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Case No. 22-CU-05-390**

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. 3858

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 pretrial conference on June 15, 2022. The Board indicated that certain information from that pretrial conference would be issued in a written order, which the Board does in this order.

2. Motion to Dismiss; Motion to Strike

The Board allowed the parties to present oral argument on HSTA’s Motion to Dismiss (MTD) and took the matter under advisement. The Board did not set a date when it would issue a ruling on the Motion to Dismiss.

The Board further denied HSTA’s Motion to Strike Ms. Weiss’ opposition to the MTD based on Ms. Weiss’ good faith effort to work with the Board’s staff to timely file the documents.

3. Bifurcation

The Board noted and the parties agreed that this case is a “hybrid case” as defined by the Hawai‘i Supreme Court (HSC) in Poe v. Haw. Labor Rels. Bd., 105 Hawai‘i 97, 102, 94 P.3d 652, 657 (2004) (Poe II). This means that there are two “prongs” to this case which must both be proven for the case to succeed.

After consideration, the Board, in its discretion, bifurcated the case. *See* HRS § 89-5. In the first phase of these bifurcated proceedings, the Board will take up the case **only** on the alleged breach of the duty of fair representation by HSTA.

This means that all evidence related to the DOE’s conduct is irrelevant at this time and will not be allowed into the record until and unless the Board moves on to dealing with the DOE’s conduct.

Should the Board move on to dealing with the DOE's conduct, the parties will have a later opportunity to submit witnesses and exhibits regarding that case.

4. Facts; Judicial Notice

The Board summarized the relevant facts in this case as follows:

- The DOE terminated Ms. Weiss and on February 15, 2017, HSTA filed a grievance on Ms. Weiss' behalf challenging her termination;
- HSTA and the DOE reached a settlement that HSTA believed was reasonable under the circumstances, and HSTA communicated the offer to Ms. Weiss in writing;
- The Employer signed the Settlement Agreement on June 9, 2020, and HSTA signed the Settlement Agreement on July 1, 2020;
- HSTA could not get in touch with Ms. Weiss for some time, and Ms. Weiss signed the Settlement Agreement on April 12, 2022.

The Board noted that Ms. Weiss is arguing, among other things, that she was coerced into signing the Settlement Agreement and that HSTA breached its duty of fair representation owed to her in this process.

Further, based on the bifurcation of the case, the Board notes that it is looking strictly at HSTA's conduct in processing the February 15, 2017 grievance. All events and evidence prior to the filing of the February 15, 2017 grievance is, accordingly, presumed irrelevant, and may not be entered into the record in either testimony or exhibits.

To provide relevant background as to the relationship between Ms. Weiss and HSTA, the Board takes judicial notice of the following Decisions and Orders:

- Decision No. 420, Board Case No. CU-05-164 (March 9, 2001) (<https://labor.hawaii.gov/hlrh/files/2018/12/Decision-No-420.pdf>);
- Decision No. 425, Board Case No. CU-05-452 (August 1, 2001) (<https://labor.hawaii.gov/hlrh/files/2018/12/Decision-No-425.pdf>); and
- Order No. 3031, Board Case No. CU-05-321 (November 12, 2014) (<https://labor.hawaii.gov/hlrh/files/2019/01/HLRB-Order-3031.pdf>)

5. Filings and Redactions

The Board further noted that in filings from both parties, names have been included in situations that the Board believes falls under HRS § 92F-14, Significant Privacy Interest. The Board will redact those names from the official record.

The documents containing those names are deemed withdrawn and replaced by the redacted copies for purposes of the official record. The Board will file the redacted copies, which will provide those redactions to the parties.

Further, the Board ordered the parties to ensure that individuals who are not witnesses or being identified strictly in their organizational official capacity are not referred to by name unless the Board otherwise grants permission. The Board clarified that this means that a person may be identified by their job position (e.g., secretary, teacher, etc.) and that the person cannot be referenced by their initials.

6. Statement of Issues

After review of the statements, the Board found and the parties agreed that the issues to be addressed during Ms. Weiss' case-in-chief are:

1. Whether HSTA wilfully violated its duty of fair representation owed to Ms. Weiss in an arbitrary manner by perfunctorily processing the 2017 Grievance?
2. Whether HSTA wilfully violated its duty of fair representation owed to Ms. Weiss in a discriminatory manner?
3. Whether HSTA wilfully violated its duty of fair representation owed to Ms. Weiss in bad faith? and
4. Whether HSTA wilfully violated the Unit 5 collective bargaining agreement (CBA) by not following the timelines set by the CBA while processing Ms. Weiss' February 15, 2017 grievance?

The Board further found that HSTA intends to raise several affirmative defenses if it puts on a case in response to Ms. Weiss' case-in-chief.

7. Witness Lists

After reviewing Ms. Weiss' witness list, and based on the bifurcation of the case, the Board struck all DOE witnesses from the list.

The Board accepted three HSTA witnesses, two of them over HSTA's objections.

- The Board accepted Maia Daugherty, HSTA UniServ Director, (Ms. Daugherty) based on her presence at meetings preparing Ms. Weiss for arbitration of the February 15, 2017 grievance. HSTA objected to Ms. Daugherty as a witness, arguing that her testimony would be duplicative of witness Ray Camacho, HSTA UniServ Director (Mr. Camacho).
- The Board accepted Andrea Eshelman, HSTA Deputy Executive Director, (Ms. Eshelman) based on her position as the supervisor to Mr. Camacho and her communications with Ms. Weiss regarding the February 15, 2017 grievance. HSTA objected to Ms. Eshelman as a witness, arguing that her testimony would be duplicative of Mr. Camacho.
 - HSTA represented that, while counsel could not guarantee production of Ms. Eshelman as a witness, Ms. Eshelman could be served with a subpoena at HSTA’s main office.
- The Board accepted Mr. Camacho based on his position as the primary HSTA employee who dealt with Ms. Weiss’ February 15, 2017 grievance.
 - HSTA represented that it would produce Mr. Camacho as a witness without Ms. Weiss needing to subpoena him.

The Board further found that the following witnesses were not relevant at this time and cannot be called unless they become relevant through the course of the HOM:

- Wilbert Holck, HSTA Executive Director;
- David Forrest, HSTA UniServ Director; and
- Corey Rosenlee, former HSTA President

The Board also noted that the Board does not have jurisdiction over who can attend internal HSTA conferences and conventions; therefore, any such discussion would be irrelevant.

The Board clarified that when Ms. Weiss calls her witnesses, these witnesses are called on “direct examination.” Direct examination typically consists of who, what, when, where, and why style questions. During direct examination, witnesses generally cannot be asked “leading questions.” This means that all questions on direct examination should typically be open-ended, allowing the witness to freely describe what happened in a certain situation. Yes/no questions are usually not acceptable during direct examination.

After Ms. Weiss directly examines a witness, HSTA will have the opportunity to “cross-examine” the witness. Cross-examination is limited based on what information was raised during direct examination. During cross-examination, the witness may be asked “leading questions.”

After HSTA’s cross-examination of a witness, Ms. Weiss may choose to “redirect” the examination of the witness. Redirect allows Ms. Weiss to ask additional questions of the witness and is limited based on what information was raised during the cross-examination. During redirect, the witness generally cannot be asked “leading questions.”

After Ms. Weiss’ redirect, HSTA may choose to “re-cross” examine the witness. Re-cross allows HSTA to ask additional questions of the witness and is limited by what information was raised during the redirect. During re-cross, the witness may be asked “leading questions.”

Because Ms. Weiss is presenting her case-in-chief first and there is no issue of witnesses potentially having to fly to another island, the Board ruled that HSTA cannot perform direct examination of the witnesses while they appear as Ms. Weiss’ witnesses. However, HSTA has the right to call the witnesses if HSTA puts on a case in response to Ms. Weiss’ case-in-chief.

8. Exhibit Lists

Based on the Board’s rulings regarding bifurcation and limiting the scope of this case to HSTA’s processing of the February 15, 2017 grievance, the Board ruled that it would not allow Ms. Weiss to present evidence irrelevant to the current case.

The Board further noted that Proposed Exhibit CCC, “log of 3 YRS of Emails w/HSTA 2017-2020” consists of multiple documents in one file. This log also includes additional highlighting and commentary by Ms. Weiss.

Accordingly, the Board ordered that Ms. Weiss separate out the documents in accordance with Board Order No. 3848. Each email thread must be its own exhibit and must be in its original form for the purpose of authentication. HSTA’s submitted proposed exhibits of emails provide an example of what the “original form” of an email may look like.

Proposed Exhibit KKK consists of the same issues, and the Board ordered Ms. Weiss separate out those documents as well.

HSTA did not object to Exhibit LLL being entered into the record. Accordingly, the Board entered Exhibit LLL into the official record, and Ms. Weiss does not have to introduce or authenticate the exhibit at the HOM.

Based on the Board’s rulings, the Board ordered Ms. Weiss to submit a replacement exhibit list on or by June 22, 2022 at 4:30 p.m. The Board will consider the replacement exhibit list at the start of the HOM.

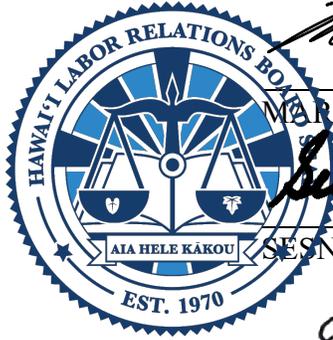
9. Further Proceedings

The HOM will begin on **June 27, 2022 at 10:00 a.m.** and will take place remotely. The Board's office is available for witnesses to appear at if necessary.

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

DATED: Honolulu, Hawai'i, _____ June 15, 2022 _____.

HAWAI'I LABOR RELATIONS BOARD



Marcus R. Oshiro

MARCUS R. OSHIRO, Chair

Sesnita A. D. Moepono

SESNITA A.D. MOEPONO, Member

J.N. Musto

J.N. MUSTO, Member

Copies sent to:

Janet Weiss, SRL
Keani Alapa, Esq.