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Case No. 20-CU-06-379, 20-CE-06-940

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:

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

a. Name, address and telephone number.

Erin K. Kusumoto (Employee)
[redacted]

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.

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

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

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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.

Respectfully Submitted,
/s/Miles T. Miyamoto

Miles Miyamoto
Employee's Representative

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the following via File and ServeXpress:

Peter Liholiho Trask, Esq.
Attorney for HGEA

Miriam P. Loui, Esq.
Attorney for Hawaii DOE

DR. CHRISTINA M. KISHIMOTO
SUPERINTENDENT

STATE OF HAWAI'I
DEPARTMENT OF EDUCATION
P.O. BOX 2360
HONOLULU, HAWAI'I 96804

OFFICE OF THE SUPERINTENDENT

August 6, 2018

Certified Mail No. 7014 2870 0001 0903 9212
Return Receipt Requested and Regular Mail

Ms. Erin Kusumoto
[redacted]

Dear Ms. Kusumoto:

As you know, Complex Area Superintendent ("CAS") Clayton Kaninau wrote to me on June 29, 2018 recommending that your employment as Vice Principal at Pearl City Highlands Elementary School ("PCHES"), Position #604029, be terminated. CAS Kaninau made this recommendation in accordance with School Code Regulation #5110, School Code Procedure #5110.2, and Article 6 of the current Collective Bargaining Agreement in effect between the Department of Education ("Department") and the Hawaii Government Employees Association ("HGEA").

You and your union representative were afforded an opportunity to meet with me on July 18, 2018 to discuss CAS Kaninau's recommendation.

CAS Kaninau's recommendation for your termination from employment was based on the Investigation Report dated June 1, 2018 that examined your conduct with Principal Michael Nakasato ("Principal Nakasato") and your post investigation meeting with CAS Kaninau on June 22, 2018.

The June 1, 2018 Investigation Report substantiated findings that include:

1. *"...there is sufficient evidence to conclude that VP Kusumoto 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. The text also indicate there is at least one incident in which they left campus during the work day (starting at 05-18-2017 11:38:57). Based on the sexually explicit nature of the texts before they left campus at 11:40am and after they returned to campus, it is more likely than not that they left campus to engage in sexual relations as described above ("So obvious not obvious" 05-18-2017 11:40:25)."* (Please refer to the June 1, 2018 Investigation Report, page 28.)
2. *"...there is sufficient evidence to conclude that VP Kusumoto 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 work hours."* (Please refer to the June 1, 2018 Investigation Report, page 28.)

3. "*...there is sufficient evidence to show that VP Kusumoto inappropriately used DOE work time for personal reasons when she engaged in inappropriate conduct of a sexual nature and/or sexual relations with Principal Nakasato during DOE work time.*" (Please refer to the June 1, 2018 Investigation Report, page 28.)
4. "*Based on the information gathered and Erin's own admission that she was involved in a sexual and/or romantic relationship with Mike, there is sufficient evidence to find that VP Kusumoto was dishonest and/or misrepresented information to CAS Kaninau when he previously asked her affair/relationship* [sic] *Principal Nakasato. VP Kusumoto was also dishonest about Principal Nakasato sending her personal texts. As discussed above, just during the time period of April 1, 2017 – June 14, 2017 they exchanged 6875 texts, most of which were sexually explicit and romantic in nature after the Houston trip.*" (Please refer to the June 1, 2018 Investigation Report, page 31.)

These substantiated findings lead to the following conclusions in regards to violations of policy:

1. There is sufficient evidence to find that being dishonest to CAS Kaninau about your romantic relationship with Principal Nakasato, misuse of Department property, and using Department work time for personal reasons (engaging in conduct of a sexual nature and/or sexual relations) violates the DOE Code of Conduct, so as to be construed as misconduct. (Please refer to the June 1, 2018 Investigation Report, page 32.)
2. Being dishonest and less than truthful during a direct inquiry by CAS Kaninau (and during a fact-finding on behalf of the CAS) is contrary to the ethical expectations of any Department employee, but especially of a school administrator such as a vice principal. Your inappropriate conduct violated BOE Policy 201-1 Ethics and Code of Conduct, so as to be construed as misconduct. (Please refer to the June 1, 2018 Investigation Report, page 32.)
3. In 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.
4. Your inappropriate conduct as described in the Investigation Report is also a violation of BOE Policy 201-2, Accountability of Employees. (Please refer to the June 1, 2018 Investigation Report, page 33.)

The Investigation Report determined your conduct was not in violation of BOE Policy 900-1 Department of Education Applicant and Employee Non-Discrimination because the described conduct "was not unwelcome." (Please refer to the June 1, 2018 Investigation Report, page 33.)

During our meeting on July 18, 2018, we discussed, in answer to my direct questions to you, your understanding of your performance as Vice Principal as compared to the Investigation Report with a focus on judgement, ethics, and conduct; the impact of your conduct and resulting absence on the school community; how do you move forward when your integrity and trust has been violated; and as a school leader, your accountability on the job. You said you were a trustworthy advocate for children. You spoke about the uncertainty you created for the school because of your unexplained absence. You noted that trust is hard to rebuild. You stated that you have to be accountable for your mistakes. You indicated that there is no excuse for your lack of judgement.

You have not disputed the substantiated findings of the Investigation Report. You didn't dispute the evaluation of policy violations presented in the Investigation Report.

CAS Kaninau correctly carried out his responsibility in this matter in accordance with School Code Policy #5110 and School Code Procedure #5110.2. CAS Kaninau was not a "witness" for the investigation. A report of an inappropriate relationship between you and Principal Nakasato was brought to CAS Kaninau's attention, by Principal Nakasato, in October 2017. CAS Kaninau followed up on that matter. Subsequent investigation, based on an email circulated on March 20, 2018 led to an investigation that substantiated you lied to CAS Kaninau and Investigator Hookano in November 2017. That does not make CAS Kaninau a "witness" any more than I should be considered a "witness" in this matter.

Contrary to Mr. Moniz's assertion, you did not make "inaccurate statements" to CAS Kaninau and Investigator Hookano in November 2017. You lied to them. You and Mr. Moniz now state the reason that you lied was to protect others. However, that begs the fact there would be no need to protect any other persons by lying except to protect those persons from the results of your misconduct. In the end, it is less important why you say you lied than the undisputed substantiated finding that you did lie.

Mr. Moniz states there is no proof that your misconduct negatively affected the day-to-day operations of PCHES. Mr. Moniz's statement is not correct. The Investigation Report cites at least one example when custodians were sent home early from work in order for you and Principal Nakasato to have sexual relations at PCHES. This directly affected "day-to-day operations" of PCHES. The news of your intimate relationship with Principal Nakasato announced in October 2017 had a direct effect on the operations of PCHES. 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. In fact, by your own admission and statements to me concerning the "uncertainty," "lack of judgement," and "trustworthiness" evidenced impacts on PCHES day-to-day operations.

You and Mr. Moniz asked me to consider leniency as an alternative short of CAS Kaninau's recommendation for termination.

You knew your behavior was inappropriate. You knew that the Department's expectations for your conduct were related to the efficient operation of schools. The Department conducted a fair and objective investigation, and the substantiated findings of that investigation are not disputed. I am presented with substantial evidence of your misconduct and violation of policies, rules, and regulations. And the Department applies those policies, rules, and regulations without discrimination. The proven offenses in this matter are quite serious and do rise to the level of termination.

You have broken the most basic and elemental trust of the Department when you put your personal interests and desires ahead of the Department, to the detriment of the Department, and lied about it. Now you plead for leniency. As much as I might wish to alleviate your personal suffering in this matter, my responsibility is to the Department, its staff, its students, and the

When asked how you would move forward at this point, you said you want to continue to work for the Department. You want to "regain trust."

HGEA Representative Stacy Moniz ("Mr. Moniz") stated that investigators are supposed to be fact finder and not make judgements, pointing to the fact that the Investigation Report reached conclusion based on substantiated findings.

Mr. Moniz also said that due process in this matter was flawed because CAS Kaninau was both a "witness" and a decision maker.

Mr. Moniz excused the "inaccurate statements" you made claiming you made those out of concern for other people.

Mr. Moniz said there was no proof that the day-to-day operations of the school were affected as a result of your misconduct with Principal Nakasato.

Both you and Mr. Moniz asked me to consider any alternative short of your termination of employment.

The record in this matter indicates that details of your sexual relationship with Principal Nakasato were made known to PCHES staff members, Assistant Superintendent Rodney Luke, and CAS Kaninau in October 2017. CAS Kaninau informed you of the allegations and questioned you about those allegations on November 1, 2017. On November 6, 2017 you were interviewed concerning the allegations, which you denied in whole. On March 20, 2018 an email circulated to staff at PCHES regarding your sexual relationship with Principal Nakasato. You were given a notice of complaint and investigation on March 23, 2018. On May 8, 2018 you were interviewed by the investigator. You were given a copy of the June 1, 2018 Investigation Report and had the opportunity to meet with CAS Kaninau on June 22, 2018 to respond to that report. You were made aware of CAS Kaninau's recommendation for the termination of your employment and you met with me on July 18, 2018 to discuss that recommendation. It is apparent from the foregoing that you received due process in accordance with School Code Procedure #5110.2.

I disagree with Mr. Moniz's claim that the investigation and subsequent meeting with CAS Kaninau were not handled properly. First, a Department investigation is not simply fact finding. A Department investigation also regularly includes an evaluation to determine if substantiated findings give rise to violations of BOE policies and/or Department rules, regulations, procedures, etc. The instant situation is no different. The Investigation Report cited four (4) substantiated findings. Upon evaluations of those findings, the Investigation Report determined that there were four (4) violations of policy, regulations, rules, and/or procedures. I require the investigator to provide me with that information and evaluation. As a decision maker, and certainly as the Superintendent, it is my responsibility to determine if the findings and evaluation of the Investigation Report are sustainable and what action, if any, should be taken.

community which we serve. Once the basic element of professional trust is destroyed, as it has been in this case, there is no chance for recovery. If you remained employed with the Department, in any capacity, the question would always remain concerning what you are basing your future professional decisions on: the well-being of the children committed to your care or your own personal interests. The Department cannot operate in that manner.

Further, there are no circumstances in the record or presented to me at our July 18, 2018 meeting that offer any mitigation of the misconduct you engaged in.

In accordance with the provisions of School Code #5110, School Code Procedure #5110.2 as well as Articles 6 and 12, Section E, of the current collective bargaining agreement, I therefore concur with CAS Kaninau's recommendation that your employment with the Department as Vice Principal at Pearl City Highlands Elementary School, Position 604029, be termination upon the close of business August 21, 2018.

Please make sure that prior to that date you have turned over all Department property to CAS Keith Hui and made arrangements with him to remove any of your personal belongings that may still be at PCHES.

Sincerely,

Dr. Christina M. Kishimoto
Superintendent

CMK:nd

c: Phyllis Unebasami, Deputy Superintendent
Keith Hui, Complex Area Superintendent
Zachary Sheets, Principal, Pearl City Highlands Elementary School
Jeff Hoover, Personnel Regional Officer
OFS- Payroll (redacted)
OTM- Records and Transactions Section, Benefits Section (redacted), Labor Relations Section
Stacy Moniz, HGEA

DR. CHRISTINA M. KISHIMOTO
SUPERINTENDENT

STATE OF HAWAI'I
DEPARTMENT OF EDUCATION
LEEWARD DISTRICT OFFICE
601 Kamokila Boulevard, Room 588
Kapolei, Hawaii 96707

June 29, 2018

Ms. Erin Kusumoto
[redacted]

Certified Mail: 7015 0640 0002 5918 1447
and Regular Mail

Dear Ms. Kusumoto:

RECOMMENDATION FOR TERMINATION
VICE PRINCIPAL I ERIN KUSUMOTO
POSITION #604029

In accordance with School Code Regulation 5110, School Code Procedure 5110.2 and Article 6 Rights of the Employer, of the Agreement between the Hawaii Government Employees Association and the Board of Education, I am recommending termination of your employment (position #604029) to Superintendent Christina M. Kishimoto. The recommendation for termination is for your failure to comply with the Department of Education Code of Conduct and the Superintendent's Leave of Absence Memos (dated May 6, 2016 and May 1, 2017), and your violation of Board of Education Policies 201-2 Ethics and Code of Conduct, and 1200-1.42 Accountability Policy.

On June 22, 2018, you were afforded an opportunity to meet with me to address the findings in the Final Investigation Report (FIR) dated June 1, 2018 by Investigator Nanette Hookano (Investigator Hookano). Present at the June 22, 2018 meeting in addition to you and I were HGEA Union Agent Stacy Moniz (Union Agent Moniz) and Personnel Specialist Susan La Vine. The Department offered to meet on June 19, 2018, but your Union Agent was not available and we mutually agreed to hold the meeting on June 22, 2018.

When asked if you received and read copies of the June 1, 2018 FIR, you and Union Agent Moniz affirmed the receipt and review of the FIR and attached documents.

INVESTIGATION'S FINDINGS:
According to the June 1, 2018 FIR, the following misconduct was substantiated against you:

1. Based on the information gathered, there is sufficient evidence to conclude that you inappropriately engaged in conduct of a sexual nature and/or sexual relations with Principal Nakasato on and off the Pearl City Highlands Elementary School (PCHES) campus before, during and after work hours. Included in the text messaging (texts) attributed to you, was at least one incident in which you and the principal left campus together during the workday (5-18-2017 11:38:57). Based on the sexually explicit nature of the texts, before you and the principal left campus at 11:40 am and after you and principal returned to campus, it is more likely than not that you and principal left campus to engage in sexual relations as described in the FIR Analysis and Conclusion of Issue 1.
2. It is concluded that there is sufficient evidence to conclude that you inappropriately used DOE facilities for personal use, when you engaged in conduct of a sexual nature and/or sexual relations with Principal Nakasato on campus before, during and after normal work hours.

3. Based on the information gathered, there is sufficient evidence to show that you inappropriately used DOE work time for personal reasons when you engaged in inappropriate conduct of a sexual nature and /or sexual relations with Principal Nakasato during DOE work time.
4. Based on the information gathered and your own admission that you were involved in a sexual and/or romantic relationship with the principal, there is sufficient evidence to find that you were dishonest and/or misrepresented information to me in my capacity as CAS when I asked you about your affair /relationship with Principal Nakasato. You were also dishonest to me about Principal Nakasato sending you personal texts. As provided in the FIR's Analysis and Conclusion of Issue 4, the exchange of 6,875 text messages most of which were sexually explicit and romantic in nature occurred during the time period of April 1, 2017 to June 14, 2017 after the school's Houston robotics trip.

Because the allegations were substantiated, an analysis was conducted to determine whether your conduct violated any DOE policies or procedures so as to be construed as misconduct. You were found to have violated Board of Education policies and rules and orders of management as follows:

1. **DOE Code of Conduct** There is sufficient evidence that your dishonesty to me as well as misuse of DOE property and DOE work time for personal reasons was a violation of the Code of Conduct, so as to be construed as misconduct.
2. **BOE Policy 201-2 Ethics and Code of Conduct** Your admitted dishonesty and being less than truthful during a direct inquiry from me about something as serious as having a romantic relationship with the principal is contrary to the ethical expectations of any DOE employee, but more so of a school administrator such as a vice principal. Therefore, it is concluded that your inappropriate conduct violated the BOE 201-1 Ethics and Code of Conduct Policy, so as to be construed as misconduct.
3. **Superintendent's Leave of Absence Memo** (dated May 6, 2016 and May 1, 2017) Your meeting with the principal on June 1, 2017 at the Airport Honolulu Hotel, during the work day is not only considered time abuse (personal business on DOE work time) and a violation of the DOE Code of Conduct (Section B) but also not in compliance with the Superintendent's Memo regarding Leave of Absence, as a review of your 2017 Form 7 Leave Report does not reflect you were on any type of leave at the date and time.
4. **BOE Policy 201-2 Accountability of Employees**, due to a violation of policy, you were found to have violated the Accountability of Employees policy.
5. **BOE Policy 900-1 DOE Applicant and Employee Non-Discrimination** No violation of this policy was found.

RESPONSE TO INVESTIGATION'S FINDINGS:
In your presentation, you 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. You said your behavior impacted the Department, your colleagues, Pearl City Highlands Elementary and your family.

You said that Pearl City Highlands Elementary was your second family and you wouldn't do anything to them. You said you were glad to be at the meeting to apologize to me in person. You acknowledged my impending retirement and said that it should be a time of celebration.

You said you could not recall any conversation when you were assigned to be the acting principal and asked about your relationship with Principal Nakasato. You said you had extreme pressure at home and at work. Your husband just found out and you were confused and worried not just for yourself but for PCHES as well.

You said your behavior was wrong and you should have been forthcoming last November. You said the worst thing was that you and your husband were dealing with your problems when the email came out. I

understood this to mean, the email on March 20, 2018. You added that the worst thing was telling your girls. In the last few months you have been able to think and you are no longer carrying around a lie.

You added that you always wanted to be a teacher, you chose..., you love kids, you're a believer in education and how education can bring hope and inspiration. You said one of your regrets was that you were not able to complete the school year. You continued your presentation by saying that you want to continue with the DOE, students and families. You closed by saying thank you.

At that point, I proceed with asking clarifying questions. When you replied, "No, I don't recall," I asked if you didn't remember or it didn't happen, you replied that you didn't recall. I expanded my inquiry by specifically asking if you didn't remember my conversation with you in November. You responded that you didn't recall, but added that you remembered my coming to talk to staff (at PCHES).

When I asked for a response to the findings that you had used work time on June 1, 2018 to go to the Honolulu Airport Hotel to meet the Principal. You stated that you had no recollection of the date and did not deny the findings. Therefore, based on the information available to me, I have concluded that you did use work time on June 1, 2018 inappropriately.

Union Agent Moniz asked that I take into account the fear factor and uncertainty that you had. He added that you have been forthcoming in the investigation and requested that I consider extenuating circumstances and put everything into context.

7 STEPS OF JUST CAUSE STANDARD ANALYSIS

The Department and the HGEA recognize the 7 Steps of Just Cause Standard to determine just cause. It serves as a useful guideline and does not always require an affirmative answer to each of the seven questions for a determination of just cause. At the very least just cause depends on the sufficiency and reliability of the evidence and whether the Department conformed to the minimal requirements of due process.

A handout listing the 7 Steps was provided to you and Union Agent Moniz. Union Agent Moniz thanked the Department for the handout and agreed to explain the just cause standard to you.

1. Notice. Did the Employer give the Employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the Employee's conduct?

Where 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.

In our meeting on June 22, 2018, you repeatedly apologized for lying to me and the investigator. When asked you affirmed that the investigative findings of misconduct were accurate, and asked that I consider not terminating you but instead place you in another school or another office position. You demonstrated to me that you were clearly aware that there were consequences for your conduct.

For those policies that were violated and those rules that you did not comply with, as the administrator of the school, you are responsible for all employees at your school to have knowledge of the consequences of these policies. Therefore, your knowledge and the consequences for your conduct are clearly known to you.

2. Reasonable Rules: Are the Employer's Rules reasonably related to the orderly, efficient and safe operations of the Employer's business and the performance the Employer might reasonably expect of the Employee.

I would contend that the Department's expectations of its employees to behave with honesty and respect for Department policies and rules and orders of management especially at such a high level of authority as a vice principal or acting principal are reasonably related to the orderly, efficient and safe operation of the Department's business and what the Department might expect of its employees.

3. Investigation: Before administering discipline to the Employee, did the Employer, make an effort to discover whether the Employee did in fact violate or disobey a rule or order of management.

In conducting its investigations, the Department has for many years used two stages to conduct an investigative analysis. The first stage of the analysis is to determine if there is sufficient evidence to show that the alleged conduct occurred. No further analysis is conducted regarding an allegation when there is insufficient evidence. Where there is sufficient evidence that the alleged conduct occurred, the second stage is to determine whether the conduct violated a BOE policy or Department rule or order of management.

During the meeting, Union Agent Moniz stated that the substantiations made by Investigator Hookano were procedurally flawed and that substantiations were the responsibility of the decision maker. I disagree.

The longstanding process as has been described here is appropriate to the investigative process. I also rely on Investigator Hookano's credentials as a trained, experienced and certified workplace investigator to conduct procedurally sound investigations.

4. Fair Investigation: Was the Employer's investigation conducted fairly and objectively?

In the subject investigation, the investigator first confirmed the allegations occurred and then analyzed the behavior against BOE policies to determine if a violation occurred or if there was non-compliance with rules or orders of management. Considerable efforts were made to determine whether you violated

- BOE Policy 201-2 Ethics and Code of Conduct;
- BOE Policy 1200-1.42 Accountability;

and failed to comply with

- Department of Education Code of Conduct; and
- May 6, 2016 Superintendent's Leave of Absence Memo
- May 1, 2017 Superintendent's Leave of Absence Memo

You yourself admitted that you engaged in deceptive behavior. You also confirmed to me that you did not challenge the specific findings that lead to violations of policy and failure to comply with rules or orders of management. The evidence shows that you misused your authority as a vice-principal and acting principal to purposely deceive me and the investigator about inappropriate behavior with the principal that violated policy and rules or orders of management.

The HGEA fully and fairly represented you during the investigation process and the post investigation process. The efforts by investigator Hookano were made with the intent of discovering whether you violated policy or disobeyed a rule or order of management. The findings are presented in the June 1, 2018 FIR.

The Department followed its procedure for evaluating your conduct. You were given an opportunity at each step to defend the findings against you and respond to the pending disciplinary action. The investigation was therefore conducted in a fair, objective and *consistent* manner.

5. Proof: At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

You repeatedly admitted and apologized for lying to me and the investigator. The available evidence analyzed in the June 1, 2018 FIR, shows you did engage in the prohibited behavior. The investigator also interviewed witnesses and reviewed documents that provided insights of the behavior you exhibited. The statements of these witnesses and the documents contained in the FIR were considered in this decision. You did not deny engaging in the misconduct or the non-compliance with rules or orders of management or violation of the policies analyzed.

At the meeting, Union Agent Moniz stated that you were forthcoming in the investigation that was initiated after March 20, 2018. It was at that time, that the evidence showed you had already lied to me and the investigator in November 2017. Union Agent Moniz asked that I consider that you were concerned with orderly, efficient and safe operation of PCHES and that what was occurring afterschool or off school grounds had no effect on the safe operations of the school. Upon review of the findings of the investigation, and your admissions to me at the June 22, 2018 meeting, Union Agent Moniz's contentions are insufficient as the investigation found that you engaged in behavior that was not work related during work time and/or on campus. The findings of the investigation to which you and Union Agent Moniz both admitted reading, included findings that you engaged in sexual relations before, during, and after work hours on and off campus. You did not dispute the findings of the FIR.

I also learned that you were complicit in dismissing workers from work early to engage in behavior that you wanted to conceal from those workers.

At our meeting on June, 22, 2018, your responses to me were not accompanied by any documents or other evidence for my consideration or in support of your presentation.

6. Equal Treatment: Did the Employer apply its rules, orders and penalties evenhandedly and without discrimination to all Employees.

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. The discipline imposed in this case is based on the seriousness of your conduct found in the investigation and in our meeting on June 22, 2018 during which you were apologetic.

Though you stated that you care about students, staff and the Pearl City Highlands Elementary School community, you misused your positions as a vice-principal and acting principal for personal benefit and to the detriment of morale and well-being in this community. A position at another school or in another office will not assist other administrators who will be left to address the detriment to morale and well-being in this community caused by your misconduct.

7. Penalty: Was the degree of discipline administered by the Employer reasonably related to the seriousness of the Employee's proven offense and the Employee's record in his service with the Employer.

Your official personnel file has no prior incidents of misconduct. However, in the absence of any statement by you as to how the deceptive behavior will not be repeated or how it would be different if you were given a second opportunity, I have no evidence that you have accepted responsibility for your deceptive behavior or the misconduct you admitted. You did not offer any insights as to how you would contribute to repairing and rebuilding the morale and well-being of the PCHES community. You made no statements about how you would be a better school administrator or office employee who can be trusted to perform the work that is entrusted to all Department of Education employees.

Furthermore, the volume of evidence in this case is significant such that your statements that you cannot recall are dubious. Having no recollection is inconsistent with Union Agent Moniz's contention that you

have been forthcoming . The risk of having this behavior reoccur to the detriment of any school community or department office is too great.

CONCLUSION:
The basis for this recommendation for termination is:

- The statements you and Union Agent Moniz made in our June 22, 2018 meeting,
- The June 1, 2018 Final Investigation Report,
- Your official personnel file,
- 7 Steps of Just Cause Standard

With all of the information that has been gathered as well as your responses to my specific questions about your conduct, I am recommending termination to Superintendent Kishimoto. Your statements have not convinced me that if given another chance that you would conduct yourself with honesty and integrity. Your misconduct was a serious violation of the public trust and there is no confidence that the deceptive behavior will not be repeated if given a second chance at employment.

Your current employment status with the DOE is that you are on summer session and the recall period for vice principals is July 12, 2018 to August 1, 2018. If necessary and upon recall of 10 month vice-principals, you will be returned to Department Directed Leave (DDL). A written notice as appropriate will be issued. The directives issued to you when you were placed on DDL remain in effect.

Please be advised of your right to meet with and/or submit comments in writing to the Superintendent by **July 11, 2018**. A meeting has been scheduled for **July 18, 2018 at 10:30 am at the Superintendent's Office, Queen Liliuokalani Building 1390 Miller Street.** You are further advised to contact **Secretary Claudia Asato-Onaga** at the office of the Superintendent at **586-3310 by July 11, 2018** should you decide to attend this meeting. If you waive your opportunities to meet or submit comments, a decision will be rendered based on the available information.

Sincerely,

Clayton K. Kaninau
Acting Complex Area Superintendent,
Pearl City-Waipahu Complex Area

CKK:slv:jsh

c: Dr. Christina M. Kishimoto, Superintendent, Department of Education
Neil Dietz, Personnel Specialist, OHR Labor Relations
Jeff Hoover, PRO, Leeward District Certificated Personnel Regional Office
Susan La Vine, Personnel Specialist, Leeward District Labor Relations
Stacy Moniz, Union Agent, HGEA

Doe v. DOJ

United States Court of Appeals for the Federal Circuit

May 11, 2009, Decided

2008-3139

Reporter
565 F.3d 1375 *; 2009 U.S. App. LEXIS 10031 **

JOHN DOE, Petitioner, v. DEPARTMENT OF JUSTICE, Respondent.

Subsequent History: On remand at, Remanded by *Doe v. DOJ, 2010 M.S.P.B. 16, 2010 MSPB LEXIS 294 (M.S.P.B., 2010)*

Prior History: [**1] Petition for review of the Merit Systems Protection Board in CH0752040620-B-1.

Doe v. DOJ, 2007 M.S.P.B. 282, 107 M.S.P.R. 397, 2007 MSPB LEXIS 7053 (2007)

Disposition: REVERSED AND REMANDED.

Core Terms

nexus, removal, misconduct, Female, discipline, off-duty, disciplinary, employees, employment agency, videotaping, articulate, preponderance of evidence, investigate, charges, personal relationship, impose discipline, de novo, tapes, internal regulation, agency's decision, adversely affect, initial decision, agency's action, burden of proof, special agent, dishonest, voyeurism, sexual, cases

Case Summary

Procedural Posture

Petitioner, an FBI agent who had been removed for off-duty misconduct involving videotaping of sexual encounters with two other agents, challenged a Merit Systems Protection Board (MSPB) ruling approving his removal. At issue was whether respondent FBI had shown a sufficient nexus between the conduct and his employment affecting the "efficiency of the service" within the meaning of *5 U.S.C.S. § 7513(a)* and whether the penalty was justified.

Overview

Though petitioner and a female agent (agent 1) consensually taped their encounter, agent 1 later found that petitioner had recorded encounters with other women, including agent 2. Agent 1 disclosed the same to other FBI personnel, causing disruption. As a result, petitioner was twice removed or reassigned and twice won challenges to the validity thereof. After the MSPB held that the FBI's process, including removal, was reasonable, petitioner sought review. The court reversed and remanded. First, the MSPB had failed to articulate a meaningful standard as to when private dishonesty constituted misconduct adversely affecting the "efficiency of the service" per *§ 7513* and that using "clearly dishonest" as a standard was improper as the question of removal then turned on the MSPB?s subjective moral compass. Noting that grounding disciplinary decisions in the nebulous field of comparative morality was too easily used as a post hoc justification, the court held that the articulation of a meaningful standard was necessary in light of an apparent conflict between the FBI's policy on investigating personal relationships and its policies

requiring agents to act with integrity and honesty.

Outcome

The court vacated the efficiency determination and the penalty determination and remanded for further consistent proceedings.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Governments > Federal Government > Employees & Officials

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Administrative Law > Judicial Review > Standards of Review > Exceeding Statutory Authority

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN1[] **Standards of Review, Abuse of Discretion**

Decisions of the Merit Systems Protection Board are affirmed by the U.S. Court of Appeals for the Federal Circuit unless they are found to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law or unsupported by substantial evidence.

Administrative Law > Agency Adjudication > Review of Initial Decisions

Governments > Federal Government > Employees & Officials

Labor & Employment Law > Employment Relationships > At Will Employment > Public Employees

HN2[] **Agency Adjudication, Review of Initial Decisions**

It is for the Merit Systems Protection Board to ascertain the reasonableness of a federal agency's chosen penalty for an employee's alleged misconduct.

Evidence > Burdens of Proof > Allocation

Governments > Federal Government > Employees & Officials

Labor & Employment Law > Employment Relationships > At Will Employment > Public Employees

Evidence > Burdens of Proof > Preponderance of Evidence

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

HN3[] **Burdens of Proof, Allocation**

To sustain a charge of misconduct, a federal agency must have established by preponderant evidence the existence of a nexus between the employee's misconduct and the work of the agency, i.e., the agency's performance of its functions. The agency has the burden of proof to establish that the employee's discipline will promote the efficiency of the service. 5 *U.S.C.S. § 7513(a)*.

Administrative Law > Agency Adjudication > Decisions > Contents

Governments > Federal Government > Employees & Officials

Labor & Employment Law > Employment Relationships > At Will Employment > Public Employees

Administrative Law > Agency Adjudication > Review of Initial Decisions

HN4[] **Decisions, Contents**

The Merit Systems Protection Board, in considering the removal of a federal agency employee, must carefully scrutinize the circumstances that led to the employee's removal, and specifically state its justification for upholding that decision in order for it to be deemed reasonable. The Board must itself precisely articulate the basis for upholding the agency's action. The active process inherent in the precise articulation of any justification as a matter requires careful scrutiny of the circumstances: thus, the need for, and legitimacy of, the Board's exercise of its balancing authority. If proper justification does not reveal itself upon careful scrutiny, the agency's penalty cannot be sustained.

Governments > Federal Government > Employees & Officials

Labor & Employment Law > Employment Relationships > At Will Employment > Public Employees

HN5[] **Federal Government, Employees & Officials**

Misconduct that is private in nature and that does not implicate the job performance of an employee of a federal agency in any direct and obvious way is often insufficient to justify removal from a civil service position. That is, it is insufficient for an agency to rely on internal regulations that proscribe in general certain employee conduct, e.g., conduct that is "immoral" or "disgraceful," as proof of the required nexus between off-duty dishonesty/immorality and the efficiency of the service.

Governments > Federal Government > Employees & Officials

Labor & Employment Law > Employment Relationships > At Will Employment > Public Employees

HN6[] **Federal Government, Employees & Officials**

A clear articulation of a standard is essential to the government's ability to reasonably and legitimately remove an employee of a federal agency for off-duty conduct relating to personal relationships.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Governments > Federal Government > Employees & Officials

Labor & Employment Law > Employment Relationships > At Will Employment > Public Employees

HN7[] **Fundamental Rights, Procedural Due Process**

At a minimum, a federal agency is bound to accord due process and set basic substantive limits on its prerogative to remove its employees.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Governments > Federal Government > Employees & Officials

Administrative Law > Agency Adjudication > Review of Initial Decisions

HN8[] **Standards of Review, De Novo Standard of Review**

Fact finding by a federal agency as to discipline of a federal employee is subject to de novo review by the Merit Systems Protection Board.

Governments > Federal Government > Employees & Officials

Labor & Employment Law > Employment Relationships > At Will Employment > Public Employees

HN9[] **Federal Government, Employees & Officials**

A federal agency has a certain amount of discretion in choosing between two courses of action, one which would involve adverse action procedures and one which would not. Under such circumstances, the task of the Merit Systems Protection Board is not to make the discretionary decision as to whether discipline is desirable but to determine the facts; assess whether the agency had the authority to impose discipline; and determine whether discipline would have been imposed

absent the legal error. In the penalty area the Board must conduct just such an inquiry before sustaining the agency's penalty where the Board sets aside some of the charges on which the penalty is based. There is no reason to apply a different approach to the basic question of discipline.

Governments > Federal Government > Domestic Security

Labor & Employment Law > Employment Relationships > At Will Employment > Public Employees

Governments > Federal Government > Employees & Officials

HN10[] **Federal Government, Domestic Security**

In the absence of a violation of criminal law, the FBI is permitted to discipline an employee for off-duty personal conduct only if the conduct impacts the agency's ability to perform its responsibilities or if the conduct constitutes a violation of an internal regulation.

Counsel: Richard L. Swick, Swick & Shapiro, P.C., of Washington, DC, argued for petitioner.

Sean B. McNamara, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent. With him on the brief were Jeanne E. Davidson, Director, and Todd M. Hughes, Deputy Director.

Judges: Before BRYSON, DYK, Circuit Judges, and PATEL, District Judge. * Opinion for the court filed by District Judge PATEL. Dissenting opinion filed by Circuit Judge BRYSON.

*The Honorable Marilyn Hall Patel, District Judge, United States District Court for the Northern District of California, sitting by designation.

Opinion by: Marilyn Hall Patel

Opinion

[*1376] PATEL, *District Judge.*

Petitioner John Doe appeals the final decision of the Merit Systems Protection Board ("MSPB" or "Board"). *Doe v. Dep't of Justice, 2007 M.S.P.B. 282, 107 M.S.P.R. 397 (M.S.P.B. 2007)*. Doe was removed from his position as a Special **[*1377]** Agent by the Federal Bureau of Investigation ("FBI" or "agency") based on a charge of "unprofessional conduct." Following a dismissal of Doe's internal agency appeal, Doe sought review before **[**2]** the Board. Two Initial Decisions by an MSPB Administrative Judge ("AJ") and petitions for review by the FBI followed, and the Board twice sustained Doe's removal. Before this court, Doe contends that the FBI failed to establish a sufficient nexus between Doe's charged off-duty misconduct and his FBI employment, i.e., the efficiency of the service, and that the penalty of removal was unjustified. For the reasons set forth below, we vacate the Board's final decision and remand with instructions.

BACKGROUND

Doe was initially employed by the FBI in January 1997. Prior to his removal, Doe worked as a Special Agent pilot near an FBI Field Office in Ohio. While Doe was off duty, he had consensual sex with a female member of the FBI's support staff ("Female # 1"), whom he was dating. Doe and Female # 1 videotaped their sexual encounters, at her suggestion. However, Doe also videotaped his separate consensual sexual encounters at his residence with another female FBI employee ("Female # 2") as well as with one woman who was not an employee ("Female # 3").

This aspect of Doe's private life came to be known by the FBI through the actions of Female # 1. In October 2002, while Doe was out of town, **[**3]** Female # 1 entered his house and found the tapes, each with a videotaped partner's name labeled on it. She contacted Doe and together, with the assistance of a professional counselor, they worked out the problems the tapes revealed about their relationship. Later, she shared her concerns with, and revealed the existence of the tapes to, counselors in the FBI Employee Assistance Program. From that point rumors spread about Doe and

female co-workers at the FBI, which were upsetting to Female # 1 and Female # 2.

In March 2003, in response to these rumors, the Office of Professional Responsibility ("OPR") of the FBI began to investigate. Doe admitted to videotaping the three women, on occasion, without their knowledge or consent. In March 2004, the OPR concluded that Doe's off-duty behavior, specifically videotaping sexual encounters with women without their consent, was unprofessional conduct and "contrary to the FBI's suitability requirements." In discussing whether Doe's conduct was sanctionable, the OPR decision memorandum stated that Doe's non-consensual taping activities "may have constituted a violation of criminal law." Based on these findings, Doe was removed from employment with **[**4]** the FBI on June 9, 2004. At the time of that decision, the deciding official Jody Weiss, then Deputy Assistant Director of OPR, and Doe's supervisor Gary Klein, Assistant Special Agent in Charge, both believed that Doe's conduct had violated the Ohio state voyeurism law.

The FBI's Disciplinary Review Board sustained Weiss' decision on June 7, 2005. Doe timely appealed the FBI's removal action to the MSPB. On October 26, 2005, an AJ conducted an evidentiary hearing regarding Doe's removal. In a March 2006 Initial Decision, the AJ reversed the removal, finding no legal nexus between Doe's off-duty personal conduct and "the efficiency of the agency's operation" nor with the performance of Doe's work duties. In his analysis, the AJ found insufficient evidence that Doe's conduct violated Ohio state law and, moreover, held **[*1378]** that the FBI's policy regarding the intimate relationships of its employees did not support extending the review of the legality of Doe's conduct in jurisdictions other than the state of Ohio. The AJ found no evidence that Doe ever discussed his videotaping activity with anyone other than Female # 1, prior to the April 2003 investigation, nor that Doe had ever shown the **[**5]** tapes to any other person, including Female # 1. The AJ held that Doe was neither responsible for the rumors that circulated at the Field Office, nor for any disruption that resulted from those rumors. The FBI was ordered to retroactively restore Doe effective June 9, 2004, and transfer back pay, with interest. In accordance with the interim relief provided by the AJ's order, Doe was reinstated and reassigned to a different FBI location in Omaha, Nebraska.

The FBI appealed the Initial Decision to the Board. In an August 14, 2006 decision, the Board held that the agency had established a nexus between Doe's conduct and the efficiency of the service. Relying on evidence that Doe's conduct had adversely affected his division's operations and caused his supervisors to lose trust and confidence in him, the Board reversed the Initial Decision and remanded the case for further adjudication. As to the perceived criminality of Doe's conduct, the Board "agree[d] with the administrative judge that it does not appear to have violated any laws of the state in which it occurred." The Board did not analyze what effect the perception that the behavior was criminal had on the decision to remove Doe.

On **[**6]** remand, considering only the propriety of the removal penalty, the AJ mitigated the penalty to a 120-calendar-day (time served) suspension and a directed reassignment at the FBI's option. The AJ found that Doe's conduct was not actionable under section 1 of the FBI's policy, which addresses conduct or relationships involving violations of the law, because it was not criminal. The AJ found that any conduct by Doe that disrupted the FBI's operation, as a violation of section 2 of the FBI's policy, was mitigated by the workplace disruptions caused by others. The AJ further held that the FBI officials' loss of trust and confidence in Doe was "to some extent grounded in the unsubstantiated belief that the appellant's conducted [SIC] violated a local voyeurism statute." Comparing the penalty that Doe had received for his "morally wrongful off-duty conduct in his intimate relationships" against a history of similar cases, the AJ concluded that Doe's removal exceeded the tolerable limits of reasonableness.

The FBI then appealed again to the Board, arguing that the AJ erred in finding Doe's removal to be a penalty beyond tolerable bounds of reasonableness. The Board held that intervening acts **[**7]** by others did not absolve Doe of culpability for "clearly dishonest" actions and that his seven-year length of service with no disciplinary record and a history of positive performance reviews did not warrant mitigation. Concluding that the FBI had not failed to weigh any relevant mitigation factors and that Doe's removal was a reasonable penalty, the Board sustained the FBI's removal action.

This appeal followed. We have jurisdiction pursuant to 5 U.S.C. § 7703(b)(1).

II. DISCUSSION

This appeal centers on whether the removal of Doe and the Board's decision to sustain that penalty were permissible. *See* **[*1379]** 5 U.S.C. § 7703(c) (*HN1*[↑] Board decisions are affirmed unless they are found to

be "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law . . . or unsupported by substantial evidence."); Modrowski v. Dep't of Veterans Affairs, 252 F.3d 1344, 1353 (Fed. Cir. 2001) (HN2[↑] the Board ascertains the reasonableness of an agency's chosen penalty).

HN3[↑] To sustain the charge of misconduct, the agency must have established by preponderant evidence the existence of a nexus between the employee's misconduct and the work of the agency, i.e., the agency's performance of its functions. [**8] See Brown v. Dep't of the Navy, 229 F.3d 1356, 1358 (Fed. Cir. 2000) (citing Mings v. Dep't of Justice, 813 F.2d 384, 389-90 (Fed. Cir. 1987)). The agency has the burden of proof to establish that the employee's discipline will "promote the efficiency of the service." 5 U.S.C. § 7513(a).

With respect to the penalty, HN4[↑] the Board's decision must carefully scrutinize the circumstances that led to Doe's removal, and specifically state its justification for upholding that decision in order for it to be deemed reasonable. See Lachance v. Devall, 178 F.3d 1246, 1258 (Fed. Cir. 1999) ("The Board must . . . itself precisely articulate the basis for upholding the agency's action. The active process inherent in the precise articulation of any justification as a matter of course requires 'careful' scrutiny of the circumstances: thus, the need for, and legitimacy of, the Board's exercise of its balancing authority with aplomb."). If proper justification does not reveal itself upon careful scrutiny, the agency's penalty cannot be sustained. Id.

In this case, the agency's own regulations circumscribe the conduct the agency may investigate and consider as grounds for removal of an employee. Accordingly, [**9] the Board decisions have focused on whether or not the FBI's inquiry into Doe's personal affairs, and attendant disciplinary removal, was in accordance with the FBI's personal relationships policy. The FBI policy does not condone disciplinary consideration of an employee's morality in romantic or intimate relationships in the absence of (1) a violation of criminal law, (2) an adverse impact on the agency's ability to perform its responsibilities, or (3) a violation of an internal regulation. Moreover, the policy affirmatively indicates that OPR may investigate conduct of employees in the context of a personal relationship only if that conduct is criminal, stating:

> OPR does not investigate relationships based upon the morality of romantic or intimate relationships, or upon the marital status or gender of the parties, unless they would realistically be subject to prosecution and thus impact upon the accomplishment of the FBI's mission.

Memorandum from Louis Freeh to All Employees (March 27, 2001).

Respondent proffers two arguments to quiet the dissonance apparent between its policy and its investigation into, and subsequent disciplinary decision based on, Doe's personal relationships. The [**10] first argument is that even if Doe's conduct was not criminal in the jurisdiction where it took place, it could be elsewhere. We agree with the AJ and the Board that questioning whether Doe's conduct would have been legal if it had occurred in a different jurisdiction, at least in the circumstances of this case, is immaterial to the review of his removal and need not be considered.

The second argument is that there is a duty of agents to behave honestly at all [*1380] times, and a potential breach of this duty warrants investigation, regardless of whether he employee's underlying conduct was criminal. [1] Although the FBI suitability standards referred to by respondent do not include explicit guidance on whether an agent must behave honestly in all aspects of an agent's life in order to remain employed, the FBI Employee Handbook states that high standards of conduct must be maintained "not only when they are engaged in their official duties but while off duty." See also Ludlum v. Dep't of Justice, 87 M.S.P.R. 56, P 29 (2000), aff'd, 278 F.3d 1280 (Fed. Cir. 2002) (the FBI has a right to hold its special agents to a high standard of conduct). It was this theory that the Board adopted in

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[1] The FBI requires certain suitability standards which must be met for a person to be hired and employed as an agent. Among these are honesty and integrity, which is described as including,

> . . . behavior that shows the person to be honest, trustworthy, self-disciplined, and respectful of laws and regulations; behaviors that display high standards of ethical conduct and actions that are taken without jeopardizing or compromising these standards, even when there are no ramifications for not doing so. Behaviors involve following agency policy and the letter and spirit of the law and avoiding even the appearance of impropriety. This is related to a person's professionalism, ability to maintain a positive image, ability to serve as a role model and represent the FBI positively to others. It can be contrasted with behavior that involves breaking the law and deviating from agency policy.

See Manual of Administrative Operations and Procedures ("MAOP"), [**12] Part I, Section 21-11.1.

its December [**11] 4, 2007 decision when it sustained the FBI's removal action. *See* Doe v. Dep't of Justice, 2007 M.S.P.B. 282, 107 M.S.P.R. 397 (holding that "clearly dishonest" conduct is sufficient to trigger investigation and ultimately justify a decision to remove a special agent).

We think that the Board's decision cannot be sustained and that a remand is required for 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. The articulation of a meaningful standard is necessary particularly in light of the apparent conflict between the FBI's policy on investigating personal relationships and its policies requiring their agents to act with "[i]ntegrity and [h]onesty." *Compare* Memorandum from Louis Freeh to All Employees (March 27, 2001) *with* MAOP, Part I, Section 21-11.1.

This court recognizes the difficulty in drawing a line between the types of conduct that can justify investigation, discipline, and the penalty of removal and those that cannot. Indeed, at oral argument neither party was able to define a meaningful [**13] standard. This conundrum does not justify the Board's failure to articulate a meaningful standard. Elsewhere we have acknowledged that *HN5*[↑] misconduct that is private in nature and that does not implicate job performance in any direct and obvious way is often insufficient to justify removal from a civil service position. *See* Brown v. Dep't of the Navy, 229 F.3d 1356, 1360 (Fed. Cir. 2000); Bonet v. U.S. Postal Serv., 661 F.2d 1071, 1078 (5th Cir. 1981) (it is insufficient for an agency to rely on internal [*1381] regulations that proscribe in general certain employee conduct, e.g., "immoral" or "disgraceful," as proof of the required nexus between off-duty dishonesty/immorality and the efficiency of the service).

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 [**14] to investigation and the government could use this overly broad standard to legitimize removals made for personal or political reasons. *HN6*[↑] 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. *See, e.g.*, Doe v. Hampton, 566 F.2d 265, 272 n.20, 273, 184 U.S. App. D.C. 373 (D.C. Cir. 1977) (particularized requirements for removal serve to "minimize unjustified governmental intrusions into the private activities of federal employees" and have become a "leitmotif throughout federal personnel administration" to delimit employment concerns). [2]

To allow the Board decision to stand would [**15] be to recognize a presumed or per se nexus between the conduct and the efficiency of the service. We cannot endorse such an interpretation here, as we agree with the Board that the required nexus is not one that can be presumed based on Doe's conduct "speaking for itself." *See, e.g.*, Allred v. Dep't of Health & Human Servs., 786 F.2d 1128, 1130 (Fed. Cir. 1986) (a presumption of the nexus arises when the misconduct is so egregious that it "speaks for itself," which "places an extraordinary burden on an employee, for it forces him to prove the negative proposition that his retention would not adversely affect the efficiency of the service") (quoting Crofoot v. U.S. Gov't Printing Office, 761 F.2d 661, 664 (Fed. Cir. 1985)). The case is remanded so that the Board may articulate a meaningful standard as to when private misconduct that is not criminal rises to the level of misconduct that adversely affects the efficiency of the service, and apply that standard to the facts of this case.

Secondly, we think that the Board has failed to address the fact that the FBI's decisions to sustain the charge and to impose the penalty of removal were influenced at least in part by the assumed criminality [**16] of the behavior. It remains unclear to this court whether the

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[2] Courts have long recognized that, *HN7*[↑] at a minimum, the government is bound to accord due process and set basic substantive limits on its prerogative to remove its employees. *See, e.g.*, Norton v. Macy, 417 F.2d 1161, 1164, 135 U.S. App. D.C. 214 (D.C. Cir. 1969) ("The Due Process Clause may also cut deeper into the government's discretion where a dismissal involves an intrusion upon that ill-defined area of privacy which is increasingly if indistinctly recognized as a foundation of several specific constitutional protections.").

deciding officials at the FBI interpreted its policy to *require* a criminal finding, such that they could only investigate Doe if his surreptitious videotaping of his sexual liaisons was criminal. The record indicates that the deciding officials at OPR as well as Doe's own supervisors were under the impression that Doe's conduct violated state voyeurism laws, and was reasonably subject to criminal prosecution. On appeal, the AJ held that Doe's conduct likely did not violate the Ohio state voyeurism law, **[*1382]** because Doe had not shown the videotapes to any other person and the females who had been taped waived their right to privacy with respect to Doe. *See* State v. Frost, 92 Ohio App. 3d 106, 634 N.E.2d 272, 272, 634 N.E.2d 273 (Ohio Ct. App. 1994) (holding no violation of Ohio state voyeurism statute when the privacy interest to be protected had been waived by the females who "probably expected to be observed").

Yet, while the Board agreed with the AJ's conclusion that Doe's conduct was not criminal, it failed to examine what role that impression played in the initial decision by the agency to remove Doe based on "clearly dishonest" conduct proscribed by the FBI **[**17]** policy. Because the Board sustained the agency's decision without regard to the violation of law issue, it did not consider whether the FBI would have disciplined Doe absent assumed criminality.

The dissent suggests that it is irrelevant that in imposing discipline the FBI may have been improperly influenced by the assumed criminality of petitioner's conduct, relying on cases holding that the Board reviews the agency's decision de novo. The dissent correctly points out that, in the Board context, HN8[↑] agency fact finding is subject to de novo review by the Board. Thus, in the cases relied on by the dissent, the Board (or arbitrator) was required to determine de novo whether the agency acted in bad faith (Fucik v. United States, 655 F.2d 1089, 228 Ct. Cl. 379 (Cl. Ct. 1981)); whether the employee had engaged in sexual harassment (Jackson v. Veterans Admin., 768 F.2d 1325 (Fed. Cir. 1985)); whether the employee was disabled (Licausi v. Office of Pers. Mgmt., 350 F.3d 1359 (Fed. Cir. 2003)). So too, the Board must determine whether the agency exceeded its authority in determining that the employee's action would adversely affect the efficiency of the service. Brook v. Corrado, 999 F.2d 523, 526 (Fed. Cir. 1993).

None **[**18]** of those cases involved a situation where the agency had discretion to impose or not to impose discipline, and the agency had imposed discipline under a mistaken view of the applicable law. As we concluded in *Fucik*, "we believe HN9[↑] an agency does have a certain amount of discretion in choosing between two courses of action, one which would involve adverse action procedures and one which would not." 655 F.2d at 1097. Under such circumstances the Board's task is not to make the discretionary decision as to whether discipline is desirable but to determine the facts; assess whether the agency had the authority to impose discipline; and determine whether discipline would have been imposed absent the legal error. As the dissent concedes, in the penalty area the Board must conduct just such an inquiry before sustaining the agency's penalty where the Board sets aside some of the charges on which the penalty is based. Dissent at 2. There is no reason to apply a different approach to the basic question of discipline.

In this case there is no factual dispute and, as described above, we leave it to the Board in the first instance to determine whether the FBI would have authority to discipline Doe for **[**19]** his actions. But even if the FBI could impose discipline, the Board must determine whether the agency would have imposed discipline absent the legal error, i.e., whether the FBI would impose discipline now that the FBI's legal error (the assumed criminality) has been corrected.

The record indicates that Doe's supervisor and the deciding official lost confidence in Doe's honesty and integrity, questioned his judgment and ability to perform his **[*1383]** duties, and found Doe's misconduct serious because they believed it violated Ohio state law. Because it seems probable that Doe was disciplined at least in part because the deciding official mistakenly believed that his misconduct was in violation of the law, it is necessary to know what conclusion the decision makers would have reached, and what penalty they would have imposed, if the possibility that the conduct was criminal was removed from consideration. *See* Hayes, 727 F.2d at 1539 ("it is not our duty to find nexus but rather to decide . . . whether the [MSPB] affirmance of the agency conclusion on the nexus issue meets the statutory criteria for our affirmance."); *see also* Lachance v. Devall, 178 F.3d 1246 (Fed. Cir. 1999) (where there are **[**20]** several charges leading to a penalty, and not all the charges are sustained, it is necessary to consider what penalty would have been appropriate in light of the dropped charges).

HN10[↑] In the absence of a violation of criminal law, the FBI is permitted to discipline an employee for off-duty personal conduct only if the conduct impacts the

agency's ability to perform its responsibilities or if the conduct constitutes a violation of an internal regulation. In addition to the remand described above (requiring the Board to articulate and apply a meaningful standard), the case is remanded to the Board to consider whether the agency (1) rendered its decision based on a determination that Doe's conduct satisfied either of those two prongs; and thereafter (2) would have imposed the penalty of removal as an appropriate disciplinary measure, independent of any determination that a violation of criminal law had occurred.

III. CONCLUSION

For the aforementioned reasons, we vacate both the efficiency determination as well as the penalty determination and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

COSTS

No costs.

Dissent by: BRYSON

Dissent

BRYSON, *Circuit Judge*, dissenting.

In my view, **[**21]** the Board's finding of a nexus between the charged conduct and the efficiency of the service is not supported by substantial evidence. That should end the case. The majority, however, remands for further proceedings, in particular for the Board to examine (1) whether the FBI's decision to remove Mr. Doe was affected by its belief that his conduct was criminal, and (2) whether the FBI removed Mr. Doe either because his off-duty conduct impacted the agency's ability to perform its responsibilities or because the conduct constituted a violation of an internal regulation.

The Board is required to decide whether there is a nexus between the charged misconduct and the efficiency of the service. The Board makes that determination de novo. We review that determination, not the decision of the employing agency. It is therefore irrelevant what motivated the agency to conclude that there was a nexus between Mr. Doe's conduct and the efficiency of the service. For that reason, the court's remand is both unnecessary and at odds with the proper roles of the employing agency, the Board, and this court in the review of agency disciplinary actions.

The court's error may stem from conflating the nexus **[**22]** and penalty issues. This court has held that when the basis for the agency's penalty is undermined, such as by **[*1384]** the reversal of the most serious charges against the employee, the Board must consider whether there is evidence that the agency would have selected a lesser penalty if it had known that those more serious charges could not be considered in the penalty determination. *See* Lachance v. Devall, 178 F.3d 1246 (Fed. Cir. 1999). The reason for that rule is that the Board reviews the penalty selected by the agency under an abuse of discretion standard. *See* Beard v. Gen. Servs. Admin., 801 F.2d 1318, 1322 (Fed. Cir. 1986). The nexus inquiry, however, is different.

Under chapter 75 of title 5, an agency may take certain disciplinary actions against an employee, such as removal or a suspension for more than 14 days, only "for such cause as will promote the efficiency of the service." 5 U.S.C. §§ 7513(a), 7512. When an agency takes an action covered by section 7512, the employee may appeal to the Merit Systems Protection Board. *Id.* § 7513(d). The action before the Board is not a typical form of review of agency action, such as the "substantial evidence" review of agency action under section 10(e) **[**23]** of the Administrative Procedure Act, 5 U.S.C. § 706. Rather, the action before the Board is a de novo proceeding in which the employee is entitled to a full adversary hearing on the record. 5 U.S.C. § 7701(a); Licausi v. Office of Pers. Mgmt., 350 F.3d 1359, 1364 n.2 (Fed. Cir. 2003) ("On an appeal from such an adverse agency action, the Board reviews de novo whether the agency's decision was justified."); Brook v. Corrado, 999 F.2d 523, 528 (Fed. Cir. 1993) (same); Jackson v. Veterans Admin., 768 F.2d 1325, 1329 (Fed. Cir. 1985) (same); Fucik v. United States, 655 F.2d 1089, 1097, 228 Ct. Cl. 379 (Ct. Cl. 1981) ("It is the board's obligation to consider the cases before it de novo without regard to any decision by the agencies that have gone before it.").

The pertinent statute and regulation provide that in such a Board proceeding the employing agency bears the burden of proof by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(a)(1)(ii). The employing agency must demonstrate to the satisfaction of the Board both that the charged conduct was committed and that there is a nexus between the

charged conduct and the efficiency of the service. "By seeking 'review,' an employee **[**24]** puts the agency in the position of a plaintiff bearing the burden of first coming forward with evidence to establish the fact of misconduct, the burden of proof, and the ultimate burden of persuasion, with respect to the basis for the charge or charges." *Jackson, 768 F.2d at 1329*.

This court has made clear that the employing agency must prove not only the charged conduct but also the requisite nexus by a preponderance of the evidence. *See Brown v. Dep't of the Navy, 229 F.3d 1356, 1363 (Fed. Cir. 2000)* ("The task of the Board is to decide whether the agency met the burden of proving a nexus by a preponderance of the evidence."); *Corrado, 999 F.2d at 527* ("[T]he Government showed by a preponderance of the evidence the connection between Mr. Corrado's misconduct and his removal to promote NASA's efficiency."); *Brown v. Dep't of Transp., 735 F.2d 543, 548 (Fed. Cir. 1984)* ("This 'nexus' limitation requires the agency to show by a preponderance of the evidence the necessary connection (*i.e.*, promotion of the efficiency of the service) between the employee's offending conduct (off-duty in this case) and the employee's job-related responsibilities."). A finding by the Board that the nexus **[**25]** element has been proved must be based on evidence presented to the Board; like the Board's finding as to whether the misconduct has **[*1385]** been proved, the Board's finding on nexus is not based on whether sufficient evidence was available to, or considered by, the employing agency at the time of the adverse agency action. [1] In the event the Board finds that the agency has proved the charged misconduct and established a nexus between the misconduct and the efficiency of the service, this court reviews the Board's findings under the substantial evidence standard. *5 U.S.C. § 7703*.

The majority opinion recognizes these general principles, but in the course of selecting a remedy in this case, it abandons them. With respect to the nexus issue, the majority states that the employing agency's decision was "influenced at least in part by the assumed criminality" of Mr. Doe's conduct. The majority then concludes that the Board improperly sustained the agency's decision because "it did not consider whether the FBI would have disciplined Doe absent assumed criminality." Based on the evidence that the employing agency believed Mr. Doe's conduct violated Ohio law, the majority remands the case to the Board to consider whether the agency rendered its decision based on a determination that Mr. Doe's conduct impacted the agency's ability to perform its responsibilities or that the conduct violated an internal regulation.

As the majority notes, the Board's role with respect to nexus is to "assess whether the agency had the authority to impose discipline" for the employee's behavior. That determination must be made de novo based on evidence before the Board. The question whether the employing **[**27]** agency may have been influenced in its judgment as to nexus by its belief that Mr. Doe's conduct was criminal is irrelevant to the Board's decision on the nexus issue; the Board's task is not to review the agency's analysis of the nexus issue, but to determine whether the agency has proved nexus based on the evidence presented to the Board. The Board found that the nexus requirement was satisfied in this case, even though it clearly understood that the conduct in question was not criminal. If the Board had been laboring under the misapprehension that Mr. Doe's conduct was criminal, it would be reasonable to remand this case to the Board for a new determination as to nexus. But the Board was not mistaken on that issue, and thus there is no reason for a remand.

The majority states that it "leave[s] it to the Board in the first instance to determine whether the FBI would have authority to discipline Doe for his actions." Yet the Board has already answered that question in the affirmative. I would hold that the Board's ruling in that regard is in error and that the Board's decision as to nexus should be reversed. Because the agency, in the proceedings before the Board, failed to prove a **[**28]** nexus between the charged misconduct and the "efficiency of the service," there is no need to ascertain whether the agency's deciding officials would have found such a nexus if they had **[*1386]** known that the conduct in question was not criminal. I therefore respectfully dissent from the court's decision to remand the case to the Board for further proceedings.

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[1] In some instances, involving egregious misconduct, the proof of nexus is presumed, subject to rebuttal by the employee. *See Dominguez v. Dep't of the Air Force, 803 F.2d 680, 682 (Fed. Cir. 1986)* ("A nexus between the conduct and the efficiency of the service may be established by a preponderance of specific evidence or by a rebuttable presumption where the conduct is so egregious that it 'speaks for itself.'"); *Graybill v. U.S. Postal Serv., 782 F.2d 1567 (Fed. Cir. 1986)*. It is undisputed that this case does not involve egregious misconduct that would trigger the presumption of nexus; in this case, therefore, the **[**26]** agency bore the burden of proving nexus before the Board by a preponderance of the evidence.

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< 110 LRP 65493 >

JOHN DOE, Appellant, v. DEPARTMENT OF JUSTICE, Agency

U.S. Merit Systems Protection Board, Central Regional Office

CH-0752-04-0620-M-1

May 14, 2010

107 LRP 69315 vacated by 109 LRP 26438

109 LRP 26438 remand decision at 110 LRP 3829

110 LRP 3829 remand decision at <**110 LRP 65493**>, cancelling removal and substituting 45-day suspension and directed reassignment

<**110 LRP 65493** affirmed at 111 LRP 22803

Related case at 113 LRP 22377, 113 LRP 22377

Judge / Administrative Officer

Gregory A. Miksa

Full Text

APPEARANCES:

Richard L. Swick, Esquire, Washington, D.C., for the appellant.

Jeffrey B. Killeen, Esquire, Pittsburgh, Pennsylvania, for the agency.

Initial Decision

Introduction

The appellant was removed June 9, 2004, from his position as a Special Agent with a Federal Bureau of Investigation (FBI) Field Office based on the charge of unprofessional conduct for videotaping several of his off-duty, consensual sexual encounters with three women without their knowledge. On July 6, 2005, the appellant timely refiled his June 2004 appeal after it was dismissed without prejudice pursuant to a July 30, 2004, Initial Decision in MSPB Docket No. CH-0752-04-0620-I-1. The original appeal was dismissed to afford the appellant the opportunity to pursue his petition for reinstatement before the FBI Disciplinary Review Board (DRB). The DRB issued its letter of decision affirming the appellant's removal on June 8, 2005. See Record at tab 1; Agency file at tab 1, p. 3.

A hearing concerning the issues raised by the refiled appeal was conducted in Chicago, Illinois, on October 26, 2005. Finding the conduct specified under the agency's charge occurred, the undersigned nevertheless reversed the agency's action in a March 3, 2006, Initial Decision finding a lack of nexus between the appellant's off-duty conduct and the efficiency of the service, noting particularly the lack of evidence showing the appellant's conduct was illegal under the applicable state voyeurism statute as had been asserted by the agency. See 5 U.S.C.A. §§ 7511, 7512(1) & 7513(d) (West 1996).

On August 14, 2006, the Board granted the agency's petition for review of the Initial Decision, agreed that the agency failed to demonstrate the appellant's conduct violated the relevant state voyeurism statute, but reversed the Initial Decision as to the nexus issue and remanded the appeal for further adjudication. *See Doe v. Department of Justice,* 103 M.S.P.R. 135, ¶ 14 (2006). The sole issue for adjudication on the first remand was the propriety of the agency's removal penalty to the extent that the appellant's conduct and its impact on the efficiency of the service had been proven. *See Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 306 (1981) (the agency must demonstrate that removal constitutes a penalty that is within tolerable limits of reasonableness).

In a May 7, 2007, Initial Decision, the undersigned MITIGATED the removal penalty to a 120-calendar-day (time served) suspension and a directed reassignment, at the agency's option. The agency filed a petition for review from the May 7, 2007, remand Initial Decision. In a December 4, 2007, final decision, the Board affirmed but modified the May 7, 2007, Initial Decision, reinstating the penalty of removal, again agreeing the appellant's conduct did not violate the relevant state voyeurism statute.

The appellant appealed the Board's December 2007 decision to the U.S. Court of Appeals for the Federal Circuit. In a May 11, 2009, decision, the court vacated the Board's December 4, 2007, final decision and remanded the appeal to the Board. *Doe v. Department of Justice,* 565 F.3d 1375 (Fed. Cir. 2009); see also Remand Record (M. Record) at tab 1. By its Opinion and Order dated January 15, 2010, the Board remanded the appeal to the Central Regional Office. *See Doe v. Department of Justice,* 113 M.S.P.R. 128, ¶ 11 (2010).

A hearing was conducted on April 20, 2010, concerning the issues identified by the Board for further adjudication. For the reasons given below, the agency's action is MITIGATED to a 45-calendar day (time served) suspension with a directed reassignment to another Field or Headquarters agency office, the latter at the agency's discretion.

Analysis and Findings

Background

In its decision remanding this appeal to the Board, the U.S. Court of Appeals for the Federal Circuit stated in pertinent part:

We think the Board's decision (sustaining the appellant's removal) cannot be sustained and that a remand is required for 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. The articulation of a meaningful

standard is necessary particularly in light of the apparent conflict between the FBI's policy on investigating personal relationships and its policies requiring their agents to act with [i]ntegrity and [h]onesty. Compare Memorandum from Louis Freeh to All Employees (March 27, 2001) with MAOP, Part I, Section 21-11.1.

This court recognizes the difficulty in drawing a line between the types of conduct that can justify investigation, discipline, and the penalty of removal and those that cannot. Indeed, at oral argument neither party was able to define a meaningful standard. This conundrum does not justify the Board's failure to articulate a meaningful standard. Elsewhere we have acknowledged that misconduct that is private in nature and that does not implicate job performance in any direct and obvious way is often insufficient to justify removal from a civil service position. *See Brown v. Dep't of the Navy,* 229 F.3d 1356, 1360 (Fed. Cir. 2000); *Bonet v. U.S. Postal Service,* 661 F.2d1071, 1078 (5th Cir. 1981) (it is insufficient for an agency to rely on internal regulations that proscribe in general certain employee conduct, e.g., immoral or disgraceful, as proof of the required nexus between off-duty dishonesty/immorality and the efficiency of the service.).

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.*

... [W]e agree with the Board that the required nexus is not one that can be presumed based on Doe's conduct speaking for itself. ... *The case is remanded so that the Board may articulate a meaningful standard as to when private misconduct that is not criminal rises to the level of misconduct that adversely affects the efficiency of the service, and apply that standard to the facts of this case.*

Secondly, we think that the Board has failed to address the fact that the FBI's decisions to sustain the charge and to impose the penalty of removal were influenced at least in part by the assumed criminality of the behavior. *It remains unclear to this court whether the deciding officials at the FBI interpreted its policy to require a criminal finding, such that they could only investigate Doe if his surreptitious videotaping of his sexual liaisons was criminal.* The record indicates that the deciding officials at OPR as well as Doe's own supervisors were under the impression that Doe's conduct violated state voyeurism laws, and was reasonably subject to criminal prosecution. On appeal, the AJ held that Doe's conduct likely did not violate the Ohio state voyeurism law, because Doe had not shown the videotapes to any other person and the females who had been taped waived their right to privacy with respect to Doe. *See State v. Frost,* 634 N.E. 2d 272, 272 (Ohio Ct. App. 1994) (holding no violation of Ohio voyeurism statute when the privacy interest to be protected had been waived by the females who probably expected to be observed).

Yet while the Board agreed with the AJ's conclusion that Doe's conduct was not criminal, it failed to examine what role that impression played in the initial decision by the agency to remove Doe based on clearly dishonest conduct proscribed by the FBI policy. Because the Board sustained the agency's decision without regard to the violation of law issue, it did not consider whether the FBI would have disciplined Doe absent assumed criminality.

... *The dissent correctly points out that ... agency fact finding is subject to de novo review by the Board. Thus, in the cases relied on by the dissent, the Board (or arbitrator) was required to determine de novo whether the agency acted in bad faith .... So too, the Board must determine whether the agency exceeded its authority in determining that the employee's action would adversely affect the efficiency of the service.Brook v. Corrado,* 999 F.2d (Fed. Cir. 1993).

... Under the circumstances the Board's task is not to make the discretionary decision as to whether discipline is desirable but to determine the facts; *assess whether the agency had the authority to impose discipline; and determine whether discipline would have been imposed absent the legal error. ...*

In this case there is no factual dispute and, as described above, we leave it to the Board in the first instance to determine whether the FBI would have the authority to discipline Doe for his actions. But even if the FBI could impose discipline, the Board must determine whether the agency would have imposed discipline absent the legal error, i.e., whether the FBI would impose discipline now that the FBI's legal error (the assumed criminality) has been corrected.

... Because it seems probable that Doe was disciplined at least in part because the deciding official mistakenly believed that his misconduct was in violation of the law, it is necessary to know what conclusion the decision makers would have reached, and what penalty they would have imposed, if the possibility that the conduct was criminal was removed from consideration.

In the absence of a violation of criminal law, the FBI is permitted to discipline an employee for off-duty personal conduct only if the conduct impacts the agency's ability to perform its responsibilities or if the conduct constitutes a violation of an internal regulation. In addition to the remand described above (requiring the Board to articulate and apply a meaningful standard), the case is remanded to the Board to consider whether the agency (1) rendered its decision based on a determination that Doe's conduct satisfied either of those two prongs; and thereafter (2) would have imposed the penalty of removal as an appropriate disciplinary measure, independent of any determination that a violation of criminal law had occurred.

Doe v. Department of Justice, 565 F.3d 1375, 1380-83. (Emphasis added).

In its January 15, 2010, Opinion and Order remanding the appeal to the Central Regional Office, the Board found that the FBI had the authority to investigate the appellant's off-duty personal life because it may negatively impact the agency's ability to perform its responsibilities. *See Doe v. Department of Justice*, 113 M.S.P.R. 128, ¶ 11 (2010). It further noted that the agency's proposing and deciding officials identified numerous policies and regulations of the agency requiring employees to comport themselves both on and off duty with honesty, integrity, and good judgment. *Id.* at ¶ 12. The Board further stated the agency's Personal Relationships Policy clearly states that employees must not allow their personal relationships to disrupt the workplace. *Id.* at ¶ 11. After an exhaustive review of employee statements obtained by the agency's Office of Professional Responsibility (OPR) from April 7 through 9, 2003, as well as the August 24, 2005, De Bene Esse deposition of the Assistant Special Agent in Charge (ASAC)of the agency's Field Office, Gary G. Klein, the Board further found:

... [t]he agency has shown that it is more likely true than untrue that the appellant's unprofessional conduct of videotaping his sexual encounters with two FBI employees adversely affected the job performance of those employees, as well as the job performance of other employees and the efficiency of the service as a whole.

Id. at ¶ 13. The Board specifically found, however, no nexus between the appellant's videotaping of Female 3, a non-agency employee, and the efficiency of the service, notwithstanding his similar dishonesty with respect to her. *Id.* at ¶ 35. Accordingly, the Board's nexus determination with respect to Female 3 shows that the appellant's otherwise personally dishonest off-duty conduct, standing alone, would not warrant the imposition of any discipline.

The Board further stated:

The question whether the agency would have disciplined the appellant at all, let alone imposed the penalty of removal, absent assumed criminality of his conduct, was not addressed by the parties below or directly asked of the key witnesses in this case. ... Accordingly, we remand this case for further adjudication consistent with this decision and with the court's opinion in Doe, including the submission of evidence on this issue and a hearing if requested by the appellant.

Id. at ¶¶ 15-16.

The Board concluded stating:

The (U.S Court of Appeals for the Federal Circuit) vacated the Board's determination that the penalty of removal was reasonable. *Doe*, 565 F.3d at 1383. *Accordingly, if the AJ finds on remand that the agency would have removed the appellant in the absence of legal error, the AJ shall determine whether the penalty of removal is reasonable, taking into consideration our finding that the agency has not proven a nexus between the appellant's conduct as it related to Female 3 and the efficiency of the service.*

Id. at ¶ 36. (Emphasis added).

The factors relevant for consideration in determining the appropriateness of a penalty were set out by the Board in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). While not purporting to be exhaustive, the Board identified the following factors: (1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (3) the employee's past disciplinary record; (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties; (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; (7) consistency of the penalty with any applicable agency table of penalties; (8) the notoriety of the offense or its impact upon the reputation of the agency; (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; (10) potential for the employee's rehabilitation; (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter; and (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. *Id.* at 305-06. Not every factor will be present in every appeal and, as noted above, the list is not exhaustive.

The Deciding Official Would Have Taken the Same Action in the Absence of His Legal Error

At the Board's April 20, 2010 hearing, Jody Weis, currently Superintendent of the Chicago, Illinois Police Department, testified that on April 1, 2003, he entered on duty as Deputy Assistant Director (DAD) of the agency's Office of Professional Responsibility (OPR), after previously serving in the position of Assistant Special Agent in Charge (ASAC) of the agency's Chicago field office. Tr. 8 & 72; see also Original Record (OR) hearing transcript (Tr.) at 78. As the DAD of OPR, Mr. Weis served as the agency's deciding official in the instant case. *Id.*

Mr. Weis generally testified that if the possibility the appellant's admitted conduct was criminal was removed from his consideration, he would still have effected the appellant's removal. He testified that he would still think the appellant's offense of video taping his individual sexual encounters with three women in his bedroom without their knowledge, was very, very significant. Tr. 17. He generally testified the appellant's actions in private life would attack his trustworthiness as an FBI Special Agent. *Id.* He further testified:

I think it would be difficult for an FBI agent to continue on in that position if his integrity, his honor, his honesty, his trustworthiness has been impugned based upon his actions either on or off duty.

Id.

Mr. Weis generally testified the appellant's offenses were related to his position as a Special Agent (SA) because they re affecting his character. *Id.* He elaborated:

I mean, his offenses looked at his level of honest[y], his integrity, his trustworthiness. So, regardless of the criminality of that, you still would have certain character considerations. And I think his offenses would, identifies his flaws and I do believe that it would be hard for him to be effective as an FBI agent when his trustworthiness, his honest[y], his integrity would have been impugned by his actions.

Tr. 18. In response to somewhat leading questioning, Mr. Weiss further testified that the appellant's admitted actions were intentional and for his own gain. *Id.;* Tr. 19. He testified that the appellant, knowingly did it with no consideration as to how they may affect the individuals who was engaged with at that time. *Id.* Mr. Weiss further testified as to his understanding of the appellant's motivation:

Well, the actions were for personal gratification. It wasn't for, in my opinion, to protect himself from any future type of actions from any of these folks that we could see in any of the evidence presented to us. It appeared as if these recordings were made for the personal gratification, you know, of Mr. Doe.

Tr. 19. Mr. Weiss provided no testimony that the agency's investigation disclosed any intent on the part if the appellant to show the video recordings to another person. The agency also produced no evidence to show the appellant intended to publish the recordings or to disseminate them over the internet or other media.

Mr. Weis further testified that because the appellant videotaped Female 1 (the appellant's future fiancé) several times (both with and without her knowledge), Female 2 one time without her knowledge, and Female 3 (a non-employee) two times, the appellant engaged in repeated dishonest conduct and poor judgment. He generally testified that if the appellant continued in a variety of assignments as an SA, he could be required to testify in court if he was a key witness in a criminal case. In such a circumstance, Mr. Weis testified, a local field office would have to disclose to a United States Attorney the record in this case to determine if that would create a problem for his testimony in that particular case. Tr. 21. Mr. Weis generally testified that disclosure of this information is consistent with its policy to ensure that prosecutors receive sufficient information to meet their obligations under *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), (requiring disclosure of potential impeachment information by the United States Attorney relative to the testimony of government witnesses that is material to the issues in a criminal case).

Mr. Weis testified the appellant had no prior disciplinary record in the appellant's seven years with the agency, but that fact would not have affected it [his decision to remove the appellant]. Tr. 23. He testified, somewhat repetitively, that the appellant's offenses are significant, and he personally believe[s] he would have a great difficulty in testifying in court with a record that shows dishonesty, lack of trustworthiness and lack of integrity. *Id.*

Mr. Weis further testified that the appellant's work history, particularly as a co-pilot on an agency aircraft, was at least satisfactory with respect to his work performance. He further testified:

I think the magnitude of the events in this case would override any type of favorable considerations based upon a lack of a prior disciplinary or an acceptable level of work.

Tr. 24. Questioned how the appellant's conduct affected his confidence in the appellant's ability to perform the job of an SA, Mr. Weis testified:

The lack of honesty, the lack of trustworthiness, the betrayal of trust from co-workers, you know, those significantly impacted upon my confidence in him to do his job. To me it strikes at the very core of what an FBI agent should be, which is honest, trustworthy, exercise sound judgment, have impeccable integrity, and I think he lacks that based upon his pattern of behavior with, you know, at least these two women that are, or at least at the time I was in OPR were employees of the FBI.

Id.

Asked on direct examination how other disciplinary cases adjudicated by OPR would affect his decision to remove the appellant if the possibility of criminal conduct was taken out of the equation, Mr. Weis generally testified:

I think we researched that and *I don't believe we actually found any cases which were right on point to this and we certainly consider other cases, but it is a challenge sometimes to get a case that would match up point by point.* And again, I think when you look at what we were able to prove in this case, I think the actions were so egregious that my decision would have led to separation irregardless of the criminality of the behavior if that were to have been removed from the equation.

Tr. 25. (Emphasis added). He further testified that the agency's table of penalties provides for penalties ranging from a reprimand to removal for unprofessional conduct. *Id.* When asked how the notoriety of the appellant's actions or misconduct impacted his decision, taking the possibility that his conduct was criminal out of the equation, Mr. Weis generally testified:

If I recall, the office, this was not uncommon throughout the office. I believe ASAC Gary Klein had to counsel and work with the women that were involved in this case. It was a distraction within the office. *I don't know if it actually made its way outside the FBI office* but I do know from within it was a matter of discussion and it was a distraction throughout the ... field office.

Tr. 26. (Emphasis added).

Asked how the appellant's conduct would affect the reputation of the FBI, in the absence of the possibility the appellant's actions were not criminal, Mr. Weis testified:

... I think it sends a very, you know, bad message if this type of behavior was tolerated, you know, amongst FBI agents. It attacks credibility, honesty, trustworthiness, integrity. And I think if those *character traits* which I think, you know, kind of represent what an FBI agent should be; I think our reputation would be soiled if we kept someone on the books who at least demonstrated to have *character flaws* in each of those areas.

Tr. 29. (Emphasis added).

Questioned about the appellant's potential for rehabilitation, in the absence of the possibility that the appellant's actions were criminal, Mr. Weis testified:

I'm not sure you can rehabilitate what I view as character flaws. I don't know how you can make someone more honest. I don't know how you can make someone have better judgment. I think these strike at the core of the person, and either you're honest or you're not. Either you're trustworthy or you're not. *And I think the actions shown here and this pattern of behavior shows there is a character flaw regarding honesty, regarding integrity, regarding trustworthiness, regarding judgment.*

Id. (Emphasis added).

Finally, when asked whether, taking the possibility that the appellant's conduct was criminal out of the equation, he would consider any alternative sanctions, Mr. Weis testified, No. Tr. 30. In explaining why, Mr. Weis repeated his testimony that he believed the appellant demonstrated character flaws in the categories of honesty, trustworthiness, integrity, and judgment. *Id.* He further testified that the egregious nature of the appellant's character issues outweighed mitigating factors such as the appellant's work record that certainly met expectations, and his lack of any prior discipline. *Id.* Asked what his decision in 2004 would have been if the presumed criminality of the appellant's conduct was taken out of the question, Mr. Weiss testified:

In looking at the totality of the circumstances, in considering all the factors we had before us, the fact that *his character traits* were found to be dishonest, lack of trustworthiness, exercised poor judgment, the integrity issues, I would have ruled at that time that he be separated from the rolls of the FBI.

Tr. 31. (Emphasis added).

Under cross examination, Mr. Weis's testimony shows that the exact parameters of potential *Giglio* impeachment information are not easily determined. He testified that under the agency's *Giglio* policy, if the agency has notice of information that might impeach an agent if he testifies, the information must be provided to the U.S. Attorney's Office for assessment as to whether the information must be provided to

the court. The court may then review the information, in camera, to determine if the prejudicial nature of the information outweighs its probative value in assessing the agent's credibility on the matters for which he or she is called to testify. Tr. 32. Mr. Weis testified that he did not know if information related to an SA's dishonesty in personal relationships, such as from a divorce case, had ever been turned over to the U.S. Attorney under the agency's *Giglio* policy or if it had, whether the court found it overly prejudicial. Tr. 34. Mr. Weis further testified that as the ASAC in Chicago, he had two agents who had *Giglio* problems, which he did not describe, and that such agents can be assigned to duties where they do not have to testify. Tr. 37.

Under further examination, Mr. Weis testified that the March 27, 2001, Personal Relationships Policy of former FBI Director Louis Freeh applies to OPR investigations. See OR at Appellant Exhibit D. He agreed that under the policy, OPR does not investigate relationships or marital status or gender of parties unless it was *reasonably subject to prosecution* and *thus* impact on the coverage of the FBI's mission. Tr. 41. (Emphasis added).

Mr. Weis further testified that he agrees that the statement whenever feasible, OPR inquiries will be structured to avoid exploring romantic or intimate relationships if other factual issues will resolve the inquiry, such as the subject's acknowledgment of a relationship or conduct, is part of the Policy.

Tr. 45-46. He further testified that he agreed that OPR's guidelines provide that *OPR will not inquire into the non-life threatening sexual practices which do not involve potential criminal liability.* Tr. 52. (Emphasis added).

Asked on cross examination whether there was a basis to investigate the appellant's conduct if it was not illegal and not life threatening, Mr. Weiss testified:

Well I believe you would because it impacted upon the mission of the FBI. *You had employees in the Field Office being disrupted. They weren't doing their jobs properly.* I don't believe the appellant would be able to testify, and I think being able to testify is part of the mission of the FBI. So, I do think, although I wasn't there, the opening of the case would have been substantiated because you had employees who were being distracted and their work product was being affected to which the ASAC had to provide personal counseling to.

Tr. 52. (Emphasis added).

Questioned whether discord and rumor were adequate reasons to discipline an employee in the absence of a violation of a rule, Mr. Weis further testified:

Well, *not to discipline* but I believe there's enough reason to open a case when you have the stories at which at that time there was a belief that it was possibly a criminal nature. You certainly had a reasonable suspicion to open a case. You had the employees telling the ASAC what had happened. *They weren't functioning.* And then, at the end of the day, I think by your own words, his actions were dishonest, untrustworthy, which would impact upon the mission of the FBI because his ability to testify would be damaged.

Tr. 53. (Emphasis added). Asked to clarify what record of dishonesty Mr. Weis relied on to determine that the appellant had a *Giglio* problem, Mr. Weis denied he was alluding to the Board's or the Federal Circuit Court's decisions after the appellant's removal, instead referring to the appellant's admissions in his sworn statements to agency investigators that showed betrayal, ... distrust, ... dishonesty in his personal relationships. Tr. 53. He further testified:

When you have someone videotaping people in the most intimate of circumstances without their knowledge, without their consent, it had an impact upon them, *they went to higher ups and executives in the (field) office and said it's impacting upon them.*

....

... And then when the case was initiated at that time, we have to accept the fact, I believe, that there was cause to believe that it might possibly be criminal in nature. That was ruled out during the course of, I don't know, *the past several years.* But initially, I think there was reasonable indication that there was certainly merit to open the case.

Tr. 54. (Emphasis added). Mr. Weis testified that he did not believe the appellant brought the matter of his videotaping activities into the workplace, and agreed that Female 1 was the employee who talked about the appellant's actions in the workplace. Mr. Weis further agreed that if Female 1 had not entered the appellant's house when he was not there, found the tapes in the appellant's bedroom and informed her friends, the matter would not have made its way into the workplace. Tr. 55. He further noted that if the appellant had not made the tapes in the first place, the problem would not have been there for Female 1 to convey to her friends. He further agreed that OPR's investigation disclosed that Female 1 had made several consensual videotapes of her sexual activities with the appellant, although she also discovered tapes made without her consent. Tr. 56

Under further examination, Mr. Weis testified that he did not sustain the charge contained in the agency's February 2004 proposal notice that the appellant lied under oath. He testified that he found the appellant's statement to OPR investigators in December 2003, after he provided his initial statement on April 9, 2003, was an attempt to clarify the appellant's April statement as to his conduct in relation to Female 3. In this regard Mr. Weis testified, I actually felt it would be piling on to hold that against him. Tr. 60. Mr. Weis further testified he did not recall concluding the appellant had violated the Ohio statute, and stated there was no evidence to pursue that. *Id.* He further testified:

We could consider the potentiality of criminal activity, *but I don't believe we considered that yes, he had done that.*

Tr. 61. (Emphasis added). This testimony appears to conflict somewhat with Mr. Weis's May 24, 2004, decision letter in which he describes the appellant's conduct as in apparent violation of state law. Agency file at tab 4b, p. 5. He further testified, somewhat contradicting his earlier testimony:

My memory *is we considered it as he engaged in criminal activity,* but that was not the sole factor. We considered the core values, we considered the suitability standards. So, we looked at the totality of the circumstances.

If the court had ruled, and I believe it has, that that was an error, that we should not have considered *the criminal activity,* I would still have ruled for separation based upon his violation of what I believe to be the core values of being an FBI agent, poor judgment, lack of honesty, lack of integrity and lack of trustworthiness.

Tr. 61. (Emphasis added).

Under further examination, Mr. Weis testified that the statement, The [Field] Division also observed that the nature of the videotaping offense is not the type that required an employee to be put on notice in that the offense is related to common decency *and isa crime in the State of Ohio,* accurately describes the basis for his finding the appellant was on notice that his conduct violated agency policy. Tr. 65. (Emphasis added).

In acknowledging that field office personnel had a better idea of the extent of the disruption caused by the appellant's conduct and recommended only up to a thirty-day suspension and transfer, Mr. Weiss testified that field office managers have no ability to check on what is a precedent, and while we would consider the recommendations from a Special Agent in Charge, OPR was not bound by them. Tr. 66. He testified this policy was in place to assure consistency across at least 56 agency field offices nationwide. Tr. 67.

Mr. Weis proceeded to testify, however, that he found no precedent on point in considering the proposed penalty. *Id.* He testified that in the year he served in OPR, OPR's research showed the appellant's case had no comparable precedent. He somewhat generally testified he was aware of a case in which an agent had sexual activity with an FBI source's wife while the source was in prison, but he does not know if the agent resigned or was removed. Tr. 68. He later referred to the imprisoned individual as a cooperator, but

then added, I could be wrong. Tr. 68. Mr. Weis testified that during the time he was in OPR, he does not recall any agent being terminated for off duty conduct that was not illegal and that did not result in the involvement of local law enforcement authorities. *Id.*

Asked whether OPR would investigate an FBI employee cheating on his wife, who is also employed by the agency, and that behavior becomes a topic of rumor and gossip in the office, Mr. Weis testified:

If it impacts on the mission of the FBI, I would say yes. And it's hard to just speculate, but *if it was causing the entire office to stop functioning, yes, we probably would look at it because there's probably indication that things have been going on in the Bureau time, perhaps the Bureau vehicle.* If the mission of the FBI is impacted and this personal relationship enters the workplace so it impacts the mission of the FBI, I fully believe that you can look at it.

Tr. 53. (Emphasis added).

Questioned as to what evidence he looked to in forming his conclusion that disruption occurred as a result of the appellant's off-duty conduct in the field office, Mr. Weis identified ASAC Klein's electronic communication, a copy of which is included at Agency file tab 4g, outlining Klein's *Douglas* factor assessment of the appellant's off-duty conduct. Tr. 69. Mr. Weis testified that he does not know whether a statement was taken from the Special Agent in Charge. Mr. Weis further testified that the OPR on-site investigation of the appellant did not begin until April 7, 2003, approximately six days after he assumed his post in the OPR office.

Asked what consideration he gave to Female 1's statement that she and the appellant had become engaged to be married on February 3, 2003, over four months after she discovered the subject video tapes, and two months before being interviewed by OPR, Mr. Weis testified:

I was aware she was engaged at the time, *andwe tried to pull that,* I didn't consider that. I looked more at his [the appellant's] actions were.

Tr. 71. (Emphasis added). Mr. Weis acknowledged he knew Female 1 had seen an EAP counselor, but he initially testified that he did not know if Female 1 had previously made a complaint to OPR. *Id.* He further testified that he did not know how Female 1's initial information concerning the appellant's actions had come top the attention of field office management. He acknowledged, however, an October 8, 2002, memorandum to OPR, in which ASAC Joseph Persichini, Jr., advised that he received information from an agency Employee Assistance Program (EAP) Counselor who stated that Female 1 was dating the appellant, had consented to video taping some of those encounters, but discovered other video tapes made without her consent, and other videotapes of other women.[1] Agency file at tab 4bb. Mr. Persichini further stated in his memorandum

As requested by OPR, no one in the [Field] Division has been contacted concerning this matter. *Female 1 has not come forward to [Field] Division management to lodge a complaint against [the appellant].*

Therefore, the [Field] Division will take no action unless advised by OPR.

Id. (Emphasis added).

Informed of the lack of evidence showing Female 1 had directly complained to local management about disruption in either her personal or professional life regarding the appellant's conduct, Mr. Weis testified:

Well, sure. But when management learns of *any problem* they have a responsibility to pursue it. Whether Female 1 brought it to their attention or they learned of it from someone else they do have a responsibility to try and resolve the matter.

Tr. 73.

Asked to comment regarding the Federal Circuit Court's question whether OPR would investigate or discipline an employee for cheating in an off-duty poker game, Mr. Weis vaguely testified:

I think it would look at does it get into that realm, it's a broad realm, of unprofessional conduct. What impact does it have on the reputation of the agency? Does it have any negative impact?

If you get into an argument with your neighbor. Is that an issue? Police come, maybe it is. Before the police come maybe the neighbor complained.

It's hard to nail down because unprofessional conduct, as you know, is very, it is broad.

Tr. 77.

Under further examination, Mr. Weis agreed the agency employs individuals who are married to each other in the same or different offices.

Tr. 73-74. Asked whether OPR would investigate the conduct of an employee who had a surreptitious affair or a series of such affairs causing the other employee spouse emotional distress and disruption to the point he or she would talk to co-workers or take leave, Mr. Weiss unresponsively testified, Well, I think at first they would look at [sic] is the personal relationship policy, further volunteering that the instant case involved the possibility of criminal activity.

Tr. 75.

Under further examination, it was noted for Mr. Weis's consideration that in some state jurisdictions adultery is at least a criminal misdemeanor. Asked whether, in such a jurisdiction, OPR would investigate the honesty, integrity, or judgment of an agency employee who repeatedly cheated on the employee's spouse with several sexual partners, causing the innocent spouse distress and loss of focus in performing agency work,. Mr. Weis testified, *I don't think so, don't think so to that.* Tr. 79. (Emphasis added). Asked if this was OPR's policy even if the offending spouse's betrayal and dishonesty violated a state statute,

Mr. Weis generally testified:

There is a level of discretion, and I think, you know, in some of those things you d have to look at the whole factor. *If there's complete craziness going on and it is, the whole office is disrupted,maybe* they would look at it.

Id. (Emphasis added). He did not explain what he meant by the term complete craziness, or the criteria he would use to determine when the whole office is disrupted.[2]

Asked to explain his view of the dividing line or rationale for investigating and disciplining the appellant for his personal, off-duty dishonesty with respect to Females 1 and 2, and not disciplining a dishonest employee spouse for engaging in repeated extra marital affairs in betrayal of the trust (and health) of his or her spouse/co-worker, Mr. Weis testified that the appellant in this case betrayed the trust of Female 1, and Female 2, who did not know of the appellant's video taping. Tr. 80. Mr. Weis further testified that the appellant in this case engaged in his dishonest conduct, based solely on personal gratification, where I think it rises to the level of discipline is that fact that it attacks the very core of what agents have to do. Tr. 80. Mr. Weis offered no further testimony to explain his reasons for refraining from investigating or disciplining an employee for engaging in surreptitious extra-marital affairs for his own gratification, possibly endangering the health of his spouse.

Mr. Weis concluded his testimony citing his concerns regarding the appellant's personal dishonesty, stating, If they can't testify you (sic) can't serve in law enforcement. Tr. 81.

The agency also produced at the Board's April 20, 2010, hearing Mary Frances Rook, currently a Special Agent, who was the agency's proposing official in this case. Ms. Rook testified she began work in the OPR investigative side on June 11, 2001, and left from the adjudicative side on October 14, 2004.

Tr. 117. She testified that she was not in charge of the investigation of the appellant's case. She previously testified that she was Unit Chief of Adjudication Unit 2 in OPR when she issued the appellant's February 2004 proposal notice. OR Tr. p. 10.

Ms. Rook's testimony largely mirrors the testimony of Mr. Weis with respect to her assessment of the appellant's integrity, trustworthiness and judgment with respect to the agency's regulations general regulations governing employees personal conduct. Ms. Rook testified that if the possibility of the appellant's off-duty conduct was criminal was removed from her consideration, she would still have proposed the appellant's removal because he demonstrated a lack of integrity, a lack of trustworthiness, and poor judgment. Tr. 84. She testified that the agency's suitability factors required integrity, trustworthiness, and good judgment, and the fact that he lacked those qualities relates the offense to his position. *Id.* She testified that the appellant's repeated dishonest conduct was also intentional and therefore more serious than a single spontaneous act. *Id.*

She further testified the fact that the appellant had no past disciplinary record *didn't factor into the decision.* Tr. 85. (Emphasis added). She testified that because the appellant was an average employee, his work record *had no bearing, positive or negative, really on the evaluation we conducted.Id.* (Emphasis added). She generally testified that without considering the appellant's conduct as criminal the appellant's offenses still have a significant impact on her confidence in his ability to perform his job because he lacks integrity, trustworthiness, honesty, good judgment, (that) are required to perform in the position and I don t believe he has those qualities. Tr. 86. She generally testified that she considered past OPR disciplinary cases for guidance, but she did not cite a specific comparative case on direct examination.

Ms. Rook further testified:

I think the (appellant's) potential for rehabilitation is poor simply because the characteristics that we're discussing here, integrity, the trustworthiness, the honesty, the judgment, *I don't think those are characteristics that can easily be rehabilitated. If you don't have them you don't have them.*

Tr. 87. (Emphasis added). She further testified that the appellant's professed addiction to pornography, for which he has since obtained counseling, *was not really considered a mitigating factor in his conduct.Id.* (Emphasis added). Asked whether taking the possibility that the appellant's conduct was criminal out of the equation would result in her consideration of alternative sanctions outside of removal, she responded, No. *Id.* Asked why, Ms. Rook testified:

I think removal is the appropriate sanction for this type of egregious misconduct. To do less would send the message that it is not totally unacceptable for an FBI agent to behave this way and it would not deter others from acting in a similar manner.

Id. She further testified she regarded the appellant as having been found to be dishonest and, therefore, *Giglio* impaired. Tr. 88.

Under cross examination, Ms. Rook testified that she has not testified in an agency criminal case since 1993. She further testified that agents assigned to serve in the FBI Agents-in-Training Program do not appear in court to testify concerning their work in that program, and they are not criminal investigators when they work in that program. She testified that she agreed that the following statement is part of Director Freeh's 2001 Personal Relationships Policy:

Whenever feasible OPR inquiries will be structured to avoid exploring romantic or intimate relationships if other factual issues will resolve the inquiry or [if] general acknowledgment of the relationship sufficiently establishes the offense.

Tr. 92. When asked whether this provision was binding on OPR at the time the appellant was under investigation, Ms. Rook testified, It was our policy.

Tr. 93. Ms. Rook further acknowledged that OPR asserted in its analysis that with the addition of the charge of lying under oath, (the appellant) would be unable to serve as a credible witness to give sworn testimony in a court of law. Tr. 106; Agency file at tab 4f, p. 14. She further acknowledged, in light of the fact

Mr. Weis did not find sufficient evidence to support the charge the appellant lied under oath, her *Giglio* concerns were different from those she had when she proposed the appellant's removal. She later testified:

It depends on the prosecutor. A finding of lack of honesty and integrity *might* be sufficient to consider him to have a *Giglio* problem (in the absence of a finding he lied under oath).

Tr. 108. (Emphasis added).

Ms. Rook testified that at the time she proposed the appellant's removal, she believed he violated a state law, and that since law enforcement is the agency's mission, the appellant's conduct was inconsistent with that mission.

Tr. 97-98. She acknowledged that absent a sustained charge the appellant lied under oath and the possibility his conduct was criminal, OPR would have performed a somewhat different Douglas factor analysis. Tr. 100.

Ms. Rook further testified that OPR might investigate a personal relationship if sexual conduct occurred in the workplace on work time, or in an agency vehicle. Tr. 99. When asked if she recalled whether OPR ever investigated a non-criminal off-duty romantic relationship in an employee's home, she was unable to recall such an instance. *Id.*

Ms. Rook testified that the case OPR considered most analogous to the appellant's off-duty offense, Adjudication United (AU) Case No. #97-0337, involved the dismissal of an employee who surreptitiously videotaped two other people, but not himself, who were removing their clothes in a bathroom, and subsequently lied under oath denying that he had done so. Tr. 101. She further acknowledged that all other examples of past discipline cited by OPR in its *Douglas* analysis involved employees who lied about the conduct upon which their administrative inquiries were based. Tr. 104-5; Agency file at tab 4f, p. 12. Since the agency's charge the appellant lied under oath was not sustained, Ms. Rook acknowledged the appellant's case no longer is analogous to the precedent cases cited by OPR. Ms. Rook further testified that she received input from the field office stating that the appellant's off-duty conduct had not become notorious outside the agency, but that his reputation within the field division was poor as a result of office rumors. Tr. 106; Agency file at tab 4g. She testified that she still believes the appellant suffers from character traits of dishonesty, untrustworthiness, and poor judgment, which cannot be rehabilitated notwithstanding Mr. Weis's determination the agency lacked evidence the appellant lied under oath or his actions violated state criminal law. Tr. 107

Under further examination, Ms. Rook agreed that Female's 1 and 2, having consensual sex with the appellant in his bedroom, could not have been surprised that the appellant was seeing them nude. Tr. 111. She further acknowledged that OPR had no evidence the appellant showed the video tapes to anyone else. *Id.* She testified that her objection to the appellant's conduct was that he videotaped the women without their knowledge, and that (the video) gave him a different viewpoint than what he had when he was actually participating in the sex act. Tr. 111.

Based on Mr. Weis's and Ms. Rook's April 20, 2010, testimony, I find they would have disciplined the appellant by proposing and effecting his removal, in the absence of their legal error in assuming the appellant's conduct violated the State of Ohio voyeurism statute.

Imposition of the Penalty of Removal for the Appellant's Off-Duty Conduct Is Not Reasonable

As noted, the Board has found a nexus between the appellant's off-duty conduct and an adverse impact on the efficiency of the service by reason of the adverse impact on the job performance of Female 1 and Female 2, as well as on the job performance of other employees, caused by the appellant's admitted conduct being discussed by Female 1 in the workplace.

As the agency's primary witness concerning the degree of impact the appellant's conduct had on the field office in which Females 1 and 2 are employed, ASAC Klein testified the appellant was assigned to a special operations group as a pilot, and he almost never came into (the) headquarters city (field office), ... OR at tab 7, Agency's Pre-hearing submissions, sub tab 4a , August 25, 2005, DeBene Esse Deposition of ASAC Gary Klein, p. 40.

Mr. Klein testified that over an unspecified period of time he met approximately six times with Female 1, the field office Receptionist, for a total of 3 to 4 hours, concerning the appellant's conduct, and that he also met with Female 2, a professional administrative support employee, on a number of occasions, also for a total of about 3 to 4 hours. *Id.* at 26-27. Questioned how knowledge of the appellant's conduct impacted Female 2's productivity, Mr. Klein responded:

She was always a good employee. She continued to be a good employee, but it obviously disrupted her life. Psychologically, she seemed to be bothered much of the time, and obviously she did not devote her entire energies to her work.

Id. p. 25. Asked whether Female 1's productivity was affected, Mr. Klein generally testified, Well, she obviously devoted a lot of her energies to this matter. When asked how he could tell, Mr. Klein testified:

Because she spent a lot of time with me, and I heard – well, *there were a lot of complaints about her from other employees that she was talking about this.* I mean, it was just something for many months was the principal focus of a lot of energies and attention in the office.

Id. p. 27. (Emphasis added). Mr. Klein acknowledged that Female 1 and the appellant became engaged to be married, testifying, [s]o obviously, you know, they became very close as a result of this I think for a while. ... *Id.* at 41. He offered no testimony regarding Female 1's attention to her work or productivity after she apparently worked through her personal issues with the appellant and became engaged to marry him. Asked how his own productivity was affected dealing with Female 1, Mr. Klein testified:

Well, obviously I took a lot of time in talking to her, and trying to reassure her and explain to her, you know, and advise her on various aspects of this matter.

Id. p. 27.

Mr. Klein also testified that a third female employee in the field office (not Female 3) had dated the appellant for a period of time, but later married another agency employee. Mr. Klein testified he met with this employee who advised that her husband was upset about allegations in the office that she had dated the appellant, that she had had a relationship with the appellant, and that she knew she was going to be interviewed, or probably interviewed by OPR. *Id.* at 28. Asked how all of this impacted this employee's productivity, Mr. Klein generally testified:

Well, she was always a good employee, and all I know that it took away from her activities in the normal course of business. And it obviously affected her relationship with her husband, and *I don't know how much time or how serious it was.* But she was concerned enough that she brought it to my attention.

Tr. 29. (Emphasis added). Mr. Klein estimated the total time he devoted to meeting with this employee was 30 minutes. *Id.*

In her sworn April 8, 2003, statement to OPR, the third employee referenced by Mr. Klein specifically stated that the appellant asked her out on dates but she turned him down. Agency file at tab 4v, p. 1. She further stated that on one occasion she went out with the appellant as a friend but when he made forward advances toward her, I made it very clear to him that nothing was going to happen between us. *Id.* at 2. She provided no information to show any further involvement with the appellant other than as a friend.

I find somewhat problematic the agency's evidence of the level of office disruption occasioned by office discussion of the appellant's conduct prior to April 2003. The witness statements and Mr. Klein's testimony show that Females 1 and 2 were under some degree of personal distress following Female 1's disclosures to an EAP Counselor and friends at work concerning her discoveries in the appellant's bedroom. Female 1

admits in her April 8, 2003, statement that the resulting rumors had gotten out of control. Agency file at tab 4y. Neither the statements of Females 1 and 2, nor Mr. Klein's testimony show that the employees weren't doing their jobs properly, or weren't functioning as asserted by Mr. Weis. Tr. 52-53. It is unclear over what period of time

Mr. Klein intermittently met with Females 1 and 2, during or throughout the eighteen-months between his first meetings with Female 2 in January 2003 and the appellant's June 2004 removal. Mr. Klein provided no testimony that apart from meeting with him, Females 1 and 2 took any leave from their duties as a consequence of being upset by information concerning the appellant's conduct.

Mr. Klein's testimony on direct examination, however, further shows that the manner in which OPR ultimately conducted its investigation also caused disruption among field office employees. Concerning the impact of the OPR's on-site investigation, Mr. Klein vaguely testified:

It was certainly disruptive, and they interviewed probably at least half a dozen employees, and there were a number of or *many other employees who expected to be interviewed. It was pretty muchwhile they were in the office* one of the subjects of the conversations about what had happened, and who had been talked to. You know, just a lot of rumors and a lot of disruption.

Record at tab 7, sub tab 4a, p. 20. He further testified that all of the interviews were conducted on regular business hours during times of regular FBI work. *Id.* at pp. 20-21. He noted that the interviews could have been conducted in a location other than the office, but no employee requested this accommodation. *Id.* He offered no testimony why OPR did not itself determine to conduct its interviews off-site, and during alternative hours, to minimize office disruption. He testified that OPR's interviews were conducted in an empty supervisor's office at the front of the field office to which the employees individually reported for their interviews.

As noted, Ms. Rook and Mr. Weis testified that OPR investigations should be structured to avoid investigating personal relationships when other means are available to confirm the facts, including obtaining agreement on the facts from the subject of the investigation. In light of this policy, it is unclear why OPR's investigation was not at least initially confined to interviews with Females 1 and 2, and the appellant who, when questioned, admitted to the conduct at issue. The record shows OPR initiated its investigation by interviewing not only Females 1 and 2, but also four other employees not directly implicated in having engaged in sexual conduct with the appellant. See Agency file at tabs 4s-4y. All interviewed employees were informed that if they refused to fully cooperate they could expect to be dismissed from the rolls of the FBI. *Id.* They were further notified that their interview was part:

[O]f an administrative inquiry regarding an allegation that (the appellant) engaged in unprofessional conduct by surreptitiously videotaping sexual encounters with various ... Division female support employees, possibly without their consent.

Id. Notwithstanding instructions to the employees that they were not to discuss this matter with anyone other than designated agency officials, I find OPR's manner of investigating the case had the foreseeable impact of disseminating the content of the allegations against the appellant to four field office employees who were not intimately associated with the appellant's behavior.

Mr. Klein's August 2005 testimony contains no clear information showing how many of his discussions with Females 1 and 2 occurred after the disruption caused by OPR's interviews at the field office. It is undisputed that the appellant's and Female 1's engagement came to an end at an unspecified time after OPR's April 2008 investigation at the field office.

With the possible exception of the two-day period when OPR exercised its discretion to conduct interviews of employees at their field office during regular duty hours, I find the agency has not demonstrated that the whole office was disrupted to the degree the agency would exercise its level discretion to investigate or discipline an employee for other off-duty, illegal or legal betrayals of a co-worker's trust, such as adultery committed by a coworker spouse. See Tr. 79, Mr. Weis's testimony. To hold the appellant accountable for the impact of the exercise of OPR's discretion in the manner in which it conducted its investigation would allow an agency to magnify, by its investigatory conduct, the level of disruption associated with an off-duty

personal offense. As discussed below, the same circumstance applies where OPR creates a Giglio impairment by virtue on insisting, under penalty of job loss, the employee sign a statement attesting to off-duty dishonest behavior in a personal relationship.

Further problematic is OPR's apparent failure, before it interviewed any of the involved employees, to research Ohio state court precedent to determine how broad or narrow the Ohio voyeurism statute had been interpreted as to putative adult victims. Nor did OPR approach the local state prosecutor for an opinion on the viability of prosecution under the Ohio statute until after the aforementioned six agency employees were interviewed on April 7 and 8, 2003, with the allegations against the appellant communicated to them.

Assistant Prosecutor, Dave Zimmer, Supervisor of the General Crimes Division of the local county prosecutor's office, informed the agency on April 9, 2003, that he was familiar with the Ohio voyeurism statute. See Agency file at tab 4q. After being informed of a summary of the employees statements, he advised the agency there was no probable cause on which to initiate prosecution of the appellant. Scott Brantley, the OPR official who summarized Mr. Zimmer's opinion in an April 9, 2003, report of contact, did not record Mr. Zimmer's rationale for concluding the agency's case lacked probable cause. *Id.*

Not to be deterred, Mr. Brantley requested a second opinion of Mr. Zimmerman after the appellant provided a sworn affidavit on April 9, 2003, admitting to the conduct at issue.[3] On April 15, 2003, Mr. Zimmerman advised that his opinion the agency lacked probable cause had not changed. Agency file at tab 4p. Although noting that Mr. Zimmerman inquired whether the agency had uncovered any actual tapes, Mr. Brantley did not disclose in his April 15th report of contact Mr. Zimmerman's reason for declining prosecution. Agency file at tab 4p. Mr. Brantley did not affirmatively state that producing the appellant's videotapes would alter Mr. Zimmerman's opinion. In light of the appellant's sworn admissions on April 9, 2003, a dispute of fact regarding the actual occurrence of the appellant's conduct could not have been a factor in Mr. Zimmerman's opinion the case lacked probable cause.

Noting that probable cause, does not require assembling evidence sufficient to secure a conviction (See Black's Law Dictionary 1219 (7th Ed. 1999)), I find it more likely true than not true Mr. Zimmerman informed Mr. Brantley the state courts restrictive interpretation of the Ohio voyeurism would preclude the appellant's conviction because the subject statute did not criminalize the appellant's conduct. In these circumstances, I find the agency's continued reliance on the appellant's apparent violation of state law to have been in bad faith.

Concerning the consistency of the penalty of removal imposed in this case with penalties imposed for past workplace disruptions caused by an off-duty betrayal of a co-worker's trust (which did not constitute a violation of state criminal law), Mr. Weis and Mr. Rook testified there are essentially no such past cases on record with OPR, or within their knowledge. Both witnesses testified they would likely not investigate or discipline a married employee who betrayed the trust of a co-worker spouse by engaging in extra-marital affairs, even if the innocent spouse lost focus at work, could not stop talking to co-workers at work about his or her resulting betrayal, or had to take leave due to an inability to work resulting from the betrayal. Ms. Rook testified that she would agree that office breakups, love triangles, messy divorces, adultery, and cheating are common and are discussed by employees in the workplace. Tr. 116. When asked if she could cite a single example when such conduct resulted in an OPR investigation, discipline, or removal, Ms. Rook testified: I can recall one but I don't remember the specifics, but it was a love triangle in an office. Tr. 116. She provided no testimony regarding the level of discipline, if any, that resulted from OPR's investigation of the three employees involved in that workplace incident. *Id.*

Mr. Weiss and Mr. Rook also provided no rationale for disciplining the appellant, but not disciplining a dishonest, untrustworthy spouse whose lack of judgment would cause similar, and likely more serious, disruption to the work of his or her spouse. I find it more likely true than untrue that a philandering spouse or member of an office romantic triangle, if compelled to cooperate with an OPR investigation under threat of being removed, if truthful would be compelled to make a statement that at some point he or she was dishonest with respect to the employee's relationship(s) with a co-worker sexual partner(s) or spouse. It is thus within OPR's control whether it creates the type of *Giglio* problem Mr. Weis and Mr. Rook now claim the appellant has with respect to his truthful statements to OPR admitting his off-duty sexual betrayals.

The agency's evidence of the level of disruption from the appellant's off-duty behavior pales somewhat in comparison to the likely workplace disruptions caused by the direct, intentional, on-duty conduct of other agency employees disciplined by OPR at the approximate time the appellant's behavior came to the attention of OPR ... For instance, in Case #03-0069 (5/14/2003) during Mr. Weis's OPR tenure:

[An] SA, *over the course of approximately one and one-half to two years,* engaged in multiple instances of making sexually inappropriate remarks to female co-workers. Also, on one occasion, he made a remark to a support employee that was perceived as a threat to the support employee's safety and life. Specifically, *the SA told the support employee that, if the SA eve[r] went postal, the support employee would be the first person the SA would shoot.* In addition, *he left inappropriate (both sexual and threatening) voice-mail messages for coworkers, as well as the mother of a criminal subject.*

See OR Appellant Hearing Exhibit 5 (OPR Case precedent search results), p. 5 of 38. The final disciplinary action recorded for this case: a 45 CALENDAR DAY SUSPENSION. *Id.* (Emphasis in original). In Case #03-0252 during Mr. Weis's OPR tenure:

[An] SA engaged in unprofessional conduct and disruption of the office by subjecting a co-worker to a pattern of harassment and/or offensive jokes. Allegation that the SA misused Bureau computers was not substantiated.

AGGRAVATION: *SA did not take responsibility for his actions and blamed the co-worker. SA acted in concert with others to target the co-worker. SA had to be transferred out of the RA to another office in order to keep him away from the co-worker. One of the incidents involved the co-worker's children and neighbor and the established evidence undermined the SA's stated intention that this was an innocent inquiry.*

Id. at p. 6 of 38. (Emphasis added). The final disciplinary action for this case: 5 CALENDAR DAY SUSPENSION WITHOUT PAY. *Id.* (Emphasis in original). In Case #03-0156 during Mr. Weis's OPR tenure:

[A] Supervisor engaged in unprofessional conduct and misused Bureau computers by e-mailing inappropriate sexual comments and/or advances *to a subordinate.* (An allegation of sexual harassment was not substantiated).

AGGRAVATION: The contents of the e-mail constituted a direct request for a sexual act -- *the penalty is an upward departure from previous precedent.*

Id. at p. 5 of 38. (Emphasis added). The final disciplinary action in this case: a 5 CALENDAR DAY SUSPENSION. Id. (Emphasis in the original). In Case # 02-0130 (3/6/2002) (not within Mr. Weis's tenure, but at the approximate time of the appellant's sexual encounters while dating Female 1):

A Special Agent in Charge (SAC) made numerous insensitive and unprofessional comments of a sexual nature. There were acts of unprofessional and sexually suggestive conduct on the SAC's part *which causes substantial comment and criticism among subordinates.*

Id. at 18 of 38. (Emphasis added). The final disciplinary action recorded for this case: LETTER OF CENSURE *Id.* (Emphasis in original).

In light of these OPR disciplinary precedents, I find the penalty of removal imposed in the instant case is disproportionate to the level of discipline imposed on employees whose workplace disruptions were more intentional, direct, serious, and pervasive than those resulting from the appellant's wholly off-duty and personally dishonest behavior with respect to Females 1 and 2.

Concerning the appellant's potential for rehabilitation, Mr. Klein's August 2005 testimony reflects his opinion, at that time, that the appellant's videotaping constituted a violation of state law. Nevertheless, he recommended only up to a 30-day suspension and a disciplinary transfer due to the adverse impact on the appellant's reputation by all of this. *Id.* at 38; see also Agency file at tab 4g. In his *Douglas* Factors statement, Mr. Klein described the appellant's potential for rehabilitation:

[The appellant] is a good pilot and this matter does not affect his ability to fly FBI aircraft. However, the nature of the alleged offense does affect how the rest of the employees relate to [him]. *[His] potential for rehabilitation would be enhanced if he were transferred to another division.*

Id. p. 2.

Mr. Klein's January 20, 2004, *Douglas* Factor statement further shows the appellant continued to be employed as a pilot after OPR obtained statements from field office employees and the appellant admitted his dishonest off duty conduct. No evidence was produced showing the appellant was relieved of his SA duties after April 2003 through the effective date of his removal in June 2004.

I find Mr. Klein's testimony and prior statements show the appellant's local agency supervision believed he had rehabilitation potential notwithstanding their legal error and concern that his private conduct with Females 1 and 2 was potentially illegal. Mr. Weis's apparent failure to fully consider these factors is consistent with his apparent disregard of the appellant's effort to obtain counseling for a pornography addiction, which may have contributed to his admitted conduct, and to reconcile with Female 1. See Tr. 71. I note the agency produced no psychiatric or psychological assessment to corroborate Ms. Rook's and Mr. Weis's repetitious and conclusory testimony that the appellant suffers flawed character traits that allegedly preclude his rehabilitation. I further find this testimony insufficient to justify Mr. Weis's apparent refusal to appropriately consider the appellant's years of service and otherwise discipline-free record.

The record shows the appellant was initially employed by the agency in January 1997, with over seven years as a Special Agent at the time of his removal. Agency file at tab 4s. At all times material to the agency's charge in this case, the appellant was assigned as a Pilot of agency aircraft at the metropolitan airport of the city in which his Field Division Office was located. As noted by Mr. Klein, the appellant did not, however, work in the Field Office headquarters several miles distant from the airport in which Females #1 and #2 were employed. See Record at tab 7, Agency Exhibit 1 at 41. Until the agency initiated the instant action in February 2004, the appellant had never been the subject of disciplinary action. Mr. Klein testified that he last rated the appellant's performance as Superior, which is regarded as a satisfactory rating among Special Agents, and that his performance after that rating was at least satisfactory.

I find that FBI Special Agents hold a position of prominence in the law enforcement community, and the community at large, and that their professional and personal public behavior must reflect the maturity, judgment and integrity expected of them in their professional capacity. But as former Director Freeh recognized in publishing his 2001 Personal Relationships Policy, and Mr. Weis and Ms. Rook recognize but refuse to apply in this case, FBI Special Agents mistakes in their intimate sexual lives with their spouses or partners fall into a different category of consideration. The agency has articulated no meaningful standard to distinguish the serious exhibition of poor judgment and dishonorable, dishonest, untrustworthy behavior of some of its married employees in extra-marital relationships, which it does not investigate or discipline, from the serious exhibition of poor judgment and dishonorable, dishonest conduct of the unmarried, Mr. Doe, with respect to videotaping Females 1 and 2, which it did choose to investigate and to punish by effecting his removal.

The appellant's surreptitious videotaping while engaged in consensual sex with Females 1 and 2 in his bedroom constitutes serious, reprehensible behavior on a personal level, and, as the agency has previously argued, may well subject to the appellant to a meritorious civil suit by one or both individuals. One can easily envision, however, far more serious, dishonest, reprehensible, life-changing betrayals by a married employee's co-worker spouse, causing even greater disruptions in the work environment for the innocent spouse and his or her co-workers. The innocent spouse's recourse is to file suit for divorce, not to complain to OPR, or to an agency supervisor, although the spouse may, and likely would, do so. Based on the testimony of Mr. Weis or Ms. Rook, it is not likely the agency would take any disciplinary action with respect to such an offending spouse, even if that spouse's misbehavior involved a third agency employee, other than to impose a short suspension and geographic reassignment. *Cf.* Appellant Hearing Exhibit 5, OPR Case #03-0252.

To the extent the disclosure of the appellant's behavior in this case caused disruption to the agency, it has not been shown to have exceeded the disruption intentionally caused by the Special Agents and Supervisors, above cited from the OPR case precedent. See Appellant Exhibit #5. I find the appellant's

voluntary actions in addressing the addiction underlying his conduct months before he became aware of the agency's investigation, his reconciliation with Female #1 during the months preceding the agency's investigation, and his candor in immediately admitting the off-duty conduct for which he was responsible when interviewed by agency investigators, demonstrate the appellant's substantial capacity for rehabilitation.

Based on the foregoing, I find the penalty of removal exceeds tolerable limits of reasonableness for the appellant's off-duty behavior. *See Woebcke v. Department of Homeland Security,* MSPB Docket No. NY-0752-09-0128-I-1, slip op. (May 6, 2010). I further find the maximum reasonable penalty to be imposed for the appellant's admitted off duty conduct is a 45-day (time served) suspension and directed reassignment as a Special Agent to another agency Field or Headquarters Office, at the agency's discretion.

Decision

The agency's action is MITIGATED.

Order

I ORDER the agency to cancel the removal and substitute in its place a forty-five day (time served) suspension without pay, and a directed reassignment to another agency Field or Headquarters Office, at the agency's discretion. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

I ORDER the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I ORDER the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I ORDER the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I ORDER the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. I ORDER the agency to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

Interim Relief

If a petition for review is filed by either party, I ORDER the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit

evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

[1]In her sworn April 8, 203, affidavit, Female 1 states that she did not actually view the tapes of the other women. Agency file at tab 4y.

[2]As discussed below, Mr. Weis's testimony that he gave no consideration to Female 1's reconciliation with, and engagement to, the appellant shows he failed to properly consider that Female 1 was likely less distressed, and disrupted at work, due to the appellant's efforts to seek counseling, reform his behavior and mend his relationship with her. In these circumstances, Female 2, was the sole remaining employee whose work may have been disrupted due to the appellant's surreptitious behavior concerning his sexual activities with her before OPR initiated its investigation.

[3]The correct spelling of the Assistant Prosecutor's name is not clear from the record. In his April 9, 2003 report, Mr. Brantley spells the name Zimmer. Agency file at 4q. In his April 15, 2003, report he spells the name Zimmerman. Agency file tab 4p.

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Case No. 20-CU-06-379, 20-CE-06-940

AFSCME LOCAL _____

STEP _____

OFFICIAL GRIEVANCE FORM

NAME OF EMPLOYEE Erin Kusumoto

DEPARTMENT _____ CLASSIFICATION_____

STATEMENT OF GRIEVANCE:

List applicable violations:

The DOE violated HGEA AFSCME Unit 6 Contract, Article 12, Paragraph E, "educational officers with tenure shall not be suspended, demoted, discharged or terminated without proper cause(.)"

The DOE terminated Grievant without due process in violation of School Code #5110 and School Code Procedure #5110.2(2)(c).

STATEMENT OF GRIEVANCE

I. INTRODUCTION

Erin K. Kusumoto (Ms. Kusumoto) was a tenured education officer with the State of Hawaii Department of Education (DOE) with approximately 20 years of heretofore unblemished service as a teacher and education officer. On August 7, 2018, Ms. Kusumoto, then a vice-principal at Pearl City Highlands Elementary School, received notice of termination of her employment from the DOE effective August 21, 2018 (Decision Letter). Although Superintendent Dr. Christina Kishimoto (Dr. Kishimoto) declared in her Decision Letter that she prepared the letter "in accordance with the provisions of School Code #5110, School Code Procedure #5110.2," she had not. A review of the Decision Letter reveals that Dr. Kishimoto did not furnish Ms. Kusumoto with "a statement of the appeal rights of the employee," as mandated by the due process requirement spelled out in the School Code Procedure #5110.2.

Dr. Kishimoto attempted to remedy her failure to follow due process by sending a second letter, dated August 13, 2018, and received by Ms. Kusumoto on August 16, 2018. Again, she failed to follow due process. School Code #5110, School Code Procedure #5110.2 requires that Dr. Kishimoto must "(furnish) educational officer written notice at least 10 calendar days prior to effective date indicating the disciplinary action." Moreover, while she stated that Ms. Kusumoto had appeal rights she did not provide "a statement of the appeal rights of the employee." Scrutiny of her second decision letter reveals that she, again, failed to meet due process requirements.

In terminating Ms. Kusumoto, effective August 21, 2018, Dr. Kishimoto did not provide Ms. Kusumoto with due process mandated by the School Code that she claims to have acted in accordance with. Thus, her termination of Ms. Kusumoto without due process constitutes a termination without proper cause.

Moreover, even if we assume for the sake of argument that Dr. Kishimoto afforded Ms. Kusumoto with due process before termination, Dr. Kishimoto's termination of Ms. Kusumoto was NOT for proper cause for many other reasons.

Ms. Kusumoto now presents her grievance based on Dr. Kishimoto's violations of School Code #5110, School Code Procedure 5110.2, Article 15 Section B of the HGEA AFSCME Local 1152, AFL-CIO Unit 6 Contract (hereinafter referred to as "CBA) (Collective Bargaining Agreement)."

II. DR. KISHIMOTO'S CONCLUSIONS IN REGARDS TO VIOLATIONS OF POLICY

Before beginning our analysis of Ms. Kusumoto's termination, we set forth Superintendent Dr. Christina Kishimoto's (Dr. Kishimoto's) "conclusions in regards to violations of policy." (Decision Letter, pg. 2). As required under School Procedure #5110.2, these include Dr. Kishimoto's conclusions as to the nature and details of the specific charges. As such, they identify what Dr. Kishimoto concludes are the proven violations upon which she bases her decision to terminate. Therefore, these "conclusions in regards to violations of policy" set the parameters for our forthcoming analysis. In her Decision Letter, Dr. Kishimoto concludes "in regards to violations of policy:"

1. There is sufficient evidence to find that being dishonest to Complex Area Superintendent (CAS) Kaninau about your relationship with Principal

Nakasato, misuse of Department property, and using Department work time for personal reasons (engaging in conduct of a sexual nature **and/or** sexual relations) violates the DOE Code of Conduct so as to be construed as misconduct. (Emphasis added).

2. Being dishonest and less than truthful during a direct inquiry by CAS Kaninau (and during a fact-finding on behalf of the CAS) is contrary to the ethical expectations of any Department employee, but especially of a school administrator such as a vice principal. Your inappropriate conduct violated BOE Policy 201-1, Ethics and Code of Conduct, so as to be construed as misconduct.

3. In 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.

4. Your inappropriate conduct as described in the Investigation Report is also a violation of BOE Policy 201-2, Accountability of employees. (Decision Letter, pg. 2).

Under the CBA, the DOE may not terminate Ms. Kusumoto without proper cause. In turn, proper cause requires both proof of misconduct and that "the punishment fits the crime." As will be shown below, Dr. Kishimoto does not identify with intelligible specificity the misconduct related to the most substantial charge, i.e., "misuse of Department property, and using Department work time for personal reasons (engaging in conduct of a sexual nature **and/or** sexual relations)." (Emphasis added). Also, she fails to make any showing to meet the DOE's burden to show with a preponderance of evidence that "the punishment fits the crime." As such, Dr. Kishimoto's actions and lack thereof demonstrate that Ms. Kusumoto's termination did not stem from proper cause.

Broken down, Dr. Kishimoto's conclusions relate to three alleged events. These are 1) lying to CAS Kaninau about a romantic relationship, 2) using Department property and work time to engage in conduct of a sexual nature **and/or** sexual relations, and 3) meeting with Principal Nakasato on June 1, 2017 at the Airport Honolulu Hotel, during the work day, which use of time was not in compliance with the Superintendent's memo regarding Leave of Absence. Note that, as is evident in her Investigation Report, Investigator Hookano equates "conduct of a sexual nature" to whether Ms. Kusumoto "ever kissed **and/or** hugged romantically **and/or** 'made

out' with Mike on campus during work hours." (Emphasis added). (Investigation Report, pg. 14).

Before beginning our analyses of Dr. Kishimoto's conclusions upon which she justifies termination, we provide an overview of the analytical model put forth by the DOE and refinements that make up current arbitration decisions.

III. THE 7 STEPS OF JUST CAUSE STANDARD ANALYSIS AND REFINEMENTS

As recognized by CAS Kaninau in his Recommendation for Termination, "(t) he Department and the HGEA recognize the 7 steps of Just Cause Standard to determine just cause." (Recommendation for Termination, pg. 3).

Professor Carroll Daugherty put forth the "7 Steps of Just Cause Standard Analysis" in 1966. While we agree that Daugherty's just cause analysis has applicability today, it has been refined by decades of subsequent arbitration. We mention these refinements as summarized by author Robert M. Schwartz in 2013, confident in the belief that an arbitrator will also subscribe to them.

Daugherty's and Schwartz' Analytical Models for Just Cause

No.	Professor Carroll Daugherty, 7 Steps of Just Cause Standard Analysis (1966), as presented by CAS Kaninau	Robert M. Schwartz, whose 2013 summary of refined analysis we believe an arbitrator will apply consistent with contemporary arbitration decisions
1	Notice: Did the Employer give the Employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the Employee's conduct?	Fair notice. An employer may not penalize an employee for violating a rule or standard whose nature and penalties have not been made known.
2	Reasonable Rules: Are the Employer's Rules reasonably related to the orderly, efficient and safe operations of the Employer's business and the performance the Employer might reasonably expect of the employee?	
3	Investigation: Before administering discipline to the Employee, did the employer make an effort to discover whether the Employee did in fact violate or disobey a rule or order of management?	
4	Fair Investigation: Was the Employer's investigation conducted fairly and objectively?	

5	Proof: At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?	Substantial proof. Charges must be proven by substantial and credible evidence.
6	Equal Treatment: Did the Employer apply its rules, orders and penalty without discrimination to all employees?	Equal treatment. 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.
7	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 with the Employer?	Mitigating and extenuating circumstances. Discipline must be proportional to the gravity of the offense, taking into account any mitigating, extenuating, or aggravating circumstances.
8		Due process. An employer must conduct an interview or hearing before issuing discipline, must take action promptly, and must list charges precisely. Once assessed, discipline may not be increased.
9		Prior enforcement. An employee may not be punished for violating a rule or standard that the employer has failed to enforce for a prolonged period.
10		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 an opportunity to improve.

While we subscribe to and believe that an arbitrator will also subscribe to the analysis that has been followed by other current arbitrators, as summarized by Robert Schwartz in 2013, we will nevertheless show that analyses under either Daugherty's and Schwartz' analytical models lead to the same conclusion, i.e., the DOE failed to meet its burden of proving by a preponderance of the evidence that Dr. Kishimoto removed Ms. Kusumoto for proper cause.

Under both the Daugherty and Schwartz analyses, an employer must not only sustain a charge, it must prove the reasonableness of its penalty. In this case, the DOE proves its most severe charge nor addresses in any meaningful way the reasonableness of the application of the employment law death penalty by Dr. Kishimoto.

IV. ANALYSIS

We begin our analysis by applying Daugherty's seven steps and Schwartz' refinements to Dr. Kishimoto's conclusion that there is proper cause for termination because "there is sufficient evidence to find that being dishonest to CAS Kaninau about your relationship with Principal Nakasato...violates the DOE Code of Conduct so as to be construed as misconduct" and "being dishonest and less than truthful during a direct inquiry by CAS Kaninau (and during a fact-finding on behalf of the CAS) is contrary to the ethical expectations of any Department employee, but especially of a school administrator such as a vice principal," thus violating "BOE Policy 201-1, Ethics and Code of Conduct, so as to be construed as misconduct." (Decision Letter, pg. 2).

A. Lying to CAS Kaninau

In her interview of Mike Nakasato on May 8, 2018, Hookano quotes Mike Nakasato as saying,

> In October 2017, I was at a principals meeting and (Cyd Nakasato, Mike Nakasato's wife) followed me by Find My iPhone. (She) came to the school, (and) confronted Erin. I contacted (CAS Kaninau), he didn't pick up. I called Rodney. Rodney said (CAS Kaninau) just left. So, I called back (CAS Kaninau) and told him that I was having an affair and I need help. I admitted to having an affair. (Investigation Report, pg. 17).

CAS Kaninau followed up on Mike Nakasato's admission of having an affair with Ms. Kusumoto by meeting with Ms. Kusumoto on November 1, 2017. Based on CAS Kaninau's notes on that date, DOE Investigator Nanette Hookano (Investigator Hookano) summarized their November 1, 2017 meeting as follows:

> CAS Kaninau asked Erin, **"Was there a relationship?" Erin said, "No."** CAS Kaninau said, "Mike share (sic) something a little different." Erin asked, "What do you mean?" CAS Kaninau said, "He said it was more personal." Erin said, **"No, we talked a lot and it was professional. Sometime we would text late."** CAS Kaninau then asked, **"Was it professional?" Erin said, "Yes."** (emphasis in bold by Investigator Hookano) (Investigation Report, pg. 30).

Thereafter, as Investigator Hookano wrote in her Investigation Report,

> Fact-finding: Per CAS Kaninau's request, PS Hookano conducted a fact-finding meeting with Erin, to gather additional information for CAS Kaninau to determine next steps regarding the "relationship" between Erin and Mike. On November 6, 2017, PS Hookano met with Erin for fact-finding on behalf of the CAS. ... **Erin**

was asked whether she has ever been involved in a romantic or sexual relationship with Mike, she said, "No." (emphasis in bold by Investigator Hookano) (Investigation Report, pg. 30).

The above shows that, in early November 2017, CAS Kaninau initiated his own inquiry and a follow up investigation by Investigator Hookano to determine whether Ms. Kusumoto had ever been involved in an affair with Mike Nakasato. With Mike Nakasato's earlier admission, query why CAS Kaninau did not follow up with immediate further inquiry or discipline since he knew that Mr. Nakasato and Ms. Kusumoto were having an affair and she lied about it.

Application of the Daugherty and Schwartz Analyses to the Issue of Lying

1. Notice: Did the Employer give the Employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the Employee's conduct? (Daugherty). Fair notice. An employer may not penalize an employee for violating a rule or standard whose nature and penalties have not been made known. (Schwartz).

CAS Kaninau: "When 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 to Terminate, pg. 3).

Dr. Kishimoto: While she is the official responsible for making the decision to terminate, she does not address notice of possible or probable disciplinary consequences at all.

Comment: CAS Kaninau's mere assertion that Ms. Kusumoto should have known that she was breaking a rule begs the question as to whether the DOE provided notice of possible or probable disciplinary consequences and penalties. His statement above confirms that, upon completion of the investigation and his recommendation, both Investigator Hookano and he had not bothered to look, or, having looked, found nothing that would constitute notice of disciplinary consequences and penalties for dishonesty.

2. Reasonable Rules:

Comment: The Decision letter refers to certain rules, i.e., the DOE Code of Conduct Sections B and L, BOE Policy 201-1, Ethics and Code of Conduct, the Superintendent's Memo Regarding Leave of Absence and BOE Policy 201-2 (Accountability of Employees). While the DOE's enforcement of the applicable rules is unreasonable, the rules themselves are reasonable.

3. Investigation:

The DOE made an effort to discover whether Ms. Kusumoto did in fact violate or disobey a rule or order of management as to the issue of lying to CAS Kaninau.

4. Fair Investigation: Was the Employer's investigation conducted fairly and objectively? (Daugherty).

At page 1 of DOE's Manual for Conducting Internal Investigations, the Manual instructs, "Investigations should be conducted promptly and in a fair an objective manner." In concluding

in her June 1, 2018 Investigation Report that Ms. Kusumoto lied about her affair with Mike Nakasato, Investigator Hookano merely resurrected her investigation that was completed almost seven months earlier in November 2017. At that time and with the same facts, CAS Kaninau chose to not pursue a disciplinary action against Ms. Kusumoto. Then, four months later, he directs an investigation based on the same events already investigated four months ago by Investigator Hookano . Query why Hookano felt a need to resurrect an investigation that was completed many months ago for which he did not deem that disciplinary action was needed at that time. This untimely and unexplained resurrection of an investigation four months before rendered the March 2018 investigation unfair at its inception.

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to why CAS Kaninau chose to resurrect an investigation which had already been substantially completed four months earlier.

5. Proof:

CAS Kaninau: "In your presentation, you 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." ..."You repeatedly admitted and apologized for lying to me and the investigator." (Recommendation to Terminate, pg. 5). CAS Kaninau was referring to his June 22, 2018 interview with Ms. Kusumoto.

Comment: As shown in her admissions, Ms.Kusumoto admitted to lying to CAS Kaninau in November 2017, a fact that CAS Kaninau was already aware of more than seven months before Ms. Kusumoto's tearful apologies in June 2018.

6. Equal Treatment: Did the Employer apply its rules, orders and penalties without discrimination to all employees? (Daugherty). 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. (Schwartz).

CAS Kaninau: "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." (Recommendation to Terminate, pg. 5).

Dr. Kishimoto: "And the Department applies those policies, rules and regulations without discrimination. The proven offenses in this matter are quite serious and do rise to the level of termination." (Decision Letter, pg. 4).

Comment: By his own statement, CAS Kaninau admits that he was recommending different treatment in this case as compared to other cases. Thereafter, even in the light of CAS Kaninau's affirmation that he was recommending different treatment, Dr. Kishimoto inexplicably follows his lead and makes a blanket statement that the Department punishes without discrimination. Query how Dr. Kishimoto, the deciding official, could, without further thought, fail to address

CAS Kaninau's own admission that his recommendation to terminate was different in this case from other cases.

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to the DOE's consideration or lack thereof concerning equal treatment.

7. 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 with the Employer? (Daugherty). Mitigating and extenuating circumstances: Discipline must be proportional to the gravity of the offense, taking into account any mitigating, extenuating, or aggravating circumstances. (Schwartz).

CAS Kaninau: "I have no evidence that you have accepted responsibility for your deceptive behavior." (Recommendation to Terminate, pg. 5).

Dr. Kishimoto: "The proven offenses in this matter are quite serious and do rise to the level of termination." (Decision Letter, pg. 4).

Comment: The first step to accepting responsibility is acknowledgment of misconduct by an employee. Query how CAS Kaninau could use Ms. Kusumoto's repeated acknowledgments and tearful apologies to sustain proof of misconduct, but ignore completely her contriteness when determining an appropriate penalty. Also, while Dr. Kishimoto concludes that the lying fell into a "quite serious" category, she offers no explanation of what "quite serious" means. We suggest that the "Issue/Incident Levels" identified in the DOE's Conducting Internal Investigations Manual at pg. 6 is far more instructive. That table identifies four levels for specifically named offenses, with Level 4 being the most serious. A review of the levels and issue types shows that the best fit for Ms. Kusumoto's lying to CAS Kaninau is "Inappropriate Behavior," which falls under Level 1, the least severe level. The two other examples listed in level 1 are "Unfair treatment by manager" and "insubordination." By contrast, Level 4 lists the much more serious misconduct of "Assault/bodily, Sexual Harassment (physical, sexual assault, etc.), Violence or Threat, Possession or Use of Dangerous Instrument/ Weapons." Dr. Kishimoto's proclamation of "quite serious" could encompass all levels. No one would argue against a blanket statement that proven "insubordination" is quite serious. However, by using "quite serious" as the benchmark for termination, Dr. Kishimoto does not make any attempt to differentiate between different levels of offenses. Thus, she gave no thought as to whether the punishment (termination) fit the crime (lying about having an affair). She merely assumed if she could label misconduct as "quite serious," termination is justified.

A blanket declaration that misconduct was "quite serious" is inadequate to differentiate between levels of misconduct. To determine whether the punishment fit the crime for particular misconduct requires more than the observation that the misconduct was "quite serious." Determining levels of misconduct requires comparisons. Dr. Kishimoto made none.

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to the DOE's consideration or lack thereof of whether the "punishment fits the crime."

8. Due process. An employer must conduct an interview or hearing before issuing discipline, must take action promptly, and must list charges precisely. Once assessed, discipline may not be increased. (Schwartz).

As noted above, CAS Kaninau received Mike Nakasato's admission of an affair in October 2017. Then, he confronted Ms. Kusumoto with questions concerning the affair on November 1, 2017. At his behest, Investigator Hookano investigated further on November 6, 2017. As such, he conducted not only one, but two interviews. With Mike Nakasato's admission and Ms. Kusumoto's responses, he could surely have imposed discipline for lying. He failed to take action promptly, but instead waited more than six months before including Ms. Kusumoto's lying in his recommendation to terminate her in June 2018. He did NOT take action promptly. As to the charge of lying, CAS Kaninau did not follow due process.

Also, Dr. Kishimoto did not follow the DOE's own policy for due process. An employer's disregard of and failure to follow its own required processes for termination constitutes a lack of due process. Please refer to page 1 and 2 above which are incorporated herein by reference.

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to whether the DOE followed due process in this case. We seek information concerning why the affair and lying did not result in disciplinary action in November 2017, yet was resurrected by CAS Kaninau many months later. We will also seek information related to Dr. Kishimoto's failure to follow the DOE's own required processes in her Decision Letter.

9. Prior enforcement. An employee may not be punished for violating a rule or standard that the employer has failed to enforce for a prolonged period. (Schwartz).

There is no indication that CAS Kaninau and, later, Dr. Kishimoto took this factor into consideration.

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to the DOE's consideration, or lack thereof, of prior enforcement.

10. Progressive discipline. When responding to conduct that is short of egregious, the

employer must issue at least one level of discipline that allows the employee an opportunity to improve. (Schwartz).

Dr. Kishimoto: "You and Mr. Moniz asked me to consider leniency as an alternative short of CAS Kaninau's recommendation for termination." As noted earlier, she also stated, "the proven offenses in this matter are quite serious and do rise to the level of termination."

Comment: Under the guidelines presented for "Issue/Incident Levels" in the DOE's manual for Conducting Internal Investigations, pg. 6, Ms. Kusumoto's lying to CAS Kaninau falls under level 1, "inappropriate behavior." Of course, "lying" does not always remain at level 1 if it is combined with other offenses, e.g., "theft/embezzlement" which is a level 3 offense. However, neither CAS Kaninau nor Dr. Kishimoto tie Ms. Kusumoto's lying to CAS Kaninau to any higher level offense. While lying to CAS Kaninau is, of course, a serious offense, it surely does not rise to the level 4 issue/incident level that is defined as assault/bodily harm, sexual harassment, violence or threat, or possession or use of dangerous instrument/weapons. To determine that Ms. Kusumoto's offense was so egregious as to preclude progressive discipline equates to ignoring the need for progressive discipline in any case. In Dr. Kishimoto's view, every proven offense is so egregious that there is no need to consider progressive discipline once she determines that an offense is "quite serious."

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to Dr. Kishimoto's termination of Ms. Kusumoto because of "quite serious" offenses.

Under either Daugherty's or Schwartz' analytical model for discipline based on proper cause, Dr. Kishimoto's decision to terminate Ms. Kusumoto for lying to CAS Kaninau was not based on proper cause.

B. Misuse of Department property and using work time to engage in conduct of a sexual nature and/or sexual relations.

To start, we reiterate Dr. Kishimoto's conclusion that "(t)here is sufficient evidence to find ... misuse of Department property, and using Department work time for personal reasons (engaging in conduct of a sexual nature **and/or** sexual relations) violates the DOE Code of Conduct so as to be construed as misconduct." (Emphasis added). (Decision Letter, pg. 2). This is the most serious of the conclusions proffered and relied on by Dr. Kishimoto to justify termination. As will be shown below, for this allegation, there was no notice of possible or probable disciplinary consequences, the investigation was flawed, the investigation was unfair,

Dr. Kishimoto's conclusions were flawed, there was no meaningful consideration of equal treatment or reasonableness of the penalty, due process was denied, there was no consideration of prior enforcement, and there was no progressive discipline.

Application of the Daugherty and Schwartz Analyses to Dr. Kishimoto's Conclusion of Misuse of Department Property, and Using Department Time for Personal Reasons (Engaging in Conduct of a Sexual Nature **and/or** Sexual Relations).

1. Notice: Did the Employer give the Employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the Employee's conduct? (Daugherty). Fair notice. An employer may not penalize an employee for violating a rule or standard whose nature and penalties have not been made known. (Schwartz).

CAS Kaninau: "When 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 to Terminate, pg. 3).

Dr. Kishimoto: While she is the official responsible for making the decision to terminate, she does not address notice of possible or probable disciplinary consequences at all.

Comment: CAS Kaninau's mere assertion that Ms. Kusumoto should have known that she was breaking a rule begs the question as to whether the DOE provided notice of possible or probable disciplinary consequences and penalties for engaging in conduct that, according to Dr. Kishimoto's conclusion, could range from hugging to having intercourse during work hours on campus. CAS Kaninau's statement above confirms that, upon completion of the investigation and his recommendation, both Investigator Hookano and he had not bothered to look, or, having looked, found nothing that would constitute notice of disciplinary consequences and penalties for consenting adults engaging in consensual activity ranging from kissing and romantic hugging on grounds to having intercourse on school grounds during work hours.

Is it unusual for persons within the DOE to meet, find another attractive, date and sometimes even marry? Does this not happen in superior/subordinate relationships involving senior DOE managers, principals, vice-principals and teachers? If these relationships are known to exist, is it common sense to conclude that activities within these relationships may be punished by termination without notice for conduct ranging from hugging to having intercourse on campus during school hours?

2. Reasonable Rules: Are the Employer's Rules reasonably related to the orderly, efficient and safe operations of the Employer's business and the performance the Employer might reasonably expect of the employee? (Daugherty).

In arriving at her conclusions in her Decision Letter, Dr. Kishimoto identifies two rules that apply to this step. The first is the DOE Code of Conduct, Section L. That section, entitled Appropriate Use of DOE Funds and Property, states "The employee...shall not misuse any funds or property

of government, school, school-related, or the organization, or the funds or property of any employee, volunteer or contractor." (Decision Letter, pg. 2 and Termination Recommendation, pg. 32). The second is BOE Policy 201-2 Accountability of Employees, which is quoted by CAS Kaninau as stating, in relevant part, "...it is the policy of the Board of Education ('Board') that all Department of Education ('Department') employees at school, complex area, and state levels comply with and implement Board policies and Department rules, regulations and procedures. All Department employees will be held accountable for failure to comply with or implement Board policies or Department rules, regulations, or procedures." (Decision Letter, pg. 2 and Termination Recommendation, pg. 33).

Comment: The rules above are reasonable. However, their application to termination in this case is not.

3. Investigation. Before administering discipline to the employee, did the Employer make an effort to discover whether the Employee did in fact violate or disobey a rule or order of management. (Daugherty).

Although fraught with harmful error, the DOE did make an effort to discover whether Ms. Kusumoto did in fact violate or disobey a rule or order of management.

4. Fair Investigation. Was the Employer's investigation conducted fairly and objectively?

As will be addressed in the "proof" step, we maintain that an investigation that repeatedly misuses and misplaces reliance on "and/or" during the investigation, recommendation and decision destroy any potential for a fair and objective investigation. We will address the "and/or" usage in detail below. For now, we address if an investigation can be fair when it aids in the violation of constitutional rights that protect against invasion of privacy.

In her Investigation Report, Investigator Hookano focuses extensively on texting on private phones between Mike Nakasato and Ms. Kusumoto. Unlike with devices owned by the Government, e.g. Government computers, employees have a reasonable expectation of privacy in private conversations on phones owned by them. In cherry picking the private texts between Mike Nakasato and Ms. Kusumoto, Investigator Hookano uses their private conversations to paint as graphic a sexual picture as any photo.

The Hawaii Constitution expressly recognizes the right to privacy (Hi Const. Art. 1, Secs. 6 & 7). Indeed, invasion of privacy is a crime in Hawaii. A person is guilty of invasion of privacy in the first degree if he or she knowingly discloses an image or video of another identifiable person either in the nude or engaging in sexual conduct without the consent of the depicted person, with intent to harm substantially the depicted person with respect to that person's health, safety, business, calling, career, financial condition. Here, Cyd Nakasato's disclosure of the texts that Investigator Hookano cherry-picked to create a graphic image of Ms. Kusumoto engaging in sex violated Ms. Kusumoto's right to privacy.

In her investigation, Investigator Hookano notes that Cyd Nakasato informed that "Mike told her that he would give her the phone if she promised not to report him." (Investigation Report, pg. 4). Thus, it should have been clear to Investigator Hookano that Michael Nakasato had not consented to disclosure of the private texts. What should have been even clearer to her is that

Ms. Kusumoto, the identifiable victim, did not consent to the disclosure of the texts that Investigator Hookano used to depict a graphic image of her engaging in sexual activity. Query why the DOE conducted an investigation based on private texts obtained and disclosed in violation of a person's constitutional rights to privacy. Also, the passing of the texts from Investigator Hookano to CAS Kaninau and then to others with the knowledge that there was no consent for disclosure and the cherry picking of selected texts to paint a graphic picture of sexual conduct constituted further invasions of privacy with complete disregard for Ms. Kusumoto's constitutionally protected rights.

How can the DOE purport to having conducted a fair investigation when the evidence used and disclosed up the chain stemmed from an invasion of privacy that is both a crime and violation of the State Constitution?

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to Investigator Hookano's use and further disclosure of private texts that were obtained by invasion of privacy in violation of Ms. Kusumoto's constitutional rights.

5. Proof: At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged? (Daugherty). Substantial proof. Charges must be proven by substantial and credible evidence. (Schwartz).

From investigation thru recommendation to decision, Investigator Hookano, CAS Kaninau, and Dr. Kishimoto rely on what they purport to be "substantiated findings" to drive their investigation, recommendation and conclusions, respectively However, what they rely on is a mishmash in which any "substantiated findings" or "proven" misconduct remains indiscernible. This unintelligible mishmash is the result of Investigator Hookano's, CAS Kaninau's and Dr. Kishimoto's prolific misuse and misplaced reliance on "and/or" in their investigation, recommendation and decision, respectively. As noted by one author, "although lawyers and courts have vilified "and/or" for most of its life, this bit of legalese continues to infest legal writing and create ambiguity."

As recognized as far back as 1932,

> In the matter of the use of the alternative, conjunctive phrase 'and/or,'...we take our position with that distinguished company of lawyers who have condemned its use. It is one of those inexcusable barbarisms which was sired by indolence and damned by indifference, and has no more place in legal terminology than the vernacular of Uncle Remus has in Holy Writ. I am unable to divine how such senseless jargon becomes current. Cochrane v. Florida East Coast Ry Co, 145 So 217 at 218-219 (Fla 1932).

In similar language, in Raine v. Drasin, 621 SW 2d 895 at 905 (Ky 1981), the Court refers to "and/or" as "the much condemned conjunctive-disjunctive crutch of sloppy thinkers."

As summarized by Robert C. Dick in Legal Drafting in Plain Language, 3d ed (Scarborough, ON: Carswell, 1995, Rule 10 at 107-11:

> Never use "and/or." This linguistic aberration is dealt with harshly by the courts....The eye tends to trip and stumble over this symbol. It has been promulgated largely by those who either have not taken the trouble to decide, or cannot make up their minds which of the two words they mean."

As reflected in cases reviewed, when used, "and/or" most often finds its way into contracts and the like. Based on our review, you never come across "and/or" as a statement of a factual finding. Perhaps this is so because, as stated by the Court in In re Bell, 122 P2d 22 at 29 (Cal 1942), "and/or" "cannot intelligibly be used to fix the occurrence of past events." This case is illustrative of the finding in Bell.

During her investigation, Investigator Hookano asked Ms. Kusumoto "whether she has ever kissed and/or hugged romantically and/or 'made out" with Mike **on campus during working hours,** Erin said, '**Yes.**' (Emphasis in bold is Hookano's)." (Investigation Report, pg. 14). Through her use of a multiple or compound question that her own manual for conducting internal investigations instructs her to avoid (Conducting Internal Investigations, State of Hawaii, Department of Education, 2015, pg. 12), Investigator Hookano's question and Ms. Kusumoto's responses results in the following mishmash of seven potential "factual findings." These are that Ms. Kusumoto engaged in 1) kissing only, 2) hugging romantically only, 3) making out only, 4) kissing and hugging romantically, 5) kissing and making out, 6) hugging romantically and making out or 7) (kissing, hugging romantically and making out). Although not defined by Investigator Hookano, it should be apparent that "making out" connotes misconduct beyond an occasional kiss or hug. Query how would a recommender or decision maker be able to decipher what are the proven facts upon which he or she can base a reasonable recommendation, conclusion and decision on.

Thereafter, and more dangerously, Investigator Hookano would continue her "and/or" approach and put forth "substantiated findings" that CAS Kaninau would adopt and Dr. Kishimoto would later review to formulate her conclusion. These were 1) "there is sufficient evidence to conclude that VP Kusumoto 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," 2) "there is sufficient evidence to conclude that VP Kusumoto 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," and 3) "there is sufficient evidence to show that VP Kusumoto inappropriately used work time for personal reasons when she engaged in inappropriate conduct of a sexual nature and/or sexual relations with Principal Nakasato during DOE work time." (Investigation Report, pgs. 28 and 29 and Superintendent's Decision Letter, dated August 6, 2018, pgs. 1and 2). The repeated use and acceptance of "and/or" throughout leaves the following potential "factual" findings.

Ms. Kusumoto engaged in:

1. kissing on campus before, during and after work hours.
2. romantic hugging on campus before, during and after work hours.
3. making out on campus before, during and after work hours.
4. kissing and romantic hugging on campus before, during and after work hours.
5. kissing and making out on campus before, during and after work hours.
6. romantic hugging and making out on campus before, during and after work hours.
7. kissing, romantic hugging and making out on campus before, during and after work hours.
8. kissing off campus during work hours.
9. romantic hugging off campus during work hours.
10. making out off campus during work hours.
11. kissing and romantic hugging off campus during work hours.
12. kissing and making out off campus during work hours.
13. romantic hugging and making out off campus during work hours.
14. kissing, romantic hugging and making out off campus during work hours.
15. having sexual relations on campus before, during and after work hours.
16. having sexual relations off campus during work hours.

The foregoing, all of which could be included under Investigator Hookano's all encompassing "and/or" umbrella, do not inform in any way what she concludes are the proven facts. She simply makes no effort do decide and, unfortunately and inexplicably, CAS Kaninau and Dr. Kishimoto followed suit. Thus, this mishmash is adopted up the chain to Dr. Kishimoto who relies on Hookano's "and/or" based "fact finding" to arrive at her own indiscernible conclusions.

In her Decision Letter, Dr. Kishimoto declares that CAS Kaninau's adopted "substantiated findings lead to the following conclusions in regards to violations of policy." Then, she declares that "there is sufficient evidence to find that Ms. Kusumoto was guilty of "misuse of Department property, and, using Department work time for personal reasons (engaging in conduct of a sexual nature and/or sexual relations)." (Superintendent's Decision Letter, pgs. 1 and 2). By relying on and cementing in her decision Investigator Hookano's and CAS Kaninau's use of "and/or", Dr. Kishimoto leaves no doubt that her decision stems from the investigation and recommendation that are fatally flawed because of their misuse and misplaced reliance on "and/or." To reiterate, as stated by the Court in In re Bell, 122 P2d 22 at 29 (Cal 1942), "and/or" "cannot intelligibly be used to fix the occurrence of past events."

In this case, Investigator Hookano's use of "and/or" to confuse her questions and substantiate her mishmash of potential "facts" along with the adopting of Investigator Hookano's "substantiated findings" by CAS Kaninau and reliance by Dr. Kishimoto to form her conclusions destroy the possibility of reasonable decision making based on proven facts. Simply put, "and" means both and either means "or". There is no discernible fact in a statement that it could have been this or that or both. This is especially true when the final "fact" is itself based on a preceding "fact" arising out of "and/or" logic, i.e., Hookano asks whether Ms. Kusumoto

engaged in kissing and/or hugging romantically **and/or** making out to establish engagement in conduct of a sexual nature.

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to the DOE's use of "and/or" to make a case based on failure to make a decision as to what the facts actually are.

6. Equal Treatment: Did the Employer apply its rules, orders and penalty without discrimination to all employees? (Daugherty). 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. (Schwartz).

CAS Kaninau: "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." (Recommendation to Terminate, pg. 5).

Dr. Kishimoto: "And the Department applies those policies, rules and regulations without discrimination. The proven offenses in this matter are quite serious and do rise to the level of termination." (Decision Letter, pg. 4).

Comment: By his own statement, CAS Kaninau admits that he was recommending different treatment in this case. Thereafter, even in the light of CAS Kaninau's affirmation that he was recommending different treatment, Dr. Kishimoto inexplicably follows his lead and makes a blanket statement that the Department punishes without discrimination. Query how Dr. Kishimoto, the deciding official, could, without further thought, fail to address CAS Kaninau's own affirmation that his recommendation to terminate was different in this case from other cases.

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to the DOE's consideration or lack thereof concerning equal treatment.

7. 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 with the Employer? (Daugherty). Mitigating and extenuating circumstances: Discipline must be proportional to the gravity of the offense, taking into account any mitigating, extenuating, or aggravating circumstances. (Schwartz).

Again, because of the use of "and/or," we cannot decipher what is the "proven offense." Simply put, Investigator Hookano, CAS Kaninau and Dr. Kishimoto have not themselves decided what the facts are. Thus, Dr. Kishimoto cannot provide any basis to show that termination is proportional to the gravity of the offense since the offense remains indiscernible.

Dr. Kishimoto: With reference to aggravating circumstances, Dr. Kishimoto emphasizes that "(t)he 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." (Decision Letter, pg. 4). In this statement, Dr. Kishimoto correctly identifies that it was the email that had a direct effect on staff members at PCHES. In contrast, every PCHES employee interviewed by Investigator Hookano testified that they saw nothing in Ms. Kusumoto's behavior at school that indicated that she was having an affair with Mike Nakasato or that their affair affected them or the school in any way. (Investigation Report pp. 6-13).

So far as the effect of the email as recognized by Dr. Kishimoto, query if there can be any argument that leaving such a hateful email on a Government email system constituted a de facto ratification by the DOE of the contents of the email. Surely, people who saw the email months after Ms. Kusumoto requested that it be taken down may well have assumed that the incredulous accusations must be true. Otherwise, they would ask, why would the DOE permit it to continue to remain there after five months? If anything, it was the DOE's handling of the hateful email that caused the notoriety emphasized by Dr. Kishimoto.

While Investigator Hookano, CAS Kaninau and Dr. Kishimoto point to generalized descriptions of misconduct during the investigation, recommendation and decision, they do not address at all misconduct by Cyd Nakasato that can be tied to specific as opposed to generalized misconduct. Along this line, 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 the DOE Acceptable User guidelines and procedures.

In line with the foregoing, under Hawaii DOE Acceptable Use Guidelines, "Users (of DOE technology services) are prohibited from sending unsolicited, commercial and/or offensive e-mail" (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).

Investigator Hookano, CAS Kaninau and Dr. Kishimoto ignore completely Board Policy 305-2, entitled "Safe Workplace." That policy 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.

Finally, 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."

Query how can Dr. Kishimoto rely on the effects of the hateful email that appeared to be ratified by the DOE as an aggravating factor. In short, the DOE created the aggravating factor by appearing to condone the contents of the email when it should have taken it down immediately. This goes beyond cherry picking evidence and crosses over to manufacturing evidence that Ms. Kusumoto created notoriety that hurt the school. The refusal to remove this hateful email created the impression that unsubstantiated allegations were true. Giving the false allegations an air of credibility by not taking the email down immediately is what hurt the school most.

Dr. Kishimoto: "The proven offenses in this matter are quite serious and do rise to the level of termination." (Decision Letter, pg. 4).

Comment: Surely, the offenses stemming from the posting of the email and the refusal to take it down are serious violations of specific DOE policy. Indeed, in the DOE's Manual for Conducting Internal Investigations, "Inappropriate Use of Internet and/or Equipment" is identified as a Level 3 issue/incident. How does the DOE explain that termination of Ms. Kusumoto is based on proper cause when the so-called "substantiated findings" are unintelligible and, yet, do absolutely nothing to discipline unambiguous misconduct in violation of clear policy?

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to the DOE's decision to terminate Ms. Kusumoto on misconduct that cannot be deciphered and its corresponding failure to take any action against misconduct in the posting of the hateful email and the decision to not remove it in clear violation of numerous and specific DOE policies.

8. Due process. An employer must conduct an interview or hearing before issuing discipline, must take action promptly, and must list charges precisely. Once assessed, discipline may not be increased. (Schwartz).

For punishment to be based on proven misconduct, the charges must be stated precisely. The use of "and/or" in the "substantial findings" of the investigation and the adoption of these "substantial findings" at the recommendation and decision stages violate due process. This is because, if Dr. Kishimoto is undecided on the actual facts, how can she fashion a reasonable penalty.

Moreover, the aiding and abetting of a violation of a constitutional right to privacy violates due

process as discussed in Section 4, entitled "Fair Representation" above.

Finally, Dr. Kishimoto did not follow the DOE's own policy for due process. An employer's disregard of and failure to follow its own required processes for termination constitutes a lack of due process. Please refer to page 1 and 2 above which are incorporated herein by reference.

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to whether the DOE followed due process in this case. We will seek information related to the failures to provide due process as described in the foregoing.

9. Prior enforcement. An employee may not be punished for violating a rule or standard that the employer has failed to enforce for a prolonged period. (Schwartz).

There is no indication that CAS Kaninau and, later, Dr. Kishimoto took this factor into consideration.

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to the DOE's consideration, or lack thereof, of prior enforcement.

10. 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 an opportunity to improve. (Schwartz).

Dr. Kishimoto: "You and Mr. Moniz asked me to consider leniency as an alternative short of CAS Kaninau's recommendation for termination." As noted earlier, she also stated, "the proven offenses in this matter are quite serious and do rise to the level of termination." (Decision Letter, pg. 4).

Comment: In Dr. Kishimoto's view, once she determines that an offense is "quite serious," there is no need to consider progressive discipline. First, what is the offense? Again, her use of "and/or" merely reflects that she could not decide on the misconduct that she considers "quite serious." Second, "quite serious" can be easily applied to describe almost any misconduct. Thus, Dr. Kishimoto was required to consider the particular nature of proven misconduct to determine whether the misconduct was egregious. In failing in this, she merely employs "quite serious," a descriptor broad enough to cover an entire spectrum of potential misconduct that ran the gamut from hugging on school property to engaging in intercourse on school property during work hours.

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a

grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to Dr. Kishimoto's failure to consider progressive discipline.

C. June 1, 2017 Meeting at the Airport Honolulu Hotel

At the start of this analysis, we quote Dr. Kishimoto's 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." (Decision Letter, pg. 2).

Application of the Daugherty and Schwartz Analyses to the Issue of the Meeting at the Airport Honolulu Hotel

1. Notice: Did the Employer give the Employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the Employee's conduct? (Daugherty). Fair notice. An employer may not penalize an employee for violating a rule or standard whose nature and penalties have not been made known. (Schwartz).

CAS Kaninau: "When 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 to Terminate, pg. 3).

Dr. Kishimoto: While she is the official responsible for making the decision to terminate, she does not address notice of possible or probable disciplinary consequences at all.

Comment: CAS Kaninau's mere assertion that Ms. Kusumoto should have known that she was breaking a rule begs the question as to whether the DOE provided notice of possible or probable disciplinary consequences and penalties for a ten-month employee who did not follow normal school-year leave procedures after school had closed for teachers. This is especially significant when Investigator Hookano, CAS Kaninau and, eventually, Dr. Kishimoto ignore completely that the applicable rule on June 1, 2017 was Article 25(A)(2) of the CBA which states that "Ten-month school level educational officers shall be required to complete all required tasks in June, not to exceed one (1) week after the school is closed for teachers. The end result was that Dr. Kishimoto terminated Ms. Kusumoto without even addressing whether she had violated leave procedures during the period when many educational officers follow a very flexible schedule because school is already closed for teachers.

2. Reasonable Rules:

Comment: The Decision letter refers to certain rules, i.e., the DOE Code of Conduct Section B and the Superintendent's memo regarding Leave of Absence. While the DOE's enforcement of

what it mistakenly views as the applicable rule is unreasonable, the rules themselves are reasonable.

3. Investigation:

There is no dispute that, before terminating Ms. Kusumoto, the DOE made an effort to discover whether Ms. Kusumoto did in fact violate or disobey a rule or order of management regarding taking leave. Unfortunately, Investigator Hookano did not even recognize or acknowledge the applicable rule.

4. Fair Investigation: Was the Employer's investigation conducted fairly and objectively? (Daugherty).

Article 25(A)(2) of the CBA states that "Ten-month school level educational officers shall be required to complete all required tasks in June, not to exceed one (1) week after the school is closed for teachers." When charging Ms. Kusumoto with misusing time during a work day, Investigator Hookano made no attempt to determine whether Ms. Kusumoto complied with Article 25(A) 2. When this single event occurred after teachers were already out of school, ten-month employees were on a very flexible schedule merely guided by the need to complete required tasks one week after school closed for teachers. To our understanding, school closed for teachers on May 30, 2017. By disregarding the point or even the existence of Article 25(A)(2), the investigation targeted Ms. Kusumoto for leave abuse that was not applicable at all for this particular period for ten-month employees who historically are on very flexible schedules. To conduct a fair investigation, Investigator Hookano should have investigated to see if there was any violation of Article 25(A)(2). She did not.

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to why Hookano's investigation did not focus on Article 25(A)(2) of the CBA as it should have.

5. Proof:

Ms. Kusumoto admits to meeting with Michael Nakasato at the Airport Honolulu Hotel on June 1, 2017. However, there is no proof that Ms. Kusumoto's meeting violated any leave procedures after school had closed for teachers and educational officers were on a very flexible schedule.

6. Equal Treatment: Did the Employer apply its rules, orders and penalties without discrimination to all employees? (Daugherty). 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. (Schwartz).

As noted above, Investigator Hookano focused on the wrong issue. Thus, analysis here is unnecessary. However, if we assume for the sake of argument that misuse of leave remains an issue, we offer the following:

CAS Kaninau: "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." (Recommendation to Terminate, pg. 5).

Dr. Kishimoto: "And the Department applies those policies, rules and regulations without discrimination. The proven offenses in this matter are quite serious and do rise to the level of termination." (Decision Letter, pg. 4).

Comment: By his own statement, CAS Kaninau admits that he was recommending different treatment in this case. Thereafter, even in the light of CAS Kaninau's affirmation that he was recommending different treatment, Dr. Kishimoto inexplicably follows his lead and makes a blanket statement that the Department punishes without discrimination. Query how Dr. Kishimoto, the deciding official, could, without further thought, fail to address CAS Kaninau's own affirmation that his recommendation to terminate was different in this case from other cases. Thus, CAS Kaninau and Dr. Kishimoto ignore the applicable rule entirely and, then, fail to address equal treatment even under their misplaced reliance on the wrong rule.

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to the DOE's consideration or lack thereof concerning equal treatment.

7. 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 with the Employer? (Daugherty). Mitigating and extenuating circumstances: Discipline must be proportional to the gravity of the offense, taking into account any mitigating, extenuating, or aggravating circumstances. (Schwartz).

As noted above, Investigator Hookano focused on the wrong issue. Thus, analysis here is unnecessary. However, if we assume for the sake of argument that misuse of leave remains an issue, we offer the following:

Comment: Again, Dr. Kishimoto uses the "quite serious" label to bring all misconduct into a range where termination is justified. She ignores completely the mitigating circumstance that, when school is out of session, many 10-month education officers do not adhere strictly to the same hours as when school is in session.

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to the DOE's consideration or lack thereof of whether the "punishment fits the crime."

8. Due process. An employer must conduct an interview or hearing before issuing discipline, must take action promptly, and must list charges precisely. Once assessed, discipline may not be increased. (Schwartz).

Investigating an event that occurred more than a year before a recommendation to terminate and without necessary consideration of Article 25(A)(2) violates due process.

Also, Dr. Kishimoto did not follow the DOE's own policy for due process. An employer's disregard of and failure to follow its own required processes for termination constitutes a lack of due process. Please refer to page 1 and 2 above which are incorporated herein by reference.

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to whether the DOE followed due process in this case.

9. Prior enforcement. An employee may not be punished for violating a rule or standard that the employer has failed to enforce for a prolonged period. (Schwartz).

As noted above, Investigator Hookano focused on the wrong issue. Thus, analysis here is unnecessary. However, if we assume for the sake of argument that prior enforcement remains an issue, we offer the following:

There is no indication that CAS Kaninau and, later, Dr. Kishimoto took this factor into consideration.

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to the DOE's consideration, or lack thereof, of prior enforcement.

10. Progressive discipline. When responding to conduct that is short of egregious, the employer must issue at least one level of discipline that allows the employee an opportunity to improve. (Scwartz).

As noted above, Investigator Hookano focused on the wrong issue. Thus, analysis here is unnecessary. However, if we assume for the sake of argument that misuse of leave remains an issue, we offer the following:

Dr. Kishimoto: "You and Mr. Moniz asked me to consider leniency as an alternative short of CAS Kaninau's recommendation for termination." As noted earlier, she also stated, "the proven offenses in this matter are quite serious and do rise to the level of termination." By this statement, Dr. Kishimoto includes the hours taken off campus during a period when many utilized flexible hours as "quite serious," thus rising to the level of termination.

Further Follow up: Under the CAB, Article 15, Section A which directs that "any relevant information specifically identified by the grievant or the Union to investigate and process a grievance shall be provided to them upon request within seven (7) working days," we will request relevant information and documents that pertain to Dr. Kishimoto's termination of Ms. Kusumoto because of this "quite serious" offense without any consideration of progressive discipline.

In this least serious of Dr. Kishimoto's "quite serious" offenses, there is again no showing of just cause to justify termination.

D. Accountability of Employees, Policy 201-2

Dr. Kishimoto throws this in as a catchall. As such, we incorporate by reference all arguments made with regards to specific incidents identified by Dr. Kishimoto above.

V. CONCLUSION

As shown in the foregoing, Investigator Hookano's investigation, CAS Kaninau's recommendation to terminate and Dr. Kishimoto's decision to terminate are fraught with errors and shortcomings as to applicable charges, notice, fair investigation, proof, equal treatment, penalty, due process, prior enforcement and progressive discipline. As such, the DOE fails to meet is burden of proving that Ms. Kusumoto's termination was for proper cause.

In making her decision to terminate Ms. Kusumoto, Dr. Kishimoto ignores that the primary function of workplace discipline should be to rehabilitate, not to punish, humiliate, or set an example. An employer should apply the lowest level of discipline that is likely to lead an employee to mend his or her ways. With punishment and setting an example as her goal, Dr. Kishimoto glosses over the steps necessary to prove proper cause and, instead, improperly buttresses her decision to terminate with "findings" and "conclusions" that, for the most serious of the charges is unintelligible. These form no basis from which a reasoned disciplinary decision can be made.

Indeed, Dr. Kishimoto's use of "and/or", her use of "quite serious" without comparison, her failure to address adequately or at all most of the steps necessary for just cause analysis mandates a conclusion that she terminated Ms. Kusumoto without proper cause. To conclude otherwise would change the DOE's contractual relationship with its education officers from termination based on proper cause to terminable at will.

VI. REQUEST FOR RELEVANT INFORMATION UNDER CBA ARTICLE 15 (HIGHLIGHTED AS A DEMAND FOR WHICH THE DOE IS REQUIRED TO RESPOND IN A TIMELY MANNER)

Under Article 15 A of the CBA, 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." Under this agreement, Ms. Kusumoto and Union requests the following:

1. Addressing the equal treatment, penalty, prior enforcement and progressive discipline steps necessary for proper cause analysis requires a comparison of how the termination of Ms. Kusumoto compares to the enforcement of punishment for other violations of the same rules upon which Dr. Kishimoto based her decision to terminate. As such, Ms. Kusumoto and Union requests copies of all DOE records related to charges, recommendations, decisions and eventual enforcement made from August 8, 2015 to August 7, 2018 related to the following policies identified by Dr. Kishimoto as having been violated by Ms. Kusumoto in this case:

   DOE Code of Conduct, Section B. Honesty states the following: 'The employee...shall maintain honesty in all professional dealings. The employee...shall not engage in conduct involving any form of dishonesty falsification, deception, misrepresentation or cheating."

   BOE Policy 201-1 Ethics and Code of Conduct states in relevant part, 'All employees, contractors, and volunteers of the public school system shall conduct themselves in an ethical manner and comply with federal and state laws, rules, regulations, policies, procedures and guidance to promote public trust and confidence in public education...

   Superintendent's Leave of Absence Memo states, in relevant part for Certificate Employees (Bargaining Units 05 and 06), 'All employees are responsible and required to give prior notification and obtain approval from their principal/supervisor prior to taking any leave of absence except for sick and emergencies..."

   BOE Policy 201-2 Accountability of Employees states in relevant part, '...it is the policy of the Board of Education (Board) that all Department of Education (Department) employees at school, complex area, and state levels comply with and implement Board policies and Department rules, regulations, and procedures. All Department employees will be held accountable for failure to comply with or implement Board policies or Department rules, regulations or procedures.

2. With reference to the equal treatment and penalty steps of Daugherty's analytical model, CAS Kaninau states, "(t)he 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." Bottom line, CAS Kaninau admits to imposing unequal treatment. With this admission before her, Dr. Kishimoto merely wrote that the Department punishes without discrimination. To determine Dr. Kishimoto's consideration or lack thereof of equal treatment, we ask Dr. Kishimoto, "what did she do in considering the equal treatment and penalty steps necessary for a showing of just cause?"

3. With Mike Nakasato's admission in October 2017 of having an affair with Ms. Kusumoto, we ask CAS Kaninau, "why did he not give Ms. Kusumoto forewarning of possible or probable disciplinary consequences of lying about the affair when he questioned Ms. Kusumoto in person on November 1, 2017?"

4. The DOE's Manual for Conducting Internal Investigations instructs that "Investigations should be conducted promptly and in a fair and objective manner." CAS Kaninau did not direct an investigation of the November 1, 2017 lying incident until after March 21, 2018. Thus, as being relevant to the 4th of Daugherty's 7 steps, Ms. Kusumoto and Union request copies of all correspondence, including, but not limited to, email, memos, written exchanges, minutes of meetings, discussing Ms. Kusumoto's lying after November 1, 2017 to August 21, 2018.

5. In line with our request relevant to determining why CAS Kaninau did not follow up with a prompt investigation or disciplinary decision shortly after November 6, 2017, we ask CAS Kaninau, "Why did you not move to discipline Ms. Kusumoto for lying in November 2017?"

6. We ask Dr. Kishimoto, "what consideration did she give to whether Ms. Kusumoto received notice forewarning her of the possible or probable disciplinary consequences for misconduct ranging from kissing to sexual relations on campus during work hours?"

7. Investigator Hookano uses text messages that she knew 1) was taken from private phones for which there is a reasonable expectation of privacy and 2) for which the person described in the graphic images created by the text messages had not consented to its disclosure. We ask Investigator Hookano, why she used and disclosed further the text messages without consent from Ms. Kusumoto, the victim of Cyd Nakasato's invasion of privacy and cyberbullying?

8. We also ask Investigator Hookano and CAS Kaninau why they did not recognize that Cyd Nakasato's email and its continued posting constituted cyberbullying.

9. In line with no. 7 and 8 above and as being relevant to whether there was a fair investigation and due process, Ms. Kusumoto and Union request copies of all correspondence, including, but not limited to, email, memos, written exchanges, minutes of meetings, discussing Investigator Hookano's use of the text messages to further her investigation. This would be for the period March 20, 2018 to August 7, 2018.

10. In determining the appropriateness of the penalty of termination, Dr. Kishimoto uses the

hateful and, in most part, unsubstantiated email sent by Cyd Nakasato on March 20, 2018 to bolster her conclusion that Ms. Kusumoto's actions had caused irreparable harm to the school. She uses this as an aggravating factor while ignoring testimony that Ms. Kusumoto's affair with Michael Nakasato went unnoticed by all three witnesses who testified in the investigation. Query how can Dr. Kishimoto attribute the harm caused by the email to Ms. Kusumoto when leaving the email posted after a request to take it down 1) violated numerous policies, 2) appeared to ratify the mostly unsubstantiated rants of Cyd Nakasato and caused irreparable harm to the school, Ms. Kusumoto, her family and friends. As such, Ms. Kusumoto and Union request copies of all correspondence, including, but not limited to, email, memos, written exchanges, minutes of meetings, discussing Cyd Nakasato's email, including how it should be handled, from March 20, 2018 to the present.

11. We ask Dr. Kishimoto, "in light of all the violations of policy and the irreparable harm to the school, Ms. Kusumoto, her family and friends resulting from the failure to remove Cyd Nakasato's hateful email, what steps has the DOE taken to investigate and administer appropriate discipline for these readily apparent violations?" This question is relevant to determining equal treatment, penalty, fair investigation and due process issues.

12. Shortly after its receipt of Cyd Nakasato's hateful email on March 20, 2018, the DOE refused to take it down and immediately embarked on an investigation, recommendation and decision that is fraught with errors and shortcomings as to notice, fair investigation, proof, equal treatment, penalty, due process, prior enforcement and progressive discipline. As such, Ms. Kusumoto and Union request copies of all correspondence, including, but not limited to, email, memos, written exchanges, minutes of meetings, discussing Ms. Kusumoto's purported misconduct in any way for the period March 20, 2018 to August 7, 2018.

13. Ms. Kusumoto and Union ask CAS Kaninau and Dr. Kishimoto to admit or deny that 10-month education officers often follow a more flexible work schedule without punishment after school is closed for teachers.

As noted above, under the CBA, the DOE has seven days to respond to the foregoing requests.

ADJUSTMENT REQUIRED:

Setting aside of Ms. Kusumoto's termination and award of backpay to compensate Ms. Kusumoto wholly for any salary lost.

I authorize the A.F.S.C.M.E. Local 152 AFL-CIO as my representative to act for me in the disposition of this grievance

Date_____ Signature of Employee _____

Disposition of Grievance: _____

THIS STATEMENT OF GRIEVANCE IS TO BE MADE OUT IN TRIPLICATE. ALL THREE ARE TO BE SIGNED BY THE EMPLOYEE AND/OR THE AFSCME REPRESENTATIVE HANDLING THE CASE.

ORIGINAL TO _____

NOTE: ONE COPY OF THIS GRIEVANCE AND ITS DISPOSITION TO BE KEPT IN GRIEVANCE FILE OF LOCAL UNION.

THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES