

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CU-05-164
JANET WEISS,	)	DECISION NO. 420
	)	FINDINGS OF FACT, CONCLUSIONS
Complainant,	)	OF LAW, AND ORDER
	)	
and	)	
	)	
JOAN LEE HUSTED, Deputy Executive	)	
Director, Hawaii State Teachers Association;	)	
MARK NAKASHIMA, Uniserv Director,	)	
Hawaii State Teachers Association; DON	)	
MERWIN, Uniserv Director, Hawaii State	)	
Teachers Association; and HAWAII STATE	)	
TEACHERS ASSOCIATION,	)	
	)	
Respondents.	)	

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 4, 2000, Complainant JANET WEISS (WEISS), proceeding *pro se*, filed this prohibited practice complaint with the Hawaii Labor Relations Board (Board) alleging that Respondents JOAN LEE HUSTED (HUSTED), Deputy Executive Director, MARK NAKASHIMA (NAKASHIMA), Uniserv Director, DON MERWIN (MERWIN),<sup>1</sup> Uniserv Director and the HAWAII STATE TEACHERS ASSOCIATION (HSTA or Union) breached the duty of fair representation in wilful violation of Hawaii Revised Statutes (HRS) § 89-13(b)(4) and (5).<sup>2</sup>

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<sup>1</sup>MERWIN was dismissed as a party to the complaint by the Board on October 6, 2000, inasmuch as WEISS admitted that MERWIN was not involved in the processing of her 1999 grievance over the transfer. MERWIN appeared as a witness for HSTA.

<sup>2</sup>HRS § 89-13 provides in part:

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

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- (4) Refuse or fail to comply with any provision of this chapter; or
- (5) Violate the terms of a collective bargaining agreement.

The Board held hearings on August 1 and 24, 2000 and October 6 and 31, 2000 and gave both parties a full and fair opportunity to call and examine witnesses and submit evidence. WEISS appeared pro se. Respondents were represented by Vernon Yu, Esq. The record was closed on October 31, 2000,<sup>3</sup> and the parties submitted post-hearing briefs on December 8, 2000.

Based on a careful consideration of the reliable, probative and substantial evidence in the record and the arguments of both parties, the Board majority makes the following findings of fact, conclusions of law and order.

### **FINDINGS OF FACT**

1. Complainant WEISS is a secondary, physical education teacher and at all relevant times a public employee, within the meaning of HRS § 89-2, of the Department of Education (DOE), State of Hawaii, and a member of bargaining unit 05 as defined in HRS § 89-6.
2. Respondent HSTA is the exclusive representative, as defined in HRS § 89-2, for Unit 05 and its Deputy Executive Director HUSTED, and Uniserv Director NAKASHIMA, at all relevant times, were agents of the HSTA.
3. HRS § 89-8(a), sets forth the HSTA's duty of fair representation which provides in part:

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.

4. NAKASHIMA is starting his third year as HSTA Uniserv representative for Kohala, Hamakua and Kona. As a Union representative NAKASHIMA's supervisor is HUSTED. Prior to becoming a Union representative, he worked for HSTA as a governance specialist. He first met WEISS when she served as

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<sup>3</sup>On January 3, 2001, Catherine Bratt sent a letter addressed to Board Chair Nakamura seeking to clarify her testimony. WEISS responded on January 16, 2001. The Board neither accepted nor considered any information submitted after the record was closed.

HSTA Kohala Chapter President and he was training chapter presidents on parliamentary procedure, policies and team building activities at an HSTA two-day seminar. NAKASHIMA holds a bachelor of arts degree from the University of Hawaii in education, and was a high school teacher for seven years before joining HSTA.

5. Approximately seven months after becoming the Uniserv representative, NAKASHIMA and WEISS on April 1, 1999, met with Kohala High and Intermediate School Principal Catherine Bratt (Bratt) who informed WEISS that she would be transferred to the middle school at the Halaula campus for the 1999-2000 school year because WEISS did not have the additional certification to teach weight training that was required and Bratt believed WEISS refused to teach weight training in the past.
6. WEISS demanded NAKASHIMA file a grievance, which NAKASHIMA attempted to resolve by scheduling an informal meeting with Bratt after researching with the DOE whether additional certification was required. NAKASHIMA informed WEISS that attempts to resolve the informal grievance failed on April 13, 1999.
7. On April 29, 1999, NAKASHIMA filed a formal (Step 1) grievance over the transfer alleging WEISS “was arbitrarily and capriciously” moved from her teaching assignment at Kohala High School to a position at the Halaula Campus” in violation of Articles II (Non-Discrimination), VII (Assignments and Transfers) and XXII (Maintenance of Benefits) of the Unit 05 collective bargaining agreement (Unit 05 contract).<sup>4</sup>

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<sup>4</sup>Excerpts from Article VII (Assignments and Transfers) and Articles V (Grievance Procedure), of the Unit 05 contract were admitted into evidence, and provide as follows:

#### ARTICLE VII - ASSIGNMENTS AND TRANSFERS

For the purpose of this article (Article VII), “school” shall mean any DOE facility where teachers are assigned.

Assignments and transfers shall be governed by this Article and by the policies, regulations and procedures as contained in the 5100 section of the School Code (5000 Series). Other relevant memoranda shall be posted in schools or administrative units or distributed to teachers as appropriate.

##### A. NOTIFICATION OF ASSIGNMENTS

Assignments and schedules for the following year shall be made by June 10 and by that date teachers shall be notified of their next year’s assignments in writing.

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Unassigned or transferred teachers will be given their assignments to schools when assigned and be given their teaching schedules as soon as possible.

In order to notify teachers of their employment and salary status for the ensuing school year, teachers shall receive their SF-5As no later than June 10 or as soon as possible after consummation of transfers and/or new assignments.

Changes made to the SF-5A form shall be reflected on the reverse side as soon as possible.

**B. MASTER SCHEDULE**

During the third quarter of the school year, information such as the preliminary position allocation from the District Office, student course request tally, conflict matrix (if available) and resource allocation sheet shall be shared with the faculty to encourage and facilitate teacher input and collaborative planning to maximize quality student programming based upon student needs and requirements.

During the fourth quarter of the school year or earlier, the tentative master schedule for the following school year shall be posted in an area accessible to faculty members. Teachers may submit recommendations for changes to the school administrator through the department or grade level chairperson, or a teacher may submit written recommendations directly to the school administrator with a copy to the department or grade level chairperson.

Changes in assignments within the school after June 10 shall be made for the good of the educational program of that school and upon consultation with the teacher(s) affected.

Upon request, information regarding the current master schedule and/or the schedule itself shall be made available.

**C. ASSIGNMENT/TRANSFER SELECTION CRITERIA**

Teachers shall not be assigned nor granted a transfer outside the scope of their teaching certificate and their major or minor field of study except for good reason.

A principal or immediate supervisor when making assignments or affecting transfers shall consider a teacher's qualifications for performing tasks related to the assignment such as certification. Teaching skills; experience(s) and special ability(ies) related to the school program; and past performance including teacher evaluation and prior supervisors' reports.

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When two (2) or more teachers apply for a vacancy, the Employer shall award the position to the teacher determined to be the most qualified to perform the duties related to that vacancy.

If it is determined that there is no material difference between qualifications of the applicants, then the Employer shall select or award the position to the teacher with the greatest length of service with the DOE. If the applicants are tied in the years of state service, the applicant with the most district seniority shall be granted the position. If the candidates remain tied in seniority, a neutral method (such as flipping a coin) shall be used to select the candidate.

Any arbitration of such grievances arising during the transfer period (February through June) filed under this section shall be completed on or before August 15 of any school year, and the parties shall make every good faith effort to complete such arbitration prior to said date, to the end that no teaching position shall remain unfilled at the commencement of each semester. (Emphasis added.)

Any other grievance arising out of Article VII - Assignments and Transfers, may be filed under and shall be processed in accordance with the procedures set forth in Article V - Grievance Procedure, of this Agreement.

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#### ARTICLE V- GRIEVANCE PROCEDURE

- A. Definition. Any claim by the Association or a teacher that there has been a violation, misinterpretation or misapplication of a specific term or terms of this Agreement shall be a grievance.

Grieving Party. Only teachers covered hereunder, or their certified bargaining representative, shall have the right to institute and process grievances under this Article.

- B. Time Limits. All limits herein shall consist of school days, Monday through Friday, except that when a grievance is submitted on or after June 1, and before the first work day of the next school year, time limits shall consist of all week days, Monday through Friday, so that matters may be resolved before the close of the school term or as soon as possible thereafter. The number of days indicated at each level should be considered a maximum and every effort should be made to expedite the process. There shall be no obligation by the Employer to consider any grievance not filed or appealed in a timely manner.

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In the event that the Employer processes a complaint hereunder which may not be properly defined as a grievance as set forth herein, the Employer shall not be stopped from rejecting such complaint on that basis at a later date, except as provided in Section E-2g, or refusing to process the complaint further provided that such disputes shall be provided under Section E-2e.

- C. Association Representation. Upon selection and certification by the Association, the Board shall recognize an Association grievance representative in each school on the following ratio: one (1) Association grievance representative for each school with up through one hundred (100) members of the bargaining unit; two (2) Association grievance representatives for schools with over one hundred (100) members of the bargaining unit.

An individual teacher of the bargaining unit may present a grievance at any time to the Employer and have the grievance heard without intervention of the Association, provided that the Association is afforded the opportunity to be present at such conferences and that any adjustment made shall not be inconsistent with the terms of this Agreement.

Insofar as possible, grievance investigation and handling will not interfere with classroom instruction. However, for grievance meetings beyond the school level, grievance representatives, individual grievants and other necessary parties in interest who are bargaining unit personnel shall be given release time during the day without loss of pay or benefits to attend such meetings if held during the work day.

Grievance meetings beyond the school day shall be held at times mutually convenient for the Employer and the grievant.

The Association will furnish in writing to the Superintendent a list of authorized Association grievance representative(s) in each school and maintain its currency.

- D. Informal Discussion. Any teacher or the Association, in cases of an Association grievance, may institute a grievance by notifying the principal/immediate supervisor of such and shall meet with the principal/immediate supervisor on an informal basis for the purpose of discussing and attempting to settle the matter. When requested by the teacher, the Association grievance representative may intervene to assist.

Step 1. a) If the matter is not settled on an informal basis in a manner satisfactory to the teacher involved, then the teacher or the certified bargaining representative may institute a formal grievance by setting forth in writing on the form set forth in Appendix I, the nature of the complaint, the specific

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term or provision of the Agreement allegedly violated and the remedy sought.

b) The grievance must be presented to the District Superintendent/Assistant Superintendent in the case of State Office teachers, in writing within twenty (20) days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) days after the alleged violation first became known or should have become known to the teacher involved.

c) The District Superintendent/Assistant Superintendent in the case of State Office teachers may hold a meeting for the purpose of obtaining evidence pertaining to the grievance and for the purpose of attempting to settle the matter. The decision will be in writing and delivered to the grieving party within five (5) days of the receipt of the grievance.

Step 2. a) If the answer to the grievance in Step 1 is not delivered within five (5) days or does not satisfactorily resolve the matter, then the grieving party in Step 1 may appeal such answer to any part thereof, by filing the grievance with the State Superintendent/designee within five (5) days after the receipt or non-receipt of the answer in Step 1. The State Superintendent/designee shall hold a meeting within five (5) days. However, a formal hearing shall be held in lieu of a second level meeting if requested by either party.

b) The grievance must be set forth in writing on a form set forth in Appendix 1 and specifically state which portion of the answer to the grievance in Step 1 is being appealed and the remedy sought.

c) The State Superintendent/designee's answer to the grievance shall be in writing and delivered to the grieving party within five (5) days after the hearing/meeting.

#### E. MEDIATION/ARBITRATION

1. Mediation. The parties agree that a grievance may be submitted to mediation after the Association has submitted its request for arbitration in accordance with the Memorandum of Understanding contained in Appendix XII.
2. Arbitration. If a claim by the Association or teacher that there has been a violation, misinterpretation or misapplication of this Agreement is not satisfactorily resolved at Step 2, the Association may present a request for arbitration of the grievance within ten (10) days after receipt of the answer at Step 2.

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- a. Representatives of the parties shall immediately thereafter attempt to select an arbitrator. If the parties have not appointed an arbitrator within two (2) weeks from the receipt of the request for arbitration, the parties will request that the Hawaii Labor Relations Board provide five (5) names from the register of arbitrators.

The arbitrator shall be chosen by the parties by alternately striking one (1) name at a time from the list. The first party to scratch a name shall be determined by lot. The arbitrator whose name remains on the list shall serve for that case.

By mutual agreement, the parties may select a permanent umpire to serve on all cases.

- b. In making a decision on a case, the arbitrator shall not have the authority to consider any facts not in evidence, nor shall the arbitrator add to, subtract from, delete, or in any way amend or modify any term or condition of the collective bargaining agreement. The arbitrator's decision shall be in writing and shall contain the rationale supporting the decision. The decision will be final and binding on the parties.
- c. The voluntary labor arbitration rules of the American Arbitration Association as amended and in effect during the life of this Agreement shall apply to the proceedings except as otherwise provided here or as otherwise amended by mutual agreement.
- d. The fees and expenses of the arbitrator shall be shared equally by the Employer and the Association, including the cost of the arbitrator's transcript if one is requested by the arbitrator. Each party will pay the cost of presenting its own case.
- e. If the Employer disputes the arbitrability of any grievance submitted to arbitration, the arbitrator shall first determine the question of arbitrability. If the arbitrator finds that it is not arbitrable, the grievance shall be referred back to the parties without decision or recommendation on its merits.



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- f. When the arbitrator finds that any disciplinary action was improper, the action may be set aside, reduced or otherwise modified by the arbitrator. The arbitrator may award back pay to compensate the teacher wholly or partially for any salary lost. Such back pay award shall be offset by all other compensation received by the grievant(s) including but not limited to unemployment compensation or wages.
  - g. The parties shall not have the right to present different allegations, facts, evidence and arguments in arbitration than those presented to the State Superintendent/designee at the Step 2 meeting/hearing.
- F. The Employer acknowledges the right of the Association's grievance representative to represent any grievant at any level if so requested by the grievant.
  - G. The parties by mutual written agreement may waive Steps 1 and 2 of the Grievance Procedure and proceed with arbitration.
  - H. No reprisals of any kind will be taken by the Employer or the school administration against any teacher because of his/her participation in this Grievance Procedure.
  - I. All documents, communications and records dealing with the processing of a grievance will be filed separately from the personnel files at the participants.
  - J. The Employer has the right to suspend, demote, discharge or take other disciplinary action against a teacher for the proper cause.
  - K. Disciplinary action taken against any teacher shall be for proper cause and shall be subject to the Grievance Procedure.

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The Memorandum of Understanding in Appendix XII referred to in Article V, entered into on July 1, 1995 and in effect at the time provides:

In conjunction with the provisions of the Master Agreement, the parties agree to the following Rules of Mediation:

1. After the Association has filed a request for arbitration of a grievance, either party may request that the grievance be referred to mediation.
2. Within five (5) days filing for arbitration, either party may present a written request for mediation to the other party.

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Upon receipt of the request, the receiving party shall respond in writing to the requesting party within five (5) days of receipt.

3. The Department of Education (DOE) and the Association must mutually agree to submit a grievance to mediation, the time lines and procedures contained in this Article shall be suspended for at least twenty-five (25) days to accommodate the mediation process.
4. Within five (5) days following the agreement by the DOE and the Association to mediate the grievance, the parties shall mutually agree to a mediator experienced in the application of mediation skills. If the parties are unable to mutually agree upon a mediator, the parties shall request from the Hawaii Labor Relations Board (HLRB) the names of five (5) mediators. The mediator shall then be chosen by the parties by alternately striking one (1) name at a time from the list. The party to scratch a name first shall be determined by lot. The mediator whose name remains on the list shall serve that case.
5. The grievant shall have the right to be present at the mediation conference(s).
6. There shall be one (1) person from each party designated as spokesperson for their respective party at the mediation conference. The composition of each party's team shall be left to the discretion of the parties.
7. The mediator shall have the authority to meet separately with either party, but shall not have the authority to compel the resolution of a grievance. The mediation process shall be limited to five (5) days from the date of selection, unless both parties mutually agree to extend this limit.
8. The issue(s) shall be limited to those presented at Step 2 of the Grievance Procedure. Proceedings before the mediator shall be informal in nature. There shall be no formal rules of evidence, no transcript or any formal record of the conference(s) or meetings(s). The mediator shall be instructed not to make public any information relating to or arising from the mediation process.
9. If no settlement is reached in mediation within the specified time limit, the Association shall notify the DOE of its intent to proceed with arbitration in accordance with Section E of said Article.
10. In the event that a grievance which has been mediated is appealed to arbitration, the mediator shall not serve as the arbitrator. In the arbitration proceedings, there shall be no

8. This was NAKASHIMA's first grievance as the Uniserv Director after replacing MERWIN.
9. Between 1989 to 1996, WEISS had never filed grievances or had problems at Kohala High School. Her first grievance was filed in 1997 against Bratt who denied WEISS' application for the girls' track coach position.
10. WEISS' introduction to HSTA politics began when she was elected the Kohala Chapter President and participated in strike preparation meetings in 1996.
11. WEISS is the only HSTA Chapter President to be recalled by petition in the 30-year history of HSTA in March of 1996 after the teachers' strike was averted for having directly communicated to the legislature to advocate the need for a raise.
12. For WEISS, the grievance over her transfer was her third of six grievances filed by HSTA that went to arbitration since 1997. As a result, WEISS was familiar with the grievance process and frustrated by the amount of time she had spent over the past summers embroiled in grievances.
13. WEISS faults NAKASHIMA for not waiving a Step 1 hearing after the employer's deadline to answer, and instead agreeing to schedule a Step 1 hearing on June 3, 1999. NAKASHIMA had created an expectation for WEISS that he could waive Step 1 and proceed to Step 2, if the District Office

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reference to the fact that a mediation conference was or was not held.

11. The fees and expenses of the mediator shall be shared equally by the parties.
12. During the month of January in 1999, representatives of the parties shall meet to evaluate this experimental agreement and shall report their findings and recommendations to their respective organizations for consideration.
13. No grievance shall be submitted to mediation after June 30, 1999 provided that any grievance in the mediation process as of June 30, 1999, shall continue in accordance with the Rules of Mediation as set forth in this Memorandum of Understanding.

This Memorandum of Understanding shall expire on June 30, 1999.

did not provide a response by May 6, 1999.<sup>5</sup> Knowing that the terms of the contract allows a waiver of Step 1 if the DOE is not able to deliver an answer within five days of receiving the Step 1 grievance, NAKASHIMA provided no explanation as to why he did not seize the opportunity to expedite a Step 2 hearing at the Superintendent's level.

14. NAKASHIMA testified that the DOE did respond to him which is why he chose to accommodate the DOE by agreeing to a Step 1 hearing on June 3, 1999. The only evidence of DOE's answer at Step 1, as called for in the Unit 05 contract is dated June 10, 1999. NAKASHIMA explained that he was accommodating the schedule of DOE: Alvin Rho, Interim Deputy District Superintendent, who was serving as the hearing officer at Step 1, Bratt, and Rosemary Kawamoto, who could not find an earlier date on their calendar. NAKASHIMA opines that he did not believe the DOE at the district level was deliberately stalling, and that it wasn't an "uncommon length of time." Whether the DOE was "deliberately stalling" is immaterial and does not outweigh NAKASHIMA's duty to WEISS. The Board majority finds NAKASHIMA acted without regard to the interests of WEISS in processing the grievance as provided in Article V and Article VII, paragraph C of the Unit 05 contract.
15. On June 7, 1999, NAKASHIMA submitted to Alvin Rho, Interim Deputy District Superintendent written arguments on behalf of WEISS for more open and collaborative discussions and consultation.<sup>6</sup>

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<sup>5</sup>In a cover letter dated April 29, 1999 sending WEISS a copy of the Grievance Form, NAKASHIMA wrote: "If we do not hear from the District Office by May 6, 1999, we do have the opportunity to file a grievance with the State by May 13th."

<sup>6</sup>NAKASHIMA wrote, in relevant part:

The Association understands that the principal must have the administrative authority to make the final decision at their school. What we must be cognizant of is that in the environment in which we now operate, administrators can no longer make these decisions in a vacuum. Principals of effective management indicate that it would behoove administrators to discuss planned changes with their faculties in general and with the effected personnel in specific.

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The goal of every school-based decision is the improved delivery of education to our students. This cannot happen in a school where the principal has alienated the faculty and has demonstrated an inability or unwillingness to discuss school-based decisions in an open and collaborative manner. Had she discussed the possibility of moving Ms. Weiss to the Halaula and given her the information that I obtained from OASIS, this situation could have been resolved at the

16. On June 10, 1999, Patricia Bergin, Interim District Superintendent found no violation of Articles II, VII or XXII of the contract.
17. On June 14, 1999, NAKASHIMA filed a Step 2 grievance with School Superintendent Paul LeMahieu appealing the District Superintendent's failure to find a violation "when the principal failed to participate in open and collaborative discussions prior to assigning the grievant to the other campus." NAKASHIMA sought to have WEISS return to her teaching position at Kohala High School; "revisit the master schedule process; conduct open and collaborative meeting with faculty and staff in preparation for the 2000-2001 course offerings and other remedies as appropriate."
18. There were two reasons why it was important to WEISS that her transfer grievance be expedited. First, she had plans to take her daughter to tour a college on the mainland on July 12, 1999. Consequently, NAKASHIMA scheduled a grievance hearing on July 14<sup>th</sup>, which then caused WEISS to cancel her trip. Later, she learned that Bratt is not available for that date and a hearing at Step 2 was re-scheduled to August 13 and 18, 1999. NAKASHIMA testified that when he originally agreed to a July 14<sup>th</sup> hearing date, he assumed Bratt was available because the DOE had agreed to the date.
19. Second, a delay in Step 2 meant no arbitration could be held before August 15 and WEISS would have to prepare to teach at the Halaula campus. WEISS saw the delay in scheduling the Step 2 meeting as being contrary to the provision in Article VII, paragraph C, requiring the parties to "make every good faith effort to complete such arbitration" by August 15<sup>th</sup>. This reinforced her perception of the Union's bad faith in not applying contract requirements whenever it involved WEISS.<sup>7</sup>

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school level. During the informal discussion, Ms. Weiss did offer to teach the weigh (sic) training class as a last resort. Ms. Bratt at that time was unwilling to compromise.

<sup>7</sup>In testimony before the Board, WEISS stated:

The witness: Okay. What I am trying to say, sir – forgive me if I keep hitting my head on the wall – this delay until the last day of Summer was purposeful to allow the principal to send me to middle school so there wouldn't be a determination at the step 2 level. There wouldn't be a chance to go to arbitration. That Step 2 meeting should have been made the 13<sup>th</sup> – August the 13<sup>th</sup>. That four months made all of the difference – three months made all of the difference in the world to me, because now I have to go out to middle school and wait for the arbitration and the decision, et cetera. If it had been all done before, which like what it calls for in the contract, the assignments and transfer have to be finished before August the 10<sup>th</sup> (sic). All of

20. The Board majority finds NAKASHIMA made no good faith effort to complete the arbitration by August 15<sup>th</sup> as provided in Article VII, paragraph C of the contract.
21. According to HUSTED, Article VII, paragraph C did not apply to WEISS because it only applied to grievances for transfers that were voluntary versus involuntary. Based on a reading of Article VII, in its entirety, no such distinction is made. Paragraph C includes: "Any arbitration of such grievances arising during the transfer period (February through June) filed under this section . . . ." Given the fact that the provision is cited as having been violated in the grievances filed at Steps 1 and 2, the Board majority finds HUSTED's explanation unreasonable.
22. The Step 2 hearing was held on August 13 and 18, 1999 and denied on August 26, 1999 in a written decision by the Superintendent's Designated Representative Leighton Hirai.<sup>8</sup>

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the rules that are in the contract, when Janet is involved, are negated, no one – no one is following them. . . ." Transcript of August 1, 2000, p. 59, lines 6-24.

<sup>8</sup>The Findings of the Superintendent's Designated Representative state in part:

The Association alleges Article II, Article VII and Article XXII as being violated. The reassignment contractual language was not followed. The Association maintains that assignments at the school is done with no collaboration or input from the faculty, and the reassignment of the Grievant was due to the animosity and discriminatory actions of the Principal. The assignment therefore was arbitrary and capricious.

The Association further states that the Grievant is willing to teach and is not opposed to teaching weight training. The Association contends that the Principal is not listening to the Grievant's request the reassignment is not for the good of the school and is in retaliation for the Grievant's involvement in SCBM (School Community Based Management).

The Department, on the other hand, contends that the Principal has the authority to assign and reassign teachers within the school for the good of the Department in accordance with School Code Regulation #5108. The regulation maintains that the Principal retains management rights to exercise sound judgement to effectively utilize personnel resources for the benefit of the school program and the needs of the students.

Further, the Department presented three arbitration decisions upholding the right of management and the Principal to assign teachers provided that there is no discrimination, reprisal or retaliation, and that the assignment is not arbitrary and capricious.

23. By letter dated September 9, 1999, NAKASHIMA informed WEISS that “the HSTA Board of Directors has approved your case for arbitration on August 23, 1999, and a Demand for Arbitration was filed with the Department of Education on August 30, 1999.” At the same time, WEISS learned of NAKASHIMA’s decision to use the “mediation-arbitration” (med/arb) process.<sup>9</sup> Consequently, HSTA secured Tsukiyama and scheduled a mediation for October 25, and the arbitration on October 26.
24. This was the first time HSTA used the mediation-arbitration process on the recommendation of NAKASHIMA. Although HUSTED believed NAKASHIMA to be well-trained and qualified to handle the mediation portion of the case, the evidence shows that NAKASHIMA relied upon a different mediation-arbitration process based on a seminar he attended and not the rules of mediation as provided for in Appendix XII and Article VII of the Unit 05 contract. NAKASHIMA said he had read the rules of mediation provided for in the Unit 05 contract, but was unaware that it called for the use of a separate mediator and arbitrator. NAKASHIMA provided no reasons for not following the rules of mediation as set forth in Appendix XII of the contract.

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The Department also claims that the Principal’s decision to reassign the Grievant was based on the Grievant’s statements on several occasions that she was not qualified or willing to teach weight lifting. The Grievant had opportunity through the school’s master scheduling process to modify/suggest course offerings. Weight lifting was listed in the course offerings and several students have registered for the class. The Department argues that the Principal has the authority to assign teachers in the school for the benefit of the school program and the needs of the students.

Hirai concludes the Principal properly exercised her authority to reassign a teacher, and states that “when the Principal assigns the Grievant to Physical Education classes at the Halaula Campus, she is complying with the suggestion made by Arbitrator Gary Kam on September 18, 1998, ‘... that when Grievant is evaluated for the next PATH cycle, someone other than the principal takes on the task of evaluating Grievant.’ (DOE Exhibit H) The Association has stated that the Grievant had no problems with the Acting Administrator, Mr. Paget, when the Principal was on sabbatical. Since Mr. Paget handles most of the day-to-day operations for the Halaula Campus, he can do the evaluation for the Grievant and be in compliance with Arbitrator Kam’s suggestion.”

<sup>9</sup>In the same letter, WEISS was also informed by NAKASHIMA that “Mr. Gary Kam has joined the State of Hawaii Office of the Attorney General, and is no longer available for Arbitration Services. We are currently investigating the availability of Mr. Ted Tsukiyama as an alternate, and as such, I am pursuing the possibility of engaging in a Mediation-Arbitration session should Mr. Tsukiyama be selected.”

25. HUSTED described a med/arb process followed by NAKASHIMA that is contrary to the rules of mediation provided in Appendix XII,<sup>10</sup> to the extent that the mediator/arbitrator was one and the same person. The Board majority finds incredulous HUSTED's explanation that the rules of mediation in Appendix XII and Article VII of the Unit 5 agreement did not apply.<sup>11</sup> The decision to follow a med/arb process was not made when preparing for the arbitration hearing, but initiated by NAKASHIMA at the very outset when HSTA approved the case for arbitration.
26. According to HUSTED, "the parties established a practice over the past 28 years to mutually agree to introduce into arbitration a "variety of arbitration techniques, one of which is Med Arb, so it is done by mutual agreement between the parties in administering Article 5." HUSTED testified that "there wasn't a consideration to send her grievance to mediation first and then to arbitration." HUSTED believed that following the mediation rules was not in

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<sup>10</sup>HUSTED's testimony states:

Q. When you say Med Arb, can you describe what that process is?

A. Med Arb is a process in which the parties who have agreed to go into arbitration may of their own volition agree to try a mediation process first and see if they can't resolve the issues in mediation. If they cannot, then the issue moves to the arbitrator. In the Med Arb experiences that I have had the arbitrator is both mediator and arbitrator. Transcript of Hearing on October 31, 2000, page 19.

<sup>11</sup>Upon questioning by Board Chair Nakamura, HUSTED testified:

Q. Well, subsection 10 of Appendix 12 states: "In the event that a grievance which has been mediated is appeal to arbitration, the mediator shall not serve as the arbitrator." Is that provision relevant to this case?

A. No.

Q. Why not?

A. Because this is a new step in the grievance procedure, so if we had used Charlie Bocken, for example, as the mediator in this case, then we would--when we filed for arbitration, when we did our pre-Arb hearing and our arbitration approach, we wouldn't have used Charlie Bocken. In Janet's case we did not invoke this step. We went right from step two to the arbitration step. And then it was when preparing for the arbitration hearing, I believe, that the issue of doing Med Arb raised its head. Med Arb is a different process than the arbitration that is mentioned in this particular agreement.

Q. So the provisions of Appendix 12 don't apply?

A. No.

Q. To Med Arb?

A. No.



WEISS' best interest. In her professional judgment, HUSTED believed that WEISS "would have seen it as another delay." The Board majority finds HUSTED's explanation too convenient and unreasonable under the circumstances. First, NAKASHIMA was inattentive to WEISS' interests in scheduling the grievance meetings and failed to waive Step 1 and proceed to Step 2 when the opportunity arose. Second, contrary to HUSTED's testimony, the issue of using med/arb did not arise while preparing for the arbitration process. NAKASHIMA decided to use med/arb when HSTA approved proceeding to arbitration. This provided more than ample time at the outset to select a separate mediator and arbitrator.

27. HUSTED recommended to NAKASHIMA to select Ted Tsukiyama (Tsukiyama) to do the med/arb; the DOE mutually agreed. HUSTED's recommendation was based on Tsukiyama's reputation in the community as the "Dean of arbitrators, his experience as a triple A arbitrator" and his ability to control volatile grievants like WEISS. In HUSTED's judgment, Tsukiyama could keep WEISS "focused and contained" as opposed to an arbitrator who behaved more like a "quasi judge."
28. HUSTED testified that even though WEISS had requested Jim Nicholson (Nicholson) to arbitrate her transfer grievance, she did not know Nicholson except for the one arbitration he did for an earlier WEISS grievance which HSTA and WEISS lost. HUSTED stated that she did not want to hire Nicholson because she knew "virtually nothing about his ability to handle a grievant as volatile or as contentious as Janet was."
29. The mediation phase of the arbitration upset WEISS because of remarks made to her by Tsukiyama. WEISS testified that in the presence of NAKASHIMA and Milton Fuke (Fuke), HSTA's Uniserv Director for East Hawaii, the mediator told her "you are mainland haole, why can't you just go with the flow like us local Hawaiians?" WEISS was told she was "like a nail sticking up wanting to be beaten down" and that she had a "Christ complex." The Board majority credits WEISS' testimony and finds it reasonable for WEISS to believe the mediator's comments rendered him predisposed to ruling against her in the arbitration phase. As WEISS explained it, "he was not going to rule in my favor because that would send me back to the principal at the high school just to get into another grievance at a future time."
30. Even more upsetting to WEISS, was the fact that neither NAKASHIMA nor Fuke did anything to prepare her in advance for the mediation. As a result, WEISS felt like a "guinea pig" in a mediation arbitration process that was a first for HSTA. Not knowing what to expect at mediation, WEISS faults both NAKASHIMA and Fuke for doing nothing other than observing the

mediation. The Board majority agrees and finds NAKASHIMA and Fuke were wholly inattentive to WEISS at the mediation. Both acted as if no duty to represent her was owed to her during the mediation phase.

31. HUSTED had every confidence that NAKASHIMA was qualified to handle the mediation phase of the arbitration because he had the training and experience. According to HUSTED, “mediation is not a procedural process, it is basically trying to get parties talking to find out if there is room for settlement.” She condoned the inaction of NAKASHIMA in the mediation phase because “usually in most mediation the advocates aren’t even going to sit in the same room.” As HUSTED explained, “mediation is a dialogue between the parties, so it would be between – in this case it would probably be between Janet and her school administrator or whoever else was involved. You don’t do mediation through a third party.” HUSTED opined that it is not the job of the HSTA representative in the mediation process to intervene. To do so would be inappropriate; and doing so, renders mediation a “meaningless process.”
32. The arbitration award by Tsukiyama, In the Matter of the Arbitration Between Department of Education State of Hawaii, Employer, and Hawaii State Teachers Association, Union, issued December 22, 1999 found no violations of Articles II, VII and XXII of the contract. The transfer grievance of WEISS was denied and dismissed, and her transfer to the Halaula campus was upheld and sustained.
33. The Board majority credits the arbitration award by Tsukiyama that NAKASHIMA, as WEISS’ representative in the arbitration hearing, “fully, fairly and competently represented the positions and interests” of WEISS.
34. NAKASHIMA accepted the arbitration award as final and binding and did not know of any procedure by which a challenge or appeal could be made. He believed that his duty of fair representation ended with the issuance of the arbitrator’s award.
35. Based on her review of the arbitration award and her knowledge of the grievance, HUSTED decided there was no basis for filing an appeal. Upon receipt of the arbitrator’s award, NAKASHIMA did nothing because he believed his duty to WEISS ended. Any appeal rights of the arbitration award were not communicated to WEISS either by NAKASHIMA or HUSTED.
36. The Board majority finds that fellow colleagues and members of WEISS’ Union—namely Margaret Hoy (Hoy), Colleen Pasco (Pasco), Wesley Voth

(Voth)—share an animosity towards WEISS, that led to WEISS' recall as HSTA Kohala Chapter President.

37. HUSTED acknowledged having to overcome complaints by Union members that it "played favorites" with WEISS and condoned her behavior.

### DISCUSSION

The gravamen of WEISS' complaint stems from HSTA's handling of her third grievance and arbitration, in as many years, against her employer, the DOE, and specifically Kohala High and Intermediate School Principal Bratt, who on or about April 1, 1999 notified WEISS that she would be transferred from her physical education teaching duties to the middle school at Halaula after ten years at Kohala High and Intermediate School.

WEISS contends that HSTA breached its duty of fair representation owed to her in processing the grievance up to and including the mediation-arbitration process, as follows:

- 1) Uniserv Director MARK NAKASHIMA's incompetent representation for failing to follow the time limits in the contract at Steps 1 and 2 thereby delaying the grievance filed beyond August 15, 1999 as required in Article VII of the contract;
- 2) failing to question DOE witnesses adequately enough to expose the collusion between the local Union leader and the principal against WEISS; and,
- 3) the submission of a poor closing brief after the mediation-arbitration was conducted.
- 4) WEISS also points to HSTA's Deputy Executive Director JOAN HUSTED's refusal to select Arbitrator Jim Nicholson whom WEISS preferred even though he issued an unfavorable decision in a previous grievance involving WEISS and Bratt;
- 5) HSTA's first time use of a mediation-arbitration process conducted by Arbitrator Ted Tsukiyama whom WEISS felt made prejudicial remarks in mediation which NAKASHIMA did nothing about; and
- 6) HUSTED's acceptance of the award as final and binding, and deciding there was no reasonable basis for an appeal about which WEISS was never informed.

HSTA denies any breach of its duty of fair representation to WEISS and submits that the conduct of NAKASHIMA and HUSTED, in processing the transfer grievance was not arbitrary, discriminatory or in bad faith.

### Standard of Review

The burden of proof is on WEISS to show by a preponderance of evidence that the Union breached its duty of fair representation if it processed her grievance in an arbitrary or perfunctory manner. Vaca v. Sipes, 386 U.S. 171, 190-191, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). “A union’s conduct is ‘arbitrary’ if it is ‘without rational basis,’ ... or is ‘egregious, unfair and unrelated to legitimate union interests,’” Peterson v. Kennedy, 771 F.2d 1244, 1254 (9<sup>th</sup> Cir. 1985).

The Supreme Court in Airline Pilots Ass’n, Intern. v. O’Neill, 499 U.S. 65, 111 S.Ct. 1127, 136 LRRM 2721 (1991), held that “a union’s actions are arbitrary only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness,’ as to be irrational.” Id. at 1130. The Court’s holding in O’Neill reflects that a deferential standard is employed as to a union’s actions. They may be challenged only if “wholly irrational.” Id., at 1136. In carrying out its duty of fair representation, an unwise or even unconsidered decision by the union is not necessarily an irrational decision. Id., at 1136.

The Fourth Circuit in Griffin v. International Union, 469 F.2d 181 (4<sup>th</sup> Cir. 1972), discussed this standard:

Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction 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 process a 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. (Emphasis added.)

Id., at 183.

“Slightly different standards are applied, depending on whether the union’s act or failure to act involved the union’s judgment, or was procedural or ministerial in nature.” Bloom v. Make-up Artists, Local 706, 162 LRRM 2485, 2489 (D. CA 1999). If the alleged misconduct is procedural or ministerial, then complainant prevails if the union actions or inactions were arbitrary, discriminatory, or in bad faith. Id. at 2491 citing Marino v. Writers Guild of America, East, Inc., 992 F.2d 1480, 1486, 143 LRRM 2249 (9<sup>th</sup> Cir. 1993). “The union is not liable for ‘mere negligence;’ rather to be arbitrary, the union must have acted in ‘reckless disregard’ of the union member’s rights.” Id. On the other hand, if the union’s exercise of its judgment is questioned, then to constitute a breach of the duty of fair representation requires a finding that the union’s decision was discriminatory or in bad faith. Id.

### Duty of Fair Representation

Simple negligence or mere errors in judgment will not suffice to make out a claim for breach of duty of fair representation, Farmer v. ARA Servs. Inc., 660 F.2d 1096, 108 LRRM 2145 (6<sup>th</sup> Cir. 1981); Whitten v. Anchor Motor Freight, Inc., 521 F.2d 1335, 1341, 90 LRRM 2161 (6<sup>th</sup> Cir. 1975). Standing alone, therefore, each of WEISS' claims one through six, may not ordinarily give rise to arbitrary or bad faith conduct by HSTA to breach the duty of fair representation.

However, WEISS alleges that "HSTA made only a shadow of appearance in representing" her.<sup>12</sup> She contends the breach of duty to fair representation amounted to bad faith on the part of HUSTED and NAKASHIMA. WEISS asserts that HUSTED's and NAKASHIMA's bad faith was motivated by their support for her fellow teachers and Union members – namely Wes Voth, an HSTA Board member, Colleen Pasco and Margaret Hoy – who WEISS held responsible for successfully petitioning for her recall as the HSTA Chapter President in 1996; and support for DON MERWIN, the Uniserv Director who was NAKASHIMA's predecessor before resigning.

The duty of fair representation embodied in HRS § 89-8(a) is twofold. First, the exclusive representative is mandated "to act for and negotiate agreements covering all employees in the unit." Second, the exclusive representative must "be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership." "When the Union files a grievance, with the Employer on behalf of an employee, the Union undertakes a duty to fully and fairly represent the interests of the employee." Robert H. Garner, 5 HLRB 157 (1993).

Accordingly, in scrutinizing the conduct of NAKASHIMA and HUSTED and their duty of fair representation owed to WEISS, we find there were times when they did not act in WEISS' best interest in the processing of her transfer grievance without discrimination and without regard to employee organization membership.

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<sup>12</sup>WEISS concludes the allegations of her complaint with the following statement:

The untimeliness in filing; the purposeful omissions by NAKASHIMA in the questioning of DOE witnesses; his lack of any vigorous objections to DOE's out-of-date evidence and total elimination of our witnesses; and his lack of effort and poor writing of the final brief lost this Grievance. His duty was to prove the retaliation and thus, harassment and discrimination by this principal of me. But that would have implicated local chapter leadership in wrongful doing; therefore again my human and civil rights have been sacrificed by HSTA's JOAN HUSTED and MARK NAKASHIMA. HSTA has failed in its duty to fairly represent me for three yrs.

Based on the relationships between HSTA and WEISS, HSTA and other members of the teachers Union, and HSTA and principal Bratt, and given the fact that WEISS is the first HSTA Chapter President in its 30-year history to be recalled, the animosity for WEISS shared and held by fellow Union members Voth, Pasco and Hoy that was evident to the Board majority; and the hostile working relationship between Bratt and WEISS, the Board majority finds merit to WEISS' claims.

Specifically, however, we do not find that NAKASHIMA breached his duty in the manner he prepared and handled the grievance hearings at Steps 1 and 2, and the arbitration hearing which includes his presentation of the case, questions asked or omitted, and his closing briefs.

The Board majority is disturbed by HSTA's failure to follow provisions of the contract governing their actions in handling WEISS' transfer grievance and using a mediation-arbitration process while wholly ignoring the rules of mediation contained in the contract.

First, NAKASHIMA filed the transfer grievance citing violations of Article VII regarding assignments and transfers. Specifically, Article VII, paragraph C, requires the parties to "make every good faith effort to complete such arbitration" by August 15<sup>th</sup>. In Article V regarding the grievance procedure at Step 2, NAKASHIMA had the opportunity to file the grievance with the State Superintendent, within five days after "non-receipt of the answer in Step 1." This short fuse is written into the contract for the benefit of the Union and grievant. Instead of taking advantage of the opportunity to move the grievance forward, NAKASHIMA agreed to hearing dates at Step 1 before the District Superintendent. This was done in an effort to accommodate the schedules of the DOE participants, and without regard to the interests of WEISS.

Second, from the outset, NAKASHIMA recommended the use of a mediation arbitration process. The DOE and NAKASHIMA secured the services of Tsukiyama and schedule a mediation and arbitration back to back, i.e., mediation on October 25, and arbitration on October 26. When questioned by the Board at the hearing, NAKASHIMA testified that he knew of, but ignored, the rules of mediation contained in Appendix XII and relied instead on a mediation process he learned about in training conducted by Tsukiyama. NAKASHIMA could provide no explanation why a separate mediator and arbitrator were not selected for this arbitration. Given WEISS' experience at mediation, the Board majority finds WEISS was probably prejudiced by not having the benefit of using a separate mediator and arbitrator.

Even more disturbing is HUSTED's explanation that neither the provision on transfers and assignments requiring parties to make a good faith effort to complete the arbitration by August 15<sup>th</sup>, nor the rules of mediation in Appendix XII, applied to WEISS'

situation. Indeed, the Board majority finds HUSTED's explanations to be wholly unreasonable, and therefore, arbitrary.

Regarding the duty of fair representation during the mediation phase, HUSTED opined that it is not the job of the HSTA representative in the mediation process to intervene. To do so would be inappropriate; and doing so, renders mediation a "meaningless process." HUSTED explained that mediation only involves the true parties to the dispute. In this case, WEISS and Bratt. And the job of the mediator is to get the parties to engage in a dialog. As such she condoned the inaction of NAKASHIMA by explaining that advocates have no place in the process.

The Board majority disagrees and finds too extreme HUSTED's opinion over the role of a union representative during the mediation phase. Contrary to HUSTED's opinion that a representative's job is not to intervene, some duty is owed such as advising the grievant in an attempt to foster a solution. In this case, NAKASHIMA did nothing to prepare WEISS for mediation and barely, if at all, communicated with WEISS during the mediation. In essence, the Board majority finds that any duty owed to WEISS during the mediation phase was suspended by NAKASHIMA.

Regarding HSTA's acceptance of the arbitrator's award absent a review of possible grounds to vacate, we find support in the record that HSTA acted in a perfunctory manner. NAKASHIMA is under the mistaken impression that once an arbitrator issues a decision, the duty of fair representation ends. While an arbitrator's award is binding, and a union is never obligated to contest an award in circuit court in order to discharge its duty of fair representation, (Bonds v. Coca-Cola Co., 806 F.2d 1324, 1326, 123 LRRM 3284, (7<sup>th</sup> Cir. 1986)), the union's duty of fair representation to its members does not end usually until there is a change in his or her employment status and the member is no longer part of the bargaining unit. In this case, it would have been appropriate to review the arbitration award for purposes of determining whether there is any basis to vacate the award in circuit court. It is also in the member's interest to understand the award, and have communicated the reasons why the award will not be contested. That did not happen in WEISS' case. After NAKASHIMA received the decision, he did nothing because he believed there was nothing more to do.

Under the totality of circumstances, the record supports a finding that NAKASHIMA and HUSTED did not pursue WEISS' transfer grievance and the subsequent mediation-arbitration in good faith. Based upon the foregoing, the Board majority concludes that the Respondents breached their duty to fairly represent WEISS which is a prohibited practice in violation of HRS § 89-13(b)(4).

With respect to a remedy in this case, WEISS seeks to be made whole and requested, inter alia, a return to her position at Kohala High and Intermediate School, consequential and punitive damages, costs of litigation, the reimbursement of four years of

Union dues, a written apology by the Respondents, payment for WEISS' re-education, a computer, travel to the NEA convention, and special and economic damages, including compensation for jobs lost due to alleged discrimination by Bratt. With respect to the rescission of her transfer to Halaula School, since the employer is not a party to this case who has been found to have committed a prohibited practice and the arbitration award was not challenged and appears on its face to be consistent with HRS Chapter 89, the Board majority cannot order such remedy. With respect to the other remedies requested, the Board majority finds that such remedies are inappropriate either because there is an insufficient nexus between the Union's breach of duty and the alleged damages or the Board majority believes that such an award is not supported by the record. The record however does support a finding that WEISS took a leave of absence without pay from her teaching position to pursue the instant complaint before the Board. This being the case, the Board majority finds that WEISS suffered a measurable compensable loss as a direct result of the Union's breach of duty and further finds that the pursuit of her claim before the Board enured to the benefit of bargaining unit members. See, Sheldon H. Varney, 5 HLRB 369 (1995). Accordingly, the Board majority orders that in addition to a cease and desist order, the HSTA reimburse WEISS for her salary lost in pursuing the instant claim.

### CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint, under HRS §§ 89-5 and 89-13.
2. By not making a good faith effort to complete the arbitration by August 15<sup>th</sup>, as required under Article VII relating to Transfers and Assignments and Article V, Respondents wilfully violated the terms of its collective bargaining agreement prohibited under HRS § 89-13(b)(5).
3. By ignoring the mediation provision under Article V, and the rules of mediation found in Appendix XII of the collective bargaining agreement, after choosing to use a mediation-arbitration process as provided for under the contract, Respondents wilfully violated the terms of its collective bargaining agreement prohibited under HRS § 89-13(b)(5).
4. By providing wholly unreasonable explanations as to why neither provisions in the contract applied to WEISS' transfer grievance, the Board finds HSTA processed the grievance transfer and mediation-arbitration in bad faith in violation of HRS §§ 89-8(a) and 89-13(b)(4).
5. HSTA acted in an unreasonable and arbitrary manner, thereby breaching its duty of fair representation when:



- a. NAKASHIMA acted in reckless disregard of the interests of WEISS by not waiving the transfer grievance at Step 1, and instead opting to accommodate the schedules of the employers' participants.
- b. NAKASHIMA and HUSTED acted in reckless disregard of the interests of WEISS by not following the rules of mediation provided in Appendix XII, in particular the provision that calls for a separate mediator and arbitrator.
- c. NAKASHIMA and HUSTED acted in reckless disregard of the interests of WEISS by failing to review the arbitrator's award for purposes of determining whether any basis existed to vacate the award in light of prejudicial remarks made to WEISS during mediation and by failing to keep WEISS informed of her rights.

### ORDER

In accordance with the above, the Board sustains WEISS' prohibited practice complaint and orders that:

The HSTA shall cease and desist from failing to provide fair representation to WEISS in the processing of any future grievances.

The HSTA shall compensate WEISS for the salary lost from September 2000 to January 2001 while on leave without pay to pursue her prohibited practice complaint before the Board.

The HSTA shall within 30 days of the receipt of this decision, post copies of this decision on its website and in conspicuous places on the bulletin boards located in every public school office statewide where employees of bargaining unit 05 assemble and leave such copies posted for a period of 60 days from the initial date of posting.

The HSTA shall notify the Board within 30 days of the receipt of this decision of the steps taken to comply herewith.

DATED: Honolulu, Hawaii, March 9, 2001

HAWAII LABOR RELATIONS BOARD

  
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CHESTER C. KUNITAKE, Member

  
KATHLEEN RACUYA-MARKRICH, Member

**DISSENTING OPINION**

The majority finds five instances in which the HSTA is concluded to have violated its duty of fair representation to WEISS:

1. The decision of NAKASHIMA to accommodate the schedules of DOE participants during the Step 1 hearing so that the arbitration hearing date fell outside of the August 15<sup>th</sup> deadline identified in the bargaining agreement;
2. The decision of NAKASHIMA and HUSTED to utilize the mediation-arbitration (med/arb) format for WEISS' arbitration without apparent authority from either the collective bargaining agreement or the relevant Memorandum of Agreement entered into between the union and employer;
3. The silence of NAKASHIMA during the mediation process;
4. In the alleged acceptance of the Arbitrator's award without review of grounds to vacate or advising WEISS of the potential for appeal; and
5. As a result of the totality of the circumstances.

The majority also concludes that underlying each of these improper activities was some animus towards WEISS resultant from long-standing strained relationships between she and her colleagues (Union members and local Union leadership), principal and Union.

I dissent because I believe that the majority's conclusions in this case come dangerously close to the substitution of our judgment for that of the Union in the prosecution of the instant grievance. As much as we may disagree with the handling of the case, the applicable legal standard does not permit the substitution of our judgment or a finding for the complainant based on mere negligence or strained relations.

There are admittedly ample grounds upon which to disagree with the Union's judgment in each of the identified instances. And the proceedings evidenced ample support for a conclusion of animus between some of the parties.

But the Board majority's disagreement with the strategic or ministerial decisions of the Union, or disappointment with the performance or attitude of the exclusive representative is not, in itself, sufficient to support the finding of a failure to satisfy the duty of fair representation. Instead, it must be established by a preponderance of evidence that the union's conduct in prosecuting, or failing to prosecute, the grievance was arbitrary, discriminatory or in bad faith. Sheldon H. Varney, supra. Proof of Union error due to negligence, inefficiency, inexperience, or even a misguided interpretation of contract provisions will not suffice. Bruce J. Ching, 2 HLRB 23 (1978). Because I believe that any failings in the Union's representation of WEISS are more likely to be attributable to negligence, inefficiency, inexperience or misguided interpretations of the contract than by bad faith, I cannot find the duty to have been violated.

Scheduling the Arbitration hearing. The cited provision of the collective bargaining agreement (Art VII(c)) requires only that the parties make "every good faith effort" to complete arbitrations regarding assignments and transfers by August 15<sup>th</sup>. No bad faith is evidenced in the failure to meet this schedule. Throughout the scheduling of the arbitration, the record does not reflect any animus between NAKASHIMA and WEISS other than WEISS' impatience with the delay. NAKASHIMA apparently kept WEISS fully advised of his scheduling efforts. WEISS herself was unavailable during a part of this period because of mainland and island travel. And it is the uncontroverted testimony of the Union that such cases conform to the timeline only about ten percent of the time. TR. 10/31/2000 at 48.

Thus while WEISS may have been frustrated or disappointed in the failure to meet the August 15<sup>th</sup> deadline, the record cannot support a conclusion of indifference, bias, discrimination or bad faith. This does not excuse the apparently routine failure of the union and employer to conform their conduct to the intent of the contract. But if, as testified, this deviation occurs some ninety percent of the time, a single application, absent more, can hardly be viewed as a result of bias or bad faith.

The decision to utilize the Mediation-Arbitration format. WEISS argued that, in effect, the use of the mediation-arbitration format of consecutive days of mediation and arbitration before the same arbitrator prejudiced her by permitting the arbitrator to preconceive conclusions and remedies during mediation thereby prejudging the arbitration.

There is evidence to support WEISS' arguments. And the Board might have fairly concluded that these failings critically prejudiced the arbitrator's decision. But the issue of the validity of the arbitrator's decision is, properly, not before us. The issue is only whether the Union selected and imposed the med/arb format in an arbitrary, capricious or discriminatory manner.

The majority apparently concludes that the decision was "arbitrary" because the format departs from the mediation provision of the collective bargaining agreement and

no authority could be cited to justify this departure. The collective bargaining agreement (CBA) and Memorandum of Understanding on the subject requires that mediation be kept distinct from arbitration. This is apparently to avoid precisely the outcome that is alleged by WEISS – participation in mediation fatally prejudicing an arbitrator’s objectivity. The Union curiously argued that the mediation provisions did not apply because med/arb, an integration of mediation and arbitration, was not subject to either the mediation or arbitration provisions of the CBA. This stunning non sequitur apparently led the majority to conclude that the choice of format was arbitrary.

But the record demonstrates that the choice was not arbitrary. Both NAKASHIMA and HUSTED testified that the choice was driven in part by hopes that the mediation portion might somehow address underlying interpersonal conflicts between WEISS and Bratt. Both also testified that they thought separate mediation and arbitration would delay the resolution of the grievance and that WEISS was opposed to any such delay. NAKASHIMA further testified that med/arb was recommended because it might have given him an opportunity to introduce evidence and arguments that would not have been admissible in a pure arbitration. Most significantly, both NAKASHIMA and HUSTED recommended that the Union take the case to arbitration in the first instance—hardly evidence of indifference or hostility.

NAKASHIMA’s silence during mediation. The majority apparently concludes that by remaining virtually silent during mediation NAKASHIMA on behalf of the Union abandoned its duty to represent WEISS. The record does not contradict the majority’s finding of relative inactivity on the part of NAKASHIMA. It is in fact particularly disturbing that NAKASHIMA sat in silence when WEISS wept in reaction to what she perceived as racist and judgmental remarks by the mediator. HUSTED’s testimony that the advocate had no role to play in mediation is, at least, a curious posture for an exclusive representative who claims to be the only party with standing in an arbitration (and therefore presumably in a med/arb) proceeding.

NAKASHIMA’s failure to provide any meaningful representation in mediation might indeed have violated a fiduciary duty of representation had one existed. But the standard to be applied to the Union is not one of a fiduciary. The Union’s conduct only need be not arbitrary, capricious or discriminatory. HUSTED testified as to the belief that an advocate’s active participation in mediation undermines the effectiveness of the proceeding and makes a positive resolution less likely. This is an understandable and defensible, if not entirely convincing, position. As there existed a defensible principle guiding NAKASHIMA’s conduct, NAKASHIMA’s conduct was neither arbitrary nor capricious. And since it is apparently the policy of the Union, it was not discriminatory.

Acceptance of the arbitrator’s award. WEISS was never advised that it was possible to appeal the adverse arbitrator’s decision. In fact NAKASHIMA testified that he was not aware that such a possibility existed or the basis for any appeal. HUSTED testified

that she discussed the opinion with NAKASHIMA and reviewed the decision and could identify no grounds for appeal. TR 10/31/2000 at 87. On these facts, the majority concludes that the Union acted in reckless disregard by failing to review the award for the purposes of determining whether there was any basis to vacate.

Again, there are numerous grounds to question the Union's decisions in the arbitration. This was NAKASHIMA's first arbitration. He testified to having received no formal training and no guidance, supervision, review or evaluation in the course of his representation. He testified to knowing nothing about grounds for appeal. It could be fairly concluded that the WEISS med/arb was his training ground and WEISS his guinea pig.

But inexperience or even negligence does not provide a basis for finding a violation of the duty of fair representation. HUSTED testified that she trained and supervised NAKASHIMA, and discussed the case with him. She further testified that she had knowledge of the case and award when she decided not to appeal. Her testimony demonstrated intimate knowledge of the case and WEISS' history at Kohala. It is difficult to conclude that her decision not to appeal was unconsidered. Notwithstanding what might be the Board's frustration with choices made, I do not believe that on the record they cannot be said to be arbitrary, capricious or discriminatory.

The totality of the circumstances. The majority finally concludes that based on the totality of the circumstances NAKASHIMA and HUSTED did not pursue WEISS' grievance in good faith. WEISS' longstanding quixotic campaign against her principal at the Kohala complex, local Union leadership, and now the Union itself certainly has generated strong feelings. Navigating between the interests and sensitivities may well be a practical impossibility. And it may well be that the Union recognized this impossibility and took the course of least resistance, by "going through the motions," in a grievance that could yield no long term positive result. Each of the Union's suspect activities would conform to such a theory.

However, while such a theory might conform to the evidence, it is not supported by the evidence. If none of the circumstances to which the majority looks in themselves reveal the bad faith concluded by the majority, I cannot see how viewed in the totality, a conclusion of bad faith can be manufactured.

  
BRIAN K. NAKAMURA, Chair

Copies sent to:

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JANET WEISS v. JOAN LEE HUSTED, et al.  
CASE NO. CU-05-164  
DECISION NO. 420  
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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