

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

HAWAII STATE TEACHERS
ASSOCIATION,

Complainant,

and

BOARD OF EDUCATION, Department of
Education, State of Hawaii; KATHERINE
TOLENTINO, Principal, Honoka`a
Elementary School, Department of
Education, State of Hawaii; and SHANE
SAIKI, Personnel Regional Officer,
Department of Education, State of Hawaii,

Respondents.

CASE NO. CE-05-658

ORDER NO. 2572

ORDER GRANTING HSTA'S MOTION
TO REOPEN PROCEEDINGS;
GRANTING RESPONDENTS' MOTION
TO STRIKE AFFIDAVIT OF
DANNY J. VASCONCELLOS, FILED
DECEMBER 24, 2008; AND
GRANTING IN PART, HSTA'S
RENEWED MOTION FOR
INTERLOCUTORY RELIEF FILED
DECEMBER 24, 2008

ORDER GRANTING HSTA'S MOTION TO REOPEN
PROCEEDINGS; GRANTING RESPONDENTS' MOTION TO
STRIKE AFFIDAVIT OF DANNY J. VASCONCELLOS, FILED
DECEMBER 24, 2008; AND GRANTING IN PART, HSTA'S RENEWED
MOTION FOR INTERLOCUTORY RELIEF FILED DECEMBER 24, 2008

On February 19, 2008, Complainant HAWAII STATE TEACHERS ASSOCIATION (HSTA or Union) filed a prohibited practice complaint (Complaint) against the above-named Respondents with the Hawaii Labor Relations Board (Board). The HSTA alleged that on November 7, 2007, Lisa E. Leach (Leach), a teacher employed at Honoka`a Elementary School, Department of Education, State of Hawaii, who was a duly designated HSTA faculty representative and chairperson of the Association Policy Committee (APC), attended a faculty meeting and raised questions over faculty member concerns regarding the 2008-2009 academic plan. The HSTA alleged that on November 8, 2008, Respondent KATHERINE TOLENTINO, Principal, Honoka`a Elementary School, Department of Education, State of Hawaii (TOLENTINO or Principal), informed Leach that she received complaints regarding the questions Leach raised and she would be investigating the complaints. The HSTA alleged that Leach arranged to have an HSTA field representative attend the investigative meeting with her and TOLENTINO abruptly cancelled the meeting when the HSTA field representative arrived. The HSTA alleged that on November 23, 2007, TOLENTINO issued a written memorandum to Leach that two anonymous complaints had been received regarding Leach's demeanor at the November 7, 2007 faculty meeting and a

an alleged "verbal attack" by Leach over confidential HSTA information at a November 8, 2007 APC meeting. The HSTA alleges that November 23, 2007 memorandum was included in Leach's personnel file and intended as disciplinary action against her. The HSTA contends that Respondents thereby committed prohibited practices in violation of Hawaii Revised Statutes (HRS) §§ 89-13(a)(1), (3), and (7).

On April 8, 2008, the HSTA filed a Motion to Amend Complaint which was granted by the Board. On April 16, 2008, the HSTA filed its First Amended Complaint (First Amended Complaint) alleging in addition to the allegations regarding Leach in the initial complaint, *inter alia*, that on January 25, 2008, TOLENTINO informed Cindy Sharp (Sharp) who had also been the head faculty representative for the HSTA and chairperson of the APC that she would be transferred from third grade to the fourth grade in the 2008-2009 school year. The HSTA contended that the actions against Leach and Sharp are part of an ongoing pattern of adverse, discriminatory, and retaliatory actions against HSTA representatives at Honoka'a Elementary School. The HSTA also alleged that in the previous year, TOLENTINO reassigned Rhonda Anduha (Anduha) from fourth to sixth grade and reportedly called her a troublemaker and union person when she sought a transfer to Waimea Elementary School. The HSTA contended that Respondents wilfully interfered with, restrained, and coerced employees in the exercise of protected conduct under HRS § 89-3, including, but not limited to engaging in retaliatory conduct, creating an impression of surveillance, and engaging in other inherently destructive conduct to undermine the collective bargaining process in HRS § 89-13(a)(1); unlawfully discriminated against two employees in the employees' terms and conditions of employment to discourage membership in HSTA in violation of HRS § 89-13(a)(3); and violated the statutory rights of employees to be consulted and have input over policies affecting employee-employer relations under HRS § 89-9(c) and to exercise public employee rights free from interference, restraint, or coercion under HRS § 89-3, in violation of HRS § 89-13(a)(7).

The Board conducted hearing on the merits of the complaints on July 14 - 16, and 31, 2008. The hearings are continuing.

On July 16, 2008, the HSTA filed a Motion for Interlocutory Relief with the Board to enjoin and restrain Respondents from implementing the personnel action announced on January 25, 2007 to change Sharp's teaching assignment from the third to the fourth grade for school year 2008-2009, pending a final decision and order by the Board in this case. The HSTA alleged that the 2008-2009 school year commenced on or about July 24, 2008 and the record of proceedings indicated a likelihood of success on the merits of the Union's claims, that irreparable harm would be suffered unless interlocutory relief is granted, and that public policy favored the issuance of the requested relief. The HSTA thus moved the Board for the issuance of an interlocutory order.

On July 22, 2008, Respondents filed a Memorandum in Opposition to Complainant's Motion for Interlocutory Relief with the Board. Respondents contend that the Board is not authorized under HRS § 377-9(d) to issue an interlocutory order prior to

completing the hearing of the underlying prohibited practice complaint. Respondents allege that three days of hearing took place on the island of Hawaii and they have not had the opportunity to present testimony and evidence and not even had the opportunity to cross examine Complainant's first witness, TOLENTINO. Respondents contend that the motion is premature and the Board does not have authority to award the relief sought by Complainant at this time. Alternatively, Respondents contend, assuming arguendo, Complainant's motion is appropriate, the facts presented thus far do not support the issuance of interlocutory relief, i.e., Sharp testified that she was ready and willing and able to teach the fourth grade students thus she would not be irreparably harmed by the reassignment to the fourth grade.

On July 29, 2008, the HSTA filed a Supplemental Memorandum in Support of Motion for Interlocutory Relief (Supplemental Memorandum) with the Board. The HSTA's Supplemental Memorandum consists of a synopsis of the testimony from the evidentiary hearing as well as further arguments supporting the issuance of interlocutory relief.

On July 24, 2008, the Board issued a notice scheduling a hearing on the HSTA's Motion for Interlocutory Relief on July 30, 2008 and the continuation of the hearing on the merits of the complaint on July 31, 2008 and August 18, 2008.

On July 30, 2008, the Board conducted a hearing on the HSTA's Motion for Interlocutory Relief. At the hearing, Respondents objected to the late filing and service of the HSTA's Supplemental Memorandum and orally requested the Board to strike the memorandum or continue the proceeding to permit a response. After considering Respondents' motion, the Board permitted Respondents until 8:30 a.m. the following day to file a response to the HSTA's Supplemental Memorandum. Respondents' counsel indicated that there would not be sufficient time for Respondents to respond to the Supplemental Memorandum and suggested the Board move forward as the evidentiary hearing was scheduled the next morning and if Respondents found any discrepancy with the transcripts, Respondents would file a response to the Supplemental Memorandum or request reconsideration. The Board indicated that it would review the transcripts and Respondents could raise discrepancies between the Supplemental Memorandum and the transcripts to the Board's attention. Respondents have not filed a response to the Supplemental Memorandum. The Board took the motion under advisement.

The Board conducted a further hearing on the merits of the complaint on July 31, 2008 and August 18, 2008. Thereafter, further proceedings were held in abeyance to permit the parties to explore a resolution of the disputes underlying the complaint.

On December 24, 2008, the HSTA filed a Motion to Reopen Proceedings (Motion to Reopen) and HSTA's Renewed Motion for Interlocutory Relief with the Board on December 24, 2008. The HSTA alleged that on December 19, 2008, Sharp informed HSTA representatives that TOLENTINO gave her a letter from Superintendent Patricia Hamamoto

(Hamamoto), dated December 18, 2008, directing her transfer to Paauilo Elementary School beginning January 13, 2009. HSTA alleged that all negotiations with the DOE to settle the instant Complaint and attempts to resolve the issues involving Sharp have failed. Thus, the HSTA moved to reopen the record of the proceedings and contends that the Board should grant the previous July 16, 2008 motion for interlocutory relief and the present renewed motion for interlocutory relief because the December 19, 2008 removal of Sharp evidences an ongoing pattern of adverse, discriminatory and retaliatory actions against HSTA representatives by the DOE and by TOLENTINO; there is a high probability that HSTA will prevail on its position that the pattern of retaliatory reassignments, especially the December 19, 2008 proposed removal of Sharp to Paauilo, has caused fear of reprisal for speaking out on protected concerted activities; irreparable harm will be suffered by the students, teachers, Honoka`a School community and the Union unless interlocutory relief is granted; and the public interest would be best served by the issuance of interlocutory relief.

On January 5, 2009, Respondents filed a Memorandum in Opposition to HSTA's Renewed Motion for Interlocutory Relief Filed December 24, 2008 arguing that the December 18, 2008 letter from Superintendent Hamamoto is not a matter before the Board and unless the Complaint is amended, the matter is not before the Board. Also on January 5, 2009, Respondents filed a Statement of No Opposition to HSTA's Motion to Reopen the Record of Proceedings on Board of Education and Katherine Tolentino, Filed on December 24, 2008. In addition, Respondents filed a Motion to Strike Affidavit of Danny J. Vasconcellos, Filed December 24, 2008 (Motion to Strike) requesting that the Board strike parts of HSTA's counsel's affidavit because it is based on hearsay and inaccurate or incomplete. Respondent's Memorandum in Support of Motion specifically refers to the details contained in paragraph 5 of the affidavit.

On January 6, 2009, the Board conducted a hearing on the foregoing motions. Hearing no objection to the HSTA's Motion to Reopen, the Board granted the HSTA's Motion to Reopen. After hearing argument on the Respondents' Motion to Strike, the Board took the matter under advisement and heard argument on Respondents' Renewed Motion for Interlocutory Relief. The Board recessed the hearing and after reviewing the record in this matter and the arguments of counsel, the Board reconvened the hearing and reiterated its granting of the HSTA's Motion to Reopen; granted the Respondents' Motion to Strike; and granted, in part, Respondents' Renewed Motion for Interlocutory Relief. The Board ordered that the status quo be preserved and that Sharp be retained in her fourth grade position at Honoka`a Elementary School pending a final decision and order in this matter. The Board also indicated that a written decision would follow.

Based on a careful review of the record and consideration of the arguments made, the Board makes the following findings of fact, conclusions of law, and hereby grants, in part, the Complainant's Renewed Motion for Interlocutory Order.

FINDINGS OF FACT

1. Complainant HSTA, was or is, at all times relevant to this proceeding, an employee organization and the exclusive bargaining representative, within the meaning of HRS § 89-2,¹ of employees included in bargaining unit 05.²
2. Respondents were or are, at all times relevant to these proceedings, representatives of the public employer within the meaning of Hawaii Revised Statutes (HRS) § 89-2.³
3. The HSTA and the Board of Education, State of Hawaii are parties to the Unit 05 collective bargaining agreement (Agreement).

¹HRS § 89-2 provides in relevant part:

“Employee organization” means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund or a voluntary employees’ beneficiary association trust, and other terms and conditions of employment of public employees.

²HRS §89-6 provides in relevant part:

Appropriate bargaining units.

(a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

* * *

(5) Teachers and other personnel of the department of education under the same pay schedule, including part-time employees working less than twenty hours a week who are equal to one-half of a full-time equivalent; ...

³HRS § 89-2 provides in relevant part:

“Employer” or “public employer” means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees.

4. TOLENTINO was for all times relevant, the principal of Honoka`a Elementary School. TOLENTINO has been the principal at Honoka`a since the end of April 2005.
5. Sharp started teaching at Honoka`a Elementary School in 2004 and was assigned to the fifth grade. Sharp taught the fifth grade for two years and was reassigned to teach the third grade in 2006-2007 and 2007-2008. HSTA representatives are selected on a rotational basis at Honoka`a Elementary school and in school year 2006 - 2007, Sharp served as the HSTA faculty representative. In that capacity, she represented the teachers and voiced their concerns to the Principal at the APC⁴ meetings. Sharp felt there were existing communication problems with the Principal and when issues were raised in the APC meetings they were not addressed and remained unresolved.
6. In January 2007, Sharp contacted HSTA Uniserv director Thelina Alfiler (Alfiler) to see if she could arrange a meeting with Complex Area Superintendent (CAS) Art Souza (Souza) to hear the faculty's concerns because

⁴Article IV, Association Rights, Section J, Association Policy Committee (APC) of the Agreement provides as follows:

In each school, an Association Policy Committee (APC) will be recognized by the Employer. This committee may consist of not more than four (4) teachers from that school. For a school with more than fifty (50) faculty members, this committee may consist of not more than six (6) members from that school.

The principal will meet and discuss with the committee such topics as the following: excursion procedures, student rules, activity policies, monitors, extracurricular policies, intraschool communications, school forms, fund raising projects and matters which may be subject to discussion under Section 89-9(c) HRS.

Meetings and committee activities will be conducted in such a manner that they will not interfere with classroom instruction.

(HRS § 89-9(c) refers to consultation and provides as follows:

Except as otherwise provided in this chapter, all matters affecting employee relations, including those that are, or may be, the subject of a rule adopted by the employer or any director, shall be subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with exclusive representatives and consider their input, along with the input of other affected parties, prior to effecting changes in any major policy affecting employee relations.)

the teachers felt they weren't getting anywhere with solving issues and problems. After Souza agreed to meet with the faculty, TOLENTINO e-mailed the teachers that the meeting would not occur and that she would address the concerns with Alfiler.

7. In January 2007, TOLENTINO reassigned Rhonda Anduha (Anduha) from fourth to sixth grade for the 2007-2008 school year. TOLENTINO also changed Angela Henline (Henline), SCC teacher representative, from a full-time Gifted and Talented (GT) teacher to a halftime GT teacher, and halftime upper elementary reading coach.
8. A meeting was scheduled on February 5, 2007 with Souza and the teachers to discuss, inter alia, the reassignment of Anduha and Henline. The HSTA members had requested that TOLENTINO not be present at the meeting because they wanted to be able to voice their concerns without fear of retaliation. About 23 teachers, Alfiler and HSTA Deputy Executive Director Ray Camacho (Camacho) were present to meet with Souza when Camacho received a call from Souza that he would not attend the meeting without TOLENTINO present
9. The teachers still requested a meeting with Souza and he agreed to meet with them on Sunday February 11, 2007 at the North Hawaii Educational Research Center (NHERC). Nineteen to twenty teachers attended the meeting. Sharp greeted him because as the HSTA faculty representative, she believed she should express the teachers' concerns and the teachers also were given the opportunity to express their concerns. They expressed a fear of retaliation which began when two senior teachers were reassigned to different grades, i.e., Ellen Kawashima (Kawashima) was moved from third grade to first grade and Dana Morifuji was moved from second grade to junior kindergarten. The faculty members felt they would be reassigned to a different grade level if they spoke out, asked questions, if they wanted information, or wanted to participate in decisionmaking; the teachers were very quiet at faculty meetings because the teachers were afraid to voice their concerns and ask questions of TOLENTINO. Souza told the teachers he would hold a full faculty meeting with the principal present and he would tell them that he would not stand for retaliation.
10. Alfiler suggested the faculty do a climate survey at the school because of the continuing issues and concerns to show there was a problem at the school. Alfiler compiled the information to present to Souza when he met with the teachers. At the February 16, 2007 APC meeting, TOLENTINO and Souza were present and Alfiler presented the results of the climate survey. Sharp felt that Souza was supportive and agreed that the GLC meetings should be reinstated and that TOLENTINO needed to prioritize workload issues for the teachers.

11. On March 5, 2007, a group of teachers decided to attend the School Community Council (SCC) meeting, including Sharp, Henline, Walter Mosch, Janet Goh, and Tracie Souza, because they felt that nothing was progressing through the APC or from the meeting with Souza. The teachers wanted to present the climate survey results to the SCC members. Souza and TOLENTINO told the teachers that it was not the appropriate venue to share the results of the HSTA climate survey. The teachers voiced their concerns about their fear of retaliation and about the reassignments of grade levels. Anduha, who had been reassigned from the fourth grade to the sixth grade, spoke about how she felt about the reassignment.⁵ TOLENTINO said there was no retaliation at the school; that she was more than willing to work with the teachers; and that she always has an open door policy. Souza said the teachers and TOLENTINO needed to work together on the teachers' issues and concerns. The teachers were told that if they were not happy at Honoka`a Elementary School, they had the right to transfer. Souza indicated he would not remove TOLENTINO.
12. On March 19, 2007, TOLENTINO sent Henline a memorandum regarding a school climate survey progress report. TOLENTINO indicated that at the APC meeting on March 16, 2007, Souza clarified that it was inappropriate for the report to be distributed to the teachers and inappropriate for the report to be provided to the SCC. Henline was told that pursuant to Souza's instruction, she was directed to cease using the report at Honoka`a Elementary School. TOLENTINO directed that no information from the reports should be released to any entity outside of the Department of Education, including the SCC and/or any of its individual members. TOLENTINO warned Henline that failure to comply with the directives may lead to disciplinary action.
13. Henline signed the Summary of Conference on April 4, 2007 and stated:

Thank you for the opportunity to respond to this
Summary of Conference dated March 19, 2007.

I believe that the contents of the memo is more
appropriately addressed to the chair of the SCC.

⁵Anduha was a fourth grade teacher at Honoka`a Elementary School, the alternate HSTA faculty representative and an APC member. Because of perceived distrust of the school office, Anduha collected the DOE teacher questionnaires for a survey because some teachers were afraid that the surveys would not be sent to Honolulu. In January 2007, Anduha received a letter of reprimand and/or a written discipline and was later reassigned from the fourth grade to the sixth grade. Anduha subsequently transferred out of Honoka`a Elementary.

The issue of the School Climate Survey Progress Report is one in which the SCC had requested.

I was acting as a member of the SCC and not as an employee of the DOE.

C's Ex. 24a.

14. TOLENTINO sent Sharp a memorandum, dated January 11, 2008, regarding teaching assignments for the 2008-2009 school year. Sharp indicated her preference to remain in the third grade and turned in the form on January 22, 2008.
15. In a memorandum dated January 22, 2008, TOLENTINO indicated that she wanted to meet with Sharp on January 25, 2008 to discuss her teaching assignment for the next year. Sharp and Ingrid Nishimoto, APC chair, met with TOLENTINO who advised Sharp that she would be reassigned from the third grade to fourth grade. TOLENTINO stated that the reassignment was based on school-wide needs and that Sharp was a strong teacher in writing. Sharp believed she was reassigned in retaliation for voicing the teachers' concerns as the HSTA representative in the 2006-2007 school year and asked TOLENTINO what she based her decision on. TOLENTINO said she had observed Sharp in the classroom, observed Sharp's writing instruction, observed the student work in the classroom, and observed Sharp in discussions with peers about writing. Sharp countered that TOLENTINO had not observed her teaching or student work in the classroom or had evaluations supporting her decision to reassign Sharp. Sharp asked TOLENTINO what she meant by school-wide needs and TOLENTINO said it was her decision to make and that this was best for the school.
16. TOLENTINO memorialized the conference with Sharp in a Summary of Conference, dated January 25, 2007 (sic). TOLENTINO informed Sharp that she would be placed in the fourth grade based on school-wide needs, because Sharp's experience in the third and fifth grades made her familiar with SFA and math at the fourth grade level, as well as the developmental level of the students. TOLENTINO highlighted Sharp's specific skills and special abilities as 1) she was a certified elementary school teacher, 2) she had experience in third and fifth grade, and 3) she was particularly skilled in teaching writing. TOLENTINO confirmed that she had observed her instruction; that she had seen student work from her classes, and that she observed her discussing writing instruction with her peers. TOLENTINO acknowledged that Sharp's only preference was to teach the third grade. TOLENTINO indicated that the Agreement requires that she inform Sharp of changes in teaching assignments prior to June 10 and that she was making an effort to inform her prior to the

intra-school transfer period and prior to the Teacher Assignments and Transfer Period. TOLENTINO stated that as a tenured teacher, if she was unhappy with her teaching assignment she could participate in the intra-school transfer period and Teacher Assignment and Transfer Period if she wished to do so.

17. The Teacher Assignment and Transfer Procedures in the Agreement provide that the master schedule comes out in the third quarter of the school year and teachers have the opportunity to provide input about the master schedule. According to Sharp, a tentative schedule comes out in the third quarter and teachers have the opportunity to provide input about the schedule. If there are going to be vacancies or transfers out of the school, the teachers can have opportunity to provide input to the schedule.
18. Article VII, Subsection A regarding Assignments and Transfers Procedures requires assignments and schedules to be made by June 10th. Sharp received written notice of her reassignment in January; her third grade position was unfilled at the time.
19. When a teacher changes from one grade level to another, the teacher must learn a new curriculum and spend time to prepare to effectively teach the new grade level. Sharp described that moving one grade level is a major move because the students are at a new developmental level, the curriculum is different with new programs involving math and reading. Due to the reassignment, Sharp would have to spend hours learning the curriculum and Sharp felt it wasn't fair to the students or to the community. While she was prepared to teach the fourth grade, Sharp would like to go back to teach at the third grade level to strengthen it. Sharp did not seek a transfer to the fourth grade and she wanted to stay in the third grade to improve upon her teaching and serve as the GLC. In addition, Sharp was concerned because the class list indicated that the third grade would only have a part-time teaching position.
20. TOLENTINO confirmed that the reassignments included Sharp, the HSTA faculty representative, Anduha, the HSTA alternate faculty representative for APC, Henline, SCC teacher representative, Judy Vuono 02-03 HSTA alternate rep and in 07-08 teacher Colleen Foster. Four of the five assignments involve HSTA representatives in the last two school years.
21. TOLENTINO had also previously reassigned Kawashima who had taught at Honoka'a Elementary School for over 30 years and taught third grade continuously for 24 years. Kawashima was looked up to as a leader who spoke up at a faculty meeting when TOLENTINO was talking about the school budget. Kawashima was the only teacher who spoke at the meeting and asked for a copy of the budget. Soon thereafter, in early 2006, TOLENTINO informed Kawashima that she would be transferred to the first grade.

Kawashima was shocked and asked the principal why she was being reassigned; TOLENTINO told Kawashima that it was her decision to transfer Kawashima and if she didn't like it to fill out a 101B [to transfer out of the school]. While Kawashima knew the third grade curriculum very well, she did not know the first grade curriculum which used a different reading program. TOLENTINO scheduled a one-hour training for Kawashima during the summer which Kawashima felt was inadequate. In addition, the two teachers who taught first grade were also senior teachers with almost as many years of experience as Kawashima. Within weeks Kawashima learned that a first grade teacher, Toni Jose, was being moved out of the first grade. Kawashima chose to retire the next year. After seeing the stress and emotional upheaval suffered by the HSTA faculty representatives (Sharp and Leach), Kawashima would not accept the HSTA faculty representative position at Honoka`a.

22. Jo Ann Kinoshita (Kinoshita) has been a teacher for 37 years and teaches third grade at Honoka`a Elementary. Kinoshita confirmed the low morale among the teachers and very little collaboration under TOLENTINO's administration. Kinoshita does not generally speak up. Kinoshita was on the APC committee with Sharp and Anduha at the time and Sharp took charge as the APC chair. If Sharp remained in grade three Sharp would have been the GLC for school year 2008-2009. Kinoshita would not accept the HSTA representative position just held by Sharp and Leach because it is very stressful. Kinoshita understands that if Henline replaces Sharp, Henline would teach the third graders reading until 10:00 a.m., then a halftime teacher will teach the students in other areas. Kinoshita testified that Kawashima was very vocal but not as vocal after she was reassigned to the first grade. Last year, six or so teachers left. Kinoshita believes the remaining teachers are not as vocal as before; few people speak up. Kinoshita confirms there is a fear of retaliation by the principal and unhappiness among the teachers.
23. Janet Goh (Goh) has been a teacher for 25 years and taught at Honoka`a Elementary for eight years. In 2007-2008, Goh was the faculty representative to the SCC. Goh attended the February 2007 meeting with Souza and expressed her frustration because there was a total breakdown in communication between the administration and the teachers; there was little opportunity for collaboration. In addition, Goh felt there were instances of retaliation, including against her husband, Walter Mosch (Mosch), whose position was reduced to half-time because he was extremely vocal. Goh believes Henline was reassigned and received a summary of conference letter because Henline was told she was not allowed to present the results of the climate survey at the SCC meeting. Goh would not accept the HSTA faculty representative position while TOLENTINO is principal because it is difficult trying to be the person bringing the teachers' concerns to TOLENTINO. As a member of the SCC, Goh tried to raise the faculty concerns with the Academic

Financial Plan (AFP) with TOLENTINO but very minimal changes were made. Goh brought the issues for discussion at the SCC meeting but TOLENTINO told her it was not an appropriate place to discuss the matters. TOLENTINO also told her she could not speak for other teachers, only herself. Ultimately, Goh dissented from the AFP. Goh is afraid of retaliation and even now as the SCC representative, it is difficult for her at meetings where she is supposed to discuss concerns raised by the teachers and discuss it with the principal in order to reach a resolution. Goh admits there are times when she has been afraid to speak up.

24. Mosch was a Student Services Coordinator at Honoka`a Elementary in connection with special education, gifted and talented, for six or seven years. Mosch brought many of the teachers' concerns to TOLENTINO and feels TOLENTINO changed his position from a full-time position to halftime position in retaliation for being vocal and raising the concerns. Mosch would not serve as a representative for HSTA and is no longer working at Honoka`a Elementary because the climate has become hostile and destructive.
25. Sharp was reassigned to the fourth grade for the 2008-2009 school year which began on or about July 24, 2008.
26. At the conclusion of hearings on August 18, 2008, the Board scheduled further hearings to resume on September 3 and 4, 2008. The hearings were recessed to permit the parties to seek a resolution of the issues underlying the complaint.
27. On December 19, 2008, at approximately 9:50 a.m., Sharp was watching children in the playground and was informed to return to her fourth grade classroom where vice principal Georgina Carvalho (Carvalho) gave her an envelope marked "Urgent" and "Confidential." The letter, dated December 18, 2008, from Superintendent Hamamoto states as follows:

Re: Transfer to Paauiilo Elementary School, Position Number
72819

Pursuant to Regulation #5109 of the School code, Certificated Personnel Policies and Regulations (5000 Series) of the Department of Education, I am hereby directing your transfer from your current Elementary Teacher position at Honoka`a Elementary School to an Elementary position at Paauiilo Elementary School beginning January 13, 2009.

School Code Regulation #5109(E), entitled "Superintendent-Directed Transfers," states:

“The Superintendent may, in extraordinary situations, when considering the welfare of the students, the school or the good of the Department, direct the transfer of any teacher or any educational officer.”

My decision is based on concerns raised by the Hawaii State Teachers association regarding your health and well-being in your current position. It is the Department’s opinion that continuing your assignment at Honoka`a Elementary School will exacerbate your current health condition. Therefore, this decision is being made for the betterment of your welfare and for the good of the Department.

This action will be classified as a lateral transfer and there shall be no decrease in your salary. You will remain at your current salary level, Class III, Step 7, and receive the negotiated across the board increase of four percent (4%) effective January 13, 2009.

The Elementary Teacher position, number 72819, at Paauiilo Elementary is funded until June 30, 2009, however, as a tenured teacher, you are entitled to continuous employment. Due to this transfer, your status will be “district unassigned.” As a district unassigned teacher, you will notified to participate in a meeting of district unassigned teachers for Hawaii district. In addition, you will have the opportunity to provide either three (3) geographic preferences within the District or three (3) schools within the District in which you would like to be placed. The Department will then place you in a position from your listed preferences for which you are qualified.

Further, as a tenured teacher, you will have the opportunity to apply for a transfer during the posting period which will commence on February 28, 2009. Should a transfer request during the Spring 2009 posting period not be consummated, then your teaching assignment for School Year 2009-2010 will be the position which you were placed in as part of the district unassigned placement process.

If you have any questions regarding this personnel action, please contact Personnel Regional Officer Shane Saiki at (808)974-6605.

28. Sharp explained to Carvalho that the letter was a mistake and she had not wanted to be transferred out of Honoka`a School. Carvalho also gave her an envelope with a set of directives from TOLENTINO which stated:

You will need to turn in all of your HES school keys to the administration office no later than 3:00 PM on Friday December 19, 2008. As is our school's standard procedure, you will need to sign that your keys have been returned.

You are welcome to return to HES campus at any time during our regular business hours (7:30 A-4:30 P, Monday through Friday, excluding holidays) to clean the K-11 classroom, should you wish to do so, during the intercession. Please check in at the office when you arrive on campus and you will be given access to the K-11 classroom.

You will be paid recall pay for one day to return to pack the personal items from the K-11 classroom, should you wish to do so, during the winter intercession. Please notify Shawna Jardine, at your convenience, about what day you would like to paid (sic) recall pay for. She will arrange for the necessary paperwork to be processed.

Your Honoka`a Elementary School eSIS computer will remain at HES.

Your grades for the first semester at HES are due ten (10) working days after you return to work at Pa`auilo Elementary and Intermediate School in January 2009 (per the HES school-wide agreement regarding turning in semester grades.) You will be able to enter your grades on the eSIS computer that Pa`auilo Elementary and Intermediate School provides to you.

Any questions regarding these issues should be directed to Mrs. Tolentino, as she will be the administrator on campus during the winter intercession.

29. Later that morning, TOLENTINO and a school counselor came to Sharp's classroom at approximately 10:15 a.m. and TOLENTINO told her that she should leave immediately and go with her to her office. Sharp requested a Union representative at the meeting and asked TOLENTINO if she could wait until the end of the school day at 11:30 a.m. TOLENTINO, while standing in the doorway to the classroom and in the presence of the students, then told Sharp her transfer to Paauilo was not a mistake; that the transfer would go

through; her position was now vacant and TOLENTINO would be advertising it for an immediate opening. Sharp broke down crying and the counselor covered her class while she regained her composure. Sharp returned to her classroom and the students were dismissed at 11:30 a.m. At 12:00 noon, the SASA (School Administrative Services Assistant) gave her a blank report card template and instructed her to fill the grades out and someone else would input them into the eSIS system. Sharp had the keys returned to the office at approximately 3:00 p.m. When she returned home, she received the certified letter from Hamamoto transferring her to Paauilo Elementary School.

30. The current fourth grade GLC at Honoka`a is on an indefinite leave of absence and there is a long-term substitute in her place. If Sharp was removed from the fourth grade at this time, there would be two new teachers at the fourth grade level and consequent disruption for the students, instability for the grade level, and possibly the school curricular.
31. As the Board considers the substance of the settlement discussions, including the settlement offers, which occurred between the parties to be confidential, the Board cannot address or resolve the dispute as to what prompted the proposed transfer of Sharp out of Honoka`a School.
32. The Board is concerned that at this juncture of the proceedings, the Respondents have not yet presented their case-in-chief and have not as yet cross-examined TOLENTINO. The Board notes that Respondents did not present a sworn statement or declaration from TOLENTINO to support her reassignment of Sharp for the 2008-2009 school year in its opposition to the initial Motion for Interlocutory Relief, and thus, the Board relies upon TOLENTINO's reasons set forth in the Summary of Conference of the meeting held on January 25, 2008, as her justification for reassigning Sharp. Based upon a review of the Summary of Conference, TOLENTINO reassigned Sharp because of school-wide needs, that Sharp had teaching experience in both third and fifth grade, and that she was skilled in teaching writing. Sharp however denied that TOLENTINO had observed her instruction, had seen her student work, had observed Sharp's discussion with her peers, or had even evaluated her as a teacher. Moreover, TOLENTINO also indicated that she was making an effort to inform Sharp of the change prior to the intra-school transfer period and the Teacher Assignment and Transfer Period so Sharp could transfer if she was unhappy with the teaching assignment.
33. After reviewing the record, the Board finds that as the HSTA representative, Sharp voiced the teachers' issues and concerns to the TOLENTINO, as well as to others and expressed the teachers' unhappiness and fear of retaliation based on the pattern of unilateral actions and retaliatory reassignments by TOLENTINO, to the Union, to the CAS, and to the SCC. The Board also finds

based on the record that TOLENTINO discouraged the open discussion of issues and concerns by the teachers and summarily dismissed open expression from the teacher advocates.

34. Based on the record thus far, the Board is persuaded that Complainant will prevail on the merits of its complaint that TOLENTINO reassigned Sharp to teach the fourth grade for the 2008-2009 school year in retaliation for her persistent and outspoken service as the HSTA faculty representative in 2006-2007. The Board notes, that Sharp testified that she had prepared her fourth grade classroom, and was willing to spend the countless hours required to learn the new curriculum and subjects and develop lesson plans for the fourth grade. Thus while Sharp may not suffer irreparable harm if she was required to teach the fourth grade pending a final decision in this case, the Board is convinced that there will be irreparable harm to the bargaining unit at the school as the record demonstrates that the teachers are afraid of retaliation by TOLENTINO for expressing their concerns and issues and there is a chilling effect on the advocacy of the faculty's rights by the HSTA or teacher representatives at the school because the teachers are afraid and unwilling to assume these roles and engage in dialogue with the Principal. It can be argued that having the HSTA rotate their representatives at the school dilutes any anti-union animus. It becomes problematic, however, when the teachers are afraid and reluctant to assume any Union position to avoid confrontation with and retaliation by TOLENTINO. The teachers uniformly testified to the low morale of the faculty and the perceived retaliatory reassignments prompting the transfers and retirements of the faculty during TOLENTINO's tenure. Sharp testified, and the teachers thus far confirmed, that the faculty was extremely afraid of TOLENTINO and expressed their frustration in seeking help from the HSTA, the CAS, and the SCC. The Board also believes that the public policy supports interlocutory relief in this instance. HRS § 89-1 provides that joint decision-making is the modern way of administering government and that where public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. These policies will be promoted by the issuance of an interlocutory order.

35. With respect to the Renewed Motion for Interlocutory Relief, the Board finds that Complainant demonstrated that irreparable harm would result by the involuntary movement or transfer of Sharp to Paauilo Elementary School on or about January 13, 2009. It is clear that similar to her reassignment to the fourth grade, Sharp did not seek nor did she request to be transferred to Paauilo Elementary. Sharp is the HSTA faculty representative at Honoka`a. As the record shows, the teachers at Honoka`a are afraid of retaliation by the principal if they express their concerns and issues. It is unlikely that any other teacher

would be willing to step forward and assume the role of faculty representative at this time should Sharp leave; also, the teachers appear afraid and unwilling to engage in dialogue with the principal on their own. Additionally, the transfer of Sharp unwillingly to Paauilo School may create a chilling effect on the other teachers, and exacerbate problems at Honoka`a between the teachers and the principal. Moreover, the students may be irreparably harmed by the disruption caused by the midyear introduction of a new teacher, especially since the present fourth grade GLC is already on a leave of absence. Given the potential harm to the students and disruption to the school from moving a teacher in the middle of the school year; the harm to the HSTA and the other teachers in losing a faculty representative at Honoka`a, and the chilling effect the transfer would have on other teachers at Honoka`a, the Board concludes that the balance of irreparable harm favors the granting of injunctive relief. The Board also concludes that the public interest, as reflecting the interest of the students at Honoka`a, supports the granting of temporary injunctive relief.

DISCUSSION AND CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant Complaint pursuant to HRS §§ 89-5 and 89-14.
2. The HSTA contends that the reassignment of Sharp is part of an ongoing pattern of adverse, discriminatory and retaliatory actions against HSTA representatives by TOLENTINO and Respondents. The HSTA argues that there is a high probability that HSTA will prevail that the pattern of retaliatory reassignments has caused the fear of reprisal for speaking out and engaging in protected concerted activities. The HSTA contends that irreparable harm will be suffered by the students, teachers, the community and the union unless interlocutory relief is granted. The HSTA argues that the public interest would be best served by the issuance of interlocutory relief.
3. HRS § 377-9(d) made applicable to the Board by HRS § 89-14,⁶ provides:

After the final hearing, the board shall promptly make and file an order or decision, incorporating findings of fact upon all the issues involved in the controversy and the termination of the rights of the parties. Pending the final determination of the controversy the board may, after hearing, make interlocutory

⁶HRS § 89-14, Prevention of Prohibited Practices, provides in part, "Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9;"

orders which may be enforced in the same manner as final orders. Final orders may dismiss the complaint or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend the person's rights, immunities, privileges, or remedies granted or afforded by this chapter for not more than one year, and require the person to take such affirmative action, including reinstatement of employees with or without pay, as the board may deem proper. Any order may further require the person to make reports from time to time showing the extent to which the person has complied with the order. (Emphasis added.)

4. Similarly, HAR § 12-42-48, which governs interlocutory orders during prohibited practice proceedings, provides in relevant part:

Pending the final determination of the controversy the board may, after hearing, make interlocutory orders which may be enforced in the same manner as final orders.

5. "Interlocutory" is defined as "[p]rovisional; interim; temporary; not final. ... An interlocutory order or decree is one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." Black's Law Dictionary 815 (6th ed.1990).
6. Respondents argue that the term "after hearing" as used in HAR § 12-42-48 refers to hearing on the merits of the case, and not merely hearing on a motion for interlocutory relief, and therefore, the Board may not issue an interlocutory order such as the one sought here prior to completion of the hearing on the merits of the case.
7. HAR § 12-42-48 does not expressly state whether the term "after hearing" refers to the hearing on the merits of the case or hearing on a motion for interlocutory relief, nor is there any language in the rules to clarify the term "after hearing"; thus the Board concludes that the term "after hearing" as used in HAR § 12-42-48 is ambiguous.
8. Historically, the Board has relied upon the civil procedures of Hawaii's courts in resolving ambiguities in the Board's rules. See e.g., Hawaii Federation of College Teachers, Local 2003, 1 HPERB 428; United Public Workers, 5 HLRB 177; Hawaii Government Employees Association, Order No. 1903 (July 21, 2000).

9. Pursuant to Hawaii Rules of Civil Procedure (HRCP) Rule 65, a court “may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application [for preliminary injunction].” However, a court may hear the motion for preliminary injunction prior to the trial of the action on the merits. See HRCP Rule 65(a)(2).

10. Accordingly, using HRCP Rule 65 as guidance, the Board concludes that it may issue an interlocutory order prior to completion of the hearing on the merits of the case.

11. HRS § 89-13(a) provides in part:
 - (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
 - * * *
 - (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;
 - (7) Refuse or fail to comply with any provision of this chapter;

12. The HSTA alleges that Respondents wilfully interfered with, restrained, and coerced employees in the exercise of protected conduct under HRS § 89-3, including, but not limited to engaging in retaliatory conduct, creating an impression of surveillance, and engaging in other inherently destructive conduct to undermine the collective bargaining process in HRS § 89-13(a)(1); unlawfully discriminated against Sharp in her terms and conditions of employment to discourage membership in HSTA in violation of HRS § 89-13(a)(3); and violated the statutory rights of employees to be consulted and have input over policies affecting employee-employer relations under HRS § 89-9(c) and to exercise public employee rights free from interference, restraint, or coercion under HRS § 89-3, in violation of HRS § 89-13(a)(7).

13. Initially, the HSTA filed the motion for interlocutory relief requesting that the Board enjoin Respondents from reassigning Sharp to teach the fourth grade. Thereafter, the HSTA filed a renewed motion for interlocutory relief to also enjoin Respondents from transferring Sharp to Paauilo Elementary School.

14. The power to issue an injunction is discretionary. Penn v. Transportation Lease Hawaii, Ltd., 2 Haw. App. 272, 275, 630 P.2d 646, 649 (1981) (citing 42 Am. Jur. 2d Injunctions § 24 (1959)) (Penn).
15. In deciding whether to issue injunctive relief, a court balances three considerations (1) whether a plaintiff is likely to succeed on the merits; (2) whether the balance of irreparable harm favors the temporary injunctive relief; and (3) whether the public interest supports granting the temporary injunctive relief. Penn at 276, 630 P.2d at 649-50; Life of the Land v. Ariyoshi, 59 Haw. 156, 158, 577 P.2d 1116, 1118 (1978). The more the balance of irreparable damage favors issuance of the injunction, the less the party seeking the injunction has to show the likelihood of success on the merits. Penn at 276, 630 P.2d at 650; Office of Hawaiian Affairs, et al. v. Housing and Community Development Corp., et al., 117 Hawaii 174, 211, 177 P.3d 884, 921 (2008).
16. a). Likelihood of success on the merits.

The HSTA has demonstrated a likelihood of success on the merits. The Board is mindful of the fact that Respondents have not completed the presentation of their case, although they have had the opportunity to cross examine the HSTA's witnesses, and that the hearing on the merits is not yet completed. However, the Board's order here is based upon the evidence already received (as discussed in the above Findings of Fact) and, moreover, upon the arguments and statements presented by the parties in support of and in opposition to the HSTA's Motion for Interlocutory Relief and Renewed Motion for Interlocutory Relief. The evidence up until this point supports the granting of an interlocutory order; the teachers uniformly testified to the low morale of the faculty and the perceived retaliatory reassignments prompting the transfers and retirements of the faculty during the principal's tenure, and the faculty were extremely afraid of the principal and frustrated in seeking help from the HSTA, the complex superintendent and the SCC.

17. Additionally, Respondents submitted the Declaration of Susan La Vine (La Vine), Personnel Specialist III with the DOE, in support of their Motion to Strike Affidavit of Danny J. Vasconcellos Filed December 24, 2008, filed January 5, 2009.⁷ La Vine states, inter alia, that on October 22, 2008, HSTA Deputy Executive Director Ray Camacho (Camacho) mentioned the need to transfer Cindy Sharp "for her health condition due to stress, effective the first day of the next semester"; that at a later date, La Vine called Camacho and

⁷The Declaration of La Vine was not submitted in support of Respondents' Memorandum in Opposition to the HSTA's Renewed Motion for Interlocutory Relief (and indeed no declaration or affidavit was submitted in support of the memorandum in opposition); nevertheless, the Board takes notice of said Declaration as part of the official record in this case.

Camacho confirmed that the transfer should take place on January 12, 2009; that La Vine and Camacho discussed transfer to Paauilo School; and that on December 9, 2008, Camacho denied the telephone conversation.

18. Viewing the Declaration of La Vine in the light most favorable to Respondents, it appears that, at most, Respondents' action may have been the result of discussions with Deputy Executive Director Camacho. However, it remains undisputed that, despite any statements Camacho may or may not have made, Cindy Sharp did not desire a transfer to Paauilo School, and that Sharp was not given any notice of the contemplated transfer by Respondents until nearly two months after the October 22, 2008 conversation between La Vine and Camacho.
19. Finally, the Board notes that Sharp already had pending before the Board the matter of her reassignment from the third grade to the fourth grade for the 2008-09 school year, and that reassignment itself has been alleged to be retaliatory for the following reasons:

Sharp was ostensibly reassigned because of school wide needs, that she had teaching experience in both third and fifth grade, and that she was skilled in teaching writing. However, Sharp denied that the principal had observed her instruction, had seen her student work, had observed Sharp's discussion with her peers, or had even evaluated her as a teacher. Moreover, Sharp, and the HSTA faculty representative, voiced the teachers' issues and concerns to the principal as well as to others and expressed the teachers' unhappiness and fear of retaliation based on the pattern of perceived unilateral actions and retaliatory reassignments by the principal. Also, that the principal appeared to discouraged the open discussion of issues and concerns by the teachers and summarily dismissed open expression from the teacher advocates.

20. For these reasons, the Board concludes that the HSTA is likely to prevail based upon the evidence presented to the Board thus far.
21. (b). Whether the balance of irreparable harm favors the temporary injunctive relief.

The Board concludes that there may be irreparable harm to the bargaining unit at the school if Sharp is transferred to Paauilo School on January 13, 2009. Sharp is the HSTA faculty representative at Honoka`a. As the record shows, the teachers at Honoka`a are afraid of retaliation by the principal if they express their concerns and issues. It is unlikely that any other teacher would be willing

to step forward and assume the role of faculty representative at this time should Sharp leave; also, the teachers also appear afraid and unwilling to engage in dialogue with the principal on their own. Additionally, the transfer of Sharp unwillingly to Paauiilo School may create a chilling effect on the other teachers, and exacerbate problems at Honoka`a between the teachers and the principal.

22. There may also be irreparable harm to the students at Honoka`a should Sharp be transferred. The principal's justification for reassigning Sharp from the third grade to the fourth grade was because Sharp's "experience and skills" were needed in the fourth grade based on school-wide needs. Transferring Sharp to Paauiilo on January 12, 2009, may injure the fourth grade students she now teaches. At the July 31, 2008 hearing before the Board on the HSTA's Motion for Interlocutory Relief, Respondents argued that moving Sharp out of her fourth grade class, after the start of the 2008-09 school year, would harm the students, and that Honoka`a needs improvement pursuant to No Child Left Behind (NCLB) requirements, and that must be taken into account when the school assigns teachers. Furthermore, that moving teachers after the start of the school year means the teachers wasted time getting the class ready and buying supplies; in short, that moving Sharp would be disruptive to the students and the school.
23. Given the potential harm to the students and disruption to the school from moving a teacher in the middle of the school year; the harm to the HSTA and the other teachers in losing a faculty representative at Honoka`a, and the chilling effect the transfer would have on other teachers at Honoka`a, the Board concludes that the balance of irreparable harm favors the granting of injunctive relief, in part, and maintaining the status quo by retaining Sharp in the fourth grade at Honoka`a.
24. (c). Whether the public interest supports granting the temporary injunctive relief.

As discussed above, the principal's justification for reassigning Sharp from the third grade to the fourth grade was because Sharp's "experience and skills" were needed in the fourth grade based on school-wide needs; additionally, Respondents have argued that moving Sharp out of her fourth grade class, after the start of the 2008-09 school year, would harm the students, and that Honoka`a needs improvement pursuant to NCLB requirements, and that must be taken into account when the school assigns teachers. For these reasons, the Board concludes that the public interest, as reflecting the interest of the students at Honoka`a, supports the granting of temporary injunctive relief.

25. For all the reasons discussed, the Board concludes that injunctive relief is warranted at this time to preserve the status quo in this case, to prevent irreparable harm to the students, Sharp, and the HSTA.
26. Accordingly, the Board grants in part the HSTA's Renewed Motion for Interlocutory Relief to enjoin Respondents from transferring Sharp to Paauilo School on or about January 12, 2009 and reserves ruling on Sharp's reassignment from the fourth to the third grade.

ORDER

Based on the foregoing, the Board grants the HSTA's Motion to Reopen ; grants Respondents' Motion to Strike; and grants in part HSTA's Motion for Renewed Interlocutory Relief.

DATED: Honolulu, Hawaii, January 27, 2009.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member

Copies sent to:

Danny J. Vasconcellos, Esq.
James E. Halvorson, Deputy Attorney General