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Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

Hawaii State Teachers Association,)	Civil No. <u>09-1-1372-06</u>	K K S
)	(Other Civil Action)	
Plaintiff,)		
)		
vs.)	COMPLAINT; SUMMONS	
)		
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.)		
)		
)		

(13:42)

COMPLAINT

COMES NOW the Hawaii State Teachers Association, hereafter "HSTA," and respectfully states as follows:

X COPY

I.
JURISDICTION & VENUE

1. This is a civil action and proceeding challenging the constitutionality of a statewide furlough of public employees announced on June 1, 2009 by Governor Linda Lingle and implemented thereafter by the Director of the Department of Human Resources Development, State of Hawaii, Marie Laderta, and the Director of Finance of the Department of Budget and Finance, State of Hawaii, Georgina Kawamura.

2. Plaintiff Hawaii State Teachers Association (HSTA) brings this action on behalf of approximately 12,997 public employees and approximately 4,507 retirees in the State of Hawaii.

3. Jurisdiction is conferred on this Court by Hawaii Revised Statutes (HRS) Sections 603-21.5 (3), 603-21.9(6), 632-1, 661-1, and other relevant statutory provisions.

4. The claims for relief alleged herein arose on the island of Oahu within the first judicial circuit and venue for this action is proper under Section 603-36 (5), HRS.

II.
PARTIES

5. Plaintiff HSTA is a non-profit corporation organized and duly chartered on or about December 8, 1970 by the State of Hawaii.

6. HSTA is an employee organization within the meaning of Section 89-2, HRS, and it represents public employees who have the right to organize for the purpose of collective bargaining on questions of wages, hours, and terms and conditions of employment under Section 89-3, HRS.

7. HSTA is an employee organization within the meaning of Section 88-95, HRS, and represents employees within

the meaning of Section 88-21, HRS, who are members of the Employees' Retirement System under chapter 88, HRS.

8. Defendant Linda Lingle, hereafter "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.

9. Lingle is a public employer within the meaning of Section 89-2, HRS, for the State of Hawaii.

10. Defendant Marie Laderta, hereafter "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.

11. 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 89-2, HRS.

12. Defendant Georgina Kawamura, hereafter "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.

13. 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.

III.

FACTUAL ALLEGATIONS

14. The history and development of collective bargaining in the United States for all practical purposes began with the adoption of the Wagner Act in 1935 which granted to certain private employees the statutory right to organize and to bargain collectively with employers in units of their choosing

over matters of wages, hours, and other terms and conditions of employment.

15. The Wagner Act was amended in 1947 by the Taft Hartley Act which in relevant portions defined the "obligation to bargain collectively" as a duty of the employer and representatives of the employees "to meet at regular times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

16. The right to organize and to engage in collective bargaining was afforded constitutional protection in the states of New York in 1939, Florida in 1944, Missouri in 1945, and New Jersey in 1947.

17. Hawaii adopted the Little Wager Act in 1945 which granted to agricultural and other private sector employees, who were exempt from coverage under the Wagner Act of 1935, the statutory right to organize and to engage in collective bargaining.

18. In the 1950 Constitutional Convention, "the right to organize for the purpose of collective bargaining" was constitutionally established for persons in private employment in Hawaii.

19. In the private sector, the scope of collective bargaining covers "wages, hours, and other terms and conditions of employment" which are considered "mandatory" subjects of collective bargaining, and the unilateral implementation of changes in wages, hours, and terms and conditions of employment by the employer are per se violations of the duty to bargain.

20. Prior to the advent of collective bargaining in the public sector the wages, hours, and other terms and conditions of employment of state and county employees were unilaterally established by civil service, tenure, and other statutes.

21. Collective bargaining for the state and county employees developed after private sector collective bargaining, and evolved in several distinct stages over a span of approximately 30 years.

22. In Hawaii the initial stage of public sector collective bargaining was initiated in 1950 with the adoption of Article XII, Section 2 of the Hawaii State Constitution which afforded to persons in public employment the right to organize and present and make known their grievances and proposals to the State and any political subdivision or any department or agency thereof.

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

24. Collective bargaining in the public sector in Hawaii evolved to its "final" or "sophisticated" stage of development, under the private sector model of collective bargaining, at the 1968 Constitutional Convention when 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."

25. 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.

26. 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.

27. In 1970 the legislature adopted Hawaii's public sector collective bargaining statute as set forth in chapter 89, HRS.

28. 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.)

29. 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).

For nearly forty years under chapter 89, HRS, "collective bargaining" has been understood by union and employer representatives to mean a bilateral process of good faith negotiations over wages, hours, and other terms and conditions of employment and the reaching of an agreement thereby.

30. 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).

31. Recognizing that retirement benefits for public employees were set forth by statute under HRS chapter 88, the legislature in 1970 excluded retirement benefits as a negotiable subject under Section 89-9, HRS.

32. 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 pursuant to Section 89-6, HRS.

33. Commencing in 1970 public employees in Hawaii organized for the purpose of collective bargaining under chapter 89.

34. 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.

35. On February 29, 1972 teachers and other personnel of the Department of Education exercised their right to strike on what became a eighteen-day work stoppage over a dispute involving wages and cost items.

36. 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.'"

37. 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.

38. 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 employee's retirement system from a "reduction in accrued benefits."

39. Over a period of nearly forty years, Plaintiff HSTA has freely engaged in bargaining over wages, hours, and other terms and conditions of employment in behalf of teachers and other personnel of the Department of Education in bargaining unit 5.

40. On and after February 29, 1972 to the present, HSTA, the Board of Education, the Superintendent of Education and the Governor have negotiated approximately fifteen (15)

successive collective bargaining agreements setting forth the wages, hours, and terms and conditions of employment of bargaining unit 5 employees which have been jointly negotiated, ratified by a majority of employees, and approved by appropriate legislative bodies (as to cost items) in accordance with the procedures established in Sections 89-6 and 89-10, HRS.

41. 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.

42. From 1972 to the present employees represented by HSTA have received regular increases in wages and salaries through negotiations pursuant to chapter 89, and the amounts of the negotiated wages and salaries for bargaining unit 5 employees have determined the amount of accrued retirement benefits pursuant to chapter 88, HRS, including but not limited to 88-74, HRS, and 88-81, HRS.

43. The 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.

44. 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).

45. A "furlough" is defined as a "leave of absence from work or other duties initiated by an employee to meet some special problem" in Robert's Dictionary of Industrial Relations (3rd ed. 1986) p. 236.

46. In both the private and public sectors a furlough of employees is recognized as a negotiable subject of collective bargaining which materially affects wages, hours, and other terms and conditions of employment. See Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board, 557 A.2d 1112, 1116 (Pa. Comwlth. 1989); Long Island Day Care Services, Inc., 303 NLRB 112 (1991).

47. 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.

48. At no time did Defendants Lingle and Laderta indicate on 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.

49. 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.

50. On June 1, 2009 Defendant Lingle unilaterally announced a 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 "in an amount equivalent to the three day per month furlough."

51. The June 1, 2009 decision and actions by Defendant Lingle were 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 "as provided by law."

52. The June 1, 2009 decision and action by Defendant Lingle was intended to unilaterally reduce wages and salaries of all state workers by an estimated fourteen (14) per cent from July 1, 2009 to June 30, 2011, to change and reduce the hours of work of employees, and to affect changes in other terms and conditions of employment of all state employees including but not limited to unit 5 employees represented by HSTA.

53. The June 1, 2009 decision and action by Defendant Lingle was also intended to suspend for two years the Defendants' obligation to engage in collective bargaining with respect to the three-day per month furloughs for all state employees.

54. The reduction in wages and salaries per month diminishes and impairs the accrued retirement benefit of members of the Employees' Retirement System under chapter 88, HRS, represented by HSTA.

55. On June 8, 2009 HSTA 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.

56. On June 10, 2009 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.

57. The June 1, 2009 decision by Defendant Lingle and the implementation of said decision by all Defendants was undertaken without compliance with the duty to bargain over core subjects of collective bargaining including wages, cost items, and hours of work, thereby intruding, abrogating, and abridging the rights of public employees to organize for the purpose of collective bargaining under Article XIII, Section 2 of the Hawaii State Constitution.

58. The June 1, 2009 decision by Defendant Lingle and the implementation of said decision by Defendants Laderta and Kawamura diminishes and impairs the accrued retirement benefits of members of the Employees Retirement System contrary to Article XVI, Section 2 of the Hawaii State Constitution.

59. By reason of the foregoing premises the employees represented by Plaintiff HSTA have and will suffer damages in sums as of yet unascertained and Plaintiff asks leave of this Court to show the same at the time of trial hereof.

60. Plaintiff HSTA 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 will suffer irreparable harm and injury, contrary to public policy.

IV.

COUNT I - VIOLATION OF THE RIGHT TO ORGANIZE FOR THE PURPOSE OF COLLECTIVE BARGAINING

61. The allegations of paragraphs 1 through 60 are restated, realleged, and fully incorporated herein.

62. Article XIII of the Hawaii State Constitution states as follows:

Article XIII
Organization; Collective Bargaining

Private Employees

Section 1. Persons in private employment shall have the right to organize for the purpose of collective bargaining.

Public Employees

Section 2. Persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law.

63. The right "to bargain collectively is so important that it has been elevated to constitutional status and is regarded as a fundamental right." S. Jersey Catholic School Teachers v. St. Teresa, 696 A.2d 709 (N.J. 1997).

64. The aforementioned conduct by Defendants Lingle, Laderta, and Kawamura violates Article XIII, Section 2 of the State Constitution:

a. By the Defendants' imposition, pursuant to a directive from the Governor, of a unilateral reduction of wages and cost items by approximately fourteen (14) percent each month for a two year period from July 1, 2009 to June 30, 2011 for all state employees including employees in bargaining unit 5. See United Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi, 101 Hawai'i 46, 62 P.3d 189 (2002),

b. By the Governor's prohibition on negotiations regarding a three-day furlough for two years of bargaining unit employees which affects their wages, hours, and other terms and conditions of employment which are core subjects of collective bargaining as determined in Yogi, and

c. By the Defendants' unilateral suspension for two years of the collective bargaining process as provided by law.

V.

**COUNT II - VIOLATION OF THE RIGHT OF
EMPLOYEES TO ACCRUED RETIREMENT BENEFITS**

65. The allegations of paragraphs 1 through 64 are restated, realleged, and fully incorporated herein.

66. Article XVI, Section 2 of the Hawaii State Constitution States:

Employees' Retirement System

Section 2.

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.

67. The aforementioned conduct by Defendants Lingle, Laderta, and Kawamura violates Article XVI, Section 2 of the State Constitution:

a. By the reduction of accrued retirement benefits of members of the Employees' Retirement System covered by a contractual relationship through a fourteen (14) per cent (%) reduction of wages and salaries. See Chun v. Employees' Retirement System of the State of Hawaii, 61 Haw. 596, 606, 607 P.2d 415, 421 (1980), and

b. By diminishing and impairing accrued benefits of members of the Employees' Retirement System through inadequate funding of the pension system. See Kaho'ohanohano v. State, 114 Hawai'i 302, 162 P.3d 696 (2007).

VI.

COUNT III - VIOLATION OF SEPARATION OF POWERS

68. The allegations of paragraphs 1 through 67 are restated, realleged, and fully incorporated herein.

69. On June 1, 2009 Defendant Lingle announced a decision by Defendant Kawamura (with Lingle's approval) to withhold payment of \$130 million in State in part to pay for retirement and health fund contributions and benefits due in June 2009, and commencing on July 1, 2009 and continuously thereafter to withhold and restrict funds to the Department of Education so as to implement a three-day-per month furlough of all State employees for a period of two years.

70. The aforementioned decision and action by Defendants Lingle and Kawamura abrogates Section 37-37, HRS, which prohibits reductions of any funds duly appropriated by the legislature below the amounts required to meet valid obligations or commitments previously incurred.

71. The obligation to make retirement contributions on a monthly basis is a valid obligation and commitment previously incurred by statute under Section 88-124, HRS.

72. The obligation to pay health fund contributions for bargaining unit 5 employees is a valid obligation and commitment previously incurred by contract under Appendix XXII of the current unit 5 collective bargaining agreement.

73. The obligation to pay wages and salaries to teachers and other personnel of the Department of Education on and after July 1, 2009 and to maintain hours of work and other terms and conditions of employment are valid obligations and commitments previously incurred:

a. By contract under Article VII.A of the current unit 5 collective bargaining agreement following notice to all bargaining unit 5 employees of their employment and salary status on or before June 10, 2009 (and as otherwise provided in Article VI (teaching condition and hours), Article XII (leaves), and Article XVII (salaries)), and

b. By statute under chapter 89 which prohibits any unilateral changes in wages, hours of work, and other terms and conditions of employment absent good faith bargaining leading to impasse (which has yet to occur). See Board of Education v. Haw. Pub. Emp. Rel. Bd., 56 Haw. 85, 528 P.2d 809 (1974); Univ. of Hawaii Prof'l Assembly v. Tomasu, 79 Hawai'i 154, 900 P.2d 161 (1995).

74. Article III of the Hawaii State Constitution vests the power and authority to appropriate funds to the legislative branch of government as follows:

Article III
The Legislature
Legislative power.

Section 1.

The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

75. By the aforementioned conduct Defendants Lingle, Laderta, and Kawamura have usurped the authority of the legislature, abrogated the doctrine of separation of powers as provided by law, and contravened Article III of the State Constitution and Section 37-37, HRS.

VII.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays this Court grant the following relief:

1. An order temporarily enjoining Defendants Lingle, Laderta, and Kawamura from (a) withholding payments due and owing for retirement and health fund contributions and payments in June 2009, (b) restricting or withholding funds to the Department of Education so as to implement a three-day per month furlough of all State employees for a period of two years, and (c) implementing effective July 1, 2009 and continuing for the next two years furloughs of three days per month of all state employees.

2. A preliminary injunction enjoining Defendants Lingle, Laderta, and Kawamura from (a) withholding payments due and owing for retirement and health fund contributions and

payments in June 2009, (b) restricting or withholding funds to the Department of Education so as to implement a three-day per month furlough of all State employees for a period of two years, and (c) implementing effective July 1, 2009 and continuing for the next two years a three-day per month furlough of all state employees.

3. A declaratory order and judgment that the June 1, 2009 decision and actions by Defendants Lingle, Laderta, and Kawamura constitutes a violation of Article III, Section 1, Article XIII, Section 2, Article XVI, Section 2 of the Hawaii State Constitution.

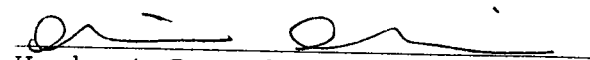
4. A permanent injunction enjoining Defendants Lingle, Laderta, and Kawamura from (a) withholding payments due and owing for retirement and health fund contributions and payments in June 2009, (b) restricting or withholding funds to the Department of Education so as to implement a three-day per month furlough of all State employees for a period of two years, and (c) implementing effective July 1, 2009 and continuing for the next two years a three-day per month furlough of all state employees.

5. An award of damages and make whole relief, including back pay and interest to all adversely affected employees in amounts to be determined at the time of trial;

6. An award and order granting attorney's fees and costs to Plaintiff HSTA; and

7. Such other and further relief as the promotion of justice requires.

Dated: Honolulu, Hawaii, June 16, 2009.


Herbert R. Takahashi
Danny J. Vasconcellos
Rebecca L. Covert
Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

Hawaii State Teachers) Civil No. _____
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Plaintiff,)

vs.)

SUMMONS

Linda Lingle, Governor, State)
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Director, Department of Human)
Resources Development, State)
of Hawaii; and Georgina)
Kawamura, Director,)
Department of Budget and)
Finance, State of Hawaii,)

Defendants.)

(13:42)

SUMMONS

STATE OF HAWAII

To the above-named Defendant(s):


You are hereby summoned and required to serve upon TAKAHASHI VASCONCELLOS & COVERT, Plaintiffs' attorneys, whose address is 345 Queen Street, Room 506, Honolulu, Hawaii 96813, an answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-entitled Court permits, in writing on this summons, personal delivery during those hours.

A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

Dated: Honolulu, Hawaii, JUN 16 2009.

M. CHING
Clerk of the above-entitled Court

A circular seal for the First Circuit Court of the State of Hawaii. The outer ring contains the text "FIRST CIRCUIT COURT" at the top and "STATE OF HAWAII" at the bottom. In the center, the word "SEAL" is printed in a bold, sans-serif font.