

Kamehameha Schools Faculty Association

P.O. Box 894163, Mililani HI 96789

NEGOTIATIONS BEGIN FEBRUARY 12

Yes, our third Collective Bargaining Agreement expires June 30th, 2004. Based on your responses to our "Big Picture" survey (see Oct/Nov 2003 KSFA newsletter) you know and KS knows what will be our general objectives and rationales for these pending negotiations. For those who cannot recall the results of that survey, the vast majority responded "yes" to all seven of the following questions:

Should KSFA insist that management's rights be clearly defined and limited in the CBA? (YES: 98 No: 0)

Should KSFA insist that any other broad and ambiguous language in the CBA that could potentially be exploited be clearly defined and limited? (YES: 98 No: 0)

Do you believe the time frames for filing a grievance or taking it to the next step should be automatically extended if the grievant or KSFA notifies KS that more time is needed to investigate and decide if they are going to file or go to the next level? (YES: 92 No: 4 Other: 2)

Do you wish KSFA to negotiate an upper limit to the total time these (extra curricular) duties can consume and develop some rules so that we can keep track of time spent and make them as equitable as feasible? (YES: 88 No: 9 Other: 1)

Do you believe we should continue to base our pay proposals on a competitive rationale? (YES: 93 No: 4 Other: 1)

Do you believe we should continue to accept the same benefits as other KS employees? (YES: 93 No: 1 Other: 4)

Do you wish KSFA to negotiate a contract so the disciplinary non-renewals are grievable?(YES:94 No: 3 Other: 1)

We believe all seven objectives are reasonable and fair and are hopeful that management will agree. Your KSFA negotiating team consists of Moana Leong, Diane Tanner-Cazinha, Don Kroessig, Bill Follmer, Rick Heyd, Larry McElheny, Jim Slagel, Nathan Nishimura, Dee Mecham, and Jeremy Dulatre. Our team works very well together and has a nice mix of experience and new blood. Feel free to ask anyone of them how things are going or to express your concerns.

Nathan, Dee, and Jeremy will be focusing on our pay proposal and are replacing Larry Mordan, who did a fantastic job on our second and third CBA pay negotiation. Two retiring negotiators are Brian Riggs and Deborah Johnson. Both did an outstanding job and were regretfully allowed to retire. So fear not, future negotiators; being on the

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team is not like a life sentence or permanent commitment.

Speaking of commitments, you, our members, play a large role in this negotiating process. Nathan, Dee, and Jeremy, our pay proposal specialists, could use some additional help in gathering data and fashioning a rationale in support of the complete pay proposal. Those of you who know colleagues at Punahou, Iolani or the DOE could be valuable resources in providing pay and benefits information, especially recent changes or

pending changes.

Even if you are not a pay and benefit resource, we still need you to keep abreast of the negotiations so that when we come back to you in May or June (if all goes well), you will be able to vote wisely on whether or not to ratify the proposed CBA. We are all in this together. Let us hope for collaborative negotiations that lead to an even better contract than we have now.

— Rick Heyd, unit 9-10

Getting Excited About Ambiguity

“O, my love’s is like a red, red rose...”

(From Robert Burns’ 1797 rewrite of an older street ballad written by Lieutenant Hennes, as a farewell to his betrothed.)

I suppose Lt. Hennes could be accused of being ambiguous. Did he confuse the woman he loved with a plant? Do you think he should have described her more accurately? He could have said “Gertrude’s beauty is like a red rose not yet faded.” A name would have provided clarity and commitment (so that the non-Gertrudes the lieutenant had recently been seen with could be distinguished from his true love). “Beauty” would have identified the rose-like attribute he prized and removed all doubt that he could differentiate between objects in the plant and animal kingdoms. Adding “not yet faded” would have refined the age and state of decay of his beloved.

Something tells me all of you would prefer the Burns-Hennes version to the above clearer but unromantic parody of the Lieutenant’s farewell. So when is ambiguity bad and clarity necessary? Ironically, the answer isn’t clear. There are things we can’t know and things we don’t want to know as well as things we need to know. The need for ambiguity or clarity depends upon the players and the consequences. “Ambiguous” is not a modifier

like “beautiful” or “ugly” which are automatically positive or negative. When words or documents are criticized as being “ambiguous,” it’s normally a mildly unfavorable judgement worthy of correction but not alarm or condemnation. Clearly, nothing to get excited about. Or is it? What if ambiguity was intentionally used in a scheme to accomplish an objective unattainable by honest means? Would that get you excited about ambiguity?

Here’s a hypothetical you can appreciate: Suppose that the employees of an organization voted to form a union. By law, the employer has to negotiate in good faith with the union and attempt to develop a package of pay, benefits and conditions of work that is mutually agreeable. Assume also that because of market factors and reasonable expectations on both sides, a mutual agreement on pay and benefits is assured. However, the laws that spell out a long list of management rights also grant limited rights to the union (primarily the right to enforce the agreement through the grievance process if the agreement is violated by the employer and the right to bargain on certain mandatory subjects). Unfortunately, those union rights are perceived by the employer as an unacceptable restriction on the employer’s “flexibility.” The employer cannot legally require the union to give them up as a condition to reaching an agreement. How can the employer nullify

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those rights since the union may not yield them knowingly? The answer is ambiguity. Make the agreement tediously long, offensive, and confusing and bury within it ambiguous language that has two or more interpretations. Under one interpretation, the union has the right to grieve and bargain on mandatory subjects and under the others it can’t. But how can management insure the contract language is contrived to contain the necessary distractions and multiple interpretations? Easy, write it yourself and threaten no first contract without years of litigation unless the union accepts your language. But won’t the union know that their rights are in danger and change the ambiguous language when the first contract expires? Not if management conceals its intentions and assures them during negotiations that the contract language does not deprive them of their rights. Later, when management actually exploits an ambiguity and claims that the union does not have the rights it thought it had, it can deny ever making those assurances and hope that its language has created enough confusion and that memories have faded sufficiently so that its scheme will not be unraveled, revealed and condemned.

While we cannot prove that KS imposed its ambiguous contract with the intent to deprive KSFA of its legal rights, there doesn’t seem to be any other plausible explanation.

Clearly, it authored the ambiguities with that effect. Resisted our attempts to clarify and remove them. Threatened extended litigation if we insisted on changing them. Assured us of their good intentions and asked for our trust. Exploited several ambiguities during our grievances and denied under oath making assurances that protected our rights.

For those spared the experience of observing Katz & McGuire perform their acts of insidious deception during first contract negotiations, it’s hard to appreciate what a masterpiece of obfuscation they created in crafting our first collective bargaining agreement. Even with the signing of

our second and third agreements, which overcame passionate HR resistance to eliminate numerous ambiguities that threatened our right to grieve, the agreements were far from clear. After discovering how little KS’ assurances were worth during the arbitration of our disciplinary non-renewal grievance, we searched the entire agreement for ambiguous passages. We identified 67. At least six of those contained interpretations that could deprive us of our right to grieve or bargain on mandatory subjects. Three of the more exciting are:

1. Section 20.1: “Covered Employees shall be subject to discipline ... for just and sufficient cause ... renewal of a Covered Employee’s employment for a new school term shall be at the Employer’s discretion.”

Ambiguity and Consequence: Is just cause a criteria for all or just some disciplinary actions taken by the Employer? We understood the above passage meant all. That understanding was so clear that we didn’t attempt to change the wording during our second and third CBA negotiations. Supporting that interpretation, the employer assured us that its discretion to non-renew would not trump other provisions of the agreement. Yet at the arbitration, Buddy testified under oath that KSFA gave KS the “unfettered right” to non-renew and the HR representative testified that she was absolutely certain we knew we had no right to grieve non-renewals. As a result of this ambiguity, the arbitrator allowed the employer to terminate a KSFA member for disciplinary reasons without deciding whether the employer had met the just cause standard.

2. Section 11.2A: “... Any resolution shall be consistent with ...the policies and procedures of the Employer.”

Letter of Understanding (also part of the CBA): “... Sections 11.2A and 11.6 ... do not restrict the Arbitrator’s traditional authority to construe the CBA ...”

Ambiguity and Consequence: We don’t

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New faculty members (and a few old ones): please consider filling out and sending this form to Human Resources. Auto dues deduction saves our treasurer time and effort.

AUTHORIZATION FORM FOR DEDUCTION OF UNION DUES/SERVICE FEE OUT OF WAGES

I, _____, an employee of Kamehameha Schools (“KS”) voluntarily agree to have KS take out of my wages regular monthly dues as established by the Kamehameha Schools Faculty Association (“KSFA”) in accordance with its Constitution and Bylaws, or a regular monthly Service Fee not to exceed KSFA’s regular monthly dues for its members as certified to you in writing by KSFA, and to turn over to KSFA any and all such monies on the following conditions:

1. This authorization shall become effective upon the date set forth below and cannot be cancelled for a period of one year from this date or until the termination of the existing collective bargaining agreement between KS and KSFA, whichever occurs sooner, unless cancelled sooner as provided in Section 2 below.

2. I agree and direct that this authorization shall be irrevocable for successive periods of one year each, or for the period of each succeeding applicable collective bargaining agreement between KS and KSFA, whichever shall be shorter unless:

- (a) I cancel this authorization by written notice to KS at any time or within ten days after the expiration of any such one year period; or
- (b) In the case of the expiration of any applicable collective bargaining agreement between KS and KSFA during any such one year period, I cancel this authorization by written notice to KS at any time during the period following the expiration of the applicable collective bargaining agreement and ten days after the effective date of any new agreement.

3. This authorization is subject to sufficient wages being available to comply with all other required deductions and existing federal and state laws. This authorization shall be suspended during any period in which there is no collective bargaining agreement in effect between KS and KSFA. This authorization shall end if my employment with KS ends. This authorization is made pursuant to the provisions of Section 302(c) of the Labor Management Relations Act of 1947.

Date: _____ Employee Signature: _____

Mailing Address: _____

SS# _____

Receipt of the foregoing authorization is acknowledged:

Employer _____

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know what “policies and procedures” the employer wants an arbitrator to be consistent with. However, since KS’ policies are voluminous, ever changing and inconsistent with each other, this ambiguous requirement is a nightmare. The LOU was added in our third CBA to eliminate the power of the employer to write policies that could preempt any remedy an arbitrator might impose if KS lost a grievance. Whether or not the LOU would allow an arbitrator to fulfill his/her traditional role of enforcing the CBA is uncertain.

3. Section 22: “... consultation shall be construed as the exchange of ideas or reactions to a particular subject covered by this Agreement, or the solicitation of input regarding the particular subject, and does not require resolution through agreement.”

Ambiguity and Consequence: This passage is so unclear, it could mean nothing or almost anything. It’s typical Buddy talk which means it’s intended to confuse us or to harm us. We believed it to be the former but now that we have seen the employer take some pretty extreme interpretations with the language in our CBA, we are not sure. Could the employer interpret it to mean that consultation is any discussion between the Employer and KSFA? Or, could they think it means that once something has been discussed with the Employer (even if it is a mandatory subject of bargaining or the subject of a grievance), that because of this consultation the employer no longer has to attempt to resolve the matter through agreement?

What kind of leaders would choose a strategy based on ambiguity? Aside from losing the moral high ground and appearing hypocritical when praying for divine guidance or appealing to employees for their understanding and support, the practical consequence of such a strategy is to alienate your work force. Treating your employees as adversaries and with contempt neither improves morale nor inspires respect and trust. With or without union presence, employees and the employer

are a team and must work together. Disagreements are inevitable, but that doesn’t make us adversaries. As employees, teachers have a special need for their leaders to behave honorably because they are also the leaders and role models for our students. We want to proud of our leaders and our school. It hasn’t been easy. If religious and cultural values drive KS’ actions, you have to ask how KS could author and sign an agreement that it apparently never intended to honor.

As it has been a long time since Lokelani and the Majority Trustees, it will be a hard sell to give them credit for this current breach of trust. They were gone a few months after the first CBA was signed and had nothing to do with the failure of our leaders to honor the agreement, live by its assurances and strive for clarity. Instead, they protected and exploited ambiguous language to gain operational advantages and to avoid being held accountable by an arbitrator who could enforce the agreement through the grievance process. If there is a good defense that explains KS’ behavior, now would be a nice time to present it. The closest thing to an explanation so far has come from a former high level KS administrator who admitted “the gloves come off during an arbitration.” It’s an ambiguous admission but nonetheless very revealing. In a grievance situation, the employer is either innocent or guilty of a contract violation. If innocent, the employer can win easily without alienating the work force by letting the truth make their case, hardly a need for “the gloves to come off.” But if it’s not innocent and it doesn’t want to admit its error or comply with the contract, then there is a need for the employer to fabricate evidence to support its case. The gloves of honesty and fairness should have prevented it from exercising this option. Isn’t it worse to loose self respect than to loose a grievance? In the absence of any reason to trust the employer to live by its assurances, KSFA is excited about eliminating ambiguities in our fourth CBA.

— *Bill Follmer, Unit 9-10*