

STATE OF HAWAII  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	)	
JERELENE M. AIO,	)	Case Nos. CU-05-22
PAULA CHAMBERS,	)	CU-05-23
DEBORAH M. C. CHU,	)	CU-05-24
ANN K. CORUM,	)	CU-05-25
VAN E. CORUM, JR.,	)	CU-05-26
SHARON DUMAS,	)	CU-05-27
HARRY M. GREENWOOD, III,	)	CU-05-28
FLORENCE M. HAYSLIP,	)	CU-05-29
DONALD FREDERICK JENSEN,	)	CU-05-30
JOANNE C. KAPAHUA,	)	CU-05-31
HAROLD W. KUHA,	)	CU-05-32
LINDA M. McLEAN and	)	CU-05-33
E. PAUL VOSBURGH,	)	<u>CU-05-34</u>
Complainants,	)	
and	)	Decision No. <u>129</u>
HAWAII STATE TEACHERS	)	
ASSOCIATION, NEA,	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER

On January 13, 1978, Complainants filed the above-designated prohibited practice charges against the Hawaii State Teachers Association (hereafter HSTA) alleging that:

Since on or about July 21, 1976, the Respondent has interfered, restrained, and coerced the Petitioner[s] in the exercise of rights guaranteed by HRS §89-3, and said Respondent has failed to comply with HRS §89-4 in violation of HRS §89-13(b)(1) and (4) by taking and continuing to take service fees from the Petitioner[s] which amounts [sic] to more than Petitioner[s'] prorata share of the cost to Respondent of the expenses of collective bargaining, contract administration and grievance adjustments.

Complainants charge that HSTA has been using service fee monies for partisan political and union membership purposes in violation of Chapter 89, HRS, and other applicable law.

On February 14, 1978 HSTA filed a Motion to Dismiss, alleging that the Complainants, in their complaints and particularization thereof, alleged no specific conduct which violated HRS 89-3, 89-4, or 89-13; that the charges and particularization are basically challenges to HPERB's findings of fact and conclusions of law in Decision 69, the most recent HPERB decision as of that time, certifying HSTA's service fee as reasonable, and are not the proper subject for a prohibited practice charge; that the findings of fact and conclusions of law reached, order issued, and principles followed in Decision 69 are in accord with the decision of the United States Supreme Court in Aboud v. Detroit Board of Education, 431 U.S. 209, 97 S.Ct. 1782 (1977), prohibiting a public sector union's use of service fees to finance ideological activities unrelated to collective bargaining; that therefore Complainants had no grounds based on that decision to challenge Respondent's expenditures; and that Complainants made no charge that HSTA had in any particular failed to abide by or follow Decision 69.

The Board in Order 190, dated May 25, 1978, denied HSTA's motion to dismiss. The Board stated that on the record as it then stood, it was unable to rule that the Complainants had failed to state a claim upon which relief could be granted. The Board added that it did not intend to open the door to a collateral attack on Decision 69, and that Complainants had the burden of proving that HSTA willfully violated 89-13(b)(1) and (4), HRS.

By Order 176, dated March 7, 1978, the Board consolidated for hearing purposes only the instant prohibited practice charges with case number SF-05-42, a petition filed by Complainants herein on January 13, 1978 for review of the

HSTA service fee established in July of 1976 in Decision 69. The Hawaii Government Employees' Association intervened in that case. (In Order 189, dated May 25, 1978, the Board denied the petition to review reasonableness of service fee. This order was appealed by Petitioners to the First Circuit Court, which remanded the matter to HPERB on the basis that the order may have been based on erroneous conclusions of law. Civil No. 54992, Decision and Order, dated November 20, 1978.)

The Board held hearings on the instant matter on March 6, April 17, September 6, October 4, December 4, 1978, and February 5, February 20, March 7, March 12, April 9, April 23, and April 30, 1979.

On September 6, 1978, hearings were continued until a Board decision on HSTA's petition for certification of reasonableness of service fees for fiscal year July 1, 1978 to June 30, 1979 was rendered, on the assumption that such decision would enable the parties to frame their charges and defenses in light of the findings of fact and conclusions of law contained in that decision, which covered many, if not all, of the issues under consideration here. Donald Jensen, a Complainant herein, intervened in the service fee hearing, and was represented by Complainants' counsel herein. The service fee decision, Decision 94, was issued on November 8, 1978 and said decision figured heavily in hearings held in the instant matter subsequent to that date.

The records in proceedings leading to Decisions 69 and 94 were admitted into evidence at hearings in the instant matter.

This case requires an examination of HSTA activities supported by service fees, and a determination as to on which

side of the allocative line drawn by Board decisions and other authority between permissible service fee-supported activities and impermissible service fee-supported activities such as HSTA activities fall. It must be determined whether, if activities such as cannot be supported by service fees have been engaged in, use of service fees to support such activities constitutes a prohibited practice under Section 89-13, HRS.

With the foregoing as introduction, the Board makes the following findings of fact, conclusions of law, and order.

#### FINDINGS OF FACT

All of the Complainants, as of the date of the filing of their complaints, were members of Unit 5; none of them, as of the date of the filing of their complaints, were members of HSTA.

HSTA is, and was at all relevant times, the certified exclusive representative of all employees in Unit 5.

The employer of Unit 5, for purposes of negotiations, are the Board of Education and the Governor. Subsections 89-2(9), 89-6(b), HRS.

Though Complainants base their complaints on activities of HSTA dating back to July 21, 1976, Section 377-9(1), HRS, and HPERB Rule 3.02(a), dictate that only alleged violations committed by Respondents within 90 days of the filing of the complaint are to be considered by the Board.<sup>1</sup> Thus

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<sup>1</sup> §377-9(1) Prevention of unfair labor practices. No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.

HPERB Rule 3.02(a) Complaint.

WHO MAY FILE; TIME LIMITATION. A complaint that any public employer, public employee or employee organization has engaged in any prohibited act may be filed by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation.

only activities engaged in by HSTA on or after October 15, 1977 are considered herein.

HSTA maintains two financial accounts. Service fee income is placed in HSTA's general fund or service fee account. HSTA charges persons who are its members a differential in excess of service fees. This dues differential is placed into a separate membership or "M" account. HSTA allocates expenses, including staff salary, to the M account in instances where it feels that such expenses are membership expenses most properly charged thereto. Actual expenses are thus apportioned between the service fee and M accounts. To make this apportionment, HSTA calculates, based on staff time sheets for the preceding year, the percentage of staff time spent on membership matters. During the subject period, this percentage was between 7 and 8%. This percentage of the total salary budget is used as a formula to allocate an equal proportion of other expenses, such as office rent, office supplies, employee liability and equipment insurance, postage and telephone to the M account. Tr. 2/5/79, pp. 79-81.

The program budget submitted by HSTA for fiscal year July 1, 1978 to June 30, 1979 in the proceedings leading to Decision 94 is as follows:

PROGRAM BUDGET  
(1978-79)

GOAL I:	ECONOMIC PROFESSIONAL SECURITY FOR ALL MEMBERS	1978-79
	1.0 Negotiations	\$ 72,656.74
	2.0 Problem Solving & Grievances	212,082.98
	3.0 Collective Bargaining Data	8,091.81
		<u>\$ 292,831.53</u>
GOAL II:	SIGNIFICANT LEGISLATIVE SUPPORT FOR PUBLIC EDUCATION	
	1.0 Increase Funding	\$ 21,918.56
	2.0 Political Organizing	9,752.68
	3.0 Legislative Support	20,839.16
	4.0 Election Process	1,392.25
		<u>\$ 53,902.65</u>

GOAL III: AN INDEPENDENT UNITED TEACHING ORGANIZATION

1.0	Maintain Governance Structure	\$ 223,495.26
2.0	Training	58,458.97
3.0	Special Services	---
4.0	Membership	13,202.71
5.0	Community Relations	4,674.70
		<u>\$ 299,831.64</u>

GOAL IV: PROFESSIONAL EXCELLENCE

1.0	In-Service Education	\$ 8,244.26
2.0	Relations with University	2,282.67
		<u>\$ 10,526.93</u>

GOAL V: HUMAN AND CIVIL RIGHTS

1.0	Teacher Rights	<u>\$ 36,604.24</u>
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GOAL VI: LEADERSHIP IN SOLVING SOCIAL PROBLEMS 1978-79

1.0	Positions on Issues of the Day	<u>\$ 3,952.04</u>
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SUPPORT AREAS

Communications	\$ 30,590.00
Administration	365,752.00
Service Fees	314,679.00
TOTALS	<u>\$ 701,021.00</u>
SERVICE BUDGET TOTALS	<u>\$1,408,670.00</u>

MEMBERSHIP AREAS

Goal III - 3.0	\$ 68,138.00
Support	51,554.00
TOTALS	<u>\$ 119,692.00</u>

Complainants submitted a computerized financial statement of actual expenditures for the 1977-78 fiscal year broken down according to substantially the same program areas utilized in the 1978-79 program budget. Complainants' Ex. 5. The statement presents a breakdown of operation expenses in program areas, with each area in the program budget represented by a numerical code. Tr. 2/5/79, pp. 87-90.

The printout indicates that for Goal II, Objective 2, on the 1977-78 program budget, "To Develop and Maintain a Grass-Roots Political Apparatus Which Includes a Precinct Level

Organization" (Complainants' Ex. 1, p. 8), \$11,513.67 was spent. Complainants' Ex. 5, p. 7. This amount was drawn from service fee account. Tr. 2/5/79, pp. 96-97, 120.

For Goal II, Objective 4, on the 1977-78 program budget, "To Elect to Public Office Those Who Have Proven or Stand to Prove That They Support the Goals and Objective of HSTA" (Complainants' Ex. 1, p. 9), \$6,829.34 was spent. (Complainants' Ex. 5, p. 9) This amount was drawn from service fees. Tr. 2/5/79, pp. 99, 101.

Eight thousand dollars was spent on "legislative support," an item that does not appear on the program budget for 1977-78, to cover work of the clerical staff which could not be placed in a specific program area under Goal II. Monies spent in this area came from service fees. Tr. 2/5/79, pp. 101-102, 114; Complainants' Ex. 5, p. 10.

For Goal III, Objective 4, on the 1977 Program Budget, "To Increase the Membership" (Complainants' Ex. 1, p. 17), \$3,407.22 was spent (Complainants' Ex. 5, p. 13). This sum came from service fees. Tr. 2/5/79, p. 108. Respondent, through Mrs. Lorna Kakesako, HSTA Director of Financial Services and Office Management, HSTA's chief fiscal officer, testified that some of the work in this area involves getting unit members to sign D-60 forms authorizing the State to make a deduction from paychecks for union dues differential. Employees returning from leaves must re-sign D-60's to maintain dues-paying status. Thus a concerted effort is necessary every year to gather D-60's to maintain HSTA's numerical strength. Most time, however, is spent in program planning, training leadership, and other staff costs. Tr. 4/23/79, pp. 26-32; Tr. 3/12/79, pp. 16-17.

Service fees are used for this activity. Tr. 4/23/79, pp. 74-75.

For Goal VI, Objective 1, "To Take Positions on the Issues of the Day" (Complainants' Ex. 1, p. 24), \$7,824.92 was spent (Complainants' Ex. 5, p. 20). This money came from service fees. Tr. 2/5/79, p. 109. HSTA gave grants, under this program area, to schools that were carrying out violence and vandalism programs. Some of the money for such grants possibly derived from NEA grants to HSTA. Tr. 3/12/79, pp. 40-41. Though it was stated that money allocated to this program area "primarily" went to HSTA's "Violence and Vandalism" program (Tr. 2/5/79, p. 109; 4/23/79, p. 72), the only further evidence elicited as to other objects of spending under this Goal and Objective was one to two hours of staff time spent attending a Japanese labor symposium and other unspecified work in the areas of venereal disease and child abuse. SF-05-58, Tr. 7/14/78, pp. 187, 213-214.

For the period July 1, 1978 to December 31, 1978, further computer printouts of HSTA expenditures submitted by Complainants indicate that expenses totaling \$5,755.65, \$9,653.65, \$1,960.01, and \$1,364.01 were charged against service fees for Goal II, Objective 2; Goal II, Objective 4; Goal III, Objective 4; and Goal VI, Objective I, respectively. Complainants' Ex. 6, Tr. 2/5/79, pp. 111-113.

Testimony was elicited from Mrs. Kakesako that the activities under Goals and Objectives II-2 and III-4 as established in the 1977-78 Program Budget were substantially similar to the activities under Goals and Objectives II-2 and III-4 in the 1978-79 Program Budget. Tr. 3/12/79, pp. 16-24.

Activities under Goal II, Objective 4, for the 1977-78 and 1978-79 Program Budgets differed in that Objective 4 for the 1978-79 Program Budget dealt with implementing the



state and local endorsement procedure, while in the 1977-78 Program Budget, this same activity was one of four sub-objectives, the other three dealing with teacher involvement in, and education as to, the 1978 Constitutional Convention (hereafter Con-Con). Complainants' Ex. 1, pp. 10-11; Complainants' Ex. 11, p. 7; Tr. 3/12/79, pp. 24-26.

After the Board issued Decision 94, which disallowed service fee expenditures in areas represented by Goal II, Objective 2; Goal II, Objective 4; Goal III, Objective 4; and Goal VI, Objective 1, of the 1978-79 Program Budget, HSTA took certain remedial actions.

As of January 1, 1979, expenditures "to date" (Tr. 3/12/79, p. 31) under Goal II, Objectives 2 and 4, have been transferred from the general account to the political action (membership) account. Expenditures under Goal III, Objective 4, have been transferred from the general account to the membership account. Tr. 3/12/79, pp. 31-32. Respondent's Ex. 1G.

Expenditures under Goal VI, Objective 1, however, have not been transferred out of the general account. HSTA feels that such expenditures, in the areas of school violence and vandalism, are legitimate service fee expenses. Tr. 3/12/79, p. 32, Tr. 4/23/79, p. 13. The activities have, however, been reclassified under Goal I of the Program Budget, "Economic and Professional Security for the Members of the Bargaining Unit" (Tr. 3/12/79, p. 39), as of January 1, 1979 (Tr. 4/23/79, pp. 13-14). Goal VI has been thus eliminated altogether. Tr. 4/23/79, pp. 14, 72.

The transfers are retroactive to July 1, 1978. Tr. 3/12/79, pp. 32-33.

In regard to the "Board Reserve" surplus account in the 1978-79 budget, which was deemed a permissible charge to

service fees in Decision 94, Complainants failed to produce any additional evidence in the instant case tending to prove its creation was an improper charge to service fees.

The Teacher Advocate is the union newspaper which is provided to all unit members and other interested non-unit members, such as members of the media or the Legislature. It is published once a month, 10 issues per year. The HSTA Executive Director and President write columns in the paper giving personal opinion and discussing issues of general concern to teachers, including legislative issues. Tr. 3/12/79, pp. 136-142. The newspaper is supported out of service fees (Tr. 2/5/79, p. 47), though non-service fee money is allocated for the newspaper's costs based on the amount of membership coverage given in the paper. The general fund is "reimbursed the full costs of the advertising for HSTA membership special services and insurance programs" contained in the paper. Tr. 2/5/79, p. 155; Tr. 4/23/79, pp. 16-20; Respondent's Ex. 5. The National Education Association, of which HSTA is an affiliate, grants funds to cover NEA ads in the Teacher Advocate. Tr. 4/23/79, pp. 20-21.

The October 1978 issue on its front page contains a lead article entitled, "Make the Difference on Oct. 7." The article discusses Political Action Committee (PAC)-endorsed candidates. Below this article is a list of HSTA-endorsed candidates in the primary election. The front page of the November 1978 issue contains a similar list pertaining to the coming general election.

The September and October 1978 issues' editorial comment by HSTA Executive Director Radcliffe and then President Barbara Nagaue contain statements urging readers to vote for HSTA's endorsed gubernatorial candidate. The November 1978 issue contains a similar article by Nagaue.

The December 1978 issue contains a front page photo of Governor Ariyoshi and Lieutenant Governor King, and an article entitled, "90%+ of HSTA Endorsed Candidates Succeed." Page 3 contains campaign photos and a list of HSTA-endorsed election winners.

The boxed article on the right margin on page 3 of the September 1978 issue contains a message phrased in persuasive terms urging teachers to "heed the HSTA endorsement of candidates and work together as one unit to help them get elected." Following are lists of HSTA-endorsed candidates and PAC representatives. An article on pages 4 and 5 of the November 1978 issue contains a spread of photos with accompanying captions relating to HSTA campaign workers holding signs and engaging in other campaign activity. The accompanying article is about HSTA election-related activities. The article ends with the exhortation, "Together we made the difference on October 7 -- now we have to continue to push for the HSTA endorsed candidates in the General Election on November 7 -- the race isn't over yet!"

Other politically-related articles deal with subjects such as the NEA convention, further editorial comment by HSTA officers, legislative and collective bargaining negotiations updates, editorial comment on the Equal Rights Amendment, an article on the effect on employee benefits of teachers running for Con-Con, general information about Con-Con, announcements of Con-Con election results, a column by the HSTA Director of Programs, Joan Husted, entitled "Know Your Rights," relating to employee rights under the Unit 5 contract, an announcement of the HSTA annual convention, activities of NEA, and an announcement of HSTA officer election results.

Announcements have been carried in the Teacher Advocate on the editorial page in spaces adjacent to the editorial columns inviting readers to write opinion letters to the paper to fill the expressly reserved space. Respondent's Exs. 13A, 13B. Tr. 4/23/79, pp. 43-44.

HSTA is extensively involved in political lobbying on a wide array of subjects. HSTA gave testimony on various Con-Con bills dealing with educational concerns. Topics of HSTA testimony included: whether the Board of Education should be elected or appointed; limitations on terms of service of Board members; if the Board is to be appointed, by whom and in what manner; numerical constitution of the Board; the relationship of the Board of Education to the Department of Education, the Legislature, and other governmental bodies; powers of the Board in relation to the Governor and Legislature; and apportionment of the Board; Complainants' Ex. 12, pp. 1, 11, 15-19, 22-25. HSTA also testified regarding: various matters relating to public negotiations in public sector collective bargaining, Complainants' Ex. 12, p. 4; collective bargaining rights for temporary workers, Complainants' Ex. 12, p. 5; the designation of the Legislature as the State's collective bargaining agent, Complainants' Ex. 12, p. 6; strikes in the public sector, Complainants' Ex. 12, pp. 7, 9, 12, 14; taxing powers for the Board of Education, Complainants' Ex. 12, p. 8; appointment of the Superintendent of Education, Complainants' Ex. 12, pp. 10, 20; mandatory service fees, Complainants' Ex. 12, p. 13; scope of the Superintendent of Education's powers, Complainants' Ex. 12, p. 21. Tr. 3/12/79, pp. 85-104.

HSTA refrained from taking a position on initiative-referendum-and-recall because it was considered not directly related to education. Tr. 3/12/79, p. 89.

Complainants submitted several written legislative testimonies of HSTA given during the period under consideration herein, directly related to teachers' working conditions. Complainants' Ex. 14, pp. 4-17.

Respondent also submitted documents summarizing HSTA Con-Con and legislative testimonies. All subjects as are disclosed in the documents directly relate to teachers' working conditions. Respondent's Ex. 2A-2D.

Complainants introduced a letter sent by Radcliffe to all members of the Legislature in 1979 laying out HSTA's legislative goals and positions. Complainants' Ex. 14, pp. 1-3. These positions were: (1) support of the 1979-81 budget request of the Superintendent of Education; (2) funding of the public employee wage agreements; (3) continuous 50% funding by the State for Health Fund premiums; (4) establishment of a dental insurance program for State employees; (5) allowance of early retirement for teachers; and (6) amendment of Chapter 89, HRS. Accompanying the letter is a one-page summary of HSTA positions in various areas of concern to teachers. All areas are related to teachers' working conditions, except the last three items, which are best characterized as issues of general concern: "economy," "environment," and "governmental services." Uncontradicted testimony was that HSTA did not lobby on these items, due to time and resource constraints. Tr. 3/12/79, pp. 113-116.

HSTA political activity originates principally from the Political Action Committee (PAC). PAC is a standing

committee with the two main functions of taking oversight on matters of legislative concern to teachers and taking oversight on political activities of HSTA. Funding of HSTA political work is allocated to either the service fee or M account on the basis of a distinction between "political" and "legislative" activity. John Radcliffe, HSTA Executive Director, defined "political" for such purposes as the process of "getting people elected." "Political" work is funded out of the M account and "legislative" work is funded out of the service fee account. Work for an HSTA-endorsed candidate would be funded out of the M account while work involved in the selection of candidates to be endorsed by HSTA would be funded out of the service fee account. The line between "political" and "legislative" work is drawn on the basis of a "judgment call," according to Radcliffe. Legislative matters, of course, become entwined with political matters to the extent that HSTA endorses candidates on the basis of their position on issues. To make the proper allocation of expenses in situations where there is no clear delineation, HSTA decides what is "pervasive" in a given activity, the "political" or "legislative" factor. Tr. 2/5/79, pp. 44-45; Tr. 3/12/79, pp. 49-55, 60-65.

Examples of political activity engaged in by HSTA include: a meeting with other Hawaii unions on the possibility of a collective approach on the part of the unions to Con-Con proposals; intra-union actions to find candidates for Con-Con sympathetic to HSTA; plans for providing office resources to HSTA-endorsed political candidates; and the dissemination of general information to possible Con-Con candidates and other information regarding fringe benefits

and leaves of absence for Con-Con delegates. Complainants' Ex. 13.

The testimony of Radcliffe was that these activities were charged to service fees (Tr. 3/12/79, pp. 55-65), though as to the provision of office resources to endorsed candidates there was some uncertainty as to whether it was an expense charged to service fees or the M account. Tr. 3/12/79, pp. 60-61; Tr. 4/23/79, p. 62. Mrs. Kakesako and Radcliffe testified that the actual use of office resources by endorsed candidates was minimal and entailed little or no additional expenses to service fees. Tr. 4/23/79, pp. 61-63.

The expenses for the dictation, typing, copying and mailing costs of the memos related to the other activities besides aiding endorsed candidates just mentioned were charged to service fees. Tr. 3/12/79, pp. 67-83.

Respondents submitted evidence which showed that unused compensation time (comp time) put in by professional staff covered the time spent in Goal-Objective areas II-2, II-4, and III-4. Tr. 4/23/79, pp. 21-26. Respondents' Exs. 7, 8. That is, monies that would cover salaries earned for the comp time would more than cover professional staff time spent on the three areas. However, staff do not restrict themselves to non-service fee work during comp time hours, and so the possibility remains that political work was done on service fee time. Tr. 4/23/79, p. 80.

The HSTA "Balance Sheet" for fiscal year 1977-78 contained on the last page of the January 1979 issue of the Teacher Advocate shows a \$39,049 insurance "experience rating refund" to the M account from the membership-only group life insurance program. Tr. 2/5/79, pp. 132-135. Mrs. Kakesako

testified that advertising and communications expenses connected with the insurance plan, such as ads in the Teacher Advocate, are drawn from non-service fee sources. Tr. 2/5/79, p. 136. She attributed the large sum of the rebate to the fact that the amount of the rebate is inversely proportional to teachers' mortality rate. In this instance, the rebate was large because of a low mortality rate among teachers. Tr. 4/23/79, pp. 53-54. Complainants questioned whether any proportion of this rebate was attributable to service fee spending but the record contains no evidence to refute Respondent's testimony.

The Balance Sheet also shows \$7,727 credited to the M account from advertising revenue. Testimony indicated that that income was derived from ads in the Teacher Advocate and the members-only special services bulletin. Tr. 2/5/79, p. 143. HSTA employs a full-time special services coordinator; most of this revenue was generated out of the special services program, which is funded out of the M account. Tr. 2/5/79, pp. 143-144. Complainants also questioned whether any proportion of this income was attributable to service fee spending but the record contains no evidence to refute Respondent's testimony.

#### CONCLUSIONS OF LAW

Complainants have charged that HSTA has failed to comply with Section 89-4, HRS, in that HSTA has taken a service fee which amounts to more than the Complainants' pro rata share of the cost of collective bargaining, contract administration, and grievance adjustments, and in doing so, has violated Section 89-3 and Subsection 89-13(b)(1) and (4), HRS.



Section 89-3, HRS, provides:

[§89-3] Rights of employees. Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except to the extent of making such payment of service fees to an exclusive representative as provided in section 89-4.

Section 89-4, HRS, provides:

[§89-4] Payroll deductions. (a) The employer shall, upon receiving from an exclusive representative a written statement which specifies an amount of reasonable service fees necessary to defray the costs for its services rendered in negotiating and administering an agreement and computed on a pro rata basis among all employees within its appropriate bargaining unit, deduct from the payroll of every employee in the appropriate bargaining unit the amount of service fees and remit the amount to the exclusive representative. A deduction permitted by this section, as determined by the board to be reasonable, shall extend to any employee organization chosen as the exclusive representative of an appropriate bargaining unit. If an employee organization is no longer the exclusive representative of the appropriate bargaining unit, the deduction shall terminate.

Subsection 89-13(b)(1) and (4), HRS, provide:

[§89-13] Prohibited practices; evidence of bad faith. (b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

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

The Board in Decision 94 expounded upon the line between permissible and impermissible "political" uses of service fees as follows:

This Board believes that the statutory phrase "negotiating and administering an agreement" is used as a term of art to describe a complex, comprehensive ongoing process of union representation of all employees in the bargaining unit. The phrase embraces activities which go beyond, but are reasonably related to, direct across the table negotiations and grievance processing. Such activities, at minimum, include all of the statutory representational duties imposed on exclusive representatives by Subsections 89-9(a) [negotiations], 89-9(c) [consultation on employment matters including those which may be nonnegotiable under 89-9(d)], and 89-8(a), HRS.

Subsection 89-9(a) imposes upon the union as well as the employer the responsibility to negotiate agreements:

(a) The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process, and shall negotiate in good faith with respect to wages, hours, and other terms and conditions of employment which are subject to negotiations under this chapter and which are to be embodied in a written agreement, or any question arising thereunder, but such obligation does not compel either party to agree to a proposal or make a concession.

Subsection 89-9(c), HRS, requires consultation between the employer and the exclusive representatives on "all matters affecting employee relations":

(c) Except as otherwise provided herein, all matters affecting employee relations, including those that are, or may be, the subject of a regulation promulgated by the employer or any personnel director, are subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with the exclusive representatives prior to effecting changes in any major policy affecting employee relations.

This Board has held that even though a matter may be nonnegotiable because of the provisions of Subsection 89-9(d), it still may be one which requires consultation with the union under Subsection 89-9(c), HRS. Decision 74.

Subsection 89-8(a), HRS, imposes a duty upon the union to negotiate agreements for all the employees in a unit and to act for them and to represent their interests:

(a) The employee organization which has been certified by the board as representing

the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.

It is this Board's opinion that the statutory intent is that the service fee collected should be used to support the exclusive representative in all of the representational activities imposed by Chapter 89, HRS.

Not all money spent by a union may be charged to service fees. Subsection 89-4(a), HRS, requires this Board to draw an allocative line between costs related to the representational process tersely outlined in Subsections 89-8(a), 89-9(a) and 89-9(c).

As this Board stated in Decision 78:

We continue to follow the rationale expressed in HPERB Decision No. 7, as affirmed in memorandum opinion form in Naud v. Amioka, Civil No. 35588 (January 24, 1972):

" . . . [O]ur Legislature apparently sought to equate the service fee to benefits derived and received from the collective bargaining representation efforts and services of the exclusive agent. Since the service fee as so determined is equally assessable against the union member as well as the non-union member in the bargaining unit, it would appear almost conclusive that our Legislature, by the deliberate choice of this criteria, intended to exclude from the computation of such service fee, the costs attributable to the internal, institutional activities of the union which are of little or no benefit to the non-member or not made available to him. There is an attempt, however inartistic and clumsy, to distinguish between 'benefits from collective bargaining services' as against 'union membership benefits,' and to exclude the latter. This segregation of 'union membership benefits' is what the statutory term of 'reasonableness' also seeks to achieve. These union membership benefits are usually deemed to refer to contributions to a political party, candidate or incumbent, initiation fees, special assessments, membership drive costs, retirement and other fringe benefits costs, costs of

educational, social, recreational and fraternal benefits and activities, financial, medical and legal assistance and service. It is conceded that costs of such membership benefits and activities, in a large sense and broad perspective, contribute to the growth and strength of the union as an organization to render it a more effective bargaining representative. This, too, the Legislature must have known, but it has nonetheless required that an allocative line be drawn. This Board must attempt to draw that line.

In the final analysis, this almost impossible task of allocation can be best approached and undertaken by a process of exclusion of so-called 'union membership benefit' costs from the total costs of operations as the statutory language seems to suggest. The approach suggested by the AFT of limiting allowable costs to direct-contact negotiations and bargaining must therefore be refused. We view the words 'negotiating and administering an agreement' as a term of art which generally encompasses the entire collective bargaining and representation activities of the representative with the employer, including all preliminary planning, preparation, training, budgeting and organizational efforts and 'tooling up' process related to a negotiating contract and administering the same after its consummation. It virtually amounts to a residuum of the union's total activities after the 'union membership benefits' have been isolated and removed. This is the 'fair share' of the collective bargaining costs to be reflected in the service fee." (Emphasis added in original quote) .1 HPERB 708-709.

The evidence on the record herein clearly establishes that HSTA made expenditures out of service fees during the subject period in program areas clearly outside the scope of permissible service fee expenditures. Goal II, Objective 2 of both the 1977-78 and 1978-79 Program Budgets, "To Develop and Maintain a Grass-Roots Political Apparatus Which Includes a Precinct Level Organization," do not reasonably relate to the process of contract negotiation and administration so as

to be properly charged to service fees. Testimony showed activities under this Goal and Objective in the 1978-79 Program Budget were substantially similar to activities under the same Goal and Objective in the 1977-78 Program Budget. These activities are clearly of a partisan political nature, judging from the projects listed under the objective areas. Activity under this objective, while connected to the bargaining process, is clearly of such a political character as to fall on the wrong side of the allocative line between allowable and non-allowable charges against service fees. See also SF-05-58, Tr. 7/14/78, pp. 169-172.

Improper service fee expenditures under Goal II, Objective 4, of both the 1977-78 and 1978-79 Program Budgets, "To Elect to Public Office Those Who Have Proven or Stand to Prove That They Support the Goals and Objectives of HSTA," have occurred during the subject period. This Goal and Objective, by its own terms and as reflected again in the items listed under the Objective, is clearly a partisan political objective and as such an improper expenditure against service fees. Again, while there is some connection here with contract negotiation and administration, the objective is obviously political. See also SF-05-58, Tr. 7/14/78, pp. 174-176; Tr. 9/19/78, pp. 7-72. This objective under the 1977-78 Program Budget differed from the same objective under the 1978-79 Program Budget in ways noted in the findings of fact; i.e., during fiscal 1977-78, Con-Con delegate selection was a major concern under this objective, whereas in fiscal 1978-79 legislative elections were the central concern. However, work to elect preferred candidates to Con-Con is as much an improper political objective as is

work to elect legislative candidates when charged against service fees.

It follows that the use of service fees to support the political work discussed in the findings of fact such as candidate searches, and the provision of office resources to endorsed candidates is improper. Such activity is not related to the working conditions or working environment of teachers in the manner that matters relating to collective bargaining, negotiations, or management-employee relations are, and so is an improper charge against service fees.

Improper service fee expenditures under Goal III, Objective 4, of both the 1977-78 and 1978-79 Program Budgets, "To Increase the Membership," have occurred during the subject period. The activities under this objective for both fiscal years were substantially similar. Membership recruitment is an improper charge against service fees. Though a union has the responsibility of giving employees an opportunity to make an informed decision as to whether to join it and to make information about it available, the activity under this objective crosses the line between informational activity and recruitment. The activities listed under the Objective in both Program Budgets liberally mention activities related to recruitment. While the budgets are not a certain indication of actual expenditures in a given area, the recurrence of recruitment-related activities in the program budgets clearly indicates that more than information-giving occurred. See also SF-05-58, Tr. 7/14/78, p. 182.

Goal VI, Objective 1, of both the 1977-78 and 1978-79 Program Budgets, "To Take Positions on the Issues of the Day," by its own terms does not bear a reasonable

relationship to contract negotiations and administration. Expenditures under this objective were not transferred out of the service fee account along with the three other program objectives deemed disallowable as service fee expenditures in Decision 94 as HSTA felt the program funded under this objective, the violence and vandalism program in the schools, is non-political in nature and has a clear connection with working conditions of teachers and to contract negotiations and administration. As transferred to Goal I, "Economic and Professional Security for the Members of the Bargaining Unit," the costs of the program are a proper charge against service fees. The record lacks any evidence which might show other charges besides staff time for attending the Japanese labor symposium against service fees under Goal VI which might be found to be improper. Decision 94 invalidates the Goal Objective itself as a service fee expenditure but not the actual activities undertaken during the period relevant herein.

Other items in HSTA's program budgets bear a reasonable relationship to contract negotiation and administration and are, therefore, proper expenditures against service fees.

HSTA improperly expended service fee monies to provide copies of the Teacher Advocate to associate members and retirees who do not pay service fees. In doing so, HSTA is paying for membership benefits out of service fees.

The coverage in the Teacher Advocate concerning the Political Action Committee is a proper service fee charge. The front page article in the January 1979 issue along with the accompanying list of PAC members is informational and not a political endorsement.

The coverage in the Teacher Advocate on political elections is likewise a proper charge against service fees. The October 1978 issue with the front page article, with the accompanying list of endorsed candidates, entitled "Make the Difference on Oct. 7" discussing PAC-endorsed candidates, and the November 1978 issue list of endorsed candidates pertaining to the coming general election are proper as communications to the readership of HSTA political endorsements, as distinguished from endorsements as such. The September, October, and November 1978 issues' editorial comment by Radcliffe and then President Nagaué containing statements urging readers to vote for HSTA's endorsed gubernatorial candidates are clearly personal opinions in the nature of editorial comment and are distinguishable from formal union endorsement. As such, they are not improper charges against service fees. As noted in the findings of fact, opportunity for similar comment has been offered to readers on the editorial page.

The December 1978 issue containing the front page photo of Governor Ariyoshi and Lieutenant Governor King, with the accompanying article entitled "90%+ of HSTA Endorsed Candidates Succeed," and page 3 of the same issue containing campaign photos and the list of HSTA-endorsed election winners are proper charges against service fees on the basis that they are communications of political news to the readership.

The boxed article on the right margin of page 3 of the September 1978 issue containing the message phrased in persuasive terms urging teachers to "heed the HSTA endorsement of candidates and work together as one unit to help them get elected" crosses the line between the communication of an



endorsement and actual political campaigning and thus is an improper charge against service fees. The same is true of the article on pages 4 and 5 of the November 1978 issue, containing a spread of photos with accompanying captions relating to HSTA campaign workers holding signs and engaging in other campaign activity. The article ending with the exhortation, "Together we made the difference on October 7 -- now we have to continue to push for the HSTA-endorsed candidates in the General Election on November 7 -- the race isn't over yet,!" amounts to more than the communication of endorsements and so is an improper charge against service fees. If these urgings to vote were general exhortations to be politically active, they could be supported by service fees; however, the exhortations are clearly to become active on behalf of HSTA-endorsed candidates and as such are political endorsements, non-chargeable to service fees.

The other politically-related articles noted in the findings of fact, i.e., those dealing with the NEA convention, further editorial comment by HSTA officers, legislative and negotiations updates, editorial comment on the Equal Rights Amendment, an article on the effect on employee benefits of teachers running for Con-Con, general information about Con-Con, announcements of Con-Con election results, the column entitled "Know Your Rights" relating to employee rights under the Unit 5 contract, an announcement of the HSTA annual convention, activities of NEA, and an announcement of HSTA officer election results are political in subject matter, but none amount to political endorsements of HSTA on election matters, and all reasonably relate to contract negotiations and administration, working conditions of

teachers, public education policy, and union governance. The costs of these articles are thus proper charges against service fees.

Complainants submitted numerous HSTA documents in regard to legislative and Con-Con lobbying and thoroughly questioned Radcliffe about them and related activities. Because the matters lobbied on have a direct relation to working conditions, whether or not they are matters negotiable under Section 89-9(d), HRS, and are not social issues of general interest only, the lobbying activity is a proper charge against service fees. Decision 92. (Although a letter from Radcliffe to a Con-Con delegate submitted as Complainants' Ex. 12, p. 3, indicates that HSTA took a position in favor of initiative-referendum-and-recall, HSTA refrained from lobbying on the subject because of its tenuous relation to teachers' working conditions.)

Counsel for Complainants questioned Radcliffe about his testimony concerning two proposals which would have transferred the power to appoint the Superintendent of Education from the Board of Education to the Governor, and abolished the Board of Education, asking him how the proposals tied in with teachers' working conditions:

Q Page 10. What's this one about, 476 -- Proposal 476?

A Well, what this would do, this was a bill which would take away from the Board of Education the ability to appoint the Superintendent of Education. Instead, the Governor would appoint the Superintendent upon advice and consent of the Senate.

Again, consonent [sic] with our philosophy that a strong Board of Education is in the best interest of teachers, we opposed this bill. It's our position that the Superintendent of Education ought to work for the Board. If the Board is unhappy with that, they should be able to fire that

superintendent. Hire themselves a new superintendent.

Q Tie that in, if you would, to terms and conditions of teachers employment?

A In a general way, it has to be in a general way as opposed to a specific, the Board of Education is oftentimes the odd body out when it comes to power politics in the State of Hawaii. In our view, they are much truncated in their ability to pursue their programs. So, we have taken a consistent policy that the Board of Education should have more to do.

There is only two ways to go with that, Mr. Fonseca. One is to abolish the Board of Education as an entity whatsoever, or to give it more power to allow it to do its job. As it stood, Proposal 476, had it passed and become a part of the constitution, the powers of the Board of Education would have been even more severely eroded than they are now.

Q I understand your policy. I might even agree with it. But, could you direct your response to my question. How does it tie into the terms and conditions of teachers employment.

A I told you.

Q Maybe I -- try me again.

A All right. It's our position that a strong, cohesive Board of Education is in the best interests of our people, in terms of collective bargaining, in terms of the conditions of employment.

Q That you'll be able to procure better terms and conditions?

A Yes.

Tr. 3/12/79, pp. 96-98.

Q Twenty-one seems to be going into something different. Can you give us a feel of what that's all about? Proposal No. 329.

A This would have set the Superintendent up as the sort of dictator in the school system.

Q Could you be more specific please?

A Yes. It would have done away with the Board and put the power for the school system in the hands of the Superintendent. It would have made him into a very strong individual subject only to the Governor.

Q You felt that this would not be conducive to the best bargaining for terms and conditions of the best employment?

A That's right.

Tr. 3/12/78, p. 102.

As these exchanges indicate, HSTA was able to tie in the matters on which it lobbied at Con-Con with working conditions of teachers.

The record as to HSTA's legislative lobbying efforts also indicates that HSTA did not cross the bounds of permissible uses of service fees. The letter sent by Radcliffe to all members of the Legislature in 1979 laying out HSTA's legislative goals and positions entailed valid charges against service fees. Complainants' Ex. 14, pp. 1-3. These positions, as stated in the findings of fact, were: (1) support of the 1979-81 budget request of the Superintendent of Education; (2) funding of the public employee wage agreements; (3) continuous 50% funding by the State for Health Fund premiums; (4) establishment of a dental insurance program for State employees; (5) allowance of early retirement for teachers; and (6) amendment of Chapter 89, HRS. Accompanying the letter as stated in the findings of fact is a one page summary of HSTA positions in various areas of concern to teachers. All areas are related to teachers' working conditions, except the last three items, which are best characterized as issues of general concern: "economy," "environment," and "governmental services." Uncontradicted testimony was that HSTA did not lobby on these items, due to time and resource constraints. Because HSTA

lobbied only on matters related to teachers' working conditions, matters encompassed in this letter constitute valid charges against service fees.

Legislative testimonies of HSTA were all in areas directly related to working conditions. Complainants' Ex. 14, pp. 4-17. Following are passages from hearing transcripts dealing with various subjects on which HSTA lobbied and their connection with teachers' working conditions, as established by John Radcliffe on questioning by counsel for Complainants.

On a bill for a per diem allotment for Board of Education members:

Q Let's go over some of the specific testimony that you or Mr. Nakano did give, starting on page 4.

On page 4, we have a bill labeled "S.B. 113, S.D. 1". I take it that means Senate Draft 1 of that particular bill. What is this bill all about?

A Per diem allotment for Board members.

Q How does your supporting the reimbursement to Board members relate to terms and conditions of teacher employment?

A I think it does the same way it does when I go before, as I did, the recent legislative commission on legislative pay raises and I encourage that commission to come down with 88.3 percent pay increase for legislators.

Q Would you answer my question?

A I am going to answer your question this way.

Q Uh-huh.

A If we can get improvements for them, it's harder for them to argue we don't deserve improvements.

Tr. 3/12/79, p. 116.

On funding for the "Rice and Roses" program:

Q (By Mr. Fonseca) Page 5, please. This is support for funding for the "Rice and Roses" program?

A Yes, it is.

Q You feel that funding for the "Rice and Roses" program -- I take it, a portion or all of "Rice and Roses" is funded through State money, is that correct?

A I don't know how the channel, KHET, handles it because, as you know, it's a voluntary public kind of a news -- television station. But, they do get a grant-in-aid from the State to underwrite the cost of "Rice and Roses". I'm not sure, Mr. Fonseca, if it underwrites a hundred percent of it.

Q How does this tie into terms and conditions of teacher employment?

A I'm glad you asked that question.

Q You would be. Would you like to respond to that?

A You, apparently, have missed the academy award caliber presentation, "HSTA, A Portrait of a Democratic Union." It will be on again, so, you will have an opportunity to look at it. It's a half an hour show which portrays [sic] our organization as being just a splendid operation. It's thirty minutes in color, and if we had to pay for that to get the kind of publicity for ourselves, to get through to State government what wonderful, deserving people teachers are because of the HSTA, we would never be able to do it. So, it was dynamite use of money.

Q Basically, it supports HSTA, not teachers as a group, doesn't it?

A We discussed before, but I think the difference is --

Q Just for the record, again, what was that?

A You had your briefs on it.

Q You see very little difference between the HSTA and the teachers they represent, is that correct?

A It's been our position that, you know, specific aspects of Decision 94 to one side,

that if the HSTA is a strong, useful organization, if it does its job, that will definitely come back to benefit the individual Bargaining Unit 5 member.

Q And you support bills like 2130, for "Rice and Roses", because you think that will help make HSTA strong?

A Yes, sir.

Tr. 3/12/79, pp. 117-118.

On implementation of school health service programs:

Q Seven, school health services. This, I take it, is not health services for the teachers, or is it for the teachers or students, or both?

A This is for students.

Q For students?

A Yes.

Q How do you relate this to the terms and condition of teacher employment?

A If you have good, healthy kids, it makes teaching a little easier than if he's sick.

Tr. 3/12/79, pp. 119-120.

On a resolution concerning programs for "gifted children":

Q This appears to be another curriculum proposal. What is it, specifically?

A This is a resolution, as opposed to a bill. What it would do would be to direct, in resolution form, the Department -- or request the Department of Education to establish some standards on how to identify gifted and talented youngsters. They did that. We now have some standards for doing that, and youngsters are being tested.

We think, again, that this is a significant group of youngsters who, if not properly educated and taken care of, tend to be very severe problems for teachers. You find that many of your truants, and your school skipper, and discipline problems, enormous percentage of those are actually gifted children.

When properly tested, and once you can test them and place them in programs where they can proceed at a rate which is satisfactory to them, the problems disappear. So, it has a direct effect on working conditions.

Tr. 3/12/79, p. 123.

On school curriculum:

Q And, finally, efforts on proposals with regard to school curriculum?

A We testified on that.

Q Forms a significant portion of your lobbying efforts?

A Books -- we go in there every year and ask for more books. We think that that's got something to do with working conditions. We go in every year and we talk about leaky roofs, paint on the outside of the buildings. We think that has something to do with working conditions as well.

Tr. 3/12/79, p. 125.

Finally, as to general social issues:

Q I take it -- did you get involved in, for example, abortion discussions with the legislators during the current session?

A Absolutely not. In fact, that's the one question that never came up. That's odd.

Q How about death penalty?

A No..

Q Nobody's ever raised that? How about population control?

A No. We testified and talked about -- talked to legislators about the homosexual bills that were up, because it has some implications for the schools. Generally not.

Q What about generally not?

A I mean, we have not talked about abortion. We have not talked about the death penalty or any of that kind of



stuff. It's never come up in a conversation with any HSTA lobbyist this year or last year or any year, that I'm aware of, where we were called in to talk about those kinds of situations, or even in passing, that we've talked about those kinds of issues.

Tr. 3/12/79, p. 127.

These exchanges indicate that HSTA's lobbying efforts have been confined to areas directly related to teachers' working conditions. Expenditures for lobbying purposes out of service fees have thus been proper.

Willfulness. Complainants allege that HSTA has violated Sections 89-3 and 89-4, HRS, and that these alleged violations constitute prohibited practices under Subsection 89-13(b)(1) and (4), HRS.

Complainants' burden of finding a willful violation under Subsection 89-13(b) was noted by the Board in Order 190. Complainants have failed to carry this burden. Complainants questioned HSTA regarding willfulness only in respect to membership recruitment activities and activities related to partisan politics in general under Goal activities II-2 and II-4 of the program budgets. Complainants did not establish willfulness in relation to other activities either general or specific. Furthermore, it is difficult to infer from circumstances willful violations in the instances where HSTA did make improper service fee expenditures, given the unsettled nature of decisional authority and the fact that the law itself offered only minimal guidance as to proper conduct in the instant matter.

While Complainants have demonstrated that expenditures of service fee monies for improper "political" purposes have occurred during the subject period, the lack of proof

that such expenditures have been undertaken in willful violation of Chapter 89, HRS, or of Board decisions necessitates that the Board find that no prohibited practices have been committed by HSTA during the subject period.

The only authority HSTA could rely on as to the permissible use of service fees in the public sector, during the subject period, which adequately or definitively sets out the boundaries of service fee expenditures on HSTA basic program budget items or comparable items is Decision 94, issued November 8, 1978, which is a little more than a year after the statutory period in the instant matter began to run. Prior to this time, HSTA was operating only on the basis of general Board statements and the Abood decision, prohibiting, in general terms, the use by public sector unions of service fees to finance ideological activities unrelated to collective bargaining, while at the same time recognizing that other types of political or lobbying activity could fall under the term "collective bargaining."

In regard to Abood, the Board noted in Decision 78:

To the extent that the decisions in Abood v. Detroit Board of Education, U.S. \_\_\_\_\_, 45 U.S.L.W. 4473 (May 23, 1977) and Int'l. Association of Machinists v. Street, 367 U.S. 740 (1961), have delineated certain expenses which cannot properly be attributed to the costs of collective bargaining, they are of some value to the Board. The Abood case is the first U.S. Supreme Court decision involving the agency shop fee in the public sector. Unfortunately, it provides only limited assistance in the overall task of determining proper charges against service fees because, due to the absence of a factual record in that case, the Court dealt only with the impermissibility of using service fee revenues to make political contributions and to express political views unrelated to the union's duties as exclusive representative:

We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or towards the advancement of other ideological causes not germane to its duties as collective bargaining representative [footnote omitted]. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment. 45 U.S.L.W. at 4480.

In fact, the Court specifically pointed out that it had had no occasion to deal with the question of "what specific union activities in the present context properly fall under the definition of collective bargaining," 45 U.S.L.W. at 4480. See also *Id.*, note 33; *Int'l. Association of Machinists v. Street*, *supra*, at 769. (Emphasis added) 1 HPERB 707-708.

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. . . It might also be noted that, although the question of legislative lobbying expenses was not decided in *Abood*, *supra*, the Supreme Court did recongize [sic] the likelihood of differences between private and public sector political expenditures:

There will, of course, be difficult problems in drawing lines between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited [footnote omitted]. The Court held in *Street*, as a matter of statutory construction, that a similar line must be drawn under the Railway Labor Act, but in the public sector the line may be somewhat hazier. The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process. We have no occasion in this case, however, to try to define such a dividing line. 45 U.S.L.W. 4480. 1 HPERB 710.

Abood gives the union only the outlines of permissible expenditures, and these outlines were not to be filled in to any appreciable extent until Decision 94's issuance.

Section 89-4, limiting the use of service fees to the costs incurred in "negotiating and administering an agreement," of course predates the commencement of the statutory period relevant to the charges herein, and Respondent is presumed to "know the law," under the basic legal dictate. Though the Board recognizes that dictate, it does not hold HSTA responsible to know the interpretation of the law before such interpretation occurs. Even noting HSTA's obligation to know the provisions of the law -- in this case Chapter 89 -- it has not been demonstrated that HSTA has not attempted good faith compliance with it. The evidence, in fact, shows that such attempts were made. The possibility of willful violations of the law, in these circumstances, is barely within the scope of consideration.

Decision 94, standing by itself, of course cannot be the basis for the finding of prohibited practices. Though certain program budget items at issue herein were ruled disallowable charges against service fees in that case, the decision postdated many of HSTA's activities at issue herein. Moreover, the burden of proof in the service fee case was on Petitioner HSTA to demonstrate the reasonableness of its requested service fee while in the instant case the burden is on Complainants to prove that the prohibited practices in fact occurred. Decision 7; HPERB Rule 1.08(g)(23). The Board now concludes, upon consideration of the evidence, much of which was submitted in the proceedings leading to Decision 94, that no prohibited practices occurred.

Though Decision 94 was the first substantive guide HSTA has had regarding matters now at issue, precedents do

exist, as previously noted, as to the general boundaries of proper service fee spending, and the question is raised as to whether HSTA willfully violated such precedents, to the extent that such is possible. Decision 7 prohibits charging "union membership benefits," including costs of "membership drive costs," and "ordinary political expenditures" or costs of "general political activity" to service fees as follows:

. . .our Legislature apparently sought to equate the service fee to benefits derived and received from the collective bargaining representation efforts and services of the exclusive agent. Since the service fee as so determined is equally assessable against the union member as well as the non-union member in the bargaining unit, it would appear almost conclusive that our Legislature, by the deliberate choice of this criteria, intended to exclude from the computation of such service fee, the costs attributable to the internal, institutional activities of the union which are of little or no benefit to the non-member or not made available to him. There is an attempt, however inartistic and clumsy, to distinguish between "benefits from collective bargaining services" as against "union membership benefits", and to exclude the latter. This segregation of "union membership benefits" is what the statutory term of "reasonableness" also seeks to achieve. These union membership benefits are usually deemed to refer to contributions to a political party, candidate or incumbent, initiation fees, special assessments, membership drive costs, retirement and other fringe benefit costs, costs of educational, social, recreational and fraternal benefits and activities, financial, medical and legal assistance and service. It is conceded that costs of such membership benefits and activities, in a large sense and broad perspective, contribute to the growth and strength of the union as an organization to render it a more effective bargaining representative. This, too, the Legislature must have known, but it has nonetheless required that an allocative line be drawn. This Board must attempt to draw that line.

In the final analysis, this almost impossible task of allocation can be best approached and undertaken by a process of exclusion of so-called "union membership benefit" costs from the total costs of

operations as the statutory language seems to suggest. The approach suggested by the AFT of limiting allowable costs to direct-contact negotiations and bargaining must therefore be refused. We view the words "negotiating and administering an agreement" as a term of art which generally encompasses the entire collective bargaining and representation activities of the representative with the employer, including all preliminary planning, preparation, training, budgeting and organizational efforts and "tooling up" process related to a negotiating contract and administering the same after its consummation. It virtually amounts to a residuum of the union's total activities after the "union membership benefits" have been isolated and removed. This is the "fair share" of the collective bargaining costs to be reflected in the service fee. 1 HPERB 34-35.

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5. Political Activities. Section 89-10 of the PERA requires that "all cost items shall be subject to appropriations by the appropriate legislative bodies". Thus, political activity directed toward such legislative bodies to secure ultimate realization of the fruits of its bargaining must definitely be considered part of the progress of contract negotiations under our law. Thus, the usual sanctions against inclusion of political activity costs in service fee negotiated in the private sector as enunciated by the Street and Allen cases (International Association of Machinists v. Street (1961) 367 U.S. 740; Brotherhood of Railway Clerks v. Allen (1963) 373 U.S. 113) should have no significant impact in the public sector (see Jay W. Waks--"Impact of the Agency Shop on Labor Relations in the Public Sector", 55 Cornell Law Review 574 at 583). The public sector union is much more politically oriented in makeup and activity than the private sector union and our Legislature has so recognized. Thus, the problem again imposes the difficulty and burdens of proper allocation, and it will become incumbent upon the union to characterize and distinguish its legislative efforts toward securing contract ratification as against ordinary political expenditures of contributing to political parties, candidates or of general political activity. 1 HPERB 36.

Decision 69 states in its conclusions of law:

Based on the evidence presented during the hearing on this matter, the Board finds that the expenditures being made or intended to be made by the HSTA from service fees are proper under the provisions of HRS Sec. 89-4(a). Service fee monies are not being used for expenses which do not relate to collective bargaining, e.g., organizational and political action purposes, or which are for the benefit of members only. Such expenses are paid for from the separate membership account. (Emphasis added)

These decisions lay out the basic parameters setting "political" and "union membership benefit" expenses as off-limits to service fee expenditures. (See also Decisions 72 and 78, in which \$2,500 items earmarked by HGEA for "organizing non-union members" were disallowed as charges against service fees without discussion.) The Board concludes that HSTA attempted in good faith to comply with these parameters and that no willful violation of them occurred.

Mrs. Kakesako, whose duty it was during the subject period to allocate expenditures between the general and membership accounts, testified as follows as to her state of mind relevant to acts under consideration herein:

Q Mr. Gill somewhat summed up by asking you whether you knew any of the expenditures to be impermissible in light of earlier decisions of this Board.

Were you, when you carried out and budgeted the expenditures from '78 through '79, were you not aware that efforts to increase union membership was not a permissible use of services?

A I think that's an area that has always been grey, if I can say so. We have had that all along.

We've never really put dollars to production of materials and things. It's been largely staff time, and as I said earlier, the staff time is largely planning and training and this type of activity, rather than going up and signing each one, each member directly.

Q Perhaps I can shorten your answer then.

Were you, at the time we are talking about, your preparation of the budgets in question, were you or were you not aware that HPERB had specifically forbidden the use of service fee monies for membership purposes in at least one prior STA [sic] proceeding?

A Well, for membership drive purposes, but we were not holding a membership drive per se.

And also, we have always stated -- I have always stated that I felt that a strong unit was necessary for us to operate, and whatever was necessary for a strong unit, unless specifically --

Q I understand; then perhaps would it be accurate to rephrase somewhat of the colloquy between yourself and Mr. Gill by saying that you did not knowingly make expenditures which you knew to be impermissible, but there were some grey areas and you were aware that you were involved in expenditures which entailed some grey areas?

A It may have been, because those that I knew the purchasing of membership forms were never in question and they were always membership expenditures.

Tr. 4/23/79, pp. 67-69.

This exchange indicates that Mrs. Kakesako was aware that "membership drive" expenses could not be charged to service fees but that a "grey area" existed in her mind as to the location of the allocative line between proper and improper service fee spending in the membership area beyond that. This conclusion is supported by the fact that, at the time the case leading to Decision 7 was being heard, a rival union was attempting to gain representational rights over Unit 5. Tr. 4/23/79, p. 82; Tr. 3/12/79, p. 35. Thus, it is reasonable that Mrs. Kakesako, though she did not specifically recall Decision 7 but knew that "membership drive" costs were not allowable charges against service fees, might assume that efforts such as planning and training activities and



other activities unrelated to a campaign against a rival union were an allowable charge against service fees. Her statement regarding "grey areas" indicates she had doubt as to the limits of permissible spending. A careful reading of the transcript indicates that Mrs. Kakesako never authorized service fee spending in the membership area that she, in fact, regarded as chargeable only to the M account. Her impression was that only activities under Goal III, Objective 3, on the Program Budgets, "To Provide the United Teaching Profession with Membership Services," and the aforementioned membership drive costs, were chargeable to the M account, and that recruitment activity under Goal III, Objective 4, "To Increase Membership" (as distinguished from campaign activities against a rival union), was chargeable to service fees. Her comments throughout the transcripts are consistent with this impression, as these exchanges between her and Complainants' counsel show:

Q No, that's the Radcliffe's individual activity record. [i.e., Complainants' Ex. 3, regarding activities under Goal III, Objective 3, Subobjective 3.1]

A Oh, okay, okay, sequential.

Q Sequential activity record.

I think you testified earlier that you produced this Petitioner's Exhibit 3 for Radcliffe in response to the subpoena, and you only produced the one for certain functions. In other words, for Goal III?

A Yes.

Q Is that right?

A Yes, sir.

Q The reason that you only produced it for Goal III was what?

A Because it would be covered by membership and it's a different budget.

Q So, would it be your testimony now, that if Mr. Radcliffe spent any time on Goal II, Roman Numeral two, that that would be out of service fees?

A At that time, everything else outside of three was service fee.

Q That's for fiscal year ending June 30, 1978?

A Yes.

Tr. 2/5/79, p. 120. (Emphasis added)

An ambiguity arises within this excerpt as to whether Mrs. Kakesako meant to say, when she referred to "three," that she regarded all of Goal III as under the M account, or Goal III, Objective 3-- which is the more limited area covered by the exhibit being discussed in the excerpt. This ambiguity is dispelled in three other passages in the transcript:

Q What is Roman Numeral three in the Association's program budget?

A An independent united teaching association -- or profession -- organization. An independent united teaching organization. Goal III. It's our third goal.

Q Okay. Was Petitioner's Exhibit 3 the only individual sequential activity record which you prepared for Mr. Radcliffe?

A Yes, it was.

Q Well, now, given that Mr. Radcliffe is the executive director of HSTA, presumably responsible for just about everything that goes on, in one way or another, could you explain to the Board why it is there is no individual sequential activity record for Mr. Radcliffe, at least none that was produced for our review, covering anything other than certain sections of Goal III, when there were actually, I think, six discreet areas, Goal No. III not representing even half of the total budget. Perhaps, a quarter of the total budget of the Association?

A Oh, certainly. We actually did it because of the Association's trying to carry out the directives of HPERB.

The budget -- Mr. Radcliffe's role in this case is a little different. I don't know if you noticed that this, under Goal Area III, 3.1 is -- and all of the activities here are membership activities, and, therefore, under our membership budget.

If I had known this, I would have pulled it out. I didn't go through the materials. This has nothing to do with service fee, and the reason for it is that we, in planning Mr. Radcliffe's time, because he is the executive director and is responsible for the operation of the Association, he is classified as support. He is responsible for everything, so, his time was allocated and we -- let's see -- I'm just not sure of how many days at that time, but how much the percentage for membership was allocated, and the membership activities were broken down here. But, for the rest --

Q So, what you're saying is that his activities on Petitioner's 3 were -- this represents an allocation by you to the M fund?

A That's right, and whatever he reported as activities accomplished in the M fund were paid by the M fund. His service fee time was -- the balance of his work here, that's not allocated here, was put in administration. So, it does -- there was no sequential activity listed for Mr. Radcliffe.

Tr. 2/5/79, pp. 73-74. (Emphasis added)

But, if a Uniserv representative was working in the area of [Subobjective] 3.1, to provide special services --

Q For members only?

A For members only, yes, and he went out to a school and talked about only the membership programs, then, he would put 3.1, and that would then be paid from the membership fund.

Tr. 2/5/79, p. 129.

Q Of the items, Goals I through VI, all of the expenditures under those items come out of service fees with a single exception. Could you point that exception out to us?

A Goal III-3.

Q Goal III-3.

A Goal III, Objective 3.

Q What is that entitled?

A The membership services. Well, we follow the membership services. Let me look for the actual terminology to provide the United Teaching Profession with membership services.

Q So, for example, Goal III, Objective 4, is all paid out of service fees, one hundred percent?

A It was budgeted under that area.

Q And that would be true for the '77-78 budget that is in evidence, is that correct?

A For the '77-78 budget, yes.

Q For all prior budgets that you are aware of?

A Yes.

Q What about for the '78-79 budget that was under discussion during the service fee proceeding this summer?

A Yes, it was, and -- yes, it was.

Q We'll get, in a moment, to what has happened since then. I'm trying to establish, up through those proceedings, Goal III, Objective 4, was all charged to general account?

A Yes, sir.

Q Is that correct?

A Yes.

Tr. 3/12/79, pp. 13-14.

These exchanges indicate that Mrs. Kakesako regarded Goal III, Objective 3, as a membership activity chargeable to the M account, and that the charging of activities under Goal III, Objective 4, to service fees was done under a good faith impression that it was proper. Her actions and testimony are consistent and straightforward in this regard.

Mrs. Kakesako's beliefs as elicited at hearing as to impermissible service fee expenditures in the membership area square with Decision 7's prohibition regarding spending for "union membership benefit": HSTA and Mrs. Kakesako could reasonably infer that this phrase was congruent with Goal III, Objective 3, activities, involving HSTA/NEA special service programs, which are provided for union members only. Further, Mrs. Kakesako could infer that Goal III, Objective 4, activity was of benefit to all unit members and so supportable out of service fees on the belief that a strong union is a more effective union. Mrs. Kakesako stated, as previously quoted:

And also, we have always stated -- I have always stated that I felt that a strong unit was necessary for us to operate, and whatever was necessary for a strong unit, unless specifically --

Q I understand; then perhaps \* \* \* [etc.]

Tr. 4/23/79, p. 68. See also SF-05-58, Tr. 7/14/78, p. 243.

Mrs. Kakesako's incompleting thought clearly suggests that she regarded efforts to increase membership, as distinguished from efforts to gain representational rights, as working to the overall benefit of the unit and so a proper service fee charge, and that she operated on that belief until it was specifically ruled improper. See also Radcliffe testimony, SF-05-58, Tr. 7/14/78, p. 209; Tr. 9/19/78, p. 72. And the excerpts indicate that a distinction existed in Mrs. Kakesako's mind between a "membership drive per se" (Tr. 4/23/79, p. 68), such as was occurring at the time of Decision 7's rendering, and annual efforts to maintain membership. See also Radcliffe testimony, SF-05-58, Tr. 9/19/78, p. 88. Mrs. Kakesako's statement that efforts to increase union membership was a grey area; even viewed in a critical light, indicates a

lack of willful intent to violate the lawful limits of service fee spending.

The distinction is a somewhat fine one but it would appear that it was arrived at in good faith.

A All I can say is that it certainly was my intent to abide by the decision [Decision 7], and whatever allocations were made were made in that spirit.

It was never my intent to face a hearing where we would find ourselves having improper expenditures.

Q You didn't foresee Decision 94 perhaps at the time you were spending the money in '76, '77 and '78?

A I think we didn't have the basis perhaps in some areas. We had never been told--well, we had never proposed perhaps such activities.

We had never been told that they were not permissible, at least to my recollection.

Tr. 4/23/79, pp. 65-66.

Though Mrs. Kakesako's actions as HSTA accountant may have been undertaken in good faith, it might be charged that she was amiss in not making positive efforts to determine the limits of permissible spending, as this exchange might indicate:

Q I asked you on direct whether you were familiar with the membership drive court expense -- the fate of the membership drive expense category in Decision No. 7 concerning HSTA, and you indicated that you were not aware of that.

In setting up these budgets, did you make any attempt to determine in prior HSTA decisions before HPERB, or any other public employment union, whether or not funds expended for unionization were, in fact, legitimate service fee expenditures before allocating those to service fees?

A I did not do that.

Q Do you know if anybody did in HSTA?

A I don't know if anyone else did it.

Tr. 3/12/79, pp. 42-43.

While the foregoing might conceivably indicate a lack of total conscientiousness, the Board concludes that a willful violation of the law is not suggested. Black's Law Dictionary defines "willful" as follows:

Willful. Proceeding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary.

An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

Willful is a word of many meanings, its construction often influenced by its context. *Screws v. United States*, 325 U.S. 91, 101, 65 S.Ct. 1031, 1035, 89 L.Ed. 1495.

The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal context it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act. *United States v. Murdock*, 290 U.S. 389, 394, 395, 54 S.Ct. 223, 225, 78 L.Ed. 381.

Whatever the grade of the offense the presence of the word "willful" in the definition will carry with it the implication that for guilt the act must have been done willingly rather than under compulsion and, if something is required to be done by statute, the implication that a punishable omission must be by one having the ability and means to perform. *In re Trombley*, 31 Cal.2d 801, 807, 193 P.2d 734, 739.

A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other negative.

Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification. (Emphasis added)

Under the definition, Mrs. Kakesako's omission might conceivably be termed a "careless disregard" for the propriety of HSTA actions, but that definition arises in the criminal context. Moreover, the thrust of the definition clearly goes to the intentional nature of willfulness. Given the rudimentary state of legal authority, it is doubtful that Mrs. Kakesako's omissions ever amounted to a "careless disregard." It is the Board's position that to make out a prohibited practice under Subsection 89-13(b), HRS, conscious, knowing, and deliberate intent to violate the provisions of Chapter 89, HRS, must be proven.

Mrs. Kakesako was also asked whether service fee spending in the election-related areas of Goal II, Objective 4, was undertaken with the knowledge it was impermissible.

Q Would you agree with the statement that service fees are not supposed to be used for political endorsements, the endorsement of political candidates?

A Yes.

Q One of the points I believe you made in your testimony a few minutes ago relates to objective 4 dealing with the election of officials, if I may paraphrase, friendly to HSTA and changed somewhat over the years in question, and that in fact less was used for endorsement purposes in '77-78 than was used in '78-79.

Isn't it in fact true, however, again looking at the breakdown of the budget's language, that at least some of the money even in '77-78 was specifically budgeted for the election of endorsed candidates?

A No; '77-78, which may have had a larger budget than the '78-79, was primarily for the constitution of convention-type activities.



Q Excuse me, I'm not excluding Con-Con; we are agreed, are we not, that service fees may not be used to elect endorsed candidates through either the Legislature of the State of Hawaii or to the Constitution Convention, so to rephrase my question slowly, is it not true that at least some of even the '78-79 budget, under goal 2, objective 4, was used for the election of endorsed candidates -- and if you want to refresh your memory, look at that program budget, Petitioner's Exhibit A.

A No, no, the program budget is what we predicted we might spend.

Q I grant that.

A And what we actually spent you can't show, because we didn't break it down to the activity level.

It was just an objective, and what I am trying to say is that objective in '77-78 was a broad objective, part of which included the election of endorsed candidates.

Now, in '78-79, to implement -- it's to implement the endorsed procedures, and that's, I think, a difference. When we say to elect, that's to -- it's a very cut and dried activity, but when we say to implement the endorsement procedures, the reason we had put it in the service fee budget, and we had only allocated, I think, something like two days in '78-79, was to do the paper work; to call the meetings to do this kind of thing, and that's why you had so little time that we had planned for, because the election procedure itself would be a much more time consuming thing.

Q I understand you, Mrs. Kakesako. I am not now arguing to the proportionate sizes.

I am asking you whether those expenditures ever actually occurred at all, not whether they were only a quarter or only a third of the budgeted amount.

Did they actually occur?

A The classification of time spent did occur.

Q Now we come to that question about grey areas.

If you knew that the election of endorsed candidates, to either Con-Con or the Legislature, was not a permissible use of service

fees, why did you spend -- why did you even budget certain of those activities under the service fee budget?

A The budget preparation included just a miniscule amount, not for the election, but to implement the procedures which I felt was grey enough that it could be permissible. (Emphasis added)

Tr. 4/23/79, pp. 69-71.

This exchange indicates that there was a distinction in Mrs. Kakesako's mind between impermissible direct spending on the election process and permissible spending under the rubric of "implementing the HSTA endorsement procedure." Given this belief of Mrs. Kakesako, it cannot be said that she expended service fee money for improper political purposes in willful violation of the law.

Moreover, it is not clear from this exchange at what point in time Mrs. Kakesako arrived at the conviction that spending on "political endorsements" is improper on service fee money, and whether spending to implement the HSTA endorsement procedure is included in her mind under the heading "political endorsements." The first question in the exchange regarding her knowledge as to the permissibility of spending service fee money on political endorsements asks her of her knowledge as of the time of that question, in April of 1979, after the budgets being discussed were prepaid, while the last question in the exchange assumes that such knowledge existed at the time of the preparation of the budgets: to the first question, Mrs. Kakesako answers a simple yes; to the last, she speaks of "grey areas." It cannot be reasonably concluded that Mrs. Kakesako authorized spending with the knowledge that, as of the time of the spending, such activity was improper spending on political endorsements. In reference to Goal II, Objective 4, spending, Mrs. Kakesako stated:

Q But for fiscal year ending June of '78 it came out of service fee?

A That's right. I thought we went over this previously, and it was never said "no" by the Board.

Q You weren't going to say it was never caught?

A No, they reviewed it.

Tr. 2/5/79, p. 101.

Mrs. Kakesako, this exchange indicates, acted under the impression that such spending was not impermissible.

The precise issues raised in the record of the proceedings leading to Decision 94 were not raised in the proceedings leading to Decisions 7 and 69. Lobbying was only discussed in a general sense. Clearly not discussed were issues relating to costs peripheral to carrying out functions charged to membership. Neither were the limits of permissible service fee expenditures to maintain membership delineated or the meaning of "membership drive costs" fleshed out. The relatively unsettled and rudimentary state of decisional authority indicates that to find that HSTA committed prohibited practices would be to find it willfully violated dictates that had not yet been established.

Though it is the Board's conclusion that impermissible expenditures have occurred, the Board also concludes that no prohibited practices as described in Subsection 89-13(b)(1) and (4), HRS, have occurred for the reasons that no willful violations of Complainant employees' rights have occurred such as would make out a case under Subsection 89-13(b)(1), and no unreasonable expenditures of service fees have willfully been undertaken such as would make out a case under Subsection 89-13(b)(4).

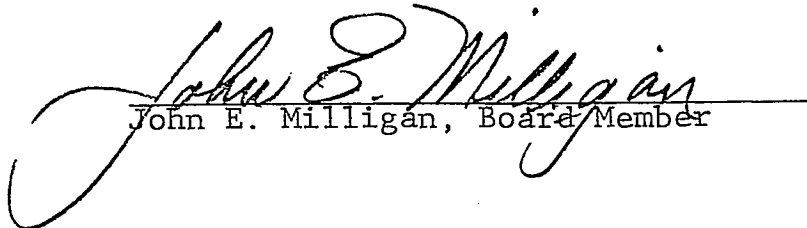
ORDER

For reasons cited in the opinion above, the prohibited practice charges brought by the Complainants in CU-05-22 through CU-05-34 are dismissed.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

  
Mack H. Hamada, Chairman

  
James K. Clark, Board Member

  
John E. Milligan, Board Member

Dated: June 13, 1980

Honolulu, Hawaii