

STATE OF HAWAII
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	
HAWAII STATE TEACHERS)	Case No. <u>SF-05-58</u>
ASSOCIATION, NEA,)	
)	
Petitioner,)	Decision No. <u>94</u>
)	
and)	
)	
DONALD FREDERICK JENSEN,)	
)	
Intervenor.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDERS

On June 22, 1978, the Hawaii State Teachers Association (hereafter HSTA) filed a Petition for Certification of Reasonableness of Service Fees. The HSTA asked the Board to certify as reasonable a service fee for employees in Unit 5 of \$148.80 per annum, effective July 1, 1978.

The current service fee for said employees is \$130 per annum. Decision 69 (July 21, 1976).

Donald Frederick Jensen, a member of Unit 5, was granted intervenor status in this case. Order No. 198 (July 6, 1978).

After publication of legal notice in newspapers of general circulation, the hearing commenced on July 12, 1978. Post hearing briefs were received on August 4, 1978. Thereafter, pursuant to Order No. 214, the case was reopened on September 14, 1976 to take additional evidence. The transcript of the hearing on reopening was received by the Board on October 12, 1978.

Based upon the entire record herein, this Board makes the following findings of fact, conclusions of law, and orders.

FINDINGS OF FACT

Petitioner HSTA is and was, at all times relevant, the certified exclusive representative of all employees in bargaining Unit 5 (teachers and other personnel on the same salary schedule).

Donald Frederick Jensen is a "public employee" as that term is defined in Subsection 89-2(7), Hawaii Revised Statutes (hereafter HRS). He is a member of Unit 5 but is not a member of the HSTA.

The employers of Unit 5, for purposes of negotiations, are the Board of Education and the Governor. Subsections 89-2(9), 89-6(b), HRS.

The number of employees in Unit 5 is approximately 8,700. Of this number, approximately 6,500 persons are HSTA members. As to the number of persons in Unit 5, there is a discrepancy in the evidence; the HSTA's exhibits show the unit size at 8,700. When this number of people is multiplied by the proposed new service fee, it generates income of \$1,294,560. Mrs. Kakesako of the HSTA testified, however, that the unit consisted of approximately 100 more people, or 8,800. This number of people would generate an additional \$14,880 per year in income. However, if Mrs. Kakesako's figure is correct, then certain expenditures directly would have to be raised also, such as per capita payments to the National Education Association (NEA). The contradiction in evidence will be resolved by using the lower income figure for the following reasons: the unit size does fluctuate, Mrs. Kakesako's answer was an approximation, and all of the expense estimates in the record were based on a unit of 8,700.

The present service fee for Unit 5 is \$130 per person per annum, of which \$30 per person is being paid as

a per capita to the National Education Association (hereafter NEA), of which the HSTA is an affiliate.

Of the requested new service fee, \$35.00 per person per year will go to the NEA, effective September 1, 1978.

The HSTA has asked for the total increase to be effective as of July 1, 1978, although the NEA's \$5 increase does not take effect until September 1, 1978. The HSTA intends to put the 83 cents per person portion of the \$5 NEA increase which will be collected for July and August into its local budget.

Service fee income is placed in the HSTA's general fund account.

For fiscal year 1978-79, the HSTA has a proposed budget calling for total expenditures out of the general fund account of \$1,408,670.

It estimates that the income to its service fee or general fund account from all sources will be \$1,408,670 consisting of the following components:

Service Fees (8,700 X 148.80)	\$1,294,560
Uniserv Grant (NEA)	80,000
Records Grant (NEA)	3,110
Training Grant (NEA)	4,000
Dushane Fund (NEA)	2,500
Other Income	2,500
Balance from Previous Year	<u>22,000</u>
Total	\$1,408,670

Based upon its proposed expenditures and estimated income, the HSTA has a balanced general fund account budget. However, during the reopening in this case, new evidence showed that staff salaries and fringe benefits for non-professional employees had increased by \$15,000 and that

there would also be a salary increase for the union's professional staff, which would amount to approximately \$10,000 for a total increase of \$25,000.

The HSTA charges persons who are its members a fee of \$13.44 per year over and above what they pay as service fees. The income from this "dues differential" goes into a separate Membership Account (also referred to as the M Account). The total amount of income budgeted for the M Account for fiscal year 1978-79 is \$119,692. The increase in the M Account income for 1978-1979 over fiscal year 1977-1978 is \$37,014. The M Account budget is in the same format as the General Fund or Operating Budget and the union allocates expenses to the M Account when it believes said expenses are not proper charges against the general fund (service fee) account. One staff member who works entirely on membership services is paid entirely out of the M Account. Other categories of expenses are apportioned between the general fund account and the M Account. Initially the apportionments were based solely on estimates, but now they are based on actual experience. Adjustments to the apportionments to the M Account are made at the end of the year to bring them in line with actual time spent on non-service fee activities. Allocations to the M Account have averaged between 7 and 8 percent of the total amounts spent by the HSTA. Time sheets support the allocation of salaries.

Items paid for out of the M Account include cost of the members-only group insurance programs, political action data processing, special service announcements concerning programs for members only such as group purchase plans, and a portion of the HSTA's postage, supplies, office equipment, rent of premises, telephone, union governance expenses, and other operating expenses.

The HSTA also has three other funds paid for out of the M Account: an HEA Fund, a Crisis Fund and a Political Action Committee Fund. The HEA Fund has been converted to an Office Location Fund and is intended to be used to purchase an office. The Crisis Fund is to provide a reserve to be used in the event a rival union challenges the HSTA's status as exclusive representative. The Political Action Fund is used to endorse candidates and make political contributions.

The display below shows the allocation of total expenditures the HSTA has made between the General Fund (service fee) Budget and the Membership Budget for fiscal year 1978-1979:

	<u>General Fund</u>	<u>Membership Fund</u>
Salaries	\$486,076	\$ 44,762
Employee Welfare	72,669	7,001
Employee Payroll Taxes	37,186	3,377
Accounting & Data Processing	48,545	13,970
Advertising - Public Media	6,000	--
Automobile	15,331	680
Board of Directors Fund	1,800	1,575
Committees	36,231	2,880
Board Reserve	23,204	23,247
Communications Internal	31,065	1,715
Expense Allowance	10,740	600
Interest - Dues	5,450	Insurance - Dues 487
Insurance	6,198	--
Legal	45,000	--

	<u>General Fund</u>	<u>Membership Fund</u>
Legislative	\$ 2,000	\$ --
Leadership Conference	15,966	--
Maintenance	5,800	512
Office Supplies	18,500	2,900
Outside Services	10,364	2,000
Postage	11,500	1,000
Rental - Premises	47,860	3,840
Rental - Equipment	6,900	600
Room & Board	16,627	892
Service Fees, NEA	297,279	1,750 (Dues)
Service Fees, Locals	17,400	100
Telephone	25,912	2,253
Travel	22,763	576
Accrued Leave Fund	15,000	--
Equipment Fund/ Depreciation	19,748	1,250
Taxes - General Excise	<u>--</u>	<u>1,500</u>
TOTAL	\$1,408,670	\$119,692
Additional Salary/Fringes Increases	<u>23,000*</u>	<u>2,000</u>
	\$1,431,670	\$121,692

Figures for the Office Location Fund, Crisis Fund and Political Action Fund for fiscal year 1978-1979 were not provided. The Board does not consider their omission significant because these funds are not service fee funds. The HSTA supports them 100 percent out of membership funds.

* Although the added salary increases (\$25,000) have not been allocated to the Membership Account in the record herein, if one uses the 8 percent the HSTA has used to allocate other salaries, then 8 percent of the \$25,000 increase or \$2,000 should be allocated to the M Account and \$23,000 to the General Fund Account.

The amount of service fee revenue, which would be generated if the present service fee were unchanged, would be \$1,131,000 (\$130 X 8700). Augmented by NEA Grants and Other Income as shown on Petitioner's Exhibit 5, the total "service fee" or General Fund Income of the HSTA would be \$1,245,110. The HSTA is asking that the service fee be increased from \$130 per person per year to \$148.80 per person per year for a total increase of \$163,560.

Its General Fund Expenses (\$1,431,670) are up \$202,551 over General Fund Expenses of \$1,229,119 for fiscal year 1977-1978.

The increase is attributable to salary increases for the HSTA employees (\$53,194), related fringe benefit and employee welfare payments (at least \$9,724), an increase in per capita payments to the NEA (a \$33,147 annual increase), adding an extra day and night to the HSTA convention (\$14,000 increase), creation of a reserve fund (\$23,204) providing full funding to delegates to the NEA convention (\$10,200), enlarging the Teacher Advocate (the HSTA's newspaper) from 8 to 12 pages (\$6,065), increases in contractual obligations, rent, and inflationary increases.

The Teacher Advocate is the union newspaper and all persons in the bargaining unit are entitled to get a copy. It is paid out of general fund money. However, the fund is reimbursed the full costs of the advertising for special services and insurance programs.

Ten issues of the Teacher Advocate published during the period September, 1977 through September, 1978 were submitted into evidence.

Most of the issues deal heavily with NEA and HSTA governance (articles about NEA and HSTA officers, elections,

structures and policies), Unit 5 negotiations and contract benefits and rights, accomplishments of individual teachers, legislation affecting working conditions of teachers, problems facing teachers and the schools, and various exhortations of teachers to become involved in politics in order to have a say in the development of educational policy.

Each issue is eight pages long. Each issue carries a one page or half page paid "special services" advertisement. The term "special services" is used to describe programs and benefits which are available only to HSTA members such as group insurance and discount purchasing programs. The November, 1977 issue devoted two inches (14 lines) to reporting that the HSTA Board of Directors had adopted, inter alia, an endorsement of the Equal Rights Amendment as it has stood in the Hawaii Constitution since 1972 and an agreement by the HSTA to work to prevent the rescision of the ERA at the state and national levels. The June, 1978 issue devotes one half of a page to report on the success of HSTA-endorsed candidates in the election of delegates to the 1978 Hawaii Constitutional Convention. One-third of one page of the May, 1978 issue reports on the results of an HSTA statewide golf tournament.

The Advocate is sent to 140 retired teachers and 5 associate members whose dues go into the M Account, not the General Fund. The Board has no information upon which to assign any cost of the production or distribution of this number of papers; the HSTA should allocate such costs to the M Account.

Also charged to the service fee account is the cost of publishing a weekly article in the Honolulu Star-Bulletin and The Advertiser called "Teacher Talk." These articles deal with matters such as the role of parents in the education process, campus violence, the HSTA-NEA role in helping

to override President Ford's veto of a Health, Education and Welfare appropriations bill, the inadequacy of classroom supplies coupled with a call to elect to the Legislature persons who are sensitive to the needs of public education, teenage drinking problems on campus, the success of HSTA-endorsed candidates in elections of public officers, an exhortation to support a change of Section 89-9(d), HRS, so that the issue of class size can be negotiated, a justification of unionization for teachers, the issues in contract negotiations such as pay raises for teachers, the need for special education teachers, the controversy over a threatened removal of school librarians from Unit 5, Teacher Institute Days, the Three-on-Two staffing programs, cutbacks in the Department of Education budget, the HSTA and NEA's efforts to secure federal funding for public education, fire hazards in the schools, a favorable evaluation of the 1977 Legislative session in terms of its support of public education, and a mahalo message to retiring teachers. Not in the record but mentioned in testimony was a "Teacher Talk" article printed just before the primary election of October 7, 1978, which was an endorsement of a candidate for the office of Governor. The HSTA's position was that this article, because it was a political endorsement, should be charged to the M Account, but that other articles such as those described above were a proper charge against service fees.

The HSTA devotes some of its resources, particularly staff time charged to service fees, to communications (often in the form of advocacy) with persons in the Department of Education, or the Board of Education, and in the Legislature related to the following subjects or objectives:

1. Direct across the table negotiation of collective bargaining agreements for Unit 5;

2. The processing of grievances arising under said agreements;
3. The anticipated or actual impact of State legislative action on working conditions of teachers;
4. Health problems in the schools, including venereal disease and drinking, among students;
5. Discipline problems in the schools, student vandalism and violence;
6. Efforts to bring about or resist, as the case may be, amendments of Chapter 89, HRS, the statute which provides for collective bargaining for public employees in Hawaii, including teachers;
7. Changes in employment related matters such as retirement and health fund benefits which are made non-negotiable by Subsection 89-9(d), HRS.

The HSTA also expends service fee resources to obtain federal funding for public education.

Before each legislative session, the union gives a party for legislators. It also sends floral gifts on opening day.

The HSTA is affiliated with the National Education Association (NEA). It presently pays a per capita to the NEA of \$30 per person per year in Unit 5. Of the requested new service fee of \$148.80, the amount of \$35 per person per year is to be paid as a per capita payment by the HSTA to the NEA, effective September 1, 1978.

The amount of the per capita is established by the NEA.

An annual per capita of \$35 per person in Unit 5 would produce revenue for the NEA of \$304,500 for fiscal year 1978-79.

In return for this money, the HSTA will receive the following support and services from the NEA:

1. Direct NEA Financial Payments to the HSTA

Uniserv Program	\$79,200
Data Gathering	3,110
Training	<u>4,000</u>
Total	\$86,310

The purpose of the Uniserv program is to assist the HSTA in collective bargaining and grievance administration.

The money for data gathering is to help the HSTA to gather information and statistics as to the identity and work location of members of Unit 5 to help the HSTA communicate with them.

The \$4,000 for training is to be used in three areas: leadership development as it relates to governance and union efficiency, collective bargaining and grievance processing.

2. NEA Insurance Programs Provided to the HSTA

The NEA also makes available to the HSTA the following services covering all persons in Unit 5:

a. Maintains an assistance fund to provide interest-free loans to teachers who are involved in strikes.

The HSTA would be allowed to draw up to \$150,000 from this fund. This kind of insurance program is not available on the open market;

b. Maintains the Dushane Unified Legal Services Program to provide a portion of the cost of litigation when represented teachers are involved in a dispute over terms of employment such as strikes. Under the guidelines for this program, the NEA will pay 10 percent of the first \$4 spent

by the HSTA times the number of active HSTA members (6,500). Thus, if the HSTA spent \$26,000 in litigation, the NEA would give the HSTA \$2,600. Non-members' litigation is covered by reimbursements by the fund although they are not counted in the formula by which the NEA's share is figured;

c. Maintains the Educators' Employment Liability Program of insurance to protect teachers from liability for acts arising out of their employment. If the NEA did not provide this program and the HSTA chose to, it would cost the HSTA approximately \$60,000 per year to do so;

d. The NEA is negotiating malpractice insurance for its staff and the staffs of its local affiliates such as the HSTA who are involved in bargaining and grievance resolution.

3. NEA Services to the HSTA

a. Maintains a telex system which permits the HSTA to communicate rapidly with the NEA and other affiliates of the NEA;

b. Maintains a nationwide bargaining support system network which consists presently of three computerized programs: salary schedules, state budget analyses, and contract clauses. Soon to be added is an arbitrator file. The HSTA would have to buy into this network at a cost of \$10,000. It cost the NEA between \$300,000 to \$375,000 to develop this system;

c. Does research for affiliates on evaluation of arbitrators, contract analysis, salary schedules, employer budgets, school finance, retirement systems, economic trends, in-service education, curriculum, and class size;

d. Provides, on request, contract language to be used in negotiations;

e. Conducts polls for the HSTA. So far, it has conducted a poll on teacher satisfaction with the Unit 5 contract and community attitudes toward education. In the Spring of 1979, it will do a poll of all Unit 5 members to determine what they hope can be achieved through collective bargaining;

f. Makes available a number of NEA publications dealing with collective bargaining, legislation which affects education, and statistics pertaining to the field of education;

g. Provides direct staff assistance in negotiations;

h. Provides the assistance of the NEA's legal staff;

i. Provides training programs for the HSTA staff.

4. NEA Lobbying

The NEA carries on a lobbying effort within both the executive and legislative branches of the federal and state governments. A primary focus of this lobbying is to get funds for education appropriated and allocated to the states. Other areas of concern have been and are legislation on social security, medical and retirement benefits for teachers, and coverage of teachers by unemployment insurance.

The NEA is mapping out strategy in several states to combat the spread nationally of the kind of limitations on public finances adopted by the voters of California in enacting Proposition 13.

The NEA does not lobby at the Legislature of Hawaii for ratification of the cost items contained in collective bargaining agreements for Unit 5.

The NEA has a rebate program to refund to dissenters money it expends on political activities.

Notice of the rebate procedure is contained in the NEA Recorder, which is sent to all persons in the unit and is posted on bulletin boards in the schools.

For fiscal year 1976-1977, approximately 215 persons in Unit 5 requested and received rebates from the NEA.

Under the NEA procedure, only persons who are not members of the HSTA and who object to the expenditure of any portion of their service fee for political activity may request a political activity rebate by sending the NEA a timely written request for the rebate. The rebate is determined by multiplying the per capita amount by the percentage of the total NEA budget which is allocated to political activity. Provision is made for year end adjustments of the rebate calculation to refund a proportion of actual expenditures for political activity if they differ from budgeted ones. One may take a challenge of the amount of the rebate to the executive committee and beyond that body to arbitration.

For purposes of the rebate plan, the term "political activity" means:

(1) the administration of an independent political action committee;

(2) the determination and/or publicizing of an organizational preference for a candidate for political office;

(3) efforts to enact, defeat, repeal, or amend legislation which is not related to the working conditions (legislation establishing collective bargaining, professional negotiation, or some other system of employer-employee relations shall be deemed related to working conditions), welfare, or working environment of employees represented by the NEA and/or its affiliates;
or

(4) contributions to charitable, religious or ideological causes.

The increase in the NEA per capita portion of the service fee from \$30 to \$35 per year became effective on

September 1, 1978. The HSTA is asking that this increase be made retroactive, along with the rest of the service fee increase, to July 1, 1978. The HSTA proposes to keep locally the July and August portion of the \$5 annual increase, which portion comes to 83 cents per person. It asks that this be done to simplify the deduction procedure. It has placed the \$7,247.10 income created by the retention of the 83 cents per person into its budget.

In addition to its line item budget, the HSTA submitted into evidence an HSTA Program Budget (1978-79). This is a document which sets forth six goals the HSTA hopes to reach during the subject fiscal year. Most of the goals are subdivided into objectives. Under the objectives are listed various activities the HSTA hopes to carry out in order to meet its objectives and goals. No dollar amounts are assigned to the individual activities. However, the objectives are assigned a dollar amount as are the goals. The total dollar amounts of the goals equal the amount of the expense total in the HSTA's general fund expenditure budget for the fiscal year. The program plan is a planning tool for carving up the income of the HSTA.

The general fund budget divides \$1,408,670 among various line item budget categories. The program plan budget commits the same \$1,408,670 to the goals and objectives of the HSTA.

The Program Budget goals, objectives and amounts designated to be spent on the goals and objectives are as follows:

PROGRAM BUDGET
(1978-79)

GOAL I:	ECONOMIC PROFESSIONAL SECURITY FOR ALL MEMBERS	<u>1978-79</u>
	1.0 Negotiations	\$ 72,656.74
	2.0 Problem Solving & Grievances	212,082.98
	3.0 Collective Bargaining Data	8,091.81
		<u>\$ 292,831.53</u>
GOAL II:	SIGNIFICANT LEGISLATIVE SUPPORT FOR PUBLIC EDUCATION	
	1.0 Increase Funding	\$ 21,918.56
	2.0 Political Organizing	9,752.68
	3.0 Legislative Support	20,839.16
	4.0 Election Process	1,392.25
		<u>\$ 53,902.65</u>
GOAL III:	AN INDEPENDENT UNITED TEACHING ORGANIZATION	
	1.0 Maintain Governance Structure	\$ 223,495.26
	2.0 Training	58,458.97
	3.0 Special Services	---
	4.0 Membership	13,202.71
	5.0 Community Relations	4,674.70
		<u>\$ 299,831.64</u>
GOAL IV:	PROFESSIONAL EXCELLENCE	
	1.0 In-Service Education	\$ 8,244.26
	2.0 Relation with University	2,282.67
		<u>\$ 10,526.93</u>
GOAL V:	HUMAN AND CIVIL RIGHTS	
	1.0 Teacher Rights	<u>\$ 36,604.24</u>
GOAL VI:	LEADERSHIP IN SOLVING SOCIAL PROBLEMS	
	1.0 Positions on Issues of the Day	<u>\$ 3,952.04</u>
SUPPORT AREAS		
	Communications	\$ 30,590.00
	Administration	365,752.00
	Service Fees	314,679.00
	TOTALS	<u>\$ 701,021.00</u>
	SERVICE BUDGET TOTALS	<u>\$1,408,670.00</u>
MEMBERSHIP AREAS		
	Goal III - 3.0	\$ 68,138.00
	Support	51,554.00
	TOTALS	<u>\$ 119,692.00</u>

A review of the objectives and goals of the HSTA indicates that some of them either are not reasonably related to the ongoing complex process of contract negotiation and administration or they fall clearly on the wrong side of the allocative line between allowable and non-allowable charges against service fees established in prior board decisions.

Goal II is entitled "Significant Legislative Support for Public Education." Objective 2 thereunder is to develop and maintain a grass-roots political apparatus which includes a precinct-level organization.

The purpose of Objective 2 is to encourage teachers to become active in politics in any party of their choosing. No political contribution or endorsements are made out of the \$9,752.68 designated for Objective 2, Goal II. This activity, while it has some obvious nexus to the bargaining process in the public sector, does not reasonably relate to the process for service fee purposes.

Objective 4 of Goal II is not an allowable charge against service fees. Its purpose is to elect to public office those who have proven or stand to prove that they support the goals and objectives of the HSTA. This is a political objective which cannot pass muster. Hence the \$1,392.25 allowed for Objective 4, Goal II, will be disallowed.

Also disallowed will be the \$13,202.71 for Objective 4, Goal III. This money is intended to be used to recruit new members into the HSTA.

Objective I of Goal VI is to take positions on issues of the day. This objective does not bear a reasonable relationship to the process of contract negotiation and administration and so the \$3,952.04 designated for it will be disallowed as a charge against service fees.

The total amount of the disallowable charges is as follows:

\$ 9,752.68	Objective 2, Goal II
1,392.25	Objective 4, Goal II
13,202.71	Objective 4, Goal III
<u>3,952.04</u>	Goal VI
\$28,299.68	

As noted above, the HSTA submitted a general fund budget with expenditures of \$1,408,670 plus an increase of \$23,000 for salaries and fringes, or a total of \$1,431,670. Reducing this sum by the disallowable amount of \$28,299.68 leaves a total planned expenditure of \$1,403,371 as against income of \$1,408,670. This means the HSTA's general fund budget has, for service fee purposes, an unjustified surplus of \$5,299.

If the surplus is divided by the number of persons in the unit, the result is that each person's share therein is 61¢ ($\$5,299 \div 8,700 = .6091$).

CONCLUSIONS OF LAW

This case requires an application to the facts of the provisions of Subsection 89-4(a), HRS:

(a) The employer shall, upon receiving from an exclusive representative a written statement which specifies an amount of reasonable service fees necessary to defray the costs for its services rendered in negotiating and administering an agreement and computed on a pro rata basis among all employees within its appropriate bargaining unit, deduct from the payroll of every employee in the appropriate bargaining unit the amount of service fees and remit the amount to the exclusive representative. A deduction permitted by this section, as determined by the board to be reasonable, shall extend to any employee organization chosen as the exclusive representative of an appropriate bargaining unit. If an employee organization is no longer the

exclusive representative of the appropriate bargaining unit, the deduction shall terminate.

This Board believes that the statutory phrase "negotiating and administering an agreement" is used as a term of art to describe a complex, comprehensive ongoing process of union representation of all employees in the bargaining unit. The phrase embraces activities which go beyond, but are reasonably related to, direct across the table negotiations and grievance processing. Such activities, at minimum, include all of the statutory representational duties imposed on exclusive representatives by Subsections 89-9(a) [negotiations], 89-9(c) [consultation on employment matters including those which may be nonnegotiable under 89-9(d)], and 89-8(a), HRS.

Subsection 89-9(a) imposes upon the union as well as the employer the responsibility to negotiate agreements:

(a) The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process, and shall negotiate in good faith with respect to wages, hours, and other terms and conditions of employment which are subject to negotiations under this chapter and which are to be embodied in a written agreement, or any question arising thereunder, but such obligation does not compel either party to agree to a proposal or make a concession.

Subsection 89-9(c), HRS, requires consultation between the employer and the exclusive representatives on "all matters affecting employee relations":

(c) Except as otherwise provided herein, all matters affecting employee relations, including those that are, or may be, the subject of a regulation promulgated by the employer or any personnel director, are subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult

with the exclusive representatives prior to effecting changes in any major policy affecting employee relations.

This Board has held that even though a matter may be nonnegotiable because of the provisions of Subsection 89-9(d), it still may be one which requires consultation with the union under Subsection 89-9(c), HRS. Decision 74.

Subsection 89-8(a), HRS, imposes a duty upon the union to negotiate agreements for all the employees in a unit and to act for them and to represent their interests:

(a) The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.

It is this Board's opinion that the statutory intent is that the service fee collected should be used to support the exclusive representative in all of the representational activities imposed by Chapter 89, HRS.

Not all money spent by a union may be charged to service fees. Subsection 89-4(a), HRS, requires this Board to draw an allocative line between costs related to the representational process tersely outlined in Subsections 89-8(a), 89-9(a) and 89-9(c).

As this Board stated in Decision 78:

We continue to follow the rationale expressed in HPERB Decision No. 7, as affirmed in memorandum opinion form in Naud v. Amioka, Civil No. 35588 (January 24, 1972):

"...[O]ur Legislature apparently sought to equate the service fee to benefits derived and received from the collective bargaining representation

efforts and services of the exclusive agent. Since the service fee as so determined is equally assessable against the union member as well as the non-union member in the bargaining unit, it would appear almost conclusive that our Legislature, by the deliberate choice of this criteria, intended to exclude from the computation of such service fee, the costs attributable to the internal, institutional activities of the union which are of little or no benefit to the non-member or not made available to him. There is an attempt, however inartistic and clumsy, to distinguish between 'benefits from collective bargaining services' as against 'union membership benefits,' and to exclude the latter. This segregation of 'union membership benefits' is what the statutory term of 'reasonableness' also seeks to achieve. These union membership benefits are usually deemed to refer to contributions to a political party, candidate or incumbent, initiation fees, special assessments, membership drive costs, retirement and other fringe benefits costs, costs of educational, social, recreational and fraternal benefits and activities, financial, medical and legal assistance and service. It is conceded that costs of such membership benefits and activities, in a large sense and broad perspective, contribute to the growth and strength of the union as an organization to render it a more effective bargaining representative. This, too, the Legislature must have known, but it has nonetheless required that an allocative line be drawn. This Board must attempt to draw that line.

In the final analysis, this almost impossible task of allocation can be best approached and undertaken by a process of exclusion of so-called 'union membership benefit' costs from the total costs of operations as the statutory language seems to suggest. The approach suggested by the AFT of limiting allowable costs to direct-contact negotiations and bargaining must therefore be refused. We view the words 'negotiating and administering an agreement' as a term of art which generally encompasses the entire collective bargaining and representation activities of the representative with the employer, including all preliminary planning, preparation, training, budgeting and organizational efforts and 'tooling up' process related to a negotiating contract and administering the same after its

consummation. It virtually amounts to a residuum of the union's total activities after the 'union membership benefits' have been isolated and removed. This is the 'fair share' of the collective bargaining costs to be reflected in the service fee." (Emphasis added)

In drawing the allocative line between permissible and impermissible uses of service fees, the Board does not act as an auditor or accountant. As we said in Decision 78:

Under the foregoing section, this Board's overall responsibility is to determine the "reasonableness" of the service fee assessment requested by an exclusive representative. We view the statute as requiring the Board to determine whether, based on the evidence presented, the service fee expenses and computations are permitted by Section 89-4(a), HRS. Thus, absolute mathematical precision is not required, as we do not think that the statute intended the Board's function to be one of a detailed auditing or accounting nature.

Turning to the merits in this case, the Board incorporates in these Conclusions of Law those determinations it made under Findings of Fact respecting the impropriety of charging against service fees Objectives 2 and 4, Goal II, Objective 4, Goal III, and Objective VI of its Program Plan. Although membership recruitment is not a permissible charge against service fees, the Board is of the opinion that a union has a responsibility to give employees an opportunity to make an intelligent decision as to whether to join it. This responsibility requires the union to make available information about union membership. On the record in this case, it was impossible to distinguish between disallowable membership recruitment and the permissible giving of information about membership. The size of the budgeted amount and the activities planned by the HSTA, however, made it clear the HSTA intended to go beyond making available information about membership; it intended to engage in a

comprehensive recruitment drive which was disallowable. See Decisions 58 and 78.

The Board also concludes that it is improper for the HSTA to charge the service fee account for union newspapers which go to associate members and retirees who do not pay service fees. See Decisions 78, 92 and 93. Since the amount of the cost of the 145 copies is probably relatively small, it does not require a disallowance or a reopening. The Board believes it is sufficient to direct the HSTA to make a charge against the M Account to pay the cost of producing and distributing these copies.

The HSTA has created a surplus account called "Board Reserve" in the amount of \$23,204. Because of the impossibility of predicting the future, especially with negotiations coming up in the next few months and because maintenance of a reasonable reserve is an acceptable and often prudent business practice, the Board finds the creation of one to be permissible. The existence of a reserve may make it possible for the union to avoid or at least delay future service fee increase.

The allocations the HSTA makes between the General Fund Account and the M Account appear to be based on actual data respecting staff time spent on activities which fall in either category and on good faith estimates by the HSTA as to other allocable expenses. The Board accepts their reasonableness.

In this case, as it was in the cases which led to Decisions 92 and 93, the Board is faced with the question of whether the costs of producing and distributing a union newspaper may be charged against service fees.

In Decision 92, the Board accepted the HGEA's position that only 18 percent of its newspaper dealt with matters

relating to collective bargaining and contract administration. We allowed the 18 percent and disallowed the rest. In the instant case, the HSTA has taken the position that all of its newspaper, the Teacher Advocate, except for the special services advertising, is chargeable to service fees.

The Board has reviewed back issues of the paper and has found that it is substantially devoted to collective bargaining, contract administration, working conditions of teachers, public education policy and union governance. Based on the testimony in this case, it is reasonable to assume that the contents of the paper will remain much as they have been. The Board is of the opinion that all of these subjects reasonably relate to negotiating and administering Unit 5 agreements and are proper charges against service fees. Items such as coverage of a golf tournament or an announcement of an HSTA Board position on the Equal Rights Amendment do not, standing by themselves, reasonably relate to negotiations and contract negotiations. Such items appear only rarely in the Teacher Advocate and so do not require an offsetting deduction from the service fee. This is so not only because they take up so little space, although this fact is of primary importance, but also because they can be regarded as making the paper more interesting to read, thereby enhancing its utility as a communication link between the union and the individuals in the bargaining unit. The article on the success of endorsed Con Con candidates in an election is not an endorsement of them; it merely announced an election result and so is not disallowable as a political expenditure.

A further difficult issue presented by the instant case is whether service fee moneys can be spent to lobby for

matters other than legislative ratification of cost items in collective bargaining agreements.

This Board previously has ruled that the cost of lobbying to secure ratification of cost items in negotiated contracts is a permissible charge against service fees. Decision 7 and Decision 78.

The Board has ruled also that "[p]ermissible lobbying need not be confined to obtaining legislative approval for negotiated contracts." Decision 92. Implicit in Decision 92 was a holding that general lobbying on social issues was not a permissible charge against service fees but that lobbying on matters directly related to working conditions of the employees represented by the union might properly be charged against service fees. This was so even if the subjects of such lobbying were not or could not* be the subjects covered in collective bargaining for said employees. In Decision 92, no such charge was allowed against service fees because the factual record developed therein was barren of any facts which might be used to determine whether there was a reasonable relationship between working condition lobbying and the process of collective bargaining and contract administration. The situation is different in this case. Enough examples of working condition lobbying and the hoped for results of such lobbying were given to permit this Board to determine that such a relationship does exist.

Initially, it should be noted that public sector contract ratification lobbying is based on more than showing up to testify before money and subject matter committees of the Legislature on the cost items in a contract. It involves

*See Subsection 89-9(d), HRS.

maintaining a relationship with legislators based on credibility, reliability, and visibility. It involves the cultivation of access to decision makers. Thus, the HSTA's party for legislators at the start of the session and floral gifts are a reasonable and customary part of lobbying for contract ratification.

When the HSTA directly or through the NEA lobbies to secure additional funds or materials for public schools-- apart from those called for by a negotiated contract, it is engaging in permissible service fee supported lobbying because such lobbying is to secure results which directly tie into the complex and continuing process of collective bargaining. Money secured through legislation in one year may be available to bargain over in the next. Similarly, lobbying on educational policy changes which can affect staffing patterns or working conditions in the schools can either make available new bargaining possibilities or can remove the need to bargain over certain working conditions and permit the union to focus its bargaining efforts on other areas.

With respect to lobbying to secure changes in those employment related matters made nonnegotiable by Subsection 89-9(d), HRS, there is also a reasonable and direct relationship to the bargaining process. While the legislative bodies of the State and its counties are not designated statutory employers for purposes of Chapter 89, HRS, they still hold the pursestrings in the bargaining process and are part of the bargaining relationship. See Subsection 89-10(b), which states:

(b) All cost items shall be subject to appropriations by the appropriate legislative bodies. The employer shall submit within ten days of the date on which the

agreement is ratified by the employees concerned all cost items contained therein to the appropriate legislative bodies, except that if any cost items require appropriation by the State legislature and it is not in session at the time, the cost items shall be submitted for inclusion in the governor's next operating budget within ten days after the date on which the agreement is ratified. The State legislature or the legislative bodies of the counties acting in concert, as the case may be, may approve or reject the cost items submitted to them, as a whole. If the State legislature or the legislative body of any county rejects any of the cost items submitted to them, all cost items submitted shall be returned to the parties for further bargaining.

To view the process described in Subsection 89-4(a) as restricted to across the table negotiating with the executive branch is an unrealistic, fragmented view of public sector bargaining. In public sector bargaining, the Legislature provides the wherewithal to fund all agreements and retains control over working conditions of public employees. It merely has delegated to the executive branch certain bargaining authority. It is the Legislature who determines whether the fruits of negotiation will ripen.

In the course of the negotiation-ratification process, tradeoffs take place which show a direct link between union bargaining with the executive branch and lobbying in the Legislature. Items given up at the negotiating table may be regained at the Legislature. A case in point is the amendment of Subsection 89-9(d), HRS, which restored certain increments given up in bargaining.

In bargaining with the executive branch, a public sector union may forego a negotiable cost item in exchange for a grant by the Legislature of greater benefits in such nonnegotiable areas as the health fund or the retirement system.

Lobbying on broad social issues unrelated to the bargaining process may not be charged against service fees. The relationship between such lobbying and the union's duties is nonexistent or at best remote.

Political contributions and endorsements, although arguably proximately related to bargaining in the public sector, may not be charged against service fees because of well established First Amendment principles. While this Board is without jurisdiction to rule on constitutional questions, it has in past service fee decisions disallowed political contributions as impermissible on the grounds that the statute did not permit them. While adhering to this reading of the statute, the Board notes that the constitutional principle forbidding political contributions out of service fees is so well founded as to be no longer open to question. Aboud v. Detroit Board of Education, 431 U.S. 209, 95 LRRM 2411 (1977).

The HSTA's Teacher Talk articles which appear in the general newspapers are, except for those which endorse candidates, permissible charges against service fees. They are targeted at the public and teachers and one of their purposes is to create a favorable public attitude toward the bargaining efforts of the HSTA by portraying the union as a responsible representative of public school teachers with a wide range of concerns toward improving the quality of public education. Such image building is directly calculated to create a favorable bargaining climate for the HSTA--to get the public on its side in negotiations and impasses. These articles directly relate to the contract negotiation and administration efforts of the HSTA.

The HSTA has exhorted unit members to be politically active. It also has committed some \$9,000 to implementing teacher activities in precinct organizing. The Board will allow the general exhortations to be politically active as a charge against the service fee but will disallow the funding of precinct organizing. These activities fall on a continuum and drawing a line between them is almost impossible.

Exhortations to teachers to become aware of and active in the political process so that they have clout in improving working conditions is reasonably related to and enhances bargaining efficacy. However, precinct organizing and the like, while arguably tending to enhance bargaining efficacy, involve ideological and political subjects and activities. As such, they are only remotely related to the representational process described in Subsections 89-8(a), 89-9(a) and (c), HRS, and hence are not allowable charges against service fees.

What has been said here applies with equal force to the activities of the NEA. Such activities are in aid of and reasonably relate to the representational efforts of the HSTA. Their value equals or exceeds the cost to the HSTA. Additionally, as noted by the Circuit Court in Jordan v. Hamada, et al., Civil No. 52424 (March 30, 1978): "Affiliation itself, with its intangible as well as concrete benefits, is an asset in the collective bargaining activity of [HSTA], and as such affiliation is not a divisible product."

In Decision 78, this Board approved a rebate procedure substantially similar to that utilized by the NEA. We similarly approve of the NEA rebate procedure. Our approval of rebates in the case of per capita as opposed

to shutting off the passage of the funds from the local to the national ab initio in large measure results from the fact that per capita are affiliation charges established at the national level. The rebate device provides a national mechanism for ferreting out impermissible political and ideological expenses which this Board could never duplicate.

In the Findings of Fact herein, the Board found that after disallowing certain impermissible charges against service fees, there was an unjustified surplus of general fund income over expenses of \$5,299 or 61 cents per person. Since this Board should not and cannot add this unjustified surplus to some other budget category, it will disallow this amount. Hence, the service fee certified herein as reasonable will be the amount requested by the HSTA less the unjustified surplus.

With the exception of all of those charges which have been disallowed as charges against service fees, the Board finds that the expenditures to be made from its general fund by the HSTA for its operations are attributable to contract negotiations and administration and are reasonable. The Board also determines that a service fee of \$148.19 ($\$148.80 - .61 = \148.19) per person per year is reasonable for employees in Unit 5.

In Decision 88 of this Board in Case SF-12-50 (May 4, 1978), this Board made the following order:

SHOPO is directed to petition for a service fee review no later than September 30, 1978, the ending date of its projected budget. In establishing this precedent, the Board is cognizant that SHOPO's service fee will be reviewed by the Board only five months from now. The Board, however, upon deeper consideration of its duty to certify the reasonableness of service fees, believes that

it cannot approve a service fee for periods for which there is no accounting or showing as to how the service fee monies will be spent. Accordingly, henceforth, the Board will certify service fee amounts only for periods for which a projected budget has been provided.

Since the HSTA's fiscal year ends on June 30, 1979, and since the evidence it put on, except that for periods in the past, covered only the 1978-79 fiscal year, the Board will approve the subject service fee only through June 30, 1979.

ORDERS

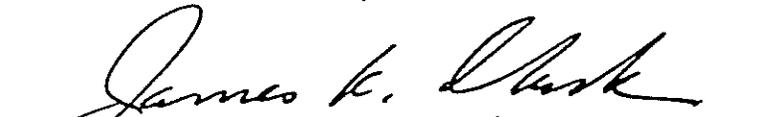
An annual service fee of \$148.19 shall be deducted by the employer of employees in Unit 5 from their payroll and transmitted to the HSTA. Such deductions shall be made each payroll period in an amount which, to the extent possible, is equal to the annual service fee divided by 24 payroll periods.

The increased service fee shall be retroactive to July 1, 1978, for all employees on the payroll at that time. For all persons hired on or after that date, the service fee shall be effective as of the date of hire.

The HSTA is directed to petition for a service fee review no later than June 30, 1979.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


James K. Clark, Board Member


John E. Milligan, Board Member

Dated: November 8, 1978

Honolulu, Hawaii