

FIRST CIRCUIT COURT  
STATE OF HAWAII  
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HAWAII STATE TEACHERS  
ASSOCIATION and UNITED PUBLIC  
WORKERS AFSCME, Local 646, AFL-CIO,

Plaintiffs,

vs.

LINDA LINGLE, Governor, State of Hawaii;  
MARIE LADERTA, Director, Department of  
Human Resources Development, State of  
Hawaii; and GEORGINA KAWAMURA,  
Director, Department of Budget and Finance,  
State of Hawaii,

Defendants.

CIVIL NO. 09-1-1372-06 KKS  
(Other Civil Action)

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW AND ORDER GRANTING  
PLAINTIFFS' MOTION FOR A  
TEMPORARY RESTRAINING ORDER AS  
TO COUNT I OF THE FIRST AMENDED  
COMPLAINT, AND DENYING  
PLAINTIFFS' MOTION FOR A  
TEMPORARY RESTRAINING ORDER AS  
TO COUNTS II AND III OF THE FIRST  
AMENDED COMPLAINT, AND ENTERING  
PERMANENT INJUNCTIVE RELIEF  
AGAINST DEFENDANTS AS TO COUNT I

**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND  
ORDER GRANTING PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING  
ORDER AS TO COUNT I OF THE FIRST AMENDED COMPLAINT, AND DENYING  
PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AS TO COUNTS II  
AND III OF THE FIRST AMENDED COMPLAINT, AND ENTERING PERMANENT  
INJUNCTIVE RELIEF AGAINST DEFENDANTS AS TO COUNT I**

This is a civil action challenging the constitutionality of executive action announced on June 1, 2009 by Governor Linda Lingle and implemented thereafter by Governor Lingle and by the Director of the Department of Human Resources Development, Marie Laderta, and the Director of Finance of the Department of Budget and Finance, Georgina Kawamura, which unilaterally implements a statewide furlough of public employees from July 1, 2009 through June 30, 2011 and imposes other spending and funding restrictions. A complaint for declaratory, injunctive, and other relief was filed by Plaintiffs on June 16, 2009 and amended on June 18, 2009.

On July 2, 2009, a hearing was held on Plaintiffs' Motion for a Temporary Restraining Order. Appearances of counsel were entered by the following: Herbert R. Takahashi, Esq., Rebecca L. Covert, Esq., and Scott A. Kronland, Esq., appearing pro hac vice, representing Plaintiffs; and Mark J. Bennett, Esq., Lisa M. Ginoza, Esq., James E. Halvorson, Esq., Deirdre Marie-Iha, Esq., and Maria C. Cook, Esq., representing Defendants Linda Lingle, Governor, State of Hawaii, Marie Laderta, Director, Department of Human Resources Development, State of Hawaii, and Georgina Kawamura, Director, Department of Budget and Finance, State of Hawaii.

The Court, having examined the evidence of the parties and considered the arguments of counsel, hereby renders its Findings of Fact, Conclusions of Law, and Order Granting the Plaintiffs' Motion for Temporary Restraining Order.

**FINDINGS OF FACT**

1. Plaintiff Hawaii State Teachers Association (HSTA) is an employee organization which at all relevant times herein is the exclusive representative of the employees in bargaining unit 05 as provided in chapter 89, HRS. (Takabayashi Decl. ¶4).

2. Plaintiff United Public Workers, AFSCME, Local 646, AFL-CIO (UPW) is an employee organization which at all relevant times herein is the exclusive representative of the employees in bargaining units 01 and 10 as provided in chapter 89, HRS. (Nakanelua Decl. ¶4).

3. Defendant Linda Lingle is the Governor of the State of Hawaii and as the chief executive is responsible for the faithful execution of the laws under Article V, Section 5 of the State Constitution. (Defs. Exh. E). Lingle is also a public employer within the meaning of Section 89-2, HRS, for the State of Hawaii..

4. Defendant Marie Laderta is the director of the Department of Human Resources Development, State of Hawaii, an executive department and instrumentality of the state government under Section 26-4, HRS, and Section 26-5, HRS. (Laderta Decl. ¶¶ 1 & 2). Laderta serves as the head of the office of collective bargaining (chief negotiator) pursuant to Section 89A-1, HRS, and as a designated representative of the Governor is a public employer within the meaning of Section 89-1, HRS.

5. Defendant Georgina Kawamura is the director of finance of the Department of Budget and Finance, State of Hawaii, an executive department and instrumentality of the state government under Section 26-4, HRS, and Section 26-8, HRS. (Kawamura Decl. ¶ 1). Kawamura, as the director of finance, also serves as a member of the Board of Trustees of the Employees' Retirement System pursuant to Section 88-24, HRS.

6. At the 1950 Constitutional Convention, "the right to organize for the purpose of collective bargaining" was constitutionally established for persons in private employment in Hawaii. (Pls. Exh. 7-5; Grodin Decl. ¶20).

7. In the 1950 Constitutional Convention, public employees were also afforded a constitutional right under Article XVI, Section 2 to accrue retirement benefits which may not be diminished or impaired.

8. Collective bargaining in the public sector in Hawaii evolved. Under the private sector model of collective bargaining, at the 1968 Constitutional Convention the framers proposed amending Article XII, Section 2 to provide that "[p]ersons in public employment shall have the right to organize for the purpose of collective bargaining as prescribed by law." (Pls. Exh. 12-7; Grodin Decl. ¶21).

9. Hawai'i is one of five states in the nation which affords constitutional protection for collective bargaining, which includes New York since 1939 (Pltfs.' Exh. 2-6), Florida since

1944 (Pltfs.' Exh. 3-12), Missouri since 1945 (Pltfs.' Exh. 5-7), and New Jersey since 1947 (Pltfs.' Exh. 6.9).

10. The intent and object of the framers who adopted Article XII, Section 2 at the 1968 Constitutional Convention was to extend to public employees similar rights to collective bargaining previously adopted in 1950 for "persons in private employment" under Article XII, Section 1 of the Hawaii State Constitution.

11. By 1968, when the proposed amendment to Article XII, Section 2 was placed on the general election ballot of November 5, 1968 for ratification by the voters of Hawaii, the term "collective bargaining" had a well recognized meaning and usage in both the private and public sectors, i.e., as the process by which wages, hours, and terms and conditions of employment are negotiated and agreed upon by a union on behalf of the employees collectively represented and the employer. (Pls. Exh. 17; Grodin Decl. ¶21).

12. In 1970, the legislature adopted Hawaii's public sector collective bargaining statute as set forth in chapter 89, HRS. (Pls. Exh. 18).

13. In relevant portions, chapter 89, HRS (as adopted in 1970), set forth the public policies underlying collective bargaining in the public sector in Section 89-1, HRS, as follows:

The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are best effectuated by (1) recognizing the right of public employees to organize for the purpose of collective bargaining, (2) requiring the public employers to negotiate with and enter into written agreements with exclusive representatives on matters of wages, hours, and other conditions of employment, while, at the same time, (3) maintaining merit principles and the principle of equal pay for equal work among state and county employees pursuant to sections 76-1, 76-2, 77-31, and 77-33, and (4) creating a labor relations board to administer the provisions of chapters 89 and 377. (Emphasis added.)

14. Section 89-2, HRS (as adopted in 1970), defined the term "collective bargaining" as follows:

"Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, amounts of contributions by the State and counties to the Hawaii public employees health fund, and other terms and conditions of employment, except that by any such obligation neither party shall be compelled to agree to a proposal, or be required to make a concession. (Emphasis added).

15. The “rights of employees” under chapter 89, HRS, are set forth in Section 89-3, HRS, as follows:

Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except to the extent of making such payment of amounts equivalent to regular dues to an exclusive representative as provided in section 89-4. (Emphasis added).

16. The legislature provided in Section 89-19, HRS that chapter 89, HRS, would “preempt all conflicting statutes and . . . contrary . . . executive orders” as follows:

Sec. –19. Chapter takes precedent, when. This chapter shall take precedent 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. (Emphasis added).

(Pls. Exh. 18-18).

17. Commencing in 1970, public employees in Hawaii organized for the purpose of collective bargaining under chapter 89. (Nakanelua Decl. ¶4b; Takabayashi Decl. ¶4b).

18. On May 21, 1971, HSTA was certified by the Hawaii Public Employment Relations Board as the exclusive bargaining representative of teachers and other personnel of the Department of Education, State of Hawaii, in bargaining unit 5. (Pls. Exhs. 19, 22; Takabayashi Decl. ¶4b). There are approximately 12,997 current employees in bargaining unit 5. (Takabayashi Decl. ¶4c; Pls. Exh. 41-2). On October 20, 1971, UPW was certified by the Hawaii Public Employment Relations Board as the exclusive bargaining representative of blue collar non-supervisory employees in bargaining unit 1, and on February 11, 1972, UPW was certified by the Hawaii Public Employment Relations Board as the exclusive bargaining representative of institutional, health, and correctional workers in bargaining unit 10. (Pls. Exhs. 20, 21; Nakanelua Decl. ¶¶4b, c). There are approximately 8,484 current employees in bargaining unit 1 and 2,961 employees in bargaining unit 10, including approximately 2,335 employees of the

Department of Education and 530 employees of the University of Hawai'i. (Pls. Exh. 41-2; Nakanelua Decl. ¶4d).

19. Chapter 89 provides for a multi-employer and statewide bargaining process including the Board of Education, the Superintendent of Education, and the Governor for employees of the Department of Education for bargaining unit 5, and the Governor, the mayors of the counties of Hawaii, Maui, the City and County of Honolulu, and Kauai, the chief justice, and the Hawaii Health Systems Corporation board for bargaining units 1 and 10, pursuant to Section 89-6, HRS. (Takabayashi Decl. ¶ 4e; Nakanelua Decl. ¶ 4f).

20. In 1974, the Supreme Court held in Board of Education v. Haw. Pub. Emp. Rel. Bd., 56 Haw. 85, 87 (1974), that "good faith bargaining or negotiation is fundamental in bringing to fruition the legislatively declared policy 'to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government.'"

21. At the 1978 Constitutional Convention, the framers rejected various proposals to limit the right to strike in the public sector. The phrase "as provided by law" was substituted for the phrase "as prescribed by law," in Article XII, Section 2, and the Article was renumbered to Article XIII. (Pls. Exh. 23).

22. In 1980, the Supreme Court held in Chun v. Employees' Retirement System of the State of Hawaii, 61 Haw. 596, 606, 607 P.2d 415, 421 (1980), that Article XVI, Section 2 of the State Constitution was intended to protect members of the employees' retirement system from a "reduction in accrued benefits."

23. The parties to the unit 5 collective bargaining agreement have historically recognized that wages, hours, and other terms and conditions of employment, including leaves of absences, constitute core subjects of collective bargaining and have negotiated over these subject matters from 1972 to the present in Article VI (teaching condition and hours), Article VII (assignments and transfers), Article XII (leaves), and Article XVII (salaries). (Pls. Exh. 34; Takabayashi Decl. ¶¶5a, b, & c).

24. The parties to unit 1 and unit 10 collective bargaining agreements have historically recognized that wages, hours, and other terms and conditions of employment including leaves of absences constitute core subjects of collective bargaining, and have negotiated over these subject matters from 1972 to the present in Section 23 (salary adjustments),

Section 23A (overtime), Section 25 (hours of work), Section 26 (overtime), and Section 38 (other leaves of absences without pay). (Pls. Exhs. 33, 35; Nakanelua Decl. ¶¶5a, b, & d).

25. Since 1989 the parties to the unit 1 and 10 collective bargaining agreements have negotiated over furloughs of bargaining unit employees in Section 38.02 which states as follows:

38.02 Leaves without pay to delay a reduction-in-force.

A regular employee may be granted a leave without pay for not more than twelve (12) months in order to delay a planned layoff when the position which the employee occupies has been abolished. If the employee has not been placed at the expiration of the twelve (12) month period, the employee shall be subject to section 12.

(Pls. Exhs. 33-36; Pls. Exhs. 35-49 to 35-50; Nakanelua Decl. ¶5e).

26. In 1996 the legislature authorized state agencies to implement a furlough during fiscal year 1996 - 1997 to address a severe budget deficit. 1996 Session Laws of Hawaii Act 283 ¶ 1, at 658-59. A furlough was defined as “the placement of an employee temporarily and involuntarily in a nonpay and nonduty status.” 1996 Session Laws of Hawaii Act 283 ¶ 2, at 659. “Act 283 was in effect for one year and was not used.” (Pls. Exh. 40-5).

27. In 2003, the Supreme Court held in United Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi, 101 Hawai‘i 46, 62 P.3d 189 (2002), that denying public employees the right to negotiate over core subjects which include wages and cost items constitutes a violation of Article XIII, Section 2 of the State Constitution.

28. In 2004, the Supreme Court in Hoopai v. Civil Service Comm’n, 106 Hawai‘i 205, 221, 103 P.3d 365, 381 (2004), held that the general statutory prohibition against a public employer and the exclusive representative to agree to a “proposal inconsistent with merit principles” in Section 89-9 (d), HRS, is subject to statutory provisions allowing for negotiations of promotion and demotion procedures in a collective bargaining agreement, and a grievance process.

29. In 2005, the Supreme Court held in United Public Workers, AFSCME, Local 646, AFL-CIO v. Hannemann, 106 Hawai‘i 359, 105 P.3d 236 (2005), that under the plain reading of Section 89-9 (d), HRS, the transfer of refuse workers from one baseyard to another is not subject to collective bargaining.

30. In 2006, the Supreme Court held in Malahoff v. Saito, 111 Hawai‘i 168, 189, 140 P.3d 401, 422 (2006), although a mere delay in payment of wages does not constitute a core

subject of collective bargaining, “reduced payments . . . would constitute a change in wages” and thus would be unconstitutional.

31. In 2007, after the decision in Hannemann, the legislature amended Section 89-9 (d), HRS. 2007 Session Laws of Hawaii, Act 58, ¶ 1, at 100-101. In relevant portions the statute proscribes the use of Section 89-9 (d), HRS, to invalidate provisions of collective bargaining agreements, and authorizes negotiations over procedures and criteria on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions as follows:

Section 1. Section 89-9, Hawaii Revised Statutes, is amended as follows:

1. By amending subsection (d) to read:

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

- (1) Direct employees;
- (2) Determine qualifications, standards for work, and the nature and contents of examinations;
- (3) Hire, promote, transfer, assign, and retain employees in positions;
- (4) Suspend, demote, discharge, or take other disciplinary action against employees for proper cause;
- (5) Relieve an employee from duties because of lack of work or other legitimate reason;
- (6) Maintain efficiency and productivity, including maximizing the use of advanced technology, in government operations;
- (7) Determine methods, means, and personnel by which the employer’s operations are to be conducted; and
- (8) Take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.

~~[The employer and the exclusive representative may negotiate procedures governing the promotion and transfer of employees to positions within a bargaining unit; the suspension, demotion, discharge, or other disciplinary actions taken against employees within the bargaining unit; and the layoff of employees within the bargaining unit. Violations of the procedures so negotiated may be subject to the grievance procedure in the collective bargaining agreement.]~~ This subsection shall not be used to invalidate provisions of collective bargaining agreements in effect on and after June 30, 2007, and shall not preclude negotiations over the procedures and criteria on promotions, transfers,

assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions as a permissive subject of bargaining during collective bargaining negotiations or negotiations over a memorandum of agreement, memorandum of understanding, or other supplemental agreement.

Violations of the procedures and criteria so negotiated may be subject to the grievance procedure in the collective bargaining agreement.”

32. HSTA, the Board of Education, the Superintendent of Education, and the Governor are currently parties to a collective bargaining agreement covering the period from July 1, 2007 to June 30, 2009. (Pls. Exh. 34; Takabayashi Decl. ¶5a).

33. UPW, the Governor, the mayors of the various counties, the chief justice, and the Hawaii Health Systems Corporation board are currently parties to collective bargaining agreements covering the period from July 1, 2007 to June 30, 2009 for bargaining unit 1 and 10 employees. (Pls. Exhs. 33, 35; Nakanelua Decl. ¶¶5a, b).

34. On or about June 16, 2008, UPW notified the Governor, the mayors, the chief justice, and the Hawaii Health Systems Corporation board of its desire to modify and amend certain provisions of the current unit 1 and 10 collective bargaining agreements, and soon thereafter bargaining commenced through the duly designated representatives of UPW and public employers. (Nakanelua Decl. ¶6a).

35. At no time did defendants Lingle and Laderta indicate on or after June 16, 2008 a desire to modify and amend Section 38.02 or any other relevant provision of the unit 1 and 10 agreements to provide for a three day furlough per month of bargaining unit employees for a period of two years from July 1, 2009 to June 30, 2011. (Nakanelua Decl. ¶6b).

36. On or about December 18, 2008 HSTA notified the Board of Education, the Superintendent of Education, and the Governor of their desire to modify and amend certain provisions of the current unit 5 collective bargaining agreement. (Pls. Exh. 38; Takabayashi Decl. ¶6a).

37. At no time did Defendants Lingle and Laderta indicate on or after December 18, 2008 a desire to modify and amend the wages, hours, and terms and conditions of employment of the current collective bargaining agreement provisions through the implementation of a furlough of all state employees for three days a month for a period of two years from July 1, 2009 to June 30, 2011. (Takabayashi Decl. ¶6b).

38. On or about January 12, 2009 duly authorized representatives of HSTA, the Board of Education, the Superintendent of Education, and the Governor commenced negotiations over wages, hours, and terms and conditions of employment. (Takabayashi Decl. ¶6a).

39. On June 1, 2009 Defendant Lingle announced a unilateral decision to implement “effective July 1st, and continuing for the next two years . . . three furlough days per month for all state employees,” and to restrict spending in the Department of Education and University of Hawaii “in an amount equivalent to the three day per month furlough.” (Pls. Exh. 44).

40. The underlying reason and purpose of Defendants' furlough plan as stated by Defendant Lingle on June 1, 2009 is to reduce “labor costs” which “includes wages as well as benefits.” (Pls. Exh. 44-5).

41. The June 1, 2009 decision and action by Defendant Lingle and Executive Order No. 09-02 (June 24, 2009) would eliminate for two years the Defendants' obligation to engage in collective bargaining with respect to the three-day per month furloughs for all state employees. (Nakanelua Decl. ¶7b; Takabayashi Decl. ¶7b).

42. The June 1, 2009 decision and action by Defendant Lingle was undertaken without the prior vote, support, or concurrence of the Board of Education and the Superintendent of Education who pursuant to Section 89-6(d), HRS, are a required part of a multi-employer bargaining process in which a majority vote of all public employers is needed for collective bargaining for bargaining unit 5 “as provided by law.” (Takabayashi Decl. ¶6e).

43. The June 1, 2009 decision and action by Defendant Lingle was undertaken without the prior vote, support, or concurrence of the mayors of the various counties, the chief justice, and the Hawaii Health Systems Corporation Board who pursuant to Section 89-6 (d), HRS, are a required part of the multi-employer bargaining process for bargaining units 1 and 10 “as provided by law.” (Nakanelua Decl. ¶6e).

44. On June 8, 2009, HSTA and UPW requested Defendant Lingle and Defendant Laderta to negotiate over the June 1, 2009 decision and action by Lingle and to cease and desist from unilaterally implementing the statewide furlough of three days a month for all state employees for two years. (Pls. Exhs. 48, 49, Takabayashi Decl. ¶6h; Nakanelua Decl. ¶6h).

45. On June 8, 2009 and thereafter, Defendants' have refused and failed to bargain in good faith over the criteria and procedures for implementing furloughs of all state employees. (Pls. Exhs. 47, 51, 52).

46. On or about June 10, 2009 and thereafter Defendants refused to negotiate over the statewide furlough of three days a month for all state employees and declined to cease and desist from the unilateral course of conduct announced on June 1, 2009. (Pls. Exhs. 50, 51; Takabayashi Decl. ¶6i; Nakanelua Decl. ¶6i).

47. On June 24, 2009 Defendant Lingle issued Executive Order No. 09-02, “pursuant to [her] executive authority,” which unilaterally imposes the three day per month furloughs of state employees as announced on June 1, 2009. (Defs. Exh. E).

48. Executive Order 09-02 provides the following definition: “‘Furlough’ means the placement of an employee temporarily and involuntarily in a non-pay and non-duty status by the Employer because of lack of work or funds, or other non-disciplinary reasons.” (Defs. Exh. E-2).

49. Executive Order 09-02 provides for state employees to “be placed on furlough for a total of seventy-two (72) days over the fiscal biennium 2009-2011. Thirty-six (36) furlough days shall be taken during the fiscal year 2009-2010 and thirty-six (36) furlough days shall be taken during the fiscal year 2010-2011.” (Defs. Exh E-2).

50. Executive Order 09-02 provides for the pay of state employees to be “automatically adjusted” by reducing full-time employees’ monthly wages “by the equivalent of one and a half (1.5) days per pay period.” (Defs. Exh. E-2). Employees who do not take the required number of furlough days in a particular month still would be subject to the statewide “furlough pay adjustment,” and would be directed to take the (untaken) furlough day before the end of the fiscal year. (Defs. Exh. E-2).

51. The “furlough pay adjustment” imposed by Executive Order 09-02 would reduce the monthly wages of state employees by approximately 14 to 16 percent. (Pls. Exhs. 57, 58; Reilly Decl. ¶¶7-9; Nakanelua Decl. ¶7; Takabayashi Decl. ¶7).

52. Executive Order 09-02 (Defs. Exh. E) makes no finding of an emergency as set forth in Section 127-10, HRS. (Pls. Exh. 40-8 to 40-9). Nor is there sufficient evidence of the type of emergency, such as an act of war or natural disaster, that would require Defendants to take immediate action before meaningful collective bargaining could occur. (Pls. Exh. 40-8 to 40-9).

53. The reduction in wages of between 14-16% will cause severe hardship for bargaining unit 1, 5 and 10 employees, many of whom live from pay check to pay check, and

have mortgages, medical bills, child support obligations, and other responsibilities. (Nakanelua Decl. ¶8; Takabayashi Decl. ¶9).

54. Plaintiffs HSTA and UPW and the public employees they represent have no plain, adequate or complete legal remedies to redress the wrongs alleged herein, and unless afforded injunctive relief by this Court there will be irreparable harm to public employees, to the integrity of the collective bargaining process, and to the effective and orderly operations of government in the State of Hawaii.

55. The Governor's June 1, 2009 raised the issue of a delay in the payment of retirement fund contributions that are due in June 2009. The obligation to make regular monthly contributions for benefits is part of the collective bargaining agreements with bargaining units 1, 5, and 10.

56. Defendants have represented that the delayed retirement fund contributions will be made on July 6, 2009 (instead of on June 29, 2009). Defendants have not presented evidence sufficient to show whether the Employees' Retirement System actually will lose income because of the stated delay in payment.

57. Also included in the June 1, 2009 action announced by Defendant Lingle is a decision to reduce funding to the Department of Education and University of Hawaii "in an amount equivalent to the three day per month furlough." (Pls. Exh. 44).

58. The parties have not presented evidence sufficient to show whether the reduction in funding to the Department of Education and University of Hawaii will prevent them from maintaining their valid obligations to continue in force the provisions of the collective bargaining agreements with Plaintiffs prior to reaching agreement or impasse in negotiations on new agreements.

59. To the extent any of the above Findings of Fact are more properly considered Conclusions of Law, they shall be treated as such.

### **CONCLUSIONS OF LAW**

1. This Court has subject matter jurisdiction to determine the constitutionality of Defendant Lingle's June 1, 2009 decision and action, and its subsequent implementation by Defendants, including through Executive Order 09-02 (June 24, 2009).

2. Plaintiffs HSTA and UPW have standing on behalf of the public employees they represent in collective bargaining under chapter 89, HRS, to challenge the validity of Defendant Lingle's June 1, 2009 decision and action and its subsequent implementation by Defendants.

3. "The test for granting or denying temporary injunctive relief is three-fold: (1) whether the plaintiff is likely to prevail on the merits; (2) whether the balance of irreparable damage favors the issuance of a temporary injunction; and (3) whether the public interest supports granting an injunction." Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai'i, 117 Hawai'i 174, 211, 177 P.3d 884, 922 (2008); Nuuanu Valley Ass'n v. City and County of Honolulu, 119 Hawai'i 90, 106, 194 P.3d 531, 547 (2008). "[T]he greater the probability the party seeking the injunction is likely to prevail on the merits, the less he has to show that the balance of irreparable damage favors issuance of the injunction." Penn v. Transportation Lease Hawaii, Ltd., 2 Hawai'i App. 272, 276, 630 P.2d 646, 650 (App. 1981).

#### **PART I: Likelihood of Success on the Merits**

##### **As to Count I of the Complaint (Article XIII § 2, core subject of collective bargaining), Plaintiffs have demonstrated that they are entitled to injunctive relief.**

4. In Count I of the Complaint, Plaintiffs HSTA and UPW allege that the June 1, 2009 decision and action of Defendant Lingle and its subsequent implementation by Defendants violates the right of public employees represented by Plaintiffs "to organize for the purpose of collective bargaining as provided by law" in contravention of Article XIII, Section 2 of the Hawaii State Constitution.

5. As to Count I, the Court finds that Plaintiffs have a strong likelihood of success on the merits.

6. Art. XIII § 2 of the Hawaii Constitution reads: "Persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law."

7. The issue presented is whether the Governor's decision to furlough certain unionized Executive Branch employees, announced June 1, 2009 and as set forth in Executive Order 09-02, effective July 1, 2009, unilaterally infringed on core subjects of collective bargaining, in violation of Art. XIII § 2 of the Hawaii constitution. The Court answers this question in the affirmative.

8. United Public Workers v. Yogi, 101 Hawaii 46, 62 P.3d 189 (2002) interprets this constitutional provision, Article XIII § 2. The analysis and holding in Yogi control this Court's decision.

9. Yogi states that the State's constitution must be construed with due regard to the intent of the framers and people adopting it. The fundamental principle in interpreting the Constitution is to give effect to that intent. With regard to Art. XIII § 2, Yogi states that the framers' "foremost intent in drafting this constitutional provision is to improve the standard of living of public employees." Yogi, 101 Hawaii at 54, 62 P.3d at 197.

10. Yogi indicates that the framers of Art. XIII § 2 did not intend to grant our legislators complete and absolute discretion to determine the scope of collective bargaining here and through the creation of various statutes. Id. at 52, 62 P.3d at 195. "Granting the lawmakers absolute discretion to define the scope of collective bargaining would also produce the absurd result of nullifying the 'right to organize for the purpose of collective bargaining.'" Yogi, 101 Hawaii at 53, 62 P.3d at 196 (quoting Art. XIII § 2).

11. The Supreme Court of Hawai'i in Yogi, held that the Legislature's statute violated article XIII § 2 by suspending for two years, the obligation to negotiate with state employees "with respect to cost items," thereby freezing salaries and benefits for two years.

12. Yogi also noted that "it is clear that, when the people ratified article XII [now XIII], section 2, they understood the phrase to entail the ability to engage in negotiations concerning core subjects such as wages, hours, and other conditions of employment." Yogi, 101 Hawaii at 53, 62 P.3d at 196. When a law, statute, or act withdraws from the bargaining process core subjects of collective bargaining that voters contemplated, it violates Art. XIII, section 2.

13. In Malahoff v. Saito, 111 Hawai'i at 184, 140 P. 3d at 417, the State contended that "by inserting the words 'as provided by law' into Article XIII, Section 2, the drafters of the Hawaii Constitution intended for the legislature to retain the ultimate authority to govern the parameters of collective bargaining." Recognizing that this precise issue based on management rights had been "examined by this Court in Yogi," the Court after carefully reexamining the Yogi decision and opinion determined that the State's view was "contrary to the conclusion reached in Yogi." Malahoff, 111 Hawai'i at 184-86, 140 P.3d at 417-18. The Court once again clarified what Yogi stands for as follows:

Thus, Yogi stands for the proposition that the legislature has broad discretion in setting the parameters for collective bargaining as long as it does not impinge upon the constitutional rights of public employees to organize for the purpose of collective bargaining and to negotiate core subjects of collective bargaining, that is, wages, hours, and other conditions of employment. (Emphasis added).

111 Hawai'i at 186, 140 P.3d at 419.

14. *Robert's Dictionary of Industrial Relations* sets forth the definition of furlough as "a leave of absence from work or other duties, usually initiated by an employee to meet some special problem. It is temporary in nature, since the employee plans to return as soon as the furlough period is over." *Robert's Dictionary of Industrial Relations* 236 (3<sup>rd</sup> ed. 1986); (Pls. Exh. 24). The Civil Service Reform Act defines furlough as "the placing of an employee in a temporary status without duties and pay because of the lack of work, or funds, or other non-disciplinary reasons." (Pls. Exh. 24).

15. Plaintiff HGEA's Exhibit H is Executive Order No. 09-02. Executive Order 09-02 provides the following definition: "Furlough' means the placement of an employee temporarily and involuntarily in a non-pay and non-duty status by the Employer because of lack of work or funds, or other non-disciplinary reasons." (Defs. Exh. E-2).

16. Paragraph 2 at page 3 of the Executive Order sets forth a furlough plan requiring thirty-six (36) furlough days be taken during the fiscal year 2009-2010 and thirty-six (36) furlough days be taken during fiscal year 2010-2011. Paragraph 4 at page 3 of the same states, "Employees' pay will be automatically adjusted each pay period to account for the directed furlough day(s), with the pay of full-time employees adjusted by the equivalent of one and a half (1.5) days per pay period." Paragraph 5 at page 3 of the same states, "Full-time employee pay will be automatically adjusted by eight (8) hours for each furlough day or by one furlough day, whichever is applicable. All other employee pay will be automatically adjusted by using the employees' full-time equivalent (FTE) in computing the number of hours per furlough day (e.g., .5 FTE, .75 FTE, etc.)." According to the Declaration of Timothy F. Reilly, the loss in paid work days would result in a cut in wages between 13.8% and 15.8% for the full two (2) years. Decl. of Timothy Reilly, ¶¶ 7, 9.

17. The unilateral imposition of furloughs concerns core subjects of collective bargaining, such as wages. This is confirmed by the Hawaii Supreme Court's ruling in Malahoff v. Saito, 111 Hawaii 168, 140 P.3d 401 (2006).

18. The Governor's June 1, 2009 decision and action, implemented in part by Executive Order 09-02 (June 24, 2009), would impose, unilaterally, a significant reduction in wages of state employees. The "furlough pay adjustment" (Defs. Exh. E-3) would be an approximately 14 to 16 percent reduction in monthly salaries for two full years. Rather than present this proposal at the bargaining table for negotiations on new contracts with state employees whose current contracts expire on June 30, 2009, the Governor removed this issue from the bargaining process by Executive Order. As such, the Governor's action is inconsistent with the constitutional requirement that the State "engage in negotiations concerning **core subjects** such as **wages, hours**, and other conditions of employment." Yogi, 101 Hawai'i at 53, 62 P.3d at 196 (emphasis added).

19. In Malahoff v. Saito, the Hawaii Supreme Court revisited Article XIII, Section 2 and held that, although a mere delay in payment of wages did not constitute a core subject of collective bargaining, "reduced payments . . . would constitute a change in wages" and thus could not be imposed unilaterally. Malahoff, 111 Hawai'i at 189, 40 P.3d at 422 (emphasis added). In reaching this conclusion, the Court distinguished a Massachusetts Supreme Court decision regarding furloughs, making clear that concluding that a mere delay in pay would not decrease wages, and thus could be unilaterally imposed by the Legislature; whereas a furlough would decrease wages and therefore is subject to collective bargaining. Id. at 190, 423. In its discussion of furlough cases from other jurisdictions, the Hawaii Supreme Court recognized that "obviously these cases involved actual wage changes[.]" Id. at 191, 424.

20. Executive Order 09-02, which unilaterally imposes unpaid three day per month furloughs of public employees for July 1, 2009 to June 30, 2011, decreasing actual wages by approximately 14 percent to 16 percent, infringes on the constitutional right of public employees to "organize for purposes of collective bargaining," as set forth in Yogi.

21. The Governor's June 1, 2009 decision and action, implemented in part by Executive Order 09-02 (June 24, 2009), would unilaterally reduce the actual wages paid to state employees by about 14 to 16 percent, so it involves a core subject of collective bargaining.

22. Based on the foregoing, the Governor's unilateral order of furloughs clearly and practically concerns core subjects of collective bargaining, such as wages, hours, and other conditions of employment.

23. The Court concludes that the core subject of collective bargaining is wages. Furloughs involve actual wages decreasing. Because the Governor's furlough order directly decreases wages, furloughs must be negotiated.

*Unilateral Change Doctrine*

24. Under the unilateral change doctrine, the employer cannot implement unilateral changes regarding matters that are mandatory subjects of bargaining, and which are in fact under discussion. NLRB v. Katz, 369 U.S. 736 (1962).

25. Katz was reading section 8(a)(5) of the National Labor Relations Act. This section is a duty to bargain collectively, which is defined as the duty to meet and confer in good faith with respect to wages, hours, and other terms and conditions of employment. The Act contains language similar to that provided in Art. XIII § 2. Thus, an employer's unilateral change in conditions of employment under negotiations – i.e. wages in this instance—violates the duty to bargain collectively.

26. Under Katz, certain terms and conditions of an expired agreement continue in effect by operation of law. They are no longer agreed-upon terms of a contract, they are terms imposed by law, so far as there is no unilateral right to change them. Therefore, because the ordered furloughs change wages, a core subject of collective bargaining, they cannot be imposed by unilateral action.

27. In Litton Financial Printing Division, A Division of Litton Business Systems v. National Labor Relations Board, the Supreme Court of the United States maintained that the Katz doctrine had been extended to circumstances where an existing agreement has expired, and negotiations on a new one have yet to be completed. Litton Financial Printing Division v. NLRB, 501 U.S. 190, 206-07, 111 S.Ct. 2215, 2225-26 (1991).

*Exclusive Jurisdiction of the Hawai'i Labor Relations Board Rejected*

28. The State's argument as to the Hawaii Labor Relations Board's (HLRB) exclusive jurisdiction, pursuant to HRS § 89-14 and 89-13, is rejected. In light of the exigent circumstances and the time frame involved in this case, and the magnitude of a constitutional violation in this particular case, it would be an absurd result for the circuit court not to prevent a constitutional violation inflicted on a mass of public workers.

29. HRCP Rule 65(a) provides for preliminary injunctive relief and Rule 65(b) temporary injunctive relief in addressing exigent circumstances.

30. Here, the extent of the constitutional violation runs deep and arises so swiftly that the employees must have an expedient avenue to justice.

31. HRS §89-13 lists various prohibited practices. A function and responsibility of the Hawai'i Labor Relations Board is to make a factual finding that a prohibited practice occurred or did not occur.

32. HRS § 89-13 "Prohibited practices; evidence of bad faith" provides:

(a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
- (2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;
- (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;
- (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;
- (5) Refuse to bargain collectively in good faith with the exclusive representative as required in > section 89-9;
- (6) Refuse to participate in good faith in the mediation and arbitration procedures set forth in > section 89-11;
- (7) Refuse or fail to comply with any provision of this chapter;
- (8) Violate the terms of a collective bargaining agreement;
- (9) Replace any nonessential employee for participating in a labor dispute; or
- (10) Give employment preference to an individual employed during a labor dispute and whose employment termination date occurs after the end of the dispute, over an employee who exercised the right to join, assist, or engage in lawful collective bargaining or mutual aid or protection through the labor organization involved in the dispute.

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
- (2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;

- (3) Refuse to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;
- (4) Refuse or fail to comply with any provision of this chapter; or
- (5) Violate the terms of a collective bargaining agreement.

33. HRS § 89-14 sets forth two exceptions to the statutory exclusive original jurisdiction of the Hawai'i Labor Relations Board. HRS § 89-14 "Prevention of prohibited practices" provides:

Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9; provided that the board shall have exclusive original jurisdiction over such a controversy *except that nothing herein shall preclude* (1) the institution of appropriate proceedings in circuit court pursuant to section 89-12(e) or (2) the *judicial review of decisions or orders of the board in prohibited practice controversies in accordance with section 377-9* and chapter 91. All references in section 377-9 to "labor organization" shall include employee organization.  
(emphasis added).

34. HRS § 337-9(a), under section title "Prevention of unfair labor practices," provides:

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

35. HRS § 390-14, entitled "Proceedings arising under employment relations act; courts jurisdiction over," provides in pertinent part:

- (a) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Hawaii labor relations board, as provided in this section, the jurisdiction of **courts sitting in equity shall not be limited by this chapter**.
- (b) The board shall have power, upon the filing of a complaint as provided in section 377-9 **to petition any circuit court of the State** within any circuit wherein the unfair labor practice in question is alleged to have occurred or wherein the person resides or transacts business, **for appropriate temporary relief or restraining order**. Upon the filing of any such petition the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper.

(c) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of section 377-7(5), (6), (7), (8), and (9)...If, after the investigation, the board has reasonable cause to believe the charge is true, it shall petition any circuit court of the State within any circuit where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein the person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the board with respect to such matter. Upon the filing of any such petition the circuit court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law or rule of court...

(emphasis added).

36. This case is properly before the Court for issuance of injunctive and declaratory relief, because the issue is whether the Governor's June 1, 2009 decision, and implementation of that decision through Executive Order 09-02 (June 24, 2009), are a violation of Article XIII, Section 2 of the Hawaii State Constitution, just as the issue in Yogi was whether a statute violated Article XIII, Section 2 of the Hawaii State Constitution.

37. The Court rejects Defendants' contention that this case must be presented to the Hawaii Labor Relations Board. The jurisdiction of the Labor Board is limited. Under Section 89-14, HRS, the "the board shall have exclusive original jurisdiction" only over "[a] controversy concerning prohibited practices . . . as provided in section 377-9." Section 377-9, HRS, provides, in turn, that "[a]ny controversy involving unfair labor practices may be submitted to the board." None of the prohibited practices in Chapter 377 include constitutional violations.

38. HRS § 89-13 addresses various prohibited practices that the HLRB is required to render factual findings whether or not a prohibited practice occurred.

39. The Labor Board has held that it lacks jurisdiction to decide constitutional questions. See In re Hawaii State Teachers Assoc. and Biven, DR-05-99 (Dec. No. 2554) (Labor Board lacks jurisdiction in cases that present "constitutional issues"); In re UPW, AFSCME, Local 646, and Lum, et al., Case No. CE-01-634 (Dec. No. 471) (Labor Board would not rule on allegation that employer action interfered with constitutional right to bargain because "[w]ith regard to constitutionality, as an administrative agency the Board is without jurisdiction to address such questions").

40. The HLRB does not determine if a prohibited practice, if one is found, rises to the level of a constitutional violation. HOH Corp. v. Motor Vehicle Industry Licensing Bd., 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987). The HLRB is without the power to grant the relief that this Court now addresses.

41. In light of the magnitude of the constitutional violation and the exigent circumstances requiring immediate injunctive relief, it would be an absurd result if the Circuit Court lacked jurisdiction to prevent the constitutional violation and harm that would be inflicted on a mass of workers. Hawaii Rules of Civil Procedure, Rule 65(a) and (b) exist to address situations of exigent circumstances such as the one before the Court. Under Section 377-9(a), HRS, entitled “Prevention of unfair labor practices,” a “controversy concerning unfair labor practices may be submitted to the board . . . **but nothing herein shall prevent the pursuit of relief in courts of competent jurisdiction.**” (emphasis added). That being so, the courts retain jurisdiction to consider constitutional claims. The relief sought is given by the courts, as the appropriate venue for constitutional questions.

42. “The ‘delicate and difficult office [of ascertaining] whether . . . legislation is in accordance with, or in contravention of, [constitutional] provisions’ is confided to the courts. Id. at 142, 1275 (quoting United States v. Butler, 297 U.S. 1, 63, 56 S.Ct. 312, 318 (1936)).

43. “[U]nder our frame of government, no other place is provided where the citizen may be heard to urge that the law fails to conform to the limits set upon the use of a granted power.” United States v. Butler, 297 U.S. 1, 67, 56 S.Ct. 312, 320 (1936).

#### The Hanneman Case

44. The Court rejects the Defendants’ contention that this case is controlled by United Public Workers, AFSCME, Local 646, AFL-CIO v. Hannemann, 106 Hawai‘i 359, 105 P.3d 236 (2005). Hannemann involved a city’s unilateral transfer of ten refuse workers from a base yard in Pearl City to a base yard in Honolulu. The two issues identified in the Hanneman case were: (1) whether the City’s proposed transfer was subject to collective bargaining under HRS § 89-9(a), and (2) whether the transfer was excluded from collective bargaining under HRS § 89-9(d). Transfers were not a core subject of collective bargaining, and therefore the Hannemann court did not address any constitutional issue.

45. HRS § 89-9(a) is the collective bargaining statute that requires parties to negotiate in good faith with respect to wages, hours, and conditions of employment. HRS § 89-9(d) is the employer's management rights statute concerning permissive subjects of bargaining.

46. The Hanneman court's holding is that the HLRB erred in concluding that the City's proposed transfer is subject to collective bargaining under HRS § 89-9(a). In other words, the City's transfer was not subject to collective bargaining under HRS § 89-9(a). Accordingly, the issue of the City's proposed transfer of workers did not involve issues of a duty to negotiate in good faith under HRS § 89-9(a).

47. Here, between Yogi and Hanneman, the Yogi case controls. The Hanneman case involved transfers, one of the permissive subjects of bargaining specifically identified in the statute. In Hanneman, the transfers did not affect the workers' wages or hours. In contrast to Hannemann, the Yogi case did involve a core subject of collective bargaining -- wages -- and the Court directly confronted the constitutional issues presented under Article XIII, Section 2. The Hanneman case does not identify any constitutional problem. No obligation to bargain under HRS § 89-9(a) existed in that case. The Yogi case, on the other hand, directly confronted the constitutional issues arising from the core collective bargaining issue of wages, which are at the heart of the issues in the instant matter. Accordingly, this case is controlled by Yogi not Hannemann.

#### Managerial Rights under HRS § 89

48. Defendants' reliance on the "managerial rights" provisions in Section 89-9(d) to justify unilateral imposition of the furlough program cannot be accepted because it would allow lawmakers absolute discretion to define the scope of collective bargaining, thereby defeating the intent of Article XIII, Section 2. See Yogi, 101 Hawai'i at 54, 62 P.3d at 197 ("Surely the framers did not contemplate such an absurd and unjust result especially in light of the fact that this constitutional provision is to improve the standard of living of public employees.").

49. The subsections of HRS § 89-9(d) relied on by the State are very broad. For example, HRS § 89-9(d)(5) would allow the employer to relieve any worker for any "legitimate reason." A "legitimate reason" is a broad term with no boundaries. Any reason the Governor puts forward could conceivably be a legitimate reason.

50. HRS § 89-9(d)(7) (methods, means and personnel) is also broad language that would allow the Governor to freely reduce wages by dictating changes to a workers methods or means of work.

51. HRS § 89-9(d)(8), concerning when the Governor can take actions as necessary to carry out the missions of the employer in cases of emergencies, presents a greater issue. The statute contains no definition of emergency, and in that regard, also presents unbridled discretion in the Governor's exercise of that section.

52. Defendants have not presented sufficient evidence of the type of statutory "emergency," such as an act of war or natural disaster, requiring immediate action without constitutional collective bargaining. In this regard, the court need not determine whether a statutory right outweighs the constitutional right of public employees to collective bargaining regarding core subjects of wages, hours and working conditions. In this case, an emergency was not properly and validly raised by the Governor to outweigh a constitutional violation that this Court has already found. The State failed to establish that the fiscal concerns presented here constitute an emergency under HRS § 127-10 or § 128-1(a).

53. The Court concludes that its finding that Plaintiffs are entitled to a preliminary injunction on Count I of their amended complaint renders Counts II and III of the amended complaint partially moot.

54. Given the Court's ruling as to the Art. XIII § 2 claim, the other issues are moot. Nonetheless, the Court will state its conclusions on Counts II and III because of the possibility of appeals and under the "public interest" and "capable of repetition, yet evading review" exceptions to the mootness doctrine. See Yogi, 101 Hawai'i at 58-59, 62 P.3d at 201-02.

**As to Count II of the Complaint, relating to Art. XVI § 2 (Accrued Benefits of Retirement), Plaintiffs have not demonstrated a likelihood of success on the merits.**

55. In Count II of their amended complaint, Plaintiffs allege that the Defendants actions will violate Article XVI, Section 2 of the Hawaii Constitution, which guarantees that "[m]embership in any employees' retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired."

56. As to Count II, the Court finds that Plaintiffs have not demonstrated a likelihood of success on the merits.

Accrued Benefits

57. Art. XVI § 2 provides: “Membership in any employees’ retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired.” UPW and HSTA allege that the affect of furloughs on employee earnings negatively impacts their accrued retirement benefits. The State argues that accrued benefits are based only on services already rendered and that the furlough order does not impact benefits attributable to those services. The Court agrees with the State. Because the furlough order is prospective only, it will have no affect on accrued benefits attributable to past services.

58. By its plain language, Art. XVI § 2 of the Hawaii Constitution applies only to accrued retirement benefits, not to future benefits.

59. In Chun v. Employees Retirement System, 61 Haw. 596, 605-06, 607 P.2d 415, 421 (1980), the Hawaii Supreme Court clarified, looking at the Committee of the Whole report from the 1950 constitutional convention, that the Legislature could reduce benefits as to persons already in the retirement system so far as their future benefits were concerned. The Committee of the Whole Report states:

It should be noted that the above provision would not limit the legislature in effecting a reduction in the benefits of a retirement system provided the reduction did not apply to benefits already accrued. In other words, the legislature could reduce benefits as to (1) new entrants into a retirement system, or (2) as to persons already in the system insofar as their future services were concerned. It could not, however, reduce the benefits attributable to past services. Further, the section would not limit the legislature in making general changes in a system, applicable to past members, so long as the changes did not necessarily reduce the benefits attributable to past services.

Id., citing Comm. Report No. 18, *Journal of the Constitutional Convention 1950* at 330.

60. The Chun Court concluded, “that the provision was meant to protect an employee from a reduction in accrued benefits. However, the extent of such benefits as well as the conditions under which an employee should receive benefits, are governed by applicable statutory provisions, among which is the condition expressed in HRS § 88-73(1).” Chun, 61 Hawai‘i at 606, 607 P.2d at 420.

61. The reduction in future compensation may have an effect on the calculation of retirement benefits but it does not impair benefits already “accrued” or affect future benefits. See Chun, 61 Hawai’i. at 606, 607 P.2d at 421 (1980) (holding that Article XVI, Section 2 “was meant to protect an employee from a reduction in accrued benefits”).

62. Based on the foregoing, there is no violation of Art. XVI § 2 in this instance.

Delay

63. Plaintiffs contend that the delay by Defendants in making the State’s required monthly contribution to the Employees’ Retirement System will cause the Employees’ Retirement System to lose the benefit of the investment income on that contribution, thereby impairing the source for retirement benefits. See Kaho’ohanohano v. State, 114 Hawai’i 302, 338, 162 P.3d 696, 732 (2007) (holding that a statute that authorized the diversion of \$346.9 million from the State’s retirement fund violated Article XVI, Section 2, because that provision “protects not only system member accrued benefits, but also as a necessary implication, protects the sources for those benefits”). Defendants have represented, however, that the retirement contribution will be made on July 6, 2009 (rather than the due date of June 29, 2009).

64. As to the issue of the State making alleged delayed contributions to the retirement system, there is insufficient evidence to establish a legally cognizable claim. Further, there is insufficient evidence to establish that the few days’ delay of the contribution has any diminishment on State employees’ retirement benefits. Therefore, HSTA and UPW failed to demonstrate a likelihood of success on the merits. Finally, it remains unclear whether this issue is rendered moot, in light of the injunction against the imposition of the Governor’s furlough plan.

**As to Count III of the Complaint (HRS § 37-37 & Separation of Powers), Plaintiffs have not demonstrated a likelihood of success on the merits.**

HRS § 37-37

65. In Count III of their amended complaint, Plaintiffs allege that Defendant Kawamura’s decision, approved by Defendant Lingle, to reduce the funds allotted to the Department of Education and University of Hawaii, pursuant to Section 37-37, HRS, is in violation of Section 37-37 and, alternatively, that Section 37-37 violates the constitutional doctrine of separation of powers.

66. Section 37-37, HRS provides in pertinent part:

[W]hen the director of finance determines at any time that the probable receipts from taxes or any other sources for any appropriation will be less than was anticipated, and that consequently the amount available for the remainder of the term of the appropriation or for any allotment period will be less than the amount estimated or allotted therefor, the director shall, with the approval of the governor and after notice to the department or establishment concerned, reduce the amount allotted or to be allotted; provided that no reduction reduces any allotted amount below the amount required to meet valid obligations or commitments previously incurred against the allotted funds. (Emphasis supplied).

67. UPW and HSTA allege that the Governor's exercise of budgetary authority over DOE and the University of Hawaii under chapter 37, Hawaii Revised Statutes: violates HRS § 37-37; violates the principles of separation of powers; and constitutes an impermissible delegation of legislative authority. The Court rejects each of these claims by HSTA and UPW.

68. HSTA contends that the reduction of funding allotments to DOE violates HRS § 37-37 because it reduces the allotted amount below the amount required to meet valid obligations or commitments previously incurred against the allotted funds. HSTA points to the collective bargaining agreement (Pls.' Ex. 34 at 34-26 and 34-27) and the teachers' next year assignment, as "valid obligations or commitments previously incurred." HSTA's argument is rejected. As noted above, the Court finds that the Governor's furlough order does not extend to employees of the DOE. Teacher assignments do not sufficiently raise a §37-37 issue that their obligations or commitments previously incurred are impacted. For this reason, the HSTA's argument is rejected.

69. The Court concludes that Plaintiffs have not demonstrated that the reduction in funds to the Department of Education and University of Hawaii will preclude those employers from meeting their obligations to maintain the commitments in their collective bargaining agreements with Plaintiffs. Accordingly, Plaintiffs have not presented sufficient evidence to establish their entitlement to a preliminary injunction on this claim.

Separation of Powers

70. The Court also rejects HSTA and UPW's contention that HRS § 37-37 is an impermissible delegation of legislative authority.

71. HRS § 37-37(a) provides that the Governor and the Director of Finance may restrict the funds of DOE and the University (technically, “reduce the allotment”) when “the probable receipts from taxes or any other sources for any appropriation will be less than was anticipated, and that consequently the amount available for the remainder of the term of the appropriation or for any allotment period will be less than the amount estimated or allotted therefor[.]”

72. Art. VII § 5 of the Hawaii Constitution reads: “Provision for the control of the rate of expenditures of appropriated state moneys, and for the reduction of such expenditures under prescribed conditions, shall be made by law.” The proceedings at the 1950 constitutional convention confirm this: “Your Committee is of the opinion that there should be vested in the chief executive the authority to reduce the level of expenditures when conditions dictate such action as essential in the interest of preserving financial stability.” Standing Committee Report No. 51, 1 *Proceedings of the Constitutional Convention of Hawaii 1950*, 191, 194.

73. The Committee of the Whole debates from the constitutional convention state that the provision (now Art. VII § 5) could “not be construed as an encroachment by the governor on the power of the Legislature[.]” 2 *Proceedings of the Constitutional Convention of Hawaii 1950*, 451 (remarks of Delegate Henry White). The delegation of power is provided in the Hawaii Constitution. Id.

74. HRS § 37-37(a) was enacted to implement Art. VII § 5 of the Hawaii Constitution. See Stand. Comm. Rep. No. 99, in 1959 Hse. Journal at 238, First Special Session Laws of Hawaii.

75. The Governor also possesses authority over the budget as chief executive. Board of Education v. Waihee, 70 Haw. 253, 768 P.2d 1279 (1989). In Waihee, the Hawai‘i Supreme Court recognized that, “The Governor exercises control over the executive budget through the Department of Budget and Finance, which is headed by the Director of Finance.” Id. at 257, 1281. The Waihee Court also held that a constitutional provision on the Board of Education’s power “can hardly be characterized as a constitutional declaration emancipating the Board of Education from all executive direction, and what has been ‘provided by law’ is consistent with the intention of the framers not to divest the Governor of his ‘statewide policy-making and executive powers’ or his authority over the executive budget.” Id. at 264, 768 P.2d at 1286. In

addition, the Court also recognized that the Director of Finance is empowered by HRS § 37-36 and 37-37 to modify or reduce allotted sums. Id. at 265, 1287.

76. Because the Hawaii Constitution provides for the Governor to be vested with the authority to reduce expenditures when conditions dictate, the Court concludes that Section 37-37, HRS does not violate the constitutional doctrine of separation of powers.

77. To the extent that any of these Conclusions of Law are more properly characterized as Findings of Fact, they are to be so construed.

### **PART II: Balance of Irreparable Damage**

78. Given the determination of a constitutional violation in this case, the Court believes that such violation itself is irreparable damage.

79. Irreparable damage is also established because, on a practical level, the unilateral imposition of furloughs in violation of our Constitution goes to the heart of workers' livelihood, their wages. A thirteen to fifteen percent cut in wages could set in motion changes in jobs, failure to pay the rent or mortgage, or other affects on families such as tuition, loans, bad credit and other cascading events.

80. As such, the balance of irreparable damage favors the issuance of injunctive relief.

81. To the extent that any of these Conclusions of Law are more properly characterized as Findings of Fact, they are to be so construed.

### **PART III: Public Interest**

82. The public interest supports granting the injunction in this case. The government, as set forth in Yogi, cannot violate the constitutional rights of the people. Justice Acoba noted in his concurring opinion in Yogi that collective bargaining affects the public interest in as much as "good faith bargaining or negotiation is fundamental in bringing to fruition the legislatively declared policy to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government." Yogi, 101 Hawaii at 61, 62 P.3d at 204 (Acoba, J., concurring), quoting Board of Ed. v. Hawaii Public Employment Relations Bd., 56 Haw. 85, 87, 528 P.2d 809, 811 (1974).

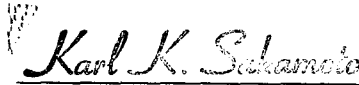
83. To the extent that any of these Conclusions of Law are more properly characterized as Findings of Fact, they are to be so construed.

**ORDER**

Wherefore, Plaintiffs' Motion for Temporary Restraining Order is GRANTED in part. Defendants are enjoined from unilaterally implementing the three-day-a-month furlough plan as to the unionized executive branch employees (within Governor Lingle's control) covered by Chapter 89, Hawaii Revised Statutes, without collective bargaining as required by Art. XIII § 2 of the Hawaii Constitution. The motion for temporary restraining order is DENIED in all other respects.

Because the above determinations are based on undisputed facts and are made as a matter of law, and in the interests of judicial efficiency, a permanent injunction is also entered in favor of Plaintiffs and against Defendants, as to Count I only (the right to bargain collectively under Art. XIII § 2) of UPW's and HSTA's first amended complaint, filed June 18, 2009. Thus, Defendants are permanently enjoined from unilaterally implementing the three-day-a-month furlough plan as to the unionized executive branch employees (within Governor Lingle's control) covered by Chapter 89, Hawaii Revised Statutes, without collective bargaining as required by Art. XIII § 2 of the Hawaii Constitution. As to Count II (accrued retirement benefits) and Count III (separation of powers) of the first amended complaint, Plaintiffs' claims fail as a matter of law and these counts are dismissed.

Dated: Honolulu, Hawaii, JUL 22 2009.

  
KARL K. SAKAMOTO  
Judge of the Above-Entitled Court

