STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Complainant, and BENJAMIN J. CAYETANO, Governor, State of Hawaii; PATRICIA HAMAMOTO, Superintendent, Department of Education, State of Hawaii; LEA E. ALBERT, Complex Area Superintendent, Department of Education, Windward Oahu District, State of Hawaii; PAULIE SCHICK, District Educational Specialist, Department of Education, Windward Oahu District, State of Hawaii; and NAOMI MATSUZAKI, Personnel Regional Officer, Department of Education, Windward Oahu District, State of Hawaii, Respondents.	CASE NO. CE-13-518 DECISION NO. 444 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On October 10, 2002, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, Local 152, AFL-CIO (Union or HGEA) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondents BENJAMIN J. CAYETANO, Governor, State of Hawaii (CAYETANO or State); PATRICIA HAMAMOTO, Superintendent, Department of Education (DOE) (HAMAMOTO), State of Hawaii; LEA E. ALBERT, Complex Area Superintendent, DOE, Windward Oahu District, State of Hawaii (ALBERT); PAULIE SCHICK, District Educational Specialist, DOE, Windward Oahu District, State of Hawaii (SCHICK); and NAOMI MATSUZAKI, Personnel Regional Officer, DOE, Windward Oahu District, State of Hawaii (MATSUZAKI) (hereafter collectively, Employer or DOE).

The Union alleges that the:

(1) DOE's failure to comply with a Step 3 Decision issued by the Department of Human Resources Development (DHRD) ordering payment of outstanding claims for mileage reimbursements to John Cabral (Cabral) violates the collective bargaining agreement

and constitutes bad faith bargaining in wilful violation of Hawaii Revised Statutes (HRS) §§ 89-13(a)(1), (5), (7), and (8).[1]

(2) DOE's involuntary reassignment of Cabral to Olomana School counseling students confined to the Hawaii Youth Correctional Facility (HYCF) where he is not required to travel and claim mileage reimbursements, was retaliatory and violates HRS §§ 89-13(a)(1) and (4); and

(3) DOE's failure to consult and negotiate over the DOE's FMS User Policy and Process Flow Guide (User Policy) as required under HRS §§ 89-9(a) and (c), before unilaterally applying the User Policy as a basis for denying mileage reimbursement claims violates HRS §§ 89-13(a)(5), (7) and (8) .

By Order No. 2130, dated November 7, 2002, the Board granted Respondents' motion to continue the prehearing conference scheduled on November 13, 2002 and hearing on November 20, 2002 for one week. On November 20, 2002, the Board conducted a prehearing conference with the parties and scheduled the hearing for December 16 and 17, 2002.[2]

---

[1]HRS § 89-13 provides, in pertinent part, as follows:

> (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
>
> * * *
>
> (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;
>
> (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
>
> * * *
>
> (7) Refuse or fail to comply with any provision of this chapter;
>
> (8) Violate the terms of a collective bargaining agreement;
>
> . . . .

[2]At the prehearing conference, the Union withdrew the allegations of HRS §§ 89-13(a)(3) and (6) violations listed in its complaint.

By Order No. 2134, dated November 27, 2002, the Board granted Respondents' motion to continue the hearing and scheduled a second prehearing conference based on a reassignment of Respondents' counsel. On December 16, 2002, the Board held a second prehearing conference with the parties and scheduled the evidentiary hearing for January 17 and 21, 2003.

By Order No. 2143, dated January 6, 2003, the Board granted Complainant's motion to continue the hearing to January 30 and 31, 2003, because of a conflict in the schedule of witnesses.

The Board conducted a hearing on January 30 and 31, 2003, at which time the parties were given the opportunity to present witnesses, evidence and to make argument. Post hearing briefs were filed with the Board on March 17, 2003.

Having considered the entire record, testimony, and arguments, the Board majority makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The HGEA is an employee organization and the exclusive representative, within the meaning of HRS § 89-2, for public employees in Bargaining Unit (BU) 13.

2. CAYETANO was, at all times relevant, the public employer within the meaning of HRS § 89-2, for public employees in BU 13 employed by the State of Hawaii.

3. HAMAMOTO is the DOE State Superintendent and a designated representative of the Employer under HRS § 89-13(a).

4. ALBERT is the DOE Kahuku Complex Area Superintendent, Windward Oahu District, and a designated representative of the Employer under HRS § 89-13(a).

5. SCHICK is the District Educational Specialist for the State DOE, Windward Oahu District, the immediate supervisor of Cabral, and a designated representative of the Employer under HRS § 89-13(a).

6. MATSUZAKI is the State DOE's Personnel Regional Officer, Windward Oahu District, and a designated representative of the Employer under HRS § 89-13(a).

7. The Union and Employer are parties to a BU 13 collective bargaining agreement (Contract), which includes provisions for travel reimbursement in Article 45,[3] consultation and negotiation provisions in Article 4,[4] and a grievance procedure in Article 11.

8. The Article 11 Grievance Procedure, provides for an employee or the Union, to file an informal and formal grievance at Step 1 with the Employer's division head, at Step 2 with the department head, and at Step 3 with the Employer or its designee, i.e., DHRD. At each step, the Employer is required to reply in writing to the Union within seven working days after a step meeting is held. If the grievance is not resolved at Step 3, only the Union can decide to proceed to Arbitration at Step 4.

In addition, Article 11, allows the Union to file a class grievance that proceeds as follows:

---

[3]Article 45 - Travel of the Contract provides, in part, as follows:

A. Applicable rules, ordinances, and policies. Except as modified by this Article, Chapter 3-10, Hawaii Administrative Rules, in the case of the State, and applicable rules, regulations, ordinances, or policies in the case of the county jurisdictions, shall remain applicable for the duration of this Agreement.

* * *

I. Mileage reimbursement.

1. The term "vehicles" as used in this paragraph only applies to automobiles, trucks, vans, or buses.

2. Employees who are authorized to use their private vehicles to carry out their duties and responsibilities shall be reimbursed at the rate of thirty-seven cents ($.37) for each mile traveled for business purposes.

[4]Article 4 - Personnel Policy Changes of the Contract provides, in part, as follows:

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.

F. If the Union has a class grievance involving Employees within a department, it may submit the grievance in writing to the department head or the department head's designee. Time limits shall be the same as in individual grievances and the procedures for appeal from unsatisfactory answer shall be the same as in Step 3.

* * *

G. Step 3. If the grievance is not satisfactorily resolved at Step 2, the grievant or the Union may appeal the grievance in writing to the Employer or the Employer's designee within seven (7) working days after the receipt of the answer at Step 2. Within seven (7) working days after the receipt of the appeal, the Employer and the Union shall meet in an attempt to resolve the grievance. The Employer or the Employer's designee need not consider any grievance in Step 3 which encompasses a different alleged violation or charge than those presented in Step 2. The Employer or the Employer's designee shall reply in writing to the Union within seven (7) working days after the meeting. Union's Exhibit (Ex.) 9.

9. The DOE User Policy (Union's Ex. 7), containing Chapter 6.20 – Automobile Allowances, adopted May 1971, revised May 1980, and updated on April 2, 2001, states:

GENERAL ALLOWANCES

It is the policy of the Department to reimburse all travel expenses necessary to perform the duties assigned to the traveler's position with the Department of Education. Travel on the employee's island should be by the most direct route possible and should not be done when phone calls, faxes, electronic mail, or letters would produce comparable results.

* * *

11. All mileage claims should be listed on a separate form for each month and submitted to the Vouchering Section within 30 days following the applicable month. If a mileage claim is submitted before the month has ended, it must include a statement that no further mileage will be claimed for that month. The Vouchering Section may

return mileage claims received that are extremely overdue for a written explanation of the late submittal.[5]

10. The Department of Accounting and General Services (DAGS) has in effect "Travel Rules" promulgated under Hawaii Administrative Rules (HAR) Chapter 10 of Title 3, for the purpose of providing "uniform application of the Hawaii Revised Statutes and administrative policies, as they relate to travel expenses incurred by state employees and representatives in connection with official business of the State." Union's Ex. 8. HAR § 3-10-3(c) provides that "[w]hereever there is a conflict between these rules and the provisions of a collective bargaining agreement that is in effect, the provisions of the collective bargaining agreement take precedence. . . . " These Travel Rules also "take precedence over conflicting travel policies, written or unwritten, of any department or agency of the state. Written travel policies for internal administration within departments and agencies are encouraged, but are subordinate to these rules." HAR § 3-10-3(d).

11. An employee's use of his/her privately owned vehicle for official business is permitted under DAGS Travel Rules at the discretion of the Department head or the authorized representative. The DAGS Travel Rules require mileage reimbursement for use of a private vehicle be recorded and reported on State Accounting Form C-33.

12. The HGEA was not consulted about the User Policy covering Automobile Allowances and the procedures for submitting mileage reimbursement forms. There are no conditions for payment of mileage reimbursement contained in Article 45 of the BU 13 Contract such as requiring that claims be submitted within 30 days from the applicable month.

13. Based on a comparison of the DAGS Travel Rules, Article 45 of the Contract, and the DOE User Policy, the Board majority finds that neither the DAGS Travel Rules nor Article 45 require that mileage claims be submitted within 30 days following the applicable month, or for claims submitted before the month has ended that employees are required to waive subsequent claims for travel taken

---

[5]The User Policy also provides for monthly Flat Allowances, for example, to the DOE Superintendent of $326, $276 for Assistant and District Superintendents, and $175 for the Executive Assistant and Deputy District Superintendents, for the use of their private cars when on official business.

The User Policy also authorizes DOE Assistant and District Superintendents, Principals and Administrators to permit subordinate employees under their supervision to use privately owned cars on official business on a mileage allowance basis. "Current mileage rates are dependent on the existing bargaining unit contracts."

within the same month. To the extent the DOE relied on Section 11 of the User Policy as a basis for denying or delaying the payment or processing of payment to Cabral and other employees identified in the Union's mileage reimbursement class grievance, the Board majority finds the DOE unilaterally changed the terms and conditions of a bargainable topic.

14. Cabral is a public employee of the State, employed as a Social Worker II at the DOE, and a member of BU 13. From April 2000 to August 2000, Cabral worked as a social worker assigned to Kahuku High and Intermediate School. From September 2000 to August 2002, Cabral was assigned to the elementary schools in the Kahuku Area Complex. Cabral's duties required him to use his personal car for travel to schools within the Kahuku Area Complex, and to make home visits to families with children in schools to which he was assigned.

15. Prior to transferring to the DOE, Cabral was employed as a BU 13 social worker at the Department of Health (DOH), Child and Adolescent Mental Health Division from December of 1993 to April 2000; and at the Department of Human Services (DHS), Child Protective Services, from 1989 to 1991. Cabral's duties as a social worker at the DOH and DHS required him to use his car to make home visits and participate in various team meetings in order to perform his job. While working at the DOH and DHS, Cabral submitted mileage reimbursement forms that were past 30 days for the period claimed and was never denied payment when the claims were made more than 30 days after the applicable period.

16. On or about October 5, 2001, the DOE received from Cabral over a year's worth of mileage reimbursements on DOH FMS PY2 forms covering the period of May 2000 to September 2001.

17. On or about November 6, 2001, SCHICK notified Cabral that she would review his claims for August, September, and October 2001, but would not sign and approve Cabral's claims for the "last fiscal year, as the claims [were] extremely overdue, the fiscal year is over, and there is no reserve in that budget." SCHICK based her disapproval on the DOE's User Policy requiring all mileage claims to be submitted to the "vouchering section within 30 days following the applicable month." Cabral was instructed by SCHICK to submit future claims within the 30-day period " to avoid any delay or disapprovals. Union's Ex. 11.

18. After Cabral was informed of the DOE's FMS User Policy that required monthly mileage forms to be submitted within 30 days from the applicable period, the DOE received Cabral's mileage form totaling $201.28 for October 2001 on November 2, 2001; and Cabral's mileage form totaling $189.44 for November 2001 on December 3, 2001. For December 2001, Cabral submitted a mileage claim form totaling $172.35. For January 2002, Cabral submitted a

mileage claim form totaling $315.78 on February 4, 2002; for February 2002, a claim for $239.44; and for March 2002, a claim for $176.18 on April 25, 2002. On July 11, 2002, the DOE received mileage forms for April 2002 of $254.19; May 2002 of $218.67; and June 2002 of $30.34.

19. On December 6, 2001, William H. Chai (Chai), HGEA's Union Agent, filed a Step 1 grievance addressed to DOE District Superintendent ALBERT for certain BU 13 employees, including Cabral, for the nonpayment of mileage.[6] Chai filed this grievance after discovering that the DOE was denying mileage reimbursement to employees who were not submitting mileage reimbursement claims within 30 days based on the DOE FMS User Policy. Chai believed DOE's denial of payment was inconsistent with the practice for payment followed by other state departments, as well as the City and County of Honolulu's Board of Water Supply. According to Chai, other departments usually paid mileage reimbursement claims within one to two months of their submission.

20. On December 11, 2001, the DOE acknowledged the Step 1 grievance for nonpayment of mileage reimbursements, and scheduled a Step 1 grievance hearing on December 17, 2001. Union's Ex. 13.

21. On December 17, 2001, ALBERT held a Step 1 grievance meeting attended by Chai, Union Agent Nora Nomura, MATSUZAKI and SCHICK. The DOE took the position that it intended to pay mileage reimbursement claims, as long as they could be verified. According to ALBERT, it was always the DOE policy to obtain a written explanation whenever mileage reimbursement claims were not submitted within 30 days from the applicable period.

---

[6]The grievance states in part:

> It has come to the Unions (sic) attention in Windward District that mileage request (sic) beyond 30 days by employees is considered late and will not be reimbursed. The Union contends that Article 45-Travel does not talk about a 30 day requirement, therefore, non payment to the Unit 13 employees is a clear violation of the contract.
>
> * * *
>
> As a remedy, the Union demands payment to these employees by the next pay period. If there is no payment we will be seeking interest on the balance due at the Employers (sic) cost.

Union's Ex. 12.

22. At the Step 1 meeting, Chai informed ALBERT, MATSUZAKI and SCHICK that the FMS User Policy requiring mileage reimbursement claims be submitted within 30 days was subject to consultation and "possibly negotiations." At the Step 1 meeting, Chai "tried to explain to them our positions, the violations of the contract, and we got nowhere. Therefore, we told them to send us a decision and we will move the grievance on." Transcript (Tr.) of Hearing on January 30, 2003, Vol. I, p. 89.

23. Following the Step 1 meeting, ALBERT wrote two letters on January 11, 2002. The first to Chai,[7] "to clarify our discussion on December 17, 2001 regarding the issue of the non-payment of mileage." ALBERT demanded that Cabral explain "why [his FMS PY2 forms] were not submitted in a timely manner." ALBERT redacted the phrase "within the thirty days as he was instructed in August 2001" typed within the body of her letter. Union's Ex. 15. The second letter was sent as a reminder letter from ALBERT to principals and district educational specialists with a copy to Chai, regarding the mileage claim procedures that staff and teachers were required to follow as set forth in the User Policy, specifically quoting Section 11 and attaching a copy of Chapter 6.20 on Automobile Allowances.

---

[7]ALBERT's letter to Chai states:

This letter serves to clarify our discussion December 17, 2001 regarding the issue of the non-payment of mileage. In a letter dated December 6, 2001, the Union demanded that payment to these employees be made by the next pay period.

The agreements related to this issue are as follows:

- Regarding Mr. John Cabral's requests for payment for mileage for the previous school year, Mr. Cabral would need to substantiate his requests with documentation for the 2000 - 2001 school year and an explanation as to the reason is (sic) was not submitted in a timely manner, (within the thirty days as he was instructed in August 2001.) This written explanation is required by Vouchering with any late request for payment.
- Regarding mileage payment requests after August 2001, all employees under the supervision of Mrs. Pauline Schick are expected to follow the instructions for submittal provided to them in a meeting in August 2001.

Union's Ex. 15.

24. By e-mail on January 11, 2002, SCHICK informed Cabral that he would need to substantiate his mileage claims for the previous school year with "documentation for the 2000-2001 school year and provide an explanation as to the reason that it was not submitted in a timely manner."

25. Chai denies that any agreements were made at the Step 1 meeting as outlined by ALBERT in her January 11, 2002 letter.

26. On January 14, 2002, Cabral wrote to the Special Services Section, Windward District, DOE in response to its "completed review and correction of" his mileage reimbursement requests for September and October 2001. Cabral provided the addresses for home visits, and disputed the accuracy of the mileage chart used to adjust Cabral's mileage from his odometer readings. Cabral stated that: "The point is that it is invalid to use that chart as the instrument by which you confirm mileage, for the reasons I have cited. Therefore, if you insist on using this instrument and deny me my mileage, I am intending to file a grievance with the union." Union's Ex. 16.

27. On January 25, 2002, Chai filed a Step 2 class grievance with DOE Superintendent HAMAMOTO over the nonpayment of mileage reimbursement which was expanded on a statewide basis to include DOE employees in the Leeward, Central Oahu, and Honolulu District employees in BU 13.[8]

28. On February 3, 2002 Cabral submitted a written explanation to the Vouchering Section, Windward District, DOE as to why his mileage reimbursement request forms "were turned in so late." Cabral explained that:

---

[8]The Step 2 grievance states in part:

> Ms. Nora Nomura (Field Services Officer for BU 9 & 13) and myself attended a Step 1 grievance meeting on December 17, 2001, we advised management that their alleged notification to employees regarding a 30 (sic) turnaround time was a clear violation of Article 4 - Personnel Policy Changes. To date employees have not been paid and now additional hurdles have been added before employees will receive reimbursement.
>
> It is the Union's position that Article 45 - Travel, (I) Mileage Reimbursement has been circumvented and violated without proper consultation with the appropriate representing Union. Therefore the Union demands payment with interest for the duration of the current Unit 13 agreement.

Union's Ex. 17.

1) He "never expected to have as much difficulty in getting reimbursed . . . . For eleven years I received mileage reimbursements from the Department of Human Services and the Department of Health where I was employed before transferring to the DOE, and not once, in spite of late turn ins, did I ever have a problem." Cabral further explained that he had no notice of the DOE's written User Policy for mileage reimbursements requiring that requests be turned in within a 30 day period.

2) Regarding the Employer's request for documentation, Cabral stated that the only written documentation required that he was aware of was the FMS Y2 forms. Cabral questioned whether the User Policy called for such documentation, and whether all persons claiming for mileage reimbursement were being asked to provide "such documentation." Finally, Cabral explained that in reviewing his forms for the period 2000 to 2001, he discovered "what [the DOE has] probably discovered – many errors, including dates which fell on weekends, return trips to the office which I failed to include, etc. The only reason that comes to me as an explanation is that when I discovered how scrutinizing your vouchering section was, the first thing I did was to transcribe all of the information I had from the Department of Health FMS PY2 forms I had brought over with me, to the DOE FMS PY2 forms I was given. This involved a very long tedious process as I had accumulated months and months of mileage for which I sought reimbursement. I had already spent a great deal of time transmitting this information from the weekly and monthly calendars which I used to notate the dates and locations I was traveling to, as well as the miles incurred – and going through this whole process again was very demanding for someone who does not do this all day long as you do. In the process, I inadvertently made some mistakes – some major mistakes." Union's Ex. 18.

29. On February 4, 2002, the DOE received corrected mileage forms for the months of May 2000 to August, 2001, which were initially received by the DOE on October 5, 2001.[9]

---

[9]Based on an internal DOE audit at the Windward District Office, Cabral was paid on May 30, 2002 for May 2000 in the amount of $45.51; and on June 11, 2002, Cabral was paid $23.31 for June 2000, $18.50 for July 2000, and $40.33 for August 2000. The only other payments made to Cabral to date are: $260.28 on May 23, 2002 for February 2002, and $226.81 on June 15, 2002 for March 2002.

30. On February 19, 2002, SCHICK acknowledged receipt of Cabral's revised mileage claims for the months of May 2000 through October 2001, and the "timely receipt" of his January mileage claim for $315.78. SCHICK informed Cabral that she could not approve his claim forms for processing because he failed to submit a "schedule, calendar, or record of documentation other than [his] claim forms." SCHICK submitted all of Cabral's mileage claims for "state audit/investigation." Union's Ex. 19.

31. On February 22, 2002, Cabral responded to SCHICK that her request for additional documentation was "without precedent" since neither the written User Policy, nor past practice by individuals submitting mileage claim forms called for such documentation to be attached. Cabral informed SCHICK that he felt harassed, and would seek legal counsel and contact his Union. Union's Ex. 20.

32. The DOE held a Step 2 meeting with Chai represented by Solette Perry (Perry) for Superintendent HAMAMOTO. Chai explained that even though the Union did not agree with the User Policy, Cabral was turning in his mileage claims as he was instructed by SCHICK. Since he did not receive a written Step 2 decision from Perry or HAMAMOTO, Chai proceeded to Step 3 on March 27, 2002.[10]

---

[10]The Step 3 class grievance states in part:

> The Department of Education picks and chooses whom (sic) they will reimburse for mileage. I have spoken with numerous classified employees who are not being reimbursed properly. It appears that some employees from the start of the school year have not been reimbursed.
>
> The Union contends that the Department of Education is arbitrary, capricious, and disparate, when it comes to mileage reimbursement. Therefore, violating Article 3-Maintenance of Rights and Benefits, Article 4-Personnel Policy Changes, Article 8-Discipline, and Article 45-Travel of the current Unit 13 agreement.
>
> As a remedy, the Union is (sic) seeks payment for mileage also interest on top of the payment if the Employer took longer than 30 days to reimburse employees.
>
> We are moving this case to your level because it has not moved since the Step 2 meeting.

Union's Ex. 21.

33. On or about July of 2002, ALBERT accompanied DOE's legal counsel Deputy Attorney General Russell Suzuki (Suzuki) to a hearing in Windward District Court over a small claims matter filed by Cabral for nonpayment of his mileage reimbursement. The court granted the DOE's motion to dismiss for lack of jurisdiction based on the DOE's contention that the grievance procedure under the collective bargaining agreement was the appropriate forum for Cabral to resolve his claim. The court dismissed the claim without prejudice so that Cabral could exhaust his remedies in the grievance process.

34. On July 25, 2002 following the small claims matter, ALBERT formally requested the State Attorney General to investigate Cabral's mileage reimbursement claims because "numerous questionable claims were discovered including claims for non-working days and claims for unauthorized travel." Said investigation files and review is pending with Deputy Attorney General Suzuki, who is looking into possible criminal and civil action that may result after reviewing Cabral's mileage reimbursement claims which the DOE has either paid or delayed payment.

35. On August 20, 2002, DHRD Director Davis K. Yogi (Yogi) sustained the Step 3 class grievance that included Cabral's mileage reimbursement claims and granted the remedy sought except for interest penalties.

The Step 3 Decision states in part:

> . . . The Union alleges violations . . . contending that the "Department of Education picks and chooses whom they will reimburse for mileage." Further, the Union contends that this situation involves several BU 13 employees and spans multiple school districts. The Union cited one employee in particular, Mr. John Cabral, as a target of the DOE's arbitrary, capricious, and disparate treatment. The remedy sought is to pay all affected employees the mileage reimbursements that they are owed, that interest should be added for all employees whose payments have taken longer than 30 days to process, and that all future payments shall be processed in a timely manner for all employees.
>
> We reviewed the grievance and found that the Union's contentions appear to be true. Mileage reimbursements to certain employees, including Mr. Cabral, have been inexplicably delayed. Furthermore, we have discovered a disconcerting lack of cooperation on the part of District-level offices in the course of our investigation in this case.

> In view of the foregoing, we sustain the grievance, and with the exception of any interest penalties, the remedy sought is granted. We hereby direct that, within 30 days of the date of this letter, the DOE shall process and pay any outstanding claims for mileage reimbursements that have been properly submitted. If any payments cannot be made within that timeframe, the DOE shall provide us with a written explanation as to why they should be allowed more time.

36. ALBERT denies having knowledge or notice of the grievance proceeding to Steps 2 and 3, and the Step 3 Decision sustaining the mileage reimbursement class grievance until she asked for and received a copy on November 2, 2002. Indeed, ALBERT testified that because she was never notified by the DOE Office of Human Resources of the Union's Step 2 grievance or asked to attend the Step 2 meeting, she assumed the Union had dropped the mileage reimbursement grievance. However, based on ALBERT's familiarity with the contractual grievance procedure; Chai's request at the Step 1 meeting to send a decision so they could move the grievance on; ALBERT's Step 1 response dated January 11, 2002 which although informally written was tantamount to a denial of the grievance; the nonpayment of Cabral's mileage reimbursement claims, and the reference in the Step 3 Decision specifically citing a "disconcerting lack of cooperation on the part of District-level offices in the course of [DHRD's] investigation," the Board majority finds that ALBERT knew, or should have known, that both Cabral and the Union were pursuing mileage reimbursement payments through the grievance process.

37. Had she known of the Step 3 Decision, ALBERT says she would have "responded immediately as to why we were not paying Mr. Cabral's mileage claims.... That we couldn't verify the claims and that those claims constituted in our opinion a pattern on his part that indicated potential fraud." Tr. Vol. II,[11] p. 298.

38. The Board majority finds that even after ALBERT obtained a copy of the Step 3 Decision, she failed to notify either DHRD and the Union of her reasons for not paying Cabral's claims within the time frame set and why the DOE should be allowed more time.

39. From on or about March 27, 2002 to August 20, 2002, the DOE knew that a Step 3 class grievance over mileage reimbursements involving claims by Cabral was pending at DHRD. The DOE was represented at a Step 2 meeting by DOE Labor Relations personnel Perry for State Superintendent HAMAMOTO. The Board majority finds that the DOE is not relieved of its contractual obligations

---

[11]Tr. Vol. II is the transcript of the hearing held on January 31, 2003.

to abide by the grievance procedure and DHRD's Step 3 Decision, even though ALBERT insists that "the extent of [her] participation ended with the Step 1 meeting" and that she did not have actual knowledge of DHRD's Step 3 Decision until she received a copy on or about November 2, 2002.

40. ALBERT has not made any attempt to provide a written explanation either to the Union or the Employer's designee at Step 3, as to why no mileage reimbursement payments have been made to Cabral. ALBERT's reason for doing nothing is simply that the 30 day "window of opportunity" had passed from the date of issue to the date she asked for and actually received a copy of the Step 3 Decision on November 2, 2002.

41. The DOE has processed and paid outstanding claims for mileage reimbursements that were properly submitted by all employees included in the grievance. Since the issuance of DHRD's Step 3 Decision to Superintendent HAMAMOTO, the DOE has not provided a "written explanation as to why they should be allowed more time to respond" regarding its refusal to pay Cabral's mileage reimbursement claims that had been forwarded to the Attorney General's Office for investigation.

42. Since the issuance of DHRD's Step 3 Decision regarding mileage reimbursements, the DOE has not paid Cabral any of his outstanding mileage claims. For each month covering September 2000 to June 2002 (excluding payments made for January and February 2002), Cabral's calculation of the outstanding mileage reimbursement owed by the DOE, based on his odometer reading, totals: $2,136.15. The DOE's audited figures of Cabral's mileage reimbursement owed based on the mileage chart for the same period, totals: $1,889.32.

43. The Board finds that DHRD's Step 3 Decision issued in accordance with the grievance procedure set forth in Article 11 of the BU 13 Contract, is final and binding on the DOE. The DOE has paid outstanding mileage claims to all affected employees subject to HGEA's class grievance, except for Cabral's because said claims were allegedly not properly submitted.

44. By failing to process and pay Cabral's mileage reimbursement claims or providing DHRD a written explanation why DOE should be allowed more time to respond, the DOE interfered with the grievance process by effectively repudiating DHRD's Step 3 decision sustaining the grievance.

Cabral's Reassignment

45. On July 24, 2002, the day before ALBERT formally requested an Attorney General investigation, ALBERT notified HGEA's Russell Okata of her decision to re-assign Cabral from Kahuku Learning Support Center to Olomana School

in the Kailua Complex which includes the HYCF to take effect August 20, 2002, and requested a "consult and confer" meeting. ALBERT provided the following reasons to reassign Cabral:

- We are mandated per Felix Consent Decree to provide the necessary mental health services to IDEA/504 students in order that they may benefit from their education. The Facility had 277 youth during this past school year, with more than 76% in the SPED or 504 categories. Although the DOH team provides risk assessments, medication evaluation, medication monitoring, skills groups and adjunct services, they have not provided the IEP delineated mental health services.

- The Facility currently does not have a DOE School Social Worker or Behavioral Health Specialist to provide services for students. Current care load is being assumed by Behavioral Health Specialists from other schools and complexes. Beginning the 2002-2003 school year, they will return to their current school assignments. Current services need to be continued for students.

- In assessing and balancing the needs of students in the District, based on services being provided, it is determined that within the current allocation, a School Social Worker position could be moved from Kahuku to Kailua. This is supported by the Kahuku Complex Quality Assurance team's assessment that two school social worker positions are not needed based on current caseload. Mrs. Paulie Schick, DES for Mental Health Services concurs with the team's assessment.

- Within the Kahuku Complex, Mr. Cabral's caseload data reveals a low number of hours: 26 hours of direct services and 23 hours of coordination in May 2002, the last full month of last school year, as compared to his colleagues who averaged 85-146 hours a month. Again, Kahuku Complex would not be negatively impacted by Mr. Cabral's re-assignment.

Respondents' Ex. 30.

Regardless of the apparently legitimate, non-discriminatory reasons stated by ALBERT in her letter to the Union, the Board majority is not persuaded that ALBERT would have taken the same action had Cabral not been engaged in protected activity pursuing his mileage claims provided by the Contract through the grievance procedure and contesting the DOE's procedural requirements.

46. By letter dated August 14, 2002, ALBERT notified Cabral that he was being reassigned to Olomana School based on a caseload comparison in the schools in the Windward District. Respondents' Ex. 36.

47. By letter dated August 14, 2002 to DOE Superintendent HAMAMOTO, Chai filed a grievance over Cabral's reassignment alleging that it was a "pretext to discipline and retaliation against Mr. Cabral." Respondents' Ex. 37.

48. Effective August 21, 2002, Cabral was involuntarily assigned to Olomana School within the Olomana/Waimanalo Area Complex, where his primary responsibility includes providing therapy to male youth confined at the HYCF.

49. Cabral's work at Olomana School does not require use of his car to travel for meetings and home visits for which he would be eligible to claim mileage reimbursements under Article 45 of the BU 13 Contract.

50. On September 12, 2002, ALBERT issued a Step 1 decision denying Cabral's reassignment grievance finding "no change in wages, hours or other conditions of work. . . . therefore no violation as alleged of Article 3, Maintenance of Rights and Benefits as:

- There was no loss of actual work time due to the travel from Grievant's home to Olomana.
- No loss of benefits afforded to Grievant in the performance of his duties under the Unit 13 Agreement.
- No inability to respond quickly to working situations as Olomana and its' (sic) students are self-contained.
- No inability to interact with needed agencies, as again, Olomana services are self-contained.

Respondents' Ex. 40.

51. ALBERT's response denying the Step 1 grievance provides no cogent explanation why Cabral's reassignment is not a "pretext" for retaliation as the Union charged.[12] The Board majority finds that ALBERT's distinction between

---

[12]ALBERT states:

Though the Union alleges that Grievant's relocation is "a pretext to discipline and retaliation against the Grievant", for the filing of another grievance for payment of his mileage benefits. The DOE needs to clarify that the grievance the Union is referencing was filed as a *Class* grievance of which the Grievant was identified as one of three affected individuals.

the Union's class grievance in which Cabral was an affected employee versus a grievance filed by Cabral, is a distinction without a difference since the filing of a grievance or complaint by the Union on behalf of employees or an individual are both protected activity.

52. The Board majority also finds that Cabral's right to submit and pursue payment of his mileage reimbursement claims as provided under Article 45 of the Unit 13 Contract, triggered the Union's mileage reimbursement class grievance on behalf of Cabral and other affected employees, and therefore also constitutes protected activity.

53. Chai testified that based on his knowledge and experience as a Union agent representing members in the DOE, Cabral was reassigned to Olomana in retaliation for his involvement in the Union's pursuit of the mileage reimbursement grievance. Chai's opinion of Olomana School and the HYCF, in particular, is that "you are working with the worst of the worst," "incarcerated kids." Tr. Vol. I, p. 100. This is in stark contrast to ALBERT's self-serving opinion[13] that "if one were truly service oriented," Olomana "would be the one place in the district that they would want to be first." Tr. Vol. II, p. 299.

54. The Board majority finds suspect ALBERT's motive for Cabral's reassignment to Olomana School for several reasons. First, the involuntary nature of Cabral's reassignment that ALBERT put into effect over the Union's objections.[14]

The DOE must also clarify that Grievant's claim for that class grievance has been paid in part *prior to the filing of this grievance* and an investigation is ongoing in the remaining portion of the two-year submission of claims Grievant filed on or about December of 2001.

Respondents' Ex. 40.

[13]Tr. Vol. II, p. 299. ALBERT testified that her "opinion of an Olomana assignment is that it would be a wonderful opportunity to help young people, often whom have come from backgrounds that didn't provide them the necessary support that they needed to succeed not only in school but in life. And that if one were truly service oriented that would be the one place in the district that they would want to be first."

[14]MATSUZAKI testified that while transfers of a permanent employee to a vacant position are normal for filling positions, Cabral was not assigned or transferred to the vacant position at Olomana, even though a social worker position had been vacant for nearly one school year. ALBERT decided to reassign Cabral based on SCHICK's review of the hours of service logged in by each social worker and recommendation to "move Mr. Cabral from Kahuku to Olomana not to fill a vacancy, but to provide an additional social worker on top [of] the vacancy. And in lieu of the fact that we still had not been able to establish the two additional behavioral health specialists positions." Tr. Vol. II, p. 302. As a result, Cabral

Second, that the timing of the reassignment and the stated reasons as provided on July 24, 2002 coincided with ALBERT's July 25, 2002 referral for investigation of Cabral's mileage reimbursement claims to the Attorney General's Office. Third, ALBERT's "stunned" reaction[15] towards Cabral's submission of a year's worth of mileage reimbursement claims singled Cabral out among the ten Social Worker IVs and 39 Behavioral Health Specialists under Respondent SCHICK's supervision who could have been assigned. Fourth, the Board majority finds ALBERT's reasons for Cabral's involuntary reassignment suspect, because ALBERT knew or should have known Cabral and the Union were pursuing the mileage reimbursement claims through the grievance process, and nevertheless, failed to communicate openly and effectively with the Union to resolve the discrepancies found in Cabral's mileage reimbursement claims within the context of the grievance procedure.

55. As a result of a quality assurance process which concluded that based on the amount of case hours logged by social workers who were providing service to

---

was reassigned, to Olomana School in the Kailua complex, and outside of ALBERT's Kahuku complex.

[15]ALBERT testified as follows:

Q. And when you first took a look at Mr. Cabral's claims, what was your reaction?
A. I was stunned.
Q. Why were you stunned?
A. I was stunned first of all by the number of claims and the fact that they went back over different fiscal years, but I was also stunned by some of the amounts.
Q. And what amounts are you talking about?
A. Well, there was one claim in excess of $300, and I was trying to figure how anybody could drive that much.
Q. And what was the basis of your comparison?
A. First of all, that I have lived in Sunset Beach for 35 years and driven to Kahuku High School from Sunset Beach for almost a decade and a half. And as a principal and as a district and complex area superintendent I receive a mileage allowance for all of the nighttime and weekend work that I am required to do in my job capacity. And I very rarely see mileage claims that ever exceed the mileage allowance that I am provided. In fact, I have never seen one, except for Mr. Cabral.
Q. What is the mileage allowance that you are provided?
A. $276 a month.

Tr. Vol. II, pp. 292-93.

students in the entire district, there was only a need for one not two social workers in the Kahuku complex. On this basis, SCHICK recommended moving Cabral to Olomana. Tr. Vol. II, pp. 303-04. ALBERT relied on the quality assurance assessment as "just more validation that it would be the most logical thing to move Mr. Cabral rather than any other social worker." Tr. Vol. II, p. 304. The Board majority finds that ALBERT's reliance on the Kahuku Quality Assurance process to justify her involuntary reassignment of Cabral to Olomana was too convenient an explanation and fails to support a finding that Cabral's involuntary reassignment was necessary or would have occurred in any event, had he not engaged in protected activity by pursuing his mileage reimbursement claims through the grievance process. On this basis, the Board majority is convinced that ALBERT went to great lengths to force Cabral out of his social worker position based within the Kahuku District and into an admittedly hard to fill social worker position in the Kailua district complex, i.e., the HCYF at Olomana School with a reputation for " working with the worst of the worst" where he is not required to use his car to travel on official business.

56. To the Union, ALBERT justified Cabral's involuntary reassignment based on a need for a social worker to service 85 percent of the student population at Olomana, who are special education Felix-class youth. However, even prior to Cabral's reassignment to Olomana the DOE had two social worker positions at Olomana School which were "hard to fill" according to MATSUZAKI. Tr. Vol. II, pp. 360-61. In fact, there were no social workers assigned to Olomana for the most part of the school year prior to Cabral's reassignment. Tr. Vol. II, p. 360. In the past, the DOE had been able to find graduates from college to work as a Social Worker III on an emergency hire basis at Olomana School. And, before Cabral's reassignment, the social worker duties were assumed in large part by a Behavioral Health Specialist, who resigned in the summer of 2002. But ALBERT's testimony focused more specifically on a need for two behavorial health specialists, "because the needs [of] the student were so great," and not social workers. Tr. Vol. II, p. 302. And, Superintendent HAMAMOTO approved the establishment of two additional behavioral health therapists. Tr. Vol. II, p. 305. Nevertheless, instead of filling the behavioral health therapist positions, ALBERT forced Cabral out of the Kahuku complex and to Olomana "not to fill a vacancy [which had been opened for a year and a half], but to provide an additional social worker on top [of] the vacancy. And in lieu of the fact that we still had not been able to establish the two additional behavioral health specialists positions." Tr. Vol. II, p. 302. Despite the professed need for additional social workers plus behavioral health positions at Olomana, which ALBERT had requested and received permission to establish, Cabral is the only social worker who has ever been involuntarily reassigned to Olomana.

57. The Board majority does not credit ALBERT's testimony that she considered Cabral to be a logical choice because of his experience as a school-based

behavioral health specialist, his DOH background as a therapist, and the fact that as a male, Cabral would serve as a "good role model" to the vast majority of young people in the HYCF. Tr. Vol. II, p. 327. Based on ALBERT's referral for investigation of Cabral's claims to the Attorney General's Office, ALBERT believes Cabral is dishonest and not trustworthy. It would be inconsistent to believe, and the Board majority is not persuaded, that ALBERT harbors any altruistic motive by thinking Cabral a "good role model" for juvenile youth simply because he's a male, however dishonest.

58. The Board majority finds that but for Cabral's pursuit of mileage reimbursement claims spanning more than one fiscal year, which triggered the Union's class grievance, ALBERT would not have involuntarily reassigned Cabral to HYCF at Olomana School, which is not only outside of the Kahuku complex, but also does not require Cabral to use his personal car to travel for official business.

DISCUSSION

In this matter, the Union's prohibited practice charges against the DOE encompass statutory violations for interference in the exercise of any rights guaranteed under HRS Chapter 89, actionable under HRS § 89-13(a)(1); retaliation for protected activity actionable under HRS § 89-13(a)(4); refusing or failing to comply with any provision of HRS Chapter 89 actionable under HRS § 89-13(a)(7); and failure to bargain in good faith under HRS § 89-13(b)(5); as well as violation of the contractual grievance procedure for not complying with the Step 3 Decision sustaining the Union's class grievance, actionable under HRS § 89-13(a)(8).

The burden of proof is the Union's to show by a preponderance of evidence that the DOE committed prohibited practices in wilful violation of HRS §§ 89-13(a)(1), (4), (5), (7), and (8), by not processing and paying Cabral's mileage reimbursement claims as directed in the Step 3 Decision; involuntarily reassigning Cabral to a social worker position at Olomana in retaliation for protected activity; and for applying procedures in the User Policy for submitting mileage reimbursement claims without consultation and negotiation.

Mileage Reimbursement

The Union contends that the DOE committed a prohibited practice by failing to pay mileage reimbursement to Cabral in accordance with the Employer's Step 3 Decision issued August 20, 2002 by DHRD sustaining the grievance filed over this matter. Since the issuance of the Step 3 Decision, the DOE has paid all employees in the affected class in the grievance, except John Cabral. Specifically, the Step 3 Decision directed the DOE to "process and pay any outstanding claims for mileage reimbursements that have been properly submitted." (Emphasis added.)

The DOE contends the Board should decline jurisdiction over the Union's mileage reimbursement grievance and defer the matter to the arbitral process because the Union has failed to exhaust its contractual remedies. In Decision No. 427, Hawaii Government Employees Association, 6 HLRB 201, 205 (2001), the Board found it inappropriate to decline jurisdiction based on the exhaustion of contractual remedies doctrine in a matter where the complainant had raised both contractual and statutory violations, stating that "[w]hile the grievance procedure is indeed available to address the alleged contractual violations,[16] the Board has exclusive jurisdiction over the alleged statutory violation." For the same reasons, it would be inappropriate to decline jurisdiction in this case based on the exhaustion doctrine.

The Employer argues, that assuming jurisdiction, the Board should find the DOE did not violate the mileage reimbursement provision of the Contract, i.e., Article 45. However, the Union's complaint raises a violation of the Contract's grievance procedure for noncompliance with the Step 3 Decision under Article 11, and not Article 45 covering mileage reimbursements.

At the heart of the Union's complaint is the integrity of the contractual grievance procedure. The Union contends that the DOE's non-compliance with the Step 3 Decision frustrated the grievance process rendering the collective bargaining process meaningless in wilful violation of HRS §§ 89-13(a)(1), (5), (7), and (8). The Step 3 Decision sustaining the Union's mileage reimbursement grievance provided a satisfactory resolution to the grievance. Or so the Union believed. And, the Union could not proceed to Step 4 to arbitrate the mileage reimbursement grievance since the Employer sustained the grievance in its favor.

Accordingly, we conclude that jurisdiction over the instant complaint properly lies with the Board under HRS § 89-5. Furthermore, to defer jurisdiction at the outset would not advance the policy of favoring dispute resolution through the contractual grievance and arbitration procedures agreed to by the parties to the Contract.

---

[16]The Board stated its reasons as follows:

> Accordingly, if the HGEA were required to exhaust the grievance process prior to pursuing this action before the Board, the results of that process would have no jurisdictional, precedential or preclusive effect and the Union would still be free to subsequently file this complaint with the Board. The results of successive identical actions would be either redundant or conflicting. Time and money would have been wasted. The Board therefore cannot identify how the interests of the parties, or principles of collective bargaining would be forwarded by a declination of jurisdiction based on exhaustion. Id.

Step 3 Decision

At issue, is the DOE's alleged failure to comply with the Step 3 Decision with respect to Cabral. The parties do not dispute that the Step 3 Decision is binding on the DOE. Nowhere is this more clearly articulated than in HRS § 89-10.8, which states in part:

> (a) A public employer shall have the power to enter into written agreement with the exclusive representative setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. The grievance procedure shall be valid and enforceable . . . .

The instant complaint not only raises allegations of a violation of the collective bargaining agreement, but more importantly, the Employer's statutory obligation to give a Step 3 Decision final and binding effect within the meaning of HRS § 89-10.8.

In this case, the Union's mileage reimbursement grievance resulted in the Employer's Step 3 Decision sustaining the grievance for the Union. As noted above, the Union did not proceed to arbitration. As a result, the Board finds the Step 3 Decision issued by the Employer is final and binding on the DOE. By failing to comply as directed under the Step 3 Decision, an employer engages in a prohibited practice for violating the terms of the collective bargaining agreement under HRS § 89-13(a)(8), as well as failing to give "final and binding" effect to a decision reached through the contractual grievance procedure within the meaning of HRS § 89-10.8, in violation of HRS § 89-13(a)(7).

The Union alleges that the DOE failed to comply with DHRD's Step 3 Decision by not processing Cabral's year's worth of claims for mileage reimbursements for payment. The preponderance of evidence does not support such a finding inasmuch as the Step 3 Decision directed the DOE to "process and pay any outstanding claims for mileage reimbursements that have been <u>properly</u> submitted." (Emphasis added.)

ALBERT questioned the veracity of Cabral's mileage reimbursement claims based on an internal audit. Cabral submitted corrected forms and admitted to making mistakes in transferring the information from one form to another. Cabral's refusal to submit additional documentation to verify his claims appeared to raise further questions. Finally, on July 25, 2002, nearly one month before the August 20, 2003 Step 3 Decision was issued, ALBERT asked the State Attorney General to investigate Cabral's mileage reimbursement claims because "numerous questionable claims were discovered including claims for non-working days and claims for unauthorized travel." To date, said investigation files and review is pending with Deputy Attorney General Suzuki, who is looking into possible criminal and civil action that may result after reviewing Cabral's mileage reimbursement claims which the DOE has either paid or delayed payment.

The HGEA contends the Employer "should not be permitted to hide behind a phantom "investigation" to justify their non-compliance with a valid Step 3 grievance decision." The Board majority disagrees. To the extent the DOE had a reasonable basis to question the veracity of Cabral's mileage reimbursement claims, the Board majority concludes that the DOE did not commit a prohibited practice as alleged by the HGEA for failing to process and pay Cabral's outstanding claims referred for investigation by the Attorney General's Office because they were not "properly submitted." Accordingly, the DOE was not obligated under the Step 3 Decision to process a year's worth of Cabral's claims for payment which it found were improperly submitted and forwarded for investigation by the Office of the Attorney General. This by no means ends the Board majority's analysis of the DOE's alleged failure to give the Step 3 Decision final and binding effect within the meaning of HRS § 89-10.8.

More specifically, the Step 3 Decision also directed that "[i]f any payments cannot be made within the timeframe, the DOE shall provide us with a written explanation as to why they should be allowed more time." What is striking to the Board majority is the absence of responsible action on the part of the DOE and ALBERT, in particular, to give the Step 3 Decision any meaningful effect by notifying the DHRD and the Union about Cabral's mileage reimbursement claims with a written explanation as to why the claims had been referred for investigation resulting in a delay of processing the claims for payment pending the outcome of the investigation.

The record supports a finding that from on or about March 27, 2002 to August 20, 2002, the DOE knew that a Step 3 class grievance over mileage reimbursements involving claims by Cabral was pending at DHRD, even though ALBERT alleges no actual knowledge of the Step 3 Decision. At the Step 2 meeting with the Union, the DOE was represented by DOE labor relations personnel Perry for State Superintendent HAMAMOTO.

ALBERT testified that had she known of the Step 3 Decision, she would have "responded immediately as to why we were not paying Mr. Cabral's mileage claims.... That we couldn't verify the claims and that those claims constituted in our opinion a pattern on his part that indicated potential fraud." Tr. Vol. II, p. 298. In this instant case, however, ALBERT took no action even after she learned of the Step 3 Decision. After learning from Perry on September 12, 2002, that the Employer rendered a Step 3 Decision over the payment of mileage reimbursement to Cabral, ALBERT took no action to notify DHRD and the Union. Moreover, after asking for and obtaining a copy of the Step 3 Decision, ALBERT took no action to provide a written explanation or notify DHRD and the Union that Cabral's mileage reimbursement claims had been referred to the Attorney General's Office for investigation, and no payments would be made until the investigation was completed.

The Board majority credits the testimony of Deputy Attorney General Suzuki that his investigation did not involve the grievance or labor relations issue.[17] Moreover, even though ALBERT testified she was instructed not to pay Cabral's claims during the pendency of the investigation by Deputy Attorney General Suzuki, it does not excuse the DOE's failure to provide a written explanation or notice of said investigation to DHRD and the Union.

In addition, SCHICK, as Cabral's supervisor, also professed ignorance of the Step 3 Decision until after ALBERT showed her a copy. Nevertheless, SCHICK admitted that at one point she had "heard things" about the Step 3 Decision which is why she began processing payment of claims for other employees included in the Union's class grievance over mileage reimbursements. SCHICK admitted that she paid the claims of one employee

---

[17]Upon examination by the Union's attorney, Deputy Attorney General Suzuki testified as follows:

> Q. And your involvement in this case is limited at this point in time to an investigation that you are conducting at the request of the Department of Education, right?
>
> A. Yes. I am not involved in the grievance or the labor relations issues.
>
> Q. And, likewise, you would have no role in instructing the department on whether to pay or withhold payment with respect to a Step 3 Decision being issued, correct?
>
> A. No, I don't handle those matters.
>
> Q. You are not aware of a Step 3 Decision that was issued, correct?
>
> A. No.
>
> Q. And in your role as the investigator for these mileage reimbursement claims you would agree that in determining whether payment should or should not be made, you would defer to the superintendent of the Department of Education to make that decision?
>
> A. Or the fiscal officer within the department.
>
> Q. Okay, But nevertheless, it would not be you, you would defer to the Department of Education to make that call as to whether payment should or should not be made, correct?
>
> A. I think the initial administrative determination as to whether or not the appropriate paperwork was submitted, and whether the matter was within the course and scope of the employee's duties or whatever, that is an administrative decision that the department staff would make, not me.

Tr. Vol. I, pp. 162-63.

within the 30 days required by the Step 3 Decision even though she had not actually seen a copy of the decision. Tr. Vol. II, p. 275.

The DOE cannot plead ignorance of the Step 3 Decision based on ALBERT's failure to have asked for and actually received a copy on November 2, 2002. Consequently, the DOE is not relieved of its contractual obligation to give "final and binding" effect to the Employer's Step 3 Decision. The DOE's obligation to implement the Step 3 Decision arose upon issuance and receipt by HAMAMOTO, to whom it was addressed. As the Kahuku Complex Area Superintendent, ALBERT was ultimately responsible for the Union's grievance over Cabral's mileage reimbursement claims from start to finish.

Based on the DOE's failure to provide DHRD and the Union a written explanation or any notice about the status of Cabral's mileage reimbursement claims, particularly information that ALBERT had referred the matter for investigation to the Attorney General's Office one month prior to the issuance of the Step 3 Decision, the Board majority concludes the DOE violated both the Article 11 contractual grievance procedure, as well as the spirit and intent of HRS § 89-10.8.

Furthermore, the Board majority concludes that the DOE interfered with the Union's right to timely proceed to arbitration by failing to provide DHRD and the Union with a written explanation for not paying Cabral's claims within the timeframe set by the Step 3 Decision, in violation of HRS § 89-13(a)(1).

Furthermore, the DOE cannot convince the Board majority that its inaction, based on ignorance of the Step 3 Decision, was not wilful.[18] In Decision No. 429, United Public Workers, AFSCME, Local 646, AFL-CIO, 6 HLRB 215, 221 (2001), the Board presumed wilfulness where the employer's violation of a settlement agreement occurred as a natural consequence of its failure to initiate the selection of an arbitrator. But rather than apply a "strict liability" test to presume a wilful violation of HRS § 89-13 in cases involving the missing of deadlines set forth in the grievance procedure, i.e., the selection of an arbitrator, the Board restated the presumption of wilfulness test as follows:

> Therefore, in cases involving the missing of deadlines, wilfulness will henceforth be presumed only when there is substantial

---

[18]In Decision No. 374, United Public Workers, AFSCME, Local 646, AFL-CIO, 5 HLRB 570, 584 (1996), the Board discussed the element of "wilfulness:"

> . . . [T]he Board, while acknowledging its previous interpretation of "wilful" as meaning "conscious, knowing, and deliberate intent to violate the provision of Chapter 89, HRS" nevertheless stated that "wilfulness can be presumed where a violation occurs as a natural consequence of a party's actions." [Citations omitted.]

> evidence that a respondent's failure to meet its obligation occurred in conscious derogation of, or indifference to, its contractual or bargaining obligations.

Id.

ALBERT provided no written explanation to either DHRD or the Union after obtaining a copy of the Step 3 Decision on November 2, 2002. When asked by the Board, ALBERT testified that she "did not think that [she] could [because] [she] had lost the 30-day window of opportunity to notify them." Tr. Vol. II, p. 317. Based on ALBERT's failure to effectively communicate with the DHRD and the Union in compliance with the Step 3 Decision, it would be appropriate to presume wilfulness.

Retaliation for Protected Activity

The Union contends that ALBERT's involuntary reassignment of Cabral was in retaliation for pursuing the mileage reimbursement grievance because ALBERT knew that Cabral's work counseling youth at the HYCF would not require him to use his personal car for official business, thereby halting his contractual right to submit claims for mileage reimbursement, in violation of HRS § 89-13(a)(4).

An employer commits a prohibited practice by retaliating against an employee engaging in protected activity such as signing or filing an affidavit, petition, or complaint or giving any information or testimony under HRS Chapter 89. Decision No. 425, Janet Weiss, 6 HLRB 188 (2001) (Weiss).

In Thomas Lepere, 5 HLRB 123, 128 (1993) the Board relied upon the analysis set forth in United Food and Commercial Workers Union, Local 480, 4 HLRB 568, 598 (1988), for discrimination cases brought under HRS § 89-13(a)(4), as follows:

> Under the *Wright Line* test, the proponent initially must demonstrate that anti-union animus contributed to the decision to discharge the employee. If this burden is satisfied, the Employer must then show by a preponderance of evidence that the employee would have been discharged even if he had not been engaged in protected activity. We note here, that a union advocate does not cloak himself with protection from discipline or discharge by his involvement with the union. While Respondent's union animus may be apparent from the record, this does not mean that Respondent cannot discharge a union adherent so long as the discharge was not based on the adherent's union activity.

Thus, if the HGEA establishes a prima facie case of retaliation sufficient to support an inference of unlawful motive, the burden shifts to Respondents to show the same

action would have been taken in any event, i.e., that there were legitimate, non-discriminatory reasons for the adverse action. In order to rebut the Respondents' inference of retaliation, the burden is on the complainant to show that the employer's articulated legitimate, nondiscriminatory reason was a pretext to mask unlawful discrimination. Decision No. 428, Susan Anderson, 6 HLRB 208 (2001) (Anderson).

In Weiss, supra, the Board found that an employee's pursuit of a grievance against the employer is protected activity under HRS § 89-13(a)(4). The Union submits that Cabral engaged in protected activity, similar to Weiss, because he was the focus of the class grievance over mileage reimbursements, and on numerous occasions warned the DOE that he would continue to pursue grievances given their refusal to pay his claims and demand for additional documentation. The Employer disputes[19] that the Union's mileage reimbursement class grievance that included Cabral motivated its decision.

The Board majority finds that Cabral's right to submit and pursue payment of his mileage reimbursement claims as provided under Article 45 of the Unit 13 Contract, triggered the Union's mileage reimbursement class grievance on behalf of Cabral and other affected employees. As such, Cabral's pursuit of payment for his mileage reimbursement claims was part and parcel of his protected activity within the meaning of HRS § 89-13(a)(4).

The Employer contends[20] that the Union has failed to prove improper motive by ALBERT to establish a prima facie case of retaliation. The Board majority disagrees. The preponderance of evidence persuades this Board majority that ALBERT's decision to reassign Cabral to Olomana School was unlawfully motivated in retaliation for protected activity.

"We rely on a number of factors in determining unlawful motive. For instance, what the employer knew of the protected activities, the employer's attitude toward the protected activities, and whether the timing of the adverse action was suspect." Anderson, supra, 5 HLRB at 213. Based on similar factors, the Board majority finds suspect ALBERT's motive for Cabral's reassignment to Olomana School for several reasons.

---

[19]In the DOE's Step 1 denial of the reassignment grievance, ALBERT addresses the Union's charge of retaliation against Cabral for the filing of the mileage reimbursement grievance, but fails to provide any cogent explanation. ALBERT's distinction between the Union's class grievance to which Cabral was an affected employee versus a grievance filed by Cabral, is a distinction without a difference since the filing of a grievance or complaint by the Union on behalf of employees or an individual are both protected activity.

[20]The Employer also urges the Board to defer jurisdiction to the grievance process because the Union had filed a Step 1 reassignment grievance on behalf of Cabral, which ALBERT denied on September 12, 2002. The Board's rationale for not deferring jurisdiction over the mileage reimbursement class grievance, also applies to the reassignment grievance.

First, the involuntary nature of the reassignment that ALBERT put into effect over the Union's objections adversely affected Cabral. Second, the timing of the reassignment and the stated reasons as provided on July 24, 2002 coincided with ALBERT's July 25, 2002 referral of Cabral's mileage reimbursement claims for investigation to the Attorney General's Office. Third, ALBERT's "stunned" reaction towards Cabral's submission of a year's worth of mileage reimbursement claims singled Cabral out among the ten Social Worker IVs and 39 Behavioral Health Specialists under Respondent SCHICK's supervision who could have been assigned. Fourth, based on ALBERT's failure to communicate openly and effectively about Cabral's mileage reimbursement claims which triggered the Union's Step 1 grievance, and her failure to pursue a means to resolve the discrepancies found in Cabral's mileage reimbursement claims within the context of the grievance procedure, the Board majority finds ALBERT's reasons for involuntarily reassigning Cabral suspect.

Shifting the burden to Respondents, we conclude that ALBERT's legitimate, non-discriminatory reasons as articulated in her meet and confer letter to the Union, dated July 24, 2002, was a pretext to mask her retaliatory intent. Chai testified that based on his knowledge and experience as a Union agent representing members in the DOE, Cabral was reassigned to Olomana in retaliation for his involvement in the Union's pursuit of the mileage reimbursement grievance. The Board majority agrees.

First, ALBERT relied on the quality assurance assessment as "just more validation that it would be the most logical thing to move Mr. Cabral rather than any other social worker." Tr. Vol. II, p. 304. The Board majority finds that ALBERT's reliance on the Kahuku Quality Assurance process to justify her involuntary reassignment of Cabral to Olomana was too convenient an explanation and fails to support a finding that Cabral's involuntary reassignment was necessary, or would have occurred had he not engaged in protected activity by pursuing his mileage reimbursement claims through the grievance process. On this basis, the Board majority is convinced that ALBERT went to great lengths to force Cabral out of his social worker position based within the Kahuku District and into an admittedly hard to fill social worker position in the Kailua district complex, i.e., at the HCYF at Olomana School with a reputation for " working with the worst of the worst" where he is not required to use his car to travel to perform work.

Second, the Board majority also finds suspect ALBERT's assertion that there was a genuine need for Cabral to fill the social worker position at Olomana when there were no social workers assigned to Olomana for the most part of the school year prior to Cabral's reassignment. Tr. Vol. II, p. 360. If the need for social workers and behavioral health specialists at Olomana School was as great as ALBERT insists it was, then it begs the question as to why Cabral is the only social worker who ALBERT involuntarily reassigned to address the need given the number of social workers and behavioral health specialists in the entire district and given the fact that she also requested, and received permission, to establish two additional behavioral health specialists.

Third, the Board majority does not credit ALBERT's testimony that she considered Cabral to be a logical choice because of his experience as a school-based behavioral health specialist, his DOH background as a therapist, and the fact that as a male, Cabral would serve as a "good role model" to the vast majority of young people in the HYCF. Tr. Vol. II, p. 327. Based on ALBERT's questioning of the veracity of Cabral's mileage reimbursement claims, which she referred to the Attorney General's Office for investigation, there is no doubt she viewed Cabral as dishonest and not trustworthy. It would be inconsistent to believe, and the Board majority is not persuaded, that ALBERT harbors any altruistic motive by thinking Cabral a "good role model" for juvenile youth simply because he's a male, however dishonest.

The Board majority finds that but for Cabral's pursuit of mileage reimbursement claims spanning more than one fiscal year which the DOE has treated as improper and fraudulent, and the Union's class grievance over mileage reimbursement claims, ALBERT would not have involuntarily reassigned Cabral to HCYF at Olomana School, which is not only outside of the Kahuku complex, but also does not require Cabral to use his car for travel for official business.

For the reasons stated above, we conclude that ALBERT acted in wilful violation of HRS § 89-13(a)(4) by involuntarily reassigning Cabral to Olomana School and out of the Kahuku complex in retaliation for engaging in protected activity.

FMS USER Policy

The Union contends that Section 11 of the DOE's User Policy is subject to negotiation because it changes or modifies Article 45 of the BU 13 Contract by requiring that claims be submitted within a 30-day period. In addition, the Union argues that the DOE applied the procedures and mileage charts[21] as a basis for delaying the processing and payment of Cabral's mileage reimbursement claims without consultation. By doing so, the Union alleges the DOE violated Article 4 of the Contract and HRS §§ 89-9(a) and (c),[22] in wilful in violation of HRS §§ 89-13(a)(5), (7), and (8).

---

[21]The record does not include a mileage chart relied on by the DOE or any DAGS Travel Rules relating to the use of a mileage chart, and therefore the Board can make no findings of fact or conclusions of law regarding the DOE's use of a mileage chart.

[22]HRS § 89-9(a) covers the scope of employee-employer negotiations, whereas HRS § 89-9(c) deals with the duty of the public employer to meet and confer with the union on matters other than those related to negotiations.

The DOE contends the User Policy[23] was a "restatement of the long-standing procedures that were embodied in the Business Office Handbook originally adopted in May of 1971," see, Decision No. 37, Hawaii Federation of College Teachers, 1 HPERB 381, 385 (1973), and as such was not a "matter subject to consultation because it was not a major or substantial and critical matter affecting employee relations." Hawaii Firefighters Association, Local 1463, IAFF, AFL-CIO, 1 HPERB 650 (1977). The DOE's reliance on Hawaii Federation of College Teachers, supra, is misplaced. In that case, the Board determined that a memorandum issued by a University of Hawaii vice president directing that all appointments to an innovative program not gain tenure track status, was a mere restatement of the University's tenure policy as it applied to programs that were experimental, provisionary and not permanently established. Therefore, the Board concluded the memorandum did not set forth a major change in policy, "but rather restated a long standing so-called common law of the University." Id., at 384.

The fact that the DOE's User Policy is a restatement of its Business Office Handbook, fails to prove that the User Policy, and specifically Section 11, pertaining to mileage reimbursements therein, is not subject to consultation. For it is the DAGS Travel Rules, that dictate how to uniformly apply rules and policies relating to "travel expenses incurred by state employees and representatives in connection with official business of the State." The subject of automobile allowances is covered under the DAGS Travel Rules,[24] which "take precedence over conflicting travel policies, written or unwritten, of any department or agency of the state. Written travel policies for internal administration within departments and agencies are encouraged, but are subordinate to these rules." HAR § 3-10-3(d). Therefore,

---

[23]The DOE's User Policy provides that:

> 11. All mileage claims should be listed on a separate form for each month and submitted to the Vouchering Section within 30 days following the applicable month. If a mileage claim is submitted before the month has ended, it must include a statement that no further mileage will be claimed for that month. The Vouchering Section may return mileage claims received that are extremely overdue for a written explanation of the late submittal.

[24]The DAGS Travel Rules are promulgated for the purpose of providing "uniform application of the Hawaii Revised Statutes and administrative policies, as they relate to travel expenses incurred by state employees and representatives in connection with official business of the State." Union's Ex. 8. HAR § 3-10-3(c) provides that "[w]hereever there is a conflict between these rules and the provisions of a collective bargaining agreement that is in effect, the provisions of the collective bargaining agreement take precedence. . . . " These Travel Rules also "take precedence over conflicting travel policies, written or unwritten, of any department or agency of the state. Written travel policies for internal administration within departments and agencies are encouraged, but are subordinate to these rules." HAR § 3-10-3(d).

the DOE's policies covering the use of an employee's personal car for travel on official business are subordinate to the DAGS Travel Rules.

Furthermore, the collective bargaining agreement takes precedence, if there exists any conflict between the DAGS Travel Rules and Article 45 of the BU 13 Contract. Article 45(A) of the BU 13 Contract provides that "[e]xcept as modified by this Article, Chapter 3-10, Hawaii Administrative Rules, in the case of the State . . . shall remain applicable for the duration of this Agreement." Article 45(I) pertains to mileage reimbursement, and provides that: "Employees who are authorized to use their private vehicles to carry out their duties and responsibilities shall be reimbursed at the rate of thirty-seven cents ($.37) for each mile traveled for business purposes."

In University of Hawaii Professional Assembly, 3 HPERB 562 (1984), the Board held that an employer is not required to negotiate over a decision to establish an evaluation policy for BOR appointees designed to improve the efficiency of government operations, unless the policy modifies or changes existing conditions under the express or implied terms of a collective bargaining agreement. In Hawaii Government Employees' Association, Local 152, HGEA/AFSCME, AFL-CIO, 1 HPERB 570, 579 (1975), the Board held that the "unilateral establishment of terms and conditions of the individual contracts with respect to mandatory subjects of negotiations does constitute a prohibited practice," where the individual contracts for hire did more than just mirror or clarify provisions in the collective bargaining agreement.

In reviewing the record, the issue for the Board majority is whether Section 11 of the DOE's User Policy changes or modifies existing conditions expressed in Article 45 of the Contract covering the rate of pay for miles traveled by an employer using their personal car on official business. The Board majority finds Section 11 of the DOE's User Policy establishes procedural conditions on the submission of claims and limits employees' rights to mileage reimbursements which were neither agreed to by the Union, nor found in the DAGS Travel Rules. Furthermore, the DOE has applied Section 11 as a basis for denying payments and delaying the processing of payments to BU 13 employees, if these conditions are not met.

In this case, the DOE's User Policy does more than just mirror or clarify the DAGS Travel Rules and Article 45 of the Contract. The Board majority can find no deadline, time period, waiver or procedures in the DAGS Travel Rules, for submitting mileage reimbursement claims that could be interpreted to mirror the DOE's User Policy covering automobile allowances. Nor can the Board majority find any similar procedures or conditions for the payment of mileage reimbursements as provided in Article 45 of the BU 13 Contract. Accordingly, by setting procedural conditions on the submission of claims which can, and have been, used to delay the processing of payments, and requiring that employees waive their rights to reimbursement, if not included in one monthly form, the DOE's application of Section 11 of the User Policy unilaterally changed Article 45 of the Contract, and is therefore subject to negotiation. Thus, the Board majority concludes that the DOE's unilateral modification of

Article 45 of the Contract constitutes a refusal to bargain in good faith with the Union as required under HRS § 89-9 and a violation of HRS § 89-13(a)(5), (7), and (8).

In United Public Workers, AFSCME, Local 646, AFL-CIO, 3 HPERB 507 (1984), the Board held that wilfulness can be inferred from the circumstances of the case and can be presumed where the violation occurred as a natural consequence of the party's actions. The DOE does not dispute, that it failed to consult with the Union over the DOE User Policy. Based on the evidence in the record, the Board majority finds Respondents wilfully violated the provisions of HRS §§ 89-13(a)(5), (7), and (8), by failing to negotiate procedural conditions on the submission of mileage reimbursement claims as set forth in Section 11 of the User Policy before applying Section 11 of the User Policy as a basis for denying or delaying payments to Cabral and other affected employees in the Union's mileage reimbursement class grievance.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject complaint pursuant to HRS §§ 89-5 and 89-13.

2. An employer violates HRS § 89-13(a)(1) by interfering, restraining, or coercing any employee in the exercise of any right guaranteed under Chapter 89.

3. An employer violates HRS § 89-13(a)(4) by retaliating or discriminating against an employee because the employee has engaged in protected activity such as signing or filing an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chose to be represented by any employee organization.

4. An employer commits a prohibited practice in violation of HRS § 89-13(a)(5) when it refuses to bargain in good faith with the union as required in HRS § 89-9.

5. An employer commits a prohibited practice in violation of HRS § 89-13(a)(7) when it fails to comply with any provision of Chapter 89.

6. An employer commits a prohibited practice in violation of HRS § 89-13(a)(8) when it violates the terms of a collective bargaining agreement.

7. Based on the preponderance of evidence, the Board concludes that Respondents committed prohibited practices in wilful violation of HRS §§ 89-13(a)(7) and (8) by failing to comply with the Step 3 Decision to provide DHRD and the Union a written explanation for not paying Cabral's claims, as well as by failing

to give "final and binding" effect to a decision reached through the contractual grievance procedure within the meaning of HRS § 89-10.8.

8. The Board majority concludes that the DOE's failure to comply with the Step 3 Decision to process the mileage claims or provide the DHRD with a written explanation for not paying Cabral's claims within a set time frame constitutes a violation of HRS 89-13(a)(1) because the DOE interfered with Cabral's and the Union's rights by effectively repudiating DHRD's Step 3 decision sustaining the grievance and providing them relief.

9. Complainant and its member, Cabral, engaged in protected activity by pursuing the mileage reimbursement class grievance and payment of Cabral's mileage reimbursement claims.

10. The Board majority concludes that Respondents' decision to involuntarily reassign Cabral to Olomana School which is out of the Kahuku complex was in retaliation for engaging in protected activity by pursuing his mileage reimbursement claims through the contractual grievance procedure, in wilful violation of HRS § 89-13(a)(4). Based on the Respondents' failure to communicate openly and effectively about Cabral's mileage reimbursement claims to pursue a means to resolve the discrepancies found in Cabral's mileage reimbursement claims within the context of the grievance procedure, the Board majority is convinced that Cabral was involuntarily reassigned to Olomana in retaliation for his involvement in the Union's pursuit of the mileage reimbursement grievance. The Board majority also concludes that Respondents' apparently legitimate, non-discriminatory reasons relating to the need to fill the social worker position at Olomana, as well as the basis for Cabral being the "logical choice" were a pretext to mask the unlawful motive.

11. Based on the preponderance of evidence, the Board majority concludes Respondents wilfully violated the provisions of HRS §§ 89-13(a)(5), (7), and (8), by failing to negotiate procedural conditions on the submission of mileage reimbursement claims as set forth in Section 11 of the User Policy before applying Section 11 of the User Policy as a basis for denying or delaying payments to Cabral and other affected employees in the Union's mileage reimbursement class grievance.

ORDER

1. The Respondents are ordered to cease and desist from committing the instant prohibited practices by failing to notify the Union and communicate openly and effectively about Cabral's mileage reimbursement claims in compliance with the Step 3 Decision. The Board further orders the Employer as follows:

a. Within 30 days from the date of this decision, the Employer shall identify for payment the claims referred for investigation, which the Employer delayed processing on the basis of their being filed more than 30 days beyond the applicable period and/or which the Employer delayed payment because Cabral did not submit additional documentation; and which claims are deemed to be improper or fraudulent based on Deputy Attorney General Russell Suzuki's investigation of said claims.

b. Within 30 days from the date of this decision, Respondents are ordered to provide written notice to the Union and DHRD, as to which of Cabral's claims are being processed for payment and which claims were improperly submitted based on the Attorney General's investigation and the DOE intends to pursue criminal and/or civil penalties against Cabral.

c. Respondents' payments to Cabral of any of the outstanding claims that were initially delayed based on the 30 day applicable period in Section 11 of the User Policy, shall be based on his odometer reading, and not the DOE's mileage chart. Any payments by the DOE shall include ten percent (10%) per annum interest calculated 30 days after the date of the Step 3 Decision.

d. Respondents are ordered to negotiate in good faith with the Union over the remaining claims identified as improper or fraudulent.

2. Respondents are ordered to cease and desist from retaliating against Cabral for engaging in protected activity related to the mileage reimbursement grievance by taking any further adverse personnel action against John Cabral for pursuing payment of his outstanding mileage reimbursement claims.

3. Respondents are ordered to cease and desist from refusing to process and reimburse Unit 13 employees for mileage claims submitted more than 30 days after the applicable month, and cease and desist from applying Section 11 of the DOE's FMS User Policy until said provisions of Section 11 are negotiated with the Union, and made a part of the DAGS Travel Rules.

4. Respondents shall immediately post copies of this decision in conspicuous places at its work sites where employees of Unit 13 assemble and congregate, and on the Respondents' respective websites for a period of 60 days from the initial date of posting.

5. Respondents shall notify the Board of the steps taken to comply herewith within 30 days of receipt of this order.

DATED: Honolulu, Hawaii, August 8, 2003.

HAWAII LABOR RELATIONS BOARD

CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

OPINION CONCURRING, IN PART, AND DISSENTING, IN PART

I concur with the conclusion of the majority that the DOE committed a prohibited practice by admittedly failing to comply with DHRD's uncontestedly binding Step 3 decision. I nevertheless have two reservations about this portion of the decision. First, in Finding of Fact 36, the majority rejects Complex Superintendent ALBERT's sworn testimony that she only knew about the Step 3 decision on November 2, 2002. It finds that Complex Superintendent ALBERT, based on circumstantial evidence, "knew or should have known" of Cabral and the Union's pursuit of the grievance apparently throughout its course. I do not join in this finding and think it is unnecessary. I find ALBERT's testimony in this regard uncontested, credible and consistent. But more than that I am disturbed at the majority's willingness simply to discount the sworn testimony of honorably serving public official in favor of its impressions and on self-selected circumstantial evidence. The finding virtually accuses ALBERT of perjury or substitutes our judgment as to what she "should have known." This presumption was wholly unnecessary because ALBERT admitted to the contract violation implicit in the DOE's ignoring of the Step 3 decision. Wilfulness was proven pursuant to the majority's adoption of the test articulated in United Public Workers, 5 HLRB 570 (1996) so the finding was merely insulting surplusage.

My second reservation regarding the contract violation relates to the majority's order in this regard. Order 1 requires the BOE "cease and desist" from the violation and enumerates specific information that is to be provided to Cabral and the Union. I join in this part of the order but wish to emphasize that it does **not** require the payment of any of Cabral's claims that were withheld because concerns of potential fraud or misrepresentation. Our order

requires no such payments until the concerns are put to rest by proof or negotiation. Payments need not be made for as long as there are concerns regarding the legitimacy of claims.

Finally, I dissent from the majority's conclusion and corresponding order regarding Respondents' alleged wilful retaliation for Cabral's engaging in protected activity. I dissent on two grounds. The transfer to Olomana took effect on August 14, 2002. As stated earlier I accept Complex Superintendent ALBERT's sworn uncontested testimony that she did not learn of the Step 3 decision or the continued pursuit of the grievance until November 2, 2002. She simply could not have retaliated for something of which she had not knowledge.

Even if (as the majority finds) Respondent was aware of the Step 3 decision at the time of the transfer, the evidence does not support a finding of the necessary retaliatory motivation. And finally, the record, and the majority's reasoning, better support a conclusion that the transfer was motivated by personal animus rather retaliation for protected activity. Respondents uniformly testified that before the transfer they had come to question, on the basis of repeated documentary reviews and uncooperative behavior, Cabral's honesty and veracity. It was for this reason that the referred questionable reimbursement claims to the Attorney General for investigation. I find it far more likely that any adverse personnel action was motivated by grounded suspicions of fraud or misrepresentation rather than the filing of claims or grievances.

BRIAN K. NAKAMURA, Chair

Copies sent to:

Debra A. Kagawa, Esq.
Jennifer R. Salvador, Deputy Attorney General
Joyce Najita, IRC
William Puette, CLEAR
State Archives
Publications Distribution Center
University of Hawaii Library
Richardson School of Law Library
Library of Congress