

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-05-452
JANET WEISS,)	ORDER NO. 1977
Complainant,)	ORDER DENYING RESPONDENT'S
and)	MOTION TO DISMISS PROHIBITED
CATHERINE BRATT, Principal, Kohala High)	PRACTICE COMPLAINT AND/OR
& Intermediate School, State of Hawaii,)	FOR SUMMARY JUDGMENT;
Respondent.)	NOTICE OF SETTLEMENT
)	CONFERENCE AND HEARING

ORDER DENYING RESPONDENT'S MOTION TO DISMISS
PROHIBITED PRACTICE COMPLAINT AND/OR FOR SUMMARY
JUDGMENT; NOTICE OF SETTLEMENT CONFERENCE AND HEARING

On August 29, 2000, Complainant JANET WEISS (WEISS), proceeding pro se, filed a complaint with the Hawaii Labor Relations Board (Board) alleging that Respondent CATHERINE BRATT, Principal, Kohala High & Intermediate School, Department of Education (DOE), State of Hawaii (Employer or BRATT) was engaged in discriminatory conduct in wilful violation of Hawaii Revised Statutes (HRS) § 89-13(a)(4).

On October 19, 2000, BRATT, by and through her attorneys, filed a motion to dismiss the complaint for failing to state a claim upon which relief can be granted; and/or for summary judgment asserting that there is no genuine issue of material fact in dispute. In support of her motion, the Employer filed affidavits by BRATT; Earl Nakaya, Teacher Housing Coordinator; Rosemary Kawamoto, DOE District Liaison Officer; and Joy Alfiler, Cottage Manager in Kohala.

WEISS opposed Respondent's motion to dismiss by filing a motion to quash on October 27, 2000. The Board treats WEISS' motion to quash as a reply in opposition to Respondent's motion.

On October 31, 2000, a hearing on Respondent's Motion to Dismiss and/or for Summary Judgment was held before Board Members Brian K. Nakamura, Chair, Chester C. Kunitake and Kathleen Racuya-Markrich. WEISS appeared pro se. Deputy Attorney General Wendy Matsumoto Chun represented BRATT. Both parties were afforded full and fair opportunity to present their arguments to the Board. Based upon a thorough review of the record, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Complainant JANET WEISS is a teacher at Halaula Middle School and a public employee within the meaning of HRS § 89-2.
2. As the principal at Kohala High & Intermediate School, Department of Education, State of Hawaii, Respondent CATHERINE BRATT is the designated representative of the Public Employer within the meaning of HRS § 89-2 for purposes of this prohibited practice complaint.
3. HRS § 89-13 provides in part that:
 - (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

* * *
 - (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;
4. WEISS alleges that while on leave of absence without pay for a semester to pursue a prohibited practice complaint before the Board against her union, the Hawaii State Teachers Association (HSTA), BRATT took retaliatory action by causing a notice to vacate and non-renewal of her lease at Halaula Teacher's Cottage to be issued by Earl Nakaya, Teacher Housing Coordinator with the Housing and Community Development Corporation of Hawaii (HCDCH), in wilful violation of HRS § 89-13(a)(4).
5. WEISS alleges that BRATT is "trying to take away my living arrangements to throw me into chaos psychologically" while she pursues her prohibited practice complaint against her union, the HSTA, in Case No. CU-05-164 currently pending before the Board.
6. Pursuant to Hawaii Administrative Rules (HAR) § 12-42-8(g)(8)(F), the Board takes administrative notice of WEISS' prohibited practice complaint, Case No. CU-05-164, against the HSTA for an alleged breach in its duty of fair representation in a grievance arising out of a decision by BRATT to transfer WEISS from Kohala High & Intermediate to Halaula Middle School.
7. Hearings before this Board in Case No. CU-05-164 were held on August 1, 2000 in Kapaau, Hawaii, August 24, and October 6, 2000 in Kona, and

concluded on October 31, 2000 in Honolulu. Upon application by WEISS, BRATT was subpoenaed to appear before the Board on August 1 and August 24. Evidence of past grievances filed by WEISS against BRATT including a discharge reversed by Arbitrator Gary Kam was received by the Board.

8. On August 14, 2000, WEISS applied for an emergency leave of absence without pay for a five-month period beginning August 21, 2000 to January 19, 2001 to spend time on her legal actions, including Case No. CU-05-164.
9. On August 15, 2000, BRATT approved WEISS' leave application and sent the request to the Hawaii District Office for final approval.
10. On August 15, 2000, BRATT spoke with Joy Alfiler (Alfiler), Cottage Manager with the HCDCH, for teacher housing in Kohala about the "possible need for additional housing for other Kohala and Waimea teachers" including a couple in need of a family unit. Alfiler told BRATT there were no vacancies.
11. On August 17, 2000, WEISS received a notice to vacate her residence at Halaula Teacher's Cottage issued by Earl Nakaya.
12. As the Teacher Housing Coordinator, Earl Nakaya is responsible for rental agreements, enforcement, and for the overall property management of the Halaula Teacher's Cottage. He sent a letter to vacate and of non-renewal to WEISS, "after being notified by Ms. Alfiler that Ms. WEISS would not be teaching this semester, because of the shortage of housing for Kohala Schools and because her lease had expired on July 30, 2000." Nakaya states that "by sending the letter to Ms. WEISS, my intent was not to evict her from teacher housing. My intent was to find out what she had planned to do so that I could respond to the Michaelis' request for housing, as well as other requests."
13. BRATT admits that although she does from time to time make requests and recommendations for teacher housing, the decision regarding the eligibility for housing rests with the DOE District Superintendent who has delegated the authority to Rosemary Kawamoto (Kawamoto) in her capacity as Teacher Housing Liaison.
14. Kawamoto states that during her conversation with BRATT over the need for housing she did not discuss or "attempt to persuade me to have Ms. WEISS evicted from teacher housing."

15. In her affidavit, BRATT admits she told Alfiler that WEISS would not be teaching for one semester “and that I wanted her to move out to possibly free up a family cottage for an incoming teacher with a family.”
16. In her affidavit BRATT explains what she meant as follows: “I knew that Ms. WEISS occupied a three bedroom cottage that was meant for families. In making the statement, I did not mean to encourage Ms. Alfiler to evict Ms. WEISS from teacher housing. I only meant that Ms. WEISS should move into another unit with a roommate or out of the cottages (as she was not teaching) in order to free up a cottage for a family. I made the statement because there was a need for housing for new teachers and it was my understanding that I might lose potential teachers, if they could not secure housing.”
17. BRATT admits she knew there were no vacancies. While BRATT says that in talking to Alfiler she meant for WEISS to go elsewhere, there is a question of fact as to what she intended.
18. WEISS alleges that BRATT singled her out for eviction “only days before WEISS was to present her case to the Board against the teachers’ union” on August 24th when BRATT was subpoenaed to testify.
19. WEISS disputes BRATT’s motives in talking to Alfiler claiming she was “singled out” when there were other tenants who could have been moved to accommodate the new teachers hired for whom BRATT sought housing.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint pursuant to HRS §§ 89-5 and 89-13.
2. An employer commits a prohibited practice by retaliating against an employee engaging in protected activity such as signing or filing an affidavit, petition, or complaint or giving any information or testimony under HRS Chapter 89.
3. To prevail before the Board on a retaliation theory, Complainant must first show that there was an improper motive; second that there was a causal connection between the improper motive and for engaging in protected activity before this Board; and third, that the improper motive was a motivating factor for taking action adverse to the Complainant. Thomas Lepere, V HLRB 329 (1993).

4. WEISS has been engaged in protected activity that includes filing past grievances against BRATT and seeking to compel BRATT's appearance as a witness in her prohibited practice complaint against her union in Case No. CU-05-164.
5. The Board concludes that whether BRATT's motive in talking to Alfiler as stated in her affidavit is genuine or pretextual presents a material issue of fact in dispute.

DISCUSSION

Respondent CATHERINE BRATT seeks a dismissal of this prohibited practice complaint filed by Complainant JANET WEISS on the grounds that 1) Complainant fails to state a claim upon which relief can be granted; and 2) there is no genuine issue of fact in dispute and therefore, she is entitled to judgment as a matter of law.

This complaint arose during the course of WEISS' prohibited practice complaint against her union when she subpoenaed BRATT to appear. WEISS' complaint against her union stems from a grievance and arbitration upholding BRATT's decision to transfer WEISS from teaching at Kohala High School to Halaula Intermediate School. WEISS charges here that BRATT retaliated against her for compelling her appearance before the Board by causing to have her evicted from her teacher housing in wilful violation of HRS § 89-13(a)(4).

Respondent does not dispute that WEISS has been engaged in protected activity by filing past grievances against BRATT and pursuing a prohibited practice complaint against her union in which BRATT was subpoenaed to testify.

Respondent contends that although she does from time to time make requests and recommendations for teacher housing, the decision regarding eligibility for housing rests with the DOE District Superintendent who has delegated the authority to Rosemary Kawamoto in her capacity as Teacher Housing Liaison. Kawamoto denies having any conversation with BRATT in which she persuaded her to evict WEISS.

Further, Respondent explains that she knew WEISS occupied a three bedroom cottage meant for families. She states that she "did not mean to encourage Ms. Alfiler to evict Ms. WEISS from teacher housing. I only meant that Ms. WEISS should move into another unit with a roommate or out of the cottages (as she was not teaching) in order to free up a family cottage for an incoming teacher with a family."

Determining whether WEISS' engaging in protected activity was an improper motivating factor for the issuance of a notice to vacate and non-renewal is a material issue of fact. This remains for the Board as the trier of fact.

Accordingly, this Board cannot dismiss at the outset WEISS' prohibited practice complaint.

ORDER

Based on the foregoing findings of fact and conclusions of law, Respondent's Motion to Dismiss Prohibited Practice Complaint and/or for Summary Judgment, is hereby denied.

NOTICE OF SETTLEMENT CONFERENCE AND HEARING

NOTICE IS HEREBY GIVEN that the Board will conduct a settlement conference on the instant complaint on January 17, 2001 at 9:30 a.m. by conference call. Complainant will be contacted at her telephone number on file with the Board. Counsel for Respondent and representatives with the authority to settle this matter shall appear in the Board's hearings room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii at the designated time.

NOTICE IS ALSO GIVEN that in the event that settlement discussions do not resolve this matter, the Board will conduct a hearing on the instant complaint on February 6, 2001 at 9:30 a.m. at a location to be announced.

DATED: Honolulu, Hawaii, January 10, 2001

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member


KATHLEEN RACUYA-MARKRICH, Member

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