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Of Counsel:
TAKAHASHI VASCONCELLOS & COVERT
Attorneys at Law

HERBERT R. TAKAHASHI #1011-0
DANNY J. VASCONCELLOS #4617-0
REBECCA L. COVERT #6031-0
345 Queen Street, Room 506
Honolulu, Hawaii 96813
Telephone Number: (808) 526-3003
Facsimile Number: (808) 531-9894

J. KUBO
CLERK

Attorneys for Plaintiffs

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)

PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER;
MEMORANDUM IN SUPPORT OF
MOTION; DECLARATION OF ROGER
TAKABAYASHI; DECLARATION OF
DAYTON M. NAKANELUA;
DECLARATION OF JOSEPH R. GRODIN;
DECLARATION OF TIMOTHY F.
REILLY; AFFIDAVIT OF REBECCA L.
COVERT; EXHIBITS 1 THROUGH 64;
NOTICE OF HEARING MOTION AND
CERTIFICATE OF SERVICE

Date: JUL 02 2009

Time: 9:15 AM

Honorable Karl K. Sakamoto

(354:701)

2009 JUN 23 PM 12:19

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

COMES NOW the Hawaii State Teachers Association, (HSTA) and the United Public Workers, AFSCME, Local 646, AFL-CIO (UPW) by and through their undersigned counsel pursuant to Rule 7 (b) and 65 (b) of the Hawaii Rules of Civil Procedure and Rule 7 (a) of the Circuit Court Rules and hereby move for a temporary restraining order and preliminary injunction enjoining Defendants Linda Lingle, Marie Laderta, and Georgina Kawamura from: (a) unilaterally implementing effective July 1, 2009 and continuing for the next two years furloughs of three days per month of all State employees; (b) withholding payments for retirement and health fund contributions and payments due and owing on June 30, 2009; and (c) restricting or withholding funds to the Department of Education and the University of Hawaii on and after July 1, 2009 so as to implement a three-day per month furlough of all State employees for a period of two years.

This motion is based on the first amended complaint filed on June 18, 2009, the declarations of Roger Takabayashi, Dayton M. Nakanelua, Joseph R. Grodin, Timothy F. Reilly, the affidavit of Rebecca L. Covert, exhibits 1 through 64, the memorandum in support of the motion, and argument to be presented at the time of the hearing.

Dated: Honolulu, Hawaii, June 22, 2009.



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

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MEMORANDUM IN SUPPORT OF MOTION

I.

INTRODUCTION

Plaintiffs seek a temporary restraining order and preliminary injunction to enjoin a statewide furlough of all State employees and spending and funding restrictions announced by Defendant Linda Lingle on June 1, 2009 (Exh. 44-4 to 44-5), and implemented by Defendants Marie Laderta and Georgina Kawamura on and after June 2, 2009. (Exhs. 45, 46, 47, 48, and 52). Defendants' unilateral decision and actions infringe the constitutional rights of public employees to collective bargaining (Article XXIII, Section 2), to contractually established retirement benefits which may not be diminished or impaired (Article XVI, Section 2), and to compliance with the lawful exercise of legislative power and authority. (Article III, Section 1).

II.

STATEMENT OF THE CASE

A. The History and Scope of "Collective Bargaining"

The right to engage in collective bargaining began in the private sector with the enactment of Wagner Act in 1935. (Exh. 1). In 1945 the Little Wagner Act was adopted in Hawaii. (Exh. 4). The constitutional "right to organize for the purpose of collective bargaining" was granted to persons in private employment in 1950. (Exh. 7-5). In 1968 the framers extended that right "as prescribed by law" "to persons in public employment." (Exh. 12-7). In 1970 the legislature enacted the public sector collective bargaining statute in chapter 89. (Exh. 18). In 1971 and 1972 HSTA and UPW were certified as exclusive bargaining representatives of employees of bargaining unit 1 (Exh. 20), bargaining unit 5 (Exh. 19), and bargaining unit 10 (Exh. 21), and the employees they represent have freely exercised the right as set forth in § 89-3, HRS, since then. Takabayashi Decl. ¶ 4d; Nakanelua Decl. ¶ 4e. At the 1978 constitutional convention the article on collective bargaining was amended to "as provided by law" and renumbered to Article XIII, Section 2. (Exh. 23-7). Hawaii is one of five states in the nation which affords constitutional protection for collective bargaining, which includes New York since 1939 (Exh. 2-6), Florida since 1944 (Exh. 3-12), Missouri since 1945 (Exh. 5-7), and New Jersey since 1947. (Exh. 6-9).

At the time Hawaii's constitutional provisions were adopted there was a clear understanding by both the framers and voters of Hawaii that the right to "collective bargaining" included a requirement for employers to negotiate to determine "wages, hours, and working

conditions.” (Exh. 17-5). Collective bargaining was defined or referred to in both the private and public sector statutes to mean the performance of the mutual obligations of the employer and the representative to negotiate in good faith with respect to “wages, hours, and other terms and conditions of employment.” (Exhs. 18-5; Exh. 1-20). Thus, over a period of more than forty years employees represented by HSTA and UPW have actively engaged in collective bargaining to improve employee wages and salaries, to set their hours and work schedules, and to determine other terms and conditions of employment such as leaves of absences. Takabayashi Decl. ¶ 5a, b, & c; Nakanelua Decl. ¶ 5a, b, c & d. The wages which have been negotiated (Exh. 32) directly affect the amount of retirement benefits under chapter 88. Takabayashi Decl. ¶ 4f; Nakanelua Decl. ¶ 4g.

The current collective bargaining agreements for employees in bargaining unit 1 (Exh. 33), bargaining unit 5 (Exh. 34), and bargaining unit 10 (Exh. 35) contain detail provisions governing these core subjects. Takabayashi Decl. ¶ 5a; Nakanelua Decl. ¶ 5a. The scope of the bargaining subjects in the private and public sectors have been determined to include changes in wages and cost items (Exh. 29), hours of work (Exh. 30-11 to 3-14), and furloughs. (Exh. 25-4 to 25-5; Exh. 63-12). A furlough is defined as “a leave of absence from work or other duties usually initiated by an employee to meet some special problem.” (Exh. 24-3). Since 1989 the unit 1 and 10 agreements contain a provision governing a leave without pay of twelve months to delay a reduction in force in Section 38.02. Nakanelua Decl. ¶ 5e; see e.g., Exh. 33-36; Exh. 35-49 to 35-50. The unit 5 agreement contains various provisions on leaves of absences (Exh. 34-34 to 34-36), which are negotiable terms. (Exh. 26).

B. The Infringements on Core Subjects of Negotiations

Starting in 2008 HSTA and UPW notified public employers of their desire to commence negotiations for revised collective bargaining agreements covering the period from July 1, 2009 to June 30, 2011. (Exhs. 36, 37, & 38). Bargaining commenced soon thereafter with public employer groups in accordance with § 89-6 (d), HRS, for their respective bargaining units. Takabayashi Decl. ¶ 6a; Nakanelua Decl. ¶ 6a. At no time during the bargaining process did Defendants Lingle and Laderta indicate a desire to modify or amend the provisions of the unit 1, 5, or 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. Takabayashi Decl. ¶ 6b; Nakanelua Decl. ¶ 6b. However, 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 funding and spending in the Department of Education and the University of Hawai‘i “in an amount equivalent to the three days per month furlough.” (Exh. 44-4 to 44-5; Takabayashi Decl. ¶ 6e; Nakanelua Decl. ¶ 6e).

On June 8, 2009 HSTA and UPW requested collective bargaining over the changes in wages, hours, and other core subjects announced on June 1, 2009. (Exhs. 48 & 49). On June 10, 2009 and thereafter defendants declined to negotiate. (Exhs. 50 & 51). Defendants' decision and actions of June 1, 2009 suspends for two years the State of Hawaii's obligation to engage in collective bargaining with respect to the three days per month furlough for all state employees. Takabayashi Decl. ¶ 7b; Nakanelua Decl. ¶ 7b. The “three furlough days per month for all state employees” reduces and cuts wages and salaries of bargaining unit 5 employees by approximately 15.79% (Takabayashi Decl. ¶ 7a; Riley Decl. ¶ 9), and reduces and cuts wages and salaries for bargaining unit 1 and 10 employees by approximately 13.79%. Nakanelua Decl. ¶ 7a; Riley Decl. ¶ 7. The spending and funding restrictions on the Department of Education imposed by Defendants Lingle and Kawamura undermines prior notices issued to teachers and other personnel regarding their “employment and salary status” for the ensuing school year. (Exh. 42; Takabayashi Decl. ¶ 7a).

On June 18, 2009 defendants announced that the hours of work of many state workers would change from a five day work week to a four day work week (three work weeks a month) commencing in July 2009. Nakanelua Decl. ¶ 6j; see e.g., Exh. 53-7. Such a furlough plan changes existing hours of work and work schedules which must be posted 12 weeks in advance. Nakanelua Decl. ¶ 7c; see e.g. Exh. 59. These actions unilaterally modify provisions of the unit 5 agreement which have set hours of work to the hour and minute to ensure concentrated effort by classroom teachers. Takabayashi Decl. ¶¶ 5c & 7c. The furlough plan also changes Section 38.02 of the unit 1 and 10 agreements which do not provide for an across the board furlough of all state employees to delay lay off or reductions in force. (Exh. 33-6, see Section 38.02). The reduction in hours of work and wages through furloughs of all state employees is considered a mandatory subject of collective bargaining. Grodin Decl. ¶ 15.

C. The Diminishment and Impairment of Retirement Benefits

The three day furlough per month of all State employees over a two year period reduces the wages and salaries of teachers and other personnel by 15.79%, and thereby

diminishes and impairs the accrued retirement benefits of members of the retirement system under chapter 88. Takabayashi Decl. ¶ 7d; Riley Decl. ¶¶ 9, 10 & 11. Similarly, the cuts and reductions of 13.8% in the wages of bargaining unit 1 and 10 employees has a corresponding effect on their retirement benefits. Nakanelua Decl. ¶ 7d; Riley Decl. ¶¶ 7, 10 & 11. Retirement benefits are calculated on actual pay that employees receive, and the reductions are indisputable. Riley Decl. ¶ 10. As defendants' June 8, 2009 publication on the furlough plan states:

Q28: Will a furlough affect the calculation of an employee's retirement benefits?

A28: Yes. Retirement benefits are based on actual pay. "Average final compensation" for service and disability retirement benefit purposes is based on the employee's 3 or 5 highest paid years of creditable service. Any furlough may lower the "average final compensation" level. (Emphasis added).

(Exh. 47-5; see also Riley Decl. ¶¶ 10, 11 & 12).

D. The Usurpation of Legislative Power and Authority

On June 1, 2009 defendant Lingle also announced a decision to restrict, withhold, and delay payment of upwards of \$130 millions to pay (in part) for retirement and health fund contributions which are due and owing in June 2009 (Exh. 44-4), and to restrict funds to the Department of Education and the University of Hawaii effective July 1, 2009 to implement the three-day-per month furlough of all state employees for a period of two years. (Exh. 44-5). Withholding payment to the employees' retirement system impairs and diminishes the assets of the retirement trust. Riley Decl. ¶ 12. The obligation to pay contributions to the benefit plans is incurred by contract for unit 5 employees under Appendix XXIII, and must be made "monthly." Takabayashi Decl. ¶ 7e; Exh. 34-48. The obligation to pay contributions for health and other benefit plans are incurred by contract for unit 1 and 10 employees under Section 62, and are also due "monthly." Nakanelua Decl. ¶ 7e; Exh. 33-55 to 33-57. The obligation to pay wages and salaries at levels which are in effect on June 30, 2009 thereafter is incurred by chapter 89 which prohibits unilateral changes in wages, hours, and other terms of employment until bargaining has occurred to a point of impasse on such specific changes. (Exhs. 60-1 to 60-3; 61-1 to 61-3; Takabayashi Decl. ¶ 7f; Nakanelua Decl. ¶ 7f). To date there has been no bargaining over the June 1, 2009 decision and actions announced by defendant Lingle, and implemented by defendants Laderta and Kawamura. Id. Takabayashi Decl. ¶ 7e; Nakanelua Decl. ¶ 7f.

III. STANDARD OF REVIEW

A motion for temporary injunctive relief asks the Court to take “action . . . appropriate to create or preserve a state of affairs such that the court will be able to render a meaningful decision on the merits.” Life of the Land v. Ariyoshi, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978). The Court’s temporary order should be “designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction.” Wahba, LLC v. USRP (Don), LLC, 106 Hawai‘i 466, 472, 106 P.3d 1109, 1115 (2005) (quoting Whitman v. Hawaiian Tug & Barge Corp., 27 F. Supp. 2d 1225, 1228 (D. Haw. 1998)).

“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 Haw. App. 272, 276, 630 P.2d 646, 650 (App. 1981).

In motions, such as the one at issue here, that concern an alleged deprivation of a constitutional right, if the court determines that the plaintiff is likely to succeed on the merits “most courts hold that no further showing of irreparable injury is needed.” 11A C. Wright, A. Miller, M. Kane, Fed. Pract. & Proc., § 2948.1 (1995), at 161; Gutierrez v. Mun. Ct. of S.E. Judicial Dist., 838 F.2d 1039, 1045 (9th Cir. 1988); Elrod v. Burns, 427 U.S. 347, 373, (1976) (a loss of constitutional rights for even minimal time constitutes irreparable harm).

IV. ARGUMENT

A. PLAINTIFFS HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

1. Violation of Article XIII, Section 2

The Hawaii Constitution guarantees that “[p]ersons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law.” Haw. Const. art. XIII, §2. In United Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi [Yogi], 101 Hawai‘i 46, 62 P.3d 189 (2002), the Hawaii Supreme Court reviewed the language and

history of this constitutional provision and held that the State could not unilaterally impose by statute a two-year wage freeze on public employees. The unilateral implementation of “core subjects” of employment violated the constitutional right of public employees “to organize for purposes of collective bargaining.” 101 Hawaii at 53, 62 P.3d at 196.

Here, Governor Lingle seeks to accomplish by unilateral action precisely what the Supreme Court held was unconstitutional in Yogi, another case that involved a fiscal crisis. Rather than present proposals to reduce labor costs at the bargaining table through negotiations on new contracts with state employees, the Governor intends to bypass the collective bargaining process by refusing to negotiate a program of three-day per month furloughs for two years for all state employees. Just as the courts enjoined the two-year, unilateral wage freeze in Yogi, so must the two-year, unilateral wage reduction through furloughs also be enjoined. Moreover, because a constitutional right to collective bargaining is at issue, the courts, rather than the Hawai'i Labor Relations Board, provide the proper forum to issue the necessary injunction.

a. In Yogi, the Supreme Court considered whether the legislature violated Article XIII, section 2, by suspending for two years by statute the obligation to negotiate with state employees “with respect to cost items,” and thereby freezing existing salaries and benefits for two years. Yogi, 101 Hawai'i at 48, 62 P.3d at 191. The Circuit Court had issued a temporary restraining order (Exh. 28), and a permanent injunction against the implementation of the law. (Exh. 29). The Supreme Court agreed the law was unconstitutional. The Supreme Court concluded that, at the time Article XIII, section 2 was adopted, there was a clear understanding by both the framers and voters that the right to “collective bargaining” includes a requirement that the employer negotiate over any changes to wages and hours. Id. at 52.

The Court began its analysis by reviewing the common understanding of “collective bargaining,” as that term is defined in various dictionaries. Yogi, 101 Hawai'i at 53, 62 P.3d at 196; see also Exh. 17. After reviewing the definition of “collective bargaining,” the Supreme Court reasoned that, “when the people ratified article XII, 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 at 53. That being so, the Supreme Court concluded that the statute imposing a two-year freeze on increases in wages and other cost items “violates article XII, section 2, because it withdraws from the bargaining process these core subjects of bargaining that the voters contemplated.” Id.; see also Malahoff v. Saito, 111 Hawai'i

168, 188, 140 P.3d 401, 421 (2006) (“implicit within article XIII, section 2 is the right to collectively bargain over ‘wages, hours, and other terms and conditions of employment.’”) (quoting HRS §§ 89-2, 89-3); Grodin Decl. at 14. (explaining that at the time Article XIII, section 2, was adopted it was well understood throughout the United States that “collective bargaining” necessarily included the right to negotiate over wages and hours).

b. It was also well-understood at the time Article XIII, section 2 was adopted at the 1968 Constitutional Convention that “the right to organize for the purpose of collective bargaining” necessarily precludes the employer from unilaterally imposing wages, hours and other core terms and conditions of employment, at least until the parties have negotiated to impasse. As a 1943 American Law Reports annotation, entitled, What Amounts To “Collective Bargaining” within National Labor Relations Act, explained:

It is a general rule that the obligation to bargain collectively, within the meaning of the act, forbids unilateral action or determination by the employer alone, with respect to rates of pay, wages, hours of employment, or other conditions of employment, during the existence of a contract or the pendency of negotiations embracing those subjects[.]

H.D. Warren, What Amounts To “Collective Bargaining” within National Labor Relations Act, 147 A.L.R. 7 (1943) (emphasis supplied) (collecting cases); see also Grodin Decl. ¶ 14 (it was well-established by 1968 that the right to “collective bargaining” precludes the employer from making unilateral changes to wages, hours, and working conditions before impasse is reached in negotiations); Univ. of Hawai‘i Prof. Assembly v. Tomasu, 79 Hawai‘i 154, 159, 900 P.2d 161, 166 (1995) (“the obligation to bargain collectively forbids unilateral action by the employer with respect to pay rates, wages, hours or other conditions of employment”)(emphasis supplied).

The obligation to refrain from unilaterally changing wages, hours, and working conditions extends beyond the expiration of a collective bargaining agreement. (Exhs. 60, 61).¹ Only “[a]fter bargaining to impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement,” may an employer make “unilateral changes that are reasonably comprehended within his pre-impasse proposals.” American Fed’n of Television & Radio Artists v. N.L.R.B., 395 F.2d 622, 624 (D.C. Cir. 1968). Moreover, an impasse does not

¹ Although opinions of the Attorney General are not binding on the Court, they are considered “highly instructive.” Taniguchi v. Ass’n of Apartment Owners of King Manor, Inc., 114 Hawai‘i 37, 46 n.12, 115 P.3d 1138, 1147 n.12 (2007).

exist until the conclusion of good faith bargaining that includes the proposals the employer wishes to implement. As the Hawaii Supreme Court has explained:

In our opinion the law on collective bargaining in public employment, without ambiguity, clearly requires both the public employer and the exclusive representative of the public employees to bargain (negotiate) collectively in good faith. The need for 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." Thus, the proper construction of HRS § 89-2(12) [defining "impasse"] is that "impasse" means failure of a public employer and an exclusive representative to achieve agreement in the course of good-faith negotiations (bargaining).

We cannot subscribe to appellant's construction of HRS § 89-2(12) that "impasse" could be the failure of a public employer and an exclusive representative to achieve agreement without good-faith bargaining or negotiation." Such a construction would totally destroy the efficacy of the law on 'collective bargaining in public employment' . . . (Emphasis added).

Bd. of Ed. v. Hawaii Public Employment Relations Bd., 56 Haw. 85, 87, 528 P.2d 809, 811 (1974).²

c. The Governor's June 1, 2009 decision and actions would impose, unilaterally, a significant decrease in hours for state employees (a reduction of 36 days of work per year) and a cut in wages of between 13.8 and 15.8 percent for two full years. Reilly Decl. ¶¶ 7, 9. Rather than present these proposals at the bargaining table for negotiations on new contracts with state employees whose current contracts expire on June 30, 2009, the Governor seeks to remove this issue from the bargaining process. (Exh. 44-4 to 44-5). 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 (emphasis added).

d. The Defendants apparently contend that furloughs are not a required subject of collective bargaining. But that is obviously wrong. The furloughs involve significant

² Given the importance to employees of subjects like wages and hours, any unilateral changes to those subjects is a per se violation of the duty to collectively bargain. N.L.R.B. v. Katz, 369 U.S. 736, 743 (1962). As such, the employer may not refuse to bargain even if it is acting in good faith or believes economic conditions justify its unilateral, unnegotiated changes.

reductions in both wages and hours, which are both core subjects of collective bargaining. In Long Island Day Care Services, 303 NLRB 112 (1999), for example, the National Labor Relations Board recognized that “furloughs are terms and conditions of employment and therefore a mandatory subject of bargaining.” 303 NLRB at 115-16 (emphasis added). (Exh. 25-4 to 25-5). Likewise, in Pennsylvania v. Pennsylvania Labor Relations Bd., 557 A.2d 1112, 1116 (Pa. Commw. 1989), the Pennsylvania Department of Public Welfare attempted to furlough employees because of a decrease in funding. The court held that while the Department may have had legitimate financial reasons for desiring the furloughs, financial need was an insufficient reason to refuse to bargain because furloughs are “clearly matters of fundamental concern to the employees’ interest in wages, hours, and other terms of conditions of employment [.]” *Id.* at 1116; see also In re Union County, 17 N.J. Pub. Employee Rep. ¶22214 (N.J. Pub. Emp. Rel. Comm. August 20, 1991) (enjoining a county’s unilateral imposition of involuntary furloughs because furloughs fall within the “mandatory negotiable subjects of work year, annual compensation, and unpaid leaves of absence.”).

Additionally, 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 would be unconstitutional. Malahoff, 111 Hawai’i at 189, 40 P.3d at 422 (emphasis added). In reaching this conclusion, the Court considered a Massachusetts Supreme Court decision regarding furloughs:

In Massachusetts Community College Council v. Commonwealth, 420 Mass. 126, 649 N.E.2d 708 (1995), the legislature enacted “a furlough program,” wherein every state employee earning an annual salary of \$20,000 or more was required to elect one of three options to be carried out between April 14, 1991, and June 30, 1991: (1) to take unpaid days off, unless the Governor designated the employee as a “critical and essential” employee[;] (2) to work without pay and receive bonus paid vacation days to be available after the beginning of the next fiscal year[;] or (3) to work without pay and receive a lump sum payment when his or her State employment terminated. *Id.* at 711 (citation omitted). The Supreme Massachusetts Judicial Court struck down the furlough program, holding that the implementation of the program impaired the obligation of the state to pay compensation pursuant to the respective collective bargaining agreements. *Id.* at 716-17. (Emphasis added).

Malahoff, 111 Hawai’i at 189, 140 P.3d at 422. The Hawaii Supreme Court distinguished a mere delay in pay from the Massachusetts furloughs, 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. *Id.* at 90. By distinguishing delayed payments from reduced payments, the Hawai'i Supreme Court indicated that furlough programs that reduce employees' wages – like the program the Governor has announced – would violate Article XIII, section 2.

The current collective bargaining agreements with Plaintiffs contain elaborate provisions regarding hours of work. Takabayashi Decl. ¶ 5c. The HSTA agreement, for example, allocates the distribution of work time in any given work week down to the minute (Exh. 34-21 to 34-22) (setting fixed distribution of minutes to be spent on various types of work, including instructional time, preparation time, duty free lunch time, and meeting time). The UPW agreement requires schedules to be formulated and posted 12 weeks in advance. Nakanelua Decl. 5c. The State's furlough plan changes work schedules. (See Exh. 49; Exh. 53-7). A reduction in work hours and wages through furloughs is a mandatory subject of bargaining. Grodin Decl. ¶ 15.

e. The Defendants also apparently contend that they can unilaterally implement the furlough program because furloughs are akin to layoffs (as to which only the procedures and criteria are subject to negotiation), yet the state need not even negotiate the procedures and criteria for furloughs because furloughs are not layoffs. This reasoning is set out in two inconsistent letters from the Department of the Attorney General to the Speaker of the House, which make no sense. (Exhs. 40 & 43).

The first letter, dated February 17, 2009 reasons that furloughs are akin to layoffs, and the State has the authority to impose layoffs, subject to negotiation of the procedures and criteria, so the State can impose furloughs, so long as the procedures and criteria are negotiated with public employee unions. Exh. 40. The second letter, dated May 29, 2009 reverses position, recognizing that furloughs are not layoffs, but then concludes, illogically, that this means the State can impose furloughs without even negotiating the procedures and criteria – rather than that the State must negotiate about a furlough program. (Exh. 43).

The sum of the matter is that the Attorney General is right that furloughs are not layoffs -- they are reductions in hours and wages for employees who continue to be employed by the State. Grodin Decl. ¶ 15. But that means that furloughs are a mandatory subject of collective bargaining because they affect both wages and hours for continuing employees. *Id.* As the Connecticut State Board of Labor Relations explained in considering this same question:

We see furloughs as a method of reducing expenditures, without laying off employees, by creating for employees a "hiatus" in their work schedules. This usually occurs during an unexpected period of financial crisis or, in the private sector, during a period of "plant shutdown". This action is perhaps best described as a short term, "quick fix" to a financial problem or a response to a temporary lack of work. Thus, a furlough is usually a short, mandatory absence from work with a concurrent loss of pay but without any expectation that the employee will be separated from his/her employment relationship and all its benefits.

In re Town of Farmington, Dec. No. 3237 (Conn. Bd. Labor Rel. 1994) at 9; Exh. 63-9. The Connecticut Labor Board therefore concluded that furloughs are a mandatory subject of bargaining: "[W]e see a furlough as more akin to changing an employee's wages in any given week than it is to a layoff because the worker remains employed but experiences altered terms of employment. The hardship of an unexpected, and perhaps sudden, reduction in hours and pay will be substantial to the average employee." Id. at 12 (emphasis added).

In this regard, it must be emphasized that just because an employer may have the authority to impose layoffs, or close a factory altogether, or close its business, does not mean the employer can take the "lesser" step of cutting wages, hours, or other labor costs unilaterally. Core terms of continued employment are a mandatory subject of negotiation even though the employer may have authority to terminate the employment relationship entirely. Nor should the Court be influenced by threats that the alternative to labor cost reductions are layoffs. See Exh. 51. The protection in the Constitution of the "right to organize for purposes of collective bargaining" is a recognition that, in both good times and bad times, the collective bargaining process is the proper means of considering such issues. See Yogi, 101 Hawai'i 54, 62 P.3 at 197 ("[I]f we follow the Defendants' reading of that provision to its logical conclusion, it would be possible for the legislature to establish a freeze in contractual terms on cost items not only for two years but for two decades.").

f. Finally, this case is properly before the Court for issuance of injunctive and declaratory relief, rather than the Hawaii Labor Relations Board, because the Governor's decision and actions present a constitutional question, just like the statute at issue in Yogi. The Labor Board has exclusive jurisdiction over the prohibited practices listed in HRS § 377-9, see HRS § 89-14, but the ambit of HRS § 377-9 does not include constitutional violations. Indeed, the Labor Board has held that in cases that "[present] constitutional issues," it lacks jurisdiction. In re Hawaii State Teachers Assoc and Biven, Dec. 2554, DR-05-99. See Exh. 62-11.

The Defendants may contend that the Labor Board should decide whether labor relations statutes give the Governor authority to unilaterally suspend collective bargaining for two years regarding mandatory unpaid furloughs. But if statutes purported to authorize the unilateral furloughs (and, in fact, the labor relations statutes do not even mention furloughs), the statutes would be unconstitutional. After all, Yogi involved a statute that did explicitly give the defendants in that case the authority to bypass collective bargaining about cost items. Nonetheless, in Yogi, the Supreme Court held that the phrase “collective bargaining as provided by law” in the Constitution permits regulation of the process of collective bargaining, not suspension of bargaining over a core subjects like wages and hours. Yogi, 101 Hawai‘i at 54; see also Malahoff, 111 Hawai‘i at 186, 140 P.3d at 419 (“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.”). If the Legislature cannot bypass collective bargaining by an explicit statute, then the Governor certainly cannot do so by unilateral employer action.³

It also must be emphasized that this case does not involve a run-of-the-mill dispute about a public employer's alleged failure to bargain in good faith about a new contract as required by statute. Such run-of-the-mill disputes would fall under HRS § 377-9, and thus be within the Board's jurisdiction. Rather, the Governor's June 1, 2009 decision is a governmental action that seeks to remove an issue from the normal collective bargaining process entirely and on an across-the-board basis, just like the statute at issue in Yogi purported to remove wage increases and other cost items from the collective bargaining process. (Exh. 44-5). In sum, Yogi held that public employees have a constitutional right to bargain over changes to their hours and wages that cannot be suspended – even by the Legislature. The Defendants' executive action

³ The Attorney General's letters to the Speaker of the House did not consider whether the Governor's unilateral imposition of furloughs would violate Article XIII, section 2 of the Constitution. But, in the Attorney General's first letter, he recognized that a statute imposing furloughs “could be challenged as being in violation of Art. XIII, Sec. 2 of the Hawaii Constitution.” See Exh. 40-5 to 40-6. If the Legislature cannot unilaterally impose furloughs by statute, it follows that the Governor cannot do so by executive action either.

unilaterally reducing wages and hours for two years is contrary to Yogi, so there is an overwhelming likelihood that Plaintiffs will prevail on their challenge to that action.

2. Violation of Article XVI, Section 2

Article XVI, Section 2 of the Hawaii Constitution 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.” Unless enjoined, the defendants’ intended actions will violate this provision in two separate and independent ways. Takabayashi Decl. ¶ 7d & e; Nakanelua Decl. ¶ 7d & e.

First, by unilaterally reducing the salaries and wages of plaintiffs’ members, the furloughs will reduce those members’ accrued retirement benefits. See Chun v. Employees’ Retirement System of the State of Hawaii, 61 Haw. 596, 606, 607 P.2d 415 421 (1980) (holding that Article XVI, Section 2 “was meant to protect an employee from a reduction in accrued benefits.”). To understand why the defendants’ changes to future pay will necessarily affect accrued benefits, it is necessary to understand how the State calculates retirement benefits. The State calculates the amount of an employee’s benefit by calculating that employee’s “average final compensation.” See HRS § 88-81. The “average final compensation” is based on the employee’s 3 or 5 highest paid years of creditable service. Id. Because the State averages the amount earned over a number of years, the furlough will diminish the value of the contribution of the employee’s current wage if the two furlough years are included in the retirement benefit calculation. (Exh. 47-5). The value of the past year of service, in other words, has been accrued, but will be undercut by the lower wages caused by the furlough. As Plaintiffs’ expert, Timothy Reilly, explains in his declaration:

When employees retire, they are usually at or near the top step of their job classification. The furlough will negate all wage increases under the current contract and possibly part of the prior contract for Unit 1, Unit 5 and Unit 10 employees, reducing their annual wages and salaries at least to 2006 wage levels. State employees who retire and have to include the two furlough years in the calculation of retirement benefits will have smaller retirement benefits than the retirement benefits calculated on the higher non-furloughed wages they would have received. In order to avoid decreased retirement benefits, an employee will need to postpone his retirement until the furlough years are excluded from the retirement benefits calculation.

Reilly Decl., ¶ 11.

Second, the furlough plan includes a one month delay in the State's payment of retirement contributions, which will impair the sources of the State employees' retirement benefits. (Exh. 44-4). The Hawaii Supreme Court has held that Article XVI, Section 2 "protects not only system member accrued benefits, but also as a necessary implication, protects the sources for those benefits." 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). Here, by delaying the date of the State's contribution to the retirement trust, the furlough plan will weaken the source of state employees' retirement benefits. As Plaintiffs' expert explains: "An increase in the price of investments between the date the contribution should have been made and the deferred date reduces the amount of investments the retirement trust could have purchased. Any future increase in value of these delayed purchased investments is a permanent loss to the trust." Reilly Decl., ¶12.

3. Violation of H.R.S. § 37-37 and Constitutional Separation of Powers

Plaintiffs are also likely to succeed on their challenge to the Defendants' plan to withhold funds appropriated by the Legislature to the Department of Education and the University of Hawaii so as to require mandatory furloughs. (Exh. 44-5). First, HRS § 37-37 permits the executive branch to withhold appropriated funds in the event of a revenue shortfall but it does not allow the funding allotted to be reduced "below the amount required to meet valid obligations or commitments previously incurred against the allotted funds." H.R.S. § 37-37(a). Defendants' plan to reduce funding below the amount necessary to meet the commitment to maintain the hours and wages in existing collective bargaining agreements pending impasse, so the withholding is not authorized by statute. Takabayashi Decl. ¶ 7f; Nakanelua Decl. ¶ 7e. Second, even if the withholding were authorized by statute, H.R.S. § 37-37 constitutes an unlawful delegation of legislative authority to the executive branch in violation of the separation of powers principle. See also Exhs. 60 & 61 (an attorney general's opinions regarding maintaining status quo after contract expiration). Courts in three states have struck down similar statutes.

a. H.R.S. § 37-37(a) purports to confer upon Defendant Kawamura the authority to restrict, with the approval of the Governor, the funds appropriated to any department, but it also provides that no "reduction may reduce any allotted amount below the amount required to meet valid obligations or commitments previously incurred against the

allotted funds.” H.R.S. § 37-37(a).⁴ Defendants’ proposed funding cuts are intended to reduce the Department of Education and the University of Hawaii’s funding below the amount required to meet valid statutory and contractual obligations and commitments to maintain the current hours and wages of the employees. Takabayashi Decl. ¶ 7e & f; Nakanelua Decl. ¶ 7e.

Under settled law, an employer must maintain the commitments made in collective bargaining agreements even after they expire, absent good-faith bargaining leading to an impasse. See Univ. of Hawai’i Prof’l Assembly v. Tomasu, 79 Hawai’i 154, 159, 900 P.2d 161, 166 (1995) (“the obligation to bargain collectively forbids unilateral action by the employer with respect to pay rates, wages, hours of employment[.]”), citing N.L.R.B. v. Katz, 369 U.S. 736, 737 (1962) (unilateral changes to wages and other conditions of employment during contract negotiations violated duty to bargain collectively). (Exhs. 60 & 61).

Accordingly, the Defendants cannot withhold appropriated funds to prevent departments from meeting this obligation. See, e.g., Helvering v. British-American Tobacco Co., 69 F.2d 528, 530 (2d Cir. 1934). (“The term ‘obligation’ includes ‘any duty imposed by law’”); Gregory v. North Dakota Workers Compensation Bureau, 578 N.W. 3d 101 (N.D. 1998) (interpreting term “valid obligation” in text of statute to include state agency’s obligation under another statute to make disability payments).

The Department of Education also has a contractual obligation not to make significant alterations to the salaries and the hours for the 2009-2010 academic year. Article VII.A of the Collective Bargaining Agreement provides that “assignments and schedules for the following year shall be made by June 10, and by that date, teachers shall be notified of their next year’s assignments in writing.” (emphasis added). (Exh. 34-26 to 34-27). In accordance with this contractual obligation and in reliance on the availability of funds appropriated by the legislature, the Department made such assignments and schedules for the 2009-2010 academic year by June 10, 2009. See Exh. 42. However, Defendants’ restriction of the funds available to the

⁴ H.R.S. § 37-37(a) 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.”

Department would require the Department to drastically alter teachers' schedules and assignments, in violation of a contractual obligation and previously incurred commitment. Defendant Lingle has made clear her intent to withhold sufficient funds to require implementation of her mandatory furlough program. (Exh. 44-5). As such, the withholding of funds violates H.R.S. § 37-37(a)'s prohibition on reducing "any allotted amount below the amount required to meet valid obligations or commitments previously incurred."

b. Alternatively, if the Court concludes that H.R.S. § 37-37(a) authorizes the Defendants' withholding of appropriated funds to force furloughs, then the Court must decide if H.R.S. § 37-37(a) is constitutional. As we explain, it is not. The statute violates constitutional separation of powers principles by impermissibly delegating sweeping powers over the state budget without providing constitutionally adequate standards for their exercise. At least three other state Supreme Courts have struck down similar provisions for this reason. See Chiles v. Children A, B, C, D, E & F, 589 So. 2d 260, 266-7 (Fla. 1991); State v. Fairbanks North Star Borough, 736 P.2d 1140 (Alaska 1987); State ex rel. Holmes v. State Board of Finance, 367 P.2d 925 (N.M. 1961). These courts held that statutes with provisions like those of H.R.S. § 37-37 violated the non-delegation doctrine because they failed to provide constitutionally adequate standards to guide members of the executive branch purportedly authorized to make budget reductions.

Like the constitutions of states in which statutes similar to H.R.S. § 37-37 were struck down, Hawaii's Constitution provides that "the legislative power of the State shall be vested in a legislature[.]" Haw. Const. Art. III., Sec. 1. "[A]ppropriating funds is a peculiarly legislative function." Bowsher v. Synar, 478 U.S. 714, 763 (1986). "Furthermore, the power to reduce appropriations, like any other lawmaking, is a legislative function." Chiles at 265 (emphasis in original).

The Hawai'i Supreme Court has "adopted the nondelegation doctrine as part of [the State's] own body of constitutional law." Application of Kauai Electric Division of Citizens Utilities Co., 60 Haw. 166, 181, 590 P.2d 524, 535 (1978). The nondelegation doctrine requires the legislature to "lay down by legislative act an intelligible principle to which the person or body authorized to [execute the law] is directed to conform." Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935) (quoting Hampton & Co. v. United States, 276 U. S. 394, 409 (1928)). In other words, "the policy of the law must be declared by the Legislature and a rule of action or

framework must be established to guide the [executive] in the exercise of such powers.” Oliver v. Oklahoma Alcoholic Beverage Control Bd., 359 P.2d 183, 187 (Okla. 1961); see also Askew v. Cross Key Waterways, 372 So.2d 913, 919 (Fla. 1978) (“Under [the nondelegation] doctrine, fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines[.]”).

Three state supreme courts have examined statutory provisions similar to H.R.S. § 37-37 and concluded that they delegated the power to make the law to the executive branch without sufficient standards, thereby violating the non-delegation doctrine. In Chiles v. Children A, B, C, D, E & F, 589 So.2d 260 (Fla., 1991), the Florida Supreme Court held that a statute that, like H.R.S. § 37-37, delegated to the governor and his cabinet the power to “reduce all approved state agency budgets and releases by a sufficient amount to prevent a deficit in any fund” lacked “sufficient guidelines to assure that the legislative intent is clearly established and can be directly followed in the event of a budget shortfall.” Id. at 268. The Court emphasized that the statute was defective because it did “not indicate which budgeting priorities to maintain or to cut from the original appropriation.” Id. at 267.

In State v. Fairbanks North Star Borough, 736 P.2d 1140 (Alaska 1987), the Alaska Supreme Court struck down another statute similar to H.R.S. § 37-37. The Alaska statute provided that the “governor may direct the withholding or reduction of appropriations to a state agency at any time during the fiscal year only if the governor determines that . . . (2) estimated receipts and surpluses will be insufficient to provide for appropriations.” The Alaska court emphasized that “most importantly, the executive is provided with no policy guidance as to how cuts should be distributed. . . . An appropriation could be eliminated entirely, cut in half or left untouched.” Id. at 1143. The Alaska court concluded that the lack of policy guidance as to how to implement budget reductions rendered the statute an unconstitutional delegation of the legislative power.

Likewise, the New Mexico Supreme Court also held that a provision similar to H.R.S. § 37-37 violated the nondelegation doctrine in State ex rel. Holmes v. State Bd. of Finance, 367 P.2d 925 (N.M. 1961). The Court struck down a provision in the state’s general appropriation bill that authorized the state board of finance “to reduce all annual operating budgets authorized herein not to exceed ten percent, except interest and principal payments on

debts and salaries of elected state officials.” *Id.* at 926. The Court acknowledged that the legislature may provide “for the executive to control the expenditure of the amounts appropriated,” but concluded that a statutory provision authorizing reduction of the operating budget of any agency, without providing standards for how to select which, was an unconstitutional delegation of the legislative power. *Id.* at 440.

H.R.S. § 37-37 is constitutionally defective for the same reasons as the Florida, Alaska and New Mexico statutes. Like those statutes, H.R.S. § 37-37 provides no legislative guidance whatsoever as to which parts of the state’s budget the director of finance must reduce in the case of a revenue shortfall. The Hawaii Supreme Court has already held that H.R.S. § 37-37 does not require the governor and director of finance to make across-the-board cuts to each program proportionate to the revenue shortfall. *Bd. of Education v. Waihee*, 70 Haw. 253, 268, 768 P.2d 1279, 1288 (1989). Rather than provide “a recitation of reduction priorities,” *Chiles*, 589 So.2d at 268, or any other workable standard to guide the executive branch in implementing budget reductions, H.R.S. § 37-37 purports to delegate virtually unfettered discretion to the governor and director of finance in making reductions to the state budget in cases of a revenue shortfall.

Not only does H.R.S. § 37-37 lack constitutionally adequate legislative standards for how the Governor and the Director of Finance should implement budget reductions, it also lacks legislative standards for whether they may make such reductions in the first place. The statute provides that, even in the event of a revenue shortfall, reductions will occur only “with the approval of the Governor” (H.R.S. § 37-37(a)), and there are no standards to bind the governor in deciding whether to approve reductions or not. The statute therefore delegates sweeping power to the Governor to decide whether to revise the State’s budget whenever the director of finance determines there is a revenue shortfall, without providing the Governor any standard by which to exercise that power – or by which reviewing courts may evaluate the legality of any exercise thereof. In sum, H.R.S. § 37-37(a) has the same flaws that led other courts to strike down similar statutes as unconstitutional, so Plaintiffs are likely to prevail on their challenge to the provision.

**B. IF NOT ENJOINED, THE DEFENDANTS' ACTIONS WILL
CAUSE IRREPARABLE INJURY TO PLAINTIFFS' MEMBERS**

The deprivation of constitutional rights is by itself sufficient to constitute irreparable injury for purposes of granting injunctive relief. See, e.g., Council of Alternative Political Parties v. Hooks, 121 F.3d 876, 883 (3rd Cir. 1997) (proof that plaintiffs' voting and association rights were burdened meets the irreparable harm requirement for a preliminary injunction); Sheet Metal Contract v. Sheet Metal Workers' Intern., 978 F. Supp. 529, 532 (S.D. N.Y. 1997) (where a constitutional right (equal protection in this case) is implicated plaintiff's showing of irreparable injury may be deemed satisfied without further demonstration of harm); Rauccio v. Frank, 750 F. Supp. 566, 573 (D. Conn. 1990) (a civil servant's deprivation of "due process" rights establishes a prima facie case of irreparable injury); Citicorp Services, Inc. v. Gillespie, 712 F. Supp. 749, 753-54, (N.D. Cal 1989) (the alleged constitutional violation of interstate commerce "should give rise to a presumption of irreparable injury").

In the present case Defendants are depriving approximately 8,484 unit 1; 12,997 unit 5, and 2,961 unit 10 employees (Exh. 41) of their "fundamental" right "to organize for the purpose of collective bargaining." Labor Board v. Jones & Laughlin, 301 U.S. 1, 33 (1937). The New Jersey Supreme Court held in S. Jersey Catholic School Teachers v. St. Teresa, 696 A.2d 709 (1997) that "the right to organize and bargain collectively" as adopted in 1947 for private employees, was "so important that it has been elevated to constitutional status is regarded as a fundamental right." Id. at 714. Unless enjoined by this Court, public employees will be disenfranchised from the process of negotiations that the framers of our Constitution mandated under Article XIII. Such an infringement even for "minimal periods" cannot be allowed to continue. See Yogi; Exhs. 28-4, 29-22.

Moreover, the huge reduction in income to Plaintiffs' members could not be fully redressed after the fact. Takabayashi Decl. ¶ 9. As the Ninth Circuit explained in a different context: "Plaintiffs are wage earners, not volunteers. They have bills, child support obligations, mortgage payments, insurance premiums, and other responsibilities. Plaintiffs have the right to rely on the timely receipt of their paychecks. Nakanelua Decl. ¶ 8. Even a brief delay in getting paid can cause financial embarrassment and displacement of varying degrees of magnitude." Univ. of Hawai'i Prof'l Assembly v. Cayetano, 183 F.3d 1096, 1106 (9th Cir. 1999).

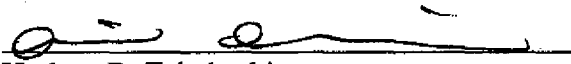
C. THE PUBLIC INTEREST FAVORS THE ISSUANCE OF AN INJUNCTION

The public interest of the State and its citizens is furthered when constitutional rights are protected. See, e.g., Council of Alternative Political Parties v. Hooks, 121 F.3d 876 (3rd Cir. 1997) (public interest favored the protection of voting and associational rights of alternative political parties); McVeigh v. Cohen, 983 F. Supp. 215 (D.C. D.C. 1998) (public has an inherent interest in the preservation of privacy rights). Moreover, in this case, an injunction would further the declared public policy favoring collective bargaining about wages, hours and terms and conditions of public employment. See Yogi; Exhs. 28-4; 29-22. The Legislature declared in HRS § 89-1: “[J]oint decision-making is the modern way of administering government. Where public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective.” The collective bargaining process is likely to produce solutions to the current fiscal issues that are better for public employees that make “government . . . more effective.”

V. CONCLUSIONS

For the foregoing reasons, Plaintiffs request this Court to issue a temporary restraining order and preliminary injunction enjoining Defendants Lingle, Laderta, and Kawamura from: (a) unilaterally implementing effective July 1, 2009 and continuing for the next two years furloughs of three days per month of all state employees; (b) withholding payments due and owing for retirement and health fund contributions and payments, and (c) restricting or withholding funds to the Department of Education and the University of Hawaii so as to implement a three-day per month furlough of all State employees for a period of two years.

Dated: Honolulu, Hawaii, June 22, 2009.


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

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

Hawaii State Teachers	)	Civil No. 09-1-1372-06 KKS
Association and United Public	)	(Other Civil Action)
Workers, AFSCME, Local 646,	)	
AFL-CIO,	)	
	)	DECLARATION OF ROGER
Plaintiffs,	)	TAKABAYASHI
	)	
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.	)	
	)	

(354:701)

DECLARATION OF ROGER TAKABAYASHI

I, Roger Takabayashi, hereby declare as follows:

1. I am the president of the Hawaii State Teachers Association (HSTA or Association), and I serve as the chief governance officer and spokesperson for HSTA. I am familiar with the collective bargaining history and background relating to teachers and other personnel of the Department of Education, State of Hawaii, and the claims presented in the above-entitled action. Except as otherwise stated, I make this declaration based on personal knowledge, including but not limited to information provided in the business records of the HSTA.

2. I am a 1965 graduate of Farrington High School, and a 1969 graduate of Western State College of Gunnison Colorado where I majored in industrial arts and physical

education. I was hired by the Department of Education, State of Hawaii on September 1, 1970 as a teacher and I have been continuously employed as a teacher ever since. I have taught industrial arts and physical education classes and served as a student activities coordinator and outreach counselor at Niu Valley Intermediate School and Dole Intermediate School. I participated in two elections conducted by the Hawaii Public Employment Relations Board to designate the exclusive bargaining representative in bargaining unit 5 for teachers and other personnel of the Department of Education, State of Hawaii in the 1970's, and in strikes over wages, hours, and other terms and conditions of employment in 1972-1973 and 2001 under chapter 89. I was duly elected to the board of directors of HSTA in the early 1990's, elected to serve as the secretary treasurer from 1994 to 1998, elected to serve as vice president from 1998 to 2000, and elected to serve as president of HSTA from 2003 to 2009. I currently serve as the chief governance officer and spokesperson for HSTA.

3. I am familiar with the history and relevant background to collective bargaining as it has been documented in a prior case over the constitutionality of a wage freeze established by the legislature in 1999. HSTA was one of four union plaintiffs in the case of United Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi, Civil No. 99-3793. See Exh. 29.

a. The right to engage in collective bargaining was established in 1935 with the passage of the Wagner Act. The Wagner Act was amended in 1947 by the Taft Hartley Act. Exhibit 1 is a copy of the Wagner Act and the Taft Hartley Act.

b. 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. Exhibit 2 is a copy of relevant provisions of

the New York Constitution. Exhibit 3 is a copy of relevant provisions of the Florida Constitution. Exhibit 5 is a copy of relevant provisions of the Missouri Constitution. Exhibit 6 is a copy of relevant provisions of the New Jersey Constitution.

c. In 1945 the territorial legislature in Hawaii adopted the Little Wagner Act which granted to agricultural and other private sector employees (who were exempt under the Wagner Act) the statutory right to organize and to engage in collective bargaining. Exhibit 4 is a copy of the Little Wagner Act of 1945.

d. At the 1950 Constitutional Convention, the right to organize for the purpose of collective bargaining was established in Hawaii. Exhibit 7 is a copy of Article XII of the Hawaii State Constitution. Exhibit 8 is a copy of the official ballot of the general election on the proposed constitution dated November 7, 1950. Exhibit 9 is a copy of the certification from the state archivist regarding the 1950 vote. Exhibit 10 is a copy of the official ballot of the plebiscite on statehood dated June 27, 1959. Exhibit 11 is a copy of the certification from the state archivist regarding the 1959 ballot, as well as the 1968 ballot.

e. At the 1968 Constitutional Convention Article XII, Section 2 was amended to provide that "persons in public employment shall have the right to organize for collective bargaining as prescribed by law." Exhibit 12 is a copy of Article XII. Exhibit 13 is a copy of the official ballot of the general election of November 5, 1968 regarding the amendment. Exhibit 14 is a copy of the information bulletin on the amendment. Exhibit 15 is a copy of the certification from the state archivist regarding the information bulletin. Exhibit 16 is a copy of the results of votes cast at the general election on November 5, 1968.

f. The meaning of the term "collective bargaining" is well recognized. Exhibit 17 is a copy of the term as defined in the Random House, Webster's, American Heritage, Oxford, and Encarta World dictionaries.

g. In 1970 the legislature adopted Hawaii's public sector collective bargaining statute as set forth in chapter 89. Exhibit 18 is a copy of 1970 Session Laws of Hawaii, Act 171.

h. At the 1978 Constitutional Convention, Article XII, Section 2 was amended and renumbered to Article XIII. Exhibit 23 is a copy of the 1978 amendments and changes.

i. In 1999 Article XIII, Section 2 of the State Constitution was enforced by the circuit court in United Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi, Civil No. 99-3793 invalidating a statute establishing a freeze on wages and cost items for two years. Exhibit 28 is a copy of the order granting plaintiffs' motion for temporary restraining order by the Honorable Virginia Crandall. Exhibit 29 is a copy of the findings of fact, conclusions of law and order granting a permanent injunction by Judge Crandall. The history and relevant background to collective bargaining is fully documented and provided in the court's findings of fact, and conclusions of law.

4. I am aware of the formation, role, and function of the HSTA (and the employees it represents) in collective bargaining and other related activities in Hawaii.

a. HSTA was formed as an incorporated organization and duly chartered by the State of Hawaii, Department of regulatory agencies on December 8, 1970.

b. After chapter 89 was enacted in 1970 HSTA successfully organized a majority of teachers and other personnel of the Department of Education, State of Hawaii in bargaining unit 5. Following two elections conducted by the

Hawaii Public Employment Relations Board HSTA was duly certified as the exclusive bargaining representative of bargaining unit 5 pursuant to Section 89-6, HRS, on May 21, 1971 and on June 14, 1974. Exhibit 19 is the May 21, 1971 certification of HSTA. Exhibit 22 is the June 14, 1974 certification of HSTA.

c. Since the aforementioned certifications HSTA has represented teachers and other personnel of the Department of Education in unit 5 continuously to the present day. HSTA serves as an employee organization within the meaning of Section 89-2, HRS. There are approximately 12,997 current employees in bargaining unit 5. Exhibit 41 is a copy of a March 3, 2009 informational bulletin from the Hawaii Labor Relations Board which indicates the number of employees in each bargaining unit.

d. Employees in bargaining unit 5 have exercised their rights under Article XIII, Section 2 of the State Constitution, and Section 89-3, HRS, to engage in collective bargaining to improve their wages, hours of work, and terms and conditions of employment for nearly forty years. Teachers were the first group of employees to strike in 1972-1973 under Section 89-3, HRS. Another strike occurred in 2001 over wages, hours and other terms and conditions of employment.

e. Negotiations in bargaining unit 5 have been conducted on a statewide basis with the Governor (representing the State of Hawaii), the Board of Education, and the Superintendent of Education under Section 89-6(d), HRS. An agreement requires a majority vote of public employers in the employer group with 3 votes for the Governor, 2 votes for the Board of Education and one vote for the Superintendent.

f. The HSTA also represents approximately 4,507 retirees of the State of Hawaii before the employees' retirement system under chapter 88, HRS, as an employee organization within the meaning of Section 88-95, HRS. Although retirement benefits

are not negotiated under chapter 89, HRS, the wages and salaries which are negotiated for bargaining unit 5 employees under chapter 89, HRS, directly affects the amount of retirement benefits which are accrued by bargaining unit 5 employees who are members of the employees' retirement system under Section 88-21, HRS.

5. As the chief governance officer and spokesperson for HSTA I know the specific history of negotiations between the HSTA and public employers in bargaining unit 5 from 1972 to the present, and the scope of subject matters covered by the term "collective bargaining" under Article XIII, Section 2 of the State Constitution and chapter 89, HRS.

a. From February 19, 1972 to the present HSTA, the governor, the Board of Education, and the Superintendent of Education have negotiated more than fifteen successive collective bargaining agreements setting forth the wages, hours, and other terms and conditions of employment for teachers and other personnel of the Department of Education in bargaining unit 5. The current collective bargaining agreement for bargaining unit 5 employees covers the period from July 1, 2007 to June 30, 2009. Exhibit 34 is a copy of relevant portions of the current unit 5 agreement covering union recognition (Article 1), teaching conditions and hours (Article VI), assignments and transfers (Article VII), leaves (Article XII), work year (Article XVI), salaries (Article XVII), duration (Article XXIV), health and other benefits under the VEBA trust fund (Appendix XXII), and the signature page.

b. For nearly forty years wages and cost items have been recognized to be a core subject of collective bargaining by the HSTA and public employers in negotiations over the unit 5 agreement. In fifteen successive unit 5 agreements wages and cost item improvements have been negotiated for bargaining unit

5 employees in Article XVII (salaries) and other provisions of the unit 5 agreement. Exhibit 32 is a chart which indicates the negotiated pay increases by bargaining units from 1972 to 1993 prepared by the office of collective bargaining on or about September 16, 1994. Under Article VII.B bargaining unit 5 employees must be notified by June 10th of their employment and salary status for the ensuing school year.

c. For nearly forty years "hours" of work have been recognized as a core (or mandatory) subject of collective bargaining by the HSTA and public employers in negotiations over the unit 5 agreements. If fifteen successive agreements hours of work have been negotiated specifically. Article XVI on "work year" establishes a restriction and limitation on the number of days for the school year; that number is 190 days under the current agreement. Article VI on teaching conditions and hours establishes a limit on class size in Article VI.A, establishes the number of consecutive instructional times in Article VI.E, a limitation on who can perform substitute teaching in Article VI.N, defines the amount of time which must be available for preparation periods in Article VI.X, and sets forth the work time distribution and total hours per day and per week to the minute in Article VI.CC.

d. A furlough of employees has been recognized as a mandatory subject of collective bargaining for many years. Exhibit 24 is a copy of the definition of the term "furlough" in the Roberts' Dictionary of Industrial Relations (3rd ed. 1986). The term means a "leave of absence from work or other duties." See Exh. 24-3. The HSTA and public employers have negotiated various provisions for leaves of absence in Article XII (leaves) of the unit 5 agreement. In Order No. 1279 the Hawaii Labor Relations Board held that leaves of absences (in that case for

sabbaticals) are a mandatory subject of bargaining. Exhibit 26 is a copy of Order No. 1279 dated January 18, 1996.

6. I have been directly involved in bargaining over the wages, hours, and terms and conditions of employment for the July 1, 2009 to June 30, 2011 unit 5 collective bargaining agreement with the public employers, and I am familiar with the June 1, 2009 decision and actions of Linda Lingle, Marie Laderta, and Georgina Kawamura regarding furloughs and funding and spending restrictions in the Department of Education and the University of Hawaii to implement the furloughs.

a. On October 1, 2008 HSTA submitted its written notice of its desire to modify and amend various provisions of the current unit 5 collective bargaining agreement as required by Article XXIV. Exhibit 38 is a copy of the notice dated October 1, 2008 for bargaining unit 5. The written notice was transmitted to Marie Laderta, the director of the department of human resources development of the State of Hawaii who represents Governor Linda Lingle (for the State of Hawaii), the Board of Education, and the Superintendent of Education. On December 18, 2008 the proposals to modify and amend the current unit 5 collective bargaining agreement were exchanged between the employer group and HSTA. On January 12, 2009 duly designated 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.

b. At no time during the bargaining process did Linda Lingle and Marie Laderta indicate a desire to modify or amend Article XII (on leaves) 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. No proposal for

such furloughs was ever submitted by the "employer group" engaged in bargaining unit 5 negotiations with HSTA.

c. During the 2009 legislative session an amended senate bill emerged from the House of Representative on employee "furlough" and the attorney general provided an opinion to the speaker of the House on the requirements of bargaining over the subject matter. Exhibit 39 is a copy of the furlough bill and standing committee report on the measure. Exhibit 40 is a copy of the February 17, 2009 opinion from the attorney general. The legislative measure was not adopted by the legislature during the session. Exhibit 43 is a copy of the May 29, 2009 amendment to the February 17, 2009 opinion of the Attorney General.

d. On June 1, 2009 Linda 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 funding and spending in the Department of Education and the University of Hawaii "in an amount equivalent to the three days per month furlough." Exhibit 44 is a copy of the June 1, 2009 public statements made by Governor Lingle regarding her decision and actions.

e. The June 1, 2009 decision and actions by Linda Lingle were undertaken without the prior vote, support, or concurrence of the Board of Education and the Superintendent of Education pursuant to Section 89-6 (d), HRS, who are part of the multi-employer bargaining process for bargaining unit 5 as provided by law.

f. On June 2, 2009 the HSTA was sent a letter by Marie Laderta regarding Governor Linda Lingle's June 1, 2009 decision and action. Exhibit 46 is a copy of the June 2, 2009 letter from Marie Laderta.

g. On June 8, 2009 the Department of Human Resources Development of the State of Hawaii published a furlough employee questions and answers. Exhibit 47 is a copy of the questions and answers dated June 8, 2009.

h. On June 8, 2009 HSTA in behalf of bargaining unit 5 employees requested Governor Linda Lingle to negotiate (no later than June 15, 2009) over the June 1, 2009 decision and actions, and asked that she cease and desist from implementing changes in wages, hours, and terms and conditions of employment pending collective bargaining. Exhibit 48 is a copy of the June 8, 2009 letter sent to Governor Lingle.

i. On June 10, 2009 Marie Laderta sent a letter to HSTA refusing the union's request to engage in collective bargaining on the June 1, 2009 decision and actions of the Governor. Exhibit 50 is a copy of the June 10, 2009 letter from Marie Laderta.

j. On June 18, 2009 Governor Lingle held another press conference in which she announced how the furloughs would be implemented by the various departments and agencies of the State of Hawaii, and the department of human resources development "published a furlough update #2 employee questions and answers." The Governor stated that many State departments and agencies would be unilaterally changing the work hours and work schedules by providing four day work weeks during three of the four weeks each month starting in July 2009. Exhibit 52 is a copy of the "furlough update #2 employee questions and answers" dated June 18, 2009.

7. I have examined the impact and affects of the June 1, 2009 decision and actions of Governor Linda Lingle and the unilateral implementation of changes thereafter on wages, hours, and terms and conditions of employment of bargaining unit 5 employees and to retirees represented by HSTA.

a. The decision and implementation "effective July 1st, and continuing for the next two years . . . three furlough days per months for all state employees" reduces and cuts wages and salaries of bargaining unit 5 employees by approximately 15.79%. Governor Lingle's decision and actions unilaterally changes the existing terms of the unit 5 agreement in Article VII.A which requires the notification to all teachers by June 10, 2009 of their employment and salary status for the ensuing school year. Bargaining unit 5 employees were already notified of their continuing employment and salary status, in some cases as early as May 21, 2009. Exhibit 42 is a copy of the notification to a Kauai teacher of her employment and salary status for the ensuing school year which commences in July 2009. The Governor's actions unilaterally changes the employment and salary status of bargaining unit 5 employees.

b. The decision and actions of June 1, 2009 suspends for two years the State of Hawaii's obligation to engage in collective bargaining with respect the three-day per month furloughs for all state employees.

c. The furlough plan and funding cuts announced on June 18, 2009 unilaterally (and without negotiations) changes existing hours of work of bargaining unit 5 employees as set forth in Article XVI (work year), and Article VI.A (class size committee), VI.E (consecutive instructional time), VI.N (substitute teachers), VI.X (preparation periods), and VI.CC (work time distribution, weekly totals within the 7-hour day, 5-day week).

d. The 15.79% reduction and cuts in wages and salaries of bargaining unit 5 employees diminishes and impairs the accrued retirement benefit of members of the employees' retirement system under chapter 88, HRS, whose contractual entitlement to retirement benefits are directly related to the

overall compensation employees receive through negotiations conducted under chapter 89.

e. The June 1, 2009 decision and actions of Governor Lingle to restrict, withhold, and delay payment of upwards of \$130 million to pay in part for retirement and health fund contributions which are due in June 2009, and to restrict funds to the Department of Education and the University of Hawaii (to implement the three-day-per month furlough of all state employees for a period of two years) effective July 1, 2009 disregards valid obligations and commitments previously incurred by contract and by statute. The obligation to make regular monthly contributions for health plan and other benefits for unit 5 employees through the VEBA trust fund has been previously incurred by Appendix XXII of the unit 5 collective bargaining agreement. The obligation to set hours of work is contractually incurred under Article VI and Article XVI under the unit 5 agreement. The obligation to grant leaves of absence without pay are contractually incurred in Article XII (leaves) of the unit 5 agreement.

f. The obligations not to change payment of wages at current levels is incurred by contract under Article VII.A (requiring notification by June 10th of the employment and salary status of all unit 5 employees), Article XVII (on work year) of the unit 5 agreement, and by chapter 89 which prohibits unilateral changes until bargaining has occurred to a point of impasse on such specific changes. To date there has been no bargaining over the June 1, 2009 decision and actions announced by Governor Lingle, and implemented by Marie Laderta and Georgina Kawamura. Exhibits 60 and 61 are Attorney General Opinions regarding the obligation to maintain wages, hours, and terms of the existing agreements in place following expiration of the collective bargaining agreements.

8. In 2008 HSTA filed a petition for declaratory ruling to the Hawaii Labor Relations Board which presented constitutional questions and issues in Case No. DR-05-99. The Board held that it had no jurisdiction to determine such questions and issues. Exhibit 62 is a copy of Order No. 2554 rendered in Case No. DR-05-99.

9. The funding restrictions on the Department of Education to implement the three days a month furlough of two years for "all State employees" will result in devastating consequences. For several years now Hawaii's public schools have been short nearly 1,500 teachers. The reduction of 15.79% in wages and salaries will cause severe hardship on teachers who have bills, child support obligations, mortgages, and other responsibilities, and discourages teacher applicants.

I, Roger Takabayashi, declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawaii

June 22, 2009

Roger Takabayashi
Roger Takabayashi

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

Hawaii State Teachers	)	Civil No. 09-1-1372-06 KKS
Association and United Public	)	(Other Civil Action)
Workers, AFSCME, Local 646,	)	
AFL-CIO,	)	
	)	DECLARATION DAYTON M.
Plaintiffs,	)	NAKANELUA
	)	
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.	)	
	)	

(354:701)

DECLARATION OF DAYTON M. NAKANELUA

I, Dayton M. Nakanelua, hereby declare as follows:

1. I am the state director of the United Public Workers, AFSCME, Local 646, AFL-CIO (UPW or Union), and I serve as the chief executive officer of the Union. I am familiar with the collective bargaining history and the claims presented in the above-entitled action. Except as otherwise stated, I make this declaration on personal knowledge based on my education and experience in collective bargaining in the private and public sectors in Hawaii as well as the business records of the UPW.

2. I am a graduate of the University of Hawaii with a major in personnel and industrial relations. From 1972 to 1979 I was employed as a business agent, supervisor, and interim business manager of the State of Hawaii Organization of Police

Officers which represents police officers in collective bargaining under chapter 89. From 1979 to 1982 I was employed as a personnel management specialist for the Department of Personnel Services, State of Hawaii, which represented public employers under chapter 89. From 1982 to 1993 I was employed by the UPW as the Oahu division director, administrative assistant and executive assistant to the state director. From 1993 to 1997 I served as the director and deputy director of the Department of Labor and Industrial Relations, State of Hawaii. From 1997 to 2003 I was employed by the UPW as the executive assistant to the state director. I was elected as state director of the UPW in December 2003 and re-elected in October 2006. I have been involved in negotiating the unit 1 and 10 collective bargaining agreements since 1982 when I began providing staff support for UPW negotiations. I currently serve as the chief negotiator and spokesperson for the UPW in bargaining units 1 and 10 (under chapter 89) and private sector bargaining units (under the Wagner Act and the Little Wagner Act) for UPW represented employees.

3. I am familiar with the history and relevant background to collective bargaining in the private and public sectors.

a. The right to engage in collective bargaining was established in 1935 with the passage of the Wagner Act. The Wagner Act was amended in 1947 by the Taft Hartley Act. Exhibit 1 is a copy of the Wagner Act and the Taft Hartley Act.

b. 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. Exhibit 2 is a copy of relevant provisions of the New York Constitution. Exhibit 3 is a copy of relevant provisions of the Florida Constitution. Exhibit 5 is a copy of

relevant provisions of the Missouri Constitution. Exhibit 6 is a copy of relevant provisions of the New Jersey Constitution.

c. In 1945 the territorial legislature in Hawaii adopted the Little Wagner Act which granted to agricultural and other private sector employees (who were exempt under the Wagner Act) the statutory right to organize and to engage in collective bargaining. Exhibit 4 is a copy of the Little Wagner Act of 1945.

d. At the 1950 Constitutional Convention, the right to organize for the purpose of collective bargaining was established in Hawaii. Exhibit 7 is a copy of Article XII of the Hawaii State Constitution. Exhibit 8 is a copy of the official ballot of the general election on the proposed constitution dated November 7, 1950. Exhibit 9 is a copy of the certification from the state archivist regarding the 1950 vote. Exhibit 10 is a copy of the official ballot of the plebiscite on statehood dated June 27, 1959. Exhibit 11 is a copy of the certification from the state archivist regarding the 1959 ballot, as well as the 1968 ballot.

e. At the 1968 Constitutional Convention Article XII, Section 2 was amended to provide that "persons in public employment shall have the right to organize for collective bargaining as prescribed by law." Exhibit 12 is a copy of Article XII. Exhibit 13 is a copy of the official ballot of the general election of November 5, 1968 regarding the amendment. Exhibit 14 is a copy of the information bulletin on the amendment. Exhibit 15 is a copy of the certification from the state archivist regarding the information bulletin. Exhibit 16 is a copy of the results of votes cast at the general election on November 5, 1968.

f. The meaning of the term "collective bargaining" is well recognized. Exhibit 17 is a copy of the term as defined

in the Random House, Webster's, American Heritage, Oxford, and Encarta World dictionaries.

g. In 1970 the legislature adopted Hawaii's public sector collective bargaining statute as set forth in chapter 89. Exhibit 18 is a copy of 1970 Session Laws of Hawaii, Act 171.

h. At the 1978 Constitutional Convention, Article XII, Section 2 was amended and renumbered to Article XIII. Exhibit 23 is a copy of the 1978 amendments and changes.

i. In 1999 Article XIII, Section 2 of the State Constitution was enforced by the circuit court in United Public Workers, AFSCME, Local 646, AFL-CIO v. Yogi, Civil No. 99-3793 invalidating a statute establishing a freeze on wages and cost items for two years. Exhibit 28 is a copy of the order granting plaintiffs' motion for temporary restraining order by the Honorable Virginia Crandall. Exhibit 29 is a copy of the findings of fact, conclusions of law and order granting a permanent injunction by Judge Crandall. The history and relevant background to collective bargaining is fully documented and provided in the court's findings of fact, and conclusions of law.

4. I am aware of the formation, role, and function of the UPW (and the employees it represents) in collective bargaining and other related activities in Hawaii.

a. UPW was formed in 1944 as an unincorporated labor organization in Hawaii, and has represented private and public sector employees for the purpose of collective bargaining ever since. The union initially organized private health care workers under the Little Wagner Act (chapter 377, HRS). Public sector employees were initially organized under the civil service and other public employment statutes which preceded chapter 89.

b. After chapter 89 was enacted in 1970 the union successfully organized a majority of blue collar non-supervisory

employees in the State and various counties in bargaining unit 1. Following an election the Hawaii Public Employment Relations Board certified the union as the exclusive bargaining representative in bargaining unit 1 pursuant to Section 89-6, HRS, on October 20, 1971. Exhibit 20 is a copy of the October 20, 1971 certification.

c. The UPW successfully organized a majority of institutional, health, and correctional workers of the State and various counties in bargaining unit 10 on February 11, 1972. Exhibit 21 is a copy of the February 11, 1972 certification by the Hawaii Public Employment Relations Board of UPW as the exclusive bargaining representative in bargaining unit 10 after the election was conducted.

d. Since the aforementioned certifications UPW has represented blue collar non-supervisory employees in bargaining unit 1 and institutional, health, and correctional workers in unit 10 continuously to the present day. UPW serves as an employee organization within the meaning of Section 89-2, HRS. There are approximately 8,484 current employees in bargaining unit 1 and 2,961 employees in bargaining unit 10 (for a total of 11,809 state and county employees). Exhibit 41 is a copy of a March 3, 2009 informational bulletin from the Hawaii Labor Relations Board which indicates the number of employees in each bargaining unit. As indicated in the exhibit, unit 1 includes approximately 2,335 employees of the Department of Education and 530 employees of the University of Hawaii.

e. Employees in bargaining units 1 and 10 have exercised their rights under Article XIII, Section 2 of the State Constitution, and Section 89-3, HRS, to engage in collective bargaining to improve their wages, hours of work, and terms and conditions of employment for nearly forty years.

f. Negotiations in bargaining units 1 and 10 have been conducted on a statewide basis with the governor (representing the State of Hawaii), the mayors of the counties of Hawaii, Maui, Kauai, and the City and County of Honolulu, and representatives of the chief justice for the judiciary, and the Hawaii Health System Corporation Board under Section 89-6 (d), HRS. An agreement requires a majority vote of public employers including one mayor. Exhibit 27 is a copy of Decision No. 395 of the Hawaii Labor Relations Board in which it was determined that a majority vote over the terms of a unit 1 agreement existed under Section 89-6, HRS, counting the votes of the governor and the vote of a representative of the mayor of the City and County of Honolulu.

g. The UPW also represents approximately 3,000 retirees of the State of Hawaii and the various counties before the employees' retirement system under chapter 88, HRS, as an employee organization within the meaning of Section 88-95, HRS. Although retirement benefits are not negotiated under chapter 89, HRS, the wages and salaries which are negotiated for bargaining unit 1 and 10 employees under chapter 89, HRS, directly affects the amount of retirement benefits which are accrued by bargaining unit 1 and 10 employees who are members of the employees' retirement system under Section 88-21, HRS.

5. As the chief negotiator for the union I know the specific history of negotiations between the UPW and public employers in bargaining units 1 and 10 from 1972 to the present, and the scope of subject matters covered by the term "collective bargaining" under Article XIII, Section 2 of the State Constitution, chapter 89, HRS, and the Wagner Act.

a. From July 1, 1972 to the present UPW, the governor, mayors, and other public employers have negotiated more than fifteen successive collective bargaining agreements

setting forth the wages, hours, and other terms and conditions of employment for blue collar non-supervisory employees in bargaining unit 1. The current collective bargaining agreement for bargaining unit 1 employees covers the period from July 1, 2007 to June 30, 2009. Exhibit 33 is a copy of relevant portions of the current unit 1 agreement covering union recognition (section 1), wages (section 23), compensation adjustments (section 23A), hours of work (section 25), overtime (section 26), leaves of absences without pay (section 38), work schedules for department of education (section 61), benefit plans (Section 62), duration (section 66), and the signature page.

b. From January 1, 1973 to the present UPW, the governors, mayors, and other public employers have negotiated more than fifteen successive collective bargaining agreements setting forth the wages, hours, and other terms and conditions of employment for institutional, health, and correctional workers, in bargaining unit 10. The current collective bargaining agreement for bargaining unit 10 employees covers the period from July 1, 2007 to June 30, 2009. Exhibit 35 is a copy of relevant portions of the current agreement covering union recognition (section 1), wages (section 23), compensation adjustments (section 23A), hours of work (section 25), overtime (section 26), leaves of absences (section 38), work schedules for emergency medical service (section 55), work schedules for correctional officers (section 61), benefit plans (Section 62), duration (section 68), and the signature page.

c. For nearly forty years wages and cost items have been recognized to be a core subject of collective bargaining by the UPW and public employers in negotiations over the unit 1 and 10 agreements. In fifteen successive unit 1 and 10 agreements wages and cost item improvements have been negotiated for bargaining unit 1 and 10 employees in Sections 23 and 23A and

other provisions of the unit 1 and 10 agreements. Exhibit 32 is a chart which indicates the negotiated pay increases by bargaining units from 1972 to 1993 prepared by the office of collective bargaining on or about September 16, 1994.

d. For nearly forty years "hours" of work and work schedules have been recognized as a core (or mandatory) subject of collective bargaining by the UPW and public employers in negotiations over the unit 1 and 10 agreements. In fifteen successive agreements hours of work and scheduling requirements are set forth in section 25 (for most state and county employees) and in section 61 (for employees of the department of education) in bargaining unit 1, and section 25 (for most State and county employees) section 55 (for City ambulance service employees), and section 61 (for adult correctional officers) in bargaining unit 10. A public employer may not change hours of work without bargaining with the UPW. Exhibit 30 is a copy of Decision No. 443 of the Hawaii Labor Relations Board in which it was determined that a public employer breached the duty to bargain by making unilateral changes to hours of work of State employees. The UPW and public employers have negotiated over changes to daily and weekly work hours and work schedules in the past. Exhibit 31 is a copy of a negotiated change in daily and weekly work hours of employees between the UPW and the Hawaii Health System Corporation as set forth in a supplemental agreement. This is just one example of negotiated changes in work hours and work schedules of employees.

e. A furlough of employees has been recognized as a mandatory subject of collective bargaining in the private and public sector for many years. Exhibit 24 is a copy of the definition of the term "furlough" in the Roberts' Dictionary of Industrial Relations (3rd ed. 1986). The term means a "leave of absence from work or other duties." See Exh. 24-3. The UPW and

public employers negotiated a provision for furloughs of bargaining unit 1 and 10 employees in 1989 in Section 38.02. The provision allowed for a one year leave of absence to delay an impending reduction in force or lay off. Section 38.02 was retained in successive two year agreements since 1989 and remains a part of the unit 1 and 10 agreements to the present day. See Exh. 33-36; Exh. 35-49 to 35-50. In the private sector a furlough is a negotiable subject as determined by the National Labor Relations Board (NLRB). Exhibit 25 is a copy of the NLRB decision in Long Island Day Care Services Inc., 303 NLRB No. 13 (1991). Furloughs are negotiable in the public sector as well. Exhibit 63 is a copy of Decision No. 3237 of the Connecticut State Board of Labor Relations dated August 31, 1994 regarding the negotiability of furloughs. Exhibit 64 is a copy of a decision of the New Jersey Public Employment Relations Commission requiring bargaining over furloughs.

6. I have been directly involved in bargaining over the wages, hours, and terms and conditions of employment for the July 1, 2009 to June 30, 2011 unit 1 and 10 collective bargaining agreements with the public employers, and I am familiar with the June 1, 2009 decision and actions of Linda Lingle, Marie Laderta, and Georgina Kawamura regarding furloughs and funding and spending restrictions in the Department of Education and the University of Hawaii to implement the furloughs.

a. On June 16, 2008 UPW submitted its written notice of its desire to modify and amend various provisions of the current unit 1 and 10 collective bargaining agreements with its proposals as required by Section 66. See Exh. 33-53; Exh. 35-77. Exhibit 36 is a copy of the notice dated June 16, 2008 for bargaining unit 1 and a list of union proposals. Exhibit 37 is a copy of the notice dated June 16, 2008 for bargaining unit 10

and a list of union proposals. The written notices were transmitted to Marie Laderta, the director of the department of human resources development of the State of Hawaii who represents Governor Linda Lingle (for the State of Hawaii), and to representatives of each of the county mayors, the chief justice, and the board of directors of the Hawaii Health Systems Corporation. Soon after June 16, 2008 bargaining commenced through the duly designated representatives of the UPW and the public employers of the employer groups.

b. At no time during the bargaining process did Linda Lingle and Marie Laderta indicate a desire to modify and amend Section 38.02 or any other relevant provisions 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. No proposal for such furloughs was ever submitted by the "employer group" engaged in bargaining unit 1 and 10 negotiations with the UPW.

c. During the 2009 legislative session an amended senate bill emerged from the House of Representative on employee "furlough" and the attorney general provided an opinion to the speaker of the House on the requirements of bargaining over the subject matter. Exhibit 39 is a copy of the furlough bill and the standing committee report on the measure. Exhibit 40 is a copy of the February 17, 2009 opinion from the attorney general. The legislative measure was not adopted by the legislature during the session. Exhibit 43 is a copy of the May 29, 2009 amendment to the February 17, 2009 opinion of the Attorney General.

d. On June 1, 2009 Linda 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 funding and

spending in the Department of Education and the University of Hawaii "in an amount equivalent to the three days per month furlough." Exhibit 44 is a copy of the June 1, 2009 public statements made by Governor Lingle regarding her decision and actions.

e. The June 1, 2009 decision and actions by Linda Lingle were 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 part of the multi-employer bargaining process for bargaining units 1 and 10 as provided by law.

f. On June 2, 2009 the UPW was sent a letter by Marie Laderta regarding Governor Linda Lingle's June 1, 2009 decision and action. Exhibit 45 is a copy of the June 2, 2009 letter from Marie Laderta.

g. On June 8, 2009 the Department of Human Resources Development of the State of Hawaii published a furlough employee questions and answers. Exhibit 47 is a copy of the questions and answers dated June 8, 2009.

h. On June 8, 2009 UPW in behalf of bargaining unit 1 and 10 employees requested Governor Linda Lingle to negotiate (no later than June 15, 2009) over the June 1, 2009 decision and actions, and asked that she cease and desist from implementing changes in wages, hours, and terms and conditions of employment pending collective bargaining. Exhibit 49 is a copy of the June 8, 2009 letter sent to Governor Lingle.

i. On June 15, 2009 Marie Laderta sent a letter to UPW refusing the union's request to engage in collective bargaining on the June 1, 2009 decision and actions of the Governor. Exhibit 51 is a copy of the June 15, 2009 letter from Marie Laderta.

j. On June 18, 2009 Governor Lingle held another press conference in which she announced how the furloughs would be implemented by the various departments and agencies of the State of Hawaii, and the department of human resources development published a "furlough update #2 employee questions and answers." The Governor stated that many State departments and agencies would be unilaterally changing the work hours and work schedules by providing four day work weeks during three of the four weeks each month starting in July 2009. Exhibit 52 is a copy of the "furlough update #2 employee questions and answers" dated June 18, 2009.

7. I have examined the impact and affects of the June 1, 2009 decision and actions of Governor Linda Lingle and the unilateral implementation of changes announced on June 18, 2009 for various state departments upon the wages, hours, and terms and conditions of employment of bargaining unit 1 and 10 employees and to retirees represented by UPW.

a. The decision and implementation "effective July 1st, and continuing for the next two years . . . three furlough days per months for all state employees" reduces and cuts wages and salaries of bargaining unit 1 and 10 employees by approximately 13.79%.

b. The decision and actions of June 1, 2009 suspends for two years the State of Hawaii's obligation to engage in collective bargaining with respect the three-day per month furloughs for all state employees.

c. The furlough plan announced on June 18, 2009 unilaterally (and without negotiations) changes existing hours of work and work schedules of bargaining unit 1 and 10 employees which must be posted 12 weeks in advance under Section 25.03 for most state departments and agencies. Exhibit 59 is a copy of a

work schedule which has been unilaterally changed. This is just one example of a work schedule which has been changed.

d. The 13.8% reduction and cut in wages and salaries of bargaining unit 1 and 10 employees diminishes and impairs the accrued retirement benefit of members of the employees' retirement system under chapter 88, HRS, whose contractual entitlement to retirement benefits are directly related to the overall compensation employees receive through negotiations conducted under chapter 89.

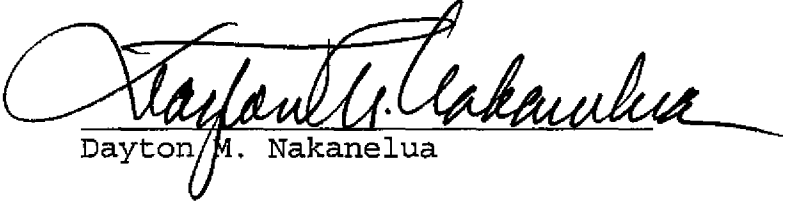
e. The June 1, 2009 decision and actions of Governor Lingle to restrict, withhold, and delay payment of upwards of \$130 million to pay in part for retirement and health fund contributions which are due in June 2009, and to restrict funds to the Department of Education and the University of Hawaii (to implement the three-day-per month furlough of all state employees for a period of two years) effective July 1, 2009 disregards valid obligations and commitments previously incurred by contract and by statute. The obligation to make regular monthly contributions for health and other benefit plans has been previously incurred by Section 62 of the unit 1 and 10 collective bargaining agreements. The obligation to make contributions to the employees retirement system has been incurred by statute under chapter 88, HRS. The obligation to set hours of work through posted work schedules twelve weeks in advance is contractually incurred under Section 25.03 (for most state employees) under the unit 1 and 10 agreements. The obligation to grant a leave of absence without pay of up to one year to delay a reduction in force is contractually incurred in Section 38.02 of the unit 1 and 10 agreements. The obligations not to change payment of wages at current levels is incurred by contract under Section 25 of the unit 1 and 10 agreements and by chapter 89 which prohibits unilateral changes until bargaining

has occurred to a point of impasse on such a specific change. To date there has been no bargaining over the June 1, 2009 decision and actions announced by Governor Lingle, and implemented by Marie Laderta and Georgina Kawamura. Exhibits 60 and 61 are Attorney General Opinions regarding the obligation to maintain wages, hours, and terms of the existing agreements in place following expiration of the collective bargaining agreements.

8. The furlough of three days a month for the next two years for all state employees will cause severe hardship on bargaining unit 1 and 10 employees many of whom live pay check to pay check, and have mortgages, medical bills, child support obligations, and other responsibilities.

I, Dayton M. Nakanelua, declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawaii June 22, 2009


Dayton M. Nakanelua

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

Hawaii State Teachers	)	Civil No. 09-1-1372-06 KKS
Association and United Public	)	(Other Civil Action)
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.	)	

DECLARATION OF JOSEPH R. GRODIN

I, JOSEPH R. GRODIN, hereby declare as follows:

1. I am a Distinguished Emeritus Professor at the University of California, Hastings College of the Law in San Francisco, where I have taught classes on labor law, including on public sector collective bargaining, and on constitutional law, including state constitutional law. I am one of the authors of the casebook PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS (Thompson/West 2004). A true and correct summary of my background and list of my publications is attached as Exhibit 54.

2. I testified as an expert witness on the history of public sector collective bargaining before the Circuit Court of the First Circuit, State of Hawai'i, in United Public Workers,

AFSCME, Local 646, AFL-CIO v. Davis Yogi, Civil No. 99-3793. This case reached the Supreme Court of Hawai'i as United Public Workers v. Yogi, 101 Hawai'i 46, 62 P.3d 189 (2002). I have been asked by the Plaintiff in this action to provide testimony on the same subject.

3. As I explain in further detail below, by the time Article XII, Section 2 of the Hawai'i Constitution was adopted in 1968, the practice of collective bargaining in the United States already was well-established. Collective bargaining became established first for private sector employees and then was gradually adopted for public employees in many states. The right of employees to organize for purposes of collective bargaining was understood to impose an obligation on the part of the employer and a labor organization representing its employees to negotiate in good faith over wages, hours, and other terms and conditions of employment.

4. I have been informed that the Governor of Hawai'i seeks to impose unpaid furloughs for all state employees of three days per month for the two-year period from July 1, 2009 to June 30, 2011. Unpaid furloughs present two issues that have historically been understood to be core subjects of collective bargaining -- at least since the adoption of the Wagner Act in 1935 -- wages and hours. It was well-established in the United States by 1968 that a constitutional or statutory right of a group of employees to organize for purposes of collective bargaining would include an obligation on the part of the employer and labor organization to negotiate in good faith about both wages and hours.

MY BACKGROUND

5. I received a B.A. from the University of California at Berkeley in 1951 and then a J.D. from Yale Law School in 1954. Following graduation from law school, I earned a

Ph.D. in labor law and labor relations from the London School of Economics.

6. After practicing as a private attorney in the field of labor law for approximately 17 years, I became a Professor at Hastings College of the Law from 1972 to 1979 and again from 1987 to 2006, when I retired from full-time teaching to become a Distinguished Emeritus Professor. My research, writing and teaching has focused on labor and employment law, including public sector labor law, and constitutional law, including state constitutional law. Among the books about public sector employment that I have co-authored or contributed to are PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS (Thomson/West 2004) (with Martin Malin & June M. Weisberger); COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT (5th ed., West Group 2003); COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT (4th ed., West Publishing Co. 1993) (with Donald H. Wollett & June M. Weisberger); COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT (3d ed., BNA 1979) (with Donald H. Wollett & Reginald H. Alleyne); and PUBLIC-SECTOR BARGAINING (BNA 1979) (with Benjamin Aaron & James L. Stern

7. I served as an Associate Justice of the California Court of Appeal for the First Appellate District, Division One from 1979 to 1982. I then served as Presiding Justice of Division Two of that Court for a little less than a year until I was appointed as an Associate Justice of the California Supreme Court. I served as an Associate Justice of the California Supreme Court from 1982 to 1987.

8. I have also served as a member of California's Agricultural Labor Relations Board, as a consultant to the Judicial Council of California with respect to a task force created to make recommendations to the Legislature regarding court employees, and as a labor arbitrator in both the public sector and private sector.

9. As previously stated, I testified as an expert on the development of public sector collective bargaining at the trial before Judge Crandall in United Public Workers, AFSCME, Local 646, AFL-CIO v. Davis Yogi, Civil No. 99-3793.

THE DEVELOPMENT OF COLLECTIVE BARGAINING IN THE PRIVATE SECTOR

10. The history and development of the legal regime for the protection of collective bargaining in the United States essentially began with Congress' adoption of the National Labor Relations Act (the Wagner Act) in 1935.

11. The National Labor Relations Act declared the right of most private sector employees to organize and to bargain collectively with their employers through representatives of their own choosing; it provided a framework for employees to decide whether or not they wish to have a union represent them; it made it an unfair labor practice for an employer to interfere with or restrain or coerce employees in the exercise of their rights protected under the statute; it made it an unfair labor practice for an employer to discriminate against employees because of union membership or activities; and it made it an unfair labor practice for employers to refuse to bargain in good faith with the designated bargaining representative as to "rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. 159(a). The National Labor Relations Act applied (and still applies) to employers in industries affecting commerce (a category that encompasses virtually all private sector employers today) but the National Labor Relations Act excluded (and still excludes) two major categories of employees: public employees and agricultural employees.

12. The next major legislative development in this area was the amendment of the National Labor Relations Act in 1947 by the Taft-Hartley Act, also known as the Labor Management

Relations Act of 1947. Among the amendments made by the Taft-Hartley Act was the addition of a definition of the "obligation to bargain collectively." The obligation "to bargain collectively" is defined in Section 8(d) of the National Labor Relations Act (29 U.S.C. 158(d)) as "the performance of the mutual obligation of the employer and the representative of employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." (Emphasis supplied.)

13. The right of private sector employees to organize and to engage in collective bargaining was afforded constitutional protection in New York in 1939, Florida in 1944, Missouri in 1945, and New Jersey in 1947. Hawai'i adopted a so-called "Little Wagner Act" in 1945 which granted to agricultural employees, and other private sector employees exempt from coverage under the Wagner Act, the statutory right to organize and to engage in collective bargaining. In the 1950 Hawai'i Constitutional Convention, "the right to organize for the purpose of collective bargaining" was constitutionally established for persons in private employment in Hawai'i.

14. After the adoption of the National Labor Relations Act, it became quickly understood that, 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 violations of the duty to bargain. An early annotation in the American Law Reports, "What Amounts to 'Collective Bargaining' within National Labor Relations Act," 147 A.L.R. 7 (1943), attempted to

collect all of the cases about the meaning of "collective bargaining" and stated: "It is a general rule that the obligation to bargain collectively, within the meaning of the act, forbids unilateral action or determination by the employer alone, with respect to rates of pay, wages, hours of employment, or other conditions of employment."

15. There is also no doubt that a reduction in work hours and wages for bargaining unit employees through mandatory "furloughs" would be considered a mandatory subject of collective bargaining. Both "wages" and "hours" are specifically listed as subjects of collective bargaining in the original Wagner Act of 1935 (see NLRA Section 9(a); 29 U.S.C. 159(a)), and in the Taft-Hartley amendments of 1947 (see NLRA Section 8(d), 29 U.S.C. 158(d)). Accordingly, the National Labor Relations Board has recognized that "furloughs are terms and conditions of employment and therefore a mandatory subject of bargaining." Long Island Day Care Services, 303 N.L.R.B. 112 (1999).

16. It also became well-established in the private sector that there are certain business decisions that primarily involve the employer's entrepreneurial interests in managing its business, and only incidentally effect terms and conditions of employment, like the decision whether to cease doing business or to manufacture a particular product or conduct an advertising campaign. The employer need not bargain about those decisions, but the employer still would have an obligation to collectively bargain with the recognized labor union about the effects of a business decision on bargaining unit employees and the procedures by which the decision is implemented. This distinction between "decision" bargaining and "effects" bargaining was made by the National Labor Relations Board in Brown Truck and Trailer Mfg. Co., 106 N.L.R.B. 999 (1953).

COLLECTIVE BARGAINING IN THE PUBLIC SECTOR

17. Collective bargaining for public employees in the United States developed after private sector collective bargaining and evolved over a span of about 30 years.

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

19. Labor relations in the public sector then evolved to an initial "primitive" stage during which public employees were permitted to organize and present proposals to the employer but there was no obligation of the employer to negotiate in good faith in an attempt to reach agreement. The employer might "meet and confer" or "consult" with a public employee labor organization upon request, but there was no obligation on the part of the public employer to refrain from making unilateral changes in wages and hours or other terms of employment until the negotiations had reached impasse. This process was commonly derided as "collective begging" by public employee unions to distinguish it from the true "collective bargaining" in the private sector, which is not satisfied by mere consultation with the employees' representative about wages, hours, and other terms of employment.

20. In Hawai'i, this initial, more primitive stage of public sector labor relations was initiated in 1950 with the adoption of Article XIII, Section 2 of the Hawai'i Constitution, which provided that "[p]ersons in public employment shall have the right to organize and to present their grievances and proposals to the State, or any political subdivision or any department or agency thereof." Thus, public sector employees could merely "present their grievances and proposals," while the Hawai'i Constitution provided private sector employees, in

Article XIII, Section 1, with "the right to organize for the purpose of collective bargaining." (Emphasis supplied.) This distinction between the right of private sector employees to engage in collective bargaining and the right of public sector employees merely to present proposals and consult with the employer was common in other states also at this time.

21. Over time, labor relations for public employees in many states evolved by the 1960s and 1970s to be much closer to the private sector model of collective bargaining. This historical development occurred in Hawai'i when an amendment to Article XIII, Section 2 was proposed at the 1968 Constitutional Convention to provide that "[p]ersons in public employment shall have the right to organize for the purpose of collective bargaining as prescribed by law."

22. By the time the proposed amendment to Article XIII, Section 2 was on the general election ballot of November 5, 1968 for ratification by the voters of Hawai'i, the term "collective bargaining" had a well recognized meaning and usage in both the private and public sectors, i.e., as a process under which the employer and a labor organization representing its employees had an obligation to meet and negotiate in good faith regarding wages, hours, and terms and conditions of employment in an effort to reach agreement. The Taft-Hartley definition of the obligation "to bargain collectively," for example, had been in effect for more than 20 years and there was a well-established body of caselaw from the National Labor Relations Board and the courts about the subjects that were considered mandatory subjects of collective bargaining.

23. In 1970, after ratification of the amendment to Article XIII, Section 2, the Hawai'i legislature adopted a public sector collective bargaining statute as set forth in chapter 89, HRS. Section 89-2, HRS (as adopted in 1970), defined

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 supplied.)

24. This original statutory definition of "collective bargaining" for public sector employees in Hawai'i largely tracked the definition in the Taft-Hartley Act of 1947 and reflects the evolution of public sector labor relations in many states to the model of true collective bargaining that had developed several decades earlier in the private sector.

I, Joseph R. Grodin, declare under penalty of law that the foregoing is true and correct.

DATED: Berkeley, California

June 20, 2009

Joseph R. Grodin
Joseph R. Grodin

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

Hawaii State Teachers	)	Civil No. 09-1-1372-06 KKS
Association and United Public	)	(Other Civil Action)
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.	)	

DECLARATION OF TIMOTHY F. REILLY

I, Timothy F. Reilly, hereby declare as follows:

1. I am a certified public accountant employed by the accounting firm of Bachecki, Crom & Co., LLP, Consultants and Certified Public Accounts in San Francisco, California.

2. I testified as an expert witness in seven binding interest arbitration hearings, including two in Hawaii involving the IAFF Local 1463 - Hawaiian Islands, Department of Transportation - State of Hawaii, the City and County of Honolulu, the County of Maui, the County of Hawaii and the County of Kauai; and the Hawaiian Government Employees Association, the State of Hawaii, the University of Hawaii, the Hawaii Health Systems Corporation, the City and County of Honolulu, the County of Maui, the County of Hawaii and the

County of Kauai on the ability to pay. I have been asked by the Plaintiff in this action to provide a declaration and testimony on the effect of furloughs on public employee wages and benefits.

MY BACKGROUND

3. I received a Bachelor of Science in History and Accounting from the University of San Francisco in 1975 and a Masters in Taxation from Golden Gate University in 1994. I have worked in public accounting since 1976, providing accounting, tax, auditing, and financial planning services to my clients. I have attached my resume as Exhibit 55.

4. Since 1990, I have prepared 336 reports and analysis of 135 local governments, covering numerous financial issues for public employee unions. I have prepared reports that analyzed the financial health of local governments, prepared tax and cost analysis of government and union contract proposals, analyzed revenues of local governments and analyzed payroll policies to determine compliance with the Fair Labor Standards Act. The local governments I analyzed include district, city, county and state governments in the states of Alaska, Arizona, California, Hawaii, Nevada, Oregon and Washington. A true and correct list of my reports and analysis is attached as Exhibit 56.

EFFECT OF FURLOUGHS ON PUBLIC EMPLOYEE WAGES AND BENEFITS

5. On June 1, 2009, Governor Linda Lingle ("Lingle"), announced her furlough plan requiring all State employees to take a mandatory unpaid three (3) day furlough each month. The furloughs are to last for twenty-four (24) months, beginning July 1, 2009 and ending June 30, 2011.

6. United Public Workers, AFSCME Local 646 (UPW) represents state employees in Unit 1 and Unit 10. Unit 1 covers non-supervisory blue collar employees and it has two job

classifications, BC for blue collar and WS for working supervisor, each with 15 steps. Unit 10 covers institutional, health and correctional workers and has three pay schedules. Schedule AM, for ambulance workers, has 19 classifications and 6 steps. Schedule HE, for health workers, has 13 classifications and 6 steps. Schedule CO, for correctional officers, has 11 classifications and 6 steps.

7. On an annual basis, each state employee who is a member of UPW will lose 36 paid work days out of a 261 day work year. The work year is calculated by subtracting the number of weekend days (52 weeks x 2 = 104 days) from 365 days in a year (365 - 104 = 261). Dividing 36 unpaid furlough days by 261 work days, results in a 13.79% reduction in paid work days and a corresponding reduction in wages, salaries and benefits based on gross pay. I prepared Exhibit 57 to show the annual reduction of Unit 1 employees' wages and salaries. Exhibit 57 is also representative of the loss to Unit 10 employees' wages and salaries. I obtained the steps and the related annual wages from Exhibit D, page 51 of the agreement between UPW and the State for Unit I for the period July 1, 2007 to June 30, 2009. This exhibit is also representative of the decrease in wages and salaries for all State employees in Unit 10.

8. The Hawaii State Teachers Association (HSTA) represents employees in Unit 5, which covers teachers and other personnel under the same salary schedule. Under the current agreement, there are 6 teacher classifications with 15 steps for the first three teacher classifications and 12 steps for the last three teacher classifications.

9. Under the current agreement, Unit 5 employees, per page 61, have a ten month pay schedule and, per page 51, a 190 day work year. As such, instead of 36 unpaid furlough days, Unit 5 employees have 30 unpaid furlough days. Dividing 30

unpaid furlough days by 190 work days, results in a 15.79% reduction in paid work days and a corresponding reduction in wages, salaries and benefits based on gross pay. Based on Lingle's 3 unpaid furlough days per month, teachers' annual wages and salaries are reduced an extra 2% as opposed to other state employees. I prepared Exhibit 58 to show the annual reduction of Unit 5 employees' wages and salaries. This Exhibit calculates the changes to wages for all steps for teachers in the lowest and highest teacher classification. I obtained the steps and the related annual wages from the Exhibit 2 salary schedule, page 61 of the agreement between HSTA and the Department of Education for the period July 1, 2007 to June 30, 2009. This exhibit is representative of the loss of wages, salaries and benefits based on wages and salaries for all employees in Unit 5.

10. The decrease of wages paid to the State's employees may lower an employee's retirement benefits. On June 8, 2009, the State issued an Employee Question and Answer memo concerning the furlough. Question 28 on page 5, asked "will the furlough affect the calculation of an employee's retirement benefits." The state answered, "Yes." Retirement benefits are based on actual pay. "Average final compensation" for service and disability retirement benefit purposes is based on the employee's 3 or 5 highest paid years of creditable service. Any furlough may lower the "average final compensation level." We obtained this memo from the State's website at hawaii.gov/gov/news/files/2009/june/Employee%20Q-A_060809.pdf. We have attached this memo as Exhibit 47. This is especially true for state employees who are expecting to retire or who become disabled within the next five years.

11. When employees retire, they are usually at or near the top step of their job classification. The furlough

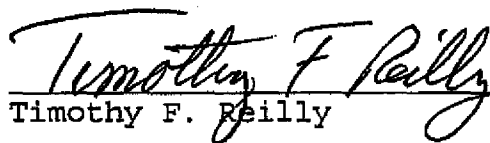
will negate all wage increases under the current contract and possibly part of the prior contract for Unit 1, Unit 5 and Unit 10 employees, reducing their annual wages and salaries at least to 2006 wage levels. State employees who retire and have to include the two furlough years in the calculation of retirement benefits will have smaller retirement benefits than the retirement benefits calculated on the higher non-furloughed wages they would have received. In order to avoid decreased retirement benefits, an employee will need to postpone his retirement until the furlough years are excluded from the retirement benefits calculation.

12. Included in Lingle's furlough plan is a delay of one month in the payment of retirement and health fund contributions and benefits due in June 2009. The delay in paying the contributions may diminish and impair the assets of the retirement trust. An increase in the price of investments between the date the contribution should have been made and the deferred date reduces the amount of investments the retirement trust could have purchased. Any future increase in value of these delayed purchased investments is a permanent loss to the trust.

I, Timothy F. Reilly, declare under penalty of law that the foregoing is true and correct.

DATED: San Francisco, California

6/22/09


Timothy F. Reilly

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

Hawaii State Teachers	)	Civil No. 09-1-1372-06 KKS
Association and United Public	)	(Other Civil Action)
Workers, AFSCME, Local 646,	)	
AFL-CIO,	)	AFFIDAVIT OF REBECCA L. COVERT
	)	
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.	)	

(354:701)

AFFIDAVIT OF REBECCA L. COVERT

STATE OF HAWAII	)	
	:	SS.
CITY AND COUNTY OF HONOLULU	)	

Rebecca L. Covert, being first duly sworn on oath deposes and says:

1. Affiant is one of the attorneys for Hawaii State Teachers Association and United Public Workers, AFSCME, Local 646, AFL-CIO (jointly referred to as "Unions" or "Plaintiffs") in the above-entitled matter.

2. Attached to Plaintiffs' Motion for Temporary Restraining Order are the declarations of Joseph Grodin and Timothy Reilly. Both reside in the Bay Area, California. Their declarations were electronically submitted to my office with their signatures. Originals of the declarations are en route to my

office. I will submit the original declarations upon receipt later this week.

Further Affiant sayeth naught.



Rebecca L. Covert

This two (2) page undated affidavit attached to the PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER was subscribed and sworn to before me this 22nd day of June, 2009 in the First Circuit of the State of Hawaii by Louise R. Lee:

LS 

Notary Public, State of Hawaii

My commission expires: 2/8/2012