STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Complainant, and BENJAMIN J. CAYETANO, Governor, State of Hawaii; TIM JOHNS, Chairman, Department of Land & Natural Resources, State of Hawaii; MASON YOUNG, Administrator, Bureau of Conveyances, Department of Land & Natural Resources, State of Hawaii; and NICOLENE GEGA-CHANG, Chief, Bureau of Conveyances, Department of Land & Natural Resources, State of Hawaii, Respondents.	CASE NO. CE-03-427 DECISION NO. 407 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) filed the instant prohibited practice complaint with the Hawaii Labor Relations Board (Board) on May 21, 1999, alleging that on or about May 5, 1999, Respondents, through NICOLENE GEGA-CHANG (GEGA-CHANG), interfered with, restrained or coerced Unit 03 employees in their right to engage in protected Union activity under § 89-3, Hawaii Revised Statutes (HRS) in violation of §§ 89-13(a)(1), (2), and (7), HRS. The Union alleged that Respondent GEGA-CHANG instructed Unit 03 employees to

first, not vote in a steward election, and then, second, "go across the hall, ask questions and vote."

On June 4, 1999, Respondents, by and through their counsel, filed a motion to dismiss the prohibited practice complaint and/or for summary judgment with the Board. Respondents contended that the complaint failed to state a claim upon which relief can be granted and/or for summary judgment on the grounds that Respondent GEGA-CHANG is not an employer within the meaning of Chapter 89, HRS.

On June 14, 1999, the HGEA filed a memorandum in response to Respondents' motion with the Board contending that GEGA-CHANG's statements violate Chapter 89, HRS, because even if she was asked about the stewards election, she was under an obligation to remain silent and direct employees' questions to the Unit 03 members conducting the election. Further, the HGEA contended that GEGA-CHANG was a supervisor of the Unit 03 employees and has inherent authority to represent the employer in dealing with employees.

The Board conducted a hearing on Respondents' motion on July 27, 1999. In Order No. 1744, dated August 10, 1999, the Board found sufficient facts alleged in the complaint to state a claim for relief and denied the Respondents' motion to dismiss the complaint. Further, the Board found that GEGA-CHANG, a supervisor included in bargaining unit 04, could represent an employer within the meaning of § 89-2, HRS, in the context of a prohibited practice charge.

The Board conducted a hearing on the instant complaint on October 8, 1999. The parties were afforded full opportunity to

present evidence and arguments to the Board. The parties filed written briefs with the Board on November 26, 1999. In Order No. 1840, dated March 8, 2000, the Board directed Respondents to submit a proposed order to the Board reflecting the Board's ruling in the case. On March 29, 2000, Respondents filed their proposed order with Complainant's approval as to form with the Board.

Based upon a thorough review of the record in this case, the Board makes the following findings of fact, conclusions of law, and order.[1]

FINDINGS OF FACT

Complainant HGEA is the exclusive representative, as defined in § 89-2, HRS, of State employees included in bargaining units 03 and 04.

Respondent BENJAMIN J. CAYETANO is the Governor of the State of Hawaii and is the employer, as defined in § 89-2, HRS, of State employees.

Respondent MASON YOUNG (YOUNG) is the acting administrator of the Bureau of Conveyances (BOC), Department of Land and Natural Resources (DLNR), State of Hawaii, and represents the interests of the employer within the meaning of § 89-2, HRS.

Respondent GEGA-CHANG is the chief of the Review Branch, BOC, DLNR, State of Hawaii and represents the interests of the employer within the meaning of § 89-2, HRS.

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[1]The Board has adopted those proposed findings of fact and conclusions of law which support its decision in this case, and has modified the order to conform with the Board's ruling in this matter.

The BOC employs approximately 55 employees and is located in the Kalanimoku building in Rooms 121 and 122. Organizationally, YOUNG is currently the acting Administrator for the BOC and Carl Watanabe is his immediate subordinate and the acting Registrar. The Registrar oversees two branches, the Land Court Branch, sometimes called Review, and the Regular System Branch, sometimes called Receiving. GEGA-CHANG is currently the head of the Review Branch and Susan Okamoto (Okamoto) is currently the head of the Receiving Branch. Both GEGA-CHANG and Okamoto are members of bargaining unit 04 which is represented by the HGEA.

In May of 1997, the HGEA conducted a Unit 03 stewards election in the BOC in which Linda Gomes (Gomes) and Harriet Enrique (Enrique) were elected. There are approximately 38 to 42 Unit 03 members in the BOC and according to HGEA bylaws, the BOC employees are entitled to have two Union stewards. Following the election, a number of employees in the BOC complained to the HGEA about the manner in which the election was conducted. On May 19, 1997, a number of Unit 03 members raised their concerns with the Union in a special HGEA Oahu Island Division (OID) meeting. Principal concerns were the apparent lack of notice of the election and the absence of a nominating process by which interested members could "run" for the steward position.

In an effort to address the concerns of the BOC Unit 03 members, the May 19, 1997 meeting ended with Enrique stating that she and Gomes, "will sit down to set down rules for the future. Standard. If you are not there, that's it. Will try to work out procedures with everyone."

Despite this promise, on May 5, 1999 Enrique came to YOUNG's office and advised him, "that they're holding a series of elections in the bureau with respect to the appointment of the new stewards." The election was to be held in the BOC conference room which had been reserved by someone without indicating the purpose for the reservation.

At this time Enrique was temporarily assigned to the position of Regular System Branch Chief, a bargaining unit 04 position, and Okamoto, was made a steward in her place.

Sometime between 11:30 and 11:45 a.m., Kinau Alber, the supervisor of the indexing section, approached Okamoto in Room 122 and asked her if she knew about the stewards election going on. Despite being one of the Union stewards, Okamoto knew nothing about the election. Employees in the area became upset that the stewards election was being conducted without adequate notice, just as it happened in 1997.

Okamoto proceeded to check on what was going on. She first went to Room 121 where HGEA business agent Beverly Look (Look) informed her that Gomes had posted the notice of the election in the lunch room on Monday morning. Okamoto proceeded to the lunch room, retrieved the notice, made copies of it and returned to Room 122 to inform her colleagues that there was indeed an election. Her colleagues were still upset and some began to tell her they were refusing to participate in the election. In addition, none of the employees indicated that the notice had been posted before that day and some employees demanded to know why Okamoto, their Union steward did not even know about the election.

Once again Okamoto went back to Room 121 where she found Look and Enrique in YOUNG's office. In response to Okamoto's question as to why she had not been informed of the election, Look said it was because Okamoto had been temporarily assigned to a Unit 04 position, which is the same reason Enrique was not informed about the election.[2]

Okamoto then proceeded to the conference room where the election was being conducted and talked to Phyllis Okamura, HGEA OID Chair, who was conducting the election. Okamoto informed Okamura about how upset some of her members were and how some were refusing to vote. Okamura indicated that it was their choice but if they didn't vote they could not complain about the results later.

Okamoto then returned to Room 122 and informed the employees who were gathered outside of GEGA-CHANG's office and still obviously upset, and informed them of what Okamura had said. GEGA-CHANG informed everyone that she encouraged everyone to go across the hall, ask questions and vote and if they didn't vote not to come grumbling to her.

At this point, Susan DeJesus (DeJesus) passed by and said something like, "I don't know what the big deal is, problem or

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[2]Ms. Enrique was obviously aware of the election because she is the one who informed Mr. YOUNG that it was to take place. Moreover, there is no reason to keep the election a secret from Bargaining Unit 04 members, especially since the Union claims the notice of election was posted on the morning of May 3, 1999. In addition, Ms. Okamoto had been serving as steward for three months and while she was temporarily assigned to the Unit 04 position from April 19 to April 26, 1999, she continued to act as steward on other Union matters. Finally, Ms. Okamoto was not temporarily assigned into a Unit 04 position on Monday, May 3, 1999, when Ms. Gomes allegedly posted the election notice.

concern is because I went and voted and I voted for Susan Okamoto and Kaiulani Lambert." DeJesus then proceeded into the vault and Okamoto left for lunch.

DeJesus testified at the hearing that Respondent GEGA-CHANG said, "They're doing it underhanded again" and further told employees "don't vote if you guys don't want." However, DeJesus' testimony is inconsistent with the testimony of the other witnesses who were present. There were a half-dozen people who were grumbling outside GEGA-CHANG's office. Okamoto had just informed them that if they did not vote they could not complain about the election results and GEGA-CHANG had just encouraged everyone to go across the hall and vote. Three of those people, Okamoto, Rexford Davis, and Carol Ching corroborate GEGA-CHANG's statements in stark contrast to DeJesus' rendition. DeJesus contradicted herself later when she says that GEGA-CHANG said, "Don't vote then if you don't want." This was clearly said in response to someone's statement but DeJesus denied it was made in response to somebody else's statement or question. Also, DeJesus testified that GEGA-CHANG later told her to go and vote.

The Board finds, based on the credible evidence in the record, that Respondent GEGA-CHANG, head of the Review Branch at the BOC, DLNR, State of Hawaii and a supervisor, told her subordinates during an internal Union election conducted on work premises, words to the effect: "Go across the hall, ask questions and vote and, if you don't vote, don't come grumbling to me."

CONCLUSIONS OF LAW

The Board has jurisdiction over this complaint pursuant to §§ 89-5 and 89-14, HRS.

Pursuant to Administrative Rules § 12-42-8(g)(16), the Complainant has the burden of proof and the quantum of proof is the preponderance of the evidence.

The Complainant must establish that the Respondents BENJAMIN J. CAYETANO, TIM JOHNS, MASON YOUNG, and/or NICOLENE GEGA-CHANG interfered with, restrained or coerced Unit 03 employees in their right to engage in protected Union activity as set forth in § 89-3, HRS. Specifically, the Complainant has alleged that Respondents violated §§ 89-13(a)(1), (2), and (7), HRS, when Respondent "Nicolene GEGA-CHANG instructed Unit 03 employees to, first, not vote, then, second, go across the hall, ask questions and vote."

In order for there to be a violation of § 89-13, HRS, the violation must be wilful. The Board has determined that "wilfulness can be inferred from the circumstances of the case and can be presumed where the violation occurred as a natural consequence of the party's action." United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 719, 730 (1997).

Section 89-13(a), provides that:

> 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;
> (2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;

* * *

(7) Violate the terms of a collective bargaining agreement; . . .

Section 89-13(a)(1), HRS, is similar to § 8(a)(1) of the National Labor Relations Act (NLRA). This Board has long held that case law developed under the NLRA will be instructive and given weight if the statutory provisions of the NLRA are similar or identical to the provisions of Chapter 89, HRS. E.g., United Public Workers, Local 646, UPW/AFSCME, 1 HPERB 71 (1972).

In 1985, the Ninth Circuit adopted the "all-the-circumstances test" to determine when an interrogation is violative of § 8(a)(1) NLRA. Hotel Employees and Restaurant Employees Union, Local 11 v. NLRB, 760 F.2d 1006, 119 LRRM 2624 (9th Cir. 1985).[3] Under this test, questioning about union sympathies is not per se unlawful; the rule is that an employee interrogation is unlawful only when under the totality of circumstances the interrogation reasonably tends to restrain or interfere with employees in the exercise of their rights.

The current "flexible all-the-circumstances test . . . recognizes that an employer's questioning of an employee's union views is not necessarily coercive and may arise during casual conversation. Employers often mingle with their employees, and

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[3]It is noteworthy that this test has changed over the years. Until 1954 the National Labor Relations Board (NLRB) adopted a per se standard. "Under the per se standard, questions concerning union sympathies are inherently coercive and violate § 8(a)(1) even if the employee openly expresses pro-union views. Id. at 2626. In 1954 the NLRB adopted the "all-the-circumstances" test where "the interrogation reasonably tends to interfere with the employees in the exercise of rights guaranteed by the Act." Id. The NLRB returned to the per se standard around 1978 until readopting the current test in 1985. Id.

union activities are a natural topic of conversation." Id. at 2626-27.

To determine whether or not questioning of an employee reasonably tends to restrain, coerce or interfere with rights guaranteed under § 8(a)(1) turns on the totality of the circumstances[4] of the alleged questioning. The Seventh Circuit stated:

> . . . [i]t is not unusual for employees who interact with one another on a daily basis to converse about matters which affect their work, thus conversations between employees and supervisors do not violate the Act. [Cite omitted.] Even an interrogation does not, per se, violate the Act. [Cite omitted.] We categorize as "interrogations" within the meaning of § 8(a)(1) only those questions which, by word or context, suggest an element of coercion or interference. [Cite omitted.] Consequently, a question becomes coercive only when it is "likely to deter the interrogated worker (or others, who had heard about the interrogation) from supporting or . . . working actively for the union." [Cite omitted.] Factors which we weigh in deciding whether a particular inquiry is coercive include the tone, duration, and purpose of the questioning, whether it is repeated, how many workers are involved, the setting, the authority of the person asking the question, and whether the company had otherwise shown hostility to the union. [Cite omitted.] We also consider whether questions about protected activity are accompanied by assurances against reprisal, and whether the interrogated workers feel constrained to lie or give non-committal answers rather than answering truthfully. [Citations omitted.]

NLRB v. Champion Laboratories, Inc., 99 F.3d 223, 227, 153 LRRM 2657, 2660 (7th Cir. 1996).

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[4]The courts have used "all-the-circumstances" and "totality of the circumstances" synonymously.

Other relevant circumstances are the employer's attitude toward its employees, the nature of the information sought, the rank of the questioner in the employer's hierarchy, the truthfulness of the employee's reply, the place and manner of the conversation, whether the employer had a valid purpose in obtaining the information sought about the union, whether a valid purpose if existent, was communicated to the employee and whether the employer assured the employee of no reprisals if he or she supported the union. Centre Property Mgmt. v. NLRB, 807 F.2d 1264, 1270, footnote 4, 125 LRRM 2409 (5th Cir. 1987). See also, Midland Transportation Co., Inc. v. NLRB, 962 F.2d 1323, 140 LRRM 2270 (8th Cir. 1992).

In this case, the record indicates that GEGA-CHANG did not interrogate the employees regarding the Union election. There is also no evidence that GEGA-CHANG initiated the conversation or asked any questions of the Unit 03 members. The upset Unit 03 employees who congregated outside her office prompted her involvement. It is unrebutted that the situation began with an employee approaching the Unit 03 Union steward.

Section 8(c) of the NLRA protects the Employer's right to free expression as follows:

> (c) Expression of views without threat of reprisal or force or promise of benefit. The expressing of any views, arguments, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Chapter 89, HRS, contains no such equivalent provision.[5] However, Hawaii public employers retain their free speech rights guaranteed under the First Amendment of the U.S. Constitution and "§ 8(c) (29 U.S.C. § 158 (c) (1964 ed.)) merely implements the First Amendment by requiring that the expression of 'any views, argument or opinion' shall not be 'evidence of an unfair labor practice,' so long as such expression contains 'no threat of reprisal or force or promise of benefit' in violation of § 8(a)(1)." NLRB v. Gissel Packing Co., 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). See also, Hawaii Gov't Employees Ass'n, AFSCME, Local 152, AFL-CIO, 4 HLRB 4, 12 (1986).

In this case, there is no evidence that Respondents made any statements to employees containing threats of reprisal or promise of benefits to coerce or influence their vote in the Union election. Ultimately, the employees were not coerced or restrained by the Respondents from exercising their right to vote in the internal Union election. The Board finds, based on the record, that GEGA-CHANG did not interfere with, restrain or coerce the employees in the free exercise of their right to vote in the stewards election.

The Board also finds that Complainant failed to prove that Respondents interfered with the conduct of the Union election or administration of the Union in violation of §§ 89-13(a)(2) and (7), HRS. However, as in a recent case involving allegations of interference with the conduct of an internal union election,

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[5]However, § 377-16, HRS, provides that "nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech."

Decision No. 404, United Public Workers, AFSCME, Local 646, AFL-CIO, 6 HLRB ___ (March 3, 2000), the Board cautions employees who represent management to refrain from engaging in activities which may give the appearance of improper assistance or interference with internal union matters.

ORDER

The Prohibited Practice Complaint is dismissed.

DATED: Honolulu, Hawaii, May 3, 2000.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

RUSSELL T. HIGA, Board Member

CHESTER C. KUNITAKE, Board Member

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