STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of VALERIE ASATO, Complainant, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION and DEPARTMENT OF EDUCATION, State of Hawai‘i, Respondent.	CASE NO(S). 19-CE-03-375 19-CE-03-934 ORDER NO. 3567 PRETRIAL ORDER AND NOTICES; (1) NOTICE TO RESPONDENT(S) OF PROHIBITED PRACTICE COMPLAINT; (2) NOTICE OF FILING REQUIREMENTS; (3) NOTICE OF APPEARANCE AND ACCESSIBILITY OR ACCOMMODATIONS; (4) NOTICE OF PREHEARING CONFERENCE; (5) NOTICE OF PRETRIAL CONFERENCE; (6) NOTICE OF HEARING ON THE MERITS; AND (7) SCHEDULE OF HEARINGS, CONFERENCES, AND DEADLINES

PRETRIAL ORDER AND NOTICES;
(1) NOTICE TO RESPONDENT(S) OF PROHIBITED PRACTICE COMPLAINT; (2) NOTICE OF FILING REQUIREMENTS;
(3) NOTICE OF APPEARANCE AND ACCESSIBILITY OR ACCOMMODATIONS; (4) NOTICE OF PREHEARING CONFERENCE;
(5) NOTICE OF PRETRIAL CONFERENCE;
(6) NOTICE OF HEARING ON THE MERITS; AND
(7) SCHEDULE OF HEARINGS, CONFERENCES, AND DEADLINES

PRETRIAL ORDER AND NOTICES

THE PARTIES ARE HEREBY NOTIFIED AND ORDERED TO COMPLY WITH THIS PRETRIAL ORDER AND NOTICES. The Hawai‘i Labor Relations Board (Board) may impose appropriate monetary or other sanctions upon parties or attorneys who do not comply with this Pretrial Order and Notice if the parties or attorneys have not shown good cause for failure to comply or a good faith effort to comply.

This document shall control the course of proceedings and may not be amended except by the Board through an Order or Notice, by a written request by a party with written consent of all the parties (stipulation), or by an order granting a motion filed with the Board. The use of singular, plural, masculine, feminine, and neuter pronouns shall include the others as the context may require.

(1) NOTICE TO RESPONDENT(S) OF A PROHIBITED PRACTICE COMPLAINT

The attached prohibited practice complaint (Complaint) was filed with the Board by the above-named Complainant(s) on: **October 4, 2019**.

PURSUANT TO HAWAI‘I REVISED STATUTES (HRS) § 377-9(b) AND HAWAI‘I ADMINISTRATIVE RULES (HAR) § 12-42-42: NOTICE IS HEREBY GIVEN TO RESPONDENT(S) that the above-named COMPLAINANT(S) filed a prohibited practice Complaint with the Board, a copy of which is attached, alleging that you have engaged in or are engaging in prohibited practices in violation of HRS Chapter 89.

YOU ARE DIRECTED to file a written answer to the Complaint within ten (10) days after service of the Complaint. One copy of the answer shall be served on each party, and the original with certificate of service on all parties shall be filed with the Board no later than 4:30 p.m. on the tenth day after service of the Complaint. If you fail to timely file and serve an answer, such failure shall constitute an admission of the material facts alleged in the Complaint and a waiver of hearing. (HAR § 12-42-45(g))

(2) NOTICE OF FILING REQUIREMENTS

1) **Electronic Filing:**

The Board provides to all parties and encourages the use of an electronic filing service through File & ServeXpress. There is no charge to the parties for use of this electronic filing service.

To register, a party is required to complete and submit the Board Agreement to E-File (Form HLRB-25), as amended, which is available at http://labor.hawaii.gov/hlrb/forms/.

Questions regarding the Board's electronic filing system should be directed to the Board's staff at (808) 586-8616.

2) Filing in Person or by Mail

A party may mail or file in person an original of any document at the Board's office at 830 Punchbowl Street, Room 434, Honolulu, Hawai'i, 96813. The Board's office is open on the weekdays (excluding state holidays) between 7:45 a.m. to 4:30 p.m.; the office may occasionally be closed from 12:00 p.m. to 1:00 p.m. The date of receipt by the Board shall be deemed the date of filing.

3) Filing Requirements Regarding Protection of Social Security Numbers and Personal Information

Before a party files or submits any pleading, correspondence, or other document (Documents) to the Board, whether electronically or manually, the party shall make certain that all social security numbers and personal information are redacted or encrypted. "Personal information" shall include social security numbers, home addresses, dates of birth, bank account numbers, medical and health records, and any other information in which a person has a significant privacy interest. To the extent any personal information is relevant to the Board's consideration of this case, the submitting party shall submit the confidential information by means of a Confidential Information Form that substantially conforms to Form 2 of the Hawai'i Court Records Rules, as amended.

If a party submits a document that requires redaction of a page(s), the party shall by motion request permission from the Board to withdraw and replace the original document, in its entirety, with a redacted copy of such document, pursuant to HAR § 12-42-8(g)(11), "The Board may permit withdrawal of original documents upon submission of properly authenticated copies to replace such document."

The Board may impose appropriate monetary or other sanctions upon parties or attorneys who do not comply with this provision where the parties or attorneys have not shown good cause for failure to comply or a good faith attempt to comply.

(3) NOTICE OF APPEARANCE AND ACCESSIBILITY OR ACCOMMODATIONS

All parties have the right to appear in person and to be represented by counsel or any other authorized person in all Board proceedings. Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai'i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, including language access, please call the Board at (808) 586-8616, at least seven (7) days prior to a Board proceeding.

The parties should be aware that the Board is in a secured State of Hawai‘i building and that any party, representative, counsel, or other person attending a proceeding will need to present a government-issued identification for entry.

(4) NOTICE OF PREHEARING CONFERENCE

PURSUANT TO HRS § 89-5(i)(4) and (i)(5), and HAR § 12-42-47:

NOTICE IS HEREBY GIVEN that the Board will conduct a Prehearing Conference on the date listed below and in the Schedule of Deadlines and Hearing Dates (Schedule) in this document.

DATE AND TIME: Wednesday, October 16, 2019 at 3:00 p.m.

LOCATION: Hawai‘i Labor Relations Board Hearing Room
830 Punchbowl Street – Room 434
Honolulu, Hawai‘i 96813

The purpose of the Prehearing Conference is to clarify the issues, if any; to the extent possible, to reach an agreement on facts, matters, or procedures that will facilitate and expedite the hearing or adjudication of the issues presented; to establish deadlines for prehearing briefing; to identify witnesses and file applications for the issuance of subpoenas; and for such other matters as may be raised.

All parties have the right to appear at the Prehearing Conference in person or telephonically and to be represented by counsel or any other authorized person. Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai‘i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, including language access, please call the Board at (808) 586-8616, at least seven (7) days prior to a Board proceeding.

(5) NOTICE OF PRETRIAL CONFERENCE

PURSUANT TO HRS §§ 89-5(i)(4) and (i)(5), and 377-9:

NOTICE IS HEREBY GIVEN that the Board will conduct a Pretrial Conference on the date listed below and in the Schedule in this document.

DATE AND TIME: Thursday, October 24, 2019 at 10:00 a.m.

LOCATION: Hawai‘i Labor Relations Board Hearing Room
830 Punchbowl Street – Room 434
Honolulu, Hawai‘i 96813

1) Pretrial Statement

Both the Complainant(s) and the Respondent(s) shall file a Pretrial Statement with the Board, as listed in the Schedule set forth below. The Pretrial Statement shall include the following:

1. Statement of Issues

2. Witness List

   The witness lists shall include, in the interest of judicial economy, a brief but meaningful summary of the nature of the testimony expected, and the order in which the witnesses are expected to be called upon, subject to the witness' availability. The summary for each witness shall include sufficient information for the Board to determine whether the testimony will be irrelevant, immaterial, or unduly repetitious to any other witness testimony; see HRS § 91-10(1).

   If a party intends to file a request for a subpoena for a witness, such request shall be concurrently filed with the Pretrial Statement, and a notation that a request is being made shall be listed in the witness list.

3. Exhibit List

   The exhibit lists shall include copies of the proposed exhibits. The parties are encouraged to use the File & ServeXpress eFiling system to file the exhibits before or by 4:30 p.m. (HST) on the deadline day. A party's exhibits or Joint exhibits shall be combined and filed in a searchable portable document format (PDF) not exceeding 10 megabytes with each exhibit bookmarked and bates-stamped at the top right corner. Alternatively, a party may file exhibits in person or by mail to the Board; the date of receipt by the Board shall be deemed the date of filing.

   If a party intends to file a request for a subpoena duces tecum for any of its exhibits, such request shall be concurrently filed with the Pretrial Statement, and a notation that a request is being made shall be listed in the exhibit list.

   The Complainant shall identify its exhibits using alphabetical letters (A, B, C, D, etc.). Union Respondent(s) shall identify its exhibits using numerical designations preceded by U (e.g., U-1, U-2, U-3, etc.). Employer Respondent(s) shall identify its exhibits using numerical designations preceded by E (e.g., E-1, E-2, E-3, etc.). In the event that there are multiple Union Respondents or Employer Respondents in a particular case, the Board shall specify the designation for each Respondent.

If there are any duplicative exhibits, the parties shall designate them as Joint Exhibits, the parties shall designate one party to file these exhibits, and the Exhibits shall be marked with numerical designations preceded by J (e.g., J-1, J-2, J-3, etc.).

Additionally**,** the Exclusive Representative, unless no Exclusive Representative is party to the case, in which case the Employer, must submit to the Board the full applicable collective bargaining agreement(s), including any Memoranda of Understanding, Memoranda of Agreement, or any other supplemental agreement that has any bearing on these proceedings. These documents shall be marked as Board Exhibit 1 or Board Exhibit 1a, 1b, 1c, etc.

2) Pretrial Conference

At the pretrial conference, the Parties shall be prepared to discuss, raise, and present their position regarding the presentation of the anticipated evidence (witnesses, exhibits) to be introduced at the Hearing on the Merits (HOM), including but not limited to any stipulations, evidentiary issues, objections, or confidentiality issues that require protection from public disclosure and the narrow tailoring of methods to protect that information (e.g. sealing or redaction).

While all parties have the right to appear at the Pretrial Conference in person or telephonically and to be represented by counsel or any other authorized person, **all parties are required to either appear in person or have a representative appear in person.** Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai‘i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, please call the Board at (808) 586-8616.

(6) NOTICE OF THE HEARING ON THE MERITS

NOTICE IS HEREBY GIVEN, pursuant to HRS §§ 377-9, 89-5(i)(3), (4), (5), and 89-14, and HAR §§ 12-42-46 and 12-42-49 that the Board will conduct an HOM on the instant Complaint at the place, time and date listed below and in the Schedule set forth below. The purpose of the HOM is to receive evidence and arguments on whether Respondent(s) committed prohibited practices as alleged by Complainant(s).

DATE AND TIME: Wednesday, November 13, 2019 at 9:00 a.m.

LOCATION: Hawai‘i Labor Relations Board Hearing Room
830 Punchbowl Street – Room 434
Honolulu, Hawai‘i 96813

All parties have the right to appear at the Hearing on the Merits in person and to be represented by counsel or any other authorized person. **All parties, representatives, and witnesses must appear in person at the hearing on the merits.** Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai'i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, please call the Board at (808) 586-8616.

(7) SCHEDULE OF HEARINGS, CONFERENCES, AND DEADLINES

DATES AND DEADLINES	DATE	TIME
Prehearing Conference	10/16/19	3:00 p.m.
Dispositive Motion Deadline *Responses to dispositive motions shall be due five business days after the dispositive motion is filed and served.* HAR § 12-42-8(g)(3)(C)(iii)	10/15/19	
Pretrial Statement; Exchange of Exhibits; Subpoena Deadline	10/22/19	
Pretrial Conference and Hearing on Dispositive Motions	10/24/19	10:00 a.m.
Hearing on the Merits	11/13/19	9:00 a.m.

All submissions shall be filed on or before 4:30 p.m. on the deadline date.

DATED: Honolulu, Hawai'i, October 8, 2019.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

EXCUSED

SESNITA A.D. MOEPONO, Member

J.N. MUSTO, Member

Enclosure: PROHIBITED PRACTICE COMPLAINT

Copies sent to:

Above-named Parties

VALERIE ASATO v. HGEA, et al.
CASE NOS. 19-CE-03-375, 19-CE-03-934
PRETRIAL ORDER AND NOTICES
ORDER NO. 3567

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

FORM HLRB-4
PROHIBITED PRACTICE COMPLAINT

INSTRUCTIONS. Submit the original[1] of this Complaint to the Hawaii Labor Relations Board, 830 Punchbowl Street, Room 434, Honolulu, Hawaii 96813. If more space is required for any item, attach additional sheets, numbering each item accordingly.

1. The Complainant alleges that the following circumstances exist and requests that the Hawaii Labor Relations Board proceed pursuant to Hawaii Revised Statutes Sections 89-13 and 89-14 and its Administrative Rules, to determine whether there has been any violation of the Hawaii Revised Statutes, Chapter 89.

2. COMPLAINANT Please select one that describes the Complainant:

☑ Public Employee ☐ Public Employer ☐ Public Union (public employee organization)

a. Name, address and telephone number.
Valerie Asato
91-1139 Kamaaha Loop #3B
Kapolei, Hawaii 96707
(808) 674-4456

b. Name, address, e-mail address and telephone number of the principal representative, if any, to whom correspondence is to be directed.
Shawn A. Luiz, Esq.
841 Bishop Street, Suite 200
Honolulu, Hawaii 96813
(808) 538-0500 or (808) 428-5441
attorneyluiz@gmail.com

[1] Notwithstanding Board rule 12-42-42(b), the Board only requires the original of the complaint.

3. RESPONDENT Please select one that describes the Respondent:

☐ Public Employee ☐ Public Employer ☑ Public Union (public employee organization)

a. Name, address and telephone number.
Hawaii Goverment Employee Association (HGEA)
888 Mililani Street, Suite 601
Honolulu, Hawaii 96813
(808) 536-2351

b. Name, address and telephone number of the principal representative, if any, to whom correspondence is to be directed.

4. Indicate the appropriate bargaining unit(s) of employee(s) involved.
HGEA Unit 3

5. ALLEGATIONS

The Complainant alleges that the above-named respondent(s) has (have) engaged in or is (are) engaging in a prohibited practice or practices within the meaning of the Hawaii Revised Statutes, Section 89-13. (Specify in detail the particular alleged violation, including the subsection or subsections of the Hawaii Revised Statutes, Section 89-13, alleged to have been violated, together with a complete statement of the facts supporting the complaint, including specific facts as to names, dates, times, and places involved in the acts alleged to be improper.)

See attached.

3. RESPONDENT Please select one that describes the Respondent:

☐ Public Employee ☑ Public Employer ☐ Public Union (public employee organization)

a. Name, address and telephone number.
State of Hawaii, Department of Education,
1390 Miller St, Honolulu, HI 96813
(808) 586-3230

b. Name, address and telephone number of the principal representative, if any, to whom correspondence is to be directed.

4. Indicate the appropriate bargaining unit(s) of employee(s) involved.
HGEA Unit 3

5. ALLEGATIONS

The Complainant alleges that the above-named respondent(s) has (have) engaged in or is (are) engaging in a prohibited practice or practices within the meaning of the Hawaii Revised Statutes, Section 89-13. (Specify in detail the particular alleged violation, including the subsection or subsections of the Hawaii Revised Statutes, Section 89-13, alleged to have been violated, together with a complete statement of the facts supporting the complaint, including specific facts as to names, dates, times, and places involved in the acts alleged to be improper.)

See attached.

6. Provide a clear and concise statement of any other relevant facts.
See attached.

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

DECLARATION IN LIEU OF AFFIDAVIT
(If the Complainant is self-represented, then the Complainant must sign this Declaration).

Please select one:
- ☐ the Complainant
- ☑ the Complainant's principle representative
- ☐ the person described below

I, Shawn A. Luiz, do declare under penalty of law that the foregoing is true and correct.

Date: October 4, 2019

/s/ Shawn A. Luiz

The person signing above agrees that by signing his or her name in the above space with a "/s/ first, middle, last names" is deemed to be treated like an original signature.

attorneyluiz@gmail.com

Signor's email address

If you are not the Complainant or listed as the principle representative in #2(b) and you are signing above, then please complete the contact information below.

Your address:

_____

_____

_____

Your phone number: _____

Your relationship to the Complainant:

_____

If the Complainant or principal representative is registered with File and ServeXpress (FSX), then you may proceed to electronically file this complaint.

If the Complainant or the principal representative is not registered with FSX and would like to electronically file this complaint through FSX, then complete the Board Agreement to E-File, FORM HLRB-25. (Form HLRB-25 is on the HLRB Website at ***labor.hawaii.gov/hlrb/forms***.) Email the completed form to the Board at ***dlir.laborboard@hawaii.gov***.

SHAWN A. LUIZ (6855)
841 Bishop Street
Suite 200
Honolulu, Hawaii 96813
Telephone: (808) 538 - 0500
Facsimile: (808) 564 - 0010
E - mail: attorneyluiz@gmail.com

Attorney for Complainant
VALERIE ASATO

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of VALERIE ASATO, Complainant, vs. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME-LOCAL 152, AFL-CIO, and DEPARTMENT OF EDUCATION, STATE OF HAWAII, Respondents.	) Case No. _____))) **COMPLAINANT VALERIE ASATO'S PROHIBITED PRACTICES COMPLAINT**))))))

COMPLAINANT VALERIE ASATO'S PROHIBITED PRACTICES COMPLAINT

Prior Related case:

This matter was previously before the STATE OF HAWAII, HAWAII LABOR RELATIONS BOARD. See Valerie Asato, Complainant v. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME-LOCAL 152, AFL-CIO, et al., Respondents; HLRB Case No. 17-CU-03-352. The parties reached a settlement and stipulated to dismiss the prior action on May 2, 2018.

Prior Procedural History:

On August 20, 2012, Complainant Valerie Asato ("Asato" or "Complainant") was given notice of complaint and investigation from the DOE regarding "this office received notification of alleged incident(ces) regarding inappropriate comments/remarks about fellow employees on the school office computer[.]", and placed Asato on leave without pay.

On December 17, 2012, Asato was officially terminated, effective December 28, 2012, as an office assistant III, despite seven and a half years of employment with Farrington High School and no record of prior discipline. Asato maintained she was terminated in violation of Article 8, without just cause and without the DOE meeting the required seven step analysis.

On October 14, 2015, HGEA after unsuccessful at the step 1 grievance and additionally, at the step 2 grievance levels, sent the DOE "notice of intent to arbitrate".

On July 6, 2017, Asato filed a prohibited practice complaint against HGEA and Kevin Nagata, Union Agent for dereliction of duty as 4.5 years had passed since Asato's termination and HGEA had still not arbitrated Asato's termination.

On July 12, 2017, HGEA Nora Nomura recommended no arbitration.

On July 17, 2017, HGEA filed its answer and prehearing statement.

By letter dated July 19, 2017, and received July 22, 2017, Asato was notified by letter that HGEA was withdrawing its arbitration request. Within days of receiving a prohibited practice complaint, HGEA withdrew its notice of intent to arbitrate in retaliation for Asato having filed the prohibited practice complaint.

On July 27, 2017, Asato filed amended prohibited practice complaint against HGEA and Kevin Nagata Union Agent for dereliction of duty and retaliation.

The parties reached a settlement and stipulated to dismiss the prior action on May 2, 2018.

The parties proceeded to arbitration in December of 2018.

On July 9, 2019, Sanford Chun, mailed Asato a copy of the Arbitration Decision. See Exhibit "1". The arbitrator upheld Asato's termination.

This action follows.

HGEA's actions giving rise to the instant Prohibited Practices Complaint in this matter:

Just as the July 19, 2017 letter signed by Sanford Chun, HGEA Executive Assistant for Field Services is a violation of 89-13(b)(1) to interfere, restrain or coerce any employee in the exercise of any right guaranteed under this chapter, likewise is the HGEA's treatment of Asato in arbitrating this matter a violation of 89-13(b)(1) to interfere, restrain or coerce any employee in the exercise of any right guaranteed under this chapter.

In accordance with the Unit 3 Contract, Article 11, Asato was entitled to non-discriminatory/non-retaliatory union representation. As shown in more detail below, HGEA willfully and intentionally failed to investigate Asato's meritorious claims in retaliation for the 2017 Prohibited Practices Complaint. The violations alleged herein are willful and retaliatory.

HGEA has willfully committed an ongoing violation of Chapter 89-13(b) 1, 4 and 5. HGEA subverted the arbitration process, i.e. "threw the fight", in bad faith as evidenced by the treatment of Asato during arbitration preparation, the arbitration result and the failure to move to set aside the arbitration.

HGEA's actions are arbitrary as HGEA's actions lack a rational basis to treat the employee with contempt as it proceeds through the arbitration process.

Allegations towards all claims:

Complainant Valerie Asato ("Asato" or "Complainant") had brought a prior case against HGEA entitled was Case No. 17-CU-03-352, VALERIE ASATO, Complainant, vs. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME-LOCAL 152, AFL-CIO and KEVIN NAKATA, Respondents.

On July 9, 2019, Sanford Chun, mailed Asato a copy of the Arbitration Decision. See Exhibit "1". The letter stated:

Enclosed is a copy of the arbitration decision from Arbitrator Thomas Crowley regarding your termination grievance.
Unfortunately, as we discussed, Arbitrator Crowley ruled in favor of the DOE and sustained the action taken against you. He agreed with the DOE and concluded that there was cause for your termination in this case.
Please contact me at 543-0070 or schun@hgea.org if you have any questions.
Take care and best of luck to you in your future endeavors.

As set forth below, the HGEA failed to properly represent Asato in proceedings before the arbitrator and HGEA violated § 89-13 (b)(1) which provides, "§ 89-13. Prohibited practices; evidence of bad faith. (b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent willfully to: … (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter; By HGEA, through its agents mocking, belittling and disparaging Asato for wanting to pursue her union rights, such actions would interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter.

For example, the attorney for HGEA stated to Asato during arbitration preparation:

"Why you sue the union for? You're stupid to sue the union. You wanted this arbitration. I know if you lose this case you're going to sue and blame the union and when you do I'm going to tear your ass apart on the witness stand."

In response Asato told the union lawyer, "Kevin was derelict in his duty. He never do his job".

The Union lawyer replied:

"Kevin is a fuck up, screwup, wimp. He does things half assed. He's lazy. Well sometimes the union does stupid things and I have to go and clean up their mess.

Do you pay dues? Because this case is going to cost the union $40,000.00 and even if you get your job back, I don't think you could pay it back in dues. You know 6 years ago I wouldn't have even taken your case. If Sanford brought this case to me, I would have rejected it right there. I give this case a 30% chance of winning. Not even that maybe a 20% chance."

Regarding Melinda or any issues/points Asato brought up:

"Melinda is dead. We can't question her. Will that change the outcome? I'm trying to think three steps ahead and look at the big picture. I don't want to give them (DOE) ammunition for their case.

When Asato asked questions or needed explanations, Asato was told by the HGEA attorney:

"I'm not your private attorney. I work for the union. I only do union/employment work. I'm not here to educate you about the law. I don't have time for that. If you want to learn the law or get an explanation, go to law school and get a law degree. Don't give me scenarios or ask me general questions. I don't have time for that."

If Asato brought up private attorneys she retained for the underlying employer investigation and for the prior prohibited practices complaint, Asato was told things such as:

"I know Mr. Luiz is a nice guy, but has he done 25 years of arbitration work for HGEA and UPW? You got the #1 best lawyer in the state. I don't do civil. I don't do criminal cases. I only do union business work (things that pertain to the union). I only have the contract to work with and whatever's in front of me. I'm not your private attorney."

All Asato wanted was the union to fairly represent her without regard to her prior prohibited practices complaint and without "interfering, restraining, or coercing any employee in the exercise of any right guaranteed under this chapter;"

If Asato asked for an explanation about the arbitration procedure/testimony given, questions, the HGEA attorney would state:

"Why do you need to know these things. You need to trust me You have the number 1 best lawyer in the state. Why are we even here? You wanted this [arbitration]. You sued the union for it. Just sit there and listen. You need to trust your union. I don't have time to explain the law to you. You want to learn the law go to law school."

Asato responded, "because the outcome affects me."

When Asato asked questions or asked general questions or scenarios, the HGEA attorney responded:

"Does this have anything to do with the case? I don't have time for stupid questions or general questions. Don't give me scenarios. I'm not your private attorney. I work for the union. If you want to learn the law go to law school. I'm trying to plan and strategize the case. I don't want to give the DOE ammunition for their case. Only ask me things that are relevant to my case only."

The Union treated Asato with utter contempt and retaliated against her for bringing the first prohibited practices complaint and did not even offer a merit-based case-in-chief to assist Asato at arbitration. The conduct of the HGEA would deter a reasonable union member from wanting to pursue a claim under the collection bargaining agreement.

HGEA willfully retaliated against Asato for enforcing her rights under Chapter 89 and failed to file a motion to set aside the arbitration award.

HGEA violated § 89-13 (b)(1) which provides, "§ 89-13. Prohibited practices; evidence of bad faith. (b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent willfully to: … (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter; (4) Refuse or fail to comply with any provision of this chapter; or (5) Violate the terms of a collective bargaining agreement."

The actions of the HGEA are a violation of 89-13(b)(1), (4) and (5). The violations are willful as the violations were done to intentionally to interfere/restrain Asato's collective bargaining rights and rights under Chapter 89.

The DOE willfully and wrongfully discharged Asato without good cause and the HGEA breached its duty to property and adequately represent Plaintiff and acted in bad faith and with dishonesty of purpose in presenting Asato's case to the arbitrator, and that in so doing, the HGEA violated its statutory duty to fairly represent Asato. As a direct result of the union's arbitrary, discriminatory and perfunctory representation, Asato lost the arbitration case. Asato's grievance was a sham, substantially inadequate and or substantially unavailable.

The DOE violated HRS § 89-13 (a) (8)(Violated the terms of a collective bargaining agreement) in willfully and wrongfully discharging Asato without good cause in bad faith. But for the Union's actions, Asato would have proven she was discharged without good cause in violation of Constitutional principles and the Unit 3 Contract at issue. For example, the Union did not present at arbitration all available evidence that Asato was not adequately warned of the serious of the complaint in accordance with the Unit 3 Contract Bill of Rights before responding to the allegations against her that could result in discipline up to and including termination. The DOE is a necessary and indispensable party pursuant to Rule 19 of the Hawaii Rules of Civil Procedure.

Prayer for relief

Asato makes demand for reinstatement, backpay and interest for the DOE's discharge without good cause and consequential damages flowing from the HGEA's discriminatory and retaliatory actions for pursuing a grievance that was a sham, substantially inadequate and or substantially unavailable and for reimbursement of attorney's fees and costs.

DATED: Honolulu, Hawaii, October 4, 2019.

/s/SHAWN A. LUIZ
SHAWN A. LUIZ
Attorney for Complainant
VALERIE ASATO

EXHIBIT "1"

HGEA

Working Together for Hawaii

July 9, 2019

TO: Valerie Asato

FROM: Sanford Chun

RE: **Arbitration Decision**

Enclosed is a copy of the arbitration decision from Arbitrator Thomas Crowley regarding your termination grievance.

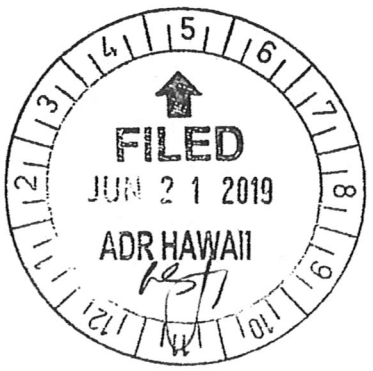
Unfortunately, as we discussed, Arbitrator Crowley ruled in favor of the DOE and sustained the action taken against you. He agreed with the DOE and concluded that there was cause for your termination in this case.

Please contact me at 543-0070 or schun@hgea.org if you have any questions.

Take care and best of luck to you in your future endeavors.

Thomas E. Crowley, III 1753-0
Dillingham Transportation Building
735 Bishop Street, Suite 205
Honolulu, Hawaii 96813
Telephone: (808) 531-6789

ARBITRATOR



BEFORE ARBITRATOR
THOMAS E. CROWLEY
STATE OF HAWAII

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Union, and DEPARTMENT OF EDUCATION, STATE OF HAWAII, Employer.	HGEA/AFSCME Bargaining Unit 03 Grievance on Behalf of Valerie Asato, Challenge to Disciplinary Termination **ARBITRATION DECISION AND AWARD;** CERTIFICATE OF SERVICE

ARBITRATION DECISION AND AWARD

I. Introduction.

The undersigned arbitrator ("arbitrator") was mutually selected by the parties to arbitrate the above-captioned grievance. The arbitrator disclosed in writing all potential conflicts, and the parties waived any objections to having the Arbitrator serve. The arbitration hearings occurred on December 17 through 20, 2018 at the Attorney General's Conference Room, 235 South Beretania Street, 15th Floor, Honolulu, Hawaii.

Peter Liholiho Trask, Esq. represented the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO ("Union") and Grievant

6/24/2019

Valerie Asato ("Grievant"); and Miriam P. Loui, Esq. represented the DEPARTMENT OF EDUCATION, STATE OF HAWAII ("Employer").

The parties were afforded a full and fair opportunity to present evidence and examine witnesses at the hearing, and to submit written arguments after the hearing. The Arbitrator commends Mr. Trask and Ms. Loui for their superior representation of their respective clients.

II. Arbitrability.

The grievance was presented to the arbitrator for final and binding decision pursuant to the Unit 03 Contract between the Union and Employer ("Unit 03 CBA"). Union Exhibit ("U-") 24.

Arbitrability is not disputed. December 17, 2018 Hearing Transcript ("Tr.") at 4. This arbitration has jurisdiction over the grievance pursuant to Article 11.H of the Unit 03 CBA, entitled: "Grievance Procedure. ... Step 4. Arbitration." U-24 at 12-13.

III. Witnesses, Exhibits, and Post-Arbitration Briefs.

A. Witnesses.

The following witnesses testified:

For the Employer: Alfredo Carganilla, Darryl Ishihara, Kevin Gujii, Allison Carkin, Aaron Oandsan, Lenn Uyeda, Calvin Nomiyama, Stephanie Silva, Marrk Nakamura, Susan La Vine, and Valerie Asato (Ms. Asato, the Grievant, was examined by Ms. Loui as part of the Employer's case-in-chief, and then also examined by Mr. Trask on behalf of the Union).

For the Union: No witnesses other than the examination of Grievant noted above.

B. Exhibits.

Subject to the weight the arbitrator gave them, the following exhibits were received in evidence:

Employer Exhibits ("E-"): E-A through D.

Union Exhibits ("U-"): U-1 through 25.

C. Post-Arbitration Briefs.

On May 10, 2019, both parties timely submitted Post-Hearing Briefs. On June 21, 2019, the arbitrator rendered this Arbitrator's Decision and Award.

IV. Background.

At all times relevant to the grievance, Grievant was employed as an Office Assistant III ("OA III") by the State of Hawaii Department of Education ("Employer"). Tr. at 467.

Grievant commenced her employment as an OA III at Farrington High School ("FHS") in March 2005. E-C-60.

On August 16, 2012, three of Grievant's co-workers (Melinda Gardner (deceased April 6, 2016), Stephanie Silva, and Katherine Badua) reported to FHS administration they inadvertently discovered an offensive email titled "flips" on Grievant's work computer in the business office at FHS. Tr. at 407-412. Grievant was not present at FHS on August 16, 2012. Tr. at 408. Ms. Silva and Ms. Badua are Filipinos. Tr. at 410-412. Ms. Silva testified that Grievant's email labeled her co-workers "Flips" and described Filipinos as greedy, selfish, stupid, and with no class. Ms. Silva testified the email made her angry, because she is Filipino-Hawaiian, and "it was as if [Grievant] told it to our face." Tr. at 412. The "flips" email was dated July 18, 2012, and sent at 10:57

a.m. by Grievant to a DOE co-worker at the DOE's Centralized Service Desk. E-B-172-173. The "flips" email stated in part:

> The flips were getting on my nerves yesterday, so I went outside to talk to Zana and I asked her if she liked Flips as a whole. She said she couldn't stand them and she thinks flips are conniving and manipulative. ... We also agreed that CB and the snobby lady are lesbian lovers because they're always together. Snobby lady doesn't have sex life and so she's happy when she's with her lesbian friend CB. Zana said she likes Polynesians. Well at least we have that in common because I don't like flips either. I think they are greedy, selfish, and stupid people. I like pure Japanese people and Chinese because they are nicer and Japanese people are generous. They are also smart people. They have class. Flips don't have any class at all.
> ... I like Zana's way of describing flips. I call them a flip bitch. Zana said that no one can stand the snobby lady. I think I will curse CB and see what happens. ... Melinda just goes along with things because she doesn't have any real friends. She's trying to buy CB as a friend and that's why CB gets stuff from her, but I know CB just wants to get free stuff because she's a typical flip, but I know CB doesn't truly consider her a friend. Flips are like that they only want free stuff, but they only use people to get what they want. You know that WAR song??? It can also apply to flips. Flips. What are they good for. ABSOLUTELY NOTHING!!! hah hah hah!!! Well I have to go because the flip bitch is watching (snobby lady).

On August 16, 2012, co-worker Melinda Gardner verbally complained to Kevin Fujii, the School Services Administrative Officer ("SASA") and submitted a written complaint to the SASA, stating:

> To whom it may concern
>
> Katherine Badua, Stephanie Silva, and I were cleaning out a cabinet to rearrange the office. Kathy placed boxes on Valerie Asato's desk and her lotus notes opened up. When her lotus notes opened we noticed an email with the subject "flips". I opened the email and we began to read. I was horrified, hurt, and upset with the contents of the email. I saw racial comments about my co-workers Kathy and Stephanie, and offensive comments about myself. I quickly notified SASA, Kevin Fujii.
>
> At this moment, I don't feel I can work in the same office as Valerie Asato. Knowing how she feels about me and our co-workers, brings up feelings of anger.

E-B-67. Mr. Fujii went to the FHS business office, read some of Grievant's email at Grievant's computer station, and submitted the following August 16, 2012 written statement:

> To whom it may concern,
>
> Business office Clerk Typist II, Melinda Gardner, came to my desk in the Main Office and told me that she had something important to show me.
>
> She directed me to Business office Clerk Typist II [sic], Valerie Asato's, computer, and explained that a box was dropped on Valerie's table and that her Lotus Notes appeared on her screen. She noticed an email with the subject matter, "Flips."
>
> While she was explaining to me, I sat down at Valerie's desk to view her screen. The email "Flips" was opened and I read the contents of the message. I was disturbed to read a "hate email" attacking her coworkers with racial slurs and sexual references. I quickly called Vice Principal, Daryl Ishihara, who oversees the School Technology System to see the contents of the message. I also, called principal, Alfredo Carganilla, to view the contents of the message.

E-B-069. On August 16, 2012, Principal Carganilla read some of Grievant's emails regarding Filipinos, and testified the emails stated: Grievant "hated Flips, they're lazy, they're no good, they're cheap;" that "Mr. Clean" [referring to Principal Carganilla, who has a shaved head] is not only cheap, he's a lousy principal; an office co-worker was a "Flip bitch;" and SASA Fujii was "WAG" [wise ass gay guy].[1] Tr.at 18-22. Principal

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[1] Grievant's August 15, 2012 email (the day before her co-workers discovered the "flips email") stated in part:

> I move in with the WAG [SASA Fujii] on Monday. How sad is that. I know there [sic] doing this to keep an eye on me. ... The flips rule the school because they are untouchable. I hate the flips. ... I don't know if I can email as much when I'm in the WAG's office. ... I know the WAG will watch my every move. He's such a FAG. He needs to get some balls, if you know what I mean for a man.

E-B-185.

Carganilla testified that the "most disturbing thing" was one of Grievant's email that "actually cursed for a student who made a complaint, that the student die." Tr. at 22. Because the emails raised the possibility of employee misconduct, Principal Carganilla informed the DOE's Civil Rights Compliance Office ("CRCO"). Tr. at 25-26.

On August 20, 2012, FHS Principal Alfredo Carganilla wrote Grievant, informing her that an administrative investigation has been initiated on her, based on information that she allegedly made "inappropriate comments/remarks about fellow employees on the school office computer." U-1.

Also on August 20, 2012, Grievant was notified by Complex Area Superintendent Calvin H. Nomiyama ("CAS") that she was placed on Leave Pending Investigation without Pay from August 20, 2012 through September 3, 2012. U-2. On August 30, 2012, Grievant was notified by the CAS that she would remain on Leave Pending Investigation without Pay from September 4, 2012 through September 18, 2012. U-3. Thereafter, Grievant was placed on leave with pay pending investigation from September 19, 2012 until her termination on December 28, 2012. U-4; U-15.

On October 24, 2012, Grievant, with the assistance of her private counsel, Ronald T. Fujiwara, responded in writing to CRCO's Questionnaire regarding the allegations against her. E-B at 231-241.

On November 2, 2012, Grievant was notified that she had been reassigned from FHS to Kalihi Uka Elementary School for the duration of the investigation. U-8.

On November 7, 2012, CRCO Director Susan H. Kitsu submitted the Final Investigative Report. U-9.

On November 20, 2012, Grievant was notified of a Post-Investigation Meeting scheduled for December 3, 2012. U-11.

On December 3, 2012, during the Post-Investigation Meeting, Grievant submitted a written and signed statement in support of her defense, which was made part of the grievance record. Tr. at 501-502. Grievant's 12/3/12 written statement stated in part:

> I admit I made a serious mistake and I know I violated policies and I misused DOE property. ...
>
> These emails were "private conversations" between a friend to another friend used to express our feelings, ... This was the wrong venue to voice my feelings and bad judgment on my part.
>
> Although this was done on school property with rules and regulations and policies in place, since I have access to computers, I routinely communicated to this friend who I felt listened to my problems. ...
>
> I accept full responsibility for my actions, and again, apologize to anyone I hurt or offended. ...
>
> Policies state DOE reserves the right to investigate and monitor any machine (computers) of policy violation I don't believe any malicious or suspicious activities took place on computer usage. I readily admit that I did not adhere to all applicable rules, regulations, laws and I know and admit I abused and violated policies.
>
> But, does that give Melinda Gardner another employee like myself authorization to go into my computer? Although nothing is confidential on DOE or any office setting, work place, and computers are subject to monitoring, inspection, there is such a thing as "private, confidential as far as computer usage. ... I admit these emails are offensive, derogatory, discriminatory and hurtful to others. I have been at Farrington 7 and a half years, and only now, upon discovery of emails she says my conduct is unwelcome and racial slurs and sexual references toward co-workers affected her.
>
> ... I understand the policies in place but the emails weren't directed to Melinda – I misused the computer and communicated with another person thinking it was a private conversation and "secure". Sooner or later my E-mails would have been "discovered", but I still question her access to my computer and she lodging this complaint. ...

> I feel the co-workers also contributed to this hostile environment by excluding me, picking on me, being ganged up on, "harassed", etc. as stated in my emails. I did state that it affected me by my hurt feelings, and it did bother and upset me. I also feel the supervisors contributed to this hostile environment when I reported my complaints and issues to them and they ignored the problems and let the problems continue and fester.

E-B-051-053.

On December 4, 2012, an Amended Final Investigation Report was submitted, which included Grievant's December 3, 2012 written statement. E-B.

On December 5, 2012, Grievant was notified that she had been reassigned from Kalihi Uka Elementary School to Hawaii School for the Deaf and Blind from December 10, 2012 to December 28, 2012. U-13; E-C-007.

On December 6, 2012, Grievant was notified of an "Amended Final Investigation & Exhibits," and notice of another opportunity to respond to it. U-4.

On December 17, 2012, Grievant was notified that she would be discharged from her OA III position, effective December 28, 2012. U-15.

On January 14, 2013, the Union filed its Step 1 Grievance challenging Grievant's termination as a violation of Articles 3 (Maintenance of Rights and Benefits), 4 (Personnel Policy Changes), 8 (Discipline), and 17 (Personal Rights and Representation) of the Unit 03 CBA. U-16.

On February 12, 2013, the Union presented its Step 2 grievance challenging Grievant's termination. U-20.

On June 30, 2015, the Step 2 meeting was conducted. U-21.

On September 24, 2015, the Employer denied the Step 2 grievance. U-21.

On October 14, 2015, the Union filed its Notice to Arbitrate. U-22.

On June 21, 2018, as a result of a settlement with Grievant in a complaint before the Hawaii Labor Relations Board, the Union agreed to arbitrate Grievant's grievance. Tr. at 461; HGEA/AFSCME'S Pre-Arbitration Hearing Conference Statement at 2.

On July 19, 2018, this Arbitrator was selected by the parties as the Arbitrator for this grievance.

Further relevant facts regarding the grievance are discussed in Section VII below.

V. The Issues and the Parties' Overall Positions.

A. The Issues.

The issues to be determined in this arbitration are:

1. Whether the Employer violated Articles 3 (Maintenance of Rights and Benefits), 4 (Personnel Policy Changes), 8 (Discipline), and 17 (Personal Rights and Representation) of the Unit 03 CBA when it terminated Grievant's employment?

2. If so, what is the proper remedy?

Tr. at 5.

B. The Parties' Overall Positions.

The Employer's overall position is: the grievance should be denied in its entirety because the Employer had just and proper cause to terminate Grievant. Employer's Prehearing Conference Statement at 2.

The Union's overall position is: the grievance should be sustained, the termination rescinded, and Grievant reinstated to her position as Office Assistant III, and made whole with regard to all benefit and compensation matters. U-20-2; .

VI. Standards of Review.

A. Relevant Provisions of the Unit 3 Collective Bargaining Agreement.

The relevant sections of the Unit 3 CBA involved in this grievance and arbitration are Articles 3, 4, 5, 8, 11, and 17. The language of the CBA as stated in U-24 was still in place from 2007 through 2015. U-24. The relevant sections are set forth below.

Article 3 – Maintenance of Rights and Benefits.

> Except as modified herein, Employees shall retain all rights and benefits pertaining to their conditions of employment as contained in the departmental and Civil Service rules and regulations and Hawai'i Revised Statutes at the time of execution of this Agreement, but excluding matters which are not negotiable under Chapter 89, HRS.

Article 4 – Personnel Policy Changes.

> A. 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 Union. The Employer shall consult with the Union prior to effecting changes in any major policy affecting Employee relations.
>
> B. No changes in wages, hours, or other conditions of work contained herein may be made except by mutual consent.

Article 8 – Discipline.

> A. Regular Employees shall not be disciplined without proper cause. Grievances regarding these matters shall be handled in accordance with the provisions of Article 11, Grievance Procedure. ...
>
> G. Discharges and Disciplinary Demotions.
>
> 1. Whenever a discharge or disciplinary demotion action is to be taken against an Employee, the Employee shall be given a written notice of such action. The notice shall contain the following:
>
> a. The specific reason(s) for the action;
>
> b. The effective date(s) of the discharge and disciplinary demotion.
>
> c. An opportunity to respond prior to the effective date of the discharge or disciplinary demotion.

d. A statement that the Employee may consult with the Union on the matter.

2. A written notice of a discharge or disciplinary demotion action shall be issues to the Employee in person, or if impracticable, mailed to the Employee's last known address at least ten (10) days prior to the discharge or disciplinary demotion action.

...

Article 11 - Grievance Procedure.

...

H. Step 4. Arbitration. ...

No grievance may be arbitrated unless it involves an alleged violation of a specific term or provision of the Agreement.

...

The decision of the Arbitrator shall be final and binding upon the Union, its members, the Employees involved in the grievance, and the Employer. There shall be no appeal from the Arbitrator's decision by either party, if such decision is within the scope of the Arbitrator's authority as described below:

1. The Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the terms of the Agreement.

2. The Arbitrator's power shall be limited to deciding whether the Employer has violated any of the terms of this Agreement.

3. The Arbitrator shall not consider any alleged violations or charges other than those presented in Step 3.

4. In any case of suspension or discharge where the Arbitrator finds such suspension or discharge was improper, the Arbitrator may set aside, reduce or modify the action taken by the Employer. If the penalty is set aside, reduced or otherwise changed, the Arbitrator may award back pay to compensate the employee, wholly or partially, for any wages lost because of the penalty.

...

Article 17 – Personal Rights and Representation.

...

J. Bill of Rights.

1. No Employee shall be required to sign a statement of complaint filed against the Employee.

2. If the employer pursues an investigation based on such complaint, the employee shall be advised of the seriousness of the complaint. The Employee will be informed of the complaint, and will be afforded an opportunity to respond to the complaint, and to furnish evidence in support of the Employee's case. The Employee shall have the right to be represented by the union in presenting the Employee's case.

3. Before making a final decision, the Employer shall review and consider all available evidence and date, including factors supporting the Employee's position, whether or not the Employee offers such factors in the Employee's own defense.

4. If the complaint filed against the Employee results in disciplinary action, and the Union or Employee believes that the action taken is improper or unjust, the Union or employee shall have the right to process a grievance pursuant to Article 11, Grievance Procedure.

Union Exhibit 24.

B. The BOE and DOE's applicable policies, rules, and procedures.

1. Board of Education Policy # 1110-11: Department of Education Applicant and Employee Non-Discrimination Policy

The Department of Education strictly prohibits any form of discrimination, including harassment based on a person's membership in a protected class. Protected classes covered by this policy include race, color, sex, religion, national origin, ancestry, age, physical or mental disability, sexual orientation, marital status, arrest and court record[2], income assignment for child support, national guard service, uniformed service, breastfeeding, or citizenship status.

The Department of Education expressly prohibits retaliation against anyone who files a complaint of discrimination, participates in complaint proceedings dealing with discrimination, inquires about their rights under discrimination laws, or otherwise opposes acts of discrimination.

The Department of Education shall develop regulations and procedures relating to this policy.

Approved: 09-01-05

[2] Except as permissible under State laws.

E-B at 187.

2. State of Hawaii Department of Education Employee and Applicant Non-Discrimination: Regulations [12/7/2005]

PURPOSE
The purpose of the Employee and Applicant Non-Discrimination Policy is to foster respect and enhance the morale and efficiency of Department of Education employees. ...

To that end, the Department of Education hereby promulgates these regulations in order to provide sufficient notice and information to its employees and applicants.

SCOPE
All employees and applicants for employment, including, but not limited to, casual hires, classified, and certificated employees.

DEFINITIONS
Discriminatory harassment under this policy is defined as unwelcome behavior based on a person's protected class which is sufficiently severe or pervasive and has the purpose or effect of either unreasonably interfering with the person's work performance or creating an intimidating, hostile, or offensive work environment.

Some examples of discriminatory harassment under this policy include, but are not limited to the following:

- Offensive or derogatory comments based on a protected class.
- Explicit anecdotes, questions or jokes based on a protected class.

...

RESPONSIBILITIES
Civil Rights Compliance Office

The Department of Education, Office of the Superintendent's Civil Rights Compliance Office shall coordinate this policy.

Administrators, Managers, and Supervisors
Administrators, managers, and supervisors, including, but not limited to, assistant superintendents, school administrators, principals, vice-principals, directors and other management personnel are responsible for maintaining a workplace free of harassment and discrimination.

Administrators, managers, and supervisors who witness or receive report(s) of harassment shall take immediate and appropriate action

reasonably calculated to end the harassment. Administrators, managers, and supervisors shall initiate an immediate investigation through the Civil Rights Compliance Office on complaints stemming from allegations that fall under this policy.

Administrators, managers, and supervisors should immediately consult with the Civil Rights Compliance Office for appropriate action once they knew about a potential discriminatory situation.
...

Employees
While at work and during work-related functions, employees have a responsibility to refrain from engaging in any behavior that violates this policy.

Employees who experience or observe any job-related harassment or believe they have been treated in a discriminatory manner are expected to report the incident(s to management in order to correct and prevent harassment.
...

VIOLATION OF PLOCY
Employees who violate this policy shall be subjected to disciplinary action reasonably calculated to stop the harassment in accordance with applicable Department of education policies, regulations, rules, collective bargaining agreement, and other Department of Education and civil service laws, rules, and regulations.
...

U-9, Exhibit 4.

3. **Board of Education Policy # 1200-1.19: Employee Electronic Communication and Technology Use and Access Policy**

Access to the Internet, personally identifiable information, and use of Department-issued technology such as cellular phones, wireless devices, computers, and software are required in order to support the efforts of the Department of Education (Department) generally by enhancing educational research activities, providing a conduit for transmitting and receiving information, and for sharing information about the Department. Internet use also provides access to appropriate national and international resources.

It the Department's policy that all employees shall limit access to the Internet and use of Department-issued technology such as cellular

phones, wireless devices, computers, and software for business transactions and business communications necessary to conduct the work of their job as a Department employee. Furthermore, it is the Board of Education's policy that all employees shall adhere to all applicable laws, rules, and regulations with respect to confidentiality of personally identifiable information. Use other than that provided for by this policy may be considered a misuse of Department assets or resources. Any employee found to be in violation of this policy may be disciplined in accordance with applicable Department policies, regulations, rules, or collective bargaining agreement, or other Department civil service laws, rules or regulations.

The Superintendent of Education shall develop standards of practice to implement this policy.

Approved: 11/19/09

E-B-243.

4. **Network Support Services Branch: Acceptable User Guidelines – Department of Education Network and Internet Servers**

...

2. Users are responsible for their account(s). Users should make appropriate use of the system and network-provided protection features and take precautions against others obtaining access to their computer resources. Individual password security is the responsibility of each user.

...

7. Users are prohibited from sending unsolicited, commercial, and/or offensive email.

8. Users are prohibited from using any form of electronic media (ex. Email or web pages) to harass intimidate or otherwise annoy another person/group.

...

21. The Department of Education reserves the right to investigate and monitor any accounts, servers, or machines suspected of policy violation.

...

E-B-245.

5. **April 9, 2012 Memorandum from**
DOE Superintendent Matayoshi to All Employees:
Use of Department of Education Computers and Electronic Systems

This memo supersedes the previous "Use of Department of Education Computers and Electronic Systems' memo dated October 5, 2009.

Please be advised that Department of Education (DOE) property, including electronic devices, computerized systems, electronic portals, and internet use and/or transmissions may only be used for work-related purposes. Any use that is not related to work may be a violation of departmental policies and procedures.

Should an employee, through an investigation, be found to have inappropriately used departmental property, time, portals, or systems, that employee may be subject to discipline up to and including termination in accordance with applicable DOE policies, regulations, rules, collective bargaining agreements, and other DOE and civil service laws, rules and regulations.

If there are any questions, please contact Mel DeCasa, DP Specialist if the Office of Information Technology Services, via Lotus Notes or at 586-3222.

Thank you.

E-B-248.

6. **July 26, 2011 Memorandum from**
FHS Principal Al Carganilla to All Farrington Staff:
Use of DOE email – Lotus Notes

Lotus Notes is a great tool for documenting meetings and department initiatives and for collaborating on issues. This tool also comes with the expectation that we will use it for professional purposes with appropriate etiquette.

Superintendent Matayoshi sent a memo (October 5, 2009) advising us that, *"Department of Education property, including electronic devices, computerized systems, electronic portals, and internet use/transmissions may only be used for work-related purposes."*

For practical purposes at our level, we should remember that we are not allowed to use our Lotus Account to forward "chain" emails or jokes, or to discuss or promote politicians or political or personal causes, or to

promote or express religious views. We need to have personal account for our email that is not related to our work.

...

E-A-24.

C. The Seven Tests for just and proper cause.

With respect to the criteria for discipline for just and proper cause, the Union and Employer agree that the applicable guidelines to determine whether the Employer had just and proper cause for terminating Grievant are the seven criterial questions ("Seven Tests") enunciated by Arbitrator Carroll R. Daugherty in Enterprise Wire Company, 46 LA 359, 362-365 (1966). Union's Post-Hearing Brief at 6; Employer's Post-Hearing Brief at 14.

The Arbitrator agrees that the Seven Tests are applicable here. The Seven Tests, as stated by Arbitrator Daugherty, are:

1. Did the employer give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

2. Was the company's rule or order reasonably related to (a) the orderly, efficient, and safe operation of the company's business, and (b) the performance that the company might properly expect of the employee?

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Was the company's investigation conducted fairly and objectively?

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

In Enterprise Wire, Arbitrator Dougherty included "Notes" discussing the application of the above tests in various contexts. 46 LA at 363. Where appropriate, these Notes are applied below.

C. Burden and Quantum of Proof.

The burden of proof in this discharge case is on the Employer. *Elkouri & Elkouri: How Arbitration Works,* at 15-25 (8th Ed., 2016). The Employer must establish that the Employer's termination of Grievant was for proper cause. Article 8.A of the CBA. The quantum of proof required to support the Employer's decision to discharge Grievant is the preponderance of the evidence. *Elkouri & Elkouri,* supra, at 15-27.

D. December 28, 2012: the "Defining Moment."

The Union states that it is the Employer's burden to prove that it had "proper cause" to terminate Grievant as of December 28, 2012, the implementation date of the of the termination decision stated in the Employer's December 17, 2012 letter notifying Grievant of her termination. U-15.

The Union states the "defining moment" is December 28, 2012, because that is the date the Employer must have "proper cause" to discipline Grievant pursuant to Article 8.A of the CBA. The Union also points out that Arbitrator Daugherty explained that his Seven Tests for Just Cause: "are to be applied to the employer's conduct in

making his disciplinary decision before same has been processed through the grievance procedure to arbitration." The Union states that this Arbitrator is therefore "compelled to only consider the evidence provided by the Employer existing and considered by" the Employer as of December 28, 2012. Union Post-Hearing Brief at 14-16.

VII. Application of the Seven Criterial Questions for just and proper cause.

1. Did the Employer give Grievant forewarning or foreknowledge of the possible or probable disciplinary consequences of Grievant's conduct?

a. Employer's Position.

The Employer states the answer to this question is "yes."

The Employer states it provided Grievant, at the beginning of the school year meeting and through the Opening of School Year Packet, with notice and forewarning of the possible disciplinary consequences for her conduct. Specifically, Employer states Grievant received notice and forewarning of the following four applicable policies and procedures:

- Board of Education Policy # 1110-11: Department of Education Applicant and Employee Non-Discrimination Policy, which states the DOE strictly prohibits any form of discrimination, including harassment based on a person's membership in a protected class. E-B at 187.

- Board of Education Policy # 1200-1.19: Employee Electronic Communication and Technology Use and Access Policy, which:

  (1) advises all employees shall limit access to the Internet and use of Department-issued technology for business transactions and business communications necessary to conduct the work of their job as a Department employee; and

  (2) forewarns that any employee found to be in violation of this policy may be disciplined in accordance with applicable Department policies,

regulations, rules, or collective bargaining agreement, or other Department civil service laws, rules or regulations. E-B-243.

- Network Support Services Branch: Acceptable User Guidelines – Department of Education Network and Internet Servers, which:

  (1) informs users they are responsible for their account and take precautions against others obtaining access to their computer resources;

  (2) prohibits users from sending unsolicited, commercial, and/or offensive email;

  (3) prohibits users from using any form of electronic media (ex. email or web pages) to harass intimidate or otherwise annoy another person/group; and

  (4) notifies users that the DOE reserves the right to investigate and monitor any accounts, servers, or machines suspected of policy violation. E-B-245.

- April 9, 2012 Memorandum from DOE Superintendent to All Employees: Use of Department of Education Computers and Electronic Systems, which:

  (1) advises employees that DOE property, including its electronic devices, computerized systems, electronic portals, and internet use and/or transmissions are to be used for work-related purposes only, and that use not related to work may be a violation of departmental policies and procedures; and

  (2) forewarns employees that should an employee, as a result of an investigation, be found to have inappropriately used DOE property, time, portals, or systems, that employee may be subject to discipline up to and including termination. E-B-248.

The Employer states that at the start of every school year, all DOE employees are required to attend a beginning of the school year meeting. At this meeting, the "Opening of the School Year Packet" ("OSY Packet") is distributed to all DOE employees. E-D-1-23. The OSY Packet contains copies of BOE policies and DOE regulations, informs employees of DOE's expectations for the coming year, advises employees that they are required to follow all BOE policies and DOE regulations, and

forewarns employees that failure to comply with such policies and regulations may subject them to disciplinary action.

The Employer states that for each of school years 2010-2011, 2011-2012, and 2012-2013 (the period during which Grievant wrote the emails at issue), Grievant signed the attendance sheet indicating she attended each Opening School Year meeting, she received and understood the materials presented (i.e., the OSY Packet for that year), and she had the opportunity to ask questions. E-A-026 (2010-2011 SY); E-A-028 (2011-2012 SY); E-A-021 (2012-2013 SY); TR.at 463-466. Among the BOE policies and DOE rules discussed were:

- 2010-2011: Bullying and harassment issues; and Civil Rights Complaint Procedure (E-A-027).
- 2011-2012: Internet Policy and Use of DOE Computers (E-A-029). At the July 27, 2011 Opening School Year meeting, Principal Carganilla discussed BOE Policy # 1110-11 (DOE strictly prohibits any form of discrimination, including harassment based on a person's membership in a protected class), and the disciplinary consequences for the failure to do so. Tr. at 37. Grievant did not seek clarification of the non-discrimination policy. Tr. at 39.

Principal Carganilla also presented and discussed his July 26, 2011 Memorandum to All Farrington Staff regarding "Use of DOE email – Lotus Notes," which referenced DOE Superintendent Matayoshi's October 5, 2009 memo advising: *"Department of Education property, including electronic devices, computerized systems, electronic portals, and internet use/transmissions may only be used for work-related purposes."* E-A-24; E-D-0222; Tr. at 22-25.

- 2012-2013: Internet/Technology Policies, Use of Computers, Network Service – Acceptable Use, and Non-discrimination (E-A-022). At the July 25, 2012 Opening School Year meeting, Vice Principal Ishihara discussed the Network Support Services Branch: Acceptable User Guidelines – Department of Education Network and Internet Servers, explaining, among other things, that every employee is responsible for the communication generated through their email account. E-B-245-246; Tr.at at 106.

Vice Principal Ishihara also discussed DOE Superintendent Matayoshi's updated April 9, 2012 memo, which reiterated that DOE equipment, computers, and the network may only be used for work-related purposes. E-B-248; Tr. at 108.

Vice Principal Ishihara testified about the purpose of BOE Policy # 1200-1.19: Employee Electronic Communication and Technology Use and Access Policy, which is that all employees shall limit access to the Internet and use of Department-issued technology for business transactions and business communications necessary to conduct the work of their job as a Department employee. E-B-243; Tr. at 1113.

b. Union's Position.

The Union argues that the answer to this question is "no." The Union states:

- The Employer did not establish that Grievant had prior notice of the type of conduct that would lead to discipline. Union's Post-Hearing Brief at 17.

- The Employer did not prove that Grievant had a "clear understanding" of the content of the Opening School Year Packet, which contained, among other BOE/DOE policies and regulations, Policy #1110-11 referred to in the December 17, 2012 termination letter.

- The Union states BOE Policy # 1110-11 may not be applicable to the circumstances in this case based on the Union's following characterization of the "situation":

> [W]here the victim has, somehow unexplained, invaded the confidential and private email account of Ms. Asato, against all precautions implicit in the DOE's email system, to expose herself to the private thinking, discussion and beliefs of Ms. Asato, and still claim a violation [of] BOE Policy #1110-11, through no fault of Ms. Asato, has not been presented by the Employer/DOE/State of Hawaii. And the question of whether such BOE Policy #1110-11 supercedes Ms. Asato's right to freedom of speech protected by the First Amendment to the U.S. Constitution, in her emails to only one other individual, who is not a victim in this case, has also not been presented by the employer/DOE/State of Hawaii.

Union's Post Hearing Brief at 22.

- The DOE Employee Non-Discrimination Regulations provide in part:

> Discriminatory harassment under this policy is defined as unwelcome behavior based on a person's protected class which is sufficiently severe or pervasive and has the purpose or effect of either unreasonably interfering with the person's work performance or creating an intimidating, hostile, or offensive work environment.
>
> Some examples of discriminatory harassment under this policy include, but are not limited to the following:
>
> - Offensive or derogatory comments based on a protected class.
> - Explicit anecdotes, questions or jokes based on a protected class.
>
> ...
>
> Persons who believe they have been subject to discriminatory harassment may use the Department of Education, state, or federal avenues.as applicable and appropriate.

E-B-188-189.

- The Union states that the definition of "discriminatory harassment" and the accompanying language in the DOE Regulation implementing BOE Policy # 1110-11 "implies some kind of direct action, or proscribed conduct, by one employee to another"

and the examples given "necessitates direct action" where the complainant is "presumed to be present." The Union states:

> Clearly, the policy prohibits Ms. Asato from engaging in an act or conduct, that is discriminatory, or harassing, as defined by the policy and its regulation, of another (victim), that is unwelcomed by the victim, of a sufficiently severe or pervasive nature, and has the purpose or effect of either of either unreasonably interfering with the person's work performance or creating an intimidating, hostile, or offensive work environment.
>
> On filing a complaint, the regulation states a person who believes that they have been subject to discriminatory harassment, which implies some kind of direct action, or proscribed conduct, by one employee to another. The regulation also provides examples of "discriminatory harassment", which by the described examples necessitates direct action, of which the complainant is presumed to be present.

Union's Post Hearing Brief at 22.

- The Union states the circumstances of this case may present questions of BOE Policy # 1110-11's ambiguity, and the policy cannot reasonably be extended to include a situation, like that presented here, implying that statements of belief, or "talking stink" about others constitutes a violation. The Union states the Employer never provided "notice" of this implied extension to Grievant.

- The Union states the Arbitrator must find BOE Policy #1110-11 contains "grand and vague statements" prohibiting discrimination, but lacks specificity as to what conduct is actually prohibited in order to conclude Grievant had proper due process notice under the first criterial question for juts cause. Union's Post Hearing Brief at 24.

- The Union states that because the Employer did not provide actual notice to Grievant of what conduct would lead to discipline, the Employer failed to satisfy the First Criterial Question for Just Cause. Union's Post-Hearing Brief at 24.

c. Arbitrator's Determination.

The arbitrator agrees with the Employer, and disagrees with the Union, regarding the first criterial test. The Employer gave Grievant forewarning of: (1) the BOE and DOE's applicable policies, rules, and procedures; and (2) the possible or probable disciplinary consequences for violating the BOE/DOE policies and rules.

The forewarnings to Grievant providing her with foreknowledge of the applicable rules and possible disciplinary consequences of her conduct include:

1. Grievant's DOE employment history.

- Grievant commenced her employment as an OA III at FHS in March 2005. E-C-60. Grievant therefore was a DOE employee at FHS for approximately 7½ years, from 2005 to 2012, before the August 16, 2012 discovery of her discriminatory emails. E-B-005.

- As an experienced DOE employee: (1) Grievant was required to know and comply with DOE's rules, policies, and procedures; and (2) Grievant knew or should have known of the possible penalties for violating BOE/DOE policies and work rules.

2. Opening of the School Year Packets.

Grievant, at the mandatory meeting at the beginning of the school year and through the Opening of School Year Packets, was provided with notice and forewarning of the possible disciplinary consequences for her conduct. At this meeting, the "Opening of the School Year Packet" ("OSY Packet") is distributed to all DOE employees. E-D-1-23.

For each of school years 2010-2011, 2011-2012, and 2012-2013 (the period during which Grievant wrote the emails at issue), Grievant signed the attendance sheet indicating she attended each Opening School Year meeting, she received and

understood the materials presented (i.e., the OSY Packet for that year), and she had the opportunity to ask questions. E-A-026 (2010-2011 SY); E-A-028 (2011-2012 SY); E-A-021 (2012-2013 SY); TR.at 463-466.

The OSY Packet contains copies of BOE policies and DOE regulations, informs employees of DOE's expectations for the coming year, advises employees that they are required to follow all BOE policies and DOE regulations, and forewarns employees that failure to comply with such policies and regulations may subject them to disciplinary action.

The Opening School Year Packet for each of SY 2012-2013, SY 2011-2012, and SY 2010-2011 commences with the DOE Superintendent's express instructions to follow BOE and DOE policies and regulations, and that failure to do so may result in disciplinary action, up to and including termination. For example, Superintendent Matayoshi's May 15, 2012 Memo to all DOE employees ("5/15/12 Memo"), states:

> As we embark upon the beginning of another school year, it is very important to inform all our employees of the Department's expectations. Please be advised that as an employee of the Department of Education ("DOE"), you are required to follow all Board of Education ("BOE") policies; as well as DOE procedures and regulations, including guidelines and profiles. Failure to do so may subject you to disciplinary action. Such action will be taken in accordance with BOE policies, regulations, rules, collective bargaining agreements, and other laws, rules, and regulations.
>
> The documents included in this packet represent some areas of particular concern. You are required to review all of the documents included in this packet in addition to following all BOE policies as well as DOE procedures and regulations.
>
> BOE policies can be found online at http://lilinote.kl2.hi.us/STATE/BOE/POL1.NSF. DOE supervisors should allow all employees the opportunity to review BOE policies upon the start of the school year or upon employment. ...

Failure to comply with BOE policies may result in disciplinary action, up to and including termination.

If you have any questions regrding information included in the packet, please see your individual school administrator ...

E-D-003.

SY 2012-2013 Opening School Year Meeting

The SY 2012-2013 Opening School Year Packet contains BOE Policy # 1110-11, which provides the DOE strictly prohibits any form of discrimination, including harassment based on a person's membership in a protected class, and the DOE shall develop regulations and procedures relating to this policy:

Board of Education Policy # 1110-11:
Department of Education Applicant and Employee Non-Discrimination Policy

The Department of Education strictly prohibits any form of discrimination, including harassment based on a person's membership in a protected class. Protected classes covered by this policy include race, color, sex, religion, national origin, ancestry, age, physical or mental disability, sexual orientation, marital status, arrest and court record[3], income assignment for child support, national guard service, uniformed service, breastfeeding, or citizenship status.

The Department of Education expressly prohibits retaliation against anyone who files a complaint of discrimination, participates in complaint proceedings dealing with discrimination, inquires about their rights under discrimination laws, or otherwise opposes acts of discrimination.

The Department of Education shall develop regulations and procedures relating to this policy.

Approved: 09-01-05

E-B at 187.

[3] Except as permissible under State laws.

The DOE Employee Non-Discrimination Regulations implementing BOE Policy #1110-11, among other things: define "discriminatory harassment;" warn DOE employees that while at work, they have a responsibility to refrain from engaging in any behavior that violates this policy; and further warn that Employees who violate this policy shall be subjected to disciplinary action reasonably calculated to stop the harassment. E-B-188-189.

The SY 2012-2013 Opening School Year Packet also contained: BOE Policy # 1200-1.19 (Employee Electronic Communication and Technology Use and Access Policy); the Network Support Services Branch Acceptable User Guidelines – Department of Education Network and Internet Servers; and the April 9, 2012 Memorandum from DOE Superintendent to All Employees: Use of Department of Education Computers and Electronic Systems:

- BOE Policy # 1200-1.19: Employee Electronic Communication and Technology Use and Access Policy, which:

  (1) advises all employees shall limit access to the Internet and use of Department-issued technology for business transactions and business communications necessary to conduct the work of their job as a Department employee; and

  (2) forewarns that any employee found to be in violation of this policy may be disciplined in accordance with applicable Department policies, regulations, rules, or collective bargaining agreement, or other Department civil service laws, rules or regulations. E-B-243.

- Network Support Services Branch: Acceptable User Guidelines – Department of Education Network and Internet Servers, which:

  (1) informs users they are responsible for their account and take precautions against others obtaining access to their computer resources;

  (2) prohibits users from sending unsolicited, commercial, and/or offensive email;

(3) prohibits users from using any form of electronic media (ex. email or web pages) to harass intimidate or otherwise annoy another person/group; and

(4) notifies users that the DOE reserves the right to investigate and monitor any accounts, servers, or machines suspected of policy violation. E-B-245.

- April 9, 2012 Memorandum from DOE Superintendent to All Employees: Use of Department of Education Computers and Electronic Systems, which:

  (1) advises employees that DOE property, including its electronic devices, computerized systems, electronic portals, and internet use and/or transmissions are to be used for work-related purposes only, and that use not related to work may be a violation of departmental policies and procedures; and

  (2) forewarns employees that should an employee, as a result of an investigation, be found to have inappropriately used DOE property, time, portals, or systems, that employee may be subject to discipline up to and including termination. E-B-248.

Vice Principal Ishihara, who is in charge of technology at FHS, testified that at the July 25, 2012 Opening School Year meeting, discussed the Network Support Services Branch: Acceptable User Guidelines – Department of Education Network and Internet Servers, explaining, among other things, that every employee is responsible for the communication generated through their email account. E-B-245-246; Tr.at at 106. 2012-2013: Internet/Technology Policies, Use of Computers, Network Service – Acceptable Use, and Non-discrimination (E-A-022).

Vice Principal Ishihara testified he also discussed DOE Superintendent Matayoshi's updated April 9, 2012 memo, which reiterated that DOE equipment, computers, and the network may only be used for work-related purposes. E-B-248; Tr. at 108.

Vice Principal Ishihara testified about the purpose of BOE Policy # 1200-1.19: Employee Electronic Communication and Technology Use and Access Policy, which is that all employees shall limit access to the Internet and use of Department-issued technology for business transactions and business communications necessary to conduct the work of their job as a Department employee. E-B-243; Tr. at 1113.

SY 2011-2012 Opening School Year Meeting

The SY 2011-2012 Opening School Year Packet contained the October 5, 2009 DOE Supervisor's Memo to all employees, which, like the Superintendent's April 9, 2012 Memo, warns that the DOE's email systems, including Lotus Notes, may only be used for work-related purposes. E-D-015.

Principal Carganilla testified that at the July 27, 2011 Opening School Year meeting, he discussed BOE Policy # 1110-11 (DOE strictly prohibits any form of discrimination, including harassment based on a person's membership in a protected class), and the disciplinary consequences for the failure to do so. Tr. at 37. Grievant did not seek clarification of the non-discrimination policy. Tr. at 39.

Principal Carganilla testified he also presented and discussed his July 26, 2011 Memorandum to All Farrington Staff regarding "Use of DOE email – Lotus Notes," which referenced DOE Superintendent Matayoshi's October 5, 2009 memo advising: *"Department of Education property, including electronic devices, computerized systems, electronic portals, and internet use/transmissions may only be used for work-related purposes."* E-A-24; E-D-0222; Tr. at 22-25.

Together, the above Opening School Day Packets and presentations placed Grievant on notice of the above BOE and DOE policies, rules, and regulations, and the possible disciplinary consequences for failing to follow them.

3. Grievant's December 3, 2012 written statement at Post Investigation Meeting.

On December 3, 2012, during the Post-Investigation Meeting, Grievant submitted a written and signed statement in support of her defense, which was made part of the grievance record. Tr. at 501-502. Grievant's 12/3/12 written statement stated in part:

> I admit I made a serious mistake and I know I violated policies and I misused DOE property. ...
>
> These emails were "private conversations" between a friend to another friend used to express our feelings, ... This was the wrong venue to voice my feelings and bad judgment on my part.
>
> Although this was done on school property with rules and regulations and policies in place, since I have access to computers, I routinely communicated to this friend who I felt listened to my problems. ...
>
> I accept full responsibility for my actions, and again, apologize to anyone I hurt or offended. ...
>
> Policies state DOE reserves the right to investigate and monitor any machine (computers) of policy violation I don't believe any malicious or suspicious activities took place on computer usage. I readily admit that I did not adhere to all applicable rules, regulations, laws and I know and admit I abused and violated policies.
>
> But, does that give Melinda Gardner another employee like myself authorization to go into my computer? Although nothing is confidential on DOE or any office setting, work place, and computers are subject to monitoring, inspection, there is such a thing as "private, confidential as far as computer usage. ... I admit these emails are offensive, derogatory, discriminatory and hurtful to others. I have been at Farrington 7 and a half years, and only now, upon discovery of emails she says my conduct is unwelcome and racial slurs and sexual references toward co-workers affected her.

> ... I understand the policies in place but the emails weren't directed to Melinda – I misused the computer and communicated with another person thinking it was a private conversation and "secure". Sooner or later my E-mails would have been "discovered", but I still question her access to my computer and she lodging this complaint. ...
>
> I feel the co-workers also contributed to this hostile environment by excluding me, picking on me, being ganged up on, "harassed", etc. as stated in my emails. I did state that it affected me by my hurt feelings, and it did bother and upset me. I also feel the supervisors contributed to this hostile environment when I reported my complaints and issues to them and they ignored the problems and let the problems continue and fester.

E-B-051-053. Grievant's written December 3, 2012 testimony demonstrates she knew, understood, and violated the subject policies. Grievant further admitted: "Sooner or later my E-mails would have been "discovered"." In short, Grievant admits she had prior notice of: the BOE and DOE's applicable policies, rules, and procedures.

Although the Investigative Report did not explicitly address proof of notice to Grievant of the above policies and regulations, this does not alter the underlying fact that Grievant had prior notice of what conduct was prohibited and the possible disciplinary consequence for engaging in such conduct.

The arbitrator respectfully disagrees with the Union's position that BOE Policy #1110-11 was unreasonably interpreted and applied in this case. The DOE Employee Non-Discrimination Regulations provide in part:

> Discriminatory harassment under this policy is defined as unwelcome behavior based on a person's protected class which is sufficiently severe or pervasive and has **the purpose or effect** of either unreasonably interfering with the person's work performance or creating an intimidating, hostile, or offensive work environment.

E-B-188. Emphasis added.

The above DOE Regulation accompanying and implementing BOE Policy #1110-11 distinguishes between the "purpose" and the "effect" of the discriminatory conduct.

Grievant and the Union urge that Grievant did not intend her co-workers to read her discriminatory emails.[4] In other words, Grievant's "purpose" may not have been to communicate her discriminatory emails directly to her co-workers, but only to her friend, Brett Yoshizumi. Even assuming, however, that Grievant didn't intend for her co-workers to find out, the "effect" on her co-workers when they did discover her emails is what counts in this case.

As stated in Ms. Gardner's August 16, 2012 complaint, when she read the "flips" email:

> I was horrified, hurt, and upset with the contents of the email. I saw racial comments about my co-workers Kathy and Stephanie, and offensive comments about myself. ...
>
> At this moment, I don't feel I can work in the same office as Valerie Asato. Knowing how she feels about me and our co-workers, brings up feelings of anger.

E-B-67. Similarly, SASA Fujii's August 16, 2012 written statement reported:

> The email "Flips" was opened and I read the contents of the message. I was disturbed to read a "hate email" attacking her coworkers with racial slurs and sexual references.

E-B-069. Grievant's co-workers Katherine Badua and Stephanie Silva, who are Filipino, were present when Grievant's computer "lit up," and saw the "flips" email.

Investigator Carkin testified it doesn't matter that Grievant did not intend to harass or intimidate co-workers, because it is the effect on the co-workers that counts once they had learned of Grievant's emails:

> [I]t didn't matter if it was face to face or not, [the co-workers] did see the emails. They felt threatened, and it was a hostile work environment when you have an employee wishing death on other employees, or death to

---

[4] Grievant, however, in her written December 3, 2012 testimony, admitted: "Sooner or later my E-mails would have been "discovered"." E-B-051-053.

> students, at that point [the work environment] becomes hostile, uncomfortable, offensive to them. So whether or not that's directly communicated, if you find out later that a coworker is maybe harboring those feelings against you, that's cause for concern.

Tr. at 207-208.

Grievant admits the harmful effect of her emails. In her written December 3, 2012 testimony, Grievant stated: "I admit these emails are offensive, derogatory, discriminatory and hurtful to others." E-B-051-053.

In short, the "effect" of Grievant's emails unreasonably interfered with the co-workers' work performance. Ms. Gardner stated: "I don't feel I can work in the same office as Valerie Asato." In addition, Grievant's emails created an intimidating, hostile, or offensive work environment. Ms. Gardner stated: "I was horrified, hurt, and upset with the contents of the email. ... Knowing how she feels about me and our co-workers, brings up feelings of anger."

Because of the above effect of Grievant's discriminatory emails, Grievant's conduct constituted a violation of BOR Policy #1110-11, regardless of her purported purpose in sending the emails.

The arbitrator also respectfully disagrees with the Union's characterizations regarding the discovery of Grievant's emails. The Union alleges Ms. Gardner "invaded the confidential and private email account of Ms. Asato." Ms. Asato's Lotus Notes' email account was not her property, it was DOE's property. BOE Policy # 1200-1.19 (Employee Electronic Communication and Technology Use and Access Policy) provides all employees shall limit access to the Internet and use of Department-issued technology to conduct the work of their job as a DOE employee. E-B-243.

The April 9, 2012 Memorandum from DOE Superintendent to All Employees on the "Use of Department of Education Computers and Electronic Systems" advised employees that DOE property, including its electronic devices, computerized systems, electronic portals, and internet use and/or transmissions are to be used for work-related purposes only, and that use not related to work may be a violation of departmental policies and procedures. E-B-248.

The Union alleges Ms. Gardner "invaded" Grievant's email account and that Ms. Gardner was an "eavesdropper" for reading Grievant's "Flips" email. The arbitrator respectfully disagrees. Grievant, and not Ms. Gardner or any other co-worker, is solely responsible for taking precautions against others obtaining access to Grievant's email account. The Network Support Services Branch: Acceptable User Guidelines – Department of Education Network and Internet Servers explicitly provide:

> 2. Users are responsible for their account(s). Users should make appropriate use of the system and network-provided protection features and take precautions against others obtaining access to their computer resources. Individual password security is the responsibility of each user.
>
> ...
>
> 7. Users are prohibited from sending unsolicited, commercial, and/or offensive email.
>
> 8. Users are prohibited from using any form of electronic media (ex. Email or web pages) to harass intimidate or otherwise annoy another person/group.
>
> ...
>
> 21. The Department of Education reserves the right to investigate and monitor any accounts, servers, or machines suspected of policy violation.

E-B-245. Grievant admits her Lotus Notes account is DOE property. In her December 3, 2012 written testimony, Grievant stated in pertinent part:

- "I know I violated policies and I misused DOE property."
- "... [T]his was done on school property with rules and regulations and policies in place, ..."
- ... [N]othing is confidential on DOE or any office setting, work place, and computers are subject to monitoring, inspection ...
- "Policies state DOE reserves the right to investigate and monitor any machine (computers) of policy violation"
- "Sooner or later my E-mails would have been "discovered"."

E-B-051-053.

Moreover, Grievant created her own passwords for her DOE computer and her Lotus Notes account. Tr. at 503-504. There is no arbitral evidence that Ms. Gardner or any other DOE coworker had Grievant's two self-created passwords.

Further, based on the arbitral record, there is substantial evidence that Grievant's co-workers did not wrongfully invade Grievant's privacy when they viewed her emails on her DOE computer monitor. Ms. Silva testified that on August 16, 2012, she, Ms. Gardner, and Ms. Padua were cleaning out a storage cabinet by Grievant's desk in the FHS business office. Ms. Silva testified that when she plopped 3 template boxes onto Grievant's desk, Grievant's computer monitor "lit up:"

> The light, it came on, it lit up, and so Melinda said, "Oh, my God, she didn't turn it off." So she went around, and she saw ... an email that it went open up to. ... Then it was another "Oh, my God, look what she wrote." ... Kathy and I went to the other side of the desk. I scanned the email. ... She had written to another clerk in another office, and she was discussing Flips. ... Valerie said Flips are greedy, they're selfish, they're stupid, and ... they don't have class.

Tr. at 409-411. Vice Principal Ishihara, whose major responsibility is overseeing all technology at FHS [Tr. at 92] testified:

> Q. ...[Y]ou testified a little while ago that the office clerks told you they were moving some things and placed [them] ... on Valerie's work station ... which cause the monitor to turn on. Can you tell me, based on your experience in computer technology, the school network that connects the computers, did that mean anything to you when you heard those facts?
>
> A. That kind of stuff would not have surprised me.
>
> Q. Why not?
>
> A. Because back then, the technology, we weren't really into wireless, computers were hard wired and had a wired mouse, and back then the mouse more likely than not had a ball in it ...and at that time any movement of the mouse would cause the display to activate because that's how the operating systems were programmed at that time.
>
> To turn on the display from a screen-saver mode – and sometimes it's not even screen-saver mode, it could be if no screen saver was configured, it would be a black screen and it would look like it's off, but any movement of that mouse, even the vibration of the table by putting something on the table would activate the screen. So knowing that, when they told me they put something on the table and the screen turned on, I thought it was totally plausible.
>
> Q. ... [C]ould that have happened, the screen going on, based on vibration to the mouse if the computer was off?

A. No.

Tr. at 101-102.

Q. [O]nce a computer is on and it might be in a sleeping mode,, and the mouse is jiggled ... and the [monitor] comes back on, what would it normally come back on to?

A. That depends. If a person configured it to the Windows log on screen, then the Windows log on screen would come on. If the person never configured it to do that, it would come on to what they were last doing.

Tr. at 138.

The Arbitrator finds there is substantial evidence, well beyond a preponderance, that Grievant simply left her computer and Lotus Notes open at the end of her preceding work day, despite Grievant's testimony that she logs off at the end of each work day. Grievant is not credible in this regard. Accordingly, Ms. Gardner did not "invade" Grievant's email account" to "expose herself" to Grievant's discriminatory opinions and belief. Grievant has the sole responsibility for keeping her email account secure.

Together, Grievant's employment history (including 7½ years as OA III at FHS); the Superintendent's Memos, BOE Policies, and DOE regulations and procedures included in the Opening of the School Year Packet for SY 2012-2013, SY 2011-2012, and SY 2010-2011; Grievant's signature on the attendance list for each of the above Opening Day mandatory meetings, expressly stating she understood the materials presented at the Opening Day meetings; Grievant's arbitration hearing testimony that she received the Opening Day Packets; and Grievant's December 3, 2012 written

testimony at the Post-Investigation Meeting, admitting "I readily admit that I did not adhere to all applicable rules, regulations, laws and I know and admit I abused and violated policies" establish that Grievant had prior notice of: (1) the BOE and DOE's applicable policies, rules, and procedures; and (2) the possible or probable disciplinary consequences for violating the BOE/DOE work rules.

In light of all of the above, the answer to the First Criterial Question 1 is "yes."

2. Were the Employer's rules reasonably related to (a) the orderly, efficient, and safe operation of the DOE, and (b) the performance that the Employer might properly expect of Grievant?

Employer's Position.

The Employer argues that the answer to this question is "yes."

The Employer states that pursuant to Article 5 of the CBA, entitled "Rights of the Employer," the Employer has the right to make reasonable rules and give reasonable orders to manage and direct its work forces and operations:

> The Employer reserves and retains solely and exclusively, all management rights, powers, and authority, including the right of management to manage, control, and direct its work forces and operations except those as may be modified under this Agreement.

The Employer states its policies and procedures on non-discrimination and the use of DOE computers/electronic systems were reasonably related to the orderly, efficient, and safe operation of the DOE and the performance the DOE might properly expect of the employee. Specifically, Employer states:

- BOE Policy # 1110-11 (Employee Non-Discrimination Policy, E-B-187).

Employer's Step 2 decision states it is reasonable to expect Grievant will refrain from discriminating fellow employees. E-A-05. Principal Carganilla testified Grievant was expected to follow BOE Policy # 1110-11. Tr. at 39.

- BOE Policy # 1200-1.19 (Employee Electronic Communication and Technology Use and Access Policy, E-B-243). Employer states it is reasonable to expect Grievant to limit the use of her computer to business transactions and communications necessary to conduct her work as an office assistant. Vice-Principal Ishihara testified Grievant was expected to know and follow BOE Policy # 1200-1.19; Tr. at 39.

- Network Support Services Branch: Acceptable User Guidelines - Department of Education Network and Internet Servers (E-B-245-246). Employer states it is reasonable to expect Grievant to be responsible for the use and security of her email account and to refrain from sending offensive emails. Vice-Principal Ishihara testified Grievant was expected to know and follow the Acceptable User Guidelines for the DOE Network and Internet Servers. TR. at 116.

- April 9, 2012 Memorandum from DOE Superintendent to All Employees: Use of Department of Education Computers and Electronic Systems (E-B-248). Employer states it is reasonable to expect Grievant to use her work computer and DOE's network/internet servers for work-related purposes only. Vice-Principal Ishihara testified Grievant was expected to know and follow the Superintendent's Memo, and to know that any use not related to work may be a violation of departmental policies and procedures, and may be subject to discipline up to and including termination. TR. at 116.

Union's Position.

The Union argues that the answer to this question is "no." The Union states:

- If a reasonable regulation is unreasonably interpreted and applied, the result is the same as if the regulation was unreasonable.

- The Employer's anti-discrimination policy prohibiting discrimination and harassment inherently involves conduct by and between employees. The application of the policy in the absence of any direct conduct by one employee to another is an unreasonable extension of the policy.

- In this case, the Complainant (Ms. Gardner) was not part of the email conversation between Grievant and Yoshizumi, and was never directly sent the emails. The Complainant is an eavesdropper, but complains as if she was the victim of direct discrimination or harassment under BOE Policy # 1110-11 and the Investigative Report. E-B-058-062 (Grievant's private attorney's October 24, 2012 letter to CRCO Director).

- Accordingly, the Employer has failed to satisfy the Second Criterial Question for Just Cause. Union's Post-Hearing Brief at 27.

Arbitrator's Determination.

The arbitrator agrees with the Employer regarding the second criterial question. The BOE/DOE policies, rules and regulations are reasonably related to the orderly, efficient, and safe operation of the DOE, and the performance that the Employer might properly expect of Grievant. It is reasonable to expect Grievant will:

- Refrain from discriminating against fellow employees. BOE Policy # 1110-11 (Employee Non-Discrimination Policy, E-B-187).

- Limit the use of her computer to business transactions and communications necessary to conduct her work as an office assistant. BOE Policy # 1200-1.19 (Employee Electronic Communication and Technology Use and Access Policy, E-B-243).

- Be responsible for the use and security of her email account and to refrain from sending offensive emails. Network Support Services Branch: Acceptable User Guidelines - Department of Education Network and Internet Servers (E-B-245-246).

- Use her work computer and DOE's network/internet servers for work-related purposes only. April 9, 2012 Memorandum from DOE Superintendent to All Employees: Use of Department of Education Computers and Electronic Systems (E-B-248).

With respect to the Union's position that BOE Policy #1110-11 was unreasonably interpreted and applied to Grievant's circumstances in this case, the arbitrator incorporates his finding in Question # 1 above regarding the distinction between "purpose" and "effect" in the DOE Regulations implementing the policy.

With respect to the Union's characterization of Ms. Gradner as an "eavesdropper" of Grievant's emails, the arbitrator incorporates his finding in Question # 1 above regarding the discovery of Grievant's emails.

Accordingly, the arbitrator finds that the answer to the second criterial question is "yes."

3. Did the Employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Employer's Position.

The Employer states that the answer to this question is "yes."

The Employer states it conducted a thorough investigation and found substantial evidence of Grievant's violations before imposing discipline. The Employer states:

- Allison Carkin ("Investigator Carkin"), who began conducting administrative investigations for CRCO in June 2011, was assigned to conduct the investigation for the Employer. Tr. at 175. Investigator Carkin acquired her investigative training via: "on the job" training; the CRCO's investigative manual; and supervision by other employees and investigators at CRCO, including its director, Susan Kitsu. Tr. 176-179, 287. Investigator Carkin had conducted approximately 30 administrative investigations for CRCO when she was assigned to the investigation on Grievant. Tr. at 178.

- Investigator Carkin:

(1) Examined all of Grievant's email messages written over a period of approximately one year and four months, from April 21, 2011 to August 15, 2012 (the day before Grievant's co-workers discovered the "flips" email on Grievant's work computer).

(2) Identified four policies and procedures that may have been violated by Grievant's conduct (BOE Policy # 1110-11, Employee Non-discrimination policy; BOE Policy # 1200-1.19, Employee Electronic Technology Use; DOE Network and Internet Acceptable User Guidelines; DOE Superintendent's Memo on Use of DOE Computers and Electronic Systems.

(3) Formulated 16 allegations collectively representing the various statements or terms used by Grievant in her email messages:

1. Used the term "flips" to describe Filipinos.

2. Said that Filipinos are "lazy, selfish, and greedy people."

3. Stated, "Flips, What are they good for. Absolutely nothing!"

4. Said that she "hate[s] flips."

5. Referred to several co-workers as "flip bitches."

6. Stated she "wanted to transfer to a school where there aren't any flips around."

7. Stated "I know the Chinese suck at games."

8. Stated people from China are "very unsanitary."

9. Stated "the best people to make friends with Japanese people because they are so generous ... Flips are on the cheap side if you ask me and that's why I like Japanese people."

10. Nicknamed a co-worker "WAG... It rhymes with fag and it stands for Wimpy Ass Gay Guy."

11. Referred to one of her co-workers as a "fag."

12. Stated one of her co-workers was "pretty faggish" because "what real guy do you know in a women's job as a secretary?"

13. Referred to her co-worker's mentally challenged son as a "moron."

14. "Cursed" co-workers with terminal cancer, wished their planes crashed when traveling, hoped they get an incurable disease, hoped they have heart attack, wished they get into a fatal car accident, wanted them to contract a flesh eating disease, wanted them to get "robbed and mugged" and "get badly beaten," and/or hoped they died.

15. "Cursed" a student that made a complaint about her and/or wished the student "get beaten to death" for filing the complaint."

16. Stated: "If a student dies from Farrington, then the curse worked and I will assume it was that loser kid that made the complaint."

E-B-002-003.

(4) Prepared and presented an investigative questionnaire for Grievant to answer. E-B-220-230.

(5) Analyzed the 16 allegations to determine whether Grievant's conduct violated those policies and procedures.

(6) Identified specific underlying email messages that corroborated the 16 allegations.

(7) Reviewed Grievant's responses to the investigative questionnaire.

- Investigator Carkin did not conduct face-to-face interviews of witnesses, including Grievant. Tr. at 186. Investigator Carkin testified her questionnaire was specific to the content of Grievant's email messages. Tr. at 187. The content of Grievant's emails were the basis for the investigation. E-B-002. The email messages were submitted to CRCO "through the chain" (the complainant, the SASA, and the principal). The emails spoke for themselves, and Grievant admitted she wrote them. Tr. at 186-187.

- Investigator Carkin's questionnaire (Questions 32 and 33) asked Grievant to provide the names and contact information of witnesses who could support her responses, and whether there was other evidence or information she wished to add looked into. E-B-210. As of October 22, 2012, when Grievant responded to the questionnaire, Grievant had no names or contact information, and no other evidence or information to add. E-B-241.

- Investigator Carkin was a fact-finder, did not participate in the decision-making process, and was not a decision-maker with regard to discipline.

- Investigator Carkin's investigation found there was sufficient evidence to conclude that Grievant's conduct violated all four policies and procedures. E-B- 042-050.

Union's Position.

The Union stated that the answer to this this third criterial question is "no." Union's Post-Hearing Brief at 30. The Union stated:

- The arbitral record confirms an investigation of sorts was conducted, but the Employer presented no information why or how this investigation was sufficient, adequate, timely, thorough or how it satisfies due process concerns.

- The Employer failed to explain how Grievant's limited discussion in emails alone violated BOE Policy #1110-11, as concluded by the investigator. There is no relative connection made between Grievant's conduct in email discussions with none of her coworkers violated BOE Policy #1110-11.

- Because of the inadequacy of the investigative report, Grievant and the Union have been deprived of the ability to respond to DOE's allegation that Grievant violated BOE Policy # 1110-11.

Arbitrator's Determination.

The arbitrator agrees with the Employer regarding the third criterial question.

In Note 1 to Question 3, Arbitrator Daugherty advised that the employee has the right to know with reasonable precision the offense with which he is being charged, so he can defend against the charge:

> Note 1: This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

46 LA at 363.

On August 20, 2012, FHS Principal Alfredo Carganilla wrote Grievant, informing her that an administrative investigation has been initiated on her, based on information that she allegedly made "inappropriate comments/remarks about fellow employees on the school office computer." U-1.

Grievant was provided with reasonable precision the offenses with which she was being charged, so that she could defend the allegations against her, via: the notice to Grievant of the investigation; the Investigator's Questionnaire of Grievant; Grievant's written responses to the Questionnaire; the Investigative Report; the December 3, 2012 Post-Investigation Meeting with CAS Nomiyama; and Grievant's December 3, 2012 written testimony at the Post-Investigation Meeting. In short, the Employer made an effort, via its investigation, to discover whether Grievant did in fact violate a rule or order of management.

The preponderance of the evidence establishes that the Employer, before administering discipline to Grievant, investigated whether Grievant did in fact violate or disobey a rule or order of management, and provided Grievant with reasonably precise knowledge of the offenses with which she was charged, so that she could defend the allegations against her.

Accordingly, the arbitrator finds that the answer to the third criterial question is "yes."

4. Was the Employer's investigation conducted fairly and objectively?

Employer's Position.

The Employer argues that the answer to this question is "yes." the evidence demonstrates Employer conducted an investigation that was fair and objective

The Employer states the following evidence demonstrates Employer conducted an investigation that was fair and objective:

- Notice of Complaint and Investigation: On August 20, 2012, FHS Principal Alfredo Carganilla wrote Grievant, informing her that an administrative investigation has been initiated on her, based on information that she allegedly made "inappropriate comments/remarks about fellow employees on the school office computer," and that she will have the opportunity to respond to the allegations and provide evidence to the investigator. U-1.

- Notice of Leave Pending Investigation: Also on August 20, 2012, Grievant was notified by the CAS that she was placed on Leave Pending Investigation. U-2. From September 19, 2012 until her termination on December 28, 2012, Grievant was on leave with pay pending investigation. U-4; U-15.

- Notification of Complaint by Ms. Gardner against Grievant: On September 20, 2012, CRCO provided Grievant with notice of Ms. Gardner's complaint, CRCO's questionnaire for Grievant, an explanation of the investigatory process, an invitation to meet with CRCO's Director, Susan Kitsu to provide Grievant's perspective on the issues, and a summary of the allegations:

> It has been alleged that you discriminated against Clerk Gardner and fellow co-workers based on their race, national origin, and/or sexual orientation when you made derogatory and/or discriminatory remarks in emails that were passed through the DOE electronic system.

E-B-199-200.

- Notification to Employer that Grievant was represented by a private attorney: On September 26, 2012, attorney Ronald T. Fujiwara informed CRCO that he represented Grievant. E-B-212-213. On October 4, 2012, CRCO produced copies of email messages and applicable policies to Mr. Fujiwara. E-B-218. On October 24, 2012, Grievant, with the assistance of attorney Fujiwara, responded in writing to CRCO's Questionnaire regarding the allegations against her. E-B at 232-241.

- Grievant notified of completion of Final Investigative Report: On November 16, 2012, CRCO Director Susan H. Kitsu wrote Grievant, stating the Final Investigative Report had been submitted to Principal Carganilla. U-10.

- Notice of Post-Investigative Meeting: On November 20, 2012, Grievant was notified of a Post-Investigation Meeting scheduled for December 3, 2012, and that Grievant was entitled to Union representation at the post-investigation meeting. A copy of the Final Investigation Report was enclosed for Grievant's information. U-11.

- Post-Investigation Meeting with Grievant. On December 3, 2012, a Post-Investigation Meeting was conducted with Grievant, Union representative Kevin Nakata, Personnel Regional Officer ("PRO") Fred Yoshinaga, and Acting PRO Lenn Uyeda. E-A-039. The purpose of the Post-Investigative Meeting was to provide Grievant with the opportunity to respond to the Final Investigative Report. At the 12/3/12 meeting, Grievant submitted a written and signed statement in support of her defense, which was made part of the grievance record. The Employer considered Grievant's arguments, including that her derogatory comments were not intended toward anyone specifically, but were merely remarks about people in general. E-A-039. The Employer determined the Union's assertions had no merit. The Employer correctly interpreted that pursuant

to BOE Policy # 1101-11, Grievant's intent was irrelevant because after her email messages were discovered by her co-workers, the impact was the same as if she made the comments to them in person, and Grievant had no privacy interest in email messages composed on her work computer. Tr. at 208.

- Amended Final Investigation Report & Exhibits provided to Grievant: On December 6, 2012, the CAS provided Grievant with a copy of an Amended Final Investigation, which included Grievant's December 3, 2012 written statement, and all the exhibits from the report. Grievant was also notified of another opportunity to respond to it before a final administrative decision was made. U-14.

- Official Letter of Termination: On December 17, 2012, Grievant was notified that she would be discharged from her OA III position, effective December 28, 2012. U-15.

- Step 1 Grievance: On January 14, 2013, the Union filed its Step 1 Grievance challenging Grievant's Termination. U-16.

- Step 2 Grievance: On February 12, 2013, the Union presented its Step 2 Grievance challenging Grievant's termination. The Union stated its understanding that the CAS waived the Step 1 hearing and asked that it be heard at the Step 2 level. U-20.

- Step 2 hearing: On June 30, 2015, the Step 2 meeting was conducted. U-21. Grievant was present and represented by Union Agent Kevin Nakata. E-A-003. The Employer considered the Union's assertion that Ms. Gardner's explanation of accidently opening Grievant's computer screen was unreliable, but determined it had no merit because the Union presented no evidence in support of that assertion. E-A-007.

- Step 2 Decision. On September 24, 2015, the Employer (by and through Don Merwin, the DOE Superintendent's Designated Representative) denied the Step 2 grievance, concluding Grievant was terminated for proper cause, and there were no violations of Articles 3, 4, 8, and 17 of the 03 CBA. E-A-003-008.

- Notice of Arbitration. On October 14, 2015, the Union filed its Notice to Arbitrate. U-22.

The Employer states it provided Grievant with due process at all phases of the investigation in compliance with Article 8.A (Discipline) and 8.G (Discharges and Disciplinary Demotions). The Employer also removed Principal Carganilla from participating in decision-making, insofar as he was a potential witness. Tr. at 27-28.

The Employer states that the above record demonstrates it conducted a fair and objective investigation.

Union's Position.

The Union argues that the answer to this question is "no." Union Post-Hearing Brief at 35. The Union states:

- The Employer's investigation failed to prove the proper application of BOE Policy #1110-11 to the factual circumstances of Grievant's case. There is no evidence that BOE Policy #1110-11 was intended to apply where there was no direct misconduct by Grievant toward any complainant, including Ms. Gardner or Ms. Silva. Union Post-Hearing Brief at 32-33.

- BOE Policy #1110-1 requires, by its own terms, "unwelcomed behavior" which is "sufficiently severe or pervasive" that has the "effect of either of either unreasonably interfering with the person's work performance or creating an intimidating,

hostile, or offensive work environment." The Investigative Report does not assess, with objective data, that Grievant's "misconduct" was "sufficiently severe or pervasive," resulting in (1) unreasonable interference with Ms. Gardner's or Ms. Silva's work performance, or (2) created an "intimidating, hostile, or offensive work environment." The Investigative Report admits to not interviewing a single witness. Tr. at 251-252.

- The Union states Grievant's emails themselves are insufficient to draw the assessments required under BOE Policy #1110-11 of adverse reactions to such emails before the August 16, 2012 date of their discovery. The conclusions reached by the investigator are speculative and presumed in the event Grievant is returned to FHS. Union Post-Hearing Brief at 34.

- The Investigative Report which relied only on Grievant's emails is perfunctory, incomplete, and draws conclusions based on the Investigator's personal opinions and nothing more.

- Accordingly, the Employer has failed to satisfy the Fourth Criterial Question for Just Cause. Union's Post-Hearing Brief at 35.

Arbitrator's Determination.

The arbitrator agrees with the Employer, and disagrees with the Union, regarding the fourth criterial test. The investigation was fair and objective.

As the Arbitrator determined with respect to Criterial Question 3, before administering discipline to Grievant, the Employer provided Grievant with reasonably precise knowledge of the offenses with which she was charged, so that she could defend the allegations against her.

In Note 1 to Question 4, Arbitrator Daugherty advised:

> Note 1: At said investigation the management official may be both "prosecutor" and "judge," but he may not also be a witness against the employee.

46 LA at 364. Here, the investigation was not conducted by an eye witness to the events underlying the charges against Grievant. Investigator Carkin had never met or communicated with Grievant before being assigned to conduct the investigation.

In Note 2 to Question 4, Arbitrator Daugherty stated:

> Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

46 LA at 364. Here, CAS Nomiyama, and not Principal Carganilla nor Investigator Carkin, performed the judicial decision-making role. E-A-038-43. Although Investigator Carkin found that there was substantial evidence to support the 16 allegations against Grievant, she did not make any recommendation regarding discipline. E-B- 001-057; Tr. at 194.

Grievant was afforded due process at all phases of the Employer's investigation prior to being disciplined, consistent with Article 8A (Discipline) and 8G (Discharge and Disciplinary Demotions) of the CBA, as demonstrated by the following:

- On August 20, 2012, FHS Principal Carganilla wrote Grievant, informing her that an administrative investigation has been initiated on her, based on information that she allegedly made "inappropriate comments/remarks about fellow employees on the school office computer," and that she will have the opportunity to respond to the allegations and provide evidence to the investigator. U-1.

- On August 20, 2012, Grievant was notified by the CAS that she was placed on Leave Pending Investigation. U-2. From September 19, 2012 until her

termination on December 28, 2012, Grievant was on leave with pay pending investigation. U-4; U-15.

- The Employer removed Principal Carganilla from participating in decision-making, insofar as he was a potential witness. Tr. at 27-28.

- On September 20, 2012, CRCO provided Grievant with notice of Ms. Gardner's complaint, CRCO's questionnaire for Grievant, an explanation of the investigatory process, an invitation to meet with CRCO's Director, Susan Kitsu to provide Grievant's perspective on the issues, and a summary of the allegations:

> It has been alleged that you discriminated against Clerk Gardner and fellow co-workers based on their race, national origin, and/or sexual orientation when you made derogatory and/or discriminatory remarks in emails that were passed through the DOE electronic system.

E-B-199-200.

- On September 26, 2012, attorney Ronald T. Fujiwara informed CRCO that he represented Grievant. E-B-212-213. On October 4, 2012, CRCO produced copies of email messages and applicable policies to Mr. Fujiwara. E-B-218. On October 24, 2012, Grievant, with the assistance of attorney Fujiwara, responded in writing to CRCO's Questionnaire regarding the allegations against her. E-B at 232-241.

- On November 16, 2012, CRCO Director Susan H. Kitsu wrote Grievant, stating the Final Investigative Report had been submitted to Principal Carganilla. U-10.

- On November 20, 2012, Grievant was notified of a Post-Investigation Meeting scheduled for December 3, 2012, and that Grievant was entitled to Union representation at the post-investigation meeting. A copy of the Final Investigation Report was enclosed for Grievant's information. U-11.

- On December 3, 2012, a Post-Investigation Meeting was conducted with Grievant, Union representative Kevin Nakata, Personnel Regional Officer ("PRO") Fred Yoshinaga, and Acting PRO Lenn Uyeda. E-A-039. The purpose of the Post-Investigative Meeting was to provide Grievant with the opportunity to respond to the Final Investigative Report. At the 12/3/12 meeting, Grievant submitted a written and signed statement in support of her defense, which was made part of the grievance record. The Employer considered Grievant's arguments, including that her derogatory comments were not intended toward anyone specifically, but were merely remarks about people in general. E-A-039. The Employer determined the Union's assertions had no merit. The Employer correctly interpreted that pursuant to BOE Policy # 1101-11, Grievant's intent was irrelevant because after her email messages were discovered by her co-workers, the impact was the same as if she made the comments to them in person, and Grievant had no privacy interest in email messages composed on her work computer. Tr. at 208.

- On December 6, 2012, the CAS provided Grievant with a copy of an Amended Final Investigation, which included Grievant's December 3, 2012 written statement, and all the exhibits from the report. Grievant was also notified of another opportunity to respond to it before a final administrative decision was made. U-14.

- On December 17, 2012, Grievant was notified that she would be discharged from her OA III position, effective December 28, 2012. U-15.

- On January 14, 2013, the Union filed its Step 1 Grievance challenging Grievant's Termination. U-16.

- On February 12, 2013, the Union presented its Step 2 Grievance challenging Grievant's termination. The Union stated its understanding that the CAS waived the Step 1 hearing and asked that it be heard at the Step 2 level. U-20.

- On June 30, 2015, the Step 2 meeting was conducted. U-21. Grievant was present and represented by Union Agent Kevin Nakata. E-A-003. The Employer considered the Union's assertion that Ms. Gardner's explanation of accidently opening Grievant's computer screen was unreliable, but determined it had no merit because the Union presented no evidence in support of that assertion. E-A-007.

- On September 24, 2015, the Employer (by and through Don Merwin, the DOE Superintendent's Designated Representative) denied the Step 2 grievance, concluding Grievant was terminated for proper cause, and there were no violations of Articles 3, 4, 8, and 17 of the 03 CBA. E-A-003-008.

Investigator Carkin testified she did not conduct interviews with Grievant or any other witnesses because the content of Grievant's emails were the basis for the investigation, the emails were presented to CRCO within the chain of custody, and the voluminous emails spoke for themselves. Tr. at 186-187. Notwithstanding the absence of interviews, and based on all of the arbitral record, the Arbitrator finds that Investigator Carkin and CAS Nomiyama were not unfairly biased, and respectively conducted a thorough, fair, and objective process of investigation and decision-making,.

The arbitrator finds that the investigation was conducted fairly and objectively. The answer to Question 4 is a moderate "yes."

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Employer's Position.

The Employer argues that the answer to this question is "yes." The Employer states that there is substantial evidence in the record to support its findings that Grievant committed all the violations for which she was charged.

a. BOE Policy # 1110-11: DOE Employee Non-Discrimination Policy

The Employer first cites BOE Policy # 1110-11, which "strictly prohibits any form of discrimination, including harassment based on a person's membership in a protected class." E-B at 187.

The Employer next cites the DOE's Regulations to BOE Policy # 1110-11 for the definition of "discriminatory harassment" as:

> Discriminatory harassment under this policy is defined as unwelcome behavior based on a person's protected class which is sufficiently severe or pervasive and has the purpose or effect of either unreasonably interfering with the person's work performance or creating an intimidating, hostile, or offensive work environment.
>
> Some examples of discriminatory harassment under this policy include, but are not limited to the following:
>
> - Offensive or derogatory comments based on a protected class.
> - Explicit anecdotes, questions or jokes based on a protected class.

E-B-188.

The Employer states that Investigator Carkin analyzed the 16 allegations regarding Grievant's conduct to determine whether the above four elements of discriminatory harassment were satisfied: (1) the conduct was unwelcome; (2) the conduct was based on a person's protected class; (3) the conduct was sufficiently severe or pervasive; and (4) the conduct interfered with the person's work performance or creating an intimidating, hostile, or offensive work environment.

(1) Conduct was unwelcome. The Employer cites:

- Co-worker Melinda Gardner's August 16, 2012 written complaint stating she "was horrified, hurt, and upset with the contents of the ["Flips"] email," which contained racial comments about her co-workers, and offensive comments about herself. E-B-67.

- Co-worker Stephanie Silva's testimony that Grievant's Flips email shocked her at first, and then made her angry, because she is Filipino-Hawaiian, and "it was as if [Grievant] told it to our face." Tr. at 411-412.

- Vice Principal Ishihara testified that when email becomes public and other recipients get access to it, they can feel the same emotions of feeling bullied and harassed as if the email was directed to them. Tr. at 112.

(2) Protected class. The Employer cites:

- Grievant made numerous statements about her co-workers based on their protected status, such as race, ancestry, physical or mental disability, or sexual orientation. Examples included: Grievant's reference to Filipinos as "lazy, selfish, and greedy people;" referred to several of her co-workers as "flip bitches," referred to a co-worker as a "fag:" referred to a co-worker as "pretty faggish;" nicknamed a co-worker as "WAG" that rhymes with "fag and refers and stands for Wimpy Ass Gay Guy;" and referred to a co-worker's mentally challenged son as a "moron." Grievant testified that "WAG" meant "Wimpy Ass Gay Guy" and referred to SASA Fujii. Tr. 472-473; E-B-173.

(3) Sufficiently severe or pervasive. The Employer cites:

- For over a one year and four months, Grievant sent the alleged discriminatory email messages on her work computer period using DOE's electronic systems. E-B-073-185.

- Grievant engaged in this behavior routinely and often on a daily basis. E-B-073-185.

- On August 15, 2012 (the day before her co-workers discovered the "flips email") Grievant's email stated in part:

> I move in with the WAG [SASA Fujii] on Monday. How sad is that. I know there [sic] doing this to keep an eye on me. ... The flips rule the school because they are untouchable. I hate the flips. ... I don't know if I can email as much when I'm in the WAG's office. ... I know the WAG will watch my every move. He's such a FAG. He needs to get some balls, if you know what I mean for a man.

E-B-185; Tr. at 489.

(4) Interfered with the person's work performance or creating an intimidating, hostile, or offensive work environment. The Employer cites:

- Ms. Gardner's August 16, 2012 written complaint stated: "I don't feel I can work in the same office as Valerie Asato. Knowing how she feels about me and our co-workers, brings up feelings of anger." E-B-067.

- Ms. Silva testified "it would be very hard" for "us Filipinos" to work alongside Grievant, knowing how Grievant felt about her coworkers: "The school, the students, the teachers, we have ... a lot of Filipinos. It'd be hard." Tr. at 413-414.

- Principal Carganilla testified: Silva, Fujii, and Badua were "disturbed by [Grievant's] email;" Silva told him she was having a hard time working and sleeping after she read Grievant's email; and Fujii was "taken aback" because he knew Grievant's use of the term "WAG" in her email referred to him. Tr. at 45.

Investigator Carkin found there was sufficient evidence that Grievant's conduct violated BOE Policy # 1101-11 based on the above analysis. E-B-003-027. In addition,

the totality of Grievant's emails independently supported Allegations 1 through 6 and 9 through 12. Tr. at 200-201.

b. BOE Policy # 1200-1.19: Employee Electronic Communication and Technology Use and Access Policy

The Employer next cites BOE Policy # 1200-1.19, which provides that all DOE employees shall limit access to the Internet and use of Department-issued technology (cell phones, wireless devices, computers, and software) for business transactions and business communications necessary to conduct the work of their job as a Department employee. E-B-243.

The Employer states Investigator Carkin found there was sufficient evidence that Grievant's conduct violated BOE Policy # 1200-1.19, because Grievant "was using her work-issued computer to send personal communications that weren't necessary or related to her job," and Grievant "admitted to writing the emails." Tr. at 204-205. The Employer cites:

- Grievant admitted that during three consecutive school years, Grievant regularly used her work computer and work email account to write personal email messages about her co-workers using DOE's electronic communication systems and technology. Tr. at 470-500. Among other things, Grievant apologized for making comments about her Filipino co-workers, referring to SASA Fujii as a "WAG," and referring to Ms. Gardner as a "flip wannabe." Tr. at 472-473.

c. Network Support Services Branch: Acceptable User Guidelines – Department of Education Network and Internet Servers

The Employer next cites the DOE's Network Support Services Acceptable User Guidelines ("DOE Network User Guidelines"), which provides DOE employees are:

responsible for their DOE email account and that individual password security is the responsibility of each user; and prohibited from sending unsolicited, commercial, and/or offensive email; prohibited from using any form of electronic media (ex. Email or web pages) to harass intimidate or otherwise annoy another person/group. E-B-245-246.

The Employer states Investigator Carkin found there was sufficient evidence that Grievant's conduct violated the DOE's Network User Guidelines. TR. at 206-208; E-B-032-037. Grievant's email messages violated the User Guidelines because Grievant (1) used her work computer and work email account; (2) to write personal email messages about her co-workers that were offensive, and/or harassed or annoyed another person; and 3) sent those offensive email messages via DOE's network internet servers.

Investigator Carkin testified it doesn't matter that Grievant did not intend to harass or intimidate co-workers, because it is the effect on the co-workers that counts once they had learned of Grievant's emails:

> [I]t didn't matter if it was face to face or not, [the co-workers] did see the emails. They felt threatened, and it was a hostile work environment when you have an employee wishing death on other employees, or death to students, at that point [the work environment] becomes hostile, uncomfortable, offensive to them. So whether or not that's directly communicated, if you find out later that a coworker is maybe harboring those feelings against you, that's cause for concern.

Tr. at 207-208.

d. April 9, 2012 Memorandum from DOE Superintendent Matayoshi to All Employees: Use of Department of Education Computers and Electronic Systems

The Employer next cites the DOE Superintendent's Memo to All Employees: Use of Department of Education Computers and Electronic Systems ("Superintendent's Memo Re: Use of DOE Electronic Systems"), which provides that DOE property,

including electronic devices, computerized systems, electronic portals, and internet use and/or transmissions may only be used for work-related purposes, and that any use not related to work may be a violation of departmental policies and procedures. E-B-248.

The Employer states Investigator Carkin found there was sufficient evidence that Grievant's conduct violated the Superintendent's Memo Re: Use of DOE Electronic Systems. Tr. at 210-211; E-B-037-041. Grievant's email messages violated the Superintendent's Memo because Grievant (1) used her work computer and work email account; (2) to write personal email messages about her co-workers that were not related to work; and 3) transmitted those personal email messages by using DOE's electronic systems. Investigator Carkin testified that Grievant admitted she had been using the work computer to send out personal emails. Tr. at 211.

The Employer states that it obtained substantial evidence that Grievant was guilty as charged.

Union's Position.

The Union argues that the answer to this question is "no." Union Post-Hearing Brief at 39. The Union states:

- Under the Seven Tests for Just Cause, and to prevail on the merits, the Employer proof should include:
  - The validity and proper application of BOE Policy #1110-11 in previous precedents to the factual circumstances of Grievant's case.
  - Notice to Grievant of the specific prohibited conduct of BOE Policy #1110-1, and proof of that notice.

including electronic devices, computerized systems, electronic portals, and internet use and/or transmissions may only be used for work-related purposes, and that any use not related to work may be a violation of departmental policies and procedures. E-B-248.

The Employer states Investigator Carkin found there was sufficient evidence that Grievant's conduct violated the Superintendent's Memo Re: Use of DOE Electronic Systems. Tr. at 210-211; E-B-037-041. Grievant's email messages violated the Superintendent's Memo because Grievant (1) used her work computer and work email account; (2) to write personal email messages about her co-workers that were not related to work; and 3) transmitted those personal email messages by using DOE's electronic systems. Investigator Carkin testified that Grievant admitted she had been using the work computer to send out personal emails. Tr. at 211.

The Employer states that it obtained substantial evidence that Grievant was guilty as charged.

Union's Position.

The Union argues that the answer to this question is "no." Union Post-Hearing Brief at 39. The Union states:

- Under the Seven Tests for Just Cause, and to prevail on the merits, the Employer proof should include:
  - The validity and proper application of BOE Policy #1110-11 in previous precedents to the factual circumstances of Grievant's case.
  - Notice to Grievant of the specific prohibited conduct of BOE Policy #1110-1, and proof of that notice.

- Proof that Grievant understood BOE Policy #1110-11 and what conduct was officially prohibited.
- Proof that Grievant engaged in the prohibited conduct with specific reference to the facts discovered in the Investigative Report.
- Objective evidence that Grievant's conduct resulted in the satisfaction of the elements necessary to find a violation of BOE Policy #1110-11 (unwelcome behavior, sufficiently severe or pervasive, and has the effect of either unreasonably interfering with the person's work performance or creating an intimidating, hostile, or offensive work environment).
- Evidence that the Employer took disciplinary action reasonably calculated to stop the harassment prescribed by BOE Policy #1110-11.

- In this case:
  - Notice of BOE Policy #1110-11 was not addressed by the investigator. Tr. 266.
  - No information was presented about the proper application of BOE Policy #1110-11 to the facts surrounding Grievant's emails.
  - The Employer did not present what specific conduct was prohibited by BOE Policy #1110-11, that Grievant knew of this prohibition, and Grievant actually engaged in the prohibited conduct.
  - Instead, the Employer presented broad personal opinions and interpretations of its Investigator who admittedly interviewed not a single witness, because they had everything they needed in the emails (Tr. at 252); did not seek to obtain school investigations of prior incidents "because this was an independent

investigation of Ms. Asato," and did not see why this question of prior incidents was relevant." (Tr. at 255).

- Accordingly, the Employer failed to present "substantial evidence or proof" that Grievant violated BOE Policy #1110-11`, and therefore failed to satisfy the Fifth Criterial Question for Just Cause. Union Post-Hearing Brief at 38-39.

Arbitrator's Determination.

The arbitrator agrees with the Employer regarding the fifth criterial test.

As a result of the investigation, the Employer did obtain substantial evidence that Grievant was guilty as charged with respect to the 16 allegations against her. In Note 1 to Question 5, Arbitrator Daugherty advises:

> Note 1: It is not required that the evidence be conclusive or "beyond all reasonable doubt." But the evidence must be truly substantial and not flimsy.

46 LA at 364. This Arbitrator defines "substantial evidence" as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. Balogh v. Balogh, 134 Haw. 29, 38, 332 P.3d 631, 640 (Haw. 2014).

In Note 3 to Question 5, Arbitrator Daugherty advises:

> Note 3: When the testimony of opposing witnesses at the arbitration hearing is irreconcilably in conflict, an Arbitrator seldom has any means for resolving the contradictions. His task is then to determine whether the management "judge" originally had reasonable grounds for believing the evidence presented to him by his own people.

Id. Here, the Arbitrator's task is to determine whether CAS Nomiyama (the management "judge") originally had reasonable grounds for believing the evidence presented to him. The evidence was essentially comprised of: the BOE/DOE policies

and regulations contained in the Opening School Day Packets; the Grievant's emails; Ms. Gardner's and Mr. Fujii's written statements on August 16, 2012, the day the emails were discovered; Grievant's responses to the CRCO Questionnaire; and Grievant's December 3, 2012 written testimony.

Investigator Carkin formulated 16 allegations collectively representing the various statements or terms used by Grievant in her email messages:

1. Used the term "flips" to describe Filipinos.
2. Said that Filipinos are "lazy, selfish, and greedy people."
3. Stated, "Flips, What are they good for. Absolutely nothing!"
4. Said that she "hate[s] flips."
5. Referred to several co-workers as "flip bitches."
6. Stated she "wanted to transfer to a school where there aren't any flips around."
7. Stated "I know the Chinese suck at games."
8. Stated people from China are "very unsanitary."
9. Stated "the best people to make friends with Japanese people because they are so generous ... Flips are on the cheap side if you ask me and that's why I like Japanese people."
10. Nicknamed a co-worker "WAG... It rhymes with fag and it stands for Wimpy Ass Gay Guy."
11. Referred to one of her co-workers as a "fag."
12. Stated one of her co-workers was "pretty faggish" because "what real guy do you know in a women's job as a secretary?"
13. Referred to her co-worker's mentally challenged son as a "moron."
14. "Cursed" co-workers with terminal cancer, wished their planes crashed when traveling, hoped they get an incurable disease, hoped they have heart attack, wished they get into a fatal car

accident, wanted them to contract a flesh eating disease, wanted them to get "robbed and mugged" and "get badly beaten," and/or hoped they died.

15. "Cursed" a student that made a complaint about her and/or wished the student "get beaten to death" for filing the complaint."

16. Stated: "If a student dies from Farrington, then the curse worked and I will assume it was that loser kid that made the complaint."

E-B-002-003.

Grievant admitted writing the emails containing the above discriminatory statements, thus substantiating them. Investigator Carkin analyzed the 16 substantiated allegations to determine whether Grievant's conduct violated the four BOE/DOE policies she had identified.

With respect to BOE Policy #1110-11, Investigator Carkin compared the substantiated allegations with the definition of "discriminatory harassment" in the DOE Regulation implementing BOE Policy #1110-11. Specifically, Investigator Carkin analyzed the 16 allegations to determine whether the four elements of discriminatory harassment were satisfied: (1) the conduct was unwelcome; (2) the conduct was based on a person's protected class; (3) the conduct was sufficiently severe or pervasive; and (4) the conduct interfered with the person's work performance or creating an intimidating, hostile, or offensive work environment. After the completion of the initial Investigation Report, Grievant submitted her December 3, 2012 written testimony, which was made part of the Amended Final Investigation Report dated December 4, 2012. E-B-001.

The arbitrator finds there is substantial evidence in the record to satisfy the four elements of discriminatory harassment:

(1) Conduct was unwelcome.

- Co-worker Melinda Gardner's August 16, 2012 written complaint stating she "was horrified, hurt, and upset with the contents of the ["Flips"] email," which contained racial comments about her co-workers, and offensive comments about herself. E-B-67.

- Co-worker Stephanie Silva's testimony that Grievant's "Flips" email shocked her at first, and then made her angry, because she is Filipino-Hawaiian, and "it was as if [Grievant] told it to our face." Tr. at 411-412.

- SASA Fujii's August 16, 2012 written statement reported:

> The email "Flips" was opened and I read the contents of the message. I was disturbed to read a "hate email" attacking her coworkers with racial slurs and sexual references. E-B-069.

- Vice Principal Ishihara testified that when email becomes public and other recipients get access to it, they can feel the same emotions of feeling bullied and harassed as if the email was directed to them. Tr. at 112.

- As the arbitrator found *supra*, there is substantial evidence that Grievant simply left her computer and Lotus Notes open at the end of her preceding work day. Grievant created her own two passwords for her DOE computer and Lotus Notes email account. Accordingly, Ms. Gardner did not "invade" Grievant's email account" to "expose herself" to Grievant's discriminatory opinions and beliefs. Ms. Gardner's exposure to Grievant's emails was unwelcome. Grievant's computer monitor "lit up" when 3 template boxes were plopped onto Grievant's desk. Even Grievant admitted: "Sooner or later my E-mails would have been "discovered"." E-B-051-053.

(2) Protected class.

- Grievant made numerous statements about her co-workers based on their protected status, such as race, ancestry, physical or mental disability, or sexual orientation. Examples included: Grievant's reference to Filipinos as "lazy, selfish, and greedy people;" referred to several of her co-workers as "flip bitches," referred to a co-worker as a "fag:" referred to a co-worker as "pretty faggish;" nicknamed a co-worker as "WAG" that rhymes with "fag and refers and stands for Wimpy Ass Gay Guy;" and referred to a co-worker's mentally challenged son as a "moron." Grievant testified that "WAG" meant "Wimpy Ass Gay Guy" and referred to SASA Fujii. Tr. 472-473; E-B-173.

- Grievant admitted in her December 3, 2012 written testimony: "I admit these emails are ... discriminatory ..."

(3) Sufficiently severe or pervasive.

- For over a one year and four months, Grievant sent the alleged discriminatory email messages on her work computer period using DOE's electronic systems. E-B-073-185.

- Grievant engaged in this behavior routinely and often on a daily basis. E-B-073-185.

- On August 15, 2012 (the day before her co-workers discovered the "flips email") Grievant's email stated in part:

> I move in with the WAG [SASA Fujii] on Monday. How sad is that. I know there [sic] doing this to keep an eye on me. ... The flips rule the school because they are untouchable. I hate the flips. ... I don't know if I can email as much when I'm in the WAG's office. ... I know the WAG will watch my every move. He's such a FAG. He needs to get some balls, if you know what I mean for a man.

E-B-185; Tr. at 489.

(4) Interfered with the person's work performance or creating an intimidating, hostile, or offensive work environment.

- Ms. Gardner's August 16, 2012 written complaint stated: "I don't feel I can work in the same office as Valerie Asato. Knowing how she feels about me and our co-workers, brings up feelings of anger." E-B-067.

- Ms. Silva testified "it would be very hard" for "us Filipinos" to work alongside Grievant, knowing how Grievant felt about her coworkers: "The school, the students, the teachers, we have ... a lot of Filipinos. It'd be hard." Tr. at 413-414.

- Principal Carganilla testified: Silva, Fujii, and Badua were "disturbed by [Grievant's] email;" Silva told him she was having a hard time working and sleeping after she read Grievant's email; and Fujii was "taken aback" because he knew Grievant's use of the term "WAG" in her email referred to him. Tr. at 45.

- Grievant admitted in her December 3, 2012 written testimony: "I admit these emails are offensive, derogatory, discriminatory and hurtful to others."

- As the arbitrator found *supra*, because of the above effect of Grievant's discriminatory emails, Grievant's conduct constituted a violation of BOR Policy #1110-11, regardless of her purported purpose in sending the emails.

Investigator Carkin found there was sufficient evidence that Grievant's conduct violated BOE Policy # 1101-11 based on the 16 allegations. E-B-042-044.

In light of the above, the Arbitrator finds that the answer to the fifth criterial question is a "yes."

6. Has the Employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

Employer's Position.

The Employer argues that the answer to this question is "yes."

The Employer points out that discrimination is an affirmative defense, and therefore the Union has the burden of proving that the Employer improperly discriminated against Grievant.

The Employer stated the evidence demonstrates it applied its rules fairly and without discrimination to all employees, and that the Union failed to meet its burden of showing disparate treatment.

The Employer states it also investigated DOE employee Brett Yoshizumi, the recipient of Grievant's emails. Tr. at 229. Like Grievant, Yoshizumi was asked to respond to an investigative questionnaire. Tr. at 187. Investigator Carkin found that Yoshizumi did not violate the BOE's non-discrimination policy, but did violate the other three computer-related policies. Tr. at 209. Investigator Carkin testified Yoshizumi did not violate the non-discrimination policy because, in general, she was the recipient of unsolicited emails, and her comments, although inappropriate, did not rise to the level of being severe or pervasive. Tr. at 230.

Investigator Carkin testified Yoshizumi did violate the other three computer-related policies because she had used her DOE work computer and LOTUS Notes to engage in personal conversations unrelated to her work. Tr. at 231. The Employer stated Yoshizumi was not disciplined following the investigation, and continued to work until her voluntary resignation on January 21, 2014. Tr. at 423. Susan LaVine, the temporary administrator of DOE Labor Relations, testified as to the factors considered by the Employer in deciding whether to impose discipline where two employees were investigated for their involvement in the same underlying incident: whether the two

employees (1) were found to engage in the same behavior, (2) were found to have violated the same policies and procedures, (3) were found to have committed serious misconduct, (4) worked min the same office, and (5) were evaluated by the same supervisor.

Applying those factors, the Employer states Grievant and Yoshizumi were not "similarly situated" employees because:

(1) Investigator Carkin found that Grievant and Yoshizumidid not engage in the same type of conduct. Grievant's actions constituted seriopus misconduct because she in initiated the discriminatory email messages and acted with a higher degree of culpability, compared to Yoshizumi, who was merely the recipient of Grievant's discriminatory email messages. Tr. 230.

(2) Investigator Carkin found that Grievant, but not Yoshizumi, violated the BOE's non-discrimination policy. Tr. at 230.

(3) Investigator Carkin found that Grievant committed serious misconduct which rose to the level of being severe and pervasive. Tr. at 230.

(4) Grievant and Yoshizumi worked at different offices and held different positions at DOE at the time of the events in question. Tr. at 469

(5) Grievant and Yoshizumi worked for different supervisors and any disciplinary action administered by the Employer would have been by different decision makers. Tr. at 450-451.

The Employer states that Mark Nakamura, the DOE's PRO for the Honolulu District, conducted a reasonable search but was unable to find evidence of other cases

concerning classified employees like Grievant who were terminated for violating the same policies as Grievant. Tr. at 432.

The Employer states it applied its rules fairly and without discrimination to all employees, and the Union failed to prove its burden of showing disparate treatment.

Union's Position.

The Union argues that the answer to this question is "no." The Union states:

- The Employer did not present any record of previous disciplinary action based on a violation of BOE Policy #1110-11. Union Post-Hearing Brief at 40.
- Accordingly, the Employer failed to satisfy the Sixth Criterial Question for Just Cause. Union Post-Hearing Brief at 41.

Arbitrator's Determination.

The arbitrator agrees with the Employer regarding the sixth criterial question.

The arbitral record shows the Employer also investigated DOE employee Brett Yoshizumi, the recipient of Grievant's emails. Tr. at 229. Like Grievant, Yoshizumi was asked to respond to an investigative questionnaire. Tr. at 187. Investigator Carkin found that Yoshizumi did not violate the BOE's non-discrimination policy, but did violate the other three computer-related policies. Tr. at 209. Investigator Carkin testified Yoshizumi did not violate the non-discrimination policy because, in general, she was the recipient of unsolicited emails, and her comments, although inappropriate, did not rise to the level of being severe or pervasive. Tr. at 230.

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stated Yoshizumi was not disciplined following the investigation, and continued to work until her voluntary resignation on January 21, 2014. Tr. at 423. Susan LaVine, the temporary administrator of DOE Labor Relations, testified as to the factors considered by the Employer in deciding whether to impose discipline where two employees were investigated for their involvement in the same underlying incident: whether the two employees (1) were found to engage in the same behavior, (2) were found to have violated the same policies and procedures, (3) were found to have committed serious misconduct, (4) worked min the same office, and (5) were evaluated by the same supervisor.

Applying those factors, the arbitral record shows Grievant and Yoshizumi were not "similarly situated" employees because:

(1) Investigator Carkin found that Grievant and Yoshizumi did not engage in the same type of conduct. Grievant's actions constituted serious misconduct because she in initiated the discriminatory email messages and acted with a higher degree of culpability, compared to Yoshizumi, who was merely the recipient of Grievant's discriminatory email messages. Tr. 230.

(2) Investigator Carkin found that Grievant, but not Yoshizumi, violated the BOE's non-discrimination policy. Tr. at 230.

(3) Investigator Carkin found that Grievant committed serious misconduct which rose to the level of being severe and pervasive. Tr. at 230.

(4) Grievant and Yoshizumi worked at different offices and held different positions at DOE at the time of the events in question. Tr. at 469

(5) Grievant and Yoshizumi worked for different supervisors and any disciplinary action administered by the Employer would have been by different decision makers. Tr. at 450-451. Gonsalves v. Nissan Motor Corp. in Haw., 100 Haw. 149, 161, 58 P.3d 1196, 1208 (2002) (Similarly situated employees are those who are subject to the same policies and subordinate to the same decision-maker).

The Employer states that Mark Nakamura, the DOE's PRO for the Honolulu District, conducted a reasonable search but was unable to find evidence of other cases concerning classified employees like Grievant who were terminated for violating the same policies as Grievant. Tr. at 432.

The arbitral record does not show that the Employer failed to apply its rules, orders, and penalties evenhandedly and without discrimination to all employees.

Accordingly, the Arbitrator finds that the answer to the sixth criterial question is a "moderate yes."

7. Was the degree of discipline administered by the Employer reasonably related to (a) the seriousness of Grievant's proven offense and (b) the record of Grievant's service with the Employer?

Employer's Position.

The Employer argues that the answer to this question is "yes."

The Employer states that the following arbitral evidence demonstrates that the Employer's decision to discharge Grievant was not unreasonable, arbitrary, or capricious:

- CAS Nomiyama testified Grievant was terminated effective December 28, 2012 for violating BOE Policy # 1110-11 (employee non-discrimination) and BOE Policy 1200 (Internet Policy). Tr. at 396; E-C-001-005.

- CAS Nomiyama testified his decision to terminate Grievant was based on the investigation, the post-investigation meeting, and the Grievant's record of service. Tr. at 389.

- CAS Nomiyama testified he did not consider progressive discipline to be appropriate because:

> Based on the evidence, the investigation, ... I found ... her conduct so distasteful ... and believed time would not change her, that these were deep rooted beliefs, and ... because of the severity of the ... derogatory and discriminatory comments made to coworkers and ... students – like I said, nobody picks on students – [I] just found termination was the most appropriate course of action.

TR. at 401.

Union's Position.

The Union argues that the answer to this question is "no." The Union states:

- In the absence of a proven offense, no disciplinary penalty is justified.

- The Employer failed to present substantiation that the plain existence of Grievant's emails, unknown to everyone for nearly 16 months, accidentally discovered as the Employer suggests, , and as derogatory as they may be, not directed to any specific victim, or claimed victim, constitutes a violation of BOE Policy #1110-11.

- The Employer has not established a "proven offense" under the 7th criterial question.

- As a result, the Employer did not have "just cause" to discipline Grievant. Union's Post-Arbitration Hearing Brief at 42-44.

- The Employer's investigation was inadequate, which is a denial of due process, and thus the just cause standard was not met. Union's Post-Arbitration Hearing Brief at 44-45.

- In addition to the Union's other arguments, the Union summarizes its positions as follows:

> ... [T]wo DOE employees, Ms. Yoshizumi and Ms. Asato, in different DOE Schools regularly communicated between themselves using the DOPE email system, to "chit-chat", sometimes expressing personal opinions and making derogatory comments about others, like gossip, like "talking stink". It appears that with the two passwords needed to utilize the DOE email system, there was some level of privacy between the two. For nearly 16 months, these two DOE employees continued to openly discuss their opinions, apparently not ever anticipating that the emails would one day be exposed to others. Those others which they had been gossiping or talking stink about.
>
> What is clear though, is that neither DOE employee ever acted in a manner that discriminated or harassed those they were talking stink about. The record is clear no one knew, and therefore there was no impact on their respective school offices. ...
>
> On August 16, 2012, with the "accidental" discovery of Ms. Asato's prior emails, Farrington High School, its administration, and Mrs. Asato's co-workers circled the wagons that morphed the "talking stink" emails into a violation of BOE Policy #1110-11.
> ...
> ... To terminate Ms. Asato for holding personal beliefs that may be derogatory, or against the vast majority of public opinion is punishing her for exercising her freedom of speech, protected by the First amendment to the U.S. Constitution.

Union's Post-Arbitration Hearing Brief at 45-47.

Arbitrator's Determination.

The arbitrator agrees with the Employer, and disagrees with the Union, regarding the seventh criterial test.

Article 8.A of the CBA provides: "Regular Employees shall not be disciplined without proper cause." Article 11.H.4 of the CBA provides:

> In any case of suspension or discharge where the Arbitrator finds such suspension or discharge was improper, the Arbitrator may set aside, reduce or modify the action taken by the Employer.

U-24 at 13.

The arbitrator interprets the above provisions to mean that unless the arbitrator finds that the disciplinary decision was unreasonable, arbitrary, or capricious, the arbitrator should not superimpose his judgment over that of management's. Hawaii Transfer Company, Ltd. and Hawaii Teamsters Union, Local 996, 74 LA 531 (Arbitrator Tsukiyama 1980). The arbitral record indicates Grievant's disciplinary record was satisfactory during her service with the Employer. In Note 4 to Question 7, Arbitrator Daugherty addressed this circumstance:

> Note 4: Suppose that the record of the arbitration hearing establishes firm "Yes" answers to all the first six questions. Suppose further that the proven offense of the accused was a serious one, such as drunkenness on the job; but the employee's record had been previously unblemished over a long, continuous period of employment with the company. Should the company be held arbitrary and unreasonable if it decided to discharge such an employee? The answer depends of course on all the circumstances. But, as one of the country's oldest arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, **leniency is the prerogative of the employer rather than of the arbitrator; and the latter is not supposed to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though the arbitrator, if he had been the original "trial judge," might have imposed a lesser penalty. Actually the arbitrator may be said in an important sense to act as an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the employer) was within the bounds of reasonableness above set forth – In general the penalty of dismissal for a really serious offense does not in itself warrant a finding of company unreasonableness.**

46 LA 364-365 (Emphasis added).

Here, there is no compelling evidence that the Employer abused its discretion in discharging Grievant. The degree of discipline administered by the Employer

reasonably related to the seriousness of the Grievant's *proven* offenses (Allegations #1 through 16 relating to BOE Policy #1110-11), notwithstanding Grievant's otherwise satisfactory record of service with the Employer. The Employer's discharge of Grievant was not unreasonable, arbitrary, or capricious.[5]

Accordingly, the arbitrator finds that the answer to the seventh criterial question is an overall "yes."

VIII. Grievant's claims that Employer violated Articles 3, 4, and/or 17 of the CBA.

A. Employer's Position.

The Employer states the Union did not present any competent evidence to show the Employer violated Articles 3 (Maintenance of Rights and Benefits), 4 (Personnel Policy Changes), and 17 (Personal Rights and Representation) of the Unit 03 CBA when it terminated Grievant's employment.

Specifically, Employer states:

- Article 3 - Maintenance of Rights and Benefits: There is no credible evidence demonstrating Grievant lost any rights and benefits pertaining to her conditions of employment as contained in the departmental and Civil Service rules and

[5] The arbitrator respectfully disagrees with the Union's argument that BOE Policy #1110-11, as applied here, violates Grievant's right to freedom of speech. While employees of the government retain First Amendment rights, when their exercise of those rights creates disruption in the workplace, it collides with the government's rights as an employer. If the exercise of the employer's First Amendment rights hinders efficiency in the workplace, and rises to the level of employee misconduct, it may constitute just cause for termination of the employment relationship, but never for termination of the right of free speech. Employees are therefore sometimes faced with the exercise of their constitutional rights and the retention of their employment. *Elkouri & Elkouri: How Arbitration Works,* at 19-3 (8th Ed., 2016). For all the reasons stated herein, BOE Policy #1110-11, as applied here, does not violate Grievant's right to freedom of speech.

regulations and Hawaii Revised Statutes as a result of the Employer's administering discipline.

- Article 4 - Personnel Policy Changes: There is no credible evidence demonstrating Employer made any personnel policy changes , much less major policy changes, affecting employee relations, which invoked the Employer's duty to consult with the Union. The decision to terminate Grievant was based on proper cause in compliance with Article 8 of the CBA.

- Article 17 - Personal Rights and Representation: With respect to Section J, Bill of Rights, the evidence demonstrates (1) Grievant was afforded due process at all phases of the investigation; (2) the Employer considered all available evidence and data, including factors that supported Grievant's position, before a final decision was made; and (3) Grievant was afforded the right to process her grievance pursuant to Article 11 of the CBA.

The Employer states Articles 3, 4, and 17 either were not violated or do not apply in this case.

B. Union's Position.

The Union's Step 1 and Step 2 claims challenge Grievant's termination as a violation of Articles 3 (Maintenance of Rights and Benefits), 4 (Personnel Policy Changes), 8 (Discipline), and 17 (Personal Rights and Representation) of the Unit 03 CBA. The Union did not state the facts or reasons for these claims in its Step 1 and Step 2 submissions. While the Union vigorously argued that the Employer violated Article 8 (Discipline), the Union did not directly address its claims of violation of Articles 3, 4, and 17 at the arbitration hearing or in its Post Hearing Brief.

C. Arbitrator's Determination.

The arbitrator carefully reviewed the arbitral record regarding the Union's Step 1 and Step 2 claims that the Employer violated Articles 3, 4, and 17 of the CBA.

Based on the arbitral record the arbitrator finds and concludes the Employer did not violate Articles 3, 4, and 17 of the CBA when it terminate Grievant.

IX. DECISION AND AWARD

Based upon a careful review of the record, including the CBA, all of the testimony, exhibits, and briefs submitted by the parties, the arbitrator finds and concludes:

1. The Employer did not violate Articles 3, 4, 8, or 17 of the Unit 3 CBA when it terminated Grievant's employment effective on December 28, 2012.

2. Grievant was terminated for proper cause.

3. Accordingly, the grievance is dismissed, and the termination of Grievant is sustained.

This award is in full and final determination of all claims submitted to arbitration. All claims not specifically addressed are deemed denied.

The arbitrator will retain jurisdiction for a 30-day period after June 21, 2019 to clarify any questions about this Award.

DATED: Honolulu, Hawaii: June 21, 2019.

Thomas E. Crowley

THOMAS E. CROWLEY
Arbitrator

BEFORE ARBITRATOR
THOMAS E. CROWLEY
STATE OF HAWAII

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Union and DEPARTMENT OF EDUCATION, STATE OF HAWAII, Employer.	HGEA/AFSCME Bargaining Unit 03 Grievance on Behalf of Valerie Asato, Challenge to Disciplinary Termination CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2019, a true and accurate copy of the Arbitration Decision and Award was duly mailed and emailed to the parties listed below at his/her last known address as follows:

Peter Liholiho Trask
92-515 Ohio Street
Honolulu, Hawaii 96707

Miriam P. Loui, Esq.
Deputy Atty. General
235 Beretania Street, Fl. 15
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Dated: Honolulu, Hawaii, June 21, 2019.

Thomas E. Crowley

THOMAS E. CROWLEY
Arbitrator