OPEN LETTER TO GOVERNOR LINGLE

February 1, 2008

The Honorable Linda Lingle
Governor, State of Hawai'i
Executive Chambers
State Capitol
Honolulu, Hawai'i 96813

Dear Governor Lingle,

We urge you to retract your recent unwarranted threats aimed at teachers who oppose your plan to subject them to random drug tests. Your misleading January 25, 2008 message to teachers is legally inaccurate and seemingly designed to turn teachers against each other, against their union, and against the Board of Education – all based on the Board's sensible vote to use its budget to fund classroom needs, rather than underwriting your plan to drug test the entirety of Hawai'i's upstanding public educational profession. We respectfully request that you uphold the duties of your office and your obligations to the public by retracting those misleading statements and issuing a legally accurate correction.

Inaccurate Statements About Teachers' Labor Agreement

Effective July 1, 2007, all Hawai'i public school teachers are subject to the terms of their negotiated collective bargaining agreement between the Hawai'i State Teachers Association and the State Board of Education. The agreement provides for pay raises and a step increase in salary scale for all teachers. Appendix II of the agreement mandates that the State must start drug testing its teachers "no later than June 30, 2008."

The drug test provision of the agreement has ignited controversy in two respects. First, teachers represented by the ACLU believe that random drug testing is unconstitutional, and have announced their preparations to mount a legal challenge to the contract. Second, the Board of Education has refused to redirect educational resources to pay for the random drug test program, labeling it an unfunded mandate. On January 24, 2008, the Board unanimously rejected the most recent funding scheme for the drug test program.

The next day, you publicly stated that the Board of Education's funding refusal imperiled teachers' pay raises. As a justification, you professed to cite concepts of contract law, stating that the labor agreement cannot be implemented at all if any of its provisions is disputed: You told the Honolulu Star Bulletin, "We cannot effectuate this contract unless the conditions are carried out." In order to silence your critics, you threatened to withdraw the pay raises that teachers have been receiving since the agreement's July 1, 2007 effective date.

Troubling Implications of Your Threat to Teacher Salaries

Misstatement of the Law. Your January 25 public statements are disconcerting on many fronts. Chiefly, you are wrong on the law. As your legal advisors must realize, the agreement contains a "severability" clause.[1] If one portion of the contract is held to be invalid, the law cuts it out but leaves the rest intact. You are legally forbidden from claiming that a disputed portion of the agreement renders it entirely invalid. The teachers' lawsuit could not possibly justify your withholding teachers' pay.

Even absent an explicit severability clause, your all-or-nothing interpretation of the labor agreement lacks legal merit. If the Board of Education or any other State entity blocks funding for teacher drug testing, the rest of the contract, including your promise to pay teachers' salaries, remains in full force. Conditioning payment upon occurrence of a circumstance, and then preventing that circumstance from occurring, does not excuse a party – such as the State – from payment. For "if a promisor himself is the cause of the failure of performance . . . of a condition upon which his own liability depends, he cannot take advantage of the failure." *Ikeoha v. Kong*, 386 P.2d 855, 860 (Haw. 1963). This principle has been reaffirmed at least twice by the Supreme Court. *See Kahili, Inc. v. Yamamoto*, 506 P.2d 9, 12 (Haw. 1973) (one party's act made the other party's performance impossible; the first party could not then claim there was a breach); *Caldeira v. Sokei*, 417 P.2d 823, 828 (Haw. 1966) (where a contract between milk producer and dairy operator made performance contingent on operator's granting

[1] See 2007-09 CBA at Article XX § A, "If any provisions of this Agreement or any application thereof to any teacher or group of teachers is held contrary to law by a court of competent jurisdiction, such provisions or application will not be deemed valid and subsisting, except to the extent permitted by law, but all other provisions or applications will continue in full force and effect."

producer a ten-year land lease, operator could not rely on its own failure to grant producer the lease to excuse itself from a breach under the contract).

This is a universal common law rule. It is both old and undisputed. *See, e.g., Nodland v. Chirpich*, 240 N.W.2d 513 (Minn. 1976); *Kooleraire Serv. & Installation Corp. v. Bd. of Educ.*, 268 N.E.2d 782 (N.Y. 1971); *Booth v. Booth & Bayliss Commercial Sch.*, 180 A. 278 (Conn. 1935); *United States v. U.S. Eng'g & Constr. Co.*, 234 U.S. 236 (1914). No matter what happens to the drug testing program, the State must still provide the salary increase it promised its teachers.

Inconsistencies in the Public Record. Recent precedent involving a provision of the current teachers' contract demonstrates conclusively that the contract is not wholly invalid because of the presence of a provision the State chooses not to implement. Article VI, section JJ of the contract, for example, reduces new teachers' probationary period from two years to one year. This one-year probationary provision was included in the contract, apparently without the State being aware that the provision was contrary to a State statute mandating a two-year probationary period. H.R.S. § 302A-607. This topic is familiar to the Governor's Office, given the four pending bills before the Hawai'i legislature that would amend the State statute to allow section JJ's fast-track probationary period to take effect. In the meantime, the State has refused to implement the promised change to teachers' probationary period.

The State's experience with the probationary provision is instructive. The State realized that one-year probation was barred by statute, took the position that the provision would not be followed, and agreed that the rest of the contract remains valid – including teacher pay raises. Yet when the State, through the Board of Education, finds that it cannot afford teacher drug testing, you claim that failure to implement that provision would void the whole contract. The inconsistency of these positions highlights the clear error in your threats concerning teacher pay raises.

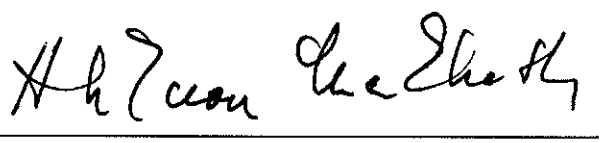
Chilling Effect on Teachers' Speech May Constitute Retaliation. Your threat to teacher raises is likely to chill teachers' constitutionally protected right to speak out against random drug testing or to consult counsel about their right to challenge the random drug testing provision of the contract. Leaving teachers with the false impression that they may stand up for their civil rights only at the expense of their salaries treads on

their constitutionally protected freedoms. This is particularly troubling in light of the now-retracted October 12, 2007 gag order that State Education official Clayton Fujie sent principals throughout Hawai'i. The email, a glaring First Amendment violation, instructed principals to tell teachers not to speak to attorneys or the media about the random teacher drug testing issue. The State retracted the email, but remains on notice that such messages chill teachers' constitutionally protected freedom of speech.

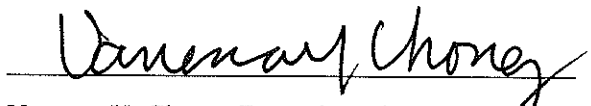
Your recent public statements about contract implementation are rife with inaccuracies and misstatements of the law. We request that you retract them. The truth is that teachers may challenge any illegal portion of their labor contract. The Board of Education may choose to direct scarce resources to students rather than funding your drug testing program. Neither of these actions would invalidate the entire contract. The citizens of our State, and mentors of our next generation of leaders deserve your respect. They deserve your apology. At the very least, they deserve accurate information about their legal rights and the State's legal duties. Teachers' pay raises are not at risk, but the honor of our chief executive office is. Please do not tarnish our State. Anything less than a retraction, apology and correction would be shameful.

Yours truly,

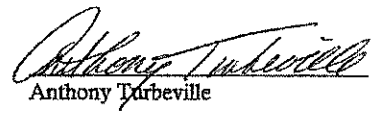
Richard S. Miller, Professor of Law, Emeritus,
Former Dean of William S. Richardson School of Law
(these views are my own and not necessarily those of U.H.)



Ah Quon McElrath, Former ILWU social worker,
and former member of the University of Hawai'i – Manoa Board of Regents



Vanessa Y. Chong, Executive Director,
American Civil Liberties Union of Hawaii

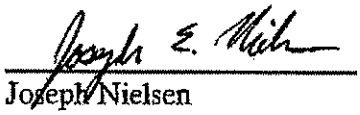


Anthony Turbeville

Math Teacher
O'ahu

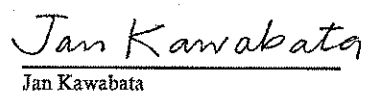
Robin Fancy

School Librarian
Lana'i



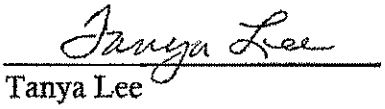
Joseph Nielsen

Spanish Teacher
Maui



Jan Kawabata

Elementary School Teacher
Oahu

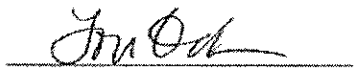


Tanya Lee

Math Teacher
Island of Hawai'i

Lynol Oda

Computer Resource Teacher/
Technology Coordinator
Island of Hawai'i



Lori Oda

Elementary School Literacy Coach
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Debra Shirai

6th Grade Science Teacher
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