STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of WILLIAM BLANCHARD, Complainant, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Respondent.	CASE NO. CU-13-51 DECISION NO. 258 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
In the Matter of WILLIAM BLANCHARD, Complainant, and TONY T. KUNIMURA, Mayor of the County of Kauai, Respondent.	CASE NO. CE-13-98

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On August 19, 1985, WILLIAM BLANCHARD [hereinafter referred to as Complainant] filed prohibited practice complaints with the Hawaii Public Employment Relations Board [hereinafter referred to as Board].

The Complainant alleges that TONY T. KUNIMURA, Mayor of the County of Kauai [hereinafter referred to as KUNIMURA, Mayor or Employer], violated Subsections 89-13(a)(1) and (4), Hawaii

Revised Statutes [hereinafter referred to as HRS], by inter alia, interfering with his employment rights.

Complainant further alleges that the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO [hereinafter referred to as HGEA or Union] violated Subsections 89-13(b)(1) and (4), HRS, by improperly representing him in his complaints against the Mayor and County of Kauai.

A prehearing conference was held on September 23, 1985. At that time, counsel for Respondent HGEA made an oral motion to consolidate the two cases. As the complaints involve the same factual situation, the Board consolidated the two complaints under Administrative Rules Section 12-42-8(g)(13).

A hearing on these complaints was held on Kauai on December 12, 13, 1985, and August 14 and September 8, 1986.

During the course of the hearing on December 12 and 13, 1985, counsels for Respondents KUNIMURA and HGEA made oral motions for a directed verdict. The motions were taken under advisement by the Board. Transcript [hereinafter referred to as Tr.] Vol. I, pp. 189, 209, and 211. The Chairperson requested the Respondents to submit their motions in writing.

On February 5, 1986, Respondent KUNIMURA filed with the Board a Motion for Judgment in Favor of Respondent Tony T. Kunimura. On February 11, 1986, Complainant filed an Answer to Motion for Judgement (sic) in Favor of Respondent Tony T. Kunimura.

On April 4, 1986, Respondent HGEA filed a Memorandum in Support of Respondent HGEA's Motion for Directed Verdict or in

the Alternative Dismissal. On April 14, 1986, Complainant filed an Answer to Memorandum of Respondent HGEA's Motion for Directed Verdict or in the Alternative Dismissal and Motion for Judgement (sic) in Favor of Complainant Against Both Respondents.

After consideration of the arguments set forth by the parties and taking the evidence in the light most favorable to the opposing party to the motions, the Board denied both motions in Order No. 597 (July 11, 1986).

All parties were afforded full opportunity to call and cross-examine witnesses, submit exhibits and present briefs and oral arguments.

Upon a full review of all exhibits, testimony presented at the hearing, and arguments made orally and in writing, the Board makes the following findings of fact, conclusions of law, and order.

PROPOSED FINDINGS OF FACT

Complainant WILLIAM BLANCHARD is and was, for all times relevant, an employee of the County of Kauai and a member of Unit 13 as defined in Subsection 89-6(a), HRS.

Respondent TONY T. KUNIMURA, Mayor of the County of Kauai, is and was, at all times relevant herein, the employer as defined in Section 89-2, HRS, of Complainant.

Respondent HGEA is and was, for all times relevant, an employee organization and the certified exclusive representative of employees in bargaining unit 13, as defined in Section 89-2, HRS.

The Complainant is employed by the County of Kauai, as an Economic Development Analyst, pursuant to a personal services contract, under Section 76-77(7), HRS. His employment contract was for a period of twelve months beginning usually from July 1 and ending on June 30. Complainant's [hereinafter referred to as Comp.] Exhibit 20B. He has held this contract position on a yearly basis for a total of five years. Tr. Vol. I, p. 118.

On or about May 13 or 14, 1985, the Complainant met with Mr. Ray Emura, the Kauai Division Chief of HGEA, to discuss some of his problems about his job status and office working conditions. Complainant told Emura that he was trying to meet with the Mayor for over a year to discuss his concerns. Complainant wanted to talk about his contract and to find out why he had to wait until the last minute--usually about four days before the expected renewal date. In essence, he wanted the Mayor to change his employment status from a contract employee to a civil service employee. In his capacity as the HGEA union agent, Mr. Emura arranged a meeting with the Mayor for Complainant on June 25, 1985. Tr. Vol. I, pp. 44-45, 65 and 72.

During this initial meeting with Mr. Emura, Complainant also complained that he was spied upon and harassed by his fellow staff people. Complainant related that he wasn't getting along with his secretary, Gloria Long. Complainant felt that she was an agent for the Mayor and spied on his office activities. Mr. Emura testified that he couldn't do anything about personalities and stated, "If you don't get along with her, you know, you have to take it in house, like I told you." Tr. Vol. I, pp. 59 and 68.

Following the advice of Mr. Emura, Complainant met with his immediate supervisor, Mr. David Penhallow, Director of Economic Development. At that meeting with only Complainant and Mr. Penhallow present, Complainant complained about Mrs. Gloria Long's activities involving her alleged spying and reporting the Complainant's activities to the Mayor. As a result of this discussion, Mr. Penhallow suggested: "Let's have a staff meeting." Tr. Vol. I, p. 106.

On or about May 31, 1985, a staff meeting was called by the Director. He did not warn the other staff members what would be happening at the meeting because the Director wanted to find out exactly what was happening--since he had just started on the job. Tr. Vol. I, p. 108. Further, Mr. Penhallow testified that this meeting was called for the purpose of letting "bygones be bygones." Complainant stated that he would try to start afresh. Complainant did not tell the Director that he was asserting a grievance under the collective bargaining agreement. According to the Director, the whole point of this staff meeting--which was attended by all members--was to try to get together as a team. Tr. Vol. II, pp. 109, 156 and 157.

However, Complainant was evidently very dissatisfied with the result of the staff meeting. On or about June 3, 1985, Complainant handed a two-page memo to Mr. Penhallow expressing his written dissatisfaction with the informal meeting which Complainant characterized as a harassment grievance meeting. The memo, which was also delivered to Mr. Emura, states a general list of alleged incidents of personal and job-related harassment

and unfair treatment against Complainant by some staff members; Gloria Long in particular. The memo was received into evidence, over the objections by counsel for HGEA and the Mayor, as Comp. Exhibit 1. The memo reads as follows:

> MEMO: To David Penhallow 6/3/85
>
> FROM: Bill Blanchard
>
> SUBJECT: Harrassment (sic) Grievance Meeting
>
> It is more than disappointing the way the Friday staff meeting turned out. I don't get the feeling that either Gloria or Betty fully realize why I have filed the grievance which includes their behavior as County employees. Gloria did an excellent job of demonstrating that my grievance is valid and that my contention that she is in fact spying on me and putting out badly distorted and erroneous information about me to the Mayor or to someone who passes it on to him. Her silly charge that I spend too much time going to the P.O. (as many as four trips a day) where the Mayor received his information which resulted in his remark to you concerning my P.O. habit.
>
> Her lack of denial that her daily whispering phone calls are aimed at me demonstrate that the harrassment (sic) continues. It is interesting that she justified it by claiming I sometimes say to a caller that I will talk with them when I get home. Her report accurate - her conclusions wrong. I am sometimes too busy to take the time at work for even a short call.
>
> Gloria's obsession of watching and listening to every thing I do or say is not conducive to her own job production. However, that is not the reason for my grievance. It is her exagerations (sic), distortions and slanderous falsehoods she reports to the Mayor or has it passed on to him. This disgusting behavior has been going on for two years now.
>
> As you have admitted and Herman has told me, she has made similar reports to both of you. I assume you have informed her to cease and desist, but I am disappointed that neither she nor Betty were told so at the Friday staff meeting. It would appear they

were instead rewarded. Gloria was very pleased at the suggested desk change, and both were pleased when told them you had discussed with Mike Belles how to handle Gloria's charge that I spend most of my work hours doing personal chores.

Both Betty and Gloria immediately reacted to your apparent acceptance of their charges. Betty stopped by my desk to tell me I had better change my ways. Gloria continues to answer the phone in a manner to which I object. She will say I am in the office and then demand the caller's name. This happened several times on Friday. Under normal circumstances, I could care less, however her misuse of information about me brings her inquisitiveness into the harrassment (sic) charge. I do not want to have her ask for anyone's name, unless they offer it regardless of whether or not I am in the office.

Her penchant for distorting information was graphically illustrated in her remark that I had zeroxed (sic) a script. The fact is that Jimmy Kurita asked permission to use my award winning treatment, Koolau, the Leper, to entice the production of the story to Kauai, part of his interest in expanding the movie industry on the island. A call to Jimmy will verify this. Her slanderous diatribe even tried to make the opening of my brief case as devious behavior.

This type of distorted reporting must have influenced the Mayor to turn down my raise request two years in a row, and most likely will have deleterious effect on my latest request. I am not surprised with such false information getting to him, unless you or others are offsetting it with more honest evaluations of my job accomplishments.

You have read my March 7, 1984 memo to Jimmy Kurita objecting to exactly the same type of behavior which has then been going on for several months. I have had to put up with Gloria's vicious behavior for two years now. Hoping that things would improve under your directorship, I did not file a grievance until I was made aware that Betty had also joined her in making phonce (sic) calls: i.e., call to Fire Chief's office. Gloria has done the same in the past, and both may still be doing it. I am sure that such calls do not come within their job descriptions.

You are personally aware that Gloria has no compunction against outright lies in reference to me, i.e., her telling the Mayor I had left for home when she was well aware that I had taken Youngki Hahn to the airport. She can have only one reason for such a lie - to hurt me and my job.

Her slanderous remarks at the Friday meeting most eloquently reveal her lack of objectivity-her goal to damage me. From her description of my work, one would think I did nothing but run back and forth to the P.O., write personal letters, make personal phone calls, scheme with Reggie and Fred, read magazines and newspapers and open and close my briefcase. In that she is well aware of the work I accomplish through typing or xeroxing and reading my weekly reports. She also knows of the awards I have received for my work, the reports I have written for two Mayors, department heads and for you, ones of great importance to the County. Her charges are too ludicrous to spend any further time answering.

It does bother me that both you and Herman complain of the growing stress in the office, but keep in mind I have been going through even worse pressure for two years now, with my job and pay in constant jeopardy. I wish to point out that Herman, Betty and I worked together with no problems for more than two years before I selected Gloria under the E.E.S. grant. For that matter for her first several months in the office no problems arose. It was only when Gloria switched her allegiance from me to Jimmy and the Mayor that problems began to erupt. I can document the reason why she made this switch, but cannot understand her gain by conducting a vendetta against me and my position, thus fomenting the deterioration of office relationships.

You asked Friday that I trust Gloria and Betty, and yet within minutes after the meeting, both had reverted to offensive behavior.

It is my opinion that both you and the Mayor have the capability to end the harrassment (sic) of me, and that must be done immediately. Tr. Vol. I, pp. 83-84, 87-90, and 138.

Mr. Penhallow testified that after reading the first sentence of the memo, he yelled at Complainant and said: "Bill, you had not listened to what I felt we were saying. I thought we were going to put bygones--be bygones, at that time and begin from there." Tr. Vol. II, pp. 115.

Complainant perceived that this yelling or screaming by Mr. Penhallow on June 3, 1985, was the beginning point of a series of retaliatory actions carried against him by the office staff. Tr. Vol. I, p. 139.

Complainant testified in detail about his perception of unsatisfactory employment conditions and alleged interference with his employment rights during the extensive four days of hearing in these consolidated cases. To begin, Complainant testified that on or about June 5, 1985, a memo from the Mayor was on his desk informing him that Complainant's airlines reservation was changed from Princeville Airways to Hawaiian Air. Complainant, who lives in Princeville, had already scheduled his flight to Honolulu to attend an energy meeting scheduled for 10:00 a.m. His original flight departure from Princeville was at 7:30 a.m. and returning 6:50 p.m. Instead, the Mayor's decision forced Complainant to fly out at 8:30 a.m. and return on Hawaiian Air's 3:00 p.m. flight. Complainant stated that this change was going "to screw up [his] time when I get there, just before the meeting and possibly not be able to get there with the traffic as it is, I'm going to have to leave the meeting immediately and return to Kauai, arriving here too late to go back to work. So it didn't save the County one thing." ". . .It's going to cost

the County--I think it was $9.70 more. . ." Tr. Vol. I, pp. 142-43.

Complainant further testified about other travel related incidents which he thought was harassment by the Mayor. For example, the Mayor had called Gloria Long to find out what Complainant did on his trips to Honolulu. Mrs. Long stated that she called Mr. Dick Kawakami in Honolulu to find out about Complainant's activities, per diem matters, and travel voucher items. All of these questions concerning his past travel activities became "somewhat of a laughing matter in Honolulu," according to Complainant. The Complainant felt embarrassed, humiliated, and that he was spied upon by Gloria Long and the Mayor. Tr. Vol. I, pp. 130, 144 and 181, and Tr. Vol. II, p. 47.

Complainant also complained about the assignment procedure between staff members and the logging system which was required in Directives 85-1 and 85-2, dated July 22 and July 26, 1985, respectively. Comp. Exhibits 7 and 9. Complainant believed that he was the only person who was forced to follow this onerous task. Tr. Vol. I, p. 148. Mr. Penhallow testified that the basic reason why he issued the two directives was because he wanted to see all materials going out of the office so that he could be aware of what goes on within the office. Tr. Vol. II, p. 129.

Nevertheless, Complainant felt discriminated against, because apparently, he was the only one following the directives --"which was a change in my job." Tr. Vol. II, p. 131. In response to this line of contention, Mr. Penhallow testified that

another reason why he initiated the logging system was to help Complainant alleviate his belief that Gloria Long was lying about him. "And since that logging has happened, you (Complainant) have never complained to me that Gloria is lying. So I felt that I had accomplished a purpose and made your life a little bit easier," said Mr. Penhallow. Tr. Vol. II, p. 131.

The office saga continues. "What went on were childish, stupid, little, annoying, exasperating things that went on. But they were starting to affect my job, and they were affecting my job security," Complainant testified. Tr. Vol. I, p. 145.

For some examples: Complainant testified that he complained about Gloria Long's whispering phone calls and "little cryptic remarks". This was annoying Complainant because he thought Mrs. Long was talking about him on County time. Tr. Vol. I, p. 150. To solve this problem, David Penhallow ordered the Complainant to move his desk into Penhallow's office--away from Gloria Long. Another disturbing incident arose over Gloria Long's practice of leaving the windows open when the air conditioner was on--so the cool air would flow right out her window. Eventually, according to Complainant this problem was solved "after an embarrasing [sic] little bunch of childish stuff." Tr. Vol. I, p. 152.

So far, Complainant's testimony covered a trail of complaints involving annoying office personality problems which in the mind and perception of Complainant amounted to acts of retaliation, harassment, and discrimination by his fellow employees and the Mayor, his employer.

Next, the Board heard Complainant's testimony about being allegedly excluded from the office team--literally ostracized from attending energy related conferences, banished from his previous work projects involving fisheries, aquaculture, tourism, and film industry. Complainant noted that he was hired as an economic development analyst. After sending the June 3, 1985 memo to Mr. Penhallow, Complainant testified that Penhallow "encapsulated my job" to only an economic energy specialist. Moreover, Complainant testified: "I was then totally ostracized from all meetings with anyone concerning any of those projects I had been working on and had been an expert in." Tr. Vol. I, p. 149, Vol. III, p. 37.

Further, Complainant made a self-evaluation of his knowledge and expertise by stating: "It happens that I know more about energy on Kauai than anyone in the State." Tr. Vol. III, p. 64. Yet, Complainant told the Board that his boss, Mr. Penhallow, didn't even ask or consult him on energy matters relating to the sugar industry and other economic development ideas which were being discussed at numerous conferences held during this period in Kauai. Tr. Vol. II, p. 152, Vol. III, p. 50. In short, Complainant felt "boxed in" his job as well as being "iced out" from his past activities--relating over the broad spectrum of economic development. Complainant perceived that his employer's actions stemmed from his notice of complaints against them. Tr. Vol. II, pp. 146-152.

On December 13, 1985, Complainant called David P. Penhallow as a witness, who testified about his relevant

involvement in this case as follows: To begin, David Penhallow was the Director of Economic Development since April 1, 1985. Upon taking this office, Mr. Penhallow testified about his role and goals: "My mission as I was hired, I believe, was to work for the County and develop a very--hopefully a stable and creative economic development program." Tr. Vol. II, p. 110.

Immediately after Mr. Penhallow took office, Complainant had a meeting with him in the council room. They discussed Gloria Long's activities which Complainant thought amounted to spying and reporting to the Mayor on him. For an example, the Mayor had evidently questioned Mr. Penhallow why Complainant goes to the post office so often, sometimes four times a day. Tr. Vol. II, pp. 104 and 106. Following this introduction with Complainant, Mr. Penhallow said, "Let's have a staff meeting."

This staff meeting was held on or about May 31, 1985. Complainant questioned Mr. Penhallow as to whether the meeting on (May 31) or June 3, (sic) 1985 was a "grievance" meeting under the collective bargaining contract. Mr. Penhallow replied, "I don't know if I would use the word grievance. I would say complaint." Tr. Vol. II, p. 108.

Mr. Penhallow testified as to what happened at the staff meeting which was corroborated before in this Findings of Fact. Three days later, Mr. Penhallow received Complainant's June 3, 1985 memo. Comp. Exhibit 1.

The Board was apprised about the reasons underlying the Director's (Penhallow) actions in moving Complainant's desk; instituting the logging system; questions relating to travel

matters; and the disturbing perception of Complainant's conclusions of being ostracized from his former economic development projects and attendance at some of the conferences.

The Director testified that Complainant was removed from the aquaculture and fisheries program because of the lack of funds in the budget, and he felt that the County needed to put more emphasis in other areas. Therefore, as of July 1, 1985, the Director told Complainant that he was to work strictly on energy related programs. Tr. Vol. II, p. 136.

Complainant testified that his job was more onerous after he had formally complained about the office problems in the June 3, 1985 memo to the Director. When questioned by the Board Chairperson on this allegation, Complainant stated that he was alone in the office and forced to use the logging system--which required him to get up from his desk and go back and forth. Tr. Vol. II, p. 139. This issue became moot when Chairperson Hamada told Complainant to ask the Director, who was on the stand, to end the logging practice. The Director instantly ended the log system. Tr. Vol. II, p. 134.

Focusing on Complainant's feelings on being ostracized from attending meetings and energy related conferences on the Mainland and in Kauai, the Director responded to each specific event and the reasons offered were as follows: The Mayor had issued a directive to all departments to stop any more field trips out of the County during this period; the Princeville Airport flight schedule change was rescinded by the Director to Complainant's satisfaction; Complainant's request to attend the

Phoenix Energy Conference to discuss his award was not approved, because Complainant did not submit a letter verifying his panelist role; there were no invitations to Complainant to attend the various mentioned conferences in Kauai; and finally, the cost to attend these conferences was too steep. Tr. Vol. II, pp. 123, 126, 146 and 150.

Next, Complainant called Gloria Long as a witness. She testified that she was hired as a clerk stenographer in 1982, later became an Energy Assistant, and now was a clerk/typist for the Office of Economic Development.

Complainant first questioned Gloria Long [hereinafter referred to as Long] about her statement to the Mayor on the day when the Mayor brought Mr. Penhallow to the office to introduce him to the staff. The Mayor had asked where Complainant was, and Long stated that Complainant had left for the day. Complainant alleges that Long should have told the Mayor exactly where he was and why he wasn't in the office at that time.

Complainant explained that he had left at about 3:40 p.m. to take a Youngki Hahn to the airport, and he told Gloria Long that because of the traffic and time factor--he might not get back to the office. Upon further questioning along these lines, Long again emphasized that she knew Complainant wasn't coming back to the office, but instead of going into details with the Mayor, "it just came out" that way and she just said that Complainant had gone for the day and not home, as Complainant averred. Tr. Vol. II, pp. 33-35.

This brief encounter between Gloria Long and the Mayor on the day that Complainant was away from the office to take a person to the airport on official company time, was a very disturbing factor for Complainant. In fact, this incident was documented as one of the numerous complaints against Long. In Complainant's memo to David Penhallow, dated June 3, 1985, he wrote: "You [Penhallow] are personally aware that Gloria has no compunction against outright lies in reference to me, i.e., her telling the Mayor I had left for home when she was well aware that I had taken Youngki Hahn to the airport. She can have only one reason for such a lie--to hurt me and my job." Comp. Exhibit 1, p. 2.

Complainant questioned Gloria Long whether she reported to the Mayor about things that he did or did not do. Long testified, "No, I didn't. I never reported to the Mayor." Complainant asked Long: "You've never talked to the Mayor about me?" Gloria Long responded by saying: "Occasionally your name may come up. . .I may have talked to the Mayor about you, but I don't go down and report to him." Tr. Vol. II, pp. 35-36.

When questioned what she may have talked to the Mayor about Complainant, Gloria Long stated the following incidents which is briefly categorized as follows: Complainant misuses County time continuously by writing personal letters on County time, using County equipment and stationery; travel and meeting activities out of the County; and Complainant's activities in going to the post office presumably as much as four times a day. Tr. Vol. II, pp. 37, 47, 49, and 74.

Whispering phone calls. This was another sore spot in Complainant's life at the office. Complainant believed that Gloria Long was talking about him--watching and listening to everything he did and said--and exaggerating, distorting, and uttering slanderous falsehoods all of which were reported to the Mayor by Long and others. Tr. Vol. II, pp. 46-47, Comp. Exhibit 1.

Gloria Long admitted that she did whisper some of her phone calls, because she didn't want Complainant to hear and broadcast what she had to say to certain people. She further testified that the phone calls were not necessarily about the Complainant. In other words, Long's primary reason for whispering on the phone was because: "I know that what you hear you tell everybody. People you know, people you don't know, to great detail. So, if there's something that I don't want you to hear, I would whisper." Tr. Vol. II, p. 45.

To dispel Complainant's belief that Gloria Long was spying on him and whispering bad things about him, the Director moved Complainant's desk away from Long's area and instituted a logging system to keep the parties apart.

During the course of Gloria Long's direct examination, the Board readily noted that Complainant and Long really hated each other. In fact, Mr. Penhallow testified that Long used to come to him to complain about Complainant because she felt harassed. Complainant asked Mr. Penhallow to punish Long, and "it wasn't the content that bothered me (Penhallow) so much, it

was the vehemence you had of feeling towards Gloria that probably disturbed me most." Tr. Vol. II, p. 117.

This intense and active hatred for each other caused the Board to question the witness, Gloria Long, along the following passages from the hearing transcripts dealing with her perception of working with Complainant:

> CHAIRPERSON HAMADA: What is the cause of this animosity between you and Mr. Blanchard, if you know?
>
> A Do you know what I think it is?
>
> CHAIRPERSON HAMADA: What?
>
> A Bill knows that I know the misuse of County time, his habitual complaining about the County as a whole, and even our office. It's really embarrassing for me. I've never worked with a person like this before, and I've worked for County, other County people and City government, and never run across this.
>
> He knows that I know what he does on County time and I don't keep quiet about it. I ask my supervisors, "Why does Mr. Blanchard get away with so much?" He comes in the morning, reads the Advertiser, gets really upset when the Advertiser is not there for him to read.
>
> The County pays for the Advertiser, used to pay for the Star-Bulletin and the Garden Island. He reads -- first of all, he reads the paper every morning and takes out the sports section and reads it. Then he reads the paper thoroughly, every day.
>
> From there on, it just -- he used to go, when we were in the portable buildings, to the Post Office at least twice in the morning and twice in the afternoon. He brings back all his mail, unopened, and he sits there and he reads it. He answers his mail there. He pays his bills there. He gets magazines. He's gotten all different kinds of magazines in the past. Like Reader's Digest. He would get the Reader's Digest and sit there and read the whole thing by the end of the day.

Time Magazine. Now he's getting National Geographic. Misuses the County watts (sic) line all the time.

BOARD MEMBER CLARK: You're assuming that -- assuming that what you say is true, do you feel that it's your mission to do something about his inequities?

A No. I feel it is up to me to ask how come he can do that and the rest of us can't.

BOARD MEMBER CLARK: When you ask his supervisor that question --

A And it goes just that far.

BOARD MEMBER CLARK: Isn't it their responsibility to correct this guy, and not yours?

A Yes. That is why I don't say anything.

BOARD MEMBER CLARK: But you still have this running feud with your boss. Why is that?

A He's not my boss. I work --

BOARD MEMBER CLARK: He's not your boss?

A No.

BOARD MEMBER CLARK: He's not your supervisor?

A He's -- I work for him, but my boss is the Director.

BOARD MEMBER CLARK: Your -- then you do his clerical work but he doesn't supervise you?

A I do his work, yes.

BOARD MEMBER CLARK: Well, if he's not your boss, why does all of these things that he's doing that irritate you bother you?

A Because I feel it's unfair.

BOARD MEMBER CLARK: You feel like you are a responsible citizen, that you should come forth and report his activities; is that the way you feel?

A At least --

BOARD MEMBER CLARK: I'd like to ask you again: Why do you feel that way?

A Because I feel the County is paying him to do things other than Economic Development.

BOARD MEMBER CLARK: Okay, let me ask you another things. You're a dues-paying member of the HGEA. Did you take your problems to them?

A No.

BOARD MEMBER CLARK: Why?

A I feel that the problem should be resolved in the office and not outside.

BOARD MEMBER CLARK: I don't know if you know it but what this person is saying is that you're an agent of the Mayor of Kauai.

A But the Mayor didn't --

BOARD MEMBER CLARK: Wait. I'm not through. I just want to clarify something here and make my feelings known.

That is what he's accusing you of, and he may be incorrect. He may really be saying that he assumes that you're an agent, but his real enemy is not Tony Kunimura, it's you.

A Right.

BOARD MEMBER CLARK: Well, is that right or wrong?

A Right.

BOARD MEMBER CLARK: Well, if that's right then we don't have a case here because his grievances here should be against you and not against the Mayor.

A That's right.

CHAIRPERSON HAMADA: Do you know what he's saying? He's saying you are spying for Tony Kunimura. Are you?

A No.

CHAIRPERSON HAMADA: Are you the agent of Mayor Kunimura to spy on him to see what he does?

A No, no. The Mayor has never said to spy on -- nobody has said to spy.

CHAIRPERSON HAMADA: He is making those allegations.

A No, that's false.

BOARD MEMBER CLARK: And another thing, the impression that I get from testimony by you and the previous people who came here is that you got a real inefficient boss who can't get two subordinates together so that you can have a harmonious type of relationship in the office. It's a reflection on your conduct, as a result of the animosity between both of you, on your boss's ability to direct.

A The present boss has tried.

BOARD MEMBER CLARK: That's very -- to me it's a very bad impression.

CHAIRPERSON HAMADA: And Mr. Blanchard has also accused -- not accused, made allegations -- through you; is that correct?

A No. That's false. Tr. Vol. II, pp. 69-74.

We now direct attention to the encounter of the June 25, 1985, meeting with the Mayor arranged by Mr. Ray Emura, the HGEA Kauai Division Chief. The testimony by Complainant established the fact that the Mayor swore at him: "He told me I was f...ed (expletive deleted) in the head, I was f...ed up, I don't know. He used f...ed at least 15 or 20 times." Also, "He said I was f...ed in the head for filing an EEOC charge," Complainant testified. Tr. Vol. II, p. 4.

The Mayor also told Complainant that his working period was changed from 7:15 a.m. to 7:45 a.m. ending at 4:30 p.m. instead of 4:00 p.m.

Besides the swearing, Complainant established the fact that the Mayor was sitting down behind his desk, and he reached over the desk to pick up a piece of paper, and threw it in the direction of Emura and Complainant. The piece of paper fell on the floor. Tr. Vol. I, pp. 38-40.

The meeting with the Mayor lasted not more than fifteen minutes. The following persons were present: KUNIMURA, Personnel Director Herbert Doi, Mr. Emura, and Complainant. In the midst of the Mayor's outburst, the Mayor and Mr. Doi suggested that they skip step two and go straight to step three for grievance. Realizing that this meeting wasn't going on well, Emura later returned to the Mayor's office, and Emura expressed his disappointment over the Mayor's actions. Tr. Vol. I, pp. 41-42, 50, and 52-54.

Mr. Emura testified that just before the scheduled meeting with the Mayor, he found out that Complainant had filed an EEOC charge against the Mayor. Complainant had sent a copy of the federal complaint to the Mayor which was apparently received on the morning of the meeting held on the 25th of June, 1985. Complainant had filed the EEOC complaint about a week to ten days before the June 25, 1985 meeting, but he didn't notify Emura about this discrimination charge against the Mayor. Tr. Vol. I, p. 93, Tr. Vol. III, p. 61, Tr. Vol. IV, pp. 33 and 52.

Did HGEA file a grievance for Complainant in this case? If not, why not. As a matter of background in this episode with Mr. Emura, Emura testified why he did not file a grievance in the first instance when they met sometime in the latter part of May 1985. The testimony reads as follows:

> In May when you [Blanchard] first approached me [Emura], you told me you were having some problems. But we didn't go into detail. You told me you wanted to talk to the Mayor to discuss some of your concerns. I said, "Fine. Since you have been turned down a couple of appointments by the Mayor, I'll go and I'll set up the appointment for you." And I told you it wasn't a grievance meeting, because I know the formal procedures of the grievance. It will have to go through informal steps, step one, step two and then to the Mayor, step three. We just went in to discuss your concerns, and that was it. There was no grievance filed. Tr. Vol. I, p. 44.

Mr. Emura further testified that Complainant had a right to request the Union (HGEA) to file a grievance, but first he must conduct an investigation, and if there's a violation, they would file a grievance. Tr. Vol. I, p. 45.

Upon questioning by Chairperson Hamada about the procedure of filing a grievance, Emura established the requirement that the employee's complaints against his employer's actions must be contrary or in violation of the collective bargaining contract or law. Tr. Vol. I, pp. 47, 57 and 58.

Emura elaborated that Complainant's initial complaints about his problems with the office involving mainly, Gloria Long, was merely a personality conflict. He therefore advised Complainant to take those problems to the Director and "clear the air" and solve it "in house". Tr. Vol. I, pp. 60 and 92.

Complainant testified that he thought he was at step one or two after he spoke to Mr. Penhallow at the informal meeting on or about May 31, 1985. In his memo of June 3, 1985, which was sent to Penhallow and Emura, Complainant thought he had initiated the grievance process at step one. Tr. Vol. I, p. 81.

The Union, on the other hand, steadfastly maintained that Complainant did not present any grievance actions in violation of the collective bargaining agreement or any laws applicable thereto. Based upon Emura's investigation in these matters involving Gloria Long's alleged spying, harassment, retaliation, and Penhallow's directives relating to the logging systems, etc., the Union concluded there were no violations. Therefore, no grievance was filed by HGEA in this case.

After the brief explosive meeting with the Mayor on June 25, 1985, Mr. Emura testified that he contacted Mr. Davis Yogi, the HGEA Contracts Specialist, in Honolulu. Emura stated that he reported the whole incident concerning the Mayor's outburst, swearing, and throwing of the letter, including the change in Complainant's work hours. Tr. Vol. I, pp. 54, and 74-75.

Two days later, Mr. Yogi contacted Emura and told him essentially that there was no violation of the agreement or the collective bargaining law. Based upon this advice from Mr. Yogi, Emura testified that he called Complainant to come to his office, where he sat down and explained to Complainant why the Union would not file a grievance against the Mayor. The issue was on

the question of whether Complainant was disciplined under Article 8 of the Unit 13 Agreement. Comp. Exhibit 24. Tr. Vol. I, p. 75.

On December 13, 1985, Davis Yogi was called as a witness by Complainant. At that hearing, Mr. Yogi established that he was present during negotiations between the public employers and HGEA. The witness clarified questions relating to salary schedules as it applied to contract employees. Tr. Vol. II, pp. 205-208.

On September 8, 1986, Respondent HGEA called Davis Yogi to testify about the discipline provisions contained in Article 8 of the Unit 13 Agreement [hereinafter referred to as Agreement], and the grievance process under the Agreement relative to this case. Mr. Yogi testified that he was familiar with the Article 8 contract provisions concerning discipline and that he personally negotiated the terms of the Article and knew what the parties bargained for in Article 8.

Mr. Yogi explained that under paragraph "A" of Article 8, the term "regular employees" was synonymous with the term "regular employee" as defined under the Civil Service Laws, Chapter 76, HRS. He further testified that HGEA and the County of Kauai finally negotiated to include only regular employees under the Article, which included exempt employees who met all of the conditions as listed in the Agreement. Yogi also established the fact that the term "employee" in the Agreement was synonymous with the term "regular employees". Tr. Vol. IV, pp. 6-8.

The Union, according to Yogi, tried during negotiations to enlarge the scope of the discipline article to include all employees, not just regular employees. This proposal was rejected by the Employer's representatives. Finally, instead of demanding this broader coverage, the Union withdrew their position on this issue, and instead got overtime benefits. Tr. Vol. IV, pp. 9-11, Respondent Union Exhibit "A".

Mr. Yogi also expressed his opinion concerning the provisions under paragraph "D" of Article 8 of the Agreement which reads; "When an Employee is orally reprimanded, it shall be done privately." Yogi testified that when the parties negotiated this provision in the Agreement, they didn't consider the reprimand of an employee who was within the presence of two management officials to be a public reprimand. Since there were no co-workers present, the oral reprimand in this case would be private. Further, the term "oral reprimand" as used in the Agreement relates only to "a reprimand for a wrongdoing relating to job performance," said Yogi. Tr. Vol. IV, pp. 14-15.

Mr. Yogi was questioned by Complainant about the change in his working schedule. The Mayor had told Complainant to begin work at 7:45 a.m. instead of 7:15 a.m. Mr. Yogi was referred to Article 20 - "Office Hours and Work Schedules" as provided in the Agreement. Comp. Exhibit 24. Yogi, however, explained the Article applied to shift workers--people in Unit 13 who work in the hospitals; other places that provide services six, seven days a week. "This doesn't apply to you [Blanchard]," said Mr. Yogi. Tr. Vol. IV, p. 63.

After conferring with Mr. Davis Yogi in Honolulu relative to the problems arising from the Mayor's meeting on June 25, 1985; HGEA, in a letter from Ray Emura, Kauai Division Chief, to Complainant, dated August 12, 1985, revealed its decision not to file a grievance based upon Emura's investigation in this matter. The letter, Comp. Exhibit 2, reads as follows:

August 12, 1985

Dear Bill:

This is in response to your letter dated August 5, 1985 regarding your alleged harrassment (sic) charges against the Mayor and also your wish to file a grievance under Article 8 - Discipline of the Unit 13 contract for the incident on June 25th in the Mayor's office.

First, let me remind you that a grievance has never been filed in that when you brought your concerns to me, I informed you that before filing a grievance I would have to conduct an investigation to see if there in fact were any violations of the Unit 13 contract and/or County Rules and Regulations.

Your major concern was that you felt you were being harrassed (sic) and alleged that the Mayor was using your subordinate and his administrative assistant to periodically check on your activities and whereabouts during a workday. You also stated that he checked on meetings you attended off island to find out how long it would last. In conducting my investigation, I checked with the Police Department, Personnel Department, Planning Department and the Finance Department to see if the Mayor did in fact check on County employees' whereabouts on and off the island for County business.

All of the above mentioned departments did confirm that the Mayor does periodic checks. How he does these checks with the various departments may not be consistent but it shows that he is not targeting any individual or department.

Since he is considered the Employer for the County of Kauai, it is his responsibility that county employees and departments function and perform in accordance with the Rules and Regulations so that the public will be able to utilize all of the services to its fullest potential.

As for your wish to file a grievance under the discipline article of the bargaining unit 13 contract, I have explained to you that being a contract worker you are considered an exempt employee. Under Article 8 - Discipline, paragraph B states:

> "Exempt Employees who meet all of the conditions listed below shall not be disciplined without proper cause. Such Employees shall be identified in a letter of understanding executed by the State and the Union. Grievances regarding these matters shall be handled in accordance with provisions of Article 11, Grievance Procedure.
>
> 1. Employee is in an exempt position in an ongoing program and whose appointment does not have a termination date.
>
> 2. Employee occupies a position which is within the authorized position ceiling as provided in the State Appropriations Act.
>
> 3. Employee has at least six (6) continuous months of service in his present position. . ."

Being that you do not meet all of the conditions, you are not covered under the article.

Furthermore, circumstances leading to the June 25th incident in the Mayor's office could have been avoided if you hadn't filed the harrassment (sic) charges. If you can recall, you told me that you had been trying to meet with the Mayor for over a year so you could discuss your concerns however, he wasn't willing or didn't have the time to meet with you.

As your union representative I set up the meeting for you however, you did not inform

me until that afternoon that you had filed charges against the Mayor. I told you at that time that I wouldn't blame the Mayor if he threw us out of his office since he was willing to meet with us and go through your concerns.

The rest is history for you know what happened when we entered his office.

Please understand that I don't condone the Mayor's actions one bit (attachment), however, we asked for it.

It is my duty to inform you that we have no grievance based on my investigation and you being an exempt employee.

Please be aware that as your union representative it is my duty to assure you that your rights under the unit contract, County Rules and Regulations and Hawaii Revised Statutes are not violated and in this case they haven't been violated.

Should you have any questions, please call me.

Sincerely,

/s/ Ray S. Emura
Ray S. Emura
Kauai Division Chief

Complainant also called Mr. Herbert Doi, Director of Personnel Services, County of Kauai to testify in this case. Complainant wanted to know why his position as an Economic Development Analyst was not in the civil service system. Mr. Doi stated that "it's been a long-standing practice of the County since Mayor Vidinha, Mayor Francis Ching, Mayor Malapit, and this current Mayor, that all positions funded in part or totally funded by State or Federal monies would not be converted into permanent Civil Service positions." Tr. Vol. II, p. 181.

Mr. Doi also clarified why Complainant was not raised to the next step in the salary range. Complainant was told that he wasn't a classified employee; and as a personal services contract employee, Complainant was not part of the salary range and step assignment scheme. This step assignment process applied only to civil service employees. Further, Mr. Doi testified that in the negotiation process, contract employees received a five percent raise per annum and any reference to salary range and step assignment were eliminated. Tr. Vol. IV, pp. 193, 196 and 197.

PROPOSED CONCLUSIONS OF LAW

William Blanchard, Complainant herein, appeared Pro Se at the hearings in these two consolidated cases.

On December 13, 1985, the Board during the course of the hearing allowed Complainant to amend his complaint against HGEA to conform to the evidence adduced at the hearing. In his August 19, 1985 prohibited practice complaint against HGEA, Complainant did not specifically cite the paragraphs under Subsection 89-13(b), HRS. Accordingly, the complaint was amended to specifically cite to Subsections 89-13(b)(1) and (4), HRS, violations. Tr. Vol. II, pp. 100-101.

The Board allowed the amendment in the instant case because, after having heard most of the evidence against the Union, it was apparent that the Complainant, appearing on his own behalf, failed to cite the appropriate alleged violations because

of a misunderstanding of the applicability of Subsection 89-13(b), HRS. There were no objections by the Respondents Union and Employer to this amendment, which the Board concludes was within the scope of its discretionary authority under Administrative Rules Section 12-42-43 to allow.

The subject cases have presented several issues of noteworthy impression before this Board. These include the question of whether, on the facts of this case, the Union breached its duty of fair representation to Complainant and whether the Employer either by himself or his representative committed prohibited practices by interfering with Complainant's employment rights guaranteed under Chapter 89, HRS; or discriminated against Complainant because of his signing or filing of an affidavit, petition, or complaint or giving any information or testimony under Chapter 89, HRS.

Addressing the merits of the case, Complainant has alleged that Respondent KUNIMURA committed prohibited practices under Subsections 89-13(a)(1) and (4), HRS, and that Respondent HGEA committed prohibited practices under Subsections 89-13(b)(1) and (4), HRS. The subsections provide as follows:

> [89-13] Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
>
> * * *
>
> (4) Discharge or otherwise discriminate against an employee because the

> employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization; . . .
>
> (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. . .

Only interference with a lawful employee activity, or restraint, coercion, or discrimination affecting the employee exercise of a protected right, may be the subject of a prohibited practice charge under Chapter 89, HRS. Section 89-3, HRS, provides the following rights:

> 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 amounts equivalent to regular dues to an exclusive representative as provided in section 89-4.

The Union's duty of fair representation is set forth in Subsection 89-8(a), HRS, which provides in pertinent part:

> 89-8 Recognition and representation; employee participation. (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...

A violation of this subsection is a breach of the Union's duty of fair representation.

We turn now to the merits of the prohibited practice charges against the Union to determine whether or not HGEA breached its duty of fair representation in its processing of Complainant's grievance or complaint against the Mayor. We hold that, under the specific facts of this case, HGEA did not breach its duty.

The Complainant, a County contract employee, is a member of Unit 13 as defined in Subsection 89-6(a), HRS. HGEA is the exclusive bargaining representative for this unit.

Subsection 89-11(a), HRS, provides that a collective bargaining agreement may include "a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement." Article 11 of the Unit 13 Agreement is such a provision.

Article 11 of the labor agreement between Unit 13 and the public employers, including the County of Kauai by its Mayor KUNIMURA, establishes the procedures to be followed where an

employee alleges that the employer has violated terms of the Agreement. Article 11, paragraph B, permits the employee to pursue the grievance without union representation if the employee so desires.[1] The Agreement encourages the informal settling of grievances between the employee and the immediate supervisor.[2]

There is no specific definition of "grievance" in the Unit 13 Agreement nor Chapter 89, HRS. In Article 11 of the Agreement, under the "Grievance Procedure", the following is provided:

> Any complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure. [Emphasis added.]

Under Article 11, paragraph H, the Arbitration clause at Step 4 provides the following restriction:

> No grievance may be arbitrated unless it involves an alleged violation of a specific term or provision of the Agreement. [Emphasis added.]

We have combed through the record with the above considerations and the statutory standards involving the resolution

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[1] B. An individual Employee may present a grievance to his immediate supervisor and have his grievance heard without intervention of the Union, provided the Union has been afforded an opportunity to be present at the conference(s) on the grievance. Any adjustment made shall not be inconsistent with the terms of this Agreement. By mutual consent of the Union and the Employer, any time limits within each step may be extended.

[2] C. Informal step. A grievance shall, whenever possible, be discussed informally between the Employee and his immediate supervisor within the twenty (20) working day limitation provided for in paragraph "A" above. The grievant may be assisted by his Union representative. If the immediate supervisor does not reply by seven (7) working days, the Employee or the Union may pursue the grievance to the next step.

of grievances in mind to decide whether there is merit in Complainant's assertion that the Union breached its duty of fair representation by not filing his complaints against the Mayor. But the evidence gives no support to this claim.

The record presents a well-developed picture of HGEA's actions at all steps of the present case. Sometime in the middle part of May 1985, Mr. Ray Emura, the HGEA Kauai Division Chief, met and discussed with Complainant his problems about his job status and working conditions. At this meeting, Complainant also told Emura that he was trying to meet with the Mayor for over a year to talk about his contract and ask why his position shouldn't be in the civil service system.

During this initial meeting with Mr. Emura, Complainant also complained that he was spied upon and harassed by his fellow staff people. Mr. Emura dutifully gave Complainant the proper advice by stating that he couldn't do anything about personalities, therefore, Complainant should take his problems and discuss it with his immediate supervisor, Mr. David Penhallow.

After a private meeting was held between Complainant and Mr. Penhallow concerning Mrs. Gloria Long's activities as perceived by Complainant, a staff meeting was called by Penhallow, the Director.

At this staff meeting, which Complainant characterized as a "harassment grievance meeting", nothing was discussed about the application and interpretation of the Unit 13 Agreement. Instead, the topic of contention involved matters relating to alleged spying, lies, whispering phone calls, desk moving, and slanderous actions by Gloria Long.

Nevertheless, the Complainant documented his dissatisfaction with this staff meeting as evidenced in his June 3, 1985 memo to Mr. Penhallow. Comp. Exhibit 1. Mr. Emura testified that he had received this memo from Complainant. Thereupon, Emura followed up on this matter by interviewing Penhallow and Long. Emura properly concluded that these office disputes did not constitute a violation of the collective bargaining agreement. Therefore, no grievance, as the term is used under Article 11, was filed by HGEA up to this time. The Board concurs and concludes that Mr. Emura's actions undertaken thus far in the investigation of Complainant's office related problems were not perfunctory.

The Board also concludes that Complainant's allegations against Mr. Penhallow's decisions to institute a logging system and move his desk; and the denial of conference attendance relating to Complainant's energy programs are not grievable under the Article 11 provision. Such subject matters are not encompassed within the Unit 13 Agreement, and further, these are not rights guaranteed under Chapter 89, HRS.

Moreover, the Board concludes that Complainant's charges that Gloria Long and David Penhallow were agents of the Mayor--acting as spies--harassing and spying on him is wholly devoid of any truth. If anything, Gloria Long may have passed on certain information about Complainant on her own volition. Mrs. Long was not directed by the Mayor to spy on Complainant, as the Board noted at the hearing. Tr. Vol. IV, pp. 37-38.

Further, the Board concludes that Complainant's allegations concerning being ostracized, embarrassed, and discriminated against by his staff members are not within the scope of the collective bargaining agreement.

When questioned by the Board as to when Complainant's charges against the Union began, Complainant testified that his problems with the Union started after the June 25, 1985 incident in the Mayor's office. Tr. Vol. I, p. 10.

Accordingly, we turn and focus upon the events which transpired in the Mayor's office on June 25, 1985. It is uncontroverted, on the record, that the Mayor swore at the meeting, threw a letter or a piece of paper in the direction of the Complainant, and told Complainant to begin work at 7:45 a.m. instead of 7:15 a.m.

The issue is raised as to whether HGEA breached its duty of fair representation by not filing a written grievance on Complainant's behalf over the June 25, 1985 incident.

Complainant believed that the Mayor by his swearing and changing his working hours was tantamount to a wrongful discipline without proper cause, and also amounted to a wrongful oral reprimand, which was not done privately in violation of Article 8 of the Agreement.

The Board concludes that this foregoing allegation concerning the question of discipline and change in working hours are specifically grievable matters under the Unit 13 Agreement. This is the first instance where Complainant had a legitimate question as to whether the discipline or change in working hours provisions were violated under the Agreement.

In the application and interpretation of the specific term or provision of the Agreement, we follow the guidelines as stated by the Hawaii Supreme Court in Gealon v. Keala, 60 Haw. 513 (1979), at 521 and 522 which reads:

> In the interpretation of a collective bargaining agreement, the first thing to be considered is the language of the agreement. Kellogg Co. v. NLRB, 457 F.2d 519, 524 (6th Cir. 1972); La China v. Dana Corporation-Parish Frame Division 433 F.Supp. 430, 437 (E.D. Pa. 1977). In addition, past interpretations and applications, La China v. Dana Corporation-Parish Frame Division, supra at 437, and past practices, as part of the common law of the shop, may be considered. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-79, 581-82 (1960); Northhampton Area Board of Education v. Zehner, 25 Pa. Commw. Ct. 401, 403, 360 A.2d 793, 795 (1976) [Footnote omitted.]
>
> * * *
>
> The meaning of certain words in a collective bargaining agreement may be determined by referring to other words and phrases in the agreement. Kellogg Co. v. NLRB, supra at 524; Refinery Employees' Union v. Continental Oil Co., 160 F.Supp. 723, 731 (W.D.La. 1958). Interpretation of a collective bargaining agreement may also be aided by the use of extrinsic evidence. Kellogg Co. v. NLRB, supra at 524; News Union of Baltimore v. NLRB, 393 F.2d 673, 678 (D.C. Cir. 1968).

Id. at 522.

Article 8, paragraph "A" reads:

> "Regular Employees shall not be disciplined without proper cause. Grievances regarding these matters shall be handled in accordance with the provisions of Article 11, Grievance procedure."

Disciplining of exempt employees who meet all of the listed conditions is governed by Article 8, paragraph "B", which reads as follows:

> B. Exempt Employees who meet all of the conditions listed below shall not be disciplined without proper cause. Such Employees shall be identified in a Letter of Understanding executed by the State and the Union. Grievances regarding these matters shall be handled in accordance with the provisions of Article 11, Grievance Procedure.
>
> 1. Employee is in an exempt position in an ongoing program and whose appointment does not have a termination date.
>
> 2. Employee occupies a position which is within the authorized position ceiling as provided in the State Appropriations Act.
>
> 3. Employee has at least six (6) continuous months of service in his present position. . .

Article 8, paragraph "D", relates to oral reprimand and reads:

> D. When an employee is orally reprimanded, it shall be done privately.

The Board holds that the interpretation of the terms of a collective bargaining agreement, like other forms of contract, depends on the intent of the parties. See, Hawaii State Teachers Association v. Hawaii Public Employment Relations Board, 60 Haw. 361 (1979). The record clearly indicates that the Union met its burden of proving by a preponderance of the evidence that Complainant was not protected by the Article 8 - "Discipline" provision.

Mr. Davis Yogi, the HGEA Contracts Specialist, who was personally involved in the collective bargaining negotiations

testified that he knew what the parties bargained for in Article 8. Mr. Yogi explained that the term "regular employees" was synonymous with the term "regular employee" as defined under the Civil Service Laws, Chapter 76, HRS. Further, the term "employee" in the Agreement also meant regular employees--that is civil service employees who had successfully completed an initial probationary period.

Mr. Yogi testified that during previous contract negotiations the Union attempted to enlarge the scope of the discipline article to include all employees--such as contract or exempt employees--but this proposal was rejected by the Employer's representatives.

Based upon this uncontroverted evidence, the Board concludes that Complainant did not meet all of the conditions listed under exempt employees as provided under Article 8, paragraph B, and we also hold that Complainant, being a contract employee, was not protected or included under the Article 8 provision. Therefore, we do not address the issue as to whether Complainant was actually disciplined or orally reprimanded by the Mayor on June 25, 1985. It is interesting to note, however, that Complainant's contract with the County was renewed for another year on June 27, 1985, two days after the Mayor swore at Complainant. Comp. Exhibit 20 B.

Finally, we address the question about the change in Complainant's working hours. Article 20 of the Unit 13 Agreement provides in pertinent part:

ARTICLE 20 - OFFICE HOURS AND WORK SCHEDULES

> A. Office hours during which offices must remain open to serve the public shall be 7:45 a.m. to 4:30 p.m., Monday to Friday inclusive, except for holidays.
>
> B. Changes in work schedules shall be prepared and prominently posted at least one (1) week in advance so that the Employees affected will be informed. Such work schedules shall be for no less than two-week (2) periods and shall not be changed except for good cause. Such work schedules are not to be considered changed by the department unless the Employees affected are given at least forty-eight (48) hours prior notice. Whenever possible, work schedules shall permit an Employee to enjoy a holiday on the day it is observed. . .

We agree with the interpretation offered by the Union that paragraph "B" of Article 20 applies to Unit 13 shift workers and not Complainant. Although the Complainant started work at 7:15 a.m., the evidence adduced at the hearing did not indicate that the current Mayor actually approved Complainant's flex time schedule. If the Mayor did in fact change Complainant's work schedule, we hold that this order did not violate the Agreement nor the statute. It is reasonable to infer that the Mayor wanted Complainant to serve the public during the normal office hours between 7:45 a.m. to 4:30 p.m.

Article 11, Grievance Procedure, of the Unit 13 Agreement, gives the Union the right to decide whether to proceed through the various steps in the grievance process. It is clear that an employee has no absolute right to arbitration and that a union has discretion as to whether any complaint should be subject to the grievance procedure. Such discretion must be exercised in a nonarbitrary fashion. As stated by the U. S.

Supreme Court in Vaca vs. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 Law.Ed.2d 842 (1967):

> A breach of the statutory duty of fair representation occurs only when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. 386 U.S. at 190.
>
> The exclusive agent's statutory obligation to serve all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion in complete good faith and honesty, and to avoid arbitrary conduct. Id. at 177.

As stated by this Board:

> While [SHOPO] is not required under the Unit 12 contract or under Chapter 89, HRS, to take every grievance to arbitration, its processing of each grievance must be done in a fair and impartial manner. Moreover, any of its decision not to proceed to arbitration must be based on objective rational criteria. Bruce J. Ching and SHOPO, et al., 2 HPERB 23 (1978).

The Board also notes that the duty of fair representation can be violated although the union acts in good faith:

> Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or an action that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation. A union may refuse to process a grievance or handle the grievance in a particular manner for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority. A union must especially avoid capricious and arbitrary behavior in the handling of a grievance based on a discharge--the industrial equivalent of capital punishment. Griffin vs. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, 469 F.2d 181, 183 (4th Cir. 1972).

The union violates its duty of fair representation when its conduct in representing its members is arbitrary, discriminatory or in bad faith. In the case at hand, the Board must conclude that the Union did not violate its duty of fair representation, on the basis that the reading of Article 11 of the Unit 13 Agreement does not cover Complainant's complaints involving his office related problems, and the terms used in the Article 8 provisions are not applicable to a contract employee as was found in this case.

In the sequence of events relating to the Union's involvement in these cases, the Board concludes that HGEA, through its designated agents, Mr. Emura and Mr. Yogi prudently performed their fiduciary duties in correctly interpretating and applying the terms arising from Complainant's problems. Mr. Emura took the extra step to arrange for the meeting with the Mayor--which was sought by Complainant for over a year--and was literally surprised when he found out that Complainant had filed an EEOC complaint against the Mayor moments before the appointed hour.

In their analysis of Complainant's complaints, the Union agents did not handle the claim in a perfunctory manner. They investigated the claims by interviewing the office staff members and other employees within the County system to find out if, in fact, the Mayor had targeted Complainant. The investigation revealed that nobody was being targeted. Mr. Yogi was personally familiar with the meaning of the Article 8, 11, and 20 provisions of the Unit 13 Agreement. We hold that HGEA met their

burden of proof by explaining the intent of the parties concerning the applicable contract terms in the collective bargaining agreement. Accordingly, we conclude that Complainant's prohibited practice complaint against the Union is without merit, because the Union did not process his complaint against the Mayor or his alleged agents in an arbitrary, discriminatory, or bad faith manner.

In Case No. CE-13-98, Complainant filed a prohibited practice complaint against Respondent, Mayor TONY T. KUNIMURA, because of the Mayor's alleged violation of Subsections 89-13(a)(1) and (4), HRS. Briefly, the Complainant alleges that over a period of more than two years, the Mayor conducted prohibited practices and exhibited evidence of bad faith by interfering with his employment rights. These acts of interference are based upon Complainant's perception that the Mayor conspired with Gloria Long to spy on him and report directly to the Mayor on his work activities, including who he goes out to lunch with and who he meets at certain meetings. These actions by the Mayor and Gloria Long are perceived by the Complainant to embarrass him and intended to jeopardize his employment and make his job more difficult to perform.

Based upon the evidence adduced in this case, we hold that, Complainant failed to carry his burden of proving the allegations by a preponderance of the evidence as required under Administrative Rules Section 12-42-8(g)(16).

As we have found and concluded in the case against the Union, Gloria Long was not an agent for the Mayor. We also

concluded that she was not spying on Complainant, and she was not reporting directly to the Mayor. Whatever information she relayed to the Mayor was done at the Mayor's behest--mainly about Complainant's travel activities--and any other information was offered voluntarily when Complainant's name came up in certain conversations with the Mayor.

Aside from these preliminary conclusions, we go on to the gist of the question as to whether the Mayor interfered with, restrained or coerced Complainant in the exercise of his "right(s) of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively . . .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." Section 89-3, HRS.

On December 12, 1985, Complainant was cross-examined by Respondent Mayor's counsel and admitted under oath that the Mayor did not interfere with Complainant's right to join Unit 13 of HGEA. Further, Complainant also testified that he did not file any complaint, petition, or affidavit under Chapter 89, HRS, prior to the June 25, 1985 meeting with the Mayor. Complainant also admitted that he did not give any information or testimony under Chapter 89, HRS, prior to the Mayor's meeting. Given these admissions, and taking all of the evidence into consideration in these matters, this Board concludes that the Mayor did not in fact violate the provisions of Subsections 89-13(a)(1) and (4), HRS.

In view of our conclusions that Gloria Long was not a spy for the Mayor, and whatever personality problems resulted therefrom; the Complainant's Section 89-3, HRS, rights were not violated by either HGEA or Mayor in this case. We find no scintilla of evidence that the Mayor or anyone else in the County, for that matter, interfered, restrained or coerced Complaint in the exercise of his right of self-organization and the right to join any employee organization for the purpose of bargaining collectively, 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. We also conclude that the Mayor did not discriminate against Complainant, because whatever alleged actions of the Mayor in violation of Subsection 89-13(a)(4) occurred prior to Complainant's having filed anything before this Board.

As we have noted before, we do not address the merits or demerits of the Mayor's swearing and throwing a piece of paper at Complainant. In this context, the Complainant refused to accept a voluntary cease and desist offer by the Mayor from performing any of the acts that Complainant alleged in his complaint.

Before we close this intriguing chapter involving the interplay of the rights of a contract employee, union and employer in the matrix of Chapter 89, the Unit 13 Agreement, and deep office related personality conflicts; this case was a difficult case for the Board because as the facts were unfolded, it became evident that this Board was powerless to grant

Complainant the remedies he wanted from his Employer and Union. Complainant simply chose the wrong forum. Issues relating to civil service status, salary schedules, punitive damages, and office personnel and management style are all matters outside of the Board's jurisdiction.

Finally, as an obiter dictum observation, we conclude these cases by noting the fact that there were many laws relied upon by the parties herein--civil service law, collective bargaining law, Unit 13 Agreement, Federal Civil Rights Act, etc. Perhaps, we should add the most important ingredient in this matrix of laws--that is, the Golden Rule.

PROPOSED ORDER

Case No. CU-13-51, against the Union, and Case No. CE-13-98, against the Employer, are hereby dismissed.

DATED: Honolulu, Hawaii, February 19, 1988.

HAWAII LABOR RELATIONS BOARD

MACK H. HAMADA, Chairperson

JAMES R. CARRAS, Board Member

GERALD K. MACHIDA, Board Member

WILLIAM BLANCHARD and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO, CASE NO. CU-13-51 and WILLIAM BLANCHARD and TONY T. KUNIMURA, Mayor of the County of Kauai, CASE NO. CE-13-98
DECISION NO. 258
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

FILING OF EXCEPTIONS

Any party adversely affected by the Proposed Findings of Fact, Conclusions of Law and Order may filed exceptions with the Hawaii Labor Relations Board, pursuant to Section 91-9, HRS, within ten days of the service of a certified copy of this document. The exceptions shall specify which proposed findings or conclusions are being excepted to with full citations to the factual and legal authorities therefore. A hearing for the presentation of oral arguments may be scheduled by the Board in its discretion. In such events, the parties will be so notified.

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