STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Complainant, and AMADOR CASUPANG, Labor Relations Specialist, Department of Transportation, State of Hawaii; LISA DAU, Department of Transportation, State of Hawaii; RODNEY HARAGA, Director, Department of Transportation, State of Hawaii; and LINDA LINGLE, Governor, State of Hawaii, Respondents.	CASE NO. CE-03-579 DECISION NO. 453 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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STATE OF HAWAII
STATE ETHICS COMMISSION

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 22, 2004, the Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, (HGEA or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against the Respondents AMADOR CASUPANG, (CASUPANG), Labor Relations Specialist, Department of Transportation, State of Hawaii; LISA DAU, (DAU), Department of Transportation, State of Hawaii; RODNEY HARAGA, (HARAGA) Director, Department of Transportation (DOT), State of Hawaii; and LINDA LINGLE, Governor, State of Hawaii (collectively, State or Employer). Complainant alleges, inter alia, that on or about October 14, 2004, Respondents committed prohibited practices in wilful violation of HRS §§ 89-13(a)(1), (3), (5), (7) and (8) when Respondents allegedly directed HGEA's Unit 03 steward to remove certain postings deemed "campaign material" from the DOT bulletin board located on the fourth floor at 869 Punchbowl Street, Honolulu, Hawaii.

On December 14, 2004, the Board conducted a prehearing conference, and after hearing oral arguments on Respondents' Motion to Continue the Evidentiary Hearing, denied said motion and scheduled the evidentiary hearing for December 21, and 23, 2004.

On December 21, and 23, 2004, the Board held hearings on December 21 and 23, 2004. Both parties were afforded full opportunity to present evidence and argument before the Board.

I do hereby certify that this is a full, true and correct copy of the original on file in this office.
Walli Sei Kumimoto
Executive Officer
Hawaii Labor Relations Board

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Thereafter, on January 24, 2005, Respondents filed a Motion to Re-Open Record. In response, the HGEA filed its Memorandum in Opposition to Respondent's Motion to Reopen Record on January 31, 2005. By Order No. 2307, dated February 2, 2005, the Board denied Respondents' motion.

On April 4, 2005, both parties filed post hearing briefs with the Board.

Based on a thorough review of the record, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The HGEA is an employee organization, as defined in HRS § 89-2, which represents all white-collar nonsupervisory State employees in bargaining unit (BU) 03. The Union was certified by the Board's predecessor, the Hawaii Public Employment Relations Board, as the exclusive representative of BU 03 on April 3, 1972.

2. LINDA LINGLE is the Governor of the State, and the public employer, as defined in HRS § 89-2, of State employees in BU 03.

3. CASUPANG, in his capacity as DOT's Labor Relations Specialist and Personnel Management Specialist IV, DAU in her capacity as DOT's Acting Business Manager, and HARAGA, in his capacity as DOT Director, are designated representatives of the Governor and are deemed to be public employers within the meaning of HRS § 89-2.

4. DAU began her employment with the State in September 1998, in the position of Auditor IV, temporarily assigned to the Administration Office as a Business Manager. She is a member of HGEA's bargaining unit 13.[1]

5. Since on or about January 1, 1973, the HGEA and the State have been parties to successive collective bargaining agreements (Contract) covering BU 03 employees.

6. At all times relevant, the BU 03 Contract provided for Union Representation Rights covered in Article 7, and states in part as follows:

[1]Transcript of Proceedings (Tr.) Vol. I, dated December 21, 2004, p. 15.

B. The Union shall be provided adequate space on bulletin boards for posting of usual and customary Union notices. Complainant's Exhibit (Ex.) 15-5, 17-4.[2]

7. At all times relevant, the BU 03 Contract provided for Personnel Policy Changes in Article 4, which states in part as follows:

B. No changes in wages, hours or other conditions of work contained herein may be made except by mutual consent. Complainant's Ex. 15-4.[3]

8. At all times relevant, Arvid Youngquist (Youngquist), a DOT State employee and member of HGEA's BU 03, in his capacity as an HGEA shop steward, posted "usual and customary union notices" on DOT's bulletin board located on the fourth floor of its office building consistent with Article 7B of the BU 03 contract. To keep its membership informed and educated, the Union mails materials to its members, including Youngquist, in the form of general membership fliers and steward bulletins, or distributes information at steward meetings.[4]

9. The Union mailed its members cards and fliers of political endorsements and newsletters asking members to support Democrats on November 2, 2004. Included in the mailings was an article entitled -- "Talking Story with Mufi Hannemann" whom the HGEA endorsed for mayor in the HGEA Public Employee, July 2004, Vol. 39 issue; and a 2004 legislative score card that not only showed how U.S. House and Senate voted on issues important to HGEA, but also identified candidates that the HGEA opposed and supported. The Union's purpose for these mailings was "to educate [the] members on why it is important to support certain candidates or a certain party for their benefit, whether it be salary, retirement, or health benefits."[5]

10. Sometime before October 14, 2004, Youngquist posted on the DOT's fourth floor bulletin board the following materials: 1) an HGEA mailed card entitled: "Veto-Proof: Lingle Wins, You Lose" message, encouraging members to "Elect Democrats on November 2nd"; 2) HGEA Public Employee, July 2004 Vol. 39 Newsletter that includes a letter from HGEA Executive Director Russell Okata

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[2]See, Tr. Vol. II, dated December 23, 2004, Testimony of Sanford Chun, p. 221.

[3]Id.

[4]Id., at pp. 259, 293-94.

[5]Id., at pp. 260-63.

endorsing Mufi Hannemann and John Kerry, a "Why It's Important to Vote" article, and HGEA's early endorsements of candidates for Congress, State Senate and House of Representatives, Hawaii County and City and County of Honolulu races; 3) Malama Pono, Volume XXXVII, No. 6, an official publication of the United Public Workers (UPW) AFSCME, Local 646, AFL-CIO, October 2004, issue that includes a Report of the State Director "Mufi Hanneman for Mayor"; and 4) 2004 Legislative score card of key votes by the Congressional Delegation on issues important to HGEA. Youngquist obtained these materials from HGEA either through the mail or at the steward or union membership meetings.[6]

11. On or about October 14, 2004, DAU saw a picture of Mufi Hannemann and the words "vote for Mufi Hannemann" in a UPW newsletter posted on DOT's fourth floor bulletin board for Union notices. DAU sought the advice of CASUPANG about the appropriateness of having campaign literature posted. CASUPANG advised DAU that based on the Hawaii State Ethics Commission's campaign restrictions flier, the DOT is not allowed to have campaign literature on the bulletin board; and CASUPANG recommended that DAU meet with Youngquist about the materials he posted. DAU and CASUPANG met with Youngquist and his supervisor, Robert M. Unangst, (Unangst) to discuss the materials posted. DAU asked Youngquist to remove the campaign literature that included the Union's political endorsements on the bulletin board, because she believed the UPW's "vote for Mufi Hannemann" newsletter on DOT's bulletin board should not be posted based on her interpretation of the Hawaii State Ethics Commission's flier covering campaign restrictions under Hawaii Revised Statutes (HRS) § 84-13. DAU agreed to Youngquist's request to get an opinion from the Hawaii State Ethics Commission about the campaign materials that Youngquist had posted.[7]

12. DAU and CASUPANG relied on a bulletin issued by the Hawaii State Ethics Commission entitled "Campaign Restrictions for State Officials and State Employees (Chapter 84, Hawaii Revised Statutes)" which reads in part as follows:

> **INTRODUCTION:** The following restrictions on campaign activities are based on section 84-13, Hawaii Revised Statutes (HRS), entitled the "Fair Treatment" section of the State Ethics Code. In general, section 84-13 prohibits the preferential use of state resources or incidents of state office. Examples of

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[6]Id., p. 295. See, Union's Exhibits (Ex.) 1 to 4.

[7]Tr. Vol. I, dated Dec. 21, 2004, Testimony of Lisa Dau, pp. 32-33, 38-39, 48-47, 52, 63, 126.

campaign activities, described below, that violate or may violate the ethics code are for illustration only and are not meant to be all-inclusive.

STATE OFFICIALS AND EMPLOYEES WHO MUST COMPLY WITH THE RESTRICTIONS: All state officials, state employees, state legislators, and state board and commission members. State justices and judges are not subject to the jurisdiction of the State Ethics Commission, but are subject to the Commission on Judicial Conduct.

CAMPAIGN RESTRICTIONS

THE FOLLOWING ACTIVITIES BY STATE OFFICIALS AND STATE EMPLOYEES VIOLATE THE STATE ETHICS CODE:

1. **Using state time, equipment supplies, or state premises for campaign activities or campaign purposes.**

* * *

State premises include state offices, conference rooms, working areas, and so forth. State premises or facilities that are available to the public for use (e.g., for holding meetings or conducting business) may also be used for campaign activities on the same basis as the facilities are available to the public.

Campaign activities or campaign purposes include: (a) selling, purchasing, or distributing campaign fundraiser tickets, including complimentary tickets; (b) conducting campaign meetings; (c) distributing campaign literature or materials; (d) soliciting campaign assistance or support; or (e) producing campaign literature or materials or storing such materials.[8]

13. The Board majority found no evidence of Union animus when DAU asked Youngquist to remove the campaign materials from the Union's section of DOT's bulletin board. DAU is a member of the same Union as Youngquist and she would have asked a nonunion member to remove campaign materials if posted on the DOT bulletin board.[9] Furthermore, DAU did not order Youngquist

[8]See Respondent's Ex. 1.

[9]Id., p. 129.

to remove specific items. Youngquist selected the materials and gave them to his supervisor to send to the Hawaii State Ethics Commission.

14. By letter dated October 18, 2004, Unangst forwarded the campaign materials to the Hawaii State Ethics Commission, and asked for an opinion as to whether the "State is within our rights to pull such items off the board or should we put them back up!"[10]

15. On and after October 29, 2004, DAU informed Youngquist that he was free to continue posting any and all HGEA materials on DOT's bulletin board that did not include campaign materials. DAU or Unangst did not review or approve Youngquist's subsequent postings of usual and customary union notices prior to posting. And, although there was some earlier discussions on or about October 20, 2004 with Youngquist about DAU or Unangst reviewing the postings, that did not occur.[11]

16. Daniel J. Mollway (Mollway), Executive Director and General Counsel of the Hawaii State Ethics Commission, opined that a state employee, like Youngquist, cannot post campaign materials on the state premises, like the DOT's bulletin board, based on his interpretation and application of the fair treatment section of the State Ethics Code, HRS § 84-13. Under the Hawaii State Ethics Code, a State official cannot give preferential treatment by allowing a non-state employee to post campaign materials on a state bulletin board. Mollway defined campaign material as "material or conduct that advocates for one candidate over another, or material or conduct that otherwise advocates for the election of a candidate."[12]

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[10]Tr. dated Jan. 6, 2005, Vol. III, Testimony of Robert Unangst, pp. 313-52, Respondent's Ex. 4. By letter dated November 9, 2004 from Respondent's attorney the Hawaii State Ethics Commission was also provided a copy of the instant complaint filed by the Complainant, the Commission's Campaign Restrictions flier, and a copy of The High Road, May 2004, No. 2004-2 issued by the Commission, in addition to Unangst's letter, seeking an opinion as to "whether the HGEA is permitted to post campaign materials on the office bulletin boards, or whether such conduct is in violation of HRS Chapter 84, Standards of Conduct. See, Respondent's Ex. 5.

[11]Tr. dated, Dec. 21, 2004, Vol. 1, pp. 70-72, 125, 191, Respondents' Ex. 12, 13. Tr. dated Jan. 6, 2005, Vol. III, pp. 345-46.

[12]See, Respondent's Ex. 10. Mollway's written opinion, dated January 3, 2005, reads:

> The Fair treatment section of the State Ethics Code, HRS section 84-13, prohibits state officials and employees from using their positions to give any individual, entity, or business any <u>unwarranted advantage</u> or <u>preferential</u> treatment. HRS section 84-13 bars the use of state time,

17. Based on Mollway's interpretation of HRS § 84-13, and his review of the campaign materials received from the DOT, the unions cannot post campaign materials on state office bulletin boards because to do so involves the use of state property, which is paid for by the taxpayers, and the state property would constitute a state resource that is controlled by a state official. Therefore, a state official violates the Hawaii State Ethics Code when he or she allows state resources to be used for campaign purposes.[13]

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equipment, or other state facilities or state resources for private business purposes. The State Ethics Commission has long maintained that the first paragraph of HRS section 84-13 and sub-section 84-13(3) also bar political campaigning that involves the use by state officials or employees of state time, equipment, facilities, personnel, or other state resources. The use of such resources constitutes the preferential use of state resources, since it is not possible to treat all political candidates or political campaigns fairly. See flyer attached, entitled "Campaign Restriction for State Officials State Employees," revised May, 2004.

Given the above, state officials and employees are barred by HRS sections 84-13 of the State Ethics Code from placing political campaign materials on state office bulletin boards. This prohibition would extend to barring the posting of material containing within such material campaign material. By campaigning or campaign material, we mean material or conduct that advocates for one candidate over another, or material or conduct that otherwise advocates for the election of a candidate.

Please note that the State Ethics Code provisions apply to the conduct of state officials and employees, who must abide by the laws set forth in Chapter 84, HRS. State officials or employees who violate the provision of Chapter 84, HRS, are subject to enforcement action and sanctions. These sanctions include termination of state employment (see HRS section 84-33) and the right of the Attorney General to pursue all legal and equitable remedies available to the State in order to address a violation of the State Ethics Code (see HRS section 84-19).

Please also note that this letter is based on a straightforward interpretation of the State Ethics Code, and would certainly be mandated further by a "liberal construction" of the State Ethics Code, in accordance with HRS section 84-1.

* * *

[13]Tr. dated Jan. 6, 2005, Vol. III, pp. 374-78, 472-73, 476, 449, 460-61.

18. The Board majority finds that Complainant failed to prove by a preponderance of evidence that Youngquist's one time removal of HGEA's newsletters and notices that contained political endorsements of candidates and other campaign related materials, which are distributed to HGEA's members through the mail or at union meetings, interfered with the Union's ability to educate and communicate with its members, or changed any conditions of work to require good faith bargaining.

DISCUSSION

Complainant contends that Respondents wilfully violated provisions of HRS §§ 89-13(a)(1), (3), (5), (7) and (8) on or about October 14, 2004, when DAU asked a DOT employee and Unit 03 steward, to remove union notices which included political endorsements for Democratic candidates and campaign materials related to the upcoming November 2, 2004 election, from the DOT's bulletin board. Complainant claims that Respondents also restricted the Union steward from further postings without submitting the material for review and prior approval and disapproved various publications and notices for posting.

HRS § 89-13(a) provides in part as follows:

> **§ 89-13 Prohibited practices; evidence of bad faith.**
> (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;
>
> * * *
>
> (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;
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> * * *
>
> (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
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> * * *
>
> (7) Refuse or fail to comply with any provision of this chapter;
>
> (8) Violate the terms of a collective bargaining agreement; . . . .

The issues for the Board raised in Complainant's brief[14] are as follows:

1) Whether Respondents unlawfully interfered with the rights of public employees to engage in protected concerted activity "for mutual aid or protection" within the meaning of HRS §§ 89-3 and 89-9,[15] thus constituting a prohibited practice under HRS §§ 89-13(a)(1) and (7);

2) Whether Respondents engaged in unlawful discrimination to undermine the Union and deter protected conduct that was "inherently destructive of employee rights," thus constituting a prohibited practice under HRS § 89-13(a)(3);

3) Whether Respondents unilaterally changed Article 7B of the BU 03 contract by imposing "new conditions regarding union bulletin boards on Unit 03 employees without prior notification or bargaining with HGEA," which is proscribed by Article 4B, and a unilateral change in the terms and conditions of work, thus constituting a breach of the duty to bargain in good faith under HRS § 89-13(a)(5);

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[14]See HGEA's Memorandum of Fact and Law, filed April 4, 2005.

[15]HRS § 89-3 states:

> **Rights of employees.** Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except for having a payroll deduction equivalent to regular dues remitted to an exclusive representative as provided in section 89-4.

HRS § 89-9 states in part,

> **Scope of negotiations; consultation.** (a) The employer and the exclusive representative shall meet at reasonable times, including meetings sufficiently in advance of the February 1 impasse date under section 89-11, and shall negotiate in good faith with respect to wages, hours, the amounts of contributions by the State and respective counties to the Hawaii employer-union health benefits trust fund to the extent allowed in subsection (e), and other terms and conditions of employment which are subject to collective bargaining and which are to be embodied in a written agreement as specified in section 89-10, ...

4) Whether Respondents wilfully violated Articles 7B and 4B, by restricting the "posting of usual and customary union notices," thus violating HRS § 89-13(a)(8).

Respondents argue that Complainant failed to establish by a preponderance of evidence that they wilfully violated the BU 03 Contract, Articles 7B and 4B; interfered with the rights of Youngquist to engage in protected concerted action; unlawfully discriminated in regard to conditions of employment; and refused to bargain in good faith and comply with HRS §§ 89-3 and 89-9. Respondents contend that the evidence shows a clear intent to comply with its obligations under HRS Chapter 89 (Collective Bargaining Act), the BU 03 Contract, and the HRS Chapter 84 (Standards of Conduct, Code of Ethics). Respondents' concern over compliance with the Hawaii State Ethics Code was the only reason Youngquist was asked to remove Union notices that contained campaign materials which he had posted on the DOT's bulletin board. As State employees, they have a statutory duty to comply with the Standards of Conduct, which "preempts the Unit 03 Agreement."[16] State of Hawaii Organization of Police Officers (SHOPO) v. Society of Professional Journalists University of Hawaii Chapter, 83 Haw. 378, 927 P.2d 386 (1996) (SHOPO). Therefore, Respondents contend the Complainant did not prove by a preponderance of evidence, a "conscious, knowing and deliberate intent to violate the provisions of Chapter 89, HRS." Aio v. Hamada, 66 Haw. 401, 664 P.2d 727 (1983). And, based on the evidence presented, Respondents argue that the Board can neither infer from the circumstances nor presume a violation occurred as a natural consequence of the Respondents' actions. United Public Workers, AFSCME, Local 646, AFL-CIO, 3 HPERB 507 (1984).

The Board majority finds that the record shows by a preponderance of evidence that on one occasion, and at the request of his supervisors, Youngquist, a DOT employee, in his capacity as a Union steward, removed several items from the Union's portion of a DOT bulletin board which contained political endorsements of Democratic candidates and campaign materials that were related to the upcoming November 2, 2004 election. Youngquist obtained these materials from the Union either through the mail or at the steward or union membership meetings.

The Union mailed its members cards and fliers of political endorsements; newsletters asking members to support Democrats on November 2, 2004, an article entitled -- "Talking Story with Mufi Hannemann" whom the HGEA endorsed for mayor in the HGEA Public Employee, July 2004, Vol. 39 issue; and a 2004 legislative score card that not only showed how U.S. House and Senate voted on issues important to HGEA, but also identified candidates that the HGEA opposed and supported. The Union's purpose for these mailings was "to educate [the] members on why it is important to support certain candidates or a certain party for their benefit, whether it be salary, retirement, or health benefits."

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[16]Respondents' Post Hearing Brief, filed April 4, 2005.

The record does not support Complainant's claim that "Respondent Lingle (and those acting in her behalf) prohibited the HGEA from communicating to its own members through the use of union bulletin boards."[17] The Board received no evidence to show that the Union was not able to communicate directly with its general membership through mailings of political endorsement cards, fliers, newsletters, or distributions at Union meetings. Therefore, the Board majority is not persuaded that Youngquist's one-time removal from a single State office bulletin board, which he selected, posted and removed, infringed on the Union's ability to educate and communicate directly with its members for their mutual aid and protection. On this basis, the Board majority concludes Complainant failed to prove an interference or restraint with the right to post "usual or customary" Union notices as provided under Article 7B of the BU 03 Contract or to engage in protected concerted activity "for mutual aid or protection" within the meaning of HRS § 89-3, in wilful violation of HRS §§ 89-13(a)(1) and (8).

The preponderance of evidence shows that on or about October 14, 2004, DAU sought the advice of CASUPANG about the appropriateness of having campaign literature posted on DOT's fourth floor bulletin board saved for Union notices, after she noticed a posted picture of Mufi Hannemann and the words "vote for Mufi Hannemann" in a UPW newsletter. CASUPANG advised DAU that based on the Hawaii State Ethics Commission's campaign restrictions flier, the DOT is not allowed to have campaign literature on the bulletin board. CASUPANG recommended that DAU meet with Youngquist about the materials he posted. DAU and CASUPANG met with Youngquist and his supervisor, Unangst, to discuss concerns about the materials he posted. DAU asked Youngquist to remove the campaign literature that included the Union's political endorsements on the bulletin board, because she believed posting the UPW's "vote for Mufi Hannemann" newsletter on DOT's bulletin board was prohibited by the Hawaii State Ethics Code.

The Board majority found no evidence of union animus when DAU asked Youngquist to remove the campaign materials from the Union's section of DOT's bulletin board. DAU is a member of the same union as Youngquist, and she would have asked a nonunion member to remove campaign materials if posted on the DOT bulletin board. Furthermore, DAU did not order Youngquist to remove specific items. Youngquist selected the materials and gave them to his supervisor to send to the Hawaii State Ethics Commission.[18]

The Board majority disagrees with Complainant that "no proof of anti-union motivation or intent is needed to establish a violation of HRS § 89-13(a)(3) in this case since Respondents' conduct is 'inherently destructive' of employees rights. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967). Respondents' reason for their conduct was to comply with their obligations under the Hawaii Ethics Code restricting campaign materials on state premises. Complainant failed to show that Youngquist

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[17]HGEA's Memorandum of Fact and Law, filed April 4, 2005.

[18]Id., p. 129.

was threatened with discharge or other disciplinary actions if he did not remove the campaign materials from the bulletin board. The Board majority is not convinced that Respondents DAU and CASUPANG's conduct was "inherently destructive of employees rights." Therefore, the Board majority concludes that Respondents did not engage in unlawful discrimination to undermine the Union and deter protected conduct that was "inherently destructive of employee rights," to constitute a prohibited practice under HRS § 89-13(a)(3).

Finally, the Complainant failed to establish by a preponderance of evidence that Respondents wilfully violated Articles 7B and 4B of the Unit 03 agreement, by unilaterally changing the conditions of work for Youngquist or any other BU 03 employee to post "usual and customary" Union notices. The Board received no testimony from Youngquist about any changes in the conditions of work or the need for prior approval before posting. Indeed, on or about October 29, 2004, Youngquist was free to continue posting any and all HGEA materials, except campaign materials, on DOT's bulletin board. In addition, Youngquist's subsequent postings were not subject to review or prior approval by either DAU or Unangst. Although there was some earlier discussion on or about October 20, 2004 with Youngquist about DAU or Unangst reviewing the postings, that did not occur.[19] Therefore the Board majority finds the Complainant's claim that Respondents unilaterally changed the terms and conditions of work in violation of Article 7B and 4B of the BU 03 Contract, is without merit.

The Board majority gave great weight to the opinion of Daniel J. Mollway, Executive Director and General Counsel of the Hawaii State Ethics Commission to find no unilateral changes in the terms and conditions of work in violation of the Articles 7B and 4B of BU 03 Contract. Mollway opined that a State employee, like Youngquist, cannot post campaign materials on the State premises, like the DOT's bulletin board, based on his interpretation and application of the fair treatment section of the State Ethics Code, HRS § 84-13. The materials posted and then removed by Youngquist constituted campaign materials which cannot be included in the "usual and customary union notices" posted on the state premises.

As State employees, Youngquist, DAU and CASUPANG are all obligated to adhere to the campaign restrictions set forth in the fair treatment section of the Hawaii State Ethics Code. The Hawaii State Ethics Code applies to all State employees, such as Youngquist, DAU and CASUPANG. Compliance with the Hawaii State Ethics Code is not a new condition of work. DAU's concern over compliance based on her understanding of the campaign restrictions was reasonable and provided a legitimate basis for asking Youngquist to remove the political endorsements and campaign materials even though they were part of the "usual and customary union notices" which Youngquist posted. Therefore, the Board majority concludes that Respondents did not unilaterally change Article 7B of the BU 03 contract by imposing "new conditions regarding union bulletin boards on unit 3 employees without prior notification

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[19]Tr. dated, Dec. 21, 2004, Vol. 1, pp. 70-72, 125, 191, Respondents' Exs. 12, 13. Tr. dated Jan. 6, 2005, Vol. III, pp. 345-46.

or bargaining with HGEA" proscribed by Article 4B which breached the duty to bargain in good faith accorded by HRS § 89-13(a)(5).

The Board majority agrees with the Respondents that as State employees they have a statutory duty to comply with the State Ethics Code and the "[p]arties may not do by contract that which is prohibited by statute." SHOPO, supra, 83 Hawai`i at 405. In SHOPO, the Hawaii Supreme Court held that: "1) HRS Chapter 92 is not a 'conflicting statute on the same subject matter' as HRS Chapter 89, within the meaning of HRS § 89-19, and thus is not preempted by HRS Chapter 89 or any collective bargaining agreement negotiated thereunder; [and] (2) a topic relating to conditions of employment cannot be subject to a negotiated agreement if the agreement would require a public employer to fail to perform a duty imposed upon it by statute." Id., at 406.

In this case, the Board majority concludes State Ethics Code, HRS § 84-13, set forth in Part II of HRS Chapter 84, Standards of Conduct, is not a "conflicting statute on the same subject matter" within the meaning of HRS § 89-19.[20] The State Ethics Code relates to the posting of "usual and customary union notices," which is an existing condition of employment negotiated in Article 7B. As State employees, Respondents, as well as Youngquist, are duty bound to comply with the campaign restrictions set forth in the State Ethics Code as it applies to the posting of union notices containing campaign materials on State premises. And, the Respondents cannot be required to negotiate the conditions set forth in Article 7B that would allow them to act contrary to their statutory duty under the Hawaii State Ethics Code.[21] Therefore, the Board majority concludes the Respondents did not wilfully violate Article 7B and 4B of the BU 03 Contract, and HRS § 89-13(a)(8) by asking Youngquist to remove Union notices that contained campaign materials to comply with the fair treatment section of the State Ethics Code.

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[20]HRS § 89-19 states:

> This chapter shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary local ordinances, executive orders, legislation, rules, or regulations adopted by the State, a county, or any department or agency thereof, including the departments of personnel services or the civil service commission.

[21]The SHOPO Court in determining whether HRS Chapter 92 was "a conflicting statute on the same subject matter" as collective bargaining reviewed the legislative history of HRS Chapter 89. The Court reasoned that under HRS § 89-9, the scope of negotiation is limited "to allow the public employees and their employers free range in negotiating the terms of their contract *as long as those terms . . . do not interfere with the rights of a public employer to carry out its public responsibility*." See, SHOPO, 89 Hawaii 403 citing Hawaii Pub. Employment Relations Bd. v. United Pub. Workers, 66 Haw. 461, 471, 667 P.2d 783, 790 (1983). In this case, the public employer's "public responsibility" includes the duties imposed by the fair treatment section of the Hawaii State Ethics Code.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this complaint under HRS §§ 89-5 and 89-13.

2. The Complainant failed to prove by a preponderance of evidence that Respondents unlawfully interfered with the rights of public employees to engage in protected concerted activity "for mutual aid or protection" within the meaning of HRS §§ 89-3 and 89-9, and committed a prohibited practice under HRS §§ 89-13(a)(1) and (7).

3. Complainant failed to prove by a preponderance of evidence that Respondents engaged in unlawful discrimination to undermine the Union and deter protected conduct that was "inherently destructive of employee rights," and committed a prohibited practice under HRS § 89-13(a)(3).

4. Complainant failed to prove by a preponderance of evidence that Respondents unilaterally changed Article 7B of the BU 03 contract by imposing "new conditions regarding union bulletin boards on unit 3 employees without prior notification or bargaining with HGEA.," which is proscribed by Article 4B, and a unilateral change in the terms and conditions of work, and breached the duty to bargain under HRS § 89-13(a)(5).

5. Complainant failed to prove by a preponderance of evidence that Respondents wilfully violated Articles 7B and 4B, by restricting the "posting of usual and customary union notices," and committed a prohibited practice under HRS § 89-13(a)(8).

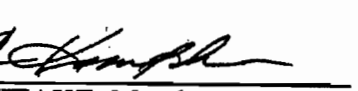
6. The Board majority concludes that the State Ethics Code, HRS § 84-13, is not a "conflicting statute on the same subject matter" within the meaning of HRS § 89-19. The State Ethics Code relates to the posting of "usual and customary union notices," which is an existing condition of employment negotiated in Article 7B. As State employees, Respondents, as well as Youngquist, are duty bound to comply with the campaign restrictions set forth in the State Ethics Code as it applies to the posting on State premises of Union notices that contain campaign materials. And, the Respondents cannot be required to negotiate the conditions set forth in Article 7B that would allow them to act contrary to their statutory duty under the Hawaii State Ethics Code.

ORDER

The Board majority hereby dismisses the instant complaint.

Dated: Honolulu, Hawaii, June 30, 2005

HAWAII LABOR RELATIONS BOARD



CHESTER C. KUNITAKE, Member

KATHLEEN RACUYA-MARKRICH, Member

DISSENTING OPINION

I dissent from the majority opinion because its reasoning threatens to undermine the rights and principles contained in Chapter 89. By its decision the majority condones the right of management to censor on the basis of content union-member communications on a matter of utmost importance in a forum contractually dedicated to such communication.

HRS § 89-3 protects the rights of a union and its membership to engage in "concerted activity for mutual aid and protection." The Supreme Court has held that this right encompasses the workplace distribution of a union newsletter urging members to register to vote and to "vote to defeat our enemies and elect our friends." Eastex, Inc. v. N.L.R.B., 437 U.S. 556, 87 S.Ct. 2505, 57 L.Ed.2d 428 (1978) (Eastex). Eastex involved union communications with private employees regarding the somewhat attenuated political issue of minimum wage legislation. The communications at issue here were to public employees regarding union endorsements. Elected officials negotiate, fund and administer public workers collective bargaining agreements. They have to power to influence virtually every condition of employment. To hold that communications identifying the workers' friends and enemies robs the right of meaning. The majority ignores the substance and relevance of the communications by concluding that the employees' rights were not infringed upon because the newsletters were probably mailed to all union members. By this reasoning, any right of workplace communication may be subverted to proof of an adequate mailing list or rolodex thereby rendering the right a virtual nullity.

The majority also undermines the precedence of collective bargaining rights as mandated in HRS § 89-19 and it misconstrues the Hawaii Supreme Court decision in SHOPO to do so. In that decision the Court held that HRS § 89-19 preemption extends only to statutory provisions of Chapter 89 and not to the specific provisions of the collective bargaining agreements derived therefrom. The Court therefore found the provisions of Chapter 92 not to be preempted by a conflicting provision in the SHOPO collective bargaining agreement (CBA). In the instant case the provisions of the Ethics code as interpreted by Mr. Mollway stand in direct conflict not only with a provision of the CBA but with .an express

statutory right of the membership to engage in "concerted activity for mutual aid and protection." If by its opinion, the Board is requiring expressly conflicting language, then it is draining HRS § 89-19 of its meaning.

For a public worker union, the ability to communicate with its membership regarding electoral activities goes to the heart o the right to engage in "concerted activity for mutual aid and protection." Like all citizens, public workers have a right to "vote to defeat our enemies and elect our friends." The identification of friends and enemies is central to "mutual aid and protection" and such communications are protected by Chapter 89. However well-intentioned, unilateral management limitations on such communications violate Chapter 89. And however clumsily clever, the condoning of such a violation is wrong.

BK Na

BRIAN K. NAKAMURA, Chair

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