STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of ) Case No. CE-07-874

UNIVERSITY OF HAWAII ) UNIVERSITY OF HAWAII PROFESSIONAL
PROFESSIONAL ASSEMBLY; ) ASSEMBLY’S MEMORANDUM IN
KEVIN BENNETT, Associate Professor ) OPPOSITION TO UNIVERSITY
of Biology, Department of Biology, ) RESPONDENTS’ MOTION TO DISMISS
University of Hawaii; and KATHLEEN ) PROHIBITED PRACTICE COMPLAINT
COLE, Associate Professor of Biology, ) AND/OR FOR SUMMARY JUDGMENT
Department of Biology, University of ) FILED ON JANUARY 15, 2016;
Hawaii,

Complainant,

and

KRISTIN KUMASHIRO, Interim Dean ) DECLARATION OF KEVIN BENNETT;
of Natural Sciences, University of ) DECLARATION OF KATHLEEN COLE;
Hawaii; and BOARD OF REGENTS, ) DECLARATION OF JAMES KARDASH;
UNIVERSITY OF HAWAII, ) CERTIFICATE OF SERVICE

Respondent.

UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY’S MEMORANDUM IN OPPOSITION TO UNIVERSITY RESPONDENTS’ MOTION TO DISMISS PROHIBITED PRACTICE COMPLAINT AND/OR FOR SUMMARY JUDGMENT FILED ON JANUARY 15, 2016
I. Introduction.

Since the inception of Chapter 89, the Board has recognized that the University of Hawaii is a unique institution, and that it takes creativity, subtlety, and judgment to apply concepts derived from an industrial context in an academic setting. "[C]ollective bargaining concepts as to who sits on which side of the bargaining table are not readily applicable to the University because of its unique manner of governance." HPERB Dec. 21 (1972).

Well, your concept of top level, you see, kind of violates the way things operate or are operating at the University. ... Well, you think of it as a hierarchy, and I know that's hard to get away from, because it's—you know, we all grow up in one culture. But this is a different culture—... University governance. ... —and marrying the culture of the University governance with the industrial union culture, which essentially is the background of this collective bargaining law, is the creative problem we have before us. Not an adversary problem, but a problem that's going to require creating something new under the sun that isn't part of previous collective bargaining experience and isn't part of previous university governance experience either....

Id. (Board quoting, with approval, UH President Harlan Cleveland).

The UH recognizes that this case presents matters of first impression.
UH Memorandum ("UH Mem.") at 43. We agree. These matters are also of the utmost importance, because they affect the careers of many, if not all, members of Unit 7. With little guidance specifically on point, the Board's response will need to be creative, and return to first principles.

The fundamental question can be posed as follows. "Unit 7 faculty are commonly hired through a unique letter of hire, negotiated between the job candidate, academic departments consisting of other Unit 7 members, and Deans of colleges, pursuant to academic tradition. The hiring negotiations process is not contractualized. These letters of hire state initial wages, and other terms and conditions of employment, which may vary considerably from case to case, but are not negotiated between the exclusive representative and the public employer. Can letters of hire be enforced in any meaningful way?" That is the basic issue in Dr. Bennett's claim.

A parallel question is posed by Dr. Cole's claim: "Can letters of appointment of academic chairs, negotiated between a faculty member and a Dean, be enforced in any meaningful way?"

Complainants hope in this case to establish that these letters are
enforceable, using the doctrines of Chapter 89. It appears the UH contends they are not enforceable, and that although the UH issues them by the pound to induce qualified people to accept offers of employment, the UH can disregard promises made in them.

First, Complainants seek a declaration of law from this Board, to the effect that initial wages and terms and conditions of hire of Unit 7 faculty are in principle bargainable, so long as they are topics that satisfy the requirements of bargainability under Chapter 89. In other words, such initial terms are not excluded from the scope of bargaining, merely because they are initial.

Second, Complainants seek a declaration of law that although there may be bargainable initial wages and terms and conditions of employment in a letter of hire, the collective bargaining parties are within their rights to delegate, to the extent they see fit, the negotiation of such bargainable initial terms to the traditional academic process, as they have always done. In other words, the collective bargaining parties may “deputize” the traditional academic process to set initial terms, so long as those terms do not violate
the formal collective bargaining agreement; and, furthermore, the collective bargaining parties have not violated Chapter 89 by abstaining from including this process in their collective bargaining agreements. This is because the bargaining parties are not obliged to include all bargainable topics in their collective bargaining agreement, if they so agree.

Third, Complainants seek a declaration of law that the traditional academic hiring process, to the extent it deals with bargainable topics, is an expression of the common law of the shop, and an established past practice of long-standing, and may not be varied without agreement of the bargaining parties. Particularly, any attempt by the public employer to unilaterally restructure the process, without bargaining, would constitute unilateral action on a bargainable topic, and hence a refusal to bargain, which is a prohibited practice. The same would be true of the traditional academic process of settling terms of compensation of academic department chairs.

Fourth, Complainants seek a declaration of law that the collective bargaining parties may bargain modifications to the traditional academic
hiring and chair compensation processes, if they so agree. This is none other than the basic power, under Chapter 89, that the parties may demand bargaining on, and agree to language on, bargainable topics.

Fifth, Complainants seek a declaration of law that, under conditions obtaining in this case, the fruits of the traditional academic hiring process, and chair hiring process, which have been "deputized" by the parties, are enforceable in the same way that any other fruits of the collective bargaining process are enforceable; of course to the extent that terms and conditions of employment are bargainable. In other words, letters of hire and letters compensating chairs, are enforceable under Chapter 89, as collective bargaining agreements are.

These several steps and legal conclusions, we feel, are reasonable and necessary to align actual University practice, adhered to for decades, and the doctrines of Chapter 89, to each other. This accomplished, the Board could address the particular situations posed in the Bennett and Cole fact patterns, find prohibited practices have occurred through the breach of letters of hire and chair compensation, and craft and award appropriate remedies.
Summary disposition of this matter, through dismissal of the complaint or summary judgment against the Complainants, is not appropriate under these circumstances, as will be discussed below.

II. Jurisdiction.

The HLRB has original jurisdiction to declare the meaning of Chapter 89, and particularly matters relating to prohibited practices. The Circuit Courts will avoid ruling on matters relating to prohibited practices, and will return them to the Board. Arbitral jurisdiction is uncertain, because the five propositions set forth above have not yet been declared, and the collective agreement does not contain express language. In principle, once the five propositions are declared, arbitrators might accept jurisdiction in future cases of this type, but it is beyond the scope here to analyze all the possibilities. This Board, in Decision 48, noted that it will not defer to arbitration, and will keep the whole case, where questions of prohibited practice overlap with questions that may be arbitrable; this is in large part to avoid a multiplicity of decisions.

The question of jurisdiction can be disposed of thus: if not before this
Board, where?

III. Legal standards applicable to the motions.

UH recites boilerplate standards.

To rephrase UH's assertions, on a motion to dismiss, the motion should be granted only where it is beyond doubt that the complainant can prove no set of facts that would entitle him to relief; and even then the Board must view the complaint in a light favorable to the complainant to determine if the complaint could succeed under an alternate theory. See, UH Mem. 31.

On a motion for summary judgment, the board must view the evidence in the light most favorable to the non-moving party, in this case the Complainants, and be convinced that there are no facts worthy of trying. If there are issues as to material facts, the motion cannot be granted. The moving party retains the burden of persuasion throughout. See, UH Mem. 31-32. Of course, it is the non-moving party's duty to show that material facts are in dispute. Id.

IV. The Motions should be denied.
The Declaration of James D. Kardash summarizes the views of an UHPA agent with thirty-eight years of experience. Kardash explains the academic process of hiring, which has been in effect throughout that time. These letters of hire have typically contained the initial salary of the incoming faculty member, and any other special terms of employment. Kardash, ¶ 11.

The academic hiring process has resulted, in the most recent ten-year period, in approximately three thousand eight hundred (3800) letters of hire. Kardash, ¶ 12. Projecting that number backwards through the decades, and assuming other things equal, it is possible that the University has issued in the range of sixteen thousand (16,000) letters of hire under essentially the same procedures, since the inception of Chapter 89. We may safely assume that this fact did not escape the notice of the collective bargaining parties. Assuming the continuation of the process, similar figures can be projected into the future. This should give the Board an impression of the importance of this case.

We do not have an estimate of the number of letters of compensation
for chairs, which would be much smaller, but the chairs issue piggybacks on the other.

The processes of hiring and chair compensation have never been contractualized. *Kardash*, ¶¶ 9 - 10. Nonetheless, throughout all this time, the academic process has been running smoothly. *Kardash*, ¶¶ 13 - 14.

The UH argues that letters of hire are not collective bargaining agreements, UH Mem. 39 et seq. This misses the point. Letters of hire contain bargainable topics. Letters of hire specify wages to be paid to a bargaining unit member. That is true both in general, *Kardash*, ¶ 11, and in this case, UH Ex. A. Wages are a bargainable topic. UH does not even suggest otherwise, nor is it likely to. Unless the Board is prepared to hold that the Board lacks jurisdiction to address agreements on wages, the Board should conclude that setting of wages in letters of hire is within the reach of Chapter 89.

UH points out that the gravamen of Bennett’s particular case is the provision of an MRI machine. UH Mem. 43. Bennett’s letter of hire stated that he would be provided with an MRI machine, laboratory space, all the
needed equipment, and $450,000 to build the lab.

These items were not frivolous; they were specified because that is what is required to build an MRI lab. We know that providing them involves a substantial expense by the employer; the Declarations of Hoffman and Taylor, numerous exhibits, and the UH Memorandum all make clear that the UH would be undertaking a large expense to establish this lab. We also know that Bennett would not have undertaken to come to the UH at all, except that the UH offered to supply those things. Bennett, ¶ 3 - 6. The commitment of Bennett to come to the UH to run and develop an MRI lab was not an idle commitment on his part, since he had to trust that uprooting from a successful situation to come to the UH was, metaphorically, not stepping into a career-destroying sinkhole. Id. See also, Cole, ¶ 4. Both parties undertook substantial detriments in accord with their mutual promises. Thereafter, the UH (before Kumashiro) reaffirmed over and over again that it was serious about its promise. Bennett, ¶¶ 12, C. 1)-8). Were anybody to suggest, after that long course of conduct, that the UH could simply repudiate its obligations with no consequence -- that would be a
staggering offense against equity.

These MRI-related items are not wages. The question is whether they are bargainable terms and conditions of employment. Why should they not be? What equipment will be supplied to an employee by the employer, is a classic negotiable item. If an employee requires gloves, whether the employee will supply his own gloves, or the employer will supply them, is bargainable. If the employee requires tools or equipment, what tools and equipment will be supplied by the employee, and what by the employer, is bargainable. If an employee must drive in the course of employment, parking spaces and use of a company car or private mileage reimbursement are bargainable. The UH was promising Bennett certain terms and conditions of employment. The fact that an MRI lab is a large expense should not change the bargainability of it\(^1\). The size of the expense, matters of the UH budget, whether the UH was over-promising, questions of

\(^1\) Heavy equipment operators in many of the larger construction companies in Hawaii are unionized. Some unionized operators drive company bulldozers, or trucks, or other equipment and some, termed "owner operators", bring their own equipment; the collective bargaining agreement allows for both situations.
possibility or impossibility of procurement, and the like, might affect the kind of remedy that should be imposed. But in order to contemplate the correctness of the remedy, the case should be heard.

If the MRI-related items are terms and conditions of employment, then the Board can reach and interpret the letters of hire to that extent. The fact that this is a new situation, that would not occur in other bargaining units, should not be an obstacle, since, like it or not, the legislature has chosen to extend labor concepts to the University. The Board has already recognized that many applications of labor doctrine, in a university setting, may be "something new under the sun."

Since the parties agree that this is a matter of first impression, in which there is no clear Board guidance, the Board should incline toward hearing the case, not dismissing it, with the goal of creating appropriate doctrine. This would accord with the legal standard discussed above, that the Board cannot dismiss a case unless it is prepared to say that it cannot prevail under any theory.

The Board should also be mindful that letters of hire, as noted above,
are a widespread practice. Not all letters of hire will include items such as laboratory equipment and startup monies, but many will, foreseeably in the sciences. The Board should be cognizant of the profound ripple effects any decision may have into the future.

The UH argues that at most, letters of hire are like memoranda of agreement, and should, the UH says, expire with each collective bargaining agreement. That would mean that letters of hire issued shortly before the expiration of a contract would be of short duration, and letters of hire entered into at the beginning of a contract (UH-UHPA contracts have lasted up to 6 years) would be of long duration. The analogy to memoranda of agreement is weak, and should be rejected.

The UH argues that a decision to purchase an MRI machine is management right, and therefore, is not bargainable. First, if that is so, it is still true that the purchase of an MRI machine may have measurable impacts on wages, hours, or terms and conditions of employment in the bargaining unit, and bargaining of impacts, even of decisions solely in managements discretion, is surely possible. For example, in the UH-UHPA contract there is
a retrenchment provision, which deals with the consequences of the UH's right to shut down entire sections of the University. No one has suggested that the UH does not have the right to decide to shut down a whole section of the university, but all of the consequences on employment matters of that decision can be bargained, and have been. Second, if the decision to purchase an MRI machine and establish an MRI lab is a decision that solely can be made by management, we submit that the decision to purchase and establish was, in fact, made by the UH prior to the hiring of Bennett. Bennett did not dictate the decision; he responded by being willing to be employed. Bennett's employment terms are one of the impacts of that decision. See, UH Ex. A. The question becomes, then, what if the UH decides a thing, hires Bennett, and then reverses its decision? The reversal of the decision, even if a management right, does not immunize UH from the consequences of impact bargaining. UH cannot reverse course, maul employees, and claim that it has no obligations. Under this approach, the UH should have, at a minimum, bargained the impacts on Bennett, prior to reversing course, even if reversing course were a management right.
If UH thinks that this matter should be arbitrated, UH should stipulate that the matters discussed above are bargainable, that the Board may issue declarations as we have noted in our introduction, and that the collective bargaining agreement covers letters of hire. We shall see whether they offer to do this; we rather expect they want to argue to an arbitrator that the arbitrator has no jurisdiction, which makes their argument here that UHPA ought to have pursued arbitration rather two-faced.

Arguing that the UH is only obligated to provide an Agilent system and no other, is unconvincing, given the UH’s extensive efforts to replace the Agilent system with the MR Solutions system, and the great support shown to the MR Solutions system by UH officials, including Declarant Taylor himself, and Vice President Jan Gouveia.

UH argues that it acted in good faith to pursue the Agilent and possibly another machine. We do not contest the UH’s behavior up to that point. We contest the peremptory unilateral repudiation of all those prior efforts by Kumashiro. The extensive efforts by the UH only make the repudiation stand out in contrast.
UH argues that Bennett failed to mitigate damages, for example by not providing a business plan or going for grants. Bennett’s declaration contradicts the facts and purport of the UH’s argument. The substance of a business plan was to support a loan, that the UH never proposed to obtain; they don’t even know if it’s possible. Going for grants would not be mitigation, it would be essentially futile. The matter must be tried on the facts.

UH argues that Cole did not exhaust contractual remedies and that Kumashiro had legitimate non-discriminatory reasons for her dismissal. Cole’s declaration contradicts Kumashiro’s assertion of legitimate reasons on all major points; additionally, Kumashiro barely asserted any reasons at all for the dismissal at the time. Kumashiro’s case smacks of post-hoc rationalization. It is a common principle of arbitration that the employer may not rely on reasoning not expressed at the time of adverse action, precisely to prevent post-hoc rationalization. Moreover, Cole’s ability to seek contractual remedies depends on this Board’s declaring that the terms of her service of chair, particularly an allocation of substantial money to
cover her research during the term of her service, were bargainable terms of employment. Cole's support monies are like Bennett's startup monies. They were arrived at by a traditional academic process akin to letters of hire, and the same arguments made in the Bennett matter apply to Cole.

Questions of remedy are premature in this litigation. Even if Kumashiro cannot be held personally responsible, the Board has a wide range of ability to structure remedies appropriate to the precise facts in the case. The facts would need to be tried.

V. Conclusion.

The complaint in this case should not be dismissed, nor summary judgment be granted against Complainants, because there is a plausible theory by which the complaint can succeed, and because reading the alleged facts in favor of Complainant, the non-moving party, reveals a substantial case to be tried. Moreover, in a matter of first impression, the Board should hear the facts and make detailed findings. This is particularly so when the Board's decision can have such a substantial impact.

Counsel notes that due to lack of time, in this brief, propositions of law
are not fully-cited. Counsel proposes, either by consent or by motion, or at oral argument, to submit a letter citing various propositions.

DATED: Honolulu, Hawaii, 1/25/16

[Signature]

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STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of) Case No. CE-07-874

UNIVERSITY OF HAWAII) DECLARATION OF KEVIN BENNETT,
PROFESSIONAL ASSEMBLY; Ph.D.
KEVIN BENNETT, Associate Professor
of Biology, Department of Biology,
University of Hawaii; and KATHLEEN
COLE, Associate Professor of Biology,
Department of Biology, University of
Hawaii,

Complainant,

and

KRISTIN KUMASHIRO, Interim Dean
of Natural Sciences, University of
Hawaii; and BOARD OF REGENTS,
UNIVERSITY OF HAWAII,

Respondent.

DECLARATION OF KEVIN BENNETT

I, Kevin Bennett, Ph.D., declare as follows:

1. I am an Associate Professor and Associate Chair in the Department of
Biology at the University of Hawaii, and I make this Declaration based on personal knowledge gained in that capacity.

2. I have read the declarations of Kristin Kumashiro, Mary Hoffman, and Brian Taylor in this case. Where I have responses to their assertions, they are keyed to the various declarations in the form “KK ¶ 5”.

3. I was recruited to come to the University of Hawaii at Manoa. I was told that UHM wanted to build an MRI center, I could develop and run that center, and UHM would provide an MRI machine for my research, from its own funds, with needed lab space and overhead. I would not have come to UHM if UHM had not promised to provide an MRI machine and lab.

4. If the deal had been “come to UHM, and you can then apply for grants to buy an MRI machine and build an MRI research center”, I would not have come. I had already done that in Arizona, where I was when I was recruited. One could reasonably question whether it would have been sane to uproot my family from a stable situation, where I had access to the tools needed for my research, and move across the Pacific, setting back my research for several years at least, all for the dubious opportunity to seek grants to start the building of a lab from scratch. I, or any faculty member, can apply for grants from anywhere, and there was no need to go to UHM to do that. Moreover, grants do not fall from trees like ripe fruit. Money of the magnitude required is not easy to get in a competitive environment, and new grant applications, even worthy ones, may have a
single-digit percentage chance of success, or take several years to succeed.

5. What made UHM attractive was its commitment to put its own money on the table to build an MRI center, plus the usefulness of an MRI center to collaborating UHM colleagues. It was also of interest that I would run the center. The research projects and faculty interests at UHM make it different from most other universities in the world, giving us a competitive advantage to pursue important problems. The UHM’s willingness to pay for building the center meant minimal delay and interruption to my research. UHM’s investment would suggest to grantors that the UHM was actively supporting this line of research. This perceived strong commitment by UHM would strengthen all of my future grant proposals and put the MRI center on track to be scientifically and financially successful. I was extremely enthusiastic about the opportunity to build this unique resource for researchers and clinicians in Hawaii.

6. UHM specifically committed to purchase and install an MRI machine in a lab suitable for it, in writing, in my letter of hire. I relied on that letter of hire in addition to verbal assurances to the same effect, in deciding to accept UHM’s offer. Nobody told me that purchasing and installing an MRI machine was anything less than a rock-solid commitment. It was not a dream or aspiration for “someday”, or something that the UHM might or might not do. Nobody suggested that the UHM retained any unilateral right to change its mind, after I had redirected my career and personal life in reliance on UHM’s promise. Nobody suggested to me that the inducement of an MRI machine and
lab and my running of it, was some kind of trap, or trick. The context was, "You come, and we will do this."

7. There is a lot of detail in the facts. The basic sequence is that I was given the letter of hire, and I arrived in 2013. UHM undertook to buy the Agilent MRI and install it. There was a tremendous amount of time wasted because UHM facilities personnel could not or would not create a space for the machine. I participated as fully as anyone can expect in assisting the creation of the lab, but there were certain impediments to getting anything done. Various persons labored mightily to overcome the resistance from Facilities and get it done, with little success. This went on for months, then years. The intervention of UH Vice President Jan Gouveia was decisive in breaking the log-jam. Unfortunately, by that time, the Agilent company was no longer interested in selling MRI machines. It turned out that the market had developed sufficiently that another machine from MR Solutions was smaller, cheaper and easier to install and maintain, and did not require expensive liquid helium. A settlement was reached with Agilent, and the UHM was prepared to go ahead, again, as of Summer, 2015.

8. I endured this long delay because UHM seemed, on balance, morally committed to getting the lab built. Again, Vice President Gouveia was instrumental in maintaining the momentum. I and my students coped with the delay and tried to mitigate the loss of research time by flying back and forth from Hawaii to Arizona, and other places where I had access to an MRI, to do what was possible under awkward
circumstances. This required, with consent of UHM, spending money that would better have been spent building up the MRI center, but there was no better option. This was money that UHM had offered for me as precious “startup” funds in my letter of hire to start my lab at UHM. I certainly had never intended to blow through it by traveling to do my research. I spent a lot of my academic time diverted into meetings and coming up with coping strategies, and identifying alternative MRI machines, and the like. It certainly has not been a robust period of research for me or my students, contrary to my expectations. But again, I have persisted because there was no doubt in my mind that, despite internal obstacles, UH was committed to the project. This was my understanding through the summer of 2015.

9. In the summer of 2015, Dean Ditto, who had recruited me, left UHM. He was replaced by Interim Dean Kumashiro, who was elevated to her interim position from the Department of Chemistry. I do not know to what extent Kumashiro determined this on her own, or in consultation with others, but Kumashiro announced to me on September 25, 2015, that, notwithstanding my letter of hire and the UH’s prior commitments and efforts, UHM would not proceed with the deal and would not purchase or install the promised MRI machine. I was shocked by this reversal, after all the time and effort expended. To date, no one from UHM or the UH system administration has stepped forward to reverse Kumashiro, so I take it to be the UHM’s position that they won’t honor the letter of hire.
10. As I understand UHM's position, they will let me build an MRI center, but through grant monies I am to obtain, starting from scratch, which they suppose is a plausible compromise that, if I accept it, lets them off the hook. The obvious problems with that are that I wouldn't have come to the UHM in the first place if that were the deal, and the odds on getting sufficient funding together from grants are not good, even over an additional few years of grant cycles, wasting professional and research time. The fact that news of UHM's attempt to renege on a hire letter and repudiate its commitment to funding an MRI center is rippling out through the germane scientific community does not in any way make grantors more likely to fund, nor does it build UHM's reputation. It is, frankly, astonishing and scandalous.

11. Kumashiro and the other declarants seem to be saying both that there is no money, but that there might be money if I were to develop a business plan for the MRI. In other words, they believe they have unilateral control over the provision of money, they are under no obligation to fund anything based on my hire letter, and I am free, if I want, to start from scratch, to convince them of the business case for an MRI and how it would work in the UHM books. My reactions to that are two. First, that business case must have been made and settled years ago, before UHM recruited me to come here, and we executed the hiring letter. Second, I don't hear from Kumashiro even an expression of moral obligation on the part of the UHM to fulfill their side of the deal. Nonetheless, I have supplied all the information I have about the Center budget and about other
potential customers for the MRI facility, who are numerous.

12. Below, I will address certain factual points asserted in the various Declarations.

A. KK ¶ 22; MH ¶ 9. The College has indeed paid me and my graduate students to travel to ASU to use the MRI machine there. Around May or June of 2015, Mary Hoffman had asked me if she could allocate to me a million dollars to simply travel to use an MRI, in lieu of providing the MRI. I informed her that would not work as a long-term solution, because one cannot pursue grant applications as a traveling scientist, and cancellation of the MRI project would essentially ruin my ability to do my job. Even in the short run, this kind of travel was eating into the startup funds, promised in my hire letter, that would be needed when the MRI was installed.

B. KK ¶ 23; MH ¶¶ 7, 8; BT ¶ 8. As far as I know, UHM is indeed in terrible financial condition, as asserted. I have no doubt that “tough choices must be made.” MH ¶ 8. Nonetheless, I consider that UH and I have a contract. I have fulfilled my part of the bargain. I have acted, to my detriment, in reliance on UH’s promises, which, prior to Kumashiro’s appointment, and even during her appointment, right up until Kumashiro’s announcement of September 25, 2015, were repeatedly reaffirmed by various UH personnel, including those above her administrative rank.

C. KK ¶ 24; MH ¶ 20; BT ¶ 9. The UH witnesses say the UH has not entered into another purchase order to replace the Agilent machine, and has discussed
purchasing another. While technically true, that falls quite short of the actual state of affairs.

1) In May or June, 2015, concerned by Hoffman’s comments about just letting me travel, instead of providing an MRI, I discussed this “travel in lieu of machine” idea with Associate Dean Steve Robinow. Robinow assured me that he and the Dean were strongly committed to fulfilling the UH’s obligations by completing the MRI project. Based on their unambiguous and reasserted commitment, I assisted UH to pursue alternatives to the Agilent machine.

2) Even before UH moved to cancel the contract with Agilent, I identified a system by Bruker for the same price as the one from Agilent, and Robinow and Ditto both confirmed that UH could move forward with such a purchase, once UH got out of the Agilent contract. When I later found the MR Solutions machine, which was cheaper, Robinow and Hoffman agreed this would be a good approach. I took this as an endorsement of the ongoing plan.

3) Furthermore, Interim Vice Chancellor of Research Brian Taylor stated in an email to me and many others at UHM, and JABSOM, including the dean of JABSOM on May 6, 2015, regarding a grant to the NIH: "The OVCR committed support for you to develop a small animal imaging center, using an MRI that should (finally) be installed in the BioMed building this fall. That commitment, shared with CNS, was made because the MRI center should become an important shared resource for the UH community, and play
a major role in research on material, biological, and biomedical, sciences."

4) Furthermore, in June 2015, in the process of applying for the BRIDGES grant renewal, Brian Taylor wrote a strong letter in support of the MRI as a resource for the UH community.

5) Furthermore, Sylvia Kondo, who works for the UHM Office of Research Compliance, which reported to Brian Taylor at the time, included the MR Solutions MRI machine in the College’s G20 grant proposal to the National Institute of Health on August 3, 2015, stating “Plans are underway to install a MR Solutions 16 cm small bore MIR, in the footprint of the Manoa vivarium.” This grant proposal was reviewed and approved by Brian Taylor and the UHM Office of Research Services prior to its submission.

6) Furthermore, I have emails in which Ditto and Robinow allowed Hoffman to proceed to get a purchase order for the new MR Solutions machine. Furthermore, vendor compliance with state taxes, a prerequisite for a P.O., was achieved on August 10.

7) Furthermore, as late as August 28, 2015, Hoffman told her staff, by email copied to me, to work with procurement to create the purchase order.

8) Furthermore, UHM commissioned the Leo A Daly planning firm (the same one mentioned in UH’s Exhibit D) to convene a meeting, which I attended, to study how to adapt space to the MR Solutions machine. The Daly firm’s report, dated September 11, 2015, copied to me, indicated cost savings were achievable with the new
machine. I believe the MR Solutions machine offered construction cost savings of several hundred thousand dollars, because it eliminated special flooring, walls, and possibly electrical wiring. This report was done during Kumashiro’s term, and included substantial participation by the UHM Facilities Management Office, which reports above Kumashiro’s level.

D. KK ¶¶ 25 - 26; MH ¶ 21; BT ¶¶ 10-11. I agree that on October 7, 2015, I met with Kumashiro, Hoffman, Biology Chair Andy Taylor (who had replaced Kathleen Cole), and declarant Interim Vice Chancellor for Research Brian Taylor (no relation to the Chair). I agree we discussed hypothetically how to afford an MRI, if the UH would not pay for one. I agree that ideas were floated including a loan, establishing a revolving fund for the use of the MRI, and pursuing grants from the NSF. The point the UH witnesses seem to be making is that I am at fault for not proposing a business plan. Kumashiro asked if I would be willing to write a business plan to support the MRI if the College could arrange a loan; presumably a business plan might be needed to justify a loan.

Hoffman had first suggested that a loan for the cost of the MRI, obtained through RCUH might be useful, back in the summer of 2014. The concept of a loan through RCUH had been reintroduced by me in the September 25, 2015, meeting at which Kumashiro told me she would not fund the MRI project. As of September 25, 2015 Hoffman still did not know for sure whether that loan idea could work, but was going to look into it. As of October 7, still nobody knew whether a loan could be arranged, so
Kumashiro and Hoffman committed to find out. Hoffman apparently has never obtained a clear answer. To the best of my knowledge, neither has Kumashiro. If they did, they did not inform me of the result. In any event, a formal business plan would have been a waste of time if there were no loan application.

On October 7, I provided what substantive information I had, in spite of uncertainty about the loan strategy. VCR Brian Taylor asked for my assessment of the numbers and operating costs. I estimated roughly $80 - $100,000 in annual income from MRI user fees, plus money from a BRIDGES grant, and suggested that this money could be directed toward operating costs or retiring a loan. Kumashiro asked for justification of the estimates, and I told her my figures were based on roughly 50% paid usage at $50 an hour, as other UH faculty used the MRI for research. I stated these were conservative figures. The MR Solutions machine would have relatively low operating costs. I reaffirmed that I would be willing to write a formal business plan if the College would confirm that they would get the loan and proceed to build the MRI facility. Of course, nobody then, or since, has confirmed any such intention.

Also on October 7, Chair Taylor reported his poll of the faculty and stated that the MRI facility would support many more faculty than just me. I noted that projected usage had already been studied, and a list of 22 faculty who expected to use the MRI facility was already in the possession of Sylvia Kondo, mentioned above. Mary Hoffman also had this list, and, through her, Kumashiro could have availed herself of this
information if she had been so inclined. VCR Taylor terminated the October 7 meeting.

12. I would like to make a few other points. Following the removal of Kathleen “Kassi” Cole as chair of Biology, Kumashiro attended a Biology Department faculty meeting. As a member of the Biology faculty, I attended that meeting also. Kumashiro angrily and emotionally explained that she had removed Cole because “Biology deserves better leadership.” Kumashiro indicated most of her problems were with Biology. In my opinion, and I believe that of most others, Cole was doing fine. Kumashiro stated that she had heard rumors that Biology was “fractured.” The faculty expressed disbelief at the notion that our department was “fractured.” Kumashiro indicated that she had this on authority of a secret source. She did not disclose this source. She told the assembled faculty that “if you re-nominate Kassi for chair, I will reject it.” In her remarks, Kumashiro did not in any sense recognize a faculty right to be represented by a chair of their choice. In my judgment, Kumashiro had failed to identify any substantive reason for Cole’s removal, was misinformed about the state of the faculty, and chose to remain so. I am no doubt one of Kumashiro’s “problems” in Biology, and I believe Chair Cole defended both my MRI project and my teaching load in meetings with Kumashiro.

13. I was informed of Kumashiro’s cancellation of the MRI project in the following manner. On September 22, 2015, I received an email indicating Kumashiro had called a meeting for the 25th. I called Hoffman to ask what this was about, since I was under pressure on an NIH grant deadline. Hoffman said she did not know. On the 25th, I
attended a meeting with Kumashiro, and Hoffman, with new acting Biology chair Andy Taylor invited (Chair Cole had been removed on the 23d). Kumashiro told me that she would not release funds to purchase the MRI. She stated that she had inherited a tight budget, and that this was necessary to clear room for other purchases. I asked whether the College could take out a loan through RCUH, which Hoffman had suggested during the previous summer. Hoffman said she had not checked, but the College did not want to carry the interest on a loan. I suggested user fees could pay back a loan. Kumashiro and Hoffman did not respond to that. We discussed my travel to carry out research, and how that was being covered by startup monies. Chair Taylor arrived. Kumashiro repeated to Taylor that the MRI was being cancelled. Taylor and Kumashiro discussed whether the College was reneging on other commitments, and how the funds had been allocated. Kumashiro indicated that half of the price was to come from the College, from the RTRF account, and that the total cost to the College would be about $1.5 Million. Hoffman stated that the money the VCR had allocated for the MRI would be returned to the VCR’s office. Taylor asked how much was in the RTRF account. Kumashiro said that the account had about $3 Million. Taylor then asked, “So what you’re saying is that you have the money in RTRF to purchase and install the MRI but you have decided not to.” Kumashiro said, “Yes.”

At the October 7, 2015, meeting, the same one discussed above, Chair Andy Taylor reminded Kumashiro that she had said that she had the funds for the MRI but was going
to put those funds to other use. She acknowledged that previous statement. Chair Taylor asked if those funds could temporarily be used to solve the problem. Interim VCR Brian Taylor rejected that.

14. Regarding my teaching load. Pursuant to my duties in the letter of hire, I was for a time assigned to Special Advisor duties to the Dean, with a reduced teaching load. I developed courses about magnetic resonance imaging, but, although they were scheduled and my time was allocated to teaching them, they had to be cancelled because the UH had failed to provide the MRI machine that would have been used in the courses. I have complied with all departmental teaching assignments and I am teaching more than the average Biology course load.

I, Kevin Bennett, Ph.D., do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawaii, 1/25/16

Kevin Bennett, Ph.D.
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Attorneys for Complainant
University of Hawaii Professional Assembly

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of ) Case No. CE-07-874

UNIVERSITY OF HAWAII ) DECLARATION OF KATHLEEN COLE,
PROFESSIONAL ASSEMBLY; ) Ph.D.
KEVIN BENNETT, Associate Professor of Biology, Department of Biology,
University of Hawaii; and KATHLEEN COLE, Associate Professor of Biology,
Department of Biology, University of Hawaii,

Complainant,

and

KRISTIN KUMASHIRO, Interim Dean of Natural Sciences, University of Hawaii; and BOARD OF REGENTS,
UNIVERSITY OF HAWAII,

Respondent.

DECLARATION OF KATHLEEN COLE

I, Kathleen Cole, Ph.D., declare as follows:

1. I am an Associate Professor in the Department of Biology at the University
of Hawaii at Manoa, and I make this Declaration based on personal knowledge gained in that capacity.

2. I have read the Declaration of Kristin Kumashiro in this case. My reactions to various assertions in her Declaration are set out below, keyed to the paragraph in which she makes them; e.g., "KK ¶ 4" refers to paragraph 4 of the Kumashiro Declaration. Where there are several topics in a paragraph, I have broken them out.

3. KK ¶ 4 a. There was a meeting between Kumashiro, Dr. Andrew Taylor, and me on August 28. I did present a document stating Biology Department space needs, which included justifications. It is true that the document was not prioritized, but Kumashiro had not requested it be prioritized. Furthermore, during our meeting, she had an opportunity to request that it be prioritized, and I could have complied, but she said nothing. Nor did she indicate that in any respect the document was inadequate. I also told her that, if she had no objections, I would present the document at a future meeting to discuss Biology's needs, to take place on September 1. Kumashiro did not then and there object to my use of the document, nor did she raise any objection at a later time. If she actually preferred at the time that the document be prioritized, she kept that a secret. If she had any criticisms of my further use of the document I had brought her per her request, she kept those a secret, too.

KK ¶ 4 b. Kumashiro says that I informed her that I planned to meet with V.P. Gouveia regarding Biology's needs. In fact, I asked Kumashiro if she had any
objection to my requesting a meeting with V.P. Gouveia, who has oversight of facilities including a proposed new building. Also, I asked Kumashiro whether she would accompany me in any such meeting, if I were able to get one. The purpose of the meeting was not to circumvent Kumashiro, but to include Kumashiro in a discussion of the vision for the new building, as seen by a person in charge of it. Kumashiro clearly said that she had no objection to my meeting with Gouveia and that she did not want to be present at the meeting. Again, if Kumashiro had reservations about this plan, she kept them a secret.

KK ¶ 4c. The Snyder building at UHM, housing Biology, was to be replaced by new construction of a “Snyder Prime”. Space allotments for Biology had changed from a third of the third floor and all of the fourth floor, to all of the fourth floor and part of the fifth. I did erroneously speak of the earlier plan for space renovation.

KK ¶ 5a. There was a meeting on September 1. It was originally intended to be an “in-house” meeting. Kumashiro had changed the attendees, without notice to me, to include higher administrators from the Manoa campus. Kumashiro says she was surprised by an “unvetted” list of needs I brought, but it was none other than the list I had presented to her on August 28, informing her at that time that I would present that list on September 1. Again, she had made no criticisms of the list on August 28 or otherwise prior to the meeting, despite being invited to do so. Kumashiro essentially concedes that she had seen the list before.
KK ¶ 5b. Kumashiro says that “meeting participants expressed
dissatisfaction with numerous claims for space.” Actually, Vice Chancellor for Academic
Affairs Reed Dasenbrock was the only one who voiced dissatisfaction with Biology’s
requests, on the grounds that Biology should request only present needs, not future
needs. Indeed, I presented both future and present needs, not having been told by
Kumashiro on August 28, or anyone else, that only present needs were to be presented, or
that what had been planned as an “in-house” meeting was converted to a meeting with
higher administrators with particular expectations.

KK ¶ 5c. I certainly did express the deeply-held views of my Department.
These included that separating Departmental space into two buildings would cause
students to walk to meet their professors, but I also expressed my faculty’s concerns that
a separated department would cause duplication of services, reduced sense of
community, reduced research collaborations, loss of department morale as evidenced by
previous experience, and in some cases separation of labs from their faculty. I do not feel
my presentation was unprofessional, and will turn to others’ recollections.

KK ¶ 6. Kumashiro’s recollection of her request for attendance at a faculty
meeting on September 4 is contradicted by her own correspondence. Her email to me
indicated that she’d heard of an upcoming faculty meeting, and asked to attend. She
wrote, “If you’d rather meet with your colleagues (without me), then that’s fine -- but I’d
like to ask that you meet with me later in the day to discuss the outcome of your meeting.
I have some time later in the afternoon (3:30?). Let me know, please. Kristin". I responded, "Hi Kristin: My sense is that the Biology faculty would prefer to have a discussion among themselves. I'd be happy to meet with you afterwards, at 3:30. Let me know if this works for you." Kumashiro confirmed the 3:30 meeting. In academic practice, Deans do not have any right to invite themselves to faculty meetings, and departmental faculty have every right to meet among themselves. Obviously, the presence of an administrator can constrain free discussion among faculty. Kumashiro's request acknowledged protocol, and she accepted my response. Therefore, it seems odd for her to say that I "told" her she "could not attend," as if I were being somehow insulting, or depriving her of some right to attend.

KK ¶ 7. On September 4, 2015, in a meeting with Kumashiro, I did express a lack of trust in administrative policy. On August 27, at a meeting of Natural Science chairs, VCAA Dasenbrock informed us that the Snyder building renovation was off the table. At the September 1 meeting, Chancellor Bley-Vroman said that all options were still on the table, which I heard as suggesting that nothing had been decided. I reported both views to the faculty. I had given Kumashiro the Biology Department's needs list, asked for her feedback, and told her what I was going to do with it; she gave me no feedback, and criticized me for lack of consultation. Considering that, as chair and primary representative of the bargaining unit faculty to the Interim Dean, I had to ask faculty to meet, confer, deliberate, and compose requests, as it turned out without
adequate specification of parameters, or feedback from Kumashiro, on a project of uncertain likelihood, I think I fairly characterized the problem.

KK ¶ 8. Departmental Personnel Committee procedures are important, and must be approved by the UHPA and the UH, per the collective bargaining agreement. DPC procedures govern many important peer review functions leading to such things as promotion or tenure. I appointed a committee to verify our compliance with requirements, as amended. I appointed Dr. Peter Marko to chair that committee. Dr. Marko consulted with the UHPA and the College of Natural Sciences personnel about our procedures. The Natural Sciences personnel were initially uncertain about current policy. The committee worked through the difficulties, and the committee recommended changes to our procedures so that they would be compliant. The recommendations were then brought to the department. There were no unusual delays introduced by our department. The College of Natural Sciences and the Office of the Vice Chancellor for Academic Affairs each took two months, for a total of four months, before returning our submission. There was no occasion for procedural error because both the union and the employer were in the loop. The committee’s recommendations were presented to the faculty, and the faculty voted on them and accepted them. I am not aware of any error in the result. Kumashiro’s criticisms of my appointment of Dr. Marko appear to be unwarranted.

KK ¶ 9. I turned down a professor’s request that the Department purchase
$250 of live lobsters for a single lab exercise. I did so because the Department had zero dollars in petty cash. The professor was upset and filed a complaint. There was a dispute about whether the expense had been budgeted for, or not.

KK ¶ 10. Kumashiro did meet with me to discuss Dr. Bennett’s teaching load. I explained that, as she well knows, teaching is scheduled up to a year in advance. Dr. Bennett had been scheduled by the prior chair for a period of time after I became chair. The average teaching load for a Biology faculty member is 6 credits a year. After I became chair, Dr. Bennett complied with all requests and standards. I should note that one course Dr. Bennett was scheduled to teach had to be cancelled, since the in-house MRI machine that UH had promised to provide was not available, use of a substitute microscopy facility would have cost $20,000, and use of another MRI facility would have cost much more.

KK ¶ 11a. Regarding whether lab fees are returned to our department, I had requested clarification from the College of Natural Sciences as to how much, if any, of lab course fees are returned to the department, and had received no clear answer. If I was wrong, so be it, but I inquired.

KK ¶ 11b. Regarding a faculty member who requested a one-year appointment at another institution; the faculty member is not specified in Kumashiro’s declaration. It is impossible to comment on an unspecified allegation.

KK ¶ 11c. Kumashiro met with an unspecified faculty member about an
APT (Administrative, Professional or Technical personnel, in Bargaining Unit 08) salary.

The faculty member apparently circumvented me and went directly to Kumashiro.

Kumashiro did not bring it up with me.

KK ¶ 12. Kumashiro met with two unspecified Biology faculty about a space planning issue. The prior Dean’s policy was to encourage direct approaches to him by concerned faculty. Kumashiro’s policy is apparently different, but she did not announce any change.

KK ¶ 13. Kumashiro received a request from an unspecified Biology faculty member to meet about a student advising question. Kumashiro rejected that meeting. Kumashiro is entitled to her own policy on meetings, but should announce it. If Kumashiro is referring to Dr. Kraft-Terry, that faculty member is extremely experienced in student advising and presumably did not have a frivolous reason for requesting a meeting.

KK ¶ 14. Kumashiro says that she became aware of a problem involving four APTs teaching in the Department of Biology, in the middle of September, 2015. Biology calls these persons Laboratory Course Coordinators ("LCCs"). When I met with Linda Voong on another matter on September 18, 2015, she raised the issue of LCC duties. This was the first notification I had from anyone in the Office of Natural Sciences that APTs acting as instructors was an issue. Ms. Voong wanted to know what duties they performed and at that time stated that LCCs, as APT appointments, were not supposed to
be acting as instructors. In response to Ms. Voong’s query, I told her what activities the
LCCs carried out, which included designing laboratory classes and carrying out learning
assessments. That same evening, Ms. Voong requested by email if I could elaborate on the
information I had provided in our meeting earlier that day, with regard to their duties
associated with laboratory class design and student assessment for their respective
courses. I informed her that I would do so. I also briefly met with Dr. Andrew Taylor, the
then-Associate Chair of Undergraduate Education, to discuss how best to shift non-APT
appropriate activities from the LCCs to Biology faculty. However, before I had finished
drafting a written report for Ms. Voong based on my handwritten notes, I was relieved of
my Chair duties, and passed the issue over to Dr. Taylor, who became the new Biology
Chair. Obviously, duties removed from LCCs must be reassigned to faculty, and this
occurred in mid-semester when duties were already allocated. I understand from talking
with one LCC that he had been performing exactly the same duties for at least a decade
with no objection from anyone, including prior deans and chairs. I am at a loss to
understand why Kumashiro thinks it is my demerit that I couldn’t, in only a few days,
correct a practice accepted by everyone for at least a decade, including her predecessors,
mid-semester, when reassignments are difficult.

KK ¶ 15. Kumashiro’s account is at variance with my sense of the
meeting. Kumashiro did ask me to step down. Linda Voong from NatSci H.R. was
present at the meeting. I dispute that I was inappropriate. Kumashiro cited the space
requests from Biology, which I have discussed above, as a reason for terminating me. I did ask for clarification of the reasons I was being asked to step down. Kumashiro halted the discussion by saying that she wasn’t going to go into any more detail. I asked Voong if Kumashiro needed to provide any reasons for my dismissal. Voong shook her head to indicate “no”. It appeared that Kumashiro’s decision was final, she felt she had the authority to relieve me, and that she did not feel obliged to provide any further reasons. I thanked Voong for her opinion, collected my notes, and left. I then emailed my colleagues, told them I had been relieved, and asked that they meet soon to elect a new chair.

KK ¶ 16. Based on the memorandum of commitment of $100,000 per year research support during my tenure as chair, I did request a proportionate sum for support of my students. I requested $70,000, which included unspent amounts from the prior academic year and three months of the current academic year, until my dismissal. The College, through Mary Hoffman, offered $5000 to $10000, no more. The college’s proposal was inadequate, contrary to previous commitment, and failed to meet the research needs of myself or my students. The College’s proposal would unfairly penalize the graduate students, who were utterly blameless, by imperiling their progress to graduation, future employment prospects, and academic reputation.

KK ¶ 17. I was fully communicative with Mary Hoffman on all aspects of the problem of research support monies. I am uncertain of the state of communication
between Kumashiro and Hoffman.

KK ¶ 18. The College has continued to pay me my chair’s stipend and an 11-month salary.

4. When Kumashiro told me that the MRI might be cancelled, I advised her that in my opinion this action would be both a legal and ethical breach of contract. I also told her that I thought it would reflect badly on not only the college, but the university as a whole. It could be difficult to recruit new faculty if there were no confidence in letters and conditions of hire. It would also be bad for the morale of current faculty in the college to feel that there was no sense of obligation on the university’s part to fulfill their written agreements. I also said the the cancellation of the MRI project would severely impair his ability to do research, obtain grants, attract students, generate top-quality publications, and in sum, would be catastrophic for his career. I may not have used those exact words, but those were the concerns I expressed. In a subsequent meeting with VCAA Dasenbrock, Kumashiro, and Bev McCreary, I expressed my concern that if the MRI were cancelled, it might be difficult to get a reasonable turnout for the NatSci Dean search, once word got around regarding the MRI cancellation. Because Deans negotiate the conditions of hire for all faculty within their college, potential applicants for the Dean position might be extremely leery of the prospect of working within a university system that did not always honor conditions of hire as expressed in hire letters. I also defended Bennett’s teaching load. Dasenbrock expressed the view that Bennett’s letter of hire was
not a legally-binding document. After that meeting, Dasenbrock removed me from the search committee for a Natural Sciences Dean.

5. In removing me as chair of Biology, Kumashiro gave only a very terse oral justification, in which she cited only her dissatisfaction with my handling of the new building space plan. She refused to provide any other reasons. She clearly felt she didn’t need to have any reasons. The overwhelming proportion of the purported reasons for my removal, that now appear in her Declaration, were not expressed by Kumashiro. They were expressed neither orally, nor in writing, nor in any other way. They were not expressed by Kumashiro at the September 23 meeting in which she removed me, and they were not called to my attention at any time prior to the meeting. She not only did not invite my comments in any manner that would have allowed me to discuss them and explain myself; additionally, some of these purported reasons remain too vague to rebut even now.

6. I was elected by my department to serve as their chair, and I did so, on condition that monies would be provided so that my duties as chair would not compromise my and my graduate students’ research. I believe I performed my duties as chair satisfactorily, because I was renewed as chair by the prior Dean for another year, shortly before Kumashiro assumed her interim position and removed me mid-term. All chairs make decisions that displease some faculty, and I am no exception to that rule, but the Biology Department did not take any vote to remove me, and did not express any
need even to discuss removing me. I believe that the Biology Department was content to have me remain as chair for the full term.

7. To the best of my knowledge, Kumashiro's removal of me as chair was undertaken solely and unilaterally by her, without notice to the Biology Department faculty, without consultation with the Biology Department faculty, and certainly without calling for any vote by the Biology Department faculty.

I, Kathleen Cole, Ph.D., do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawaii, Jan. 25, 2011

Kathleen Cole, Ph.D.
In the Matter of UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY; KEVIN BENNETT, Associate Professor of Biology, Department of Biology, University of Hawaii; and KATHLEEN COLE, Associate Professor of Biology, Department of Biology, University of Hawaii, Complainant, and KRISTIN KUMASHIRO, Interim Dean of Natural Sciences, University of Hawaii; and BOARD OF REGENTS, UNIVERSITY OF HAWAII, Respondent.

DECLARATION OF JAMES D. KARDASH

I, James D. Kardash, Ph.D., declare as follows:

1. I am an Associate Executive Director of the University of Hawaii Professional Assembly ("UHPA"), and I make this Declaration based on personal knowledge gained in that capacity.

2. I was first employed by the UHPA in 1978 and have been employed by the UHPA
continuously to date. Throughout these 38 years, my duties have always included contract enforcement and grievance processing, and receiving complaints and inquiries from Unit 7 faculty. I have addressed problems on all campuses in the University system. I believe that, over time, I have handled nearly every kind of issue raised by faculty members regarding implementation or enforcement of the contract. Compared to other UHPA staff, I spend little time supporting direct collective bargaining, or legislative action, or inter-union relations, or fiscal matters, but proportionately more time addressing the concerns of rank and file faculty in their daily operations at the University. In this area of direct faculty support, I am the most experienced employee of the UHPA.

3. Speaking generally, Unit 7 faculty members are hired because they apply, or are recruited; sometimes both. But before anyone is hired, the process of deciding on whether a position will be open for hiring, and at roughly what salary range, and precisely what the incumbent is expected to do, is in large part a negotiation between an academic department and the Dean in whose college the department is located, with important consultations with ancillary staff and other fiscal or academic authorities within the University. Also, permanent positions may be subject to legislative action, and funding sources may be considered.

4. Typically, by tradition, an academic department has a significant say in the attributes of the position to be filled, and in whether a particular applicant ought to be hired. Departmental recommendations about which applicant should be hired are usually decisive. Great involvement in the hiring process by members of the bargaining unit is a unique feature of the University. Ultimately, it is the faculty who most deeply understand the needs of the discipline, and the trajectory of intellectual growth the department must follow to keep pace with developments in the discipline.

5. Also, faculty members are perhaps the least uniform and most diversely-skilled
employees of the State. The variability of their tasks, skills, and qualifications is dizzying. They may be performing tasks, and using means and methods, that their nominal supervisors, and even many of their peers, do not understand. Furthermore, they probably have the greatest discretion of any State employees in defining the direction and bounds of their own work. Indeed, one of the purposes of the academic tenure system is to ensure that faculty members have the freedom to do precisely that, because the progress of society depends on smart people finding the edge of knowledge and pushing on past it. That kind of progress is terribly hard to manage from the top down, since it relies mostly on individual initiative and inspiration, and voluntary collaboration between faculty experts.

6. Different disciplines also command vastly different compensation in the market. There are high and low-demand disciplines, and market conditions and supply of experts in these disciplines may vary over time. Sometimes, a discipline may be “hot”, and then not. The university also must respond to the different compensation levels in professions such as law or medicine.

7. My point in this general discussion is that the work of faculty in a university is incredibly diverse, specialized, unique, and hard to incorporate into standardized step-and-rank matrices that one would expect to find in a standard employment context. Whereas it is possible to imagine that a laborer could be twice or three times as strong as another, or a clerk typist might be several times faster at keyboarding than another, in intellectual and especially creative work, looked at either individually or as a member of a team, one person may be overwhelmingly more productive than another … and also harder to evaluate. I have spent a large portion of my career trying to rectify controversial evaluations of faculty, and it is a slippery business. Typing of transcripts can be measured in accuracy, and words per minute, but the evaluation of intellectual progress and inspiration is not reducible to such statistics.
8. Some public employers and unions may have settled on standard compensation matrices. The UH and the UHPA have tried, off and on, over the years, to create some kind of a contractual salary schedule, but have basically abandoned that approach, and do not have a general salary schedule. There are some kinds of employment that have schedules, but there is no general schedule as one might find in other industries. Even in years when the parties were able to settle on a salary schedule, it was more of a convenient way of reducing an infinite number of possible salaries to a manageable number of boxes in a grid, and did not tell you where anybody in particular should be on the grid.

9. Turning more to this case – with the one except of “minimum salaries”, the UH and the UHPA have never set initial compensation. Probably everybody connected with labor relations has heard that in general, “wages, hours, and terms and conditions of employment” are bargainable topics, and that collective bargaining agreements tend to include provisions on these topics. Again with except of the minimum salary amounts UH and UHPA do not regulate initial “wages”. There is no chart one can turn to, in the collective bargaining agreement, to determine what an incoming faculty member shall make. There is no stipulated starting or probationary wage. The starting salaries are all either the subject of the academic negotiation process mentioned above, without intervention by the collective bargaining entities, or they are somehow just declared without reference to the collective bargaining agreement. One faculty member could be hired at $55,000 and another next door could be hired at $150,000, and the CBA would have nothing to say about it. In fact, UH and UHPA have never even contractualized the process by which that negotiation over initial salary takes place.

10. Some faculty are hired on condition that certain equipment be provided for them, or that certain monies be provided for them, which is more common in some disciplines than others. But again, even though such terms may logically be part of “wages” or “terms and conditions of
employment”, the collective bargaining agreement has never regulated these initial terms.

11. The initial salary and any special terms of a faculty member’s employment are set in a letter of hire, signed by the faculty member and a representative of the University. There are some pockets within the UH system and some particular types of faculty employment where letters of hire are not used, but the great majority of Unit 07 faculty are hired under a letter that states their position, position number, academic rank, department, when they will start, whether the employee is hired into a 9-month or 11-month position, and some other customary items. Of course, you expect to see in a letter of hire the starting salary, and any special conditions, such as monies allocated to the incumbent’s research.

12. I do not claim that I can count the exact number of letters of hire that have been issued to new faculty by the University of Hawaii over the years a collective bargaining agreement has been in effect, and I’m not sure the University can supply an exact figure, either. But I have tried to estimate the number of letters of hire as follows. I conclude that it is reasonable to suppose that approximately 3,800 letters of hire have been issued for the 10 year period including academic years 2005-2006 through 2014-2015 and including hires for fall 2015. Of all those letters of hire, very few have ever been the cause of a disagreement. Of the tiny numbers that have caused a disagreement, almost all disputed terms have been resolved informally. In a few the extreme cases when various levels of the administration were not in agreement as to the authority of the Dean regarding special conditions in the higher letters, the faculty member resigned and accepted a better paying position elsewhere.

13. There have probably been a number of situations in which a letter of hire was used as evidence in a discussion, or in a grievance, to prove a point, and probably there have been mistakes made in implementing the terms of a letter of hire, which needed fixing. The UH might have ignored a letter of hire, without it coming to UHPA’s attention. That said, I cannot think of
any other situation, in any decade, in which the University has acknowledged, and then repudiated, an obligation or working condition stated in a letter of hire, such that UHPA has needed to attempt formal enforcement.

14. The collective bargaining parties have provided some rules about the appointment and compensation of department chairs, but, as in the case of letters of initial hire for new faculty members, have not contractualized the negotiation of or standards for supplemental terms under which a faculty member may be induced to serve as chair. I believe it is common for certain accommodations to be reached between a Dean, a department, and a faculty member, whereby particular promises for support, resources, or other special conditions, are agreed. As above, I find it plausible to believe that these terms are within the scope of “wages, hours, and terms and conditions of employment”, and hence are, in principle, bargainable, but with the exception of the minimum monthly stipend the parties have not bargained them. Accordingly, issues can be raised about how such supplemental terms, under which a chair will serve, can be enforced.

15. I am aware that in Unit 08, Coaches are hired by the University under individual letters of hire, which may provide for high levels of compensation and special terms and conditions of service. However, I believe that HGEA signs off on such individual letters of hire. In Unit 7 practice, UHPA has never signed off either letters of hire, or chairs’ special terms of service. The UHPA has trusted traditional practice, and relied on academic self-governance and academic consultation to manage those terms, without supervision or acknowledgement by the union. It is possible that UHPA may henceforth need to bargain procedures, standards, or terms in these areas, which is one reason UHPA seeks clarification of bargainability of them.

I, James D. Kardash, Ph.D., do declare under penalty of law that the foregoing is true and correct. DATED: Honolulu, Hawaii, 01-25-2016

James D. Kardash, Ph.D.
STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of ) Case No. CE-07-874

UNIVERSITY OF HAWAII ) CERTIFICATE OF SERVICE
PROFESSIONAL ASSEMBLY;
KEVIN BENNETT, Associate Professor
of Biology, Department of Biology,
University of Hawaii; and KATHERLEEN
COLE, Associate Professor of Biology,
Department of Biology, University of
Hawaii,

Complainant,

and

KRISTIN KUMASHIRO, Interim Dean
of Natural Sciences, University of
Hawaii; and BOARD OF REGENTS,
UNIVERSITY OF HAWAII,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, a true and accurate copy of the
foregoing document was duly served upon the following individual via File &
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SARAH HIRAKAMI, ESQ.
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DATED: Honolulu, Hawaii, 1/25/16

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