STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of

ERIN K. KUSUMOTO,

Complainant(s),

and

HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; and DEPARTMENT OF EDUCATION, State of Hawai‘i,

Respondent(s).

CASE NO(S). 20-CU-06-379
20-CE-06-940

ORDER NO. 3796

PRETRIAL ORDER AND NOTICES

(1) NOTICE OF RECEIPT OF AMENDED PROHIBITED PRACTICE COMPLAINT
(2) NOTICE OF EXTRAORDINARY CIRCUMSTANCES
(3) EFFECT OF AMENDMENT
(4) NOTICE OF FILING REQUIREMENTS
(5) NOTICE OF APPEARANCE AND ACCESSIBILITY OR ACCOMMODATIONS
(6) NOTICE OF STRUCTURE FOR REMOTE HEARINGS BEFORE THE BOARD
(7) NOTICE OF PRETRIAL CONFERENCE AND HEARING ON DISPOSITIVE MOTIONS
(8) NOTICE OF WITNESS REQUIREMENTS WHILE TESTIFYING REMOTELY
(9) NOTICE OF HEARING ON THE MERITS
(10) SCHEDULE OF HEARINGS, CONFERENCES, AND DEADLINES

PRETRIAL ORDER AND NOTICES

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

This document controls the course of proceedings and may not be amended, except by the Board through an Order or Notice. The use of singular, plural, masculine, feminine, and neuter pronouns include the others as the context may require.

(1) NOTICE OF RECEIPT OF AMENDED PROHIBITED PRACTICE COMPLAINT

The attached prohibited practice complaint (Amended Complaint) was filed with the Board by the above-named Complainant(s) on: **September 7, 2021**.

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

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

(2) NOTICE OF EXTRAORDINARY CIRCUMSTANCES

Due to the current concerns regarding the COVID-19 Response, the Governor of the State of Hawai‘i (Governor) issued an Emergency Proclamation on August 5, 2021. This proclamation, among other things, gave agencies the ability to conduct certain hearings using interactive conference technology as needed to deal with the emergency situation brought on by COVID-19, and as would be permitted by 2021 Haw. Sess. Laws Act 168 when it becomes effective on October 1, 2021.

Accordingly, the Board is holding remote, videographic hearings and is mandating electronic filing during this emergency period. (See Order No. 3793)

(3) EFFECT OF AMENDMENT

The Board previously bifurcated this case in Order No. 3745. However, as Complainant has amended the charging document in this case, this bifurcation **is no longer in effect**. Therefore, the case will proceed with all allegations being tried concurrently.

Exhibits previously received into evidence at the pretrial conference held on July 22, 2021 remain in evidence as a part of the record and need not be resubmitted. These exhibits are: Joint Exhibits JE1-JE12, and Complainant's Exhibits B, E, and G. All other proposed exhibits remain able to be introduced at the hearing on the merits and do not need to be resubmitted to the Board.

(4) NOTICE OF FILING REQUIREMENTS

1) Electronic Filing

All filings in this case must be made electronically through the Board's filing service FileandServeXpress (FSX). There is no charge to the parties for use of this electronic filing service. Should any party not have access to the Internet, or for any other concerns or complications, please contact the Board via electronic mail or (808) 586-8616.

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

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

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

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

If a party submits a document that requires redaction of a page(s), the party must, by motion, request permission from the Board to withdraw and replace the original document, in its entirety,

with a redacted copy of such document, pursuant to HAR § 12-42-8(g)(11), "The Board may permit withdrawal of original documents upon submission of properly authenticated copies to replace such document."

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

(5) NOTICE OF APPEARANCE AND ACCESSIBILITY OR ACCOMMODATIONS

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

The Board is located in a secured State of Hawai'i building, which may not be accessible to the public during the emergency period referenced in Section (2) above.

(6) NOTICE OF STRUCTURE FOR REMOTE HEARINGS BEFORE THE BOARD

The Board currently uses Zoom as its primary platform for online proceedings. The Board orders all parties to follow the requirements laid out in this Order for all Remote Hearings before the Board.

Parties and representatives must familiarize themselves with Zoom in preparation for all online Board proceedings. For security purposes, the Board will utilize the "waiting room" function.

Prior to the hearing:

1. The Board will provide Zoom login information to the parties in advance of the hearing.

2. Parties and witnesses are not permitted to utilize virtual backgrounds or any other technology that alters the Board's ability to observe the area around the party/witness.

3. Parties or their representatives must always have their camera on while the hearing is being conducted and may not turn the camera off during proceedings without prior approval of the Board.

4. A party who shares the Zoom login information with any other group or individual (Sharing Party) must provide the Board and the other party/parties with a complete list of participants they have invited to attend the proceedings, including any support staff and witnesses. **This list must be emailed to the Board at dlir.laborboard@hawaii.gov prior to the start of the hearing.**

5. Any Sharing Party must inform non-witness participants:

    1) that they must keep their microphones muted at all times; and

    2) that they must keep their cameras off at all times.

6. Any Sharing Party must inform **all** participants:

    1) that they must submit their full name as their username when requesting entry to the Zoom conference, to allow the Board to ensure compliance with the witness exclusion rule, unless the party sets up a device specifically for witness use only, in which case that device may log in with the username "witness"; and

    2) **that they may not record, screen shot, record conversations, and/or use third party software to record the proceeding.**

7. Sharing Parties and their counsel or representatives are responsible for ensuring that all of their invitees abide by the requirements set forth in this Order. An invitee's failure to comply with this order will be regarded as the Sharing Party and/or their counsel or representative's failure to comply with this Order during a hearing.

    Failure to comply with this Order may be grounds for the Board to commence proceedings regarding that party's counsel or representative under HAR § 12-42-8(g)(9)(A).

(7) NOTICE OF PRETRIAL CONFERENCE AND HEARING ON DISPOSITIVE MOTIONS

Under HRS §§ 89-5(i)(4) and (i)(5) and 91-9, and HAR § 12-42-47:

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

DATE AND TIME: Monday, November 1, 2021 at 9:00 a.m.

LOCATION: Remote Zoom Hearing

1) Updated Pretrial Statement

This pretrial conference will focus on preparing the Board and parties for the Complainant's case-in-chief. Therefore, **the Complainant must file an updated pretrial statement, containing a statement of the issues, a proposed witness list, and, if necessary, an additional proposed exhibits list with the Board**[1] **by Wednesday, October 6, 2021.** Respondents are not required to file an updated pretrial statement with the Board at this time. However, should the Respondents wish to put on a case in response to Complainant's case-in-chief, Respondents will be given the opportunity to file an updated pretrial statement prior to the start of each of their cases.

Complainant's Updated Pretrial Statement must include the following:

1. Statement of Issues

   Complainant must submit a statement of the issues based on their legal and factual claims and allegations. Each statement must include the section or sections of HRS Chapter 89 that Complainant alleges is being violated and a description of how Complainant believes those sections are being violated.

   Example:

   > Whether Respondent Employer wilfully interfered, restrained, or coerced Complainant in the exercise of a right guaranteed under HRS Chapter 89 by (committing specific actions), constituting a prohibited practice under HRS § 89-13(a)(1); and
   >
   > Whether Respondent Union wilfully interfered, restrained, or coerced Complainant in the exercise of a right guaranteed under HRS Chapter 89 by (committing specific actions), constituting a prohibited practice under HRS § 89-13(b)(1).

2. Proposed Witness List

   The proposed witness list must include, in the interest of judicial economy, a meaningful summary of the nature of the testimony expected, and the order in

[1] DOE did not previously file a pretrial statement with the Board, and, as this pretrial conference will focus on Complainant's case-in-chief, is not required to file a pretrial statement with the Board at this time. However, if DOE wishes to propose exhibits for entry into the record prior to Complainant's case-in-chief, DOE may submit a pretrial statement to the Board. Should Respondents wish to jointly propose exhibits, they may designate these exhibits using numerical designations preceded by JR (e.g., "JR-1, JR-2, JR-3, etc.").

which the witnesses are expected to be called upon, subject to the witness' availability.

The summary for each witness must include sufficient information for the Board to determine whether the testimony will be irrelevant, immaterial, or unduly repetitious to any other witness testimony; *see* HRS § 91-10(1). The summary, therefore, must include sufficient information to show the Board that the testimony of each witness will be different. Accordingly, the summary for each witness must be individualized and specific.

Failure to include individualized summaries for any witness may be grounds for the Board to strike that witness and not allow them to testify at the hearing on the merits. A party's counsel or representative's failure to include these individualized summaries on multiple occasions may be grounds for the Board to commence proceedings regarding that individual under HAR § 12-42-8(g)(9)(A).

The proposed witness list must also include information regarding the location where the party expects the witness to testify from. This location may include the witness' home, a party's office, or any other location from which the witness can testify remotely, without assistance or interference from any other party, and can access the relevant exhibits.

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

2. Additional Proposed Exhibits List

Complainant must provide a list of any additional proposed exhibits based on the Amended Complaint, continuing the identification of the exhibits using alphabetical letters (e.g., K, L, etc.), following those previously proposed exhibits.

Complainant is required to use the File & ServeXpress eFiling system (FSX) to file the additional proposed exhibits list before or by 4:30 p.m. (HST) on the deadline day. Copies of all additional proposed exhibits must also be submitted to the Board through FSX. These proposed exhibits must be combined and filed in a searchable portable document format (PDF) not exceeding 10 megabytes, with each exhibit bookmarked.

If Complainant intends to file a request for a subpoena duces tecum for any of their additional proposed exhibits, that request must be concurrently filed with the

Updated Pretrial Statement, and a notation that a request is being made must be listed in the proposed exhibit list.

All Proposed Exhibits must be bates-stamped in the upper right-hand corner.

Proposed exhibits do not become a part of the official record until they are introduced or accepted into evidence and are submitted to the Board for the sole purpose of allowing the parties to consider whether they may be willing to stipulate to those exhibits being entered into evidence prior to the hearing on the merits. Proposed exhibits are considered received by, and not filed with the Board.

2) Pretrial Conference

At the pretrial conference, the Parties must be prepared to discuss, raise, and present their position regarding Complainant's statement of the issues, proposed witnesses, and any additional proposed exhibits.

In the interest of judicial economy, the Board may require Complainant to provide additional information as to what witnesses will testify to, to supplement the information submitted in the proposed witness list. Should either Respondent have any objections to any proposed witness being called by Complainant, Respondents should make those objections at the pretrial conference.

The parties may also present any stipulations or evidentiary or confidentiality issues raised by the amendment to the complaint.

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

(8) NOTICE OF WITNESS REQUIREMENTS WHILE TESTIFYING REMOTELY

Due to the situation with COVID-19, unless otherwise ordered by the Board, all witnesses must testify videographically.

For the purposes of HAR § 12-42-8(g)(5), witnesses are appearing "in person" if they appear in accordance with this Section (8). Accordingly, the Board **orders all parties** to inform their witnesses that, unless otherwise directed or allowed, when the witness testifies:

1. The witness must be in a location without anyone else in the room with them, and there should be no one at the location who can overhear their testimony;

2. The device from which the witness appears must be used during the witness' testimony solely for the purpose of the witness appearing by video;

3. The witness may not consult with anyone during testimony;

4. The party calling the witness must ensure that the witness has access to all exhibits in the case;

5. The witness must not look at or make reference to notes or any other documents or materials other than the exhibits, and may look at the exhibits only when directed to do so by a party or the Board;

6. At all times while testifying, the witness must be clearly visible, face the camera, and speak directly and audibly into the microphone;

7. The witness may not use a virtual background; and

8. The witness must not have any communication with third parties while they are on the stand and under oath.

(9) NOTICE OF HEARING ON THE MERITS

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

DATE AND TIME: Tuesday, November 2, 2021 at 9:00 a.m.
Wednesday, November 3, 2021 at 9:00 a.m.
Thursday, November 4, 2021 at 9:00 a.m.

LOCATION: Remote Zoom Hearing

Subject to the Board's discretion due to the Extraordinary Circumstances listed above in Section 2, all parties have the right to appear at the Hearing on the Merits and to be represented by

counsel or any other authorized person. **All parties, representatives, and witnesses must appear at the hearing on the merits**. Please note that this requirement may be altered due to the Extraordinary Circumstances listed above in Section 2 by Board Order.

Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai'i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, please call the Board at (808) 586-8616.

All parties must ensure that the witnesses they call have access to all exhibits, both their own and the other party's and must ensure that witnesses follow all protocols laid out above in Sections (6) and (8).

Auxiliary aids and services are available upon request to the parties and representatives with disabilities. For TTY, dial 711, then ask for (808) 586-8616, the Hawai'i Labor Relations Board, within seven (7) days prior to a Board proceeding. For any other accommodation, including language accommodations, please call the Board at (808) 586-8616.

(10) SCHEDULE OF HEARINGS, CONFERENCES, AND DEADLINES

DATES AND DEADLINES		
Dispositive Motion Deadline	10/18/21	
Response to Dispositive Motion Deadline	10/25/21	
Pretrial Statement; Exchange of Exhibits; Subpoena Deadline	10/25/21	
Pretrial Conference and Hearing on Dispositive Motions	11/1/21	9:00 a.m.
Hearing on the Merits	11/2/21	9:00 a.m.
	11/3/21	9:00 a.m.
	11/4/21	9:00 a.m.

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

DATED: Honolulu, Hawai'i, September 7, 2021.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

J N. MUSTO, Member

MIDORI K. HIRAI, Temporary Acting Member

Copies sent to:

Miles Miyamoto, Esq.
Peter Liholiho Trask, Esq.
Miriam Loui, Deputy Attorney General

KUSUMOTO v. HGEA and DOE
CASE NO(S). 20-CU-06-379; 20-CE-06-940
PRETRIAL ORDER AND NOTICES
ORDER NO. 3796

Miles Miyamoto, #4271
801 South Street, #3113
Honolulu, HI 96813
Email:mtmlaw67@gmail.com
Tele: (808) 383-1459

STATE OF HAWAI'I
HAWAI'I LABOR RELATIONS BOARD

In the Matter of ERIN K. KUSUMOTO, Complainant, And HAWAI'I GOVERNMENT EMPLOYEES ASSOCIATION and DEPARTMENT OF EDUCATION, State of Hawai'i, Respondents.	CASE NO(S) 20-CU-06-379 20-CE-O6-940 COMPLAINANT'S AMENDED PROHIBITED PRACTICE COMPLAINT, FILED PURSUANT TO HAWAI'I LABOR RELATIONS BOARD ORDER NO. 3795 GRANTING COMPLAINANT'S MOTION FOR LEAVE TO AMEND; CERTIFICATE OF SERVICE Dated: September 6, 2021

COMPLAINANT'S AMENDED PROHIBITED PRACTICE COMPLAINT, FILED PURSUANT TO HAWAI'I LABOR RELATIONS BOARD ORDER NO. 3795 GRANTING COMPLAINANT'S MOTION FOR LEAVE TO AMEND

Complainant hereby files her Amended Prohibited Practice Complaint pursuant to Hawai'i Labor Relations Board Order No. 3795, filed in this case on September 23, 2021.

COMPLAINANT'S AMENDED PROHIBITED PRACTICE COMPLAINT

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

FORM HLRB-4
PROHIBITED PRACTICE COMPLAINT

20-CU-06-379

20-CE-06-940

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

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

2. COMPLAINANT Please select one that describes the Complainant:

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

a. Name, address and telephone number.

Erin K. Kusumoto (Employee)
98-715 Iho Place, Apt 4-1502
Aiea, HI 96701
Phone: (808) 255-3508

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

Miles T. Miyamoto, Attorney No. 4271
801 South Street, Apt. 3113
Honolulu, HI 96813
Email: miles.miyamoto@va.gov
Phone: (202) 603-4360

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

3. RESPONDENT Please select one that describes the Respondent:

q Public Employee ✔ Public Employer ✔ Public Union (public employee organization)

a. Name, address and telephone number.

This is a hybrid complaint, thus we list two Respondents:

HGEA thru: Randy Perreira, Executive Director, 888 Mililani Street, Suite 401, Hon. 96813-2991, Phone: (808) 543-0000 (Public Union)

State of Hawaii, Department of Education thru: Christina M. Kishimoto, Superintendent, 1390 Miller St., Hon. 96813, (808) 586-3230 (Public Employer)

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

HGEA: Peter Liholiho Trask, 139 Kaiholu Street, Kailua, HI 96734, Telephone: (808) 484-5030, Facsimile: (808) 484-5031, Email: ttrask@hawaii.rr.com

DOE: Miriam P. Loui, Department of the Attorney General, State of Hawaii, 235 South Beretania Street, 15th Floor, Honolulu, HI 96813, Telephone: (808) 587-2900, Facsimile: (808) 587-2965, Email: Miriam.p.loui@hawaii.gov and james.e.halvorson@hawaii.gov.

---

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

HGEA AFSCME, Local 152, AFL-CIO, Bargaining Unit 6 (Educational Officers)

---

5. ALLEGATIONS

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

Appellant submits to the HLRB a hybrid complaint in which she alleges 1) failure of the aforementioned public union (Union) to meet its duty of fair representation 2) wrongful termination by the aforementioned public employer (DOE) because termination violated the terms of the controlling collective bargainin agreement becaues it was not based on proper cause and 3) affirmative defenses of whistleblower retaliation and the DOE's failure to follow its own due process requirements as affirmative defenses to the termination. Please see attached for a statement of the facts related to these allegations starting at page no. 5.

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

Please see attached statement of facts starting at page no. 5. The statement of facts include facts relevant to affirmative defenses, e.g., whisleblower retaliation, invasion of privacy and failure of the DOE to follow its own due process procedures.

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

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

Please select one:

the Complainant

(X) the Complainant's principle representative

the person described below

I, Miles T. Miyamoto,

do declare under penalty of law that the foregoing is true and correct.

Date: February 20, 2020

/s/ Miles T. Miyamoto

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

mtmlaw67@gmail.com

Signor's email address

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

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

5. EMPLOYEE'S STATEMENT OF FACTS

At the outset, we recognize that the HLRB has two forms that are applicable to a hybrid complaint, HLRB-4 and HLRB-11. We have attempted to incorporate the substance of both forms under the one form used here, HLRB-4. If this is not acceptable to the HLRB, please inform us as such and we would request permission to amend our complaint in accord with guidance from the HLRB.

As the statement of facts below show, Employee's complaint to the Hawaii Labor Relations Board (HLRB) is timely under HRS Section 378-51. In her complaint, Employee asserts that Union violated HRS Sections 89-8(a), 89-13(b)(4), when, as the exclusive representative of Employee, it failed to meet its duty of fair representation.

The following statement of facts also shows that the State of Hawaii Department of Education (DOE) violated the terms of a collective bargaining agreement by removing Employee, a tenured Educational Officer, without proper cause. This violated Hawaii Revised Statutes Sections 89-13(a)(8), 89-13(b)(5) and 377-6(6).

The following statement of facts also introduce facts related to Employee's affirmative defenses, i.e., the DOE's failure to follow its own due process procedures when terminating Employee, whistleblower retaliation and an improper investigation that aided and abetted an invasion of Employee's privacy.

At the outset, we note our understanding that the Hawaii Labor Relations Board has held that the charging party, in asserting a violation of chapter 89, HRS, bears the burden of proving its allegations by a preponderance of the evidence. Towards this end, we also understand that we must not only produce evidence but also support that evidence with arguments in applying the relevant legal principles. Makino v. County of Hawaii, Hawaii Labor Relations Board, pgs. 16, 17, Case No. CE 01-856, CU-01-332 (2017). As such, the following contains both statements of fact and supporting legal principles.

Employee states facts and legal principles as follows:

1. In a letter, dated August 6, 2018 (Decision Letter), Superintendent Christina Kishimoto (Superintendent Kishimoto) terminated Employee's employment with the State of Hawaii Department of Education (DOE), which removal took effect on August 21, 2018. ("Decision Letter," Exhibit "A").

2. The applicable Collective Bargaining Agreement between the Union (HGEA Unit 6) and the State of Hawaii (Board of Education/DOE) directs that "Educational Officers with tenure shall not be suspended, demoted, discharged or terminated without proper cause, provided, however, that the foregoing is not intended to interfere with the right of the Board to relieve employees from duties for lack of work or other legitimate reasons."

3. In his June 29, 2018 recommendation to terminate Employee (Recommendation to Terminate), Complex Area Superintendent Clayton Kaninau (CAS Kaninau) stated

"(t)he Department and the HGEA recognize the 7 steps of Just Cause Standard to determine just cause." ("Recommendation to Terminate," Exhibit "B," pg. 3"

4. In paragraph no. 3 above, CAS Kaninau was referring to Professor Daugherty's 7 Steps of Just Cause Standard Analysis, first put forth in 1966.

5. The parties agree that Professor Daugherty's 7 Steps of Just Cause Standard Analysis provide legal principles applicable to determining whether proper cause existed for the termination of Employee.

6. Professor Daugherty's 7 Steps of Just Cause Standard Analysis has been modified by arbitrators so that, today, analysis of just cause involves consideration of other factors, e.g., consideration of progressive discipline and consideration of aggravating and mitigating factors.

7. For all times applicable, Employee was a tenured educational officer with approximately 20 years of unblemished service.

NOTICE

8. The first of Daugherty's seven steps is "Notice." "Did the Employer give the Employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the Employee's conduct?" (Exhibit "B," pg. 3).

9. In October 2017 Principal Michael Nakasato's (Principal Nakasato's) wife, Cyd Nakasato came to Pearl City Highlands Elementary School and confronted Employee about Employee's relationship with Principal Nakasato.

10. In response to the confrontation in paragraph 9 above, Principal Nakasato called CAS Kaninau and admitted to him that he was having an affair with Employee and needed help.

11. In response to Principal Nakasato's admission to him that he was having an affair with Employee, CAS Kaninau approached Employee on November 1, 2017 and asked "was there a relationship?"

12. Employee answered "no" to CAS Kaninau's question, "was there a relationship?"

13. A May 29, 2018 Investigation Report prepared by Nanette Hookano (Investigator Hookano), a personnel specialist in the Investigation Section of the DOE's Office of Human Resources, contained no identification of federal or state laws, rules, regulations, policies, procedures or guidance that specifically prohibited or even addressed a consensual relationship between a DOE superior and a subordinate.

14. CAS Kaninau's June 29, 2018 "Recommendation to Terminate" likewise contained no identification of federal or state laws, rules, regulations, policies procedures or guidance that specifically prohibited or even addressed a consensual relationship between a DOE superior and a subordinate. ("Recommendation to Terminate," Exhibit "B").

15. Superintendent Kishimoto's August 6, 2018 Decision Letter to terminate Employee likewise contained no identification of federal or state laws, rules, regulations, policies procedures or guidance that specifically prohibited or even addressed a consensual relationship between a superior and a subordinate. (Decision Letter, Exhibit "A").

16. In October 2017 and even to the present, the DOE had/has no policy concerning self-reporting of a consensual relationship between a DOE superior and a subordinate.

17. CAS Kaninau understood that many persons would consider questions about their consensual personal relationships to be prying into private matters.

18. CAS Kaninau offered no explanation as to why he was asking Employee about a private consensual relationship nor what the consequences may be if Employee did not disclose her consensual relationship with Principal Nakasato.

19. Instead of providing notice as specified in Daugherty's first step, CAS Kaninau states in his Recommendation for Termination, "(w)here the conduct is clearly wrong, employees need not be notified of the rules. Notice is given by common sense rather than by specific rules, policies or regulations." "Recommendation for Termination," Exhibit "B", pg. 3.

20. CAS Kaninau's reliance on "common sense" to determine what is clearly right or wrong, i.e., engaging in a private consensual relationship and denying it, reflects his own subjective view of what is moral.

21. CAS Kaninau's imposed his subjective moral view while declaring that whether rules, policies or regulations exist or not is not relevant to determining when conduct (in what many would consider as a private matter), rises to a level that justifies investigation and subsequent removal.

22. A clear articulation of a standard is essential to the DOE's ability to reasonably and legitimately conduct an investigation that results in removal of an employee for off-duty misconduct relating to consensual personal relationships.

23. In John Doe v. Department of Justice, 565 F.3d 1375, 1380 (Fed. Cir. 2009) the Court instructed as follows:

> We think that the Board's decision [removal] cannot be sustained and that a remand is required to two separate reasons. First, the Board has failed to articulate a meaningful standard as to when private dishonesty rises to the level of misconduct that adversely affects the "efficiency of the service." Using only "clearly dishonest" as a standard inevitably risks arbitrary results, as the question of removal would turn on the Board's subjective moral compass. Grounding disciplinary decisions in the nebulous field of comparative morality is too easily used as a post hoc justification. Id. at 1380.
>
> Without a predetermined standard—e.g., the legality of the conduct—to clarify when the agency may and may not investigate the personal relationships of its employees, it is conceivable that employees could be removed for any number of "clearly dishonest" misrepresentations, from those made to preserve the sanctity of a romantic relationship to cheating in a Friday night poker game. The danger here is twofold; federal employees are not on notice as to what off-duty behavior is subject to investigation and the government could use this overly broad standard to legitimize removals made for personal or political reasons. A clear articulation of a standard is therefore essential to the government's ability to reasonably and legitimately remove an agent for off-duty conduct relating to personal relationships. Id. at 1381.

24. John Doe v. Department of Justice, 565 F.3d 1375, 1380 (Fed. Cir. 2009) held that misconduct that was private in nature and did not implicate job performance in any direct and obvious way was insufficient to justify removal from a civil service position. We have attached this opinion as Exhibit "C."

25. Following the remand in John Doe v. Department of Justice, 565 F.3d 1375 (Fed. Cir. 2009), the Merit Systems Board in John Doe v. Department of Justice, 110 LRP 65493 (May 14, 2010) mitigated its removal to a 45-calendar day (time served) with a directed reassignment to another Field or Headquarters agency office, the latter at the agency's discretion. In that this case addresses many similar issues to the case at hand, we include it as Exhibit "D."

26. On November 6, 2017, Investigator Hookano conducted a second fact-finding meeting with Employee at the request of CAS Kaninau.

27. Investigator Hookano asked Employee if she had ever been involved in a romantic or sexual relationship with Principal Nakasato.

28. Employee answered "no" to the question in paragraph no. 27 above.

29. Like CAS Kaninau, Investigator Hookano did not provide forewarning or knowledge of the possible or probable disciplinary consequences if Employee was not truthful in answering questions concerning a consensual relationship that many would consider as a private matter.

30. In light of Principal Nakasato's admission to CAS Kaninau that he engaged in an affair with Employee, CAS Kaninau detailed Principal Nakasato to a position outside of PCHES sometime in November 2017.

31. In Principal Nakasato's absence from PCHES, CAS Kaninau detailed Employee to serve as Acting Principal at PCHES.

32. CAS Kaninau returned Principal Nakasato to PCHES on or about the end of November 2017.

33. When he returned Principal Nakasato to PCHES in November 2017, CAS Kaninau was satisfied that Principal Nakasato and Employee had engaged in a consensual relationship that did not involve sexual harassment of a subordinate by a superior.

34. In CAS Kaninau's view, if Employee denied having a relationship with Principal Nakasato, she would be precluded from filing a future claim for sexual harassment.

35. From the time that CAS Kaninau made his decision to detail Principal Nakasato temporarily until the third week in March 2018, there is nothing in Investigator Hookano's Report of Investigation that indicates any disruptive effect that Principal Nakasato's and Employee's consensual relationship had on the efficiency of the service.

REASONABLE RULES

36. For this second step in Daugherty's 7 Steps of Just Cause Analysis, there were no rules at all that addressed a private consensual relationships, ergo enforcement of a rule that does not exist is not reasonable.

INVESTIGATION AND FAIR INVESIGATION

37. Daugherty's 7 Steps of Just Cause Standard Analysis includes as steps 3 and 4 "Investigation" and "Fair Investigation. We deal with both by addressing the question, "Was the Employer's investigation conducted fairly and objectively?"

38. Approximately five months following CAS Kaninau's questioning of Employee in November 2017, Cyd Nakasato uploaded a hateful email that constituted a vicious personal attack against Principal Nakasato and Employee.

39. Cyd Nakasato sent her email, dated March 20, 2018, to dozens of individuals, including to PCHES staff members (current and former) and principals of the other Pearl City complex area schools.

40. In turn, the initial recipients discussed the email with others who were not addressees.

41. In turn, the others referred to in paragraph no. 40 above passed the email contents on to others.

42. Cyd Nakasato's email found its way to a least a thousand others.

43. The lengthy email contained graphic accusations of Principal Nakasato and Employee having a relationship that included having intercourse on campus during school hours and misuse of PCHES' funds .

44. Investigator Hookano's later Investigation Report contains no evidence that supports Cyd Nakasato's accusations as to Principal Nakasato and Employee having intercourse on campus during school hours nor evidence that supports Cyd Nakasato's allegations against Principal Nakasato and Employee for misuse of PCHES funds.

45. On March 22, 2018, Employee sent the following email, which CAS Kaninau received sometime around 5:45 am on March 23, 2018:

> By this email, I am disclosing a matter of waste and abuse. As you may be aware, I am the object of a vicious personal attack by Cyd Nakasato. However, this email is not intended to address her accusations. That is a separate issue that I will address later, if necessary. Instead, I would like to point out that permitting state employees to launch and continue personal attacks on the State Government's email system is both an abuse of the Government's computers and email system and a waste of taxpayer dollars. Surely taxpayers did not intend for state employees to engage in personal vendettas that, in addition to burdening the email system, encourage disruptive and time consuming gossip during work.
>
> I am not suggesting that any employee should be prevented from contacting the DOE with any accusations that they may wish to air. However, if the DOE permits this type of misuse of the State email system in this and other cases in which employees pursue

personal vendettas, then failure to prohibit such misuse constitutes waste and abuse of state funds.

46. The State of Hawaii Department of Education Code of Conduct at Section O states as follows:

Appropriate Use of Electronic Communication, Technology and Internet

All employees, contractors, and volunteers shall limit access to the DOE's Internet connections and use of DOE-issued technology such as cellular phones, wireless devices, computers, and software to business transactions and business communications necessary to conduct their duties as a DOE employee, contractor or volunteer. DOE networks and Internet connections shall be used in accordance with DOE Acceptable User guidelines and procedures.

47. In line with paragraph no. 46 above, DOE Acceptable Use Guidelines provides "Users (of DOE technology services) are prohibited from sending unsolicited, commercial and/or offensive email" (paragraph no. 7) and "Users are prohibited from using any form of electronic media to harass, intimidate or otherwise annoy another person/group (paragraph no. 8).

48. DOE Board Policy 305-2, entitled "Safe Workplace" addresses workplace violence as follows:

Workplace violence includes but is not limited to acts involving physical attack, property damage, as well as verbal statements that a reasonable person would perceive as expressing or suggesting intent to cause physical or mental harm to another person. Examples of violent behaviors include but are not limited to hitting, pushing, or shoving; throwing or breaking an object; shouting or yelling; threatening gestures or remarks; disruptive or hostile actions; abusive or belligerent language; sabotage of equipment; repetitive unwanted phone calls, notes e-mails; or other similar acts.

49. Department of Education 2170.1, Internet Access Regulations states at paragraph no. 6:

All messages shall be appropriate for DOE purposes. Offensive messages, including foul, hateful language or racial, religious or sexual slurs are prohibited."

50. Following Employee's disclosure to CAS Kaninau and her request to take the email down, CAS Kaninau took no action to take Cyd Nakasato's March 20, 2018 hateful email off the DOE site.

51. In taking no action to take Cyd Nakasato's hateful email off the DOE internet site, CAS Kaninau altered the conditions of Employee's employment in a negative and irreparable manner.

52. The longer Cyd Nakasato's email remained on the DOE internet site, more and more people would take the view that the DOE did not dispute the contents and condoned the posting.

53. To date, CAS Kaninau has offered no legitimate reason as to why he did not take steps to remove Cyd Nakasato's hateful email from the DOE internet site when leaving it on the site was a clear and continuing violation of DOE policy.

54. CAS Kaninau took no action to remove the hateful email because he took offense that a subordinate employee would tell him what he should or should not do.

55. CAS Kaninau's refusal to take action to remove the hateful email was intended to intimidate Employee to not challenge the DOE in any way.

56. CAS Kaninau's refusal to take action to remove the hateful email constituted retaliation for making a protected whistleblower disclosure under section 378-62 of the Hawaii Revised Statutes.

57. The day after Employee sent her disclosure of misuse of the DOE internet site, March 23, 2018, CAS Kaninau assigned Investigator Hookano to open an investigation against Employee.

58. Due process requires prompt action.

59. Waiting four months following an initial investigation in November 2017 to address the same issue again is not prompt action, especially since Principal Nakasato admitted to the affair in October 2017.

60. The most egregious charge investigated by Investigator Hookano was whether Principal Nakasato and Employee had engaged in sexual intercourse on the PCHES campus during work hours.

61. On April 5, 2018, Cyd Nakasato provided to Investigator Hookano text messages taken from Employee's phone.

62. Employee had a reasonable expectation of privacy for messages sent from and received by her on her private phone.

63. Under Section 711-1111(1)(h) of the Hawaii Revised Statutes, "A person commits the offense of violation of privacy in the second degree if, except in the execution of a public duty or as authorized by law, the person intentionally: (h) Divulges, without the consent of the sender or the receiver, the existence or contents of any message or photographic image by telephone, telegraph, letter, electronic transmission or other means of communicating privately, if the accused knows that the message or photographic image was unlawfully intercepted or if the accused learned of the message or photographic image in the course of employment with an agency engaged in transmitting it(.)"

64. Investigator Hookano was aware that the texts presented to her by Cyd Nakasato contained graphic and detailed messages of Employee's off-duty consensual encounters with Principal Nakasato.

65. Investigator Hookano also knew that Principal Nakasato had given the texts to Cyd Nakasato with the understanding "that he would give her the phone (texts), if she promised not to report him."

66. Investigator Hookano knew that Principal Nakasato did not consent to the disclosure to or use of the texts by Investigator Hookano.

67. Investigator Hookano did not have the consent of Employee to use texts sent privately between Employee's personal phone and Principal Nakasato's personal phone.

68. At the very least, Investigator Hookano aided Cyd Nakasato in furthering Cyd Nakasato's invasion of the privacy rights of Employee.

69. Investigator Hookano's actions as stated in the paragraphs above demonstrate the unfairness of the investigation conducted by her.

70. Investigator Hookano's abetting in the invasion of Employee's privacy inflicted severe emotional distress and harm on Employee.

71. Even with evidence obtained thru an invasion of the privacy rights of Employer, Hookano's Report of Investigation produced no evidence that Employee engaged in sexual intercourse with Principal Nakasato during work hours on the PCHES campus.

72. Superintendent Kishimoto's decision to terminate Employee was also based on her conclusion that, "(i)n addition to being a violation of DOE Code of Conduct, Section B, meeting with Principal Nakasato on June 1, 2017 at the Airport Honolulu Hotel, during the work day is not in compliance with the Superintendent's memo regarding Leave of Absence."

73. The applicable agreement concerning education officers after the closure of school was Article 25(A)(2) of the Collective Bargaining Agreement that stated "Ten-month school level education officers shall be required to complete all required tasks in June, not to exceed one (1) week after the school is closed for teachers.

74. Following the closure of school, Educational Officers follow a very flexible schedule because school is already closed for teachers.

75. PCHES closed on May 30, 2017.

76. In following a very flexible schedule after school closures, many education officers do not adhere strictly to the Superintendent's memo regarding Leave of Absence.

77. For Investigator Hookano, CAS Kaninau and Superintendent Kishimoto not to investigate an occurrence within the context in which it occurred demonstrates the unfairness of the investigation and their later review of the investigation.

78. CAS Kaninau recommends removal based, in part, on what he concludes was Employee's complicity in sending janitors home early one day.

79. CAS Kaninau knew that Principal Nakasato admitted that it was he (Nakasato) that had released the janitors early.

80. CAS Kaninau's conclusion in the face of contradictory facts demonstrates his lack of objectivity and fairness in his Recommendation to Terminate.

PROOF

81. Daugherty's fifth of his seven steps is "Proof," At the investigation, did the fact finder "obtain substantial evidence or proof that the employee was guilty as charged."

82. The most egregious charge against Employee is that she engaged in intercourse with Principal Nakasato during normal working hours on the PCHES campus.

83. The DOE's own manual for Conducting Internal Investigations (2015) instructs investigators to "avoid multiple or compound questions. Ask one question at a time and allow the interviewee time to answer each question before asking the next question."

84. Investigator Hookano ignored completely the instructions in paragraph no. 83 and, in her words, asked Employee "whether (Employee) has ever kissed and/or hugged romantically and/or 'made out' with (Principal Nakasato **on campus during working hours,** (Employee) said, **'Yes.'** (Emphasis in bold is Investigator Hookano's).

85. With the response to paragraph no. 83 in hand, Investigator Hookano proclaimed that "there is sufficient evidence to conclude that (Employee) inappropriately engaged in conduct of a sexual nature and/or sexual relations with Principal Nakasato on the PCHES campus, before during and after work hours."

86. With the same "evidence," Investigator Hookano also proclaimed that "there is sufficient evidence to conclude that (Employee) inappropriately used DOE facilities for personal use, when she engaged in conduct of a sexual nature and/or sexual relations with Principal Nakasato on campus before, during and after normal working hours."

87. In paragraphs nos. 85 and 86 above, Investigator Hookano's reference to "sexual nature" included kissing and hugging.

88. In paragraphs nos. 85 and 86 above, Investigator Hookano's reference to "sexual relations" included intercourse.

89. In contrast to her proclaimed findings, Investigator Hookano's Investigation Report contains no evidence that Employee had engaged in sexual relations, e.g. intercourse, on campus during work hours.

90. In stating her findings, Investigator Hookano avoided using the word "and" by itself because she knew that the evidence did not support a finding that Employee had engaged in both conduct of a sexual nature, e.g. kissing and hugging, and sexual relations, e.g., sexual intercourse with Principal Nakasato during normal workdays on the PCHES campus.

91. Instead of using "and" by itself, Investigator Hookano throws in the word "or" which means that Employee may or may not have engaged in sexual relations, e.g., intercourse, during normal workdays on the PCHES campus.

92. "And" means both.

93. "Or" means either.

94. "And/or" should never be used to fix a factual finding because it results in an indiscernible finding that it could have been this or that or both.

95. In re Bell, 122 P.2d 22, 29 (Cal. 1942) is instructive. Citing to multiple cases, whose citations we omit, Bell instructs:

> The expression "and/or", which made possible a conviction couched in such general terms, has met with widespread condemnation. (Citations omitted). It is true that the expression has proved convenient in contracts and other instruments where, by its intentional equivocation, it can anticipate alternative possibilities without the cumbersome itemization of each one (Citation omitted). It lends itself, however, as much to ambiguity as to brevity. Thus, it cannot be used to fix the occurrence of past events. A purported conclusion that either one or both of two events occurred is a mere restatement of the problem, not a decision as to which event actually occurred.

96. Union Representative Joy Bulosan should have objected to the use of compound questions by Investigator Hookano, but she did not.

97. In his Recommendation for Termination, CAS Kaninau adopted Investigator Hookano's finding that Employee engaged in conduct of a sexual nature, e.g. kissing and hugging, and/or sexual relations, e.g., sexual intercourse on the PCHES campus, including during normal working hours.

98. In her Decision Letter, Superintendent Kishimoto adopted CAS Kaninau's and Investigator Hookano's conclusion that Employee engaged in conduct of a sexual nature, e.g. kissing and hugging, and/or sexual relations, e.g., sexual intercourse on the PCHES campus, including during normal working hours.

99. Employee's removal was based on what Investigator Hookano, CAS Kaninau and Superintendent Kishimoto speculated may or may not have occurred.

100. Speculation that misconduct may or may not have occurred cannot be accepted in place of substantial and credible evidence necessary to prove misconduct.

101. Superintendent Kishimoto committed harmful error in the decision making process when, in lieu of substantial evidence or proof, she accepted Investigator Hookano's and CAS Kaninau's speculation that Employee and Principal Nakasato may

or may not have engaged in intercourse on the PCHES campus during normal working hours. Speculation cannot be allowed to replace proof when determining the crime on which reasonable punishment should be based.

EQUAL TREATMENT

102. Equal treatment: "Did the Employer apply its rules, orders and penalty without discrimination to all employees?" is the sixth step in Daugherty's 7 steps of just cause standard analysis.

103. Unless a valid basis justifies a higher penalty, an employer may not assess a considerably stronger punishment against one employee than it assessed against another known to have committed the same or substantially similar offense.

104. Referring to "equal treatment," CAS Kaninau states in his Recommendation to Terminate, "The facts of this case are distinguishable from other cases that have been presented to me in the past and, therefore, the recommendation that I have decided to impose is different but not disparate from other cases."

105. Synonyms for "disparate" include "different."

106. Antonyms for "disparate" include "same."

107. In paragraph no. 104 above and with an insertion of the synonym "different" for "disparate," CAS Kaninau is stating that "the recommendation that I have decided to impose is different but not (different) from other cases."

108. CAS Kaninau's unintelligible statement in paragraph no. 107 demonstrates a perfunctory response to the question of equal treatment with CAS Kaninau simply checking off Daugherty's sixth step without a meaningful comparison of cases necessary for determining the application of equal treatment.

PENALTY

109. Penalty: Was the degree of discipline administered by the Employer related to the seriousness of the Employee's proven offense and the Employee's record in the service to the Employer?" is the seventh step in Daugherty's 7 steps of just cause standard analysis.

110. Without proof and only speculation as to the charge of the most serious misconduct, i.e., engaging in sexual intercourse on the PCHES during the normal work

day, Superintendent Kishimoto's invoking of termination is defective because her decision derives from a critical "finding" based on speculation only.

111. Superintendent Kishimoto labels Employee's misconduct as she understands it to be "quite serious."

112. The issue types listed in the DOE's Conducting Internal Investigations Manual range from level one (least serious) to level four (most serious).

113. Superintendent Kishimoto was aware of Cyd Nakasato's inappropriate use of the DOE internet.

114. Superintendent Kishimoto should have known the Cyd Nakasato's misuse of the internet was a "quite serious" violation of written policy.

115. CAS Kaninau was aware of Cyd Nakasato's inappropriate use of the DOE internet.

116. CAS Kaninau declined to take any action at all even after receiving an email disclosing Cyd Nakasato's violation of DOE rules and regulations concerning her use of the DOE's internet.

117. Following Employee's disclosure of what she believed was a violation of law, CAS Kaninau immediately ordered a new investigation on a matter that he had resolved more than four months earlier.

118. Inappropriate Use of Internet and Equipment is listed as a level three issue type in the DOE's Conducting Internal Investigations Manual (2015).

119. Retaliation is listed as a level three issue type in the DOE's Conducting Internal Investigations Manual.

120. Investigator Hookano, CAS Kaninau and Superintendent Kishimoto knew of Cyd Nakasato's unconsented to disclosure of confidential information.

121. Investigator Hookano aided and abetted in Cyd Nakasato's disclosure of confidential information without consent.

122. Disclosure of Confidential Information is a level three issue type in the DOE's Conducting Internal Investigations Manual.

123. Inappropriate Behavior is listed as a level one (least serious) issue type in the DOE's Conducting Internal Investigations Manual.

124. Superintendent Kishimoto justifies her decision to remove Employee for misconduct that she considers to be "quite serious."

125. Superintendent Kishimoto does not even consider looking into potential level three misconduct by CAS Kaninau, Investigator Hookano and Cyd Nakasato.

126. When responding to misconduct that is short of egregious, the employer must issue at least one level of discipline that allows the employee an opportunity to improve.

127. Superintendent Kishimoto dismissed considering discipline short of removal because the misconduct was "quite serious."

128. Other conduct of Cyd Nakasato, Investigator Hookano and CAS Kaninau fell into Category 3 issue types and she did not consider whether their actions warranted an investigation for misconduct or even a supervisory inquiry.

129. Discipline must be proportional to the gravity of the offense, taking into account any mitigating, extenuating, or aggravating circumstances.

130. In her Decision Letter, dated August 6, 2018, Superintendent Kishimoto stated that "the March 20, 2018 email broadcast to staff members detailing your sexual relationship with Principal Nakasato had a direct effect on staff members receiving that email and the day-to-day operation of PCHES."

131. Superintendent Kishimoto is correct that the email that had been posted in violation of DOE policies caused disruption at PCHES.

132. Leaving the email on the DOE internet site months and more led many to believe that allegations of Principal Nakasato and Employee engaging in intercourse while children were in school and mismanagement of PCHES' moneys were true.

133. The DOE could have taken Cyd Nakasato's email off the DOE Internet site with an explanation that, while the posting of the email was inappropriate and in violation of DOE policy, the DOE would investigate the allegations therein.

134. While DOE management bears sole responsibility for keeping Cyd Nakasato's email posted, they now attempt to blame the "disruption" caused by the email on Employee and ignore their responsibility to limit any disruptive effect of the email to those affiliated with PCHES, internally and externally.

135. On April 25, 2018, Investigator Hookano interviewed Debra Miyasato for the purpose of determining how the affair between Employee and Principal Nakasato affected the efficiency of the workplace at PCHES.

136. Ms. Miyasato has been a School Administrative Services Assistant (SASA) at PCHES since 1999.

137. In her position as a SASA, Ms. Miyasato worked closely with and in close proximity to Employee and Principal Nakasato.

138. During the interview, Investigator Hookano asked Ms. Miyasato whether Ms. Miyasato had noticed anything different about how Employee and Principal Nakasato interacted with one another after a school trip to Houston which took place in April 2017.

139. In response to Investigator Hookano's inquiry, Ms. Miyasato responded that she did not notice anything different.

140. On April 27, 2018, Investigator Hookano interviewed Paula Matsunaga for the purpose of determining how the affair between Employee and Principal Nakasato affected the efficiency of the workplace at PCHES.

141. At the time of the interview, Ms. Matsunaga had been at PCHES for 24 or 25 years, including as the Student Services Coordinator (SSC) since January 2018.

142. Since becoming the SSC, Ms. Matsunaga's office was located next to Employee's.

143. During the interview, Investigator Hookano asked Ms. Matsunaga what she had observed concerning the working relationship between Employee and Principal Nakasato.

144. In response to Investigator Hookano's query, Investigator Hookano recorded "(Ms. Matsunaga) said, that she never saw anything to indicate that (Employee and Principal Nakasato) were having a relationship or anything like that." Investigator

Hookano also recorded that "(Ms. Matsunaga) said she has not observed any behavior between (Employee and Principal Nakasato) that appeared flirtatious, romantic or inappropriate." Finally, Investigator Hookano recorded that "(Ms. Matsunaga) did not see anything between (Employee and Principal Nakasato) that made her feel uncomfortable."

145. On April 25, 2018, Investigator Hookano interviewed Sherilynn Ohira for the purpose of determining how the affair between Employee and Principal Nakasato affected the efficiency of the workplace at PCHES.

146. Ms. Ohira has been a Para-Professional Tutor (PPT) at PCHES since 2012. Ms. Ohira's job mostly involves work in the PCHES office.

147. During the interview, Investigator Hookano asked Ms. Ohira "if she ever observed any behavior or conduct between (Employee and Principal Nakasato) that appeared flirtatious, romantic, or inappropriate?"

148. Investigator Hookano records that Ms. Ohira responded, "she never saw anything." Investigator Hookano also records that Ms. Ohira stated that "when she would walk in (to their offices) (parenthetical clarification is Investigator Hookano's), they would be talking, she never saw anything." Investigator Hookano records, "(Ms. Ohira) never really thought anything because they were just talking, always just talking, in either the VP or principal office." When Investigator Hookano queried if Ms. Ohira "ever saw them sitting close and talking, (Ms. Ohira) said no …they would always be separate."

149. Other than the three employees identified above, Investigator Hookano's investigation includes no other referral to evidence stemming from the comments of PCHES' employees, parents or students regarding how the affair between Employee and Principal Nakasato affected operations at PCHES.

150. As recorded in Investigator Hookano's May 29, 2018 Report, no one who was interviewed and who worked with Principal Nakasato and Employee noticed any effect that their relationship had on the efficient operation of PCHES.

151. In his Recommendation to Terminate, CAS Kaninau recognizes that "In (her) presentation, (Employee) made tearful admissions and apologies. You stated that you were glad to be at the meeting to say you were very sorry for lying to me."

152. The first step to accepting responsibility is acknowledgment of misconduct by an employee.

153. CAS Kaninau used Employee's tearful admissions and apologies for lying to him about a private matter only as proof of misconduct.

154. CAS Kaninau considered the admissions and apologies as a basis for harsher punishment.

155. CAS Kaninau did not consider the tearful admissions and apologies as a basis to consider discipline short of termination that would be consistent with providing Employee with an opportunity to improve.

UNION'S DUTY OF FAIR REPRESENTATION

156. In her Decision Letter, Superintendent Kishimoto terminated Employee's employment with the DOE, effective August 21, 2018.

157. On or about August 28, 2018, Employee sent to Union Advocacy Manager Stacy Moniz a 29-page proposed official grievance prepared on an AFSCME "Official Grievance Form."

158. Exhibit "E" attached hereto is the proposed "Official Grievance Form" received by Mr. Moniz from Employee on or about August 28, 2018.

159. The proposed "Official Grievance Form" presented Professor Carroll Daugherty's 7 Steps of Just Cause Standard Analysis (1966) and Robert M. Schwartz summary of further refinement of Daugherty's 7 steps.

160. The proposed "Official Grievance Form" included Schwartz' note that current arbitration decisions included consideration of "Progressive discipline." When responding to misconduct that is short of egregious, the employer must issue at least one level of discipline that allows the employee the opportunity to improve.

161. Termination based on proper cause requires both proof of misconduct and that the "punishment fits the crime."

162. Termination cases which involve the capital sentence for employees' careers require the most diligent efforts by unions to make sure that employers both prove misconduct and that termination is commensurate with the proven misconduct.

163. The proposed "Official Grievance Form" provided arguments that addressed why Investigator Hookano's Investigation, CAS Kaninau's Recommendation for Termination and Superintendent Kishimoto's Decision relied unacceptably on the use of "and/or" to "prove" a greater offense when there was proof only of a lesser offense.

164. The proposed "Official Grievance Form" provided arguments as to why Investigator Hookano's Investigation, CAS Kaninau's Recommendation to Terminate, and Superintendent Kishimoto's Decision were fraught with errors and shortcomings as to applicable charges, notice, fair investigation, proof, equal treatment, penalty, due process, prior enforcement and progressive discipline.

165. Under the Collective Bargaining Agreement applicable to this case, the DOE has agreed that "(a)ny relevant information specifically identified by the grievant or the Union in the possession of the Board needed by the grievant or the Union to investigate and process a grievance shall be provided to them on request within seven (7) working days."

166. The proposed "Official Grievance Form" included a prepared request (with explanations as to relevance) for documents, responses and admissions critical to showing why Superintendent Kishimoto did not terminate Employee for proper cause.

167. Following Mr. Moniz' receipt of the proposed "Official Grievance Form" from Employee, Employee informed him that the person who prepared the proposed "Official Grievance Form" was her father, an attorney who has worked in employment law litigation for many years.

168. When asking Mr. Moniz for updates as to the status of her request for arbitration, Employee noted on numerous occasions her understanding of limited HGEA resources and the willingness of her father to assist, without charge, in any way that the HGEA may desire.

169. After a meeting with HGEA Executive Director Randy Perreira in the last week of January, 2019, Employee sent Director Perreira the following letter:

> Thank you for meeting with me yesterday. Also, I want to thank the union and Mr. Stacy Moniz for their support in my grievance. As attorney Eric Seitz has stated and Stacy has demonstrated, Stacy is an excellent advocate for union members.

Today, you related to me that the union filed its intent to arbitrate and my grievance is now under review by the union as concerns further processing. With this understanding, I would like to offer that my father has expressed his willingness to assist in any way possible to present this case to an arbitrator. We know that union resources are limited and my father desires to do legal work pro bono to help address any concerns of limited and strained union resources.

By way of background, my father is an attorney with the Department of Veterans Affairs with more than 31 years of experience in employment law litigation. Currently, as a VA Office of General Counsel Deputy Chief Counsel, he supervises an employment litigation team of eight attorneys, a paralegal and an assistant who provide personnel action reviews and litigation support for VA hospitals employing thousands of employees in Honolulu, Manila, San Francisco, Sacramento, Fresno, Palo Alto, Reno and Anchorage. While he has been a supervisor for many years, he continues to present cases before arbitrators, the Equal Employment Opportunity Commission and the Merit Systems Protection Board.

Moreover, in addition to engaging and providing oversight in litigation, my father's employment law team conducts more than a hundred personnel action reviews yearly. Most of the reviews are for proposed removals. He has no doubt that a legal review of the DOE's actions should have resulted in a return of the proposed removal as insufficient to sustain a removal.

Mr. Perreira, my termination reflects the DOE's efforts to by-pass the Collective Bargaining Agreement to remove education officers for proper cause only. While the DOE purports to bring this case based on proper cause, the facts show that they subscribe to the belief that they can terminate employees at will. As such, the proposing and deciding officials merely give cursory and inadequate consideration to mitigating factors. While I have always expressed a willingness to accept the consequences of my misconduct, removal, which is the equivalent of employment law capital punishment, is far out of proportion to my admitted misconduct.

Thank you in advance for considering my father's offer to provide pro bono legal assistance in my case. I hope that, with a team effort, we can

thwart the DOE's attempt to ignore the bargained for requirement of proper cause and replace it with employment law that is terminable at will.

170. The HGEA did not respond to Employee's letter that it received in the last week of January 2019.

171. Employee and Miles Miyamoto, Employee's attorney, sent a letter to Randy Perreira and Mr. Moniz, which letter was received by the HGEA on June 10, 2019. The letter stated as follows:

> As the attorney for Mrs. Erin Kusumoto, I am submitting her request that the HGEA permit me to represent both her and the HGEA in the arbitration of her grievance involving the termination of her employment by the HGEA on August 21, 2018. In that Mrs. Kusumoto will commit to paying my attorney's fees and any costs that would be the HGEA's share in arbitration, my representation will be at absolutely no cost to the HGEA.
>
> My request above follows Mrs. Kusumoto's earlier request to provide pro bono representation in this matter, dated January 27, 2019. This request differs from that earlier request by adding Mrs. Kusumoto's further commitment to cover also the HGEA's share of arbitration costs.
>
> As noted in Mrs. Kusumoto's letter, dated January 27, 2019, I am an employment law litigator with more than 31 years of experience as both a litigator and supervisor of litigators in employment law. I have no doubt that, after this matter is heard in arbitration, an arbitrator will find that the DOE terminated Mrs. Kusumoto without just/proper cause. As a reminder of our legal reasoning we have included Mrs. Kusumoto's 27-page "Statement of Grievance" that shows why the DOE's attempt to disregard termination based on just/proper cause and arbitrarily impose a terminable at will process must and will fail.
>
> If Mrs. Kusumoto prevails in arbitration, the outcome will serves as precedent as to why the DOE cannot ignore the requirement of just/proper cause to sustain disciplinary actions, which requirement the Union has bargained for on behalf of its employees. If Mrs. Kusumoto does not prevail, I would accept sole responsibility for the outcome. As noted earlier, the HGEA's permitting me to be Mrs. Kusumoto's

representative in the arbitration comes at absolutely no risk or cost to the HGEA.

In light of the foregoing, please permit me to represent Mrs. Kusumoto in her upcoming arbitration as permitted by Hawaii Revised Statutes Chapter 658A-16 (Uniform Arbitration Act) which provides as follows:

Representation by lawyer, "A party to an arbitration proceeding may be represented by lawyer."

I would be pleased to meet with you to discuss any questions or concerns that you may have. I would be pleased to draft an agreement that reflects our assurances that the HGEA will bear absolutely no attorney's fees or arbitration costs if it allows me to represent Mrs. Kusumoto in arbitration.

172. Not receiving a response to the letter in paragraph no. 171 above, Attorney Miles Miyamoto sent a November 18, 2019 letter to HGEA Executive Director Perreira and HGEA Advocacy Manager Moniz. The letter stated as follows:

This is a follow up to my letter, sent to you on June 8, 2019 and received by the HGEA on June 10, 2019. In that letter, Ms. Kusumoto committed to paying attorney's fees and the costs of arbitration incurred by the HGEA in the arbitration of her grievance against DOE. In that letter, I also stated that I would be pleased to meet with you to discuss any questions or concerns that you may have. To date, you have not responded to our offer to arbitrate this matter without cost to the HGEA nor to meet.

In light of the foregoing, please inform Ms. Kusumoto, in writing, as to the status of her grievance and arbitration. We very much desire to work with the HGEA, but are concerned because of the passage of time and need to make sure that her rights to challenge her improper removal remain protected. Please send your written response as to the status of Ms. Kusumoto's grievance and arbitration to Miles Miyamoto at 801 South Street, Apartment 3113, Honolulu, HI 96813. Please respond within 30 days of your receipt of this letter. If a written response from you is not forthcoming, we will proceed to pursue remaining options available to us.

173. Unions have a higher standard of fair representation to meet in cases involving dismissal because of the severe impact of a dismissal on an employee.

174. In a letter, dated November 26, 2019, HGEA Deputy Executive Director Debra A. Kagawa-Yogi informed Ms. Kusumoto that HGEA would not be pursuing her grievance to arbitration.

175. Director Kagawa-Yogi's decision basically adopted Superintendent Kishimoto's Decision Letter with no disagreement.

176. A union breaches its duty of fair representation when the union's conduct toward a member of the collective bargaining unit is arbitrary discriminatory, or in bad faith. Lee v. United Pub. Workers, AFSCME, Local 646, AFL-CIO, 125 Hawai'I 317, 322, 260 P.3d at 1139.

177. "Arbitrary conduct" has been defined as "unintentional conduct showing 'an egregious disregard for the rights of union members,' or even a 'reckless disregard' of such rights, conduct 'without a rational basis,' and omissions that are 'egregious, unfair and unrelated to legitimate union interests."' Johnson v. United States Postal Serv., 756 F.2d 1461, 1465 (9th Cir. 1985) (*citing* Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1089 (9th Cir. 1978).

178. The "arbitrariness analysis looks to the objective adequacy of the union's conduct." Simo v. Union of Needletrades, 322 F.3d 602, 618 (9th Cir. 2003).

179. A union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion. Vaca v. Sipes, 386 U.S. 171, 191-192 (1967).

180. Director Kagawa-Yogi's decision to deny Employee the opportunity to enter arbitration was arrived at in a perfunctory manner. In the Ninth Circuit, a union acts arbitrarily if it ignores a meritorious grievance or processes it in a perfunctory fashion. Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1272 (9th Cir. 1983).

181. The Union's conduct in denying Employee the opportunity to arbitrate this matter with absolutely no cost to the union constituted a failure of the Union to meet its duty of fair representation.

182. On July 8, 2019 HGEA Employee Representative Joy Bulosan confirmed to Principal Nakasato that the HGEA would be taking his case to arbitration. She wrote:

Hope you are well. Sorry for the delay but we have been quite busy. Your case will be forwarded to attorney Peter Trask and he will be in contact with the AG's office who represents the DOE to select an arbitrator. At this point, there are no set deadlines in the process and the schedule is dependent on the attorneys' schedules as well as the arbitrator's once one has been selected. In any case, I will keep you informed when there is any significant action. I will eventually arrange a meeting with you and Peter but that won't be for several months. He will need some time to review your case and ask the AG for more info for his own discovery and to prepare his arguments.

183. With the grievances of Principal Nakasato and Employee under review and discussion by the HGEA for almost a year after their removal, finally, the HGEA had approved the arbitration and the process was well under way.

184. Then, on August 28, 2019, Debra A. Kagawa –Yogi, HGEA Deputy Executive Director of Field Services, informed Principal Nakasato that the HGEA would not take his case to arbitration after all and, later, on November 26, 2019, informed Employee of the denial of her request for arbitration.

185. The sequence of events went from 1) lengthy review and evaluation, 2) decision to arbitrate and 3) an almost immediate reversal of the decision to arbitrate. This sequence of events suggests that the reversal of the decision to arbitrate stemmed from factors other than the merits of Employee's grievance.

186. In Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1274 (9th Cir. 1983), the Court held that unintentional union conduct may constitute a breach of the duty of fair representation in situations where the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim.

187. Along with HGEA's decision to refuse to take Employee's case to arbitration being perfunctory and arbitrary, HGEA also failed to perform a ministerial act, which failure extinguished Employee's right to pursue arbitration other than through a hybrid complaint.

Paragraph no. 188: Complainant alleges that Respondent Hawaii State Department of Education engaged in a prohibited personnel practice when it violated HRS §89-13(a)(1) and HRS §89-13(a)(8).

Paragraph no. 189: In conjunction, HRS §89-13(a)(1) and HRS §89-13(a)(8) provides that "(a) (i)t shall be a prohibited practice for a public employer or its designated representative to: (1) (i)nterfere, restrain or coerce any employee in the exercise of any right guaranteed under this chapter" and "(8) (v)iolate the terms of a collective bargaining agreement."

Paragraph no. 190: Article 14 of the applicable Collective Bargaining Agreement (CBA) in this case is entitled "Representation", and includes a "Bill of Rights" in Section "H" of Article 14.

Paragraph no. 191: Article 14(H) of the CBA includes the following at paragraph (1) "(t)he educational officer shall be informed of any complaint including repeated and anonymous complaints filed against the educational officer. The complaint shall be reported immediately to the educational officer by the supervisor receiving the complaint" and (3) (i)f the Employer pursues an investigation based on such complaint, the Employee shall be advised of the complaint, and will be afforded an opportunity to respond to the complaint, and to furnish evidence in support of Employee's case. The Employee shall have the right to be represented by the Union in presenting the Employee's case.

Paragraph no. 192: When DOE Complex Area Superintendent (CAS) interviewed Complainant on November 1, 2017, he did so based on Michael Nakasato's admitting to him earlier that he had an affair with Complainant. (Allegation made in Paragraph no. 10 of the initial Complaint).

Paragraph no. 193: In response to Principal Nakasato's admission to him that he was having an affair, CAS Kaninau approached Employee on November 1, 2017 and asked "was there a relationship?" (Allegation made in Paragraph no. 11 of the initial Complaint).

Paragraph no. 194: On November 6, 2017, DOE Investigator Nanette Hookano conducted a second interview with Employee at the request of CAS Kaninau and asked if Complainant had ever been involved in a romantic or sexual relationship with Principal Nakasato (Allegations made in Paragraphs nos. 26 and 27 of the initial Complaint.

Paragraph no. 195: There was no complaint filed in this case, thus there was no investigation in November 2017 and no lying to the Employer during the course of an investigation.

Paragraph no. 196: If we assume for the sake of argument that there were investigations, then the failure to inform the Complainant of a complaint violates the CBA and HRS §89-13(a)(1) and HRS §89-13(a)(8).

Paragraph no. 197: Complainant alleges that Respondent Hawaii Government

Employees Association engaged in a prohibited personnel practice when it violated HRS §89-13(b)(1), b(4) and b(5).

Paragraph no. 198: In conjunction, HRS §89-13(b)(1) and b(5) provide that "(i)t shall be a prohibited practice for a public employee or for any employee organization or its designated agent willfully to (1) interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter ... or (5) violate the terms of a collective bargaining agreement.

Paragraph no. 199: Stacy Moniz, the HGEA Advocacy Manager, who represented Complainant thru the investigation and grievance process following her termination, filed a Step 1 Grievance on Complainant's behalf on September 12, 2018.

Paragraph no. 200: The applicable CBA mandates that the parties shall meet within seven working days of the filing of the Step 1 Grievance, which deadline could have been extended by agreement of HGEA and the DOE.

Paragraph no. 201: Stacy Moniz, the HGEA Advocacy Manager, who represented Complainant thru the investigation and grievance process, did not request an extension of this seven working days deadline.

Paragraph no. 202: There was no meeting held in a timely manner as mandated by the CBA.

Paragraph no. 203: Stacy Moniz failed to perform a ministerial task, i.e., meeting the requirements specified in Article 15 of the CBA that pertain to the agreed upon obligations of the parties during a Step 1 Grievance.

Paragraph no. 204: In a letter, dated September 24, 2018, Stacy Moniz and Joy Bulosan sent a letter to the DOE.

Paragraph no. 205: Joy Bulosan was the Union Agent who handled the investigation and grievance of Michael Nakasato.

Paragraph no. 206: In the September 24, 2018 letter, Stacy Moniz and Joy Bulosan informed Department of Education Representative Neil Dietz that "we are waiving Step 1 as is our prerogative and will proceed directly to Step 2."

Paragraph no. 207: Stacy Moniz' and Joy Bulosan's proclamation that HGEA was waiving the Step 1 Grievance deprived Complainant the opportunity to meet the time deadline set forth in the CBA.

Paragraph no. 208: Stacy Moniz' and Joy Bulosan's proclamation that HGEA was waiving the Step 1 Grievance also deprived Complainant to opportunity to have her case

reviewed and investigated further by a Complex Area Superintendent other than the Complex Area Superintendent who recommended her termination.

Paragraph no. 209: DOE responded on numerous occasions to HGEA's September 24, 2018 proclamation that "we are waiving Step 1 as is our prerogative and will proceed directly to Step 2."

Paragraph no. 210: Starting on October 1, 2018, Neil Dietz informed that "The Department does not concur that either party to the CBA has the ability to unilaterally waive provisions of the collective bargaining agreement. Therefore, the Department reserves the right to also challenge the instant grievance on this basis.

Paragraph no. 211: In response to Neil Dietz' October 1, 2018 letter, Joy Bulosan sent an email, dated October 18, 2018, to Neil Dietz with a copy to Stacy Moniz in which she asked Neil Dietz , "Does the Department mutually agree to hearing the grievances filed for Principal Nakasato and VP Kusumoto at Step 2."

Paragraph no. 212: Joy Bulosan was seeking a mutual agreement that was already rendered moot because of missing a mandatory deadline and more than three weeks after HGEA's September 24, 2018 unilateral proclamation that it was waiving the Step 1 Grievance.

Paragraph no. 213: In a letter, dated December 24, 2018, Neil Dietz reiterated that "there is nothing in the current bargaining agreement that authorizes such 'prerogative' to unilaterally waive Step 1 of the grievance procedure" and concluded "the record is clear that HGEA has ignored the requirements of Article 15 in the instant grievance, and the grievance should be denied on those grounds alone."

Paragraph no. 214: Following the Christmas and New Year's holiday period, Stacy Moniz filed "a demand to arbitrate this matter pursuant to the CBA" on January 3, 2019.

Paragraph no. 215: In the months that followed, Complainant would inquire as to the status of her arbitration and Stacy Moniz would respond that it was "in committee."

Paragraph no. 216: Stacy Moniz sent to Debra Kagawa-Yogi a Grievance Arbitration Recommendation, dated October 23, 2021.

Paragraph no. 217: Question no. 4 on the Grievance Arbitration Recommendation asked, "are there any timeliness issues?"

Paragraph no. 218: While knowing that there had been no timely meeting during the Step 1 Grievance process because of HGEA's failure to follow the Step 1 Grievance process, Stacy Moniz responded, "not that I am aware of."

Paragraph no. 219: Question no. 5 on the Grievance Arbitration Recommendation asked, "are there any issues related to arbitrability?"

Paragraph no. 220: While knowing that Neil Dietz had steadfastly maintained that "the record is clear that HGEA has ignored the requirements of Article 15 in the instant grievance, and the grievance should be denied on those grounds alone", Stacy Moniz nonetheless responded, "not that I am aware of."

Paragraph no. 221: Nowhere in the Grievance Arbitration Recommendation does Stacy Moniz submit for consideration that Complainant had 1) committed to paying the entire cost of arbitration, including attorney's fees, 2) would be willing to address any questions and concerns that HGEA may have and 3) would draft an agreement reflecting the foregoing, if HGEA permitted Complainant to take her case to arbitration.

Paragraph no. 222: HGEA failed to give rational consideration to Complainant's request that she be permitted to pursue arbitration at her own expense.

Paragraph no. 223: HGEA's failures constitute a failure to meet its duty of fair representation that affected a significant interest of Complainant.

PRAYERS FOR RELIEF

1. Make Complainant whole by reinstatement to full duty and restoring all lost rights, wages and benefits due to her.

2. Refrain from any and all retaliatory actions against Complainant for filing her hybrid complaint.

3. Expunge from Complainant's files any and all derogatory materials.

4. Actual damages, including the cost to Complainant for bring her action against HGEA based on its failure to meet its duty of fair representation.

5. Any other relief that the HLRB deems that Complainant is entitled to.

Dated September 6, 2021

Miles Miyamoto

Miles Miyamoto
Complainant's Representative