and Accounting, and to the Research Corporation of the University of Hawai‘i (RCUH), about the availability of equipment loans. Hoffman was also troubled by the potential amount of commitments of the College that may have been promised but not yet known to Hoffman, since there were no policies in place to document them. During FY 2015, Hoffman discovered close to another $1 million in undocumented commitments. By the end of FY 2015, Hoffman was certain that RTRF would be in deficit during FY 2016. Id.

4. Impact of Deficit on College Operations

The deficit in GF and TF resulted in a hiring freeze for FY 2015 and FY 2016. Some departments were already critically short of faculty, and all departments have lost faculty since then due to retirements and resignations. Not having the ability to replace them with tenure or tenure track faculty and having to rely upon lecturers and teaching assistants (TAs) not only been detrimental to the quality of instruction but it places a huge burden on department Chairs who must constantly be concerned with ensuring that offered courses have instructors. Gaining approval to hire TAs and lecturers to cover needed courses is extremely difficult due to the understandable extra scrutiny placed upon the College by oversight units. It often takes months to secure approvals, frequently resulting in a hiring frenzy several days before classes are to start and sometimes resulting in less qualified, but available, instructors. The faculty and staff are additionally frustrated by to lack of funds to cover minor repairs and maintenance for critical items needed to keep classrooms and labs operating at a minimally acceptable level. The
College and departments have been forced to absorb costs for emergency repairs that would normally be paid centrally by the University. The College is even unable to address the myriad of relatively low-cost yet critically needed repairs and maintenance issues. Id.

5. **Factors Considered in Use of the College's Funds**

The financial crisis of the College means that tough choices must be made. The College needs to hire and retain qualified faculty and staff, and it needs funding to bring the standard of working conditions to an acceptable level. But, the College simply does not have the available funds to meet all those needs. With respect to purchasing another MRI machine, and given the financial state of the College, the College determined its priorities and made a decision that that impacted the fewest number of individuals, and that the College believed was in the best interests of the College and its stakeholder, including the public. Id.

E. **Interim Dean Kumashiro**

Former Dean Ditto’s last day was July 31, 2015, and Kristin Kumashiro replaced him as Interim Dean of the College of Natural Sciences effective August 21, 2015. (Kumashiro Declaration).

Interim Dean Kumashiro has a B.S. in Chemistry from the University, and a Ph.D. from Yale University. She joined the University faculty in the spring of 1997. Prior to being named the Interim Dean of the College of Natural Sciences, she was the Chair of the College’s Department of Chemistry for over three and a half years. (Kumashiro Declaration).

University President Lassner and the Board of Regents have provided clear directive to the Chancellor and Vice Chancellors to manage costs more effectively. Kristin Kumashiro was hired as the Interim Dean of the College of Natural Sciences with the expectation that she would
manage the finances more successfully than her predecessor. (See Taylor Declaration).

As found by the Hawai‘i Public Employment Relations Board (HPERB), the predecessor to the HLRB, a Dean acts as the chief administrative office of a College. See Decision No. 21 (1972) in Case No. R-07-12, In the Matter of Hawaii Federation of College Teachers and Hawaii Government Employees Association and Board of Regents, University of Hawaii, a copy of which is attached hereto as Exh. “J” to the Declaration of Sarah Hirakami (Hirakami Declaration). As chief administrative officer, a Dean is primarily concerned with areas of faculty personnel, curricular offering, and academic programs of a department of school. The Dean is responsible for the recruitment and retention of faculty, budgets, and the administration of University rules which are applicable to the Dean’s College. Deans are excluded from the scope of HRS chapter 89 as top-level managerial and administrative personnel. Id. A Dean is also a College’s chief advocate and administrator, who oversees personnel, academic and student programs, research, facilities, and scholarships. See Taylor and Kumashiro Declarations.

F. Unit 7 CBA Provisions

When Dr. Bennett was hired by the University, the CBA in effect was the Unit 7 CBA effective July 1, 2009, through June 30, 2015. A copy of the relevant portions of the 2009-2015 CBA is attached as Exh. “K” to the Hirakami Declaration. The 2009-2015 CBA provides, inter alia, the following:

AGREEMENT

This Agreement is made this 16th day of January, 2010, by and between the State of Hawaii and the Board of Regents of the University of Hawaii, hereinafter called the Employer or Public Employer, as defined in §89-6(d)(4), Hawaii Revised Statutes, and the University of Hawaii Professional Assembly, hereinafter called the Union.
ARTICLE III, CONDITIONS OF SERVICE

G. TEACHING ASSIGNMENT AND EQUIVALENCEIS

Standards for teaching assignments and equivalencies are determined in accordance with Board of Regent’s Policy Section 9-16 (revised) (see R-03 of Reference Section).

Pursuant to the policy the standard teaching assignments for full-time instructional Faculty shall be 24 semester credit hours per academic year for UH-Manoa, UH-Hilo, and UH-West Oahu. The standard teaching assignments for full-time instructional Faculty at all Community Colleges within the University of Hawaii System shall be 27 semester credit hours per academic year.

ARTICLE XII, TENURE AND SERVICE

C. PROBATIONARY PERIOD

1. Probationary Service.
   a. The probationary period begins when the Faculty Member first holds a tenure track appointment effective on or after July 1 and prior to October 2 of full-time service.
   b. The probationary period ends by the granting of tenure, the refusal of tenure by the Employer, or the non-renewal of appointment. During this period, probationers do not have a claim to their position and the Employer, through its officers, may exercise its prerogative of non-appointment without a statement of reasons.
c. "Full-time probationary service" eligible for credit toward academic tenure must consist of teaching and/or research and/or extension and/or specialized work in the University in Ranks 2, 3, 4, and 5 in the A, B, or S classification, or in Ranks 3, 4, and 5 in I or R classification, or in Ranks II, III, IV, and V of the C classification in the Community Colleges. In absence of agreement to the contrary, service on a terminal year contract does no count as probationary service.

***

3. Contracts During Probationary Period.

Initial appointment to the Faculty, by contract, shall be for a two-year (2) period. In the C and I classifications, the initial contract will usually be effective August 1, and continue through July 31 of the last year of the initial contract. If the Faculty Member is to be reappointed, a new contract will be offered which becomes effective August 1. For Faculty Members at Rank 2 or 3, this contract shall be for two (2) years and may be followed by one-year (1-year) contracts effective August 1, with the terminal year usually ending July 331. Faculty at all other ranks who are to be reappointed shall be given one-year (1-year) contracts effective August 1 with the terminal year ending July 31. Additional contract renewals shall be for one-year (1-year) terms not to exceed seven (7) years of full-time probationary service.

***

ARTICLE XXI, SALARIES

A. MINIMUM SALARIES

***

3. Effective July 1, 2012, the minimum annual salaries for all Faculty Members shall be:

<table>
<thead>
<tr>
<th>Rank</th>
<th>Salary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rank 2</td>
<td>$50,004</td>
</tr>
<tr>
<td>Rank 3</td>
<td>$57,504</td>
</tr>
<tr>
<td>Rank 4</td>
<td>$67,500</td>
</tr>
<tr>
<td>Rank 5</td>
<td>$77,508</td>
</tr>
</tbody>
</table>
4. Effective July 1, 2013, the minimum annual salaries for all Faculty Members shall be:

<table>
<thead>
<tr>
<th>Rank</th>
<th>Salary</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>$50,004</td>
</tr>
<tr>
<td>3</td>
<td>$60,000</td>
</tr>
<tr>
<td>4</td>
<td>$70,008</td>
</tr>
<tr>
<td>5</td>
<td>$80,004</td>
</tr>
</tbody>
</table>

***

ARTICLE XXIV, GRIEVANCE PROCEDURE

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.

***

C. PROCEDURES

***

2. Formal Grievance Procedure.

***

c. **Step 3. Arbitration.** If the grievance has not been settled as Step 2, then within thirty (30) calendar days after the receipt of the written decision of the President or the President's designee, the Union may request arbitration by giving written notice to that effect, in person or by registered or certified mail, directed to the President or the president's designee. Representatives of the parties shall attempt to select an Arbitrator immediately

18
thereafter.

**

3) The decision of the Arbitrator shall be final and binding upon the Union, its members, the Faculty Member(s) involved in the grievance, and the Employer. There shall be no appeal from the Arbitrator’s decision by either party, if such decision is within the scope of the Arbitrator’s authority as described below.

**

ARTICLE XXV, RIGHTS OF THE EMPLOYER

The Employer reserves and retains, solely and exclusively, all management rights, powers, and authority, including the right of management to manage, control, and direct its personnel and operations except those as may be modified under this Agreement.

**

ARTICLE XXVII, ENTIRETY AND MODIFICATION

This document 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.

ARTICLE XXVIII, CONFLICT

If there is any conflict between the provisions of this Agreement and any rules, regulations, and policies of the Employer, the terms of this Agreement shall prevail.

**
R-18 Contained in the Reference Section of the 2009-2015 CBA is a Memorandum of Understanding on the Procedures for Special Salary Adjustments and Bonus Payments. The limitations on such adjustments include the provision that “[i]nternal reallocation of budgeted resources to fund special salary adjustments shall not undermine the ability of the Departments or Divisions to carry out their educational missions”; and further, “[e]ven when otherwise justified, special salary adjustments to individuals will not be made when the cumulative impact of funding such adjustments, on student, faculty workload, and departmental/division resources, is deleterious to the University.” Id. at p. 101. The required procedures for adjustments include application or nomination by the Faculty, and comments from bargaining unit members in the affected department or division; the submission of a recommendation to the appropriate Chancellor, and shall include a proposed method of funding the request and a general statement concerning the impact of the funding of the request will have upon the programs, faculty workload, and department/division resources. The Chancellor then submits a recommendation to the President who shall approve or deny the request after consultation with the UHPA; the President must secure the written concurrence of the UHPA before any adjustment or bonus is awarded. Id.

A copy of the relevant provisions of the Unit 7 CBA that is currently in effect is attached as Exh. “L” to the Hirakami Declaration. This 2015-2017 CBA took effect July 1, 2015, and runs through June 30, 2017. The provisions quoted above from the 2009-2015 CBA are substantially similar to the corresponding provisions in the 2015-2017 CBA, with the exception of increased minimum salaries and revised section or reference numbers.

G. Dr. Kathleen Cole

On August 28, 2015, Interim Dean Kumashiro met with Dr. Kathleen Cole, Dr. Andrew
Taylor, and Mary Hoffman. (See Kumashiro Declaration). At this meeting, Dr. Cole presented a list of “needs” that she compiled by asking the Department of Biology for their outstanding needs and including them all on a list. It did not appear that Dr. Cole had prioritized the list or given much justification for the needs. Dr. Cole further informed Interim Dean Kumashiro that she planned to meet with Vice President of Administration Jan Gouveia on or about August 31, 2015, regarding the Department of Biology’s needs. Also at this meeting, Dr. Cole erroneously referred to proposed space for Biology in the renovated Edmondson Hall as “half of the third floor and the entire fourth floor,” reflecting a poor grasp of the earlier plans for this major renovation. Id.

On September 1, 2015, Interim Dean Kumashiro met with Dr. Cole, Chancellor Robert-Bley-Vroman, Interim Vice Chancellor for Research Brian Taylor, Mary Hoffman, and several other individuals. The College was invited to discuss its needs, primarily for the Department of Biology, which had been excluded in the discussion on the new science building that took place over the summer. The College had been involved with the proposed renovation of Snyder Hall; however, the Snyder renovation was cancelled due primarily to escalating costs and to the shortage of surge space. Thus, the new science building was proposed. Dr. Cole presented a long list of needs similar to the August 28th meeting. The list was not vetted (i.e., approved or endorsed) by Interim Dean Kumashiro, and she was surprised it was presented to the Chancellor in its unedited form. The meeting participants expressed dissatisfaction with numerous claims for space, which were viewed as excessive, such as research space for ten faculty, five of which would be new hires. Additionally, the College learned that Mānoa leadership had previously been told by the College’s former Associate Dean that all of the Department of Biology’s needs were met in Edmondson Hall; thus, the Department of Biology was not included in the proposal.
for the new science building. The former Associate Dean had previously served as the Biology Chair, so his statements were weighted heavily in the planning process of the summer. The College was told about the very short timeline for this project. Dr. Cole pleaded in a very emotional way for the renovation of Snyder Hall, which is directly adjacent to Edmondson Hall (Edmondson Hall houses the majority of teaching and research activities of the Department of Biology), and described the proposal to house the Department of Biology in any building that was not adjacent to Edmondson as “disastrous” because students that took classes in Edmondson would then have to walk to another building on campus to speak to their professors; she was unable to articulate any other reasons for support. She again incorrectly stated the assignment of space to Biology in the renovated Snyder, at which point she was correctly by others in attendance. The lack of proper consultation with the Interim Dean, incomplete and inaccurate information about the major building projects, and Dr. Cole’s emotional outburst without reasonable justifications for space and location indicated apparent unprofessionalism. Id.

On September 3, 2015, Interim Dean requested that to attend a meeting with the Biology faculty, which was scheduled for September 4, 2015, to discuss the building issues. Interim Dean Kumashiro was told by Dr. Cole that she could not attend the meeting. Id.

On September 4, 2015, Interim Dean Kumashiro met with Dr. Cole and reiterated the importance of relaying to the faculty the reason the Department of Biology had been left out of the building planning process (i.e., the former Biology Chair and Associate Dean’s assurances that all of Biology’s needs were met by Edmondson Hall), because this exclusion had been a source of outcry among the faculty. Interim Dean Kumashiro also informed Dr. Cole that not vetting the list with her could be viewed as undermining her position. Dr. Cole did not appear to understand how to proceed with revising the list, and did not appear to understand the urgency
regarding the Snyder multi-million dollar renovation, as she stated that she told the faculty there was still time for discussion and the Snyder renovation was still an option. Dr. Cole stated that she “did not trust” Interim Dean Kumashiro, and qualified it that she did not mean it as a personal affront or an attack on her character, but rather she views her role as an advocate for the Department of Biology and that, as such, she “could not trust” upper-level administrators, including the Interim Dean. Interim Dean Kumashiro countered that the interests of the College and the departments were very much in line and she was disappointed to hear outright that Dr. Cole didn’t trust her. Id.

On September 11, 2015, Interim Dean Kumashiro was copied on a message that the Department of Biology had proposed a revision to their Department Personnel Committee (DPC) procedures, which were undergoing review. Normally, these matters are handled by the Chair, but Dr. Cole had delegated to another faculty member who was not experienced in this type of procedural work, which lead to delays and the possibility of procedural error. Id.

On September 12, 2015, Interim Dean Kumashiro received a message from a faculty member who had requested $250 from Dr. Cole to buy supplies for the undergraduate lab class. Students who register for this course are obligated to pay fees that are used to purchase consumables. The faculty member approached Interim Dean Kumashiro because the issue was not resolved by the Chair at the departmental level. The faculty member was told by Dr. Cole that she (Dr. Cole) was making an executive decision not to provide the funds for the supplies and that there would be no further discussion. The faculty member also expressed concern about trying again to resolve the matter with Dr. Cole because (she [Dr. Cole] will just get angry.” Id.

On September 14, 2015, Interim Dean Kumashiro met with Dr. Cole to discuss Dr. Bennett’s reduced teaching assignments. Dr. Bennett had been teaching only one course per
year, and for the Fall 2015 semester, did not have any formal classroom responsibilities, which is too low for an instructional faculty member. Dr. Cole did not seem to understand the standard teaching load in Biology, nor did she seem to fully understand that she carried the responsibility as Chair to assign proper teaching loads. Dr. Bennett was to receive a lower than normal teaching load while he was the special advisor to the Dean; however, Dr. Bennett had not been the special advisor nor the Assistant Dean since early October of 2013, and thus his teaching load should have been appropriately adjusted by the Chair. Id.

On September 15, 2015, three faculty members separately approached Interim Dean Kumashiro with problems that the Chair should address. One faculty member was seeking her assistance to obtain funds for payment to a vendor, because Dr. Cole had asserted “we don’t get the lab fees returned to our department” which is inaccurate. Interim Dean Kumashiro asked the College staff to assist the faculty member. Another meeting was with an Instructional faculty member who requested to meet with Interim Dean Kumashiro to discuss a one-year appointment at another institution; they discussed salary support and details of his appointment; they also discussed how the faculty member’s teaching would be covered. The subject of coverage of teaching responsibilities is a matter that must include the Chair, who was not present at the meeting. A third faculty member asked to meet with Interim Dean Kumashiro to request an in-grade adjustment for an APT. Because this involves a budgetary matter, it should normally be brought to the Dean by way of the Chair of the Department, and piecemeal requests are discouraged. Id.

On September 15 and 16, 2015, Interim Dean Kumashiro meet with two faculty members to discuss the Department of Biology’s current space, focusing primarily on research and teaching that was not accommodated in Edmonson. Dr. Cole had delegated this discussion and
associated responsibilities to these faculty members and was not present at this meeting. Id.

On September 18, 2015, another faculty member requested a meeting with Interim Dean Kumashiro to discuss a student advising question. The faculty member indicated that Dr. Cole was aware of the discussion. However, this was not an appropriate subject to bring to the Dean of the College, and the meeting was subsequently cancelled, and the matter delegated to the appropriate channels. Again, the Chair should have assisted the faculty member in pursuing the correct route. Id.

Sometime in the middle of September, Interim Dean Kumashiro became aware that APTs (members of bargaining unit 8) were being regularly assigned to teaching duties in the Department of Biology. The APTs were “instructors of record” for undergraduate lab courses. Apparently, the practice had started years ago, but had expanded to the use of multiple staff members – as many as four APTs – who were assigned to teaching duties. Interim Dean Kumashiro consulted with Mary Hoffman and Linda Voong from the Dean’s office, who have been working with Dr. Taylor (the current Acting Chair of Biology) and other University officials on a solution. The Department Chairs are responsible for teaching assignments. Interim Dean Kumashiro was informed that Dr. Cole was aware of the problems associated with the teaching assignment of the APTs while she was still the Chair, but she did not take any steps to rectify the matter. Id.

On September 23, 2015, Interim Dean Kumashiro met with Dr. Cole to ask her to resign as Chair. Dr. Cole asked for specific reasons, and Interim Dean Kumashiro briefly discussed the handling of the building matter and the long list of “needs” that was never vetted before presenting at the meeting with the Chancellor, and Dr. Cole became argumentative and raised her voice, loudly demanding to know why she was being asked to step down as Chair. At that point,
Interim Dean Kumashiro stopped Dr. Cole from continuing; Dr. Cole stated “so you’ve made up your mind” and Interim Dean Kumashiro indicated that her decision was final. Dr. Cole then abruptly left without attempting to discuss a transition. Interim Dean Kumashiro did not state that Dr. Cole’s removal was effective immediately because Interim Dean Kumashiro anticipated discussing a transition with Dr. Cole, because that would have been less disruptive to the Biology Department’s operations. Id.

On October 12, 2015, Interim Dean Kumashiro was asked by Mary Hoffman about research support funds to Dr. Cole. Former Dean Ditto had signed a memorandum dated July 31, 2015, which committed $100,000 for research support “while you are serving as Chair.” Interim Dean Kumashiro requested that a reduced budget be submitted, that the College would support the purchase of supplies for the graduate students’ research projects under Dr. Cole’s direction, but at a reduced level. Mary Hoffman requested from Dr. Cole a budget request with a reduced amount for the students’ research supplies; the October 20, 2015, response did not provide those figures. Id.

On November 16, 2015, Interim Dean Kumashiro received notice of student grievances relating to the reduced budget requested from Dr. Cole. Interim Dean Kumashiro notified Acting Chair Taylor that her office had been trying to obtain information from Dr. Cole that had not yet been provided, and to inform the students that the Interim Dean’s office has been working on this matter. Id.

The College has continued to pay Dr. Cole her monthly stipend and her 11-month salary even though she is no longer the Chair of the Department of Biology. Id.

H. Provisions of the Unit 7 CBA and University Policies

The 2009-2015 CBA included the following provisions:
ARTICLE XXIII, APPOINTMENT, DUTIES, AND COMPENSATION FOR ACADEMIC CHAIRS

A. Only Faculty Members with the Rank of 4 or 5 shall be eligible to serve as the Department, Division, or Program Chair. If no one in these ranks is available or willing to serve as the Chair, then a Faculty Member from the unit holding a lower rank may be appointed as Acting Chair.

B. The Chancellor of a Community College, the Chancellor of UH-West Oahu, and the Dean/Director at UH-Hilo and UH-Manoa shall appoint Department, Division, or Program Chairs for periods of up to three (3) years. The appointments are renewed annually. Acting Chairs shall not be appointed for a term to exceed two (2) consecutive years.

C. Faculty Members in the various Department, Divisions, or Programs shall meet to consider the recommendation of a bargaining unit member to serve as Chair. Prior to the appointment or reappointment, the Chancellor of a Community College, the Chancellor of UH-West Oahu, and the Dean/Director at UH-Hilo and UH-Manoa shall consult with the all [sic] the Faculty Members wishing to participate to receive their recommendation. If there is no consensus among the Faculty, the Chancellor, Dean/Director shall consider both the majority and minority views before making an appointment. Should there be a consensus among the Faculty Members as to who should serve as Chair, and the recommendation is rejected, the Chancellor, Dean/Director shall meet with the Faculty Members and provide a written statement setting forth the reasons for selecting another Faculty Member.

D. Academic Chairs are appointed by the appropriate administrative authority, but they are not managerial or supervisory employees. The duties of Academic Chairs will be set forth in a written Memorandum of Understanding agreed to by the parties.

E. Monthly compensation for Department or Division Chairs, Associate Chairs, Assistant Chairs, or Graduate Program Chairs shall not be less than $300 per month. The size and complexity of the Department, Division, or Program and the nature of the quasi-administrative functions being performed shall determine the specific amount of the stipend. In addition, eleven (11) month appointments and workload equivalencies will be given where appropriate to the duties and responsibilities of the assignment.

See Exh. “K” (footnote omitted). The provisions in the 2015-2017 CBA are substantially similar, with the exception of the removal of the reference to Graduate Program Chairs in
paragraph E, and the removal of paragraph designations (Exh. L).

Additionally, the University’s Executive Policy (EP) 5.219 provides in relevant part:

B. Guidelines

1. Department Chairperson

   a. The chair is responsible to the dean of the college for the following functions as they apply to the department: providing the courses required by the curricula of the various colleges; preparation of the department budget; expenditure of funds allocated to the department; recommendations for reappointments and for appointments to unfilled positions; recommendations for promotions; rating of faculty members not on permanent tenure; assignment of courses and proper departmental balance of teaching load; textbook orders; supervision of instruction; direction of graduate assistants; assistance with registration during both the academic year and the summer session; improvement of instruction and encouragement of research; implementing University rules limiting “overload” teaching and other compensated work.

   b. In some colleges, some or all of these functions are consolidated in the office of the Dean.

   c. Under the leadership of the Dean of the College, the department chair meet periodically to consider matters of common concern.

   d. Appointment of a department chair at the University of Hawai‘i at Mānoa shall be made in accordance with the following procedure

   e. Only persons with the rank of associate professor or of professor are normally eligible for the chair. If no one in these ranks is available, a member of a lower rank, or some appropriate person elsewhere in the College, is appointed as acting chair.

   f. After receiving suggestions from the college dean (following the latter’s consultation with members of the department), the Chancellor appoints one member of each
instructional department as department chair with the concurrence of the President and the Board of Regents.

g. The deans' consultation with faculty members prior to recommendations on department chair may take a variety of forms depending upon such factors as the size of department, formal structure and internal relationships. Whatever form it takes, however, it should be comprehensive and effective, so the dean has the benefit of the advice of each member of the department in Rank 3 or above and those of Rank 2 with tenure. When written nominations are used, these are not to be construed as votes, since the majority opinion is not the only factor the dean must consider in selecting the persons he/she considers most likely to lead the department most effectively. When there is serious or widespread disagreement among the members of a department as to which person should be chair, or when the dean does not accede to the prevailing view expressed by a department, the dean shall include with his/her own recommendation to the Chancellor a written statement setting out the dissenting viewpoints and his/her analysis of the situation.

h. Appointments are usually announced in the early spring. Department chair are normally appointed for three-year terms, although appointments for shorter terms are made when necessary. Reappointment of a chair at the end of a term, as the appointment of a new chair, is preceded by a dean's consultation with faculty members as set forth above.

i. Faculty personnel appointed to serve as department chair may receive additional compensation in the form of released time from regular faculty responsibilities and/or change from 9 to 11-month appointments and/or monthly stipends. The specific amount of the stipend is determined by the size and complexity of the department.

See Exh. "M" attached to the Hirakami Declaration.

In addition, the 2015-2017 Unit 7 CBA provides in part:

**ARTICLE II, NON-DISCRIMINATION**

A. Neither the Employer nor the Union shall discriminate against any Faculty
Member on the basis of race, color, religion, national origin, nationality, sex, sexual orientation, gender identity, age, disability, marital status, or for being a disabled veteran, a veteran of the Vietnam era, or for lawful political activity, except for bona fide occupational or legal requirements.

B. Neither the Employer nor the Union shall discriminate against any Faculty Member on the basis of activity or lack of activity on behalf of the Union.

See Exh. "L" attached to the Hirakami Declaration.

II. LEGAL STANDARDS

A. Motions to Dismiss

The Board has consistently adhered to the legal standards used by the courts for motions to dismiss under HRCP Rule 12. Accordingly, a motion to dismiss is based on the contents of the complaint, the allegations of which must be accepted as true and construed in the light most favorable to the plaintiff. Dismissal is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of plaintiff's claim which would entitle plaintiff to relief. In considering a motion to dismiss for lack of subject matter jurisdiction, a court 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 Hawai‘i 330, 337, 13 P.3d 1235, 1242 (2000); Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawai‘i 1, 7, 175 P.3d 111, 117 (App. 2007).

Regarding a motion to dismiss for failure to state a claim, "[d]ismissal is warranted only if the claim is clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the support made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Justice v. Fuddy, 125 Hawai‘i 104, 108, 253 P.3d 665, 669 (App. 2011) (citing Rosa v. CWJ Contractors, Ltd., 4 Haw. App.
210, 215, 664 P.2d 745, 749 (1983)). "A complaint should not be dismissed for failure to state a
claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his
or her claim that would entitle him or her to relief. [The court] must therefore view a plaintiff's
complaint in a light most favorable to him or her in order to determine whether the allegations
contained therein could warrant relief under any alternative theory." Fuddy, 125 Hawai'i at 107-
108, 253 P.3d at 668-669; Young v. Allstate Ins. Co., 119 Hawai'i 403, 412, 198 P.3d 666, 675
(2008).

B. Motions for Summary Judgment

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 Hawai'i 46, 56, 292 P.3d 1276,
1286 (2013). "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,
[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 1285-1286; Querubin v.
Thronas, 107 Hawai'i 48, 56, 109 P.3d 689, 697 (2005); Thomas v. Kidani, 126 Hawai'i 125,

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. 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.


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 Hawai‘i at 56-57, 292 P.3d at 1286-1287; French, 105 Hawai‘i at 472, 99 P.3d at 1056.

Additionally, “[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 Hawai‘i 51, 58, 25 P.3d, 826, 833 (2001); Tri-S Corp. v. Western World Insurance Co., 110 Hawai‘i 473, 494 n.9, 135 P.3d 82, 103 n. 9 (2006). Once a movant has met its burden, the opposing party has the burden of coming forward with specific facts evidencing a need for trial; an opposing party may not defeat a motion for

C. Relevant Statutory Provisions

1. **HRS § 89-13**

HRS § 89-13, which governs prohibited practices, provides in relevant part:

(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;

* * *

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

* * *

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9; or

* * *

(8) Violate the terms of a collective bargaining agreement[.] 

2. **HRS § 89-2**

HRS 89-2, which governs definitions, provides the following definitions:

“Collective bargaining” means the performance of the mutual obligations of the public employer and an exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund, and other terms and conditions of employment, except that by any such obligation neither party shall be
compelled to agree to a proposal or be required to make a concession. For the purposes of this definition, "wages" includes the number of incremental and longevity steps, the number of pay ranges, and the movement between steps within the pay range and between the pay ranges on a pay schedule under a collective bargaining agreement.

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"Employee" or "public employee" means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section [89-6(f)].

"Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund, and other terms and conditions of employment of public employees.

"Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

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

3. **HRS § 89-3**

HRS § 89-3, which governs rights of employees, provides in relevant part:

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 section 89-4.

4. **HRS § 89-6**

HRS § 89-6, which governs appropriate bargaining units, provides in relevant part:

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

* * *

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

Any decision to be reached by the applicable employer group shall be on the basis
of simple majority, except when a bargaining unit includes county employees
from more than one county. In that case, the simple majority shall include at least
one county.

(e) In addition to a collective bargaining agreement under subsection (d), each
employer may negotiate, independently of one another, supplemental
agreements that apply to their respective employees; provided that any
supplemental agreement reached between the employer and the exclusive
representative shall not extend beyond the term of the applicable collective
bargaining agreement and shall not require ratification by employees in
the bargaining unit.

5. **HRS § 89-9**

HRS § 89-9, governing scope of negotiations; consultation, provides in relevant
part:

(a) The employer and the exclusive representative shall meet at reasonable
times, including meetings sufficiently in advance of the February 1
impasse date under section 89-11, and shall negotiate in good faith with
respect to wages, hours, the amounts of contributions by the State and
respective counties to the Hawaii employer-union health benefits trust
fund to the extent allowed in subsection (e), and other terms and
conditions of employment which are subject to collective bargaining and
which are to be embodied in a written agreement as specified in section 
89-10, but such obligation does not compel either party to agree to a 
proposal or make a concession.

***

(d) Excluded from the subjects of negotiations are matters of classification, 
reclassification, benefits of but not contributions to the Hawaii employer-
union health benefits trust fund, recruitment, examination, initial pricing, 
and retirement benefits except as provided in section 88-8(h). The 
employer and the exclusive representative shall not agree to any proposal 
which would be inconsistent with the merit principle or the principle of 
equal pay for equal work pursuant to section 76-1 or which would interfere with the rights and obligations of a public employer to:

(1) Direct employees;

(2) Determine qualifications, standards for work, and the 
nature and contents of examinations;

(3) Hire, promote, transfer, assign, and retain employees in 
positions;

(4) Suspend, demote, discharge, or take other disciplinary 
action against employees for proper cause;

(5) Relieve an employee from duties because of lack of work 
or other legitimate reason;

(6) Maintain efficiency and productivity, including maximizing 
the use of advanced technology, in government operations;

(7) Determine methods, means, and personnel by which the 
employer's operations are to be conducted; and

(8) Take such actions as may be necessary to carry out the 
missions of the employer in cases of emergencies.

This subsection shall not be used to invalidate provisions of collective bargaining 
agreements in effect on and after June 30, 2007, and shall not preclude 
negotiations over the procedures and criteria on promotions, transfers, 
assignments, demotions, layoffs, suspensions, terminations, discharges, or other 
disciplinary actions as a permissive subject of bargaining during collective 
bargaining negotiations or negotiations over a memorandum of agreement, 
memorandum of understanding, or other supplemental agreement.
6. **HRS § 89-10**

HRS § 89-10, which governs written agreements; enforceability; cost items, provides in relevant part:

(a) Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned, except for an agreement reached pursuant to an arbitration decision. Ratification is not required for other agreements effective during the term of the collective bargaining agreement, whether a supplemental agreement, an agreement on reopened items, or a memorandum of agreement, and any agreement to extend the term of the collective bargaining agreement. The agreement shall be reduced to writing and executed by both parties. Except for cost items and any non-cost items that are tied to or bargained against cost items, all provisions in the agreement that are in conformance with this chapter, including a grievance procedure and an impasse procedure culminating in an arbitration decision, shall be valid and enforceable and shall be effective as specified in the agreement, regardless of the requirements to submit cost items under this section and section 89-11.

***

(d) Whenever there is a conflict between the collective bargaining agreement and any of the rules adopted by the employer, including civil service or other personnel policies, standards, and procedures, the terms of the agreement shall prevail; provided that the terms are not inconsistent with section 89-9(d).

Whenever there are provisions in a collective bargaining agreement concerning a matter under chapter 76 or 78 that is negotiable under chapter 89, the terms of the agreement shall prevail; provided that the terms are not inconsistent with section 89-9(d).

7. **HRS § 89-10.8**

HRS § 89-10.8, which governs resolution of disputes, grievances, provides in relevant part:
(a) A public employer shall enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. The grievance procedure shall be valid and enforceable and shall be consistent with the following:

(1) A dispute over the terms of an initial or renewed agreement shall not constitute a grievance;

(2) No employee in a position exempted from chapter 76, who serves at the pleasure of the appointing authority, shall be allowed to grieve a suspension or discharge unless the collective bargaining agreement specifically provides otherwise; and

(3) With respect to any adverse action resulting from an employee's failure to meet performance requirements of the employee's position, the grievance procedure shall provide that the final and binding decision shall be made by a performance judge as provided in this section.

8. **HRS § 89-14**

HRS § 89-14, which governs prevention of prohibited practices, provides in relevant part:

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 and chapter 91. All references in section 377-9 to "labor organization" shall include employee organization.

9. **HRS § 377-9(d)**

HRS § 377-9, which governs prevention of unfair labor practices, provides in relevant part:

(1) No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.
III. ARGUMENT

A. The Letter of Hire to Dr. Bennett Is Not a Collective Bargaining Agreement Subject to Chapter 89 or the Board’s Jurisdiction

By definition, “collective bargaining” means “the performance of the mutual obligations of the public employer and an exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund, and other terms and conditions of employment[.]” HRS § 89-2 (emphasis added). In turn, “exclusive representative” means the employee organization certified by the Board as the collective bargaining agent to represent all employees in an appropriate bargaining unit. Id.

Additionally, HRS chapter 89 consistently refers to “collective bargaining agreement” as an agreement “reached between the employer and the exclusive representative” (see HRS § 89-10(a)); and imposes a duty upon “[t]he employer and the exclusive representative” to meet at reasonable times to negotiate in good faith with respect to wages, hours, and other terms and conditions of employment (see § 89-9(a)). Chapter 89 recognizes an employee’s right to participate in collective bargaining, but only as provided for in § 89-8, which provides in relevant part, “[e]mployee participation in the collective bargaining process conducted by the exclusive representative of the appropriate bargaining unit shall be permitted during regular working hours without loss of regular salary or wages. The number of participants from each bargaining unit with over 2,500 members shall be limited to one member for each five hundred members of the bargaining unit” (§ 89-8(c), emphasis added).

Accordingly, chapter 89 is clear that collective bargaining only occurs between an employer and an exclusive representative, and a collective bargaining agreement is reach
between a public employer and exclusive representative. Individual agreements between an employer and employee are not contemplated within the scope of chapter 89.

The Unit 7 CBA, however, does govern “Contracts During Probationary Period” in Article XII, governing Tenure and Service, and such provision would be applicable to the letter of hire that was issued to Dr. Bennett in June of 2012. However, the provisions of Article XII merely set limitations on a letter of hire to probationary employees, such as the effective dates of such a letter, and the maximum duration of the letter. Article XII’s acknowledgment of a letter of hire does not somehow incorporate the letter of hire into the CBA. (See Exh. “K”).

Moreover, both the Board and the Hawai‘i courts have looked to federal case law to guide interpretation of Hawai‘i public employment law. See Poe v. Hawai‘i Labor Relations Board, 105 Hawai‘i 97, 101, 94 P.3d 652, 656 (2004). The United States Supreme Court has recognized that collective bargaining agreements and individual contracts of hire are distinct. The case of J.J. Case Co. v. National Labor Relations Board, 321 U.S. 332, 64 S. Ct. 576 (1944), involved employees hired under individual contracts of hire. While the individual contracts were in effect, the employees became unionized. The employer’s argument was that it was not under a duty to bargain with the union until the individual contracts expire, which the Court rejected. In its analysis, the Court noted that collective bargaining between an employer and the representative of a unit results in a type of “trade agreement” that is not a contract of employment because “no one has a job by reason of it”; the Court further noted that “[a]fter the collective trade agreement is made, the individuals who shall benefit by it are identified by individualhirings . . . In the sense of contracts of hiring, individual contracts are not forbidden[.]” 321 U.S. at 335-336, at 64 S. Ct. at 579. In holding that the employer could not use the individual contracts to defeat or delay collective bargaining, the Court also held that the
National Labor Relations Board “has no power to adjudicate the validity or effect of such contracts except as to their effect on matters within its jurisdiction.” 321 U.S. at 340, 64 S. Ct. at 581.

The case of *Caterpillar Inc. v. Williams*, 482 U.S. 386, 107 S. Ct. 2425 (1987), involved managerial employees who were downgraded into unionized positions, and who asserted that they had been assured the downgrades were temporary; however, ultimately the plant was closed and the employees laid off. The employees filed suit in state court, and the employer removed the case to federal court, arguing that removal was proper because individual contracts were, as a matter of federal substantive labor law, merged into and superseded by the collective bargaining agreements. The Ninth Circuit reversed, because the cause of action did not require interpretation or application of the collective bargaining agreement. The Court affirmed the Ninth Circuit’s reversal, holding that Section 301 of the Labor Management Relations Act (LMRA) only “governs claims founded directly on rights created by collective bargaining agreements, and also claims substantially dependent on analysis of a collective bargaining agreement.” 482 U.S. at 394-95, 107 S. Ct. at 2431 (internal quotation mark omitted). The Court clarified its holding in *J.J. Case*, and concluded that individual contracts are not inevitably superseded by or subsumed into a collective bargaining agreement. 482 U.S. at 395-96, 107 S. Ct. 2431.

Although the Court has recognized that individual contracts may exist outside the scope of collective bargaining, some disputes involving individual agreements actually concern the interpretation or application of a collective bargaining agreement; however, each case is fact-specific. In *Melanson v. United Airlines, Inc.*, 931 F.2d 558 (9th Cir. 1991), a flight attendant with Pan Am transferred to United as part of United’s acquisition of Pan Am. The plaintiff alleged
that she was assured the weight requirements contained in the collective bargaining agreement would not apply to her. After being suspended due to the weight requirements, the plaintiff brought suit in court, asserting that because she was not an employee of United when first informed that she would not be subject to United’s weight requirements, the dispute was not covered by the collective bargaining agreement or the Railway Labor Act (RLA). The court disagreed, holding that “[t]he timing of the agreement or alleged tortious act . . . is not necessarily determinative. It is the relationship of the claim to the CBA, regardless of the plaintiff’s employment status, that guides the preemption analysis.” 931 F.2d at 561 (emphasis added). The court held that the plaintiff would have to show that the relevant portions of the collective bargaining agreement differed significantly from United’s representations, and that proof of United’s intent to not perform on its promise lead inevitably to the collective bargaining agreement, and thus the plaintiff’s actions under state law were properly dismissed as preempted by the RLA. 931 P. 2d at 563.

In Loewen Group International, Inc. v. Haberichter, 65 F.3d 1417 (1995), the employer, a funeral home operator, and a management employee entered into an individual employment contract that included a covenant not to compete. Later, the employer sued employee in federal court for breach of that agreement, and employee moved to dismiss due to LMRA preemption, asserting that he was a member of the union representing funeral directors, and that resolution of the employer’s claims required interpretation of the collective bargaining agreement. The court looked at whether the resolution of the claim depended on the meaning of, or required the interpretation of, a collective bargaining agreement. The employee had raised the defense that the provisions of the collective bargaining agreement conflict with the provisions of his individual contract, and thus a court must examine the collective bargaining agreement to
determine what effect the conflicts may have on the claims raised by the employer. The court acknowledged that preemption may be found when the collective bargaining agreement is the subject of the dispute, or the dispute is substantially dependent upon the analysis of the terms of a collective bargaining agreement, but that not all cases which tangentially touch collective bargaining agreements call for preemption. 65 F.3d at 1423-24.

Accordingly, the University asserts that the letter of hire is not a collective bargaining agreement, and not within the scope of chapter 89, and therefore the Board must dismiss the Complaint with respect to Dr. Bennett. Further, the University admits that it intends to assert, as part of its defense, that Complainants’ interpretation of certain elements in the letter of hire violates provisions of the CBA and chapter 89 (see discussion below); however, the University submits that the gravamen of Complainants’ claim is the provision in the letter of hire regarding the Agilent DirectDrive MRI machine, and that matter is not within the scope of the CBA or chapter 89, and accordingly, the Board lacks jurisdiction. The Board further submits that this issue appears to be an issue of first impression before the Board.

B. Even if a Letter of Hire Is Subject to Chapter 89 and the Board’s Jurisdiction, Such Agreement Expired Pursuant to Statute and CBA Provisions, and Is No Longer Effective

Assuming solely for the sake of argument that the Board holds that a letter of hire may be construed as a collective bargaining agreement or an agreement that is subject to chapter 89, Dr. Bennett’s agreement would have nevertheless expired pursuant to both statute and the Unit 7 CBA, and thus is no longer effective and cannot be enforced by the Board.

HRS § 89-6 permits members of an employer group to “negotiate, independently of one another, supplemental agreements that apply to their respective employees; provided that any supplemental agreement reached between the employer and the exclusive representative shall
not extend beyond the term of the applicable collective bargaining agreement and shall not require ratification by employees in the bargaining unit.” (HRS § 89-6(e), emphasis added). Accordingly, even if the Board deems letters of hire to be collective bargaining agreements negotiated independently by a member of the Unit 7 employer group, such agreement expires, by statute, when the master agreement expires. In Dr. Bennett’s case, the terms of the letter of hire expired no later than June 30, 2015, which was the termination date of the 2009-2015 CBA.

Moreover, Article XII of the Unit 7 CBA governs contracts during probationary periods, and that “[i]ntial appointment to the Faculty, by contract, shall be for a two-year (2) period.” Thus, the letter of hire also would have expired pursuant to the CBA. Furthermore, a letter of hire cannot amend, modify, change, alter, or waive any provision of the CBA except by written document executed by the employer and the union (see Article XXVII, governing entirety and modification). An individual agreement is not enforceable when in conflict with the CBA (see, Collins v. City of Manchester, 797 A.2d 132 (N.H. 2002)).

Accordingly, the letter of hire has expired by both statutory and CBA requirements. Pursuant to HRS § 377-9(d), which is made applicable to prohibited practice complaints by HRS § 89-14, “no complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.” The failure to file a complaint within ninety days of its occurrence divests the Board of jurisdiction to hear the complaint. This limitation is jurisdictional and provided by statute, and may not be waived by either the Board or the parties. See, Thomas v. Commonwealth of Pennsylvania Labor Relations Board, 483 A.2d 1016 (Pa. 1984) (the failure to comply with the statute of limitations for unfair labor practices goes to the subject matter jurisdiction of the labor relations board); HOH Corp. v. Motor Vehicle Industries Licensing Board, 69 Haw. 135, 736 P.2d 1271, 1275 (1987) (agencies may not nullify statutes).
C. Even if the Letter of Hire Is Construed as an Effective Collective Bargaining Agreement, the Decision to Purchase an MRI Machine is a Management Right

Assuming solely for the sake of argument that the Board construes the letter of hire to be an effective collective bargaining agreement that has not expired and over which the Board has jurisdiction, the decision to make a million dollar purchase of equipment and renovate facilities is a management right and, pursuant to statute, not subject to collective bargaining.

HRS § 89-9, which governs the scope of negotiations, provides in paragraph (d) in relevant part:

The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with the merit principle or the principle of equal pay for equal work pursuant to section 76-1 or which would interfere with the rights and obligations of a public employer to:

(1) Direct employees;

(2) Determine qualifications, standards for work, and the nature and contents of examinations;

(3) Hire, promote, transfer, assign, and retain employees in positions;

(4) Suspend, demote, discharge, or take other disciplinary action against employees for proper cause;

(5) Relieve an employee from duties because of lack of work or other legitimate reason;

(6) Maintain efficiency and productivity, including maximizing the use of advanced technology, in government operations;

(7) Determine methods, means, and personnel by which the employer's operations are to be conducted; and

(8) Take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.

Additionally, the University’s management rights are recognized and preserved.
in Article XXV of the Unit 7 CBA.

Decisions involving the “scope and direction of the enterprise” is a management right. See, First National Maintenance Corp. v. NLRB, 452 U.S. 666, 677, 101 S. Ct. 2573 (1981) (no duty to bargain over decision to terminate operations at one of employer’s sites). The Board has repeatedly held that a public employer’s right and duty to maintain efficient operations rendered certain subjects non-negotiable. In Decision No. 144, HSTA and Board of Education, Case No. DR-05-40, the Board held that the HSTA’s proposal regarding weighted class size were excluded subjects of negotiations because of the interference they would have on the BOE’s educational policies and operations, such as requiring the employer to hire additional personnel, build more classroom facilities, and due to the limitation on funds available, result in a cutback to existing programs and a shift in educational priorities. See Exh. “N” attached to the Hirakami Declaration. In Decision No. 26, In the Matter of Dept. of Education, Case No. DR-05-5, the Board held that the DOE “has the right and duty as an employer to maintain efficiency of its operations” and thus the HSTA’s work load proposal which would force the DOE to hire personnel and expand facilities, was not negotiable. See Exh. “O” attached to the Hirakami Declaration.

It should also be noted that the Board’s cases cited above pre-date United Public Workers v. Hannemann, 106 Hawai‘i 359, 105 P.3d 236 (2005), and used a “balancing test” in considering whether a subject was negotiable. However, in Hannemann, the Hawai‘i Supreme Court expressly held that, “with respect to the balancing test employed by the HLRB, HRS § 89-9 does not expressly state or imply that an employer’s right to transfer employees is subject to a balancing of interests. Contrary to the HLRB’s interpretation, our holding in Tomasu does not approve of the HLRB’s balancing test. Rather, we believe Tomasu stands for the proposition
that... 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.” 106 Hawai‘i at 365, 105 P.3d at 242.

Thus, collective bargaining is subject to, not balanced against, management rights. Furthermore, while HRS § 89-9(d) articulates permissive subjects over which the parties are allowed to bargain, matters of policy, efficiency of operations, and scope and direction of an enterprise are not among them.

Accordingly, the Complaint should be dismissed with respect to both the claim of breach of collective bargaining agreement and failure or refusal to negotiate.

D. Even if the Letter of Hire Is Construed as an Effective Collective Bargaining Agreement, Complainants Failed to Exhaust Contractual Remedies

HRS § 89-10.8 requires the employer and exclusive representative to enter into a written agreement setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. Article XXIV of the Unit 7 CBA provides for a grievance procedure that culminates in final and binding arbitration. The Complainants have not exhausted that grievance procedure. (see Kumashiro Declaration).

It is well-settled that an employee must exhaust any grievance procedures provided under a collective bargaining agreement before bringing an action pursuant to the agreement. Poe v. HLRB, 105 Hawai‘i 97, 94 P.3d 652 (2004). The exhaustion requirement preserves the integrity and autonomy of the collective bargaining process allowing parties to develop their own uniform
mechanism of dispute resolution; it also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means. 105 Hawai‘i at 101-02, 94 P.3d at 656-57. A complainant who fails to exhaust contractual remedies lacks standing to pursue a claim before the Board. 105 Hawai‘i at 104, 94 P.3d at 659.

Thus, assuming solely for the sake of argument that the Board construes the letter of hire to be an effective collective bargaining agreement, Complainants nevertheless failed to exhaust their contractual remedies. Furthermore, the Board should not retain jurisdiction merely because a complainant styles a claim as one involving a failure to bargaining. A fair reading of the Complaint shows that the gravamen of the Complaint is the letter of hire and the University’s alleged breach of that letter. Moreover, as argued above, the decision to expend over a million dollars on equipment and facility renovations is a management right that is not subject to negotiations and thus the failure to bargain claim must be dismissed as well.

E. Even if the Letter of Hire Is Construed as an Effective Collective Bargaining Agreement and Complainants Have Not Failed to Exhaust Contractual Remedies, the University Is Entitled to Judgment on the Merits

Assuming solely for the sake of argument that the Board construes the letter of hire to be an effective collective bargaining agreement, and that Complainants did not fail to exhaust their contractual remedies, the University nevertheless satisfied the conditions of the letter of hire. The letter stated that “resources will be made available to enable you to order an Agilent DirectDrive 9.4T/16MRI/MRS system[.]” The Agilent DirectDrive 2 NMRS/MRI System was purchases by the University as a “sole source” purchase for $1,066,000.00. Pursuant to Hawai‘i Administrative Rules (HAR) § 3-122-81(c), “[j]ustification for a sole source purchase must establish that the good, service, or construction has a unique feature, characteristic, or capability essential to the agency to accomplish its work and is available from only one supplier or source.”
In this case, the justification for the sole source purchase was that “Agilent Technologies, Inc. is the ONLY distributor of the Agilent DirectDrive 2 MRS/MRI System.” The justification further provided that “[t]he only competing company for small animal MRI is Bruker”; however, “Bruker does not sell small-bore systems similar to the Agilent system. The 9.4T Biospin system by Bruker is much larger (35 cm bore) which requires a larger building. Bruker also sells lower filed (3T and 7T) Biospin small animal systems but these systems do not allow for the resolution and sensitivity that is required for our studies.” The request to purchase the Agilent machine was forwarded for approval by former University President M.R.C. Greenwood, whose approval was required for a sole source purchase of this size.

By letter dated October 31, 2013, Agilent notified its customers that in response to certain market conditions, it modified its business model and would no longer be accepting order for pre-clinical MR Imaging systems, effective November 1, 2013. On or about December 3, 2014, Dr. Bennett sent an email to Hoffman, stating (emphases added):

Agilent sent us the attached letter about the MRI.

They will not be supporting MRI after June, so all of our service etc. will be handled by a third party.

With this letter they are asking us to pay for the scanner by June.

Steve suggested you might be able to help us resolve this. I think the best solution is to have the contract amicably cancelled, with no charge to us. They didn’t want to do that last time. I think we need someone in procurement or general counsel to read the contract and back up a decision on this. Obviously them going out of business does not bode well for the university in terms of having an expensive, state-of-the-art machine in operation for a long time.

Could you please let me know if you have any ideas about who we could contact here who can get stuff done?
Thanks a lot for any help.

Additionally, further concerns were raised by Agilent's letter dated March 2, 2015 [sic] which was received by Hoffman in December of 2014, and which provided in relevant part:

Additionally, as Agilent is shutting down the NMR business, we will be unable to guarantee the appropriate resources for installation due to staff attrition, parts availability and support resources should the Systems not be available for installation and acceptance at the University site by July 2014. . . .

Thereafter, the University was able to negotiate a cancellation agreement with Agilent. Subsequently, the University has discussed the possibility of acquiring another MRI machine, and is still open to that idea, with the primary obstacle being one of funding, and subject to a prudent plan for use and cost recovery.

However, given the express language of the letter of hire, the letter's reference to a specific Agilent DirectDrive 9.4T/16MRI/MRS system cannot be construed as a binding contract by the University to purchase any other system. Moreover, given the justifications that were provided for the sole source purchase of the Agilent machine in 2012, it cannot even be argued that, notwithstanding the clear and unambiguous language in the letter, the parties intended the letter be applicable to any other machine.

Accordingly, University Respondents are entitled to summary judgment on the merits.

F. The University Acted in Good Faith in Purchasing and Attempting to Install the Agilent Machine, and in Discussing the Possibility of Purchasing Another Machine

A finding of a prohibited practice requires that a respondent committed a prohibited practice "willfully" which requires a "conscious, knowing, and deliberate intent to violate the provisions of chapter 89. Aio v. Hamada, 66 Haw. 401, 409-10, 664 P.2d 727, 733 (1983).

Here, the University acted in good faith in purchasing and attempting to install the
Agilent DirectDrive machine before the vendor decided to cease production, and in discussing the possibility of purchasing another machine:

The University purchases the Agilent DirectDrive 2 MRS/MRI System for $1,066,000.00, which included $1,000,000.00 for Agilent to furnish, deliver, install, and provide training for the machine; $41,000.00 for local tax; and $25,000.00 for freight. Because of the special requirements of the Agilent machine, the University expended approximately $114,000 so far out of approximately $326,118 in design costs alone toward renovation design of existing facilities, which did not include the actual construction costs that would later occur. Initially, a site at the John A. Burns School of Medicine (JABSOM) was identified as a possible location for the machine; however, that proved to be unfeasible. The University then identified a location in the Biomedical Sciences Building, Court A, Room A101. Leo A Daly, the architecture, planning, engineering, interior design, and program management firm selected for the design project, identified architecture, mechanical systems, and electrical systems inadequacies that would need to be addressed before the machine could be housed, based upon the “‘Agilent Horizontal Imaging Site Planning Guide’ by Agilent Technologies, Inc. 2011 as edited by Kevin Bennett 26 November, 2013.”. Leo A Daly estimated a budget estimate for the eventual construction costs of $476,998.00 as of June 30, 2014.

At all relevant times, the University has paid for Dr. Bennett and his research assistants to travel to Arizona to utilize the MRI machine at Arizona State University.

By letter dated October 31, 2013, Agilent notified its customers that in response to certain market conditions, it modified its business model and would no longer be accepting order for pre-clinical MR Imaging systems, effective November 1, 2013. Dr. Bennett also expressed his desire to cancel the Agilent contract, and his concern regarding support of the machine after a
certain date. Additionally, further concerns were raised by Agilent’s letter stating “we will be unable to guarantee the appropriate resources . . .” Accordingly, the University negotiated a cancellation agreement with Agilent.

As part of the University’s exploration into the possibility of acquiring another MRI machine at a future time, Dr. Bennett; Interim Dean Kumashiro; Mary Hoffman; Acting Chair Taylor; and Interim Vice Chancellor Taylor met on October 7, 2015, and discussed possible sources of funding that could enable the University to purchase another machine. The group discussed the possibility of a loan, alongside the revolving fund, and other options, much of which hinged on a business plan to be submitted by Dr. Bennett. At the meeting, Dr. Bennett indicated he could submit the business plan “within one to two weeks; however, to date, no business plan has been submitted.

Additionally, Interim Vice Chancellor Taylor had held open for Dr. Bennett one of only three available slots to apply for federal funds to augment the approximately $500,000 in funds his office had previously provided towards acquisition of an MRI machine. A successful grant would have enabled the College of Natural Sciences to purchase and MRI in 2016. Additionally, Interim Dean Kumashiro and her staff had offered to assist Dr. Bennett in preparation of a grant proposal, and the College of Natural Sciences had a positive track record of success, as both of the college’s proposals the previous year were funded. Interim Vice Chancellor Taylor explained that “[w]e are doing our best in a difficult financial situation to work with you to obtain an MRI instrument, and would appreciate your assistance and cooperation.” However, Dr. Bennett decline to assist and cooperate.

The Board has previously held that an employer’s sole motivation of reducing expenditures in the face of budgetary cuts and the employer’s fiscal condition, does not support a
finding or an inference of unlawful motive or intent. See Decision No. 54, Sage and Board of Regents and Hawaii Federation of College Teachers, Case No. CE-07-8 (Exh. “P” attached to the Hirakami Declaration). In Order No. 2656, UPW and LaDerta, Case Nos. CE-01-720a and CE-10-720b, the Board held that the Governor’s actions in announcing layoffs of approximately 123 Unit 1 and 93 Unit 10 employees and the shutdown of programs, and where the record indicated that the State was facing a severe fiscal crisis and was required to balance its budget in the face of ever-increasing revenue shortfalls, was not a prohibited practice pursuant to HRS § 89-13(a)(1), (3), and (7), and granted summary judgment in favor of the respondents (Exh. “Q” attached to the Hirakami Declaration).

Here, it is clear from the factual background in Section I.D. of this Memorandum discussing the budgetary problems of the College, as well as the Hoffman Declaration and its attached exhibits, that the College acted in good faith in attempting to address its fiscal crisis.

G. Complainants Failed to Mitigate Damages

As already discussed above, on or about December 3, 2014, Dr. Bennett sent an email to Hoffman, stating (emphases added):

Agilent sent us the attached letter about the MRI.

They will not be supporting MRI after June, so all of our service etc. will be handled by a third party.

With this letter they are asking us to pay for the scanner by June.

Steve suggested you might be able to help us resolve this. I think the best solution is to have the contract amicably cancelled, with no charge to us. They didn’t want to do that last time. I think we need someone in procurement or general counsel to read the contract and back up a decision on this. Obviously them going out of business does not bode well for the university in terms of having an expensive, state-of-the-art machine in operation for a long time.
Could you please let me know if you have any ideas about who we could contact here who can get stuff done?

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As part of the University’s exploration into the possibility of acquiring another MRI machine at a future time, Dr. Bennett; Interim Dean Kumashiro; Mary Hoffman; Acting Chair Taylor; and Interim Vice Chancellor Taylor met on October 7, 2015, and discussed possible sources of funding that could enable the University to purchase another machine. The group discussed the possibility of a loan, alongside the revolving fund, and other options, much of which hinged on Dr. Bennett’s business plan. A business plan would include details such as the expected user base for an MRI machine; recurring costs such as service plans, consumables, utilities, and personnel costs (i.e., technicians required); the expected number of hours per month the machine would be in use, and by whom; the fees anticipated to be charged for such usage; etc. At the meeting, Dr. Bennett indicated he could submit the business plan “within one to two weeks.” However, to date, no business plan has been submitted.

Additionally, Interim Vice Chancellor Taylor had held open for Dr. Bennett one of only three available slots to apply for federal funds to augment the approximately $500,000 in funds his office had previously provided towards acquisition of an MRI machine. A successful grant would have enabled the College of Natural Sciences to purchase and MRI in 2016. Additionally, Interim Dean Kumashiro and her staff had offered to assist Dr. Bennett in preparation of a grant proposal, and the College of Natural Sciences had a positive track record of success, as both of the college’s proposals the previous year were funded. Interim Vice Chancellor Taylor explained that “[w]e are doing our best in a difficult financial situation to work with you to obtain an MRI instrument, and would appreciate your assistance and cooperation.” However,
Dr. Bennett declined to assist and cooperate.

In "contract or tort, the plaintiff has a duty to make every reasonable effort to mitigate his [or her] damages." Malani v. Clapp, 56 Haw. 507, 517, 542 P.2d 1265, 1271 (1975). Here, even assuming solely for the sake of argument that Complainants have a colorable claim, Complainants have failed to mitigate damages and should be barred from recovery.

H. Complainants Failed to Exhaust Contractual Remedies with Respect to the Removal of Dr. Cole as Chair of the Department of Biology

Article XXIII of the Unit 7 CBA governs the appointment, duties, and compensation of academic chairs, and Article II governs non-discrimination. Under the same legal principals discuss, supra, with respect to Dr. Bennett's claims, Complainants have failed to exhaust contractual remedies with respect to Dr. Cole as well. (See Kumashiro Declaration).

With respect to the claim of failure to bargain, it is well-settled that the parties to a collective bargaining agreement have no duty to engage in mid-term bargaining over subjects covered by the agreement. See United Mine Workers of America v. NLRB, 879 F.2d 939, 943-44 (D.C. Cir. 1989). Furthermore, Internal Revenue Service and National Treasury Employees Union, 29 FLRA 162, 166 (Sept. 28, 1987), held that the duty to bargain in good faith requires an agency to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters which are not contained in the agreement unless the union has waived its right to bargain about the subject matter involved. Thus, assuming Complainants will assert that there was a duty to engage in mid-term bargaining, University Respondents assert in response that, first, mid-term bargaining was not required over Dr. Cole's removal as Chair, as that subject is covered by the CBA (see United Mine Workers of America, 879 F.2d at 943-44), and if Complainants believe the CBA was violated, they have failed to exhaust contractual
remedies. And, second, in the alternative, assuming the removal of a Chair is not covered by the CBA, the UHPA presented no proposal to the University to bargain over (see Internal Revenue Service, 29 FLRA at 166).

I. Even if Complainants Did Not Fail to Exhaust Contractual Remedies with Respect to the Removal of Dr. Cole as Chair of the Department of Biology, Interim Dean Kumashiro Had Legitimate, Non-Discriminatory and Non-Retaliatory Reasons and Acted in Good Faith

To establish a prima facie case, Complainants must show that: (1) Dr. Cole engaged in protected activity; (2) the employer subjected the complainant to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse employment action. See Order No. 3081, Weiss and Champagne, Case No. CE-05-817, at p.12 (Exh. “R” attached to the Hirakami Declaration).

Complainants cannot establish that Dr. Cole, engaged in protected activity. Dr. Cole’s performance as Chair of the Department of Biology are responsibilities required by EP 5.219, and not activities protected under chapter 89. Furthermore, the Complaint alleges that Dr. Cole, “in meetings with Interim Dean Kumashiro, advocated for Bennett in favor of maintaining his terms and conditions of employment. Cole also advocated for the interest of the Department of Biology, during space planning for a new building. Both activities are properly within the role of a department chair.” However, as discussed above, the dispute regarding the purchase of another MRI machine involves an employer’s right to maintain efficiency of its operations and to control the scope and direction of an enterprise, which are a management rights and not matters of collective bargaining (see, e.g., HRS § 89-9(d); Decision No. 26, In the Matter of Dept. of Education, Case No. DR-05-5; First National Maintenance Corp. v. NLRB, 452 U.S. 666, 677, 101 S. Ct. 2573 (1981); and Decision No. 144, HSTA and Board of Education, Case No. DR-05-
40, supra). Similarly, advocating during “space planning for a new building” is not an activity protected under HRS chapter 89.

Accordingly, Complainants fail to establish a prima facie case.

However, even assuming for the sake of argument that Complainants have made a prima facie case, the University had legitimate, non-discriminatory and non-retaliatory reasons for removing Dr. Cole as Chair. University Respondents incorporate the lengthy factual background discussed in Section I.G. of the Memorandum, as well as the Declaration of Interim Dean Kumashiro and its attached Exhibit “A.”

J. Complainants Are Not Entitled to the Relief Requested

With respect to Complainants’ request that Interim Dean Kumashiro personally, and any persons acting in concert with her, shall be liable to Complainants, HRS § 89-13(a) provides that it shall be a prohibited practice for a public employer or its designated representative willfully to perform certain prohibited acts. A public employer and a designated representative are people acting in their official capacities, and Interim Dean Kumashiro at all times acted in her official capacity. A claim against a person in their official capacity is a claim against the government itself. Kaho'ohanohano v. State, 114 Hawai‘i 302, 337-38, 162 P.3d 696, 731-32 (2007).

It should also be noted that when the Hawai‘i Supreme Court reviews prohibited practice complaints on appeal, the Court automatically substitutes respondents pursuant to Hawai‘i Rules of Appellate Procedure Rule 43(c)(1), indicating the Court considers § 89-13(a) complainants to be against respondents in their official capacities. See, UPW v. Abercrombie, 133 Hawai‘i 188 n.1, 325 P.3d 600 n.1 (2014); HGEA v. Casupang, 116 Hawai‘i 73 n.1, 170 P.3d 324 n.1 (2007);

Moreover, with respect to Complainant’s analogy to improper motive and animus such as would constitute a tortious breach of contract or interference with contract in a proper forum,
University Respondents respond that with respect to remedies available in other forums, HRS § 304A-108 provides in relevant part (emphases added):

(a) The university may sue and be sued in its corporate name. **Notwithstanding any other law to the contrary, all claims arising out of the acts or omissions of the university or the members of its board of regents, its officers, or its employees**, including claims permitted against the State under chapter 661, part I, and claims for torts permitted against the State under chapter 662, **may be brought only pursuant to this section and only against the university**. However, the university shall be subject to suit only in the manner provided for suits against the State, including section 661-11, and **any liability incurred by the university in such a suit shall be solely the liability of the university, shall be payable solely from the moneys and property of the university**, and shall not constitute a general obligation of the State or be secured directly or indirectly by the full faith and credit of the State or the general credit of the State or by any revenue or taxes of the State. All defenses available to the State, as well as all limitations on actions against the State, shall be applicable to the university.

(b) The board of regents, upon the advice of its attorney, may arbitrate, compromise, or settle any claim, action, or suit brought against the university pursuant to this section. Any claim compromised or settled under this subsection shall be payable solely from the moneys and property of the university and shall not constitute a general obligation of the State or be secured directly or indirectly by the full faith and credit of the State or the general credit of the State or by any revenue or taxes of the State. Nothing in this subsection precludes the board of regents from requesting and securing legislative appropriations to fund the settlement of any such claim or judgment against the university or its regents, officers, employees, or agents.

(c) **Rights and remedies conferred by this section shall be exclusive and shall not be construed to authorize any other claim, suit, or action against the State.** In addition, a judgment, compromise, or settlement in an action brought against the university under this section shall constitute a complete bar to any action brought by the claimant, by reason of the same subject matter, against the State or an officer or employee of the university.

Accordingly, even if the Board were to look to other forums for guidance, liability, if any, remains with the University as an entity and not individual respondents.
With respect to Complainant's demand for relief that the Board require purchase of an MRI machine, such an order would violate the management rights provision of HRS § 89-9(d), as well as procurement laws and policies.

With respect to the demand for interest, HRS § 377-9(d) expressly provides for interest solely on "back pay," and any waiver of a State's sovereign immunity must be unequivocally expressed in statutory text. Taylor-Rice v. State, 105 Hawai'i 110, 94 P.3d 665 (2004). Pursuant to HRS § 304A-108, "[a]ll defenses available to the State, as well as all limitations on actions against the State, shall be applicable to the university." Accordingly, other than interest on "back pay," no other interest is permitted.

IV. CONCLUSION

For the reasons discussed above, University Respondents respectfully request that the Complaint be dismissed, and/or that the Board grant summary judgment in favor of University Respondents on all claims.


\[Signature\]

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