STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	
HAWAII STATE TEACHERS ASSOCIATION,	Case No. CE-05-10
Complainant,	Decision No. 48
and	
BOARD OF EDUCATION, STATE OF HAWAII,	
Respondent.	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This prohibited practice charge against the respondent, Board of Education, State of Hawaii (hereafter BOE) was brought before the Hawaii Public Employment Relations Board (hereafter Board) by the petitioner Hawaii State Teachers Association (hereafter HSTA) on April 11, 1974.

Pursuant to Chapter 89, Hawaii Revised Statutes (hereafter HRS), this Board sitting en banc held a hearing on May 20, 1974. The Board, having reviewed the entire record, exhibits and memoranda submitted by the parties, hereby makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. The petitioner HSTA is the employee organization certified as the exclusive bargaining representative of unit 5 (teachers and other personnel of the department of education under the same salary schedule).

2. The respondent BOE is the public employer as defined under Chapter 89, HRS.

3. The complaint alleges that the BOE, by deducting one month's seniority from each teacher who participated in the strike of April 1973, has discriminated against those teachers in violation of their rights under Chapter 89, HRS, and the strike-settlement agreement. HSTA contends that such action constitutes prohibited practices under Section 89-13(a), HRS, as follows:

> (1) Interfere, restrain or coerce any employee in the exercise of any right guaranteed under this chapter;
>
> (3) Discriminate in regard to hiring, tenure or any term or condition of employment to encourage or discourage membership in any employee organization;
>
> (5) Refuse to bargain collectively in good faith as required in section 89-9;
>
> (6) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in section 89-11; and
>
> (8) Violate the terms of a collective bargaining agreement.

4. Petitioner HSTA did not pursue the Section 89-13 (a)(5) and (6) charges alleged in its complaint. It appears that HSTA has abandoned these charges. No evidence was presented and HSTA's memorandum was confined to Section 89-13(a) (1), (3) and (8) violations.

5. Although the complaint alleges that the BOE deducted one month's seniority from each teacher who participated in the strike, HSTA recognized in its memorandum that seniority was deducted only from those teachers who remained on strike for the full term of the strike.

The BOE uniformly computed service credit for all teachers in accordance with its half-month paid status rule. Both striking and non-striking teachers received seniority credit for April if they were on paid status for half the month; both striking and non-striking teachers lost seniority credit for April if they were not on paid status for half the month.

Any teacher who remained on strike for the full term of the strike (April 2-18, 1973) consequently lost seniority credit for April, since he was not on paid status for at least half the month.

6. The strike commenced on April 2, 1973, and was terminated on April 18, 1973, after a ratification vote by the unit was taken pursuant to the terms of the strike-settlement agreement (Item #2 of said agreement).

7. The non-discrimination clause of the strike-settlement agreement (Item #3 of said agreement) allegedly violated provides:

> "There shall be no discrimination of any kind by any of the parties against participants or non-participants in the strike."

8. The strike of April 1973, was illegal. It was in violation of Section 89-12(b), HRS, and the circuit court's injunctive order of October 20, 1972. Hawaii Public Employment Relations Board v. Hawaii State Teachers Association, ___Haw.___, ____P.2d ____, S.C. No. 5460 (1974)

9. At the outset of the hearing, respondent BOE made an oral motion (Tr. 6) for the Board to refrain from exercising its jurisdiction in the subject prohibited practice charge because the matter is referrable to arbitration. In a case where HSTA similarly alleged that the BOE had violated the non-discrimination clause in the strike-settlement agreement, the

matter of spring vacation pay was resolved via the contractual arbitration procedure. In the Matter of Hawaii State Teachers Association, Grievant, and Department of Education, State of Hawaii, Respondent, before Arbitrator Bertram T. Kanbara (February 15, 1974)

10. The BOE introduced evidence to show that it computed seniority credit for teachers, both striking and non-striking teachers, in accordance with its long-standing practice, dating back to the 1940's. The "Internal Guidelines for Computing Service Credit" (BOE Exh. #1), dated July 6, 1972, documents its long-standing practice with respect to short-term leave without pay and return as follows:

> "Count number of working days in month. Must work at least half of total working days to earn service credit for that month."

The master record cards and requests for leave (BOE Exh. #2 through 17a) show the implementation of that practice.

11. Should staff reductions become necessary, the BOE will make reductions on the basis of seniority. A memorandum dated November 2, 1971, "Staff Reduction Guidelines for Certificated Personnel," was incorporated by reference into the HSTA-BOE contract under Article VII, Assignments and Transfers. Said memorandum provides, in relevant part:

> "The basis for teacher retention during staff reduction shall be according to seniority based on continuous service in the school as 'defined' in the next paragraph, unless the rule of 'seniority in the department' needs to be invoked."

CONCLUSIONS OF LAW

Before going into the merits concerning the reduction of seniority, the Board shall first deal with the jurisdictional issue raised by respondent BOE.

The BOE contends that since the prohibited practice charge concerns an alleged breach-of-contract, a matter referrable to the contractual arbitration procedure, the Board should decline to exercise its jurisdiction.

In HSTA et al, HPERB Case CE-05-4, Decision 22 (October 24, 1972), wherein the Board enunciated its deferral policy with respect to prohibited practice charges involving alleged breaches-of-contract, the Board stated that it would defer to arbitration wherever appropriate.

Thus, in HSTA et al, HPERB Case CE-05-5, the Board continued proceedings before it pending the outcome of arbitration proceedings pursuant to the parties' stipulation to arbitrate and retained jurisdiction only for limited purposes. In Arrigoni et al, HPERB Cases CE-05-7 and CU-05-10, Decision 45 (May 15, 1974), the Board dismissed the charges of the complainant. In both instances, where leaving the parties to their contractual grievance remedy appeared desirable and appropriate, the complainants initially sought relief via the contractual grievance procedure and their grievances were still pending there at the time prohibited practice charges were brought before the Board. In the instant case, HSTA had not resorted to the contractual grievance machinery prior to filing the subject prohibited practice charge.

While it remains the Board's policy to foster the peaceful settlement of disputes among the parties themselves,

the circumstances of the instant case lead the Board to conclude that it should exercise its jurisdiction, rather than relegate the parties to their contractual grievance-arbitration remedy.

The Supreme Court has held that when the elements of an unfair labor practice are present in a breach-of-contract, the injured party is not automatically deprived of his right to proceed before the Board where his remedy may be speedier and less expensive than a law suit. C & C Plywood Corp., 385 US 421, 64 LRRM 2064 (1967) In NLRB v. Great Dane Trailers, Inc., 388 US 26, 65 LRRM 2465 (1967), the Supreme Court agreed that the NLRB had properly exercised jurisdiction in a case alleging that the company had discriminated between striking and non-striking employees, since the complaint alleged an unfair labor practice in its simplest terms.

Under Article VII of the HSTA-BOE contract, teachers must be informed of their employment and salary status for the ensuing year no later than June 10 or as soon as possible thereafter. In the event of staff reduction, the employer must make offers to teachers affected by staff reduction, if vacancies are available, so that teachers may accept or reject such offers prior to August 1 of any school year. The whole thrust of that article is "to the end that no teacher position shall remain unfilled at the commencement of the school year," as evidenced by the time requirements imposed for the completion of grievance arbitration on transfers and assignments.

We note that arbitration proceedings in the spring vacation pay case were not completed until February 15, 1974, some eight months after Step 3 grievance hearings had commenced on June 20, 1973.

Thus, the Board is of the opinion that the HSTA should not be deprived of its right to proceed before the Board where its remedy may be speedier. Moreover, the Board is of the opinion that it would be in the best interest of the public, as well as the teachers, to have the seniority issue resolved expeditiously by this Board in order to minimize chaos and confusion at the start of the next school year and so that the BOE can proceed with its assignments and transfers and, if necessary, staff reductions.

Furthermore, the complaint does not solely concern an alleged breach-of-contract, but other alleged violations of Section 89-13(a)(1), HRS, prohibited practices over which the Board has jurisdiction and which are not referrable to arbitration.

In view of the foregoing, the Board exercises its jurisdiction in this prohibited practice charge and denies BOE's motion.

We turn now to the merits of the dispute concerning the reduction of one month's seniority from teachers who participated in the strike of April 1973, and who remained on strike for the full term of the strike.

Initially, HSTA argues that since employees were engaged in concerted activity, the reduction of seniority penalizes them for their participation in concerted activity protected under Chapter 89, HRS. All of the cases cited by the HSTA, in support of this contention, deal with concerted activity which is protected under the National Labor Relations Act (hereafter NLRA).

Section 7 of the NLRA provides, in relevant part:

> "Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

Both economic and unfair labor practice strikes constitute protected concerted activities.

The comparable provision under our law, Section 89-3, HRS, provides, in relevant part:

> "Employees shall have the right . . . to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

Under our law, public employees only have a right to strike as circumscribed under Section 89-12, HRS.

We find no merit in HSTA's contention that teachers were engaged in protected concerted activity under Chapter 89, HRS, since teachers had no legal right to strike in violation of Section 89-12, HRS. The Section 89-13(a)(1) charge cannot be substantiated on this ground. Whatever the result might be, had it been a lawful strike in accordance with Section 89-12, HRS, we need not here decide.

HSTA next contends that discrimination is not determined by looking only at the fact of a seemingly even-handed policy, but at how the policy operates.

HSTA relies on Tex-Tax Welhausen Co. v. NLRB, 419 F.2d 1265, 72 LRRM 2885 (CA 5, 1969), wherein the employer was found guilty of discriminatory conduct.

In our review of Tex-Tan, supra, we note that the court confined its holding to unfair labor practice strikes, since unfair labor practice strikers are in an especially protected category under the NLRA. Furthermore, the employer's policy was found to be discriminatory only insofar as it resulted in a complete abrogation of vacation benefits of striking employees. In effect, the complete forfeiture of vacation benefits was a double penalty, since vacation benefits were based on a percentage of wages paid and had a built-in adjustment

which already accounted for time lost due to the strike. The court found nothing discriminatory about the policy's built-in adjustment.

Unlike Tex-Tan, supra, the BOE's method of computing seniority credit does not result in a complete abrogation of seniority. It resembles Tex-Tan's policy to the extent that service credit is based on an employee's paid status and has a built-in adjustment for time lost due to short-term leaves without pay.

The BOE's practice of allowing one month's seniority credit if an employee is on paid status for at least half the month dates back to the 1940's. The practice merely establishes a cut-off point (half a month) for computing service credit. The half month criterion is commonly used in the computation of various kinds of benefits, such as, determining a day's pay for hazard work and whether or not to credit a quarter of an hour for overtime. Such a practice operates in favor of employees who perform work which meets the half month criterion, while, at the same time, to the disadvantage of those who perform any work short of the half month criterion. Although the BOE's practice operated in favor of teachers who were on paid status for half the month of April, yet to the disadvantage of teachers who were not on paid status for half the month of April, it was applied equally to both strikers and non-strikers. It cannot be said that the practice, by its nature, is discriminatory against strikers.

In NLRB v. Community Shops, Inc., 301 F.2d 263, 49 LRRM 2999 (CA 7, 1962), the Seventh Circuit denied enforcement of the NLRB order which found that the employer had unlawfully discriminated against certain employees who had engaged in an economic strike during the previous year. In denying enforcement, the court stated:

> "Because the record contains evidence of a legitimate business motivation for the rehire formula and since the rehire formula applied equally to strikers and non-strikers we hold, . . . that the formula was not discriminatory by its nature; that to find a violation the Board was required to make a finding that Community's intent in adopting the rehire formula was to discriminate against the employees who had struck in 1958; and that since no such finding was made or could have been made when the record as a whole is considered, the Board's petition for enforcement of its order must be and is denied."

Though the facts of this case differ, the court's rationale is that a formula, uniformly applied to both strikers and non-strikers, is not discriminatory. In order to find a violation, there must be a finding of intent to discriminate against striking employees. Inasmuch as the BOE uniformly applied a long-standing practice to both striking and non-striking teachers when it computed service credit for seniority, there can be no finding of intent to discriminate against striking teachers.

HSTA further contends that the BOE should not have considered absences due to the strike as leaves of absence in determining whether or not seniority should accrue. Had they been on leaves of absence, it would have no objection to the application of the seniority rule (Tr. 53).

The practice based on the half-month paid status criterion merely establishes a cut-off point for computation purposes, and does not set forth what leaves are creditable for seniority purposes. We must look to relevant contractual provisions and rules and regulations in the School Code to determine whether or not the BOE erred when it disallowed service credit for absences due to the strike.

The contract between HSTA and the BOE provides, under Article XII, Leaves:

"Leave policies provided for in the 5400 series of Administrative Regulations and applicable State statutes which were in effect on the execution date of this Agreement shall remain in full force and effect for the duration of the Agreement. . . ."

The 5400 series of the School Code provides, in pertinent parts:

Regulation #5401

"A. Definition. Leaves of Absence Without Pay are leaves which may be granted by the Department to its employees for the reasons listed below, provided the normal operations and educational programs of the employer are not disrupted or affected adversely. (emphasis added)

* * *

"D. Service Credit. While on Leaves of Absence Without Pay the employee will qualify for service credit and credit on the salary schedule only under the following conditions: (emphasis added)

1. Military service. The employee may receive up to a maximum of four years of credit.

2. Professional improvement. The employee may receive up to a maximum of one year credit."

Regulation #5402

"Unauthorized Leave Without Pay. Employees who are absent from work without proper authorization shall be considered on Unauthorized Leave Without Pay until such time as an accurate determination of the actual status can be determined." (emphasis added)

The above regulations incorporated into the contract show that, by definition, a strike absence cannot be construed as a leave of absence without pay, since it is clearly an unauthorized leave without pay.

Furthermore, Regulation #5401 specifically states what leaves of absence without pay are creditable toward seniority, i.e., military and professional improvement leaves. Other leaves of absence without pay, even though approved by

the department, are not creditable toward seniority. It would be unreasonable to conclude that the BOE should have granted service credit for absences due to the strike, unauthorized leaves without pay, when approved leaves of absence without pay (other than military and professional improvement) do not carry service credit.

The contract also incorporated by reference under Article VII, Assignments and Transfers, a memorandum on "Staff Reduction Guidelines for Certificated Personnel." That document contains, in relevant parts:

> "III. Seniority of service in the school shall be determined as follows (listed in order of priority):
>
> * * *
>
> "C. The third criterion to be considered is years of continuous service in the school.
>
> Teachers with more years of continuous service in the school shall have seniority over teachers with less years of continuous service in the school.
>
> 'Continuous service' is defined as the total number of active service time in the school starting from the effective date of school assignment. . . . (emphasis added)
>
> * * *
>
> "2. Teachers on leave of absence with school guarantees may retain their accumulated service time, and the period of leave shall count as active service time only if the leave itself carries service credit (professional improvement leaves, sabbatical leaves, etc.). Maternity leaves, health leaves, etc., do not count as active service time. (emphasis added)
>
> * * *
>
> "D. The fourth criterion to be considered is service time in the department.
>
> Service time in the department shall be properly computed by the Records Section of the Office of Personnel Services for this purpose. (emphasis added)

Article VII of the contract further provides:

> "The 'Procedures' hereinabove identified and as hereinabove amended shall also be applicable to assignments ~~and transfers for the 1974-1975~~ school year, unless otherwise amended by the Employer."

Again, the above shows that seniority is creditable only when the leave itself carries service credit.

Absent any provision to the contrary, the Board is of the opinion that the BOE properly regarded absences due to the strike as not creditable for seniority purposes in accordance with Articles VII and XII of the HSTA-BOE contract. Said articles similarly require the BOE to regard any other unauthorized leaves without pay and such approved leaves of absence without pay which do not carry service credit as not creditable for seniority purposes.

The fact that some strikers received seniority credit for April, while other strikers did not, is a result of the half-month paid status rule utilized for computing a month's seniority credit with respect to <u>any short-term leave without pay</u>, whether the leave is an unauthorized leave without pay or an authorized leave of absence without pay. Thus, although service credit was disallowed for all strike absences, only such absences which exceeded half a month resulted in a loss of one month's seniority.

Initially, the Board was concerned that teachers may not have been sufficiently aware that strike absences were not creditable toward seniority. However, in view of the relevant contractual provisions which specify when seniority should accrue, the Board is of the opinion that such an inference could easily have been made. Additionally, the BOE's practice

of using the half-month paid status rule for computing a month's service credit toward seniority is well established. Teachers are informed at least once annually, through the transmittal of SF-5A forms, as to the amount of seniority which they have accrued during the year. Personnel records are open to inspection, thereby enabling teachers to check their service credits toward seniority and to ascertain variances, if any.

With respect to the disallowance of service credit for strike absences, the BOE was not able to make its computations with respect thereto, until the arbitration award on spring vacation pay was rendered in February, 1974. The paid status of teachers during spring vacation was at issue. The arbitrator ruled that teachers who did not work at least one day of the week prior to spring vacation were not entitled to spring vacation pay. Only then was the BOE able to ascertain which teachers should accrue seniority for the month of April in accordance with its half-month paid status rule.

HSTA last contends, in its memorandum, that despite the illegality of the strike, the BOE had agreed in the strike-settlement agreement that it would not discriminate against those teachers who participated in the strike. With respect to this argument, we confine our determination to what the parties intended by the non-discrimination clause in their strike-settlement agreement. We do not find it necessary to be concerned herein with the force and effect of the non-discrimination clause. The Board reserves such a question as to what force and effect a non-discrimination clause in a strike-settlement agreement would have, in view of Chapter 89, HRS, when the strike engaged in was unlawful, as in the present case, or lawful in accordance with Section 89-12, HRS.

The non-discrimination clause of the strike-settlement agreement provides:

> "There shall be no discrimination of any kind by any of the parties against participants or non-participants in the strike."

There was no evidence or testimony presented that the matter of seniority was discussed, or even thought about, by the parties when the non-discrimination clause was included in the strike-settlement agreement.

In General Electric Company, 80 NLRB 510, 23 LRRM 1094 (1948), on which HSTA relies for other reasons, the NLRB dismissed refusal to bargain charges against the employer since, although the settlement agreement provided in general terms that "there shall be no discimination against any of the employees by either the company or the union," the discussions concerning the subject of discrimination contained no reference to the matter of granting or withholding continuous service credit for the period of the strike.

The language contained in the teachers' strike-settlement agreement is nearly identical. HSTA made no showing that there was any discussion concerning the subject of discrimination. Thus, the Board is of the opinion that the matter of withholding or granting service credit for the period of the strike was not covered by the non-discrimination clause.

In a case involving a teachers' strike-settlement agreement, Board of Education v. Falk, 290 NE. 2d 667, 81 LRRM 2783 (Ill App Ct, 1972), the Appellate Court found that the trial court erred when it ordered the board of education to pay the wages of teachers who engaged in a two-day strike, since the strike was contrary to public policy and state law.

Moreover, it found that the back pay award exceeded the strike-settlement agreement, which was incorporated into the court's order.

In another case involving a teachers' strike-settlement, the Fifth Circuit found that the district court erred when, pursuant to a strike-settlement agreement, it fashioned an award in excess of the said agreement. Florida Education Association v. Atkinson, 481 F.2d 662, 83 LRRM 3119 (CA 5, 1973) On remanding the case, the court stated that "a court may not add terms to a settlement which were not in the contemplation of the parties."

The Board is of the opinion that it would similarly be in error if it exceeded the scope of the strike-settlement agreement by adding terms to that settlement which were not shown to be in the contemplation of the parties.

In an arbitration case, Folding Carrier Corp., 53 LA 784 (1969), the arbitrator ruled that strikers subsequently rehired were entitled to full seniority credit from the original date of hire, minus the period from the beginning of the strike to rehire. In rendering his award, the arbitrator noted:

> "Usually these matters are covered by the parties in a settlement agreement of the strike or by covering the problems in the new labor agreement which they enter into for a definite term after the strike has been terminated. Neither of these was done in the given instance, nor was there any evidence showing either any discussions of the problems at any time between the parties or even that there had been a prior strike settlement. Thus, the arbitrator must look to the contract and see if there is any controlling language, and here again, there is no real guide as to whether time spent by a man while on strike and until he is entitled to be recalled should be counted as time worked for seniority purposes or not."

Unlike the above arbitration case, there is controlling language in the HSTA-BOE contract. An earlier discussion

above of relevant contractual provisions (Articles VII and XII) has shown that seniority is creditable for leaves without pay only when the leave itself carries service credit. In view of the controlling language, the Board is of the opinion that if it was otherwise intended that seniority should continue to accrue despite absences due to the strike, the matter should have specifically been covered in the strike-settlement agreement or the reopening agreement. Neither of these was done in the case at hand.

In view of the foregoing, the Board finds that:

(1) There was no violation of Section 89-13(a)(1), HRS. Teachers were not engaged in lawful, concerted activities under Chapter 89, HRS, nor were any of their rights under the contract impaired.

(2) There was no violation of Section 89-13(a)(3), HRS. The BOE regarded all leaves without pay as not creditable for seniority purposes, unless the leave itself carried service credit, in accordance with Articles VII nad XII of the HSTA-BOE contract. The BOE computed service credit for April in accordance with its half-month paid status role on short-term leaves without pay established since the 1940's. No differentiation was made between striking and non-striking teachers. Thus, no showing was made, or could have been made that the BOE was discriminatorily motivated against strikers when it unformly implemented such established policies and practices on seniority in its service credit computations for all teachers.

(3) There was no violation of Section 89-13(a)(8), HRS. No showing was made that the intent of the non-discrimination clause of the strike-settlement agreement was to be construed

as allowing service credit for absences due to the strike. In the absence of such showing of intent, the BOE did not discriminate against striking teachers by implementing controlling contractual language.

(4) The HSTA did not meet its burden of proof with respect to Section 89-13(a)(5) and (6) charges alleged in its complaint. It appears to have abandoned these charges.

ORDER

The Board, in view of the foregoing, hereby dismisses all of the charges alleged by petitioner HSTA in its complaint against the BOE.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada, Chairman

John E. Milligan, Board Member

Dated: July 9, 1974
Honolulu, Hawaii

DISSENTING OPINION

The majority has dismissed the petition of the HSTA, finding that the seniority policy as implemented by the DOE is not discriminatory and, therefore, not in violation of the April, 1973, strike settlement agreement nor in violation of Section 89-13(a), HRS. I respectfully dissent from this opinion of my fellow Board members.

Although the reduction of seniority of unit 5 teachers appears on its face to be non-discriminatory, I feel the DOE's actions are questionable and contrary to this Board's policy and the policy of our Legislature to promote harmonious and cooperative relations between public employees and employers.

I. THE STRIKE SETTLEMENT AGREEMENT WAS INTENDED TO PREVENT LOSS OF SENIORITY AND OTHER LONG-TERM BENEFITS BY ALL STRIKING TEACHERS.

The majority of the Board has determined that the non-discrimination provision of the strike settlement agreement only prohibited the employer or union from instituting any discriminatory acts against strikers and non-strikers. The Board has further determined that the seniority policy as implemented does not discriminate against teachers participating in the strike of April, 1973.

I disagree with these determinations of my fellow Board members.

The non-discrimination provision of the strike settlement agreement was intended to prevent the loss of seniority by all striking teachers. Despite the inept draftsmanship employed, the intent and purpose of the non-discrimination provision

is apparent from the phrase "no discrimination of any kind by any party." The HSTA is prohibited from instituting any sanctions against non-striking teachers and conversely, the DOE is prohibited from instituting any actions against striking teachers. This anti-sanction intent of the non-discrimination provision is clear since it is questionable that an official of a striking union would agree to a settlement which allows the employer to systematically reduce the seniority of the vast majority of strikers, making them more vulnerable to future lay-offs and discharge.

However, because this provision was couched in non-discrimination language, the DOE has been able to institute a strike sanction while at the same time staying within the literal perimeter of the non-discrimination language. This utilization by the DOE of a semantic loophole evidences its disregard of the original intent, spirit, and purpose of the strike settlement agreement.

Moreover, the lack of more concise language is understandable in view of the time restraints the DOE and the HSTA were subject to. Ordered on April 13, 1973, by the Circuit Court, in HPERB v. HSTA et al, Civ. No. 37812, to terminate the strike within two working days, the parties hastily executed the strike settlement agreement on April 16, 1973. The HSTA secured a ratification of the agreement on April 18, 1973, the due date set by the Court. When drafted under such time pressures, the inept language of the non-discrimination clause should not be subject to the strict and literal reading employed by the majority opinion. The original intent and purpose of the non-discrimination clause should be controlling.

For these reasons, I feel that the DOE not only violated its strike settlement agreement but is also in violation

of the mandate of Chapter 89, HRS, to promote peaceful, cooperative and harmonious employee-employer relationship.

II. THE DOE, IN IMPLEMENTING THE SENIORITY POLICY, IS DISCRIMINATING AGAINST STRIKING TEACHERS AND RESULTANTLY IMPOSING A STRIKE PENALTY.

The DOE has argued that the application of the seniority policy is not discriminatory and, therefore, not a penalty against striking teachers. Through its presentation of evidence, the DOE contends that since one non-striking teacher lost seniority and a few striking teachers did not, the application of the seniority policy is non-discriminatory and, therefore, in accordance with the strike settlement agreement and not a strike penalty. I am unconvinced by this contention as it appears to be a subterfuge.

No doubt, as the DOE contends, a few striking teachers did not lose seniority. However, a vast majority of striking teachers have lost seniority, while nearly all non-striking teachers did not. Despite the contention of non-discrimination, this end result is critical. It is inescapable that striking teachers are being penalized discriminatively. The mere fact that a few exceptions exist does not disguise this scheme of the DOE.

In Tex-Tan Welhausen Co. v. NLRB, 419 F.2d 1265, 72 LRRM 2885 (5th Cir. 1969) vacated on other grounds, 397 U.S. 819, 74 LRRM 2064 (1970), the Court stated:

> "Tex-Tax attempts to distinguish its position by asserting that it did not discriminate against strikers, claiming instead that the vacation policy was applied to strikers and non-strikers alike. While technically this may be true, the result of Tex-Tan's policy was to deprive strikers of their vacation benefits. . . .

> "Moreover, Tex-Tan's claim that there was no discrimination here is deceptive. It is true that on its face the vacation policy could be applied to all employees, strikers and non-strikers alike. Nevertheless, it is equally clear that the result in this case was that strikers were injured because they exercised their right to strike." 72 LRRM at 2890

Although the facts of Tex-Tan, supra, are not directly on point, the articulated rule of law is applicable. The DOE's seniority policy is being discriminatively applied against striking teachers in violation of the strike settlement agreement and operates as a strike penalty despite the deceptive nature of its implementation.

III. THE REDUCTION IN SENIORITY OF STRIKING TEACHERS GOES BEYOND THE NORMAL LOSS OF BENEFITS EMPLOYEES SUSTAIN WHILE ON STRIKE AND CONSTITUTES A PENALTY.

Inherent in any strike, legal or unlawful, is the loss of wages by the striking employees. Almost axiomatically, the employer cannot be required to finance a strike called against him. However, when the strikers are additionally subject to a loss of job security and made more vulnerable to lay-offs or discharge after the strike, such a situation is of a different nature. In General Electric Co., 89 NLRB No. 90, 23 LRRM 1094 (1948) the NLRB distinguished between the loss of wages and the loss of seniority. The Board, in General Electric Co., supra, stated:

> "Unlike wages, vacations, and pensions, whose sole aspect is monetary compensation for work performed during the employment relationship, relative seniority, as applied in the Respondent's plants, in addition to any compensatory characteristics it may possess, is one of the factors upon which the individual employee's tenure of employment may depend. It is well settled that, except to the extent that a striker may be replaced during an economic strike, his employment relationship cannot otherwise be severed or impaired because of his strike activity."

In the case at hand, loss of wages were inherent since the DOE could not be expected to pay teachers while they were on strike. However, the loss of seniority places no financial burden upon the DOE while it directly affects the striking teachers' tenure of employment. The implementation of the seniority policy has the only effect of penalizing a vast majority of striking teachers.

IV. EVEN ASSUMING THAT THE ILLEGALITY OF THE TEACHERS' STRIKE IS A DISTINGUISHING FACTOR, THE EXISTENCE OF THE SENIORITY POLICY HAS A CHILLING EFFECT ON ALL FUTURE LEGAL STRIKES.

The majority has pointed out, and I so agree that the April, 1973, strike was unlawful and contrary to Chapter 89, HRS. In both Tex-Tan, supra, and General Electric, supra, the strikes in those cases were lawful. Despite this distinguishing factor, the seniority policy, as implemented by the DOE is blind to the legality of a strike. Even if the April, 1973, strike had been legal, the seniority policy would have been applied. The mere existence of such a policy would have a chilling effect on future lawful teacher strikes since potential strikers would not only be subject to the normal loss of benefits but would also be subject to a loss of job security.

Under these circumstances, I find the seniority policy not only highly questionable and suspect when applied as it has been, to an illegal strike, but additionally questionable since it can have a chilling effect on future legally protected strikes.

For the reasons set forth above, I respectfully dissent from the majority opinion of my fellow Board members.

James K. Clark

James K. Clark, Board Member

Dated: July 9, 1974
Honolulu, Hawaii