

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-07-437
	)	
UNIVERSITY OF HAWAII	)	DECISION NO. 403
PROFESSIONAL ASSEMBLY,	)	
	)	FINDINGS OF FACT, CONCLU-
Complainant,	)	SIONS OF LAW, AND ORDER
	)	
and	)	
	)	
PUBLIC EMPLOYER, by Davis Yogi,	)	
its Chief Spokesperson, Office	)	
of Collective Bargaining, State	)	
of Hawaii,	)	
	)	
Respondent.	)	
_____	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On September 28, 1999, Complainant UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY (UHPA or Union) filed a prohibited practice complaint against Davis Yogi, Chief Negotiator, Office of Collective Bargaining (OCB), State of Hawaii (Yogi) and Board of Regents, University of Hawaii (UH), State of Hawaii (BOR) with the Hawaii Labor Relations Board (Board). Complainant alleged that the Respondents presented Complainant's bargaining team with a list of subjects which the Respondents contend are improper topics of bargaining and therefore refuse to bargain over. Complainant contends that many of the topics are within the proper scope of bargaining and have been bargained for previously. Complainant thus contends that Respondents wilfully violated §§ 89-9(a) and 89-13(a)(5) and (7), Hawaii Revised Statutes (HRS).

Thereafter, on October 26, 1999, UHPA filed a First Amended Prohibited Practice Complaint against the PUBLIC EMPLOYER,

by and through Davis Yogi, Chief Negotiator, Office of Collective Bargaining, State of Hawaii (Employer), with the Board. UHPA alleges that the Employer's refusal to bargain over certain subject matters has been continuous since April 6, 1999 and include: tuition exemption for faculty dependents, teaching assignments and equivalencies, transfers of programs, sabbatical and professional improvement leaves for faculty, sick leave for faculty, per diem allowances, and the aspects of the handling of personnel files. UHPA further alleged that the complaint was amended pursuant to the stipulation of the parties at the prehearing conference held on October 25, 1999 and that it was intended that the Employer would adopt the answer previously submitted by Yogi.

The Board conducted a hearing on the instant complaint on November 1, 1999. All parties were afforded full opportunity to present evidence and arguments before the Board. UHPA filed its Opening Brief on November 23, 1999. On December 10, 1999, the Employer filed its Answering Brief and on December 20, 1999, UHPA filed its Reply Brief with the Board.

After a thorough review of the record and the arguments presented in this case, the Board makes the following findings of fact, conclusions of law, and order.

#### FINDINGS OF FACT

UHPA is the exclusive representative, as defined in § 89-2, HRS, of employees included in bargaining unit 07, Faculty of the UH and the community college system.

The PUBLIC EMPLOYER, as defined in § 89-2, HRS, is the BOR in the case of the UH, and any individual who represents one of

these employers or acts in their interest in dealing with public employees. Pursuant to § 89-6(b), HRS, for the purpose of negotiations, the public employer of an appropriate bargaining unit means the governor or the governor's designated representatives of not less than three together with not more than two members of the BOR in the case of Units 07 and 08.

Yogi was for all relevant times, the Chief Negotiator, OCB, State of Hawaii and the Employer's spokesperson in the Unit 07 negotiations.

The Employer and UHPA were parties to a collective bargaining agreement for the 1995-1999 term (Unit 07 contract) which expired on June 30, 1999.

UHPA's original contract proposal is dated January 23, 1999. The proposal was revised on February 3, 1999 and thereafter on March 22, 1999.

During the Unit 07 negotiations held on March 24, 1999, the Employer and UHPA tentatively agreed to several contract proposals dealing with Article II, Non-Discrimination, Article XXVI, Entirety and Modification, and Article XXVIII, No Strike or Lockout. The Employer offered 12 proposals which were rejected by UHPA and also proposed an agenda for future negotiations which was also rejected by UHPA.

During negotiations on March 25, 1999, the Employer presented a counterproposal for the first paragraph of the agreement which UHPA rejected. UHPA provided the Employer with a summary of UHPA and Employer proposals to determine where the parties were on each issue. After UHPA presented its summary, Yogi raised the issue of the negotiability of UHPA's pending proposals

and contract provisions in light of SHOPO v. Soc. of Prof. Journalists, 83 Haw. 378, 927 P.2d 386 (1996) (SHOPO decision).<sup>1</sup>

After Yogi presented the Employer's concerns, UHPA indicated that it did not know what direction to take because of the Employer's challenge to the scope of negotiations.

On March 31, 1999, Yogi met with Dr. J.N. Musto, UHPA Executive Director (Musto) and Union spokesperson, and their respective counsel to discuss the impact of the SHOPO decision. Musto disagreed with Yogi's interpretation and the parties discussed avenues to clarify the law.

During the negotiations on April 6, 1999, Yogi gave UHPA a Sampling of Conflicts dated April 5, 1999 which he prepared. The Sampling was a list of current contract provisions and UHPA proposals which Yogi believed conflicted with a statute. UHPA requested a wage proposal and the Employer offered a 0 and 0 wage proposal for the two years of the proposed contract.

Yogi's Unit 07 Sampling of CBA and CBA Proposals that Conflict with Statute states, in relevant part:

<b>CBA Proposal</b>	<b>STATUTE</b>	<b>CONFLICT</b>
	*      *      *	
Article 3, Conditions of Service B. Outside Employment	84-14, HRS.	Union proposes that the BOR continue to recognize the right of faculty members to engage in outside employment. The proposal also expands the number of hours faculty members may engage in

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<sup>1</sup>Yogi reviewed the SHOPO decision upon his appointment in January 1999 and interpreted it to mean that if a benefit is provided by statute, the employee is entitled to it. However, if a contract provision conflicts with a statute, the employee may not be entitled to the benefit.

outside employment from 8 to 16 hours per week. The Union also proposes to have BOR recognize the appropriateness of faculty members accepting compensation for special competence provided the faculty member provides President or his designee full disclosure. The current CBA allows faculty members to engage in outside employment for compensation during work time. The Union proposals and the current CBA conflicts (sic) with the powers of the Ethics Commission under Chapter 84. The parties assumed that the BOR and the Union have the authority to determine conflicts of interest under Chapter 84 by negotiating what situations are not in a conflict of interest.

The legislature established the public policy that cannot be overridden by contract.

Chapter 89 has no specific provision regarding negotiating standards of conduct that conflict with Chapter 84; therefore, the specific provisions of Chapter 84 cannot be overridden by contract.

Article 3,  
Conditions of  
Service  
C. Exemption from  
Tuition

304-4, HRS

The Union proposes to exempt faculty and their dependents from paying tuition to any unit of the University of Hawaii. The proposal conflicts with Section 304-4, which empowers the BOR to waive tuition entirely or reduce the fees from students, resident or non-resident. The Union proposal seeks to obtain tuition waivers through collective bargaining. Section 304-4, empowers the BOR to waive tuition through the Chapter 92 process (see also Section 304-4.4, public meetings.)

The legislature established the public policy that cannot be overridden by contract.

Chapter 89 has no specific provision regarding negotiating standards of conduct that conflict with Section 304-11; therefore, the specific provisions of Section 304-11 cannot be overridden by contract.

Article 3,  
Conditions of  
Service  
G. Transfer of  
Programs

Any  
statute  
mandating  
a transfer  
of a  
program

The Union proposes the BOR to provide specific time notice when a transfer of any program from campus in the UH system (e.g., 6 months.) The requirement to provide notice may conflict with legislative mandates to transfer a program within a required statutory time schedule.

The legislature established the public policy that cannot be overridden by contract.

Chapter 89 has no specific provision regarding negotiating standards of conduct that conflict with statute; therefore, the specific provisions of a statute cannot be overridden by contract.

Article V, Leaves  
of Absence with  
Pay  
A. Sabbatical  
Leave

304-11,  
HRS

The literal reading of Section 304-11 empowers the BOR with authority to "make and enforce rules" governing sabbatical leaves without (sic) or without pay. Rule making is through the provisions of Chapter 91 and not through collective bargaining.

The legislature established the public policy that cannot be overridden by contract.

Chapter 89 has no specific provision regarding sabbaticals that conflict with Section 304-11, therefore, the specific provisions of Section 304-11 cannot be overridden by contract.

Article V, Leaves  
of Absence with  
Pay  
D. Sick Leaves

79-8, HRS

The Union proposal and the current CBA provisions conflict with Section 79-8. The statute exempts instructional personnel from receiving sick leave benefits.

Furthermore, Act 39, 1964 SLH, grandfather employees that were transferred into the University of Hawaii without lost (sic) in salary, seniority, prior service credit, vacation, sick leave pay, or other employee benefit or privileged (sic) as a consequence of the Act, provided that subsequent changes may be made pursuant to the laws of the State and the provisions of this Act. Section 79-8 exempts instructional personnel from (sic) receiving sick leave. The grandfather provision does not apply to instructional personnel hired after the transfer. Therefore, Section 79-8 applies to instructional personnel hired after 1964.

The legislature established the public policy that cannot be overridden by contract.

Chapter 89 has no specific provision regarding sick leave that conflict with Section 79-8; therefore, the specific provisions of Section 79-8 cannot be overridden by contract.

Article V, Leaves of Absence with Pay  
E. Bereavement Leave

79-13, HRS

The Union proposal exceeds provisions of Section 79-13 by increasing the bereavement leave for immediate family from three days to five days. The Union proposal also expands the definition of immediate family to include "brother in law" and "sister in law" which are not in the statutory definition of "immediate family."

The legislature established the public policy that cannot be overridden by contract.

Chapter 89 has no specific provision regarding the bereavement leave that conflict with Section 79-13; therefore, the specific provisions of

Section 79-13 cannot be overridden by contract.

Article V, Leaves Section 8,  
of Absence with HRS  
Pay  
H. Holidays

The Union proposal expands the definition of a holiday that has the effect of increasing the number of Holidays to include days the President of the United States (sic) or the Governor grants federal or State employees a day off. The proposal would create new holidays that influence when classes will not be conducted.

The legislature established the public policy that cannot be overridden by contract.

Chapter 89 has no specific provision regarding holidays that conflict with Chapter 8; therefore, the specific provisions of Chapter 8 cannot be overridden by contract (sic)

Article VI, Leaves 304-11,  
without Pay HRS  
A. Leave without  
Pay for  
Professional  
Improvement

The literal reading of Section 304-11 empowers the BOR with the authority to "make and enforce rules" governing professional improvement leaves. The recent amendment to Section 304-11 expands the authority of the BOR to include the enforcement of professional improvement leave in its rule making authority. The amendment, on its face, appears to remove the matter from negotiations in favor of the BOR adopting and enforcing professional improvement leaves through Chapter 91 or 92.

The legislature established the public policy that cannot be overridden by contract bargaining.

Chapter 89 has no specific provision regarding professional improvement leave that conflicts with Section 304-11; therefore, the specific provisions of Section 304-1 (sic) cannot be overridden by contract.

Article VII,  
Faculty Travel  
B. Per Diem

78-15, HRS

The Union proposes to increase the rate of per diem from \$80 to \$100 per 24-hour day. The Union proposal and current CBA provisions conflicts (sic) with Section 78-15, which provides for inter-island travel at \$45 per day and not to exceed \$65 per day.

The legislature established the public policy that cannot be overridden by contract.

Chapter 89 has no specific provision regarding per diem that conflict with Section 78-15; therefore, the specific provisions of Section 78-15 cannot be overridden by contract.

Article VII,  
Faculty Travel  
C. Per Diem

78-15, HRS

The CBA provides for the reimbursement of additional amounts of per diem that exceeds the per diem rate. The CBA provision of \$80 per day exceeds the amounts reimbursed under Section 78-15 of \$65 per day.

The legislature established the public policy that cannot be overridden by contract.

Chapter 89 has no specific provision regarding expense reimbursements that conflict with Section 78-15; therefore, the specific provisions of Section 78-15 cannot be overridden by contract (sic)

Article XVIII,  
Personnel Files  
D. Derogatory  
Material

92F-2, HRS

The CBA provides for the destruction of derogatory material into faculty personnel files after 5 years. The current provision conflicts with the purpose of Section 92F where the destruction of the derogatory material would not provide for a complete and accurate government record.

The legislature established the public policy that cannot be overridden by contract.

Chapter 89 has no specific provision regarding derogatory material that conflict with Section 92F; therefore, the specific provisions of Section (sic) cannot be overridden by contract.

Article (New)  
Faculty Workload  
and Professional  
Responsibilities

89-9, HRS  
& 304-5,  
HRS

The Union proposal conflicts with Section 304-5 that directs the BOR to have standards of instruction equal to that given and required in similar universities on the mainland of the United States. Section 304-5 does not allow the BOR to negotiate the definition of standards of instruction to be less than similar universities.

The Union proposal establishes a maximum instructional workload at 24 credit hour and restricts the assignment of other work unrelated to direct instruction (e.g. research and service.) By limiting the amount of tuition revenue, the Union proposal conflicts with Section 30-5 and restricts the BOR from obtaining general funds not less than three times and not more than five times the tuition and fees collected (see Section 304-7.5a) (sic)

The Union proposal also conflicts with Section 89-9(d) that prohibits parties from negotiating standards of work.

The legislature established the public policy that cannot be overridden by contract.

By letter dated April 7, 1999, Musto rejected the Employer's 0 and 0 pay increase proposal for the prospective two-year contract as unacceptable.

By letter dated April 26, 1999, Musto requested Yogi to clarify his concerns over the negotiability of the UHPA contract proposals.

By letter dated April 29, 1999, Musto presented a counterproposal to Yogi which withdrew all of the Union's previous proposals and offered an Amendment for adoption and ratification by the parties. The Amendment extended the existing 1995-1999 Unit 07 contract to June 30, 2001. Musto stated that the offer was valid until 4:30 p.m. on May 3, 1999 and on May 4, 1999 the complete and original package of UHPA proposed changes conveyed on January 22, 1999 would once again be the Union's formal bargaining position. In view of the impending legislative adjournment, Musto requested a clear acceptance or rejection of the offer before 4:30 p.m. on May 3, 1999.

By letter dated May 3, 1999 which was sent by fax to Yogi, Musto noted that as of 12:00 noon, the Union had not received any Employer response to its Counterproposal dated April 29, 1999. Musto requested Yogi to at least verbally accept or reject UHPA's proposal by 4:30 p.m.

By letter dated May 3, 1999 which was sent by fax to Musto, Yogi stated that he was reviewing the potential impact of HB (House Bill) No. 1518 which was pending a final vote in the legislature and that it was premature to agree to extend the Unit 07 contract. Yogi indicated that the OCB would review the request at a later date. In summarizing the status of negotiations, Yogi indicated that he understood that UHPA would seek clarification from either the Board or the courts on the conflict between the statutes and the collective bargaining agreements. Yogi also referred to a letter dated April 26, 1999 from UHPA requesting the OCB to clarify its statement of conflicts. Yogi stated that since Musto's fax of April 29, 1999 proposed to

withdraw the Union's proposals it was not clear whether UHPA still wanted a response to the April 26, 1999 letter. Yogi also indicated that if UHPA did not intend to seek assistance from the Board or otherwise, then Musto should call Yogi for further negotiations on "matters that are negotiable."

By letter dated May 3, 1999 to Yogi, Musto stated that UHPA's 0 and 0 wage offer was in response to the Governor's request that the public unions accept no salary increase. Musto stated that the OCB had rejected UHPA's proposal and that the offer had expired. Musto further stated that UHPA had not requested the OCB to consider an extension of the contract at a later date. Thus, since UHPA's previous proposal was on the table, Musto stated that it was "imperative" that Yogi respond to the questions raised in UHPA's April 26, 1999 letter requesting clarification of OCB's statement of conflicts.

By letter dated May 4, 1999, Yogi transmitted the provisions of SB (Senate Bill) No. 1518 to Musto and again stated that it was premature for the OCB to agree to extend the Unit 07 contract. Yogi also repeated his understanding that UHPA would seek the assistance of the Board or the court to clarify the areas of conflict. Yogi further stated that he would provide a response to UHPA's letter of April 26, 1999.

Also on May 4, 1999, UHPA issued a news release indicating its frustration in not entering into an extension of the previous contract.

Yogi never responded to Musto's April 26, 1999 letter requesting a clarification of the Statement of Conflicts because he "got caught up in other things." At some point, Yogi decided not

to respond to UHPA and the parties did not engage in further negotiations.

Yogi testified that his authority in the HGEA negotiations was limited by the other employer jurisdictions and he challenged the HGEA proposals on a limited basis because of his perceived conflict between the statutes and the contract proposals. The HGEA thereupon withdrew its proposals leaving the existing provisions intact. By contrast in the UHPA negotiations, Yogi contested the negotiability of the faculty proposals and existing provisions because Yogi controlled the majority of Employer votes with the three votes of the Governor and the Governor's representatives.

In negotiations with other bargaining units, Yogi informally raised the impact of the SHOPO decision with the United Public Workers but did not raise the issue in negotiations with the teachers, SHOPO or the fire fighters.

With respect to per diem payments, the Units 03 and 07 contracts provide for \$80 per day for intrastate travel and \$130 per day for out-of-state travel. Musto testified that UHPA's per diem rates were previously referenced in the Faculty Handbook and then incorporated into the faculty contract in 1981. The rates were raised in the 1993-1995 Unit 07 contract to \$80 per day for intrastate travel and \$130 per day for out-of-state travel.

Musto testified that per diem is not a cost item since cost items require a separate appropriation from the legislature and the per diem funds are absorbed in the general fund allocation. Thus, there is no separate appropriation for per diem payments. In

addition, Musto testified that a substantial amount of per diem is funded from federal monies or external grants.

Yogi testified that § 78-15, HRS, sets the per diem rate and the Unit 07 contract provisions violate the statute. Yogi also testified that the subject is a cost item because it requires general fund appropriations. Yogi's understanding that per diem is a cost item is based on the opinion of Eugene Imai, who did not testify in this matter.

With respect to derogatory materials in the personnel files, the Unit 07 contract provided for the destruction of materials after five years. According to Musto, the language was agreed to in 1975 and has remained unchanged. Musto further testified that the Unit 03 contract has an identical provision.

Yogi testified that he did not want to include a provision for the expungement of derogatory material after five years because he felt that the destruction of the records circumvented Chapter 92F, HRS. Yogi testified that he had spoken with the head of the State Office of Information Practices, but never requested a formal opinion from the office because the other personnel directors did not want him to.

With respect to sick leave, prior to the advent of collective bargaining community college teachers earned sick leave because the community colleges were part of the Department of Education, State of Hawaii. Thereafter, faculty sick leave was heavily bargained over and was negotiated into the 1989-1993 contract. According to Musto, the Employer never objected to the negotiability of sick leave.

Yogi testified that § 79-8, HRS, provides that the instructional staff of the UH is not entitled to sick leave benefits and thus bargaining is foreclosed over the subject. Yogi, however, acknowledged that the statute was passed prior to 1970.

With respect to the transfer of programs proposal in his Sampling of Conflicts, Yogi admitted that there is no specific statute which conflicts with UHPA's proposed language but he felt the six-month notice period proposed by UHPA could potentially conflict with a statutory requirement to transfer a program by a certain deadline. Yogi testified that he wanted to negotiate a provision in the contract which allowed for compliance with a potentially conflicting statute.

Professional improvement leave was referenced in the Faculty Handbook and later negotiated into the 1977-1979 contract. The parties modified the contract language in the 1993-1995 contract.

Musto testified that the Employer also never previously challenged the negotiability of sabbatical leaves and tuition waivers. According to Musto, sabbatical leave is not a cost item since it is not specifically allocated for. The lecturer pool money is available through the general fund and replacing the faculty on sabbatical leave with lecturers actually results in cost savings for the UH. Likewise, Musto testified that UHPA's proposal to exempt tuition for faculty dependents does not result in extra cost to the Employer because students are accommodated first and then faculty or their dependents will be allowed to take classes if room permits.

With respect to tuition waivers, sabbatical and professional improvement leaves, Yogi reasoned that §§ 304-4 and 304-11, HRS, authorize the BOR to set forth its policies on these subjects in its rules. Yogi concluded therefore that bargaining was foreclosed on the subject matters. Thus, Yogi felt there was a conflict between the contract proposals and the statutes and Chapter 89 did not supercede the processes set forth in the statute.

Yogi acknowledged that the last Unit 07 contract was signed on January 27, 1997, subsequent to the issuance of the SHOPO decision. Yogi further testified that legislation in the State's civil service reform process would eliminate the conflicts between the statutes and the contract provisions by repealing the conflicting statutory provisions.

Based upon the foregoing, the Board finds that during the Unit 07 negotiations at issue, Yogi, representing the Employer, challenged the negotiability of UHPA's bargaining proposals as well as the legality of existing contract provisions based upon his reading of the SHOPO case. Some of the existing contract provisions at issue have been included in the contract since the 1970's without challenge as to the negotiability of those subject matters. Yogi and Musto met to discuss the SHOPO holding and Musto disagreed that the matters were nonbargainable. According to Yogi, he was willing to support and join a declaratory petition proceeding to clarify the scope of negotiability issues but could not support a prohibited practice charge brought before the Board.

In questioning before the Board, Yogi admitted that there was no statute which conflicted with the transfer of programs

proposal. Yogi stated that he did not like the six-month notice period because it could conflict with future legislation. Yogi also admitted that Chapter 92F, HRS, does not set forth a specific retention period and thus the Board finds that there is no direct conflict between the derogatory materials contract provision and an existing statute.

The Board further finds that after the Employer challenged the negotiability of various proposals and current contract provisions as being contrary to statute and against public policy, UHPA requested further clarification of the Employer's position regarding the Sampling of Conflicts. Despite his promise to UHPA to provide the clarification requested, Yogi decided not to provide the information and the parties did not conduct any further negotiations. The Employer also rejected UHPA's offer to extend the provisions of the 1995-1999 contract to June 2001 with no pay increase. Yogi indicated that he was concerned with the impact of pending legislation and the Employer wanted to negotiate new contract language. Yogi also indicated that he would not sign any agreements on the contested topics until he learned they were proper and his doubts remain unresolved. The Board finds based on this record that Yogi refused to negotiate with UHPA over the subject matters contained in his Sampling of Conflicts.

The Board finds that in other bargaining units, the public employers did not challenge the legality of the contract provisions and refuse to negotiate the subject matters. In negotiations with the HGEA bargaining units, Yogi presented his concerns and the union withdrew its current proposals. The existing contract provisions continued in effect, including the per

diem language and derogatory materials language which were nearly identical to the language which were objected to as illegal and voidable in the UHPA contract. While Yogi explained that he only controlled the majority of votes as spokesperson in the Unit 07 negotiations, § 89-6, HRS, similarly provides him with the same majority of votes with respect to Unit 05 and HGEA Units 06 and 08. Yogi testified that the issue of conflicts was not even raised with Unit 05 teachers. Thus, the Employer disparately treated UHPA with no reasonable explanation as to why allegedly illegal contract language was being negotiated in some bargaining unit contracts and not others.

#### DISCUSSION

UHPA contends that the Employer refused to bargain in good faith by asserting the non-negotiability of UHPA's proposals and existing contract provisions. UHPA contends that the Employer therefore violated §§ 89-13(a)(5) and (7), HRS, which provide as follows:

**Prohibited practices; evidence of bad faith.** (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

\* \* \*

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

\* \* \*

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

Initially, UHPA seeks a declaration that the contested items are not cost items because Act 100 of 1999 bars negotiations

or changes in cost items for the biennium 1999-2001. According to UHPA, the law is presently being challenged in the courts and if Act 100 is enjoined or repealed, such a declaration would be unnecessary. UHPA further contends that if Act 100 is sustained, bargaining over cost items will be banned whether or not they are otherwise bargainable.

UHPA contends that none of the items which Yogi contested are cost items and further contends that the SHOPO decision does not support the Employer's assertions of non-negotiability. Thus, UHPA requests that the Board find that eight of the items which are included in Yogi's Sampling are not cost items, that they are proper subjects of bargaining, and issue a bargaining order to that effect. Those issues are: exemption from tuition for faculty dependents; teaching assignments and equivalencies (workload); transfers of programs; faculty sabbatical; faculty professional improvement leaves; sick leave; per diem; and the treatment of personnel files.

The Employer contends that the Board lacks jurisdiction over this complaint because it is untimely. The Employer contends that any alleged violation occurred on April 7, 1999 when the Employer provided the sampling of proposals which it considered to be non-negotiable under SHOPO to the Union. Thus, the Employer argues that the instant complaint should be dismissed because it was filed more than 90 days after April 7, 1999.

UHPA contends that the Employer's refusal to bargain is a continuing violation as evidenced by Yogi's testimony before the Board that the Employer will not enter into any agreements on the topics in dispute unless he is authoritatively informed that the

subjects are bargainable. UHPA submits that the absence of meetings confirms the continuous nature of the Employer's refusal to bargain. In addition, UHPA contends that the Employer should be estopped from raising the timeliness issue because Yogi failed to clarify the Sampling pursuant to Musto's April 26, 1999 letter although he promised to do so. Since Yogi never responded to UHPA's request for clarification, the Union contends that it should not be foreclosed from filing a complaint when it relied on Yogi's promise to provide further information. UHPA relies on Decision No. 335, University of Hawaii Professional Assembly, 5 HLRB 165 (1993), where the Board found that the union's complaint was timely because the alleged violation was continuous and the BOR representatives were obligated to investigate a matter and respond to the union but failed to do so. The Board there found that the respondent's inaction could have caused or contributed to the union's delay in filing the complaint. UHPA thus contends that it waited for a reasonable time for Yogi to clarify the Employer's position on the conflicts as promised and then filed the instant complaint when Yogi failed to respond.

Section 377-9(1), HRS, which is made applicable to the Board through § 89-14, HRS, provides that, "[n]o complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence." Based upon the record in this case, the Board finds that the alleged violation, the Employer's refusal to bargain over UHPA's proposals and existing contract provisions, was continuous. Here, Yogi refused to bargain over the subjects contained in his Sampling and Yogi confirmed in his testimony that he would not agree to any provisions unless he

was told by some authority that they were proper subjects of bargaining.

In addition, Yogi failed to provide the Union with information which it requested and created a situation nearly identical to that in the University of Hawaii Professional Assembly case cited supra. Here, Yogi promised to clarify the Sampling after the Employer had rejected the Union's Counterproposal to extend the contract. At some point thereafter, he decided not to respond to the Union and his inaction could have caused or contributed to the Union's delay in filing the instant complaint. Thus, the Board finds that the complaint is timely and that it has jurisdiction over this complaint.

The Employer also contends that the Union must file a declaratory ruling petition to resolve a dispute concerning cost items and the Union's failure to follow the applicable Board's rules is an abuse of process and violates the Board's Administrative Rules § 12-42-122.<sup>2</sup> The Employer also contends that UHPA violated Administrative Rules § 12-42-9 which provides for declaratory rulings by filing the instant prohibited practice complaint with the Board. The Employer argues that Yogi understood that Musto would file a declaratory ruling petition with the Board,

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<sup>2</sup>Administrative Rules § 12-42-122 provides as follows:

**Jurisdiction of board.** Jurisdiction of the board to resolve any dispute concerning cost items shall be limited to the determination of whether the matter in dispute is or is not a cost item and shall be processed upon petition by any exclusive bargaining representative or public employer pursuant to the provisions set forth in subchapter 1 relating to declaratory rulings.

and therefore requests the Board to dismiss the instant complaint and direct the Union to file a declaratory ruling petition.

In the Board's view, while the parties may have considered different avenues to resolve the dispute, it is clear that either party could have initiated a proceeding with the Board or the courts for clarification. As there is no proof of a binding agreement with UHPA which was relied upon by the Employer, the Board does not find that UHPA is somehow estopped from bringing the instant charge before the Board. That UHPA filed a prohibited practice charge against the Employer rather than seeking a declaratory ruling is not a defense to the instant complaint.

UHPA disputes that there was an agreement that UHPA would file a declaratory ruling petition with the Board and contends that the Board may properly determine whether the contested items are cost items because that determination is incidental to the finding of a prohibited practice charge in this case. The Union argues that the Board has in the past considered whether certain subject matters constituted a cost item within the context of a prohibited practice proceeding. The Union cites Decision No. 338, University of Hawaii Professional Assembly, 5 HLRB 186 (1993), where the Board first considered whether salary adjustments were cost items. In that case, the Board concluded that certain matters were cost items and therefore illegal subjects of bargaining which were not subject to reopening during the term of an existing contract. The Union contends that the Board can therefore properly consider whether a subject matter constitutes a cost item within the scope of the instant complaint.

Pursuant to § 89-5(b)(2), HRS, the Board is empowered to resolve any disputes concerning cost items in addition to the powers and functions provided to the Board in other sections of Chapter 89, HRS. In addition, Administrative Rules § 12-42-121 states that the subchapter provides the "general procedure" for resolving any dispute concerning cost items pursuant to § 89-5, HRS. Thus, based upon its interpretation of the foregoing statute and rule, the Board concludes that the general procedure to resolve a dispute involving a cost item is the declaratory ruling petition procedure but the rule does not prevent the Board from determining whether a certain subject is a cost item within the context of a prohibited practice complaint. Therefore, in the interest of economy and efficiency, the Board finds that it can properly resolve cost item disputes within the context of a prohibited practice complaint.

In this case, UHPA requests the Board to determine whether certain items are cost items since Act 100 of 1999<sup>3</sup> precludes the negotiation over all cost items during the biennium 1999-2001. UHPA contends that if Act 100 prevents bargaining over the subject matter, it is immaterial whether SHOPO also prevents bargaining over these subjects. According to the Union, Act 100 is presently being challenged in the courts and UHPA contends that if

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<sup>3</sup>Act 100 of 1999 provides, in part, that § 89-9(a), HRS, shall be amended to provide:

. . . the parties may not negotiate with respect to cost items as defined by section 89-2 for the biennium 1999 to 2001, and the cost items of employees in bargaining units under section 89-6 in effect on June 30, 1999, shall remain in effect until July 1, 2001.

Act 100 is sustained, whether the contested topics are cost items becomes relevant since all bargaining over cost items is precluded by Act 100. Thus, UHPA seeks a declaration that the items before the Board are non-cost items and therefore properly bargainable.

In this regard, UHPA argues that there is no appropriation pending for any of the contested items and that there are no line items in the budget devoted to any of the programs, including per diem. UHPA contends that teaching assignments or equivalencies are a means of measuring how many class hours are equivalent to other forms of University service and has no cost impact. Likewise, the six-month notice period for the transfer of programs and the purging of derogatory material in personnel files after five years provisions impose no costs on the UH. Since sabbatical and professional improvement leaves can be arranged by the Employer to cost nothing, UHPA contends that there is no cost impact for those items. In addition, UHPA contends that sick leave and tuition exemption for dependents do not impose any cost on the Employer so as to require additional appropriations to warrant their designation as cost items. The Employer presented no evidence or argument to support a finding that any of the foregoing items constitute cost items and therefore, the Board finds that the foregoing items, i.e., transfer of programs, derogatory materials, sabbatical, sick, and professional improvement leaves, and tuition exemptions, are non-cost items.

With respect to per diem, UHPA proposed to raise the intrastate per diem rate from \$80 per day to \$100 per day. Musto testified that there is no separate appropriation or line item for per diem in the budget and funds are included in a lump sum

allocation. Musto also testified that a substantial amount of faculty per diem is subsidized directly from the federal government and through outside grants. Additionally, UHPA argues that the contract provision allowing per diem for attendance at professional meetings does not result in additional cost because it provides that the Employer agrees to facilitate faculty travel to attend meetings only "insofar as is possible" and "within available funds." UHPA also argues that the Employer's position is unfair because the public employers allowed a nearly identical HGEA per diem clause to continue into the next contract while the Employer objected to UHPA's proposal as violating the SHOPO decision.

In response, Yogi admitted that there is no separate line item for per diem and the costs are "lumped together by program." Yogi relied upon Eugene Imai, a Vice-President at the University of Hawaii (Imai), who told him that per diem was the only cost item among UHPA's contested items.<sup>4</sup>

Cost items are defined in § 89-2, HRS, as "wages, hours, amounts of contributions by the State and counties to the Hawaii public employees health fund, and other terms and conditions of employment, the implementation of which requires an appropriation by a legislative body."

In AG Opinion No. 72-10, the Attorney General interpreted "cost items" as those provisions which require new or additional appropriations. The Attorney General considered that under a literal interpretation of the definition, an item which could be

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<sup>4</sup>In reviewing the evidence presented, the Board cannot consider Imai's hearsay statement pursuant to § 377-9, HRS, which prohibits the consideration of hearsay in prohibited practice complaints.

implemented by an existing appropriation may be a "cost item" as well as an item which required a new or additional appropriation for implementation. The Attorney General believed however that a literal interpretation would not reflect the reason and spirit of the statute as intended by the legislature. Under a literal interpretation, items which constitute insubstantial changes and which can be implemented under existing appropriations would require legislative approval. The literal interpretation would thus ignore existing appropriation acts which already authorized sufficient flexibility to the departments to implement the provisions of an agreement without the need for additional appropriations. The Attorney General stated:

Accordingly, we believe that in specifying that only cost items requiring appropriations be submitted to the Legislature, the Legislature did not intend that items that can be implemented under existing appropriations also be submitted merely to confirm authorizations previously granted. In this connection, we believe the following rule of statutory construction is applicable: Where adherence to a literal interpretation would lead to an absurdity or contradictory provision, the ordinary sense of the words may be modified to avoid that absurdity of inconsistency. Advertiser Pub. Co. v. Fase, 43 Haw. 154 (1959); Chang v. Meagher, 40 Haw. 96 (1953). We would therefore interpret "cost items" as those provisions the implementation of which requires new or additional appropriations.

This interpretation would recognize the authority to implement provisions of an agreement in existing appropriation acts and the flexibility contained therein and focus the attention of the legislative bodies to the consideration of major items, the implementation of which requires funds in excess of current appropriations. To the extent that only items which require new appropriations are submitted to the legislative bodies for approval, the dichotomy

between cost and non-cost items would be preserved.

Thus, in answer to your question, we conclude that where sufficient funds and flexibility are accorded the executive branch by existing legislation to implement negotiated items, those items do not require appropriations and are not, therefore cost items.

In Decision No. 338, University of Hawaii Professional Assembly, cited supra, the Board held that certain salary adjustments were cost items which were prohibited from being reopened during the term of the current collective bargaining agreement under § 89-10(c), HRS.<sup>5</sup> Thus, the Board concluded that the employer's refusal to ratify and implement a cost item which was reopened during the term of the current collective bargaining agreement did not constitute a refusal to bargain in good faith. In that case, the Board noted testimony about salary adjustments being funded entirely by monies from outside of the State such as federal and private grants or a mixture of such "soft money" and state money which was derived from the state general fund. The Board indicated that the critical issue was whether the overall

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<sup>5</sup>Section 89-10(c), HRS, provides in part:

**Written agreements; appropriations for implementation; enforcement.**

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The parties may include provisions for the reopening date during the term of a collective bargaining agreement, provided that such provisions shall not allow for the reopening of cost items as defined in section 89-2.

implementation of the tentative agreement would require new or additional appropriations by the legislature.

Under the foregoing analysis, if the implementation of the proposed contract provisions requires new or additional appropriations, the item is a cost item. Here, per diem payments compensate employees for traveling expenses while on official business and as such are like wages. UHPA proposed an increase in the intrastate per diem rates. Both parties agree that the monies are appropriated by the legislature to fund the per diem payments, and regardless of whether the money is set forth in a separate line item or lumped into a larger allocation, or whether the monies are wholly paid from state funds or are supplemented from other sources, the fact is that the legislature allocates money to implement the per diem provision. If the increase proposed by UHPA results in the need for additional appropriations, the item would be a cost item; if the increase can be funded by existing appropriations, it would not be a cost item. The Board notes that Article VII, Section A, of the Unit 07 contract provided that insofar as possible without interfering with maintaining the efficiency of University operations, the Employer agreed to facilitate travel to professional meetings within available funds. However, there is no corresponding showing in the record that all faculty travel is conducted to attend professional meetings. The record in this case does not establish whether new or additional appropriations are needed to fund UHPA's contract proposal or whether current appropriations are sufficient. The Board is therefore unable to definitively determine whether UHPA's per diem proposal constitutes a cost or non-cost item.

With regard to the merits of the complaint, the Employer denies any violation of § 89-9(a), HRS, because the matters are not subject to negotiation under the SHOPO decision. The Employer argues that since UHPA agreed that one of its proposals, regarding outside employment, was in violation of the ethics law, UHPA recognizes that the SHOPO decision applies. The Employer also contends that UHPA failed to prove that Yogi wilfully refused to bargain in good faith. Thus, the Employer requests that the Board dismiss this complaint and order the Union to file a declaratory ruling to resolve the issues in this case.

UHPA admits that the SHOPO decision may be read to prohibit bargaining on certain items and concedes that its outside employment provision appears to conflict with State Ethics laws. UHPA contends however, that Yogi's reading of the case that bargaining is prohibited on any matter where there is a statute on the subject matter is extreme and overly broad and the Employer's refusal to negotiate over the items at issue in this case constitutes a refusal to bargain in good faith.

The Court in SHOPO held that records of disciplinary actions taken against police department employees requested by the Society for Professional Journalists - University of Hawaii Chapter were properly subject to disclosure under Chapter 92F, HRS, notwithstanding conflicting provisions contained in the collective bargaining agreement. The Court construed § 89-19, HRS, which provides:

**Chapter takes precedence, when.** This chapter shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary local ordinances, executive orders, legislation,

rules, or regulations adopted by the State, a county, or any department or agency thereof, including the departments of personnel services or the civil service commission.

The Court concluded that:

Nothing in HRS Chapter 89 is explicitly contrary to, or inconsistent with, any of the provisions of HRS Chapter 92F. Specifically, HRS Chapter 89 does not require the confidentiality of any information that must be made publicly accessible under HRS Chapter 92F.

The Court rejected SHOPO and the Doe Officers' argument that collective bargaining agreement provisions assuring the confidentiality of personnel records supercede any statute that arguably implicates a condition of employment. The Court reasoned that the provisions of Chapter 89, HRS, and not the collective bargaining agreement is accorded preemptive effect against all other conflicting statutes on the same subject matter.

The Court stated at p. 405:

The United States Supreme Court has observed that, "[a]s with any contract . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy." W.R. Grace & Co. v. Local Union 759, Intern. Union of United Rubber, Cork, Linoleum and Plastic Workers of Amer., 461 U.S. 757, 766, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298 (1983). "Such a policy, however, must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" Id. (quoting Muschany v. United States, 324 U.S. 49, 66, 65 S.Ct. 442, 450, 89 L.Ed. 744 (1945)).

Other federal courts have noted that it "is elementary that parties to a collective bargaining agreement cannot bargain for provisions that are contrary to law." (Cites omitted.) . . .

Similarly, numerous state courts have held that a topic relating to conditions of employment cannot be subject to negotiated agreement if the proposal would require a

public employer to fail to perform a duty imposed upon it by statute, or to perform the duty in a way contrary to the policy and purposes of the statute. See, e.g., Lansing Ass'n of School Adm'rs v. Lansing School Dist. Bd. of Educ., 216 Mich.App. 79, 549 N.W.2d 15, 23 (1996) (holding that provisions of CBAs of public employee organizations cannot "eliminate [the agency's] statutory obligations to the public merely by contracting to do so with [the] plaintiff"); In re IFPTE Local 195 v. State, 88 N.J. 393, 443 A.2d 187, 191-92 (1982) (noting that "the scope of negotiations in the public sector is more limited than in the private sector" because "the employer in the public sector is government, which has special responsibilities to the public not shared by the private sector," and stating that "[i]f the Legislature establishes as specific term or condition of employment that leaves no room for discretionary action, then negotiation on that term is fully preempted." (Footnotes omitted.)); Board of Educ. v. Public Employment Rel. Bd., N.Y.2d 660, 555 N.Y.S.2d 659, 554 N.E.2d 1247, 1251 (1990) (recognizing that "in a few instances, however, what might otherwise be negotiable terms and conditions of employment are prohibited from being collectively bargained. For example, a statute may direct that certain action be taken by the employer, leaving no room for negotiation." (Citations omitted.)); La Crosse v. Wisconsin Employment Rel. Comm'n, 170 Wis.2d 155, 488 N.W.2d 94, 97 (1992) (stating that "[t]he public employer is not free to bargain with respect to a proposal which would authorize a violation of public policy or a statute . . . . The same principal (sic) logically extends to a proposal which requires the public employer to fail to perform a duty imposed upon it by statute or to perform that duty in a way contrary to the policy and purpose of the statute." (Citations omitted.), rev'd on other grounds, 180 Wis.2d 100, 508 N.W.2d 9 (1993). We agree, and hold that a public employer is not free to bargain with respect to a proposal which would authorize a violation of statute.

The Court held therefore that the confidentiality provision of the contract requiring the department to fail to

perform its duty to disclose disciplinary records as mandated by Chapter 92F, HRS, was not valid because the duty to provide access to government records was not discretionary. The Court further recognized that the weight of authority supports a finding that an agreement of confidentiality cannot take precedence over a public records statute mandating disclosure. The Court further stated that the initial question to be answered in determining the scope of public sector labor negotiations, therefore, is whether the parties involved in the bargaining process can legally agree to the subject in question.

The Court in SHOPO found that the negotiated contract provision was invalid because it conflicted with the statute requiring the disclosure of the records. The Court held that parties cannot agree to provisions which would require the employer to violate public policy or a statute. The SHOPO Court recognized that subjects which were contrary to statute and public policy are also illegal subjects of bargaining and contract provisions which required the Employer to violate the statute or not perform a public responsibility were void.

UHPA contends that the result in SHOPO was not unexpected given the strong public policy underlying the records disclosure law. UHPA however, contends that a statute competing with Chapter 89, HRS, must clearly impose a mission or public duty upon the Employer.

With respect to Yogi's alleged refusal to bargain over the contested items, the Board finds that Yogi refused to negotiate over the transfer of programs proposal and the existing derogatory materials contract provision where there was no conflict with an

existing statute. Yogi included these items in the Sampling of Conflicts identifying them to be provisions which were non-negotiable. In this regard, Yogi testified that he did not like the six-month notice for the transfer of programs because it could conflict with future legislation. In addition, Yogi admitted that there is no provision in Chapter 92F, HRS, which provides for the retention of personnel records which directly conflicts with the existing contract provision which provides for the destruction of derogatory materials after five years. Yogi candidly testified that there was no existing statute which conflicted with these provisions but nevertheless refused to bargain further with UHPA on them.

With respect to these two provisions, the Board finds that the SHOPO decision was inapplicable and Yogi unjustifiably denied bargaining on both issues. The Board finds that Yogi's refusal to bargain was without basis and unreasonable and constitutes a violation of § 89-13(a)(5), HRS.

With respect to faculty workload and responsibilities, UHPA contends that its proposal on Faculty Workload and Professional Responsibilities was intended to enable the bargaining parties to determine equivalencies of teaching assignments. UHPA contends that there is no statute which specifically prohibits negotiation on the subject matters.

Yogi contends that the proposal conflicts with § 304-5, HRS, which directs the BOR to have standards of instruction equal to that required in similar universities on the mainland. Yogi argues that the Union's proposal establishes a maximum instructional workload at 24 credit hours and restricts the

assignment of other work unrelated to direct instruction. In addition, Yogi contended in the Sampling that the proposal restricts the BOR from obtaining general funds not less than three times and not more than five times the tuition and fees collected pursuant to § 304-7.5a, HRS.<sup>6</sup> Yogi further contended that the contract could not override public policy established by the legislature.

Section 304-5, HRS, provides as follows:

**Purposes of university.** The purposes of the university are to give thorough instruction and conduct researches in, and disseminate knowledge of, agriculture, mechanic arts, mathematical, physical, natural, economic, political and social sciences, languages, literature, history, philosophy, and such other branches of advanced learning as the board of regents may from time to time prescribe, and to give such military instruction as the board may prescribe and the federal government require. The standard of instruction shall be equal to that given and required in similar universities on the mainland of the United States, and upon the successful completion of the prescribed courses the board may confer a corresponding degree upon all students who become entitled thereto.

Section 304-7.5, HRS, provides, in part, as follows:

**Budget appropriations; University of Hawaii.** (a) Beginning in fiscal year 1998-1999, and every year thereafter, the general fund budget appropriations for the University of Hawaii shall be an amount not less than three times and not greater than five times

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<sup>6</sup>In his Sampling, Yogi also considered the workload proposal to be non-negotiable under § 89-9(d), HRS, which excludes proposals which would interfere with the public employer's management's rights from the subjects of negotiations. There is no evidence in the record to support a finding that the instant proposal violates management's rights and the Employer did not present any argument on that issue in its brief.

the amount of regular tuition and related fee revenues estimated for that fiscal year.

UHPA contends that the standard of instruction set forth in § 304-5, HRS, refers to the quality of instruction given and the quality of the degree granted to a student and that such standard does not set the hours of work, the number of classes a faculty member must teach, or how much research is equivalent to a class hour. UHPA contends that the foregoing are properly bargainable while the quality level of the outcomes, i.e., standards of work in § 89-9(d), HRS, is non-negotiable. UHPA further contends that bargaining over the workload equivalencies does not violate the Employer's public duty. In addition, UHPA argues that the Employer did not present any proof that setting workload equivalencies would reduce tuition revenue and hinder receipt of appropriations keyed at three to five times the tuition and fees collected.

The Employer did not specifically address the issue of workload responsibilities in its arguments. In reviewing UHPA's arguments, Yogi's contentions and § 304-5, HRS, the Board is persuaded that the statute does not address faculty workload, workload equivalencies, or specifically make workload equivalencies non-negotiable. Section 304-5, HRS, refers to a standard of instruction comparable to a mainland institution resulting in the conferring of a degree. The statute does not make bargaining over workload equivalencies illegal. The Board finds that the Employer failed to prove that the subject matter is an illegal subject of bargaining under the SHOPO decision. The Board concludes that there is no applicable statute which imposes a public duty upon the Employer which would be violated by the negotiation over the

subject matter. The Board therefore concludes that the Employer improperly refused to bargain over the workload issue because of its misreading of § 304-5, HRS, and the SHOPO decision.

With respect to per diem, UHPA proposed raising the rate of per diem for interisland travel from \$80 to \$100 per day. Yogi stated in his Sampling that the Union proposal and the current contract provision conflict with § 78-15, HRS. Yogi contended that the legislature established the public policy that cannot be overridden by contract and since Chapter 89 has no specific provision regarding per diem that conflicts with § 78-15, HRS, the statute cannot be overridden by the contract.

Section 78-15, HRS, provides:

**Traveling expenses of state officials.** A state official or representative while traveling abroad on state official business shall be allowed \$60 a day, except for interisland travel which shall be \$45 a day, which amount is to cover all personal expenses, such as board, lodging, etc., but not fares for transportation; provided that a rate in excess of \$45 a day for interisland travel and \$60 a day for other travel abroad may be allowed, but neither for more than \$65 a day, upon application to and approval by the governor. The comptroller shall issue a warrant payable to the official for the purpose, at the authorized rate, from the date of the official's departure to the date of the official's return upon being furnished by the official with a certified statement setting forth the time of absence.

Section 78-15, HRS, is included in Part I of Chapter 78, HRS, which sets forth the General Provisions for Public Service and was last amended in 1981. UHPA contends that before collective bargaining, the statute set the per diem rate for traveling state employees. After the advent of collective bargaining, from 1975 to date, the Employer and UHPA negotiated contracts that raised the

per diem rates from \$45 to \$80 for intrastate travel and from \$65 to \$130 out-of-state travel for Unit 07 employees. UHPA contends that the Employer has never contested the negotiability of per diem nor sought to amend Chapter 78, HRS, or to amend Chapter 89, HRS, to remove per diem from the scope of bargaining. Further, UHPA argues that the Employer is discriminating against it in contending that UHPA's contract provisions are contrary to § 78-15, HRS, and illegal while the HGEA contracts provide for a comparable rate of per diem. UHPA contends that under SHOPO, a statute must provide a clear and unmistakable mandate of public duty or mission for the Employer and in this case, the per diem statute fails to clearly state a public duty. Thus, the per diem provision is not invalid under SHOPO and per diem payments are not an illegal subject of bargaining. UHPA further questions whether § 78-15, HRS, even applies to faculty since the statute refers to "official or representative" traveling rather than an employee.

The Board finds that § 78-15, HRS, sets a per diem rate but does not clearly define any public responsibility for the Employer nor is there a clearly defined or compelling public policy or mission imposed upon the Employer similar to the public records statute in SHOPO. The Board finds that per diem payments which reimburse employees for official travel is a term or condition of employment which is within the scope of negotiations under § 89-9(a), HRS, and therefore negotiable. As such, the Board finds that insofar as § 78-15, HRS, sets a specific per diem rate for employees in public service who are included in collective bargaining, that statute conflicts with § 89-9(a), HRS, which provides that wages and other terms and conditions of employment

are subject to negotiations. Pursuant to § 89-19, HRS, Chapter 89, HRS, takes precedence over the conflicting statute which concerns the subject matter, i.e., working conditions, and the Board finds that per diem is a negotiable condition of employment which is not otherwise an illegal subject of bargaining under the SHOPO decision. The Board finds that negotiating over per diem does not violate any clearly defined mission or public policy. In fact, the parties have negotiated per diem since 1975. Moreover, the public employers do not contend that per diem is an illegal subject of bargaining for any other bargaining unit and the record does not reflect that § 78-15, HRS, is even consistently applied to other public employees.

UHPA also contends that Yogi refused to bargain over faculty sick leave which was a hard-fought contract right which was included in the 1989-1993 agreement. Historically, the University of Hawaii faculty did not earn sick leave although the community college faculty earned sick leave prior to the advent of collective bargaining because the community colleges were part of the Department of Education. UHPA contends that sick leave is recognized as bargainable as a matter of black-letter labor relations law. UHPA further argues that § 89-9(a), HRS, provides that the Employer's contributions to the Health Fund are bargainable thereby making sick leave a "subject matter" covered by Chapter 89, HRS, which preempts contrary legislation. UHPA argues that the Employer must demonstrate that health programs are not within the subject matter of Chapter 89, HRS, which it has failed to do. Additionally, UHPA contends that § 79-8, HRS, does not contain any clear statement of the Employer's duty to the public or

mission within the meaning of the SHOPO case. UHPA contends that the Employer seeks to take back a significant benefit previously agreed to because under Yogi's analysis the Employer would also eliminate the sick leave credits previously earned by the community college faculty prior to collective bargaining.

Yogi contends that § 79-8, HRS, proscribes bargaining over sick leave for faculty. Section 79-8, HRS, provides in part:

**Sick leaves; exceptions.** With the exception of teachers, educational officers, and cafeteria managers employed in the public schools of the State, the instructional staff of the University of Hawaii, and emergency appointees, all officers and employees in the service of the State or of the several counties shall be entitled to and granted cumulative sick leave pay at the rate of one and three-quarters working days for each month of service.

The Employer does not deny that sick leave is otherwise a negotiable condition of employment within the meaning of § 89-9(a), HRS, and does not specifically address the negotiability of UHPA's sick leave provisions in its brief. Thus, upon review of the record, the Board is persuaded by UHPA's argument that sick leave is encompassed within § 89-9(a), HRS, as a negotiable subject. And, insofar as § 79-8, HRS, conflicts with § 89-9(a), HRS, which encompasses sick leave as a negotiable matter, the Board concludes under § 89-19, HRS, that Chapter 89, HRS, and specifically § 89-9(a), HRS, supercede § 79-8, HRS, which excepts the faculty from earning sick leave. The Board finds that § 79-8, HRS, imposes no public duty upon the Employer which bargaining over sick leave would cause the Employer to violate and the statute does not set forth any clearly defined mission or public policy which is furthered by the denial of sick leave to the faculty. Accordingly,

the Board finds that faculty sick leave is a negotiable working condition and Yogi improperly denied bargaining over the subject.

With respect to tuition for faculty dependents, sabbatical leaves and professional improvement leaves, UHPA contends that there is no statute which specifically prohibits negotiation of the subject matters. Yogi contended that tuition waivers conflict with § 304-4, HRS, which empowers the BOR to waive tuition entirely or reduce fees for students. Yogi also contended that the BOR was empowered to waive tuition through the Chapter 92, HRS, process which precludes collectively bargaining over such matters. Section 304-4, HRS, provides:

**Powers of regents; official name.** The board may charge resident and nonresident tuition fees for regular courses of instruction at any University of Hawaii campus, including any community college.

The board may also charge other fees for special programs of instruction, as well as laboratory fees, course fees, fees for student activities, and an information technology user fee. The board may charge other fees for summer session or evening courses, including differential fees for nonresident students.

The board may waive entirely or reduce the tuition fees or any of the other fees for graduate teaching and research assistants. The board may enter into agreements with government and university officials of any other state or foreign country to provide for reciprocal waiver of the nonresident tuition and fee differential. The board may waive the nonresident tuition and fee differential for selected students from Pacific and Asian jurisdictions when their presence would be beneficial to the university or the State. The board may waive entirely or reduce the tuition fee or any of the other fees for students, resident or nonresident. The board shall determine the percentage of allowable tuition and fee waivers for financial need and other university priorities. These tuition waivers and waivers of the nonresident tuition and fee differential shall be awarded in

accordance with guidelines established by the board.

UHPA contends that in AG Opinion No. 74-12, the Attorney General concluded that the BOR had the authority to enter into a collective bargaining agreement providing for tuition exemption for faculty and staff members. In reading §§ 89-9 and 304-11<sup>7</sup>, HRS,

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<sup>7</sup>Previously, § 304-11, HRS, provided:

**Faculty.** The faculty of the university shall be under the direction of a president who shall be appointed by the board of regents. The board shall appoint such deans, directors, other members of the faculty, and employees as may be required to carry out the purposes of the institution, prescribe their salaries and terms of service, where such salaries and terms of service are not specifically fixed by legislative enactment, make and enforce rules governing sabbatical leaves with or without pay, consistent with the practice of similar institutions on the mainland, and notwithstanding the laws of the State relating to vacations of the offices and employees of the State.

Presently, § 304-11, HRS, which was amended in 1998 provides:

**Personnel.** Personnel of the university not subject to chapters 76 and 77 shall be under the direction of a president who shall be appointed by the board of regents. The board shall appoint such deans, directors, members of the faculty, and other employees as may be required to carry out the purposes of the institution, prescribe their salaries and terms of service, where such salaries and terms of service are not specifically fixed by legislative enactment, make and enforce rules governing sabbatical and professional improvement leaves with or without pay, consistent with the practice of similar institutions on the mainland, and notwithstanding the laws of the State relating to vacations of the officers and employees of the State.

the Attorney General concluded that tuition exemption was a term of service or condition of employment which was subject to negotiations under § 89-9, HRS. UHPA contends that tuition waivers were negotiated and have been in effect since 1979.

In his Sampling, Yogi contends that pursuant to § 304-4, HRS, the BOR has the authority to set tuition through rule-making procedures which suggests that collective bargaining is foreclosed on the subject matter. The Employer's brief does not otherwise specifically address the negotiability of the tuition waivers.

UHPA contends that § 304-4, HRS, does not create a public duty on the Employer which would be violated by the negotiation of tuition waivers. In 1974, the BOR had the authority to waive tuition and the Attorney General interpreted the provision to permit collective bargaining on tuition waivers for faculty because tuition waivers were considered to be conditions of employment. Similarly, there is no provision in § 304-4, HRS, which precludes bargaining on tuition waivers for dependents of faculty. Thus, the Board finds that to the extent that § 304-4, HRS, requires the BOR to go through the rule-making procedure to provide tuition waivers, that statute conflicts with § 89-9(a), HRS, which provides that working conditions are negotiable. Under § 89-19, HRS, § 304-4, HRS, is superceded by Chapter 89, HRS. The Board concludes that the SHOPO decision does not render tuition waivers for dependents of faculty to be an illegal subject of bargaining and that the Employer improperly refused to bargain over the subject matter.

With respect to sabbatical and professional improvement leaves, Yogi contended that the leaves are not bargainable because they are contrary to § 304-11, HRS, supra. Yogi interpreted the

provisions to require the BOR to prescribe the salaries and terms of service of the faculty and make rules governing sabbatical and professional improvement leaves with or without pay.

UHPA contends that Act 115, SLH 1998, amended § 304-11, HRS, to include professional improvement leaves. However, UHPA contends that the legislative intent was clear that the granting of greater autonomy to the University was consistent with collective bargaining rights. The Act stated in part:

The granting of autonomy to the University of Hawaii will achieve its worthy goals only if collaboration characterizes the way in which the university operates. Internally, the University President and those who report directly to the President must communicate with, and invite participation from, every level of the organization in making policy decisions. The kind of participation should permeate the entire organization. In many cases, students should also be invited to participate in the decision-making process. True collaboration will lead to a feeling of belonging, a sense of unity, and a common purpose among all members of the university community.

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The concept of collaboration is not inconsistent with the principals (sic) of collective bargaining, and the intent of this Act is to support this hard-earned right of employees. This Act extends collective bargaining by authorizing members of bargaining unit (7) to make retirement benefits an issue of their collective bargaining so that those benefits can be considered as part of the total cost package of the settlement.

Thus, UHPA argues that Act 115 sought to maintain the collective bargaining rights of the employees as well as expand the scope of bargaining to include retirement benefits. In advocating a liberal reading of Act 115, UHPA points out that the Act also

provides that the BOR shall appoint the faculty and prescribe their salaries. UHPA argues that the BOR does not have the unilateral authority to prescribe wages for the faculty as faculty salaries have been bargained for since the advent of collective bargaining. In addition, UHPA contends that the BOR does not, in fact, even have the authority to negotiate the faculty wages since the "Public Employer" consists of a committee composed of five members, with only two members from the BOR. Moreover, UHPA argues that there is no clear public duty imposed on the Employer by § 304-11, HRS. Similarly, under the Attorney General's analysis with respect to tuition waivers, UHPA contends that sabbatical and professional improvement leaves are conditions of employment and the provisions of § 304-11, HRS, does not undercut the bargainability of otherwise negotiable working conditions.

The Employer did not specifically address UHPA's arguments in its brief. Based upon the record, the Board finds that while sabbatical and professional improvement leaves are set forth in § 304-11, HRS, there is no clearly defined public duty imposed on the Employer which is violated by UHPA's contract proposals and provisions. While the statute authorizes the BOR to prescribe rules for sabbatical and professional leaves, the legislative history does not indicate any intent to make the matters nonbargainable. To the contrary, the legislative history of Act 115 of 1998 indicates that the legislature recognized the collective bargaining rights of the employees and actually broadened the scope of negotiations. Thus, the Board finds on the record before it that sabbatical and professional improvement leaves are conditions of employment which are subject to

negotiations under § 89-9(a), HRS. Similar to the Attorney General's analysis of the negotiability of tuition waivers in Opinion No. 74-12, the Board finds that the statute which sets forth the BOR's authority to provide the leaves to the faculty is overridden by § 89-9(a), HRS. Again, the Board finds no clear public duty in the statute which the Employer is violating by the contract provisions and the Board concludes that the Employer's refusal to negotiate over UHPA's proposals were improper.

The Employer contends that Yogi's actions were not wilfully in violation of Chapter 89, HRS. The Employer contends that Yogi raised questions regarding the scope of bargaining because of the conflicts raised in the SHOPO decision and he sought UHPA's cooperation to file a joint petition for declaratory ruling with the Board. In viewing the facts before the Board, Yogi raised his concerns with the Union based on his interpretation of the SHOPO decision and his belief that the UHPA proposals as well as existing contract provisions were not proper subjects of bargaining. The inconsistency of his position lies in the fact that other bargaining units were permitted to retain these allegedly illegal provisions but bargaining for Unit 07 members ceased over these subjects. The Board is not persuaded that Yogi could only press these issues in the Unit 07 bargaining because he controlled the majority of votes there. Under § 89-6, HRS, the Governor or his designees control the employer votes for Units 05, 06, 07, and 08. The record indicates that the issue of conflicts was not raised with the teachers in Unit 05. Units 06 and 08 are represented by the HGEA and were permitted to retain identical provisions in their contracts.

In addition, during the course of negotiations, UHPA requested Yogi to clarify the Sampling and Yogi agreed to do so. At some point, Yogi decided not to respond to the Union notwithstanding Musto's characterization that the clarification was "imperative." There was no further clarification of the Employer's position with respect to SHOPO. Yogi invited UHPA to negotiate over bargainable subjects but also affirmed during the hearing before the Board that he would not agree to any provisions unless there was a definitive statement that the subjects which he questioned were proper subjects of bargaining. Inexplicably, Yogi never initiated any process to clarify the SHOPO ruling even when he realized that the other public employer representatives did not support his reading of the case. The Board finds therefore, that Yogi's refusal to bargain over the subject matters discussed herein was unreasonable and wilful. The natural consequence of Yogi's challenge to the negotiability of UHPA's proposals and existing hard-fought contract rights without seeking a determination in the proper forum resulted in a complete breakdown of negotiations and further dialogue with the Union. Yogi's promise to provide further information to UHPA and then not providing the clarification without further notice to the Union kept the Union waiting for no reason. The Board concludes therefore, that Yogi's actions were wilful and constitute a refusal to bargain in good faith in violation of § 89-13(a)(5), HRS.

In view of the foregoing, the Board declines to rule on the corresponding violation of § 89-13(a)(7), HRS, alleged by the Union.

### CONCLUSIONS OF LAW

The Board has jurisdiction over this complaint pursuant to §§ 89-5 and 89-13, HRS.

An employer commits a prohibited practice in violation of § 89-13(a)(5), HRS, when it wilfully refuses to bargain in good faith with the union.

The Employer violated § 89-13(a)(5), HRS, when its spokesperson improperly refused to bargain over proper subjects of bargaining.

UHPA's proposals regarding the transfer of programs and teaching assignments, and the existing contract provision regarding personnel files are not illegal subjects of bargaining under the SHOPO decision because there is no conflicting statute requiring the Employer to perform a public duty.

UHPA's proposals or existing contract provisions regarding tuition exemptions, sick and sabbatical leaves, professional improvement leave, and per diem concern subjects which are conditions of work and are negotiable.

### ORDER

Based on the foregoing, the Board orders the following:

(1) The Employer shall cease and desist from refusing to bargain in good faith with the Union over the matters addressed in this Decision;

(2) The Employer shall, within thirty (30) days of the receipt of this decision, post copies of this decision in conspicuous places on the bulletin boards at the worksites where

Unit 07 employees assemble, and leave such copies posted for a period of sixty (60) days from the initial date of posting; and

(3) The Employer shall notify the Board within thirty (30) days of the receipt of this decision of the steps taken to comply herewith.

DATED: Honolulu, Hawaii, February 25, 2000.

HAWAII LABOR RELATIONS BOARD

/s/ BERT M. TOMASU  
BERT M. TOMASU, Chairperson

/s/ RUSSELL T. HIGA  
RUSSELL T. HIGA, Board Member

/s/ CHESTER C. KUNITAKE  
CHESTER C. KUNITAKE, Board Member

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