

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of

JANET WEISS,

Complainant(s),

and

HAWAII STATE TEACHERS  
ASSOCIATION,

Respondent(s).

CASE NO(S). 22-CU-05-390

ORDER NO. 3853

MINUTE ORDER

**MINUTE ORDER**

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## **1. Introduction**

Complainant JANET WEISS (Complainant or Ms. Weiss) filed a prohibited practice complaint (Complaint) with the Hawai'i Labor Relations Board (Board) alleging that Respondent HAWAII STATE TEACHERS ASSOCIATION (Respondent, Union, or HSTA) committed prohibited practices under Hawai'i Revised Statutes (HRS) §§ 89-13(b)(4) and (5) and breached the duty of fair representation owed to her as an HSTA member.

This case arises from a grievance regarding Ms. Weiss' termination by the Department of Education, State of Hawai'i (DOE or Employer) from her position as a teacher. The Employer and Union agreed to a settlement agreement for the grievance, and the settlement agreement was fully executed in April of 2022.

The Board held a prehearing conference on May 10, 2022. The Board indicated that certain information from that prehearing conference would be issued in a written order, which the Board does in this order.

## **2. Errata to the Complaint; Amended PTO**

After filing the Complaint, Ms. Weiss submitted a letter to the Board indicating that she intended to attach a letter from HSTA to Ms. Weiss (April 8, 2022 HSTA Letter) to her Complaint. The April 8, 2022 HSTA Letter was not attached to the Complaint filed. The Board accepted the April 8, 2022 HSTA Letter to Ms. Weiss from HSTA as an errata to the Complaint.

Ms. Weiss' correspondence transmitting the April 8, 2022 HSTA Letter to the Board is not considered a part of the errata and, therefore, is not considered part of the Complaint.

At the prehearing conference, HSTA's counsel, Keani Alapa, Esq. (Mr. Alapa), requested that the date of the hearing on the merits (HOM) set by Order No. 3848, Pretrial Order and Notices, be rescheduled due to his unavailability on the scheduled date. Ms. Weiss did not object, and the Board issued an amended pretrial order setting forth the agreed upon date.

The amended pretrial order also clarifies the availability of the Board's hearing room for witnesses to attend the HOM.

## **3. Overview of the Board's Processes**

### **3.1. General Information on the Board; Burden of Proof**

The Board is a quasi-judicial agency, which means that it functions like a court. Therefore, when the Board receives a complaint, the complaint generally goes through full court-like proceedings, including an HOM where witnesses are called and evidence is presented.

In prohibited practice cases, the party that filed the complaint is known as the “complainant,” and the party responding to the complaint is known as the “respondent.” By law, the complainant has the burden of proving that it is more likely than not that the respondent committed prohibited practices. *See* HRS § 91-10(5)<sup>1</sup> and Hawai‘i Administrative Rules (HAR) § 12-42-8(g)(16)<sup>2</sup>. The complainant must prove this case against the respondents by presenting evidence in the form of exhibits and witnesses in the HOM.

The Board must construe a complaint liberally, so the general requirement that the Board follows is that the complaint must contain a “short and plain statement of the claim to provide the respondent with fair notice of the complaint and the relevant grounds.”

### **3.2. The Hearing on the Merits; Witnesses and Exhibits**

The Board must hold the HOM within 40 days of when the complaint was filed unless the parties choose to waive this requirement. *See* HRS § 377-9(b)<sup>3</sup> and HAR § 12-42-46(b)<sup>4</sup>.

All parties are responsible for calling their own witnesses for direct examination during the HOM. If a witness is not willing to appear voluntarily, then the party seeking to call that witness can request a subpoena from the Board to order the witness to appear. This subpoena must then be served on the witness by an individual who is not the named complainant.

Because the complainant must present their case first, they must call their own witnesses. Even if a witness is listed by a respondent, that is no guarantee that the respondent will call that witness. Therefore, the complainant must ensure that all witnesses are either willing to appear voluntarily or that the witnesses are properly served with a subpoena.

All subpoenaed witnesses must be paid as laid out in HRS § 607-12.

The complainant must also present exhibits, which are documents or other pieces of evidence. Any proposed exhibits must be submitted to the Board as required by the Board’s Pretrial Order. There are specific requirements for how those exhibits must be submitted to the Board.

When proposed exhibits are submitted, the parties can agree to enter those proposed exhibits into the official record without objection. If the parties can do so, it helps to make the proceedings more efficient.

If the parties do not agree to enter proposed exhibits into evidence, then they can be introduced during the HOM. Exhibits are introduced during the HOM through witnesses’ testimony, setting out the authentication and relevance of the exhibits. After exhibits are introduced, a party may “move” to have the exhibit entered into the official record. The Board will rule on whether or not the exhibit will be entered into the official record based on, among other things, whether the other parties object to the exhibit being entered into the official record.

The Board will only consider the exhibits entered into the official record when making our decision in this case. Therefore, any proposed exhibits that are not in the official record cannot impact the Board's decision.

#### **4. Prohibited Practices; the "Hybrid" Case**

When dealing with prohibited practices arising from how a union handles grievances, this falls under what is known as a "hybrid case." While this phrase does not appear in HRS Chapter 89, the Hawai'i Supreme Court (HSC) laid out the requirements for a hybrid case in Poe v. Haw. Labor Rels. Bd., 105 Hawai'i 97, 102, 94 P.3d 652, 657 (2004) (Poe II).

A hybrid case alleges that the employer committed a prohibited practice under HRS § 89-13(a)(8) and that the union breached its duty of fair representation, which is a prohibited practice under HRS § 89-13(b)(4). See Siu v. Haw. Gov't. Emples. Ass'n, AFSCME, Local 152, AFL-CIO, Case No. CU-04-291, Decision No. 505, at \*11 (June 14, 2021) (<https://labor.hawaii.gov/hlrp/files/2021/06/Decision-No.-505.pdf>) (Siu); see also Kapesi v. Dep't. of Pub. Safety, Case Nos. 17-CU-10-908; 17-CU-10-359, Decision No. 510, at \*11 (March 2, 2022) (<https://labor.hawaii.gov/hlrp/files/2022/03/Decision-No.-510.pdf>) (Kapesi).

In a hybrid case, the complainant must prove both that the employer wilfully violated the collective bargaining agreement **and** that the union breached or violated its duty of fair representation. This type of complaint can succeed only if the complainant proves **both** parts. Failure to prove one part of the hybrid case deprives the complainant of standing to prove the other side. See, e.g., Siu, Decision No. 505, at \*14-15; Kapesi, Decision No. 510, at \*14, and Caspillo v. Dep't. of Transp., Case Nos. 17-CE-01-899; 17-CU-01-355, Decision No. 509, at \*15 (Nov. 22, 2021) (<https://labor.hawaii.gov/hlrp/files/2021/11/Decision-No.-509.pdf>) (Caspillo).

The complainant may choose to bring a case against only one respondent. However, even if there is only one respondent, the complainant must still prove both parts of the case. See Siu, Decision No. 505, at \*11-12, citing Poe II, 105 Hawai'i at 101-02, 94 P.3d at 656-57.

Further, the complainant can receive remedies only from respondents in the case. This means that, for example, to receive any remedy or relief from an employer, the complainant would have to name the employer as a respondent. Therefore, in this case, Ms. Weiss can receive a remedy only from HSTA, as she has not named the Employer as a respondent.

##### **4.1. Violation of the Collective Bargaining Agreement**

To prove that the Employer violated the collective bargaining agreement regarding a termination, typically the complainant must show that the Employer did not have just cause to discharge them. Kapesi, Decision No. 510, at \*12. The Board has not adopted any particular test for determining just cause.

## 4.2. Breach of the Duty of Fair Representation

The Board can find a breach of the duty of fair representation only if the Union’s conduct towards the complainant was arbitrary, discriminatory, or in bad faith. Poe II, 105 Hawai‘i at 104, 94 P.3d at 659. These words are technical legal terms that do not necessarily follow the commonly understood meaning.

To determine which of these three elements apply, the Board has adopted a two-step analysis, first looking at whether the alleged union misconduct involved the union’s judgment or whether it was ‘procedural or ministerial.’ Caspillo, Decision No. 509, at \*11-12.

### 4.2.1. Procedural or Ministerial Acts – “Arbitrariness”

The “arbitrary” prong of a breach of the duty of fair representation is controlling only when the challenged union conduct is procedural or ministerial. Id., at \*12. For alleged misconduct to be arbitrary, the act in question must not require the exercise of judgment; there must be no rational or proper basis for the union’s conduct; the act must have been in reckless disregard of the employee’s rights; and it must prejudice a strong interest of the employee. Mere negligence does not rise to the level of arbitrariness required to show a breach of the duty of fair representation. Id.

If the union ignores or processes a meritorious grievance in a “perfunctory” manner, this would be ministerial and can be considered for a potential breach of the duty of fair representation. Id., citing Mamuad v. Nakanelua, Board Case No. CU-10-331, Order No. 3337F, at \*31-32 (May 7, 2018) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3337F.pdf>) (Mamuad). However, the union does not act perfunctorily unless it treats the complainant’s claim so lightly that it suggests an “egregious disregard” of the complainant’s rights. Id. Further, an employee has no absolute right to have a grievance taken to arbitration, and the fact that an underlying grievance was meritorious is not enough to establish a breach of the duty of fair representation. Id.

A union does not perfunctorily process a grievance as long as the union undertakes some “minimal investigation” of the grievance. Emura v. Haw. Gov’t Emp. Ass’n, AFSCME, Local 152, AFL-CIO, Board Case No. CU-03-328, Order No. 3028, at \*13 (October 27, 2014) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3028.pdf>) (Emura). The required thoroughness of the investigation depends on the particular facts of the case. Id.

### 4.2.2. Issues of Judgment – “Discriminatory” or “Bad Faith”

Decisions as to how to pursue a particular grievance, including how to present a grievance at the arbitration stage, are matters of judgment for the union, and unions are not liable for good faith, non-discriminatory errors of judgment in making those decisions. Caspillo,

Decision No. 509, at \*13, *citing* Tupola v. Univ. of Haw. Prof'l Assembly, Board Case Nos. CU-07-330; CE-07-847, Order No. 3054, at \*28 (February 25, 2015) (<https://labor.hawaii.gov/hlrp/files/2019/01/HLRB-Order-3054.pdf>) (Tupola).

The union must retain the discretion to act in what it perceives to be their members' best interest. Therefore, especially when it comes to questions of judgment, the duty of fair representation must be narrowly construed. Caspillo, Decision No. 509, at \*14. Therefore, the Board is required to give deference to the Union when substantively examining the Union's performance. Tupola, Order No. 3054, at \*27. The Board is not asking if the Union made the right decision; rather, the Board is asking whether the Union made its decision rationally and in good faith. Emura, Order No. 3028, at \*15-16.

#### 4.2.2.1. Discrimination

The Board does not follow a strict standard for discrimination in HRS Chapter 89 hybrid cases, but to succeed on a claim of discrimination requires a showing of "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Caspillo, Decision No. 509, at \*14.

A union cannot discriminate based on "protected categories" such as race or other constitutionally protected categories, but discrimination in HRS Chapter 89 hybrid cases can go beyond those categories. Tupola, Order No. 3054, at \*33. For example, a union cannot discriminate against an employee based on union membership or if discrimination comes from prejudice or animus. Id.

#### 4.2.2.2. Bad Faith

The bad faith element requires the Board to make a subjective inquiry to determine if the union acted (or failed to act) due to an improper motive. Caspillo, Decision No. 509, at \*14. Claims about the state of mind of individuals or of the union must be supported by other facts and evidence and must show substantial evidence of fraud, deceit, or dishonest conduct. Id. The complainant must do more than suggest that an improper motive is the only "reasonable explanation" for the conduct and must present actual evidence of the improper motive. Emura, Order No. 3028, at \*15.

### 5. **Further Proceedings**

The deadlines in Order No. 3848 include a deadline of **June 8, 2022** for both Ms. Weiss' response to HSTA's Motion to Dismiss and for the parties to submit their pretrial statements. These must be submitted by **4:30 p.m.**

On **June 15, 2022 at 9:00 a.m.**, the Board will hold a pretrial conference and will go through the parties' pretrial statements and take care of preliminary issues before the HOM.

The HOM will begin on **June 27, 2022 at 10:00 a.m.**

Any further changes to the dates and deadlines in this case will be issued in a written order.

DATED: Honolulu, Hawai'i, June 1, 2022.

HAWAI'I LABOR RELATIONS BOARD

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MARCUS R. OSHIRO, Chair

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SESNITA A.D. MOEPONO, Member

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J N. MUSTO, Member

Copies sent to:

Janet Weiss, SRL  
Keani Alapa, Esq.

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<sup>1</sup> HRS § 91-10(5) states:

(5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

<sup>2</sup> HAR § 12-42-8(g)(16) of the Board's rules states:

(16) The charging party, in asserting a violation of chapter 89, HRS, or this chapter, shall have the burden of proving the allegations by a preponderance of the evidence. The party raising any subsequent issue shall have the burden of proving that issue by a preponderance of the evidence.

<sup>3</sup> HRS § 377-9(b) states in relevant part:

(b) ...The board shall fix a time for the hearing on the complaint, which shall not be less than ten nor more than forty days after the filing of the complaint or amendment thereof...

<sup>4</sup> HAR § 12-42-46(b) states:

(b) The hearing shall be held not less than ten nor more than forty days after the filing of the complaint or amendment thereof...