

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

BOARD OF EDUCATION, State of Hawaii,
and BENJAMIN J. CAYETANO, Governor,
State of Hawaii,

Complainants,

and

HAWAII STATE TEACHERS ASSOCIATION,

Respondent.

CASE NO. CU-05-179

DECISION NO. 422

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On March 16, 2001, Complainants BOARD OF EDUCATION, State of Hawaii and BENJAMIN J. CAYETANO, Governor, State of Hawaii (collectively Employer) filed a prohibited practice complaint against the HAWAII STATE TEACHERS ASSOCIATION (HSTA or Union) with the HAWAII LABOR RELATIONS BOARD (Board) in Case No. CU-05-179. The Employer alleged, inter alia, that the HSTA failed to submit a new wage proposal during negotiations from October 12, 2000 to March 8, 2001 and summarily rejected the Employer's March 8, 2001 proposal without any good faith consideration. The Employer contended that the Respondent refused to bargain in good faith and engaged in prohibited practices in violation of Hawaii Revised Statutes (HRS) § 89-13(b)(2).

On March 19, 2001, the Employer filed a second prohibited practice complaint against the HSTA with the Board in Case No. CU-05-180 alleging, inter alia, that the Respondent issued Picket Instructions for Teachers and Detailed Picket Instructions for Teachers which advise striking teachers to record the names and photograph anyone crossing a picket line. The Employer contended that the HSTA thereby interfered with, restrained, and coerced the Unit 05 employees in the exercise of their rights in violation of HRS § 89-13(b)(1).

On March 21, 2001, Respondent HSTA filed a Motion to Expedite Proceedings and for Consolidation of Prohibited Practice Complaints with the Board in Case No. CU-05-179 and Case No. CU-05-180, respectively. The HSTA moved the Board for an order to consolidate the proceedings on these complaints and expedite the proceedings herein so that a decision is issued before April 5, 2001.

The Board heard arguments on the foregoing motion on March 23, 2001. In Order No. 2001, dated March 23, 2001, the Board granted the HSTA's motion to expedite the proceedings and consolidate the instant complaints for disposition.

On March 27, 2001, the Board conducted a hearing on the instant complaints. Both parties were represented by counsel and were given full opportunity to present evidence and argument to the Board. Thereafter on March 30, 2001, the parties submitted written briefs to the Board. Based upon a consideration of the evidence and arguments in the record in this matter, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

CASE NO. CU-05-179

1. The HSTA is an employee organization and the exclusive representative, within the meaning of HRS § 89-2, of public school teachers employed by the Department of Education (DOE) in bargaining unit 05.
2. For purposes of negotiations, the Public Employer is Governor BENJAMIN J. CAYETANO and the BOARD OF EDUCATION (collectively Employer) for DOE employees in bargaining unit 05.
3. The collective bargaining agreement for Unit 05 employees ended on January 31, 2000.
4. On October 12, 2000, the HSTA submitted a written proposal to the Employer for a four-year contract, retroactive to 1999, amounting to a 22 percent

increase. HSTA estimates its proposal to cost \$260 million. The Employer estimates the cost to be \$295 million. HSTA's proposal included:

Fiscal Year (FY) 1999-2000

Incremental increases for steps one through fourteen; plus an across the board two percent increase. The elimination of step one.

FY 2000-2001

Incremental increases for steps two through fourteen; plus an across the board two percent increase. The elimination of step two.

The creation of the P track of Model O with a three percent difference between the B track and P track in each classification except for non-baccalaureate holders and instructors.

The National Board of Professional Teaching Standards bonus of \$5000 continued for the life of the agreement, but converted to a differential.

FY 2001-2002

Incremental increases for steps three through fourteen; plus an across the board three percent increase. The elimination of step three.

The implementation of the first step of Senior Teacher.
The creation of a Rainbow Teacher salary schedule.

FY 2002-2003

Incremental increases for steps four through fourteen; plus an across the board increase of three percent.

The implementation of the second step of the Senior Teacher.

5. For purposes of negotiating teacher salaries, HSTA's bargaining parameters required: 1) incremental step increases based on longevity and satisfactory performance evaluations; 2) pay increases for all teachers and instructors; and 3) retroactive pay for fiscal years 1999-2000 and 2000-2001 of the four-year contract.
6. On October 21, 2000, the Employer submitted in writing its best wage offer of 9 percent costing \$67.8 million that did not include any retroactive pay or

incremental step increases. The Employer offered a 4 percent (or \$ 1,607.64 per year) across the board increase in FY 2002; and 5 percent (or \$2,092.80) across the board increase in FY 2003. The offer was rejected by HSTA on the same day proposed because the bottom line was not enough, and it did not include retroactive pay and incremental step increases. Moreover, the wage offer was also predicated on the agreement of three concepts: 1) mentor concept of 300 teachers; 2) flexibility in transfers; and 3) endorsements (i.e., two-year transition of current system into endorsement system) which made the offer less attractive according to HSTA Executive Director and Chief Negotiator Joan Husted (Husted).

7. On November 3, 2000, the Employer submitted in writing an informal proposal with two options neither of which offered retroactive pay increases in the first two years of the contract period. Both options cost \$67.8 million. HSTA rejected this proposal almost immediately because it was not enough money for a four-year contract.

Option 1 offered: one incremental step increase (in FY 2002 and 2003), drop the entry step, 1.13 percent across the board in FY 2002 and 2.20 percent across the board in FY 2003; max steps receive 1.13 percent and 2.20 percent across the board; Rainbow Teacher increases based on placement on salary schedule in FY 2002 and 2003; and 1.13 percent increase for substitute teacher rate in FY 2002, and 2.20 percent in FY 2003.

Option 2 offered: a bonus of \$550 to each teacher returning for the school year (effective July 2, 2001), one step movement equivalent to 3.14 percent and Rainbow teacher increases based on placement on salary schedule (effective September 2, 2001, February 1, 2002, and September 1, 2002). Option 2 offered no increase to substitute teacher rates, instructor salary schedule and max rates.

8. On November 13, 2000, HSTA filed a notice of impasse with the Board, having spent over 271 hours in bargaining sessions covering 74 separate days beginning on January 20, 1999. While the Employer disputed the parties were at an impasse, it was not based on a failure to bargain in good faith.
9. On December 6, 2000, the Board declared an impasse in contract negotiations for teachers and other employees of the DOE in bargaining unit 05. Based on its investigation, the Board found the Employer and HSTA were unable to reach an agreement after good faith negotiations.
10. Since the declaration of impasse, the Employer and State have followed and met the requirements for resolving the impasse through mediation on

December 13 and 18, 2000 and fact-finding from December 27, 2000 to January 8, 2001 as set forth in HRS § 89-11.

11. Throughout negotiations both before and after the declaration of impasse, HSTA negotiators knew the Employer's Chief Negotiator was steadfast in not offering retroactive pay, back-end loading, pay raises for everyone, and increasing the bottom line offer above \$67.8 million.
12. During mediation, the Union transmitted a substantially different offer to the Employer through the mediator to which the Employer did not respond.
13. In January 2001, the HSTA submitted a written proposal to the Employer on the issue of Peer Review which addressed an Employer's precondition to the salary proposal that teachers evaluate teachers.
14. On February 15, 2000, the Employer's Chief Negotiator Davis Yogi (Yogi) met with HSTA officials to share his draft to address issues of accountability and concerns for professional development in the New Salary Construct. Several of the negative factors noted by HSTA included the absence of retroactive pay and incremental step increases for steps 11 to 14. Husted noted that more than \$68 million was needed.
15. Sometime after February 15, 2001, HSTA Negotiations Specialist Irene Igawa (Igawa) told the Employer's Chief Negotiator Yogi, "you put \$161 million on the table and you have a settlement." The HSTA estimated this offer to cost 21 percent compared to its 22 percent package costing \$260 million. More importantly, this offer reflected HSTA's three essential ingredients—retroactive pay, longevity step increments, and pay raises for all.
16. Igawa did not submit a counteroffer in writing because Yogi kept responding that he had no more than \$67 million, and could not give incremental step increases and retroactive pay to all.
17. Husted, who had instructed Igawa to informally discuss the \$161million wage proposal with Yogi, acknowledged that she is not constrained to craft a counterproposal to satisfy the Employer's bargaining parameters that did not include retroactive pay, back-end loading, pay for all, and no more than \$67 million. Hence, HSTA provided no plausible reason for not submitting a written counterproposal directly to the Employer.
18. On March 8, 2001, the Employer submitted in writing its complete settlement package covering: Wages costing \$67.8 million; Health Fund contributions costing \$10.2 million; implementing the New Salary Construct for promotions,

new salary rates, step movements based on experience and financial incentives for enrolling in DOE professional development courses; and the adoption of a cost effective Teacher Peer Assistance and Review Program. This bargaining session which lasted two to three hours included a power point presentation of the state's budget and financial plan based on a need to reduce its biennium budget by \$55 million and \$115 million in each fiscal year.

19. Yogi testified that the March 8th package offered more than the best offer made on October 21st. As of March 8th, Yogi "never thought they [the HSTA] were negotiating in bad faith." Yogi also testified that the HSTA had never refused to meet, delayed or confused bargaining, been less than cooperative, or sent representatives with less than sufficient authority. After the rejection of the March 8th proposal, Yogi did not ask the Union for any written counterproposal.
20. HSTA rejected the Employer's March 8th settlement offer "on the spot" for a number of reasons, but primarily because there was no new money added to the \$67 million for a four-year contract to satisfy the Union's bargaining parameters.
21. Husted's conduct over the course of negotiations reflects hard bargaining based on her belief that the State has the funds to fund the 22 percent proposed pay increase without raising taxes. Husted is "absolutely convinced on [her] father's grave the State can afford HSTA's \$260 million proposal," the Governor's projects, and the costs of the Felix Consent Decree based upon her expert's projections. While Husted's attitude is not conducive to reaching common ground, it does not demonstrate a lack of desire to settle, but rather a desire not to settle for anything less.
22. HSTA President Karen Ginoza (Ginoza) also sits on the negotiating committee and was present at the March 8th bargaining session. She agreed with the "on the spot" rejection of the Employer's offer because it eliminated the top five of 15 step increases achievable over a period of 25 years and added another hurdle by requiring teachers to earn more credits. The Union's proposal seeks automatic step increases each year for ten years that were not subject to professional development credits.
23. On March 14, 2001, six days after rejecting the Employer's last settlement offer, Ginoza in a television interview was asked about the difference between the HSTA demand and the State's offer. In reply, she stated:

I haven't really looked at what the State – we haven't taken their proposal and broken it down. So, all we can

say is: Right now, we are at twenty-two percent. They are still at \$67 million. So, we're still very far apart.

24. Also during the interview, in response to a question about the "top end" of the salary schedule, Ginoza stated that the Employer's proposal would result in a \$4,000 salary cut. Ginoza explained in testimony that the top end of the salary schedule is \$58,000 and in the Employer's proposal, the same step would be \$54,000. Yogi confirmed that the Employer's proposal imposes additional credit requirements to achieve the highest salary and a teacher would receive \$4,000 less under his proposal unless the teacher earned the additional credits.
25. The Board finds Ginoza's posturing for public support, while probably not helpful to fostering meaningful negotiations with the Employer, does not reflect a less than sincere desire to settle. Ginoza's public remarks taken in context reflect the hard bargaining attitude of HSTA to not settle for anything less than its October 12th demand for 22 percent.
26. The 60-day cooling off period ended on March 18, 2001.
27. On March 22, 2001, the HSTA filed its notice of intent to strike with the Board on April 5, 2001 at 12:01 a.m.

CASE NO. CU-05-180

1. In preparation for its strike, the HSTA distributed Picket Instructions for Teachers and Detailed Picket Instructions For Teachers (Picket Instructions), to all picket captains as part of its training materials packet. To date, distribution of the Picket Instructions has been limited to picket captains assigned for each of the 257 public schools.
2. The Picket Instructions include an instruction to striking teachers to have a few cameras on the picket line and to "take pictures of individuals and/or vehicles attempting to cross" the picket line.
3. Non-Bargaining unit 05 employees of the DOE, who are members of the Hawaii Government Employees Association, have no right to strike and are required by law to report to work and cross the picket line in the event of a teachers' strike.
4. The picket captain training package that included the practice of surveillance and photographing was not reviewed by Husted until the Employer filed the prohibited practice complaint in Case No. CU-05-180. Husted admitted that copies for distribution to picket captains came from materials first used in

1972 and as recently as 1997. Husted admitted the copying and distribution of the photographing instructions to picket captains was not deliberate, but rather inadvertent.

5. Husted testified that someone must have mistakenly assumed that since the practice of photographing or recording the names of employees crossing the picket line has existed since 1972, and the DOE had known about its existence in the past without complaint, it was okay. The practice, however, did not go through an approval process by Husted.
6. Ginoza could provide no legitimate purpose for having a practice of surveillance and photographing and admitted it was not a "good idea."
7. HSTA has put into motion notification to all its members on the front page of the Teacher Advocate public to be distributed on April 3, 2001, rescinding any instruction to photograph or write down the names of anyone who crosses the picket line.
8. On March 23, 2001, the HSTA gave the Board and Employer a ten-day notice of intent to strike on or after April 5, 2001.

DISCUSSION

CASE NO. CU-O5-179

"To retain respect for sausages and laws, one must not watch them in the making." (Otto Von Bismark) On the basis of the evidence presented to the Board, the same can be said for the collective bargaining agreement being negotiated between the HSTA and BOE. Both sides appear to have been stubbornly intransigent. Both sides have been wedded to their version of the moral, and public relations, high ground. And both sides appear to have almost flippantly dismissed the objectives and proposals of their bargaining partners. Both sides act somewhat as though they have taken our schools hostage and are prepared to begin sacrificing hostages unless they achieve their objectives.

In this particular volley, the Employer has alleged that the teachers have refused to bargain in good faith and asked that the Board accordingly revoke our declaration of impasse and enjoin the teachers' strike currently scheduled to begin on April 5, 2001.

The duty to bargain in good faith has been described as follows:

The duty to bargain in good faith is an "obligation to...participate actively in the deliberations so as to indicate a

present intention to find a basis for agreement....” This implies both “an open mind and a sincere desire to reach agreement as well as “a sincere effort ... to reach a common ground. The presence or absence of intent “must be discerned from the record.” Except in cases where the conduct fails to meet the minimum obligation imposed by law or constitutes an outright refusal to bargain, relevant facts of a case must be studied to determine whether the employer or the union is bargaining in good or bad faith. The “totality of conduct” is the standard by which the “quality” of negotiations is tested. Thus even though some specific actions, viewed alone, might not support a charge of bad-faith bargaining, a party’s overall course of conduct in negotiations may reveal a violation of the Act. (footnotes omitted.)

Hardin, The Developing Labor Law, 608 (3rd Ed. 1992). The Board hereby adopts this standard. Thus the issue before us is whether the totality of the HSTA’s conduct evinces a present intention to find a basis for agreement and a sincere effort to reach a common ground.

In its complaint and at hearing, the Employer presents three related bases to support a finding of bad-faith bargaining by the Union. These are first, the failure of the Union to provide written counteroffers to any of the three offers made by the Employer between October 21, 2000 and March 8, 2001; second, the summary rejection of each of the Employer’s offers; and third, a televised admission that the Union’s president had not “broken down” the Employer’s offer, even though the offer had been rejected by the Union six days before.

Viewed in a vacuum, these facts may tend to suggest that the Union did not seriously consider the Employer’s proposal, that the Union was unprepared to make any concessions or counter-proposals of its own, and that the Union accordingly had no intention of finding a basis for agreement other than purely on its own terms. But we are required to examine the totality of the parties’ conduct, and when so viewed, that conclusion is not so easily reached.

Understandable but differing bargaining parameters have driven the conduct of each of the parties during negotiations. According to Igawa and Husted, the Union’s parameters were, first, retroactive pay increases for the two years of the contract that have already expired; second, incremental pay increases based on longevity and satisfactory performance evaluations; and third, that all members receive raises. Although only anecdotal evidence is provided to support any nexus, the Union’s position is that conformance to these parameters was necessary to support the goals of teacher recruitment, retention, and quality.

The Employer, reportedly viewing the Union's parameters as self-serving, offered a competing set of parameters. Foremost was that the cost of the contract fit within the State's projected budget in light of other public employee pay increases and other state priorities. The Employer identified the aggregate amount available to the HSTA to be \$67 million. Yogi testified that, "I did say we have some flexibility [with regard to the \$67 million], but I don't know where," but has not reflected any such flexibility in any offer. The Employer purports to be willing to divide and distribute the \$67 million in a fashion acceptable to the Union, but appears to have insisted that distribution bear some direct relationship to the goals of recruitment, retention, and quality.

Both the teachers' and Employer's initial proposals were crafted to conform to their parameters. The teachers' offer of October 12, 2000, incorporated retroactive pay, longevity increases and salary increases for all. The Union's projected cost of its proposal was approximately \$260 million. The Employer's counterproposals of October 21, 2000 and November 3, 2000 provided for aggregate pay increases of \$3,700 per teacher over two years and incremental or merit increases based on professional development. This offer was proportionally weighted more towards beginning teachers to promote recruitment but did not include longevity increases or proportional increases for experienced teachers. The Employer's counterproposals were costed at \$67 million.

The Union rejected the Employer's counterproposals within a minute or two. At the hearing on this matter, Igawa and Husted testified that the rejections were based on the obvious failure of the offer to conform to the Union's bargaining parameters and the gross inadequacy of the aggregate offer. They also had paid for independent economic analyses which concluded that the state's budget could well bear the \$260 million cost of the Union proposal and believed, and continue to believe, that the Employer's alleged budgetary parameter is illegitimate.

The Union filed a notice of impasse on November 13, 2000. An exhibit to the petition represented that the Union had, until that time spent over 271 hours in bargaining sessions covering 74 separate days beginning on January 20, 1999. This representation was never contested and the Employer did not contest the declaration of impasse on failure to bargain in good faith grounds. Since good faith bargaining is a prerequisite to the Board's issuance of a declaration of impasse, by our issuance of the declaration on December 6, 2000, we implicitly determined, and here conclude, that bargaining had been conducted in good faith until the point of the declaration of impasse.

Pursuant to HRS § 89-11, the declaration of impasse was followed immediately by mandatory mediation. In the course of mediation, the Union claims to have transmitted a substantially amended offer to the Employer via the mediator. The Employer is alleged not to have responded. Although the content of the offer could not be divulged pursuant to HAR § 12-42-65, that the offer was made, and that was substantially different from the initial offer

is un rebutted. The making of the offer and the Union's active participation in the mediation process we find to be evidence of further good faith bargaining.

The Union provided no plausible explanation as to why the offer in mediation was not reduced to a formal written proposal or subsequently presented to the Employer in the course of bargaining. President Ginoza testified that the HSTA was only willing to make proposals via a mediator, and that the Employer's subsequent refusal to use a mediator made the making of an offer impossible. Husted denied Ginoza's rationale and instead suggested that public and private statements by the Governor reiterating the Employer's parameters somehow precluded the making of a formal counterproposal. While the logic of neither rationale is readily apparent, the Board concludes that absence of a formal offer following mediation to be a strategic decision rather than evidence of bad faith.

Igawa testified that sometime around February 15, 2001, she called Yogi and said, "You put \$161 million on the table and you have a settlement." Husted confirmed that she directed Igawa to make the offer and further testified that the offer included terms that reflected the HSTA's bargaining parameters of retroactivity, longevity increments, and raises for all. Again, there was no response by the Employer. The Board concludes that the telephonic offer is evidence of a willingness to make concessions on the part of HSTA, and accordingly good faith bargaining.

Again, the Union provided no plausible explanation as to why the offer was not reduced to writing or put on the bargaining table. And again we conclude this to be a strategic decision rather than evidence of bad faith.

On March 8, 2001 the Employer, following a presentation on the state's budgetary situation apparently designed to convince the Union that funds in excess of \$67 million were simply not available, presented a written offer to the Union. Again, the aggregate cost was \$67 million. And again, pay increases were not proportionately distributed and incremental movement was based only on professional development. Again, the HSTA rejected the proposal "on the spot" because of the failure of the proposal to satisfy its bargaining parameters.

Husted testified that prior to the receipt of the March 8th proposal, the Union and Employer had been working through a "thicket of issues" raised by the Employer. She further claims that inasmuch as the proposal embodied many such issues, the Union was very familiar with the content and intent of the proposals and was accordingly able to assess, and reject, it without substantial further examination. Husted's claims in this regard are plausible and un rebutted. The continuing efforts of the Union to understand and work through the ostensible "thicket" would appear to evidence good faith.

Yogi testified that as of the March 8th rejection he had "never thought they [the HSTA] were negotiating in bad faith." Transcript (Tr.) p. 89. Yogi also testified that the

Union had never refused to meet, delayed or confused bargaining, been less than cooperative, or sent representatives with less than sufficient authority. Tr. pp. 91, 92. But he further testified that when his Deputy, James Halvorson, a former Deputy Attorney General in the Labor Division, called his attention to Ginoza's televised remarks of March 14th and suggested that it somehow represented a failure to bargain in good faith, he elected to explore and pursue the instant complaint. Tr. p. 100. The Employer therefore apparently looks to the interview as the most damning, if not only, evidence of a failure to bargain in good faith.

President Ginoza's interview included comments that she had not looked at the March 8th proposal and that the HSTA had not broken it down. In testimony Ginoza qualified her remarks because, "It didn't come out as what I meant." Tr. p. 116. She further testified that the Union had reviewed the proposal, that the reasons for rejection included a failure to satisfy the Union's bargaining parameters, and that her remarks were made because she was unfamiliar with the efforts of staff to break down the proposal. Similarly, Ginoza's comment in the interview in response to the question about teachers at the top end of the salary schedule characterizing the Employer's proposal as representing a \$4,000 salary cut is a glib and overly simplistic response where a complete and studied answer would have entailed a technical discussion of career rates and the Employer's insistence on additional credit requirements. While Ginoza's remarks, taken on their face, are hardly reflective of the commitment to resolution associated with good faith bargaining, the Board cannot conclude that they are dispositive. While regrettably reflective of a certain intransigence and flippancy that characterized the Union's conduct throughout, we cannot conclude that standing alone it evinces a present intention to not find a basis for agreement or reflects a less than sincere effort to reach a common ground.

Like all failed bargaining efforts, the instant negotiations to date have been disappointing. The Union began, and remains, entrenched in its purely economic bargaining parameters of retroactivity, raises for all and longevity increases. They have continued to propound, without proof, that these purely economic objectives are somehow related to the systemic problems of recruitment, retention and quality. Discussions of technical details, numerous meetings and secret counteroffers suggest some willingness and desire to bargain. But the cold reality is that, to date, little or no progress has occurred and little or no movement has been evidenced on the part of the Union.

Similarly, the Employer has stuck to the aggregate figure of \$67 million as though it is somehow magical or written in stone. Its offers, made only within the context of this magic number, have been characterized by the teachers as "rearranging deck chairs on the Titanic." This characterization might be apt. The Employer has begun to make veiled suggestions that at some point more funding might be available. But the record suggests no reason for the teachers to even begin to guess how much, when, or if the figure might increase.

Husted characterized the good faith of the Employer in addressing some of the Union's questions as follows:

I believe that the State's negotiator [Yogi] was making a good faith effort to try to wrestle with our questions. The problem was that there were times when I was speaking Greek and he was speaking Latin, and we weren't communicating very well. That's part of what made it difficult.

Tr. p. 295. The Board concludes that Husted's characterization is an appropriate description of bargaining to date – good faith, different languages, poor communication. This is especially regrettable when our schools and children are at issue. Our examination of the totality of the circumstances permits us no other conclusion. Board of Education, 1 HPERB 278 (1972).

Because we do not conclude that the HSTA failed to bargain in good faith, the Employer's complaint must be dismissed.

CASE NO. CU-05-180

In this consolidated complaint, the Employer alleges that printed picket instructions directing picketing teachers to photograph and record the names of persons crossing picket lines constitute a prohibited practice pursuant to HRS § 89-13(b)(1).¹ The Employer argues that the inclusion of the threatened surveillance is intended to intimidate Unit 05 members. The HSTA has moved to dismiss the complaint on the grounds of mootness based upon Union representations that the instructions will be withdrawn and all teachers advised that photographing and name-taking will not be conducted. The Union also argues and testified that the necessary element of wilfulness is absent because no person at HSTA knowingly included the instructions in the picketers' packets because the packets were merely an unexamined duplication of the packets in use since 1972.

At the hearing on this matter, it was the testimony of the Union that neither the President or Executive Director had any idea of who, if anyone, approved the inclusion of the instructions at issue in the Picket Captains' packet distributed sometime within the last month. Ginoza testified that upon learning of the instructions, she thought that they were "probably not a good idea," and that she instructed that it be taken out of the packet. Husted

¹ HRS § 89-13(b)(1) provides:

It shall be a prohibited practice for an ... employee organization ... willfully to:

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

testified that prior to the filing of the instant complaint, she was unaware of the instructions, and that she has since, upon advice of counsel, instructed that it be removed, communicated with picket captains that the instructions are not to be followed, and committed to the publication of a notice in the HSTA newsletter that neither pictures nor names of persons crossing picket lines will be taken by picketers. Husted also testified that the instructions were included in the picket captain packet only because the packet was an unexamined duplication of instructions used since 1972. Husted further agreed that respective counsel would participate in the development of the language to appear in the newsletter, which would be available to all teachers before April 5, 2001, the announced strike date.

Notwithstanding these representations and commitments, the Employer opposes a mootness dismissal because the representations may at some point be reversed, a determination would provide a basis for enforcement should the practice be carried out, no corrective action has yet been taken, and there is no way to ensure that all teachers would receive any remedial message.

The Board agrees that the alleged prohibited practice appears to be somewhat distasteful and may bear no legitimate relation to the Union's interests. However, the Union's actions and commitments have had, or will have, the effect of eliminating the allegedly offending practice. The complaint is thus moot.²

Employer's objections to such a dismissal are all based on the possibility that the Union's representatives will violate their sworn statements to the Board. There are consequences to such sworn duplicity, and if the events come to pass and the rights of the Employer or any Unit 05 members are violated, the filing of a new complaint remains a viable option.

Even had the complaint not been mooted by the commitments of the Union, the Union's testimony that there was no knowledge or intention to include the offending instructions in the picket captain packages may indeed have precluded the finding of a prohibited practice. Wilfulness is a statutory element of the offense. If, as represented, the HSTA merely mindlessly duplicated 1972 instructions, wilfulness would have been difficult or impossible to find. While such an act may have been neither prudent nor in the interests

² [T]he mootness doctrine encompasses the circumstances that destroy the justiciability of a case previously suitable for determination. A case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where events have so affected the relations between the parties that the two conditions for justiciability--adverse interest and effective remedy--have been compromised.

of their members, we find the testimony that unexamined duplication was the sole source of the instruction, however disturbing, credible in that regard.

Accordingly the instant complaint must be dismissed without prejudice.

CONCLUSIONS OF LAW

1. The exclusive representative commits a prohibited practice by wilfully refusing to bargain collectively in good faith with the public employer in violation of HRS §89-13(b)(2).
2. The Board concludes that under the totality of circumstances, HSTA's President Ginoza did not bargain in bad faith by admitting she had not looked at the Employer's final settlement proposal and that HSTA had not broken down the Employer's proposal in a television interview six days after rejecting the Employer's proposal.
3. The Board concludes HSTA's President Ginoza did not bargain in bad faith by inaccurately stating the effects of the Employer's proposal in a television interview six days after rejecting the Employer's final settlement proposal.
4. HSTA did not bargain in bad faith by rejecting the Employer's final settlement proposal before costing it out.
5. HSTA did not bargain in bad faith by rejecting the Employer's final settlement proposal on the spot, and not offering a written counterproposal, except in mediation.
6. HSTA did not bargain in bad faith by failing to move from its pre-impasse wage demand of 22 percent and bargaining objectives that included retroactive pay, pay raises for all, and longevity step increments.
7. The Board concludes based upon the record that the issues raised in Case No. CU-05-180 are moot.

ORDER

These complaints are hereby dismissed.

DATED: Honolulu, Hawaii, April 3, 2001

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair

recused
CHESTER C. KUNITAKE, Member³

CONCURRING OPINION

In analyzing the merits of the prohibited practice charges brought by the Employer, we considered past Board decisions to find that nearly three decades ago, when collective bargaining was at its infancy, the BOE charged the HSTA Union leaders with bargaining in bad faith before an impasse was declared. See, Decision No. 24, Board of Education, supra. The test applied by the Board in Decision No. 24, we applied today. That is, considering all the facts, whether HSTA “had no desire to reach an agreement.” In Decision No. 24, the Board considered whether “a cumulative array of facts evincing an attitude of, for example, unreasonable adamancy will, under some circumstances, support a charge of failure to bargain in good faith.” In doing so, the Board held that prior to the teachers’ strike of 1973, HSTA was bargaining in bad faith by refusing to meet at reasonable times. Back then, the Board characterized the behavior of the negotiating parties as “childlike” and found that such “behavior [had] its genesis in a now lengthy and stormy relationship between the parties which has become increasingly marked by rancor and intransigence on both sides since the second half of 1971.”

Unfortunately, there exists today a stormy relationship between the parties negotiating the teachers’ contract which probably has its genesis in the 1997 negotiations when the State was in the midst the worst economic downturn--the effects of which are still being felt. On the eve of the teachers’ strike, the Employer agreed to a pay increase and obtained a concession to increase the school calendar by seven days. Listening to the HSTA Union officials testify, I sense continued resentment over the last contract negotiations,

³At the prehearing conference held on March 26, 2001, Member Kunitake recused himself from hearing these complaints.

which explains the hard bargaining attitude to settle, but not settle for anything less than what is being demanded.

There is no question, Ginoza's remarks merely reflect the hard bargaining attitude of HSTA's Chief Negotiator Joan Husted, who adamantly believes "on her father's grave" that the Employer cannot only afford the \$260 million wage demand, but also "the Governor's own projects, and the Felix [costs]." Husted is relying on projections done by her own experts who say "there's sufficient money to cover the whole ball of wax." Tr. p. 283; lines 15-25.⁴

The Employer asks this Board to find bad faith bargaining based on the conduct and words of HSTA President Karen Ginoza in a televised interview that occurred six days after HSTA's last rejection of the Employer's final settlement offer. Based on the record and evidence presented, and applying a totality of circumstances analysis, I cannot find bad faith bargaining in HSTA President Ginoza's admissions that she had neither looked at, nor "broke down" the proposal, and inaccurately stated the effects of the Employer's offer when she said that it "cuts the teachers current salary by \$4,000" instead of talking about future cuts to the "career rates."

The record does not support a finding that Ginoza's public posturing in a televised interview, or the manner in which the Union officials summarily rejected the Employer's March 8th final settlement offer, and the Union's decision not to follow-up with a written counterproposal of an informal offer that moved from a demand for 22 percent at a cost of \$260 million, to 21 percent at a cost of \$161 million, taken as a whole amounted to anything more than hard bargaining. Therefore I concur with Board Chair Nakamura's

⁴Husted displayed her hard bargaining attitude in response to a question by this Board member whether there was any incentive to settle for anything less than the 22 percent:

A. There is an incentive for HSTA to settle. The question when you come to the point of trying to settle is can you come close enough to what you want and get something the Employer will buy. And that's what we've been trying to struggle with these months, trying to figure out what it is the Employer will buy and what we can live with. Our difficulty has been that the Employer keeps putting non economic, non money issues onto the table. So we have to keep winding our way through that. But year (sic), even if I thought the economy could afford a 50 percent pay raise, I now (sic) the State's not going to buy a 50 percent pay raise. I put on the pay raise I legitimately believed that we were waiting (sic), that there was going to be sufficient money, that the Governor and the DOE agreed with us there was a teacher shortage, that we were on the same page in dealing with it. I am convinced that we're not going to get 22 percent. And if we're going to try to get this settlement, we're going to have to find a different way to slice the money and to find a way for the Employer to find something he can buy and something we can--That's the nature of bargaining. Bargaining is not a take-it-or-leave-it-game.

analysis in concluding that HSTA Union leaders have not engaged in bad faith bargaining during the last month of the cooling off period.

That is not to say, however, that Ginoza's posturing and negotiating through the media to garner public support for the teachers under the guise of quality education during the cooling off period has helped foster meaningful bargaining. Upon viewing the entire television interview by Ginoza, it certainly raised enough suspicion about the Union's "sincere desire to settle."

Despite expediting the hearing of these prohibited practice complaints, this Board has thought long and hard about the applicability of the statutory condition set forth in HRS § 89-12(b)(2), that would preclude teachers from participating in the April 5th strike until "the proceedings for the prevention of any prohibited practices have been exhausted." The legislative intent for setting this condition has been to provide a means "to protect the public from hasty strikes and to encourage the parties to utilize every available means to resolve the dispute." Committee Report (SCR) No. 745-70, Public Employment on S.B. No. 1696-870, Senate Journal 1970 at 1333.

HSTA "has navigated through a rather rigid set of provisions to obtain the threat-of-a-strike clout which it may believe is necessary to get concessions from an employer." Board of Education, *supra*, at 285. The Employer's complaints filed in the instant case, and the Board's expedited hearing and decision, has stayed true to the legislative intent of not only protecting the public from hasty strikes, but more importantly, helped to encourage the parties to settle.

In his closing brief, Deputy Attorney General Francis Paul Keeno argues, "To not postpone the strike would be to give the Employer a hollow victory." We disagree. At this stage, postponing the strike date would not facilitate the meaningful negotiations that need to take place between the parties. It would be wrong of HSTA and the teachers to see the dismissal of these complaints as a victory. For in a strike, there are no winners. The damage to the workforce morale takes years to mend. In the words of Husted, "bargaining is not a take-it-or-leave-it game." The teachers' commitment to improve the quality of public education inevitably must include concessions to the Employer's professional development proposals, and not just the multimillion-dollar bottom line.


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BOARD OF EDUCATION, State of Hawaii, et al. v. HAWAII STATE TEACHERS
ASSOCIATION

CASE NO. CU-05-179

BOARD OF EDUCATION, State of Hawaii, et al. v. HAWAII STATE TEACHERS
ASSOCIATION

CASE NO. CU-05-180

DECISION NO. 422

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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