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December 30, 2011

RECEIVED

JAN 03 2012

Telephone: (808) 521-6927

Hawaii State  
Teachers Association  
Hilo, Hawaii

Rae A. Yamanaka  
HSTA Hilo Uniserv  
191 Aupuni St. Ste. 237  
Hilo, Hawaii 96720

Kalei Rapoza  
Labor Relations Specialist, DOE  
75 Aupuni St., Rm. 203  
Hilo, Hawaii 96720

Re: Arbitration Between Hawaii State Teachers Association and Board of Education,  
State of Hawaii, HSTA Case No. H-10-01 (Grievant: Vanessa Ott)

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Dear Ms. Yamanaka and Mr. Rapoza:

Enclosed is my Arbitration Decision and Award.

By e-mail attachment that may be dated either today or next year, I will transmit the same Decision and Award, plus my Statement For Professional Services rendered. That e-mail will be addressed to both of you, as well as to David Forrest.

It was a pleasure working with you both, and with David. Best Wishes for a dispute free 2012!

Very truly yours,



Frank Yap, Jr.

Encl.

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JAN 03 2012

Hawaii State Teachers Association  
Hilo, Hawaii

BEFORE ARBITRATOR FRANK YAP, JR.

STATE OF HAWAII

In the Matter of the Arbitration Between	)	
	)	HSTA No. H-10-01
HAWAII STATE TEACHERS ASSOCIATION	)	DOE No. 10-5-066
	)	
Union	)	Grievance of Vanessa Ott
	)	
And	)	ARBITRATOR'S DECISION AND AWARD
	)	
STATE OF HAWAII, DEPARTMENT OF EDUCATION	)	Appendix A
	)	
	)	
Employer	)	
	)	
_____	)	

**ARBITRATOR'S DECISION AND AWARD**

**I. INTRODUCTION**

This matter is before the Arbitrator on a grievance filed by the Hawaii State Teacher's Association (hereinafter "Union" or "Association"), on behalf of its member, Vanessa Ott (hereinafter "Grievant") against the Department of Education, State of Hawaii (hereinafter "Employer" or "DOE").

The grievance involves Ms. Ott's request in November 2009 for a key to unlock a metal gate's padlock, which when closed and locked, prevents access to the roadway into the Na'alehu Elementary School campus which leads to a parking area near the Grievant's assigned classroom. The particular portion of the grievance which is before the Arbitrator alleges a violation of Article II, Sections C and D of the July 1, 2009 through June 30, 2011 Collective Bargaining Agreement (hereinafter "Agreement") between the Union and the State of Hawaii Board of Education, although other Article provisions are also cited for completeness.

A two day arbitration hearing was conducted – on October 26, 2011 in Na'alehu and on October 27 in Hilo, Hawaii. The October 27 proceeding was conducted by video conference as Employer's witness was located on Oahu. Rae A. Yamanaka and David Forrest, Jr., the Union's

Uniserv Directors represented the Union and Grievant; Kaleihi'iikapoli P. Rapoza, Employer's Labor Relations Specialist represented the Employer.

The record of proceedings was preserved by stenographic transcript. The parties were afforded a full opportunity to submit evidence, to examine and cross-examine the witnesses, to present rebuttal evidence, and by written post-hearing memoranda, to present argument on the issues. The advocates fully and fairly represented their respective clients, and their respective positions were appropriately presented at the arbitration hearing and in their post-arbitration memoranda which was to have been simultaneously filed on December 13, 2011. The Union filed its memorandum on December 13. By mutual agreement between the parties, Employer was allowed until December 27 to file its memorandum, which it did on December 21.

The Union's witnesses were Teddy Burgess and Grievant. Mr. Burgess was principal of Na'alehu Elementary School (the "School") and the person who ended the gate key policy.

The Employer's witness was Beth Schimmelfennig, the Employer's Civil Rights Compliance Specialist and the person who drafted letters, signed by Susan Kitsu, the Director of Employer's Civil Rights Compliance Office, that denied Grievant's gate key request.

The parties stipulated this matter is arbitrable, that the preliminary steps in the grievance process had either been met or mutually waived, and that this matter is properly before the Arbitrator for disposition.

Prior to the hearing, Employer submitted Exhibits B through E, and the Union submitted Exhibits 2 through 22. At the outset of the hearing, Joint Exhibit 1, the pertinent Collective Bargaining Agreement, and Union Exhibits 23 through 27 were submitted. The Employer's, the Union's and the Joint Exhibit were accepted into evidence, as there was no objection raised by the parties.

## **II. ISSUE**

1. Whether Grievant's request for a gate key for School Year 2009-2010, was a reasonable employment accommodation request.<sup>1/</sup>
2. If so, what is the appropriate remedy to which Grievant is entitled.

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<sup>1/</sup> The Union framed the issue as "Did the Employer violate the rights due to disabled employees and the Collective Bargaining Agreement, by denying Vanessa Ott's requests for reasonable disability accommodations due to her medical condition and status as a disabled employee?" As phrased, the issue is overly broad, since what Grievant sought, and what Employer denied, was a key to unlock a padlock that secured the School's roadway gate from being opened before and after a particular time during the 5-day work week, and during the weekends and holidays.

### III. APPLICABLE COLLECTIVE BARGAINING AGREEMENT PROVISIONS

The following provisions of the Agreement's Articles relevant to this proceeding are as follows:

#### Article II – Non-Discrimination

\* \* \* \* \*

- C. Further, the Employer agrees not to discriminate against any employee of Bargaining Unit 5 with regard to race, creed, color, national origin, sex, marital status or disability, or any other way as prohibited by law.
- D. The Employer and the Association recognize that individuals with disabilities may require reasonable accommodations in accordance with the Americans with Disabilities Act of 1990 (ADA).

\* \* \* \* \*

### IV. BACKGROUND

Grievant began employment with the Department of Education at Na'alehu Elementary School at the beginning of School Year 2007-2008 as a third grade classroom teacher.

Grievant has had a medical condition since an early age, for which she underwent lumbar surgeries in 1998 and in 2004. Her primary care physician, C. Eric Lindborg, M.D., a family practitioner at the Kaiser Permanente's Kona Clinic opined that Grievant has a medical disability that substantially limits more than one major life activity, and for which she satisfies the criteria to obtain a State of Hawaii Parking Permit for Persons with Disabilities<sup>2/</sup>. Grievant testified she has such a removable windshield placard that hangs from her vehicle's rearview mirror, as well as a special vehicle license plate. (Transcript p. 82, Vol. 1)

Sometime in early 2009 during School Year 2008-2009, Grievant requested certain employment accommodations be made because of her physical disability. An agreement dated February 9, 2009 was eventually made between Principal Burgess and Grievant which provided that: 1) Cleaning of Grievant's classroom would be scheduled during the summer, rather than during the fall, to enable Grievant more time to arrange her classroom for the start of a new school year; 2) Grievant would be provided personnel assistance if she needed to lift or move items weighing more than 20 pounds; 3) Grievant would not be assigned tasks requiring sitting, standing or walking greater than 30 continuous minutes; 4) the administration recognizes that

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<sup>2/</sup> See Union Exhibit 2, a letter dated December 10, 2008 and Union Exhibit 15, a letter dated December 1, 2010 both authored and signed by Dr. Lindborg.

Grievant may take a longer time to accomplish tasks involving walking, lifting or bending, and is to provide Grievant sufficient notice or to adjust the deadlines for her to accomplish the particular task; 5) for meetings, trainings and parent events held in the gymnasium or cafeteria, a chair be reserved for Grievant's use and positioned in such a manner as to permit her to view the on-goings without having to twist her spine to do so; and 6) the Administration will support disability sensitivity training for all staff personnel.<sup>3/</sup>

On November 17, 2009 in School Year 2009-2010 (Union Ex. 4), Grievant made a request transmitted via e-mail to Principal Burgess that she be provided a gate key for her exclusive use for the balance of School Year, since the existing gate key policy<sup>4/</sup>, in her view, was "not workable". The existing policy allowed classroom teachers to obtain a gate key from the School's secretary ("SASA") on a "sign-out" system .

By e-mail dated November 24, Grievant sent Principal Burgess a follow-up, since she had not received a response. (Union Ex. 4)

By e-mail dated November 25 sent to all School staff members, Principal Burgess announced that the gate key would no longer be made available, and that classroom teachers were discouraged from coming onto the School campus on "non-school days or during non-school hours". The cited reason for terminating the gate key policy was "safety". (Union Ex. 4)

By e-mail dated November 29 (a Sunday), Grievant requested a gate key, and access to the School campus on the weekends, as a reasonable accommodation for her disability. Her email contained the reasons for her request. (Union Ex. 4)

By e-mail dated November 30, Principal Burgess responded, advising her to submit a particular DOE form, because Grievant was seeking an addendum to the February 9, 2009 Accommodation Agreement.

By e-mail dated December 2, 2009, Grievant complied with Principal Burgess' request and transmitted the appropriate form, RA-1. One RA-1, dated December 1, requested the gate key as a reasonable accommodation; the other RA-1, requested modification to the February 9 Accommodation Agreement to include the gate key request. (Union Ex. 5)

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<sup>3/</sup> Exhibit 3, entitled "Agreement between Principal Teddy Burgess & Teacher Vanessa Ott Regarding Disability Accommodations".

<sup>4/</sup> The metal gate was opened between 5:30 a.m. and 5:30 p.m. on school days, but was closed and locked before and after those hours, and on Saturdays, Sundays and School holidays. There were 5 gate keys assigned to specific persons – the School principal, vice-principal, SASA and Head Custodian. At least one gate key was available for use by other School personnel, on a sign-out basis,. Two additional keys were available on a written request basis to specific community organizations who regularly utilized the School gymnasium and School cafeteria.

By letter dated December 15, Director Kitsu notified Grievant that Grievant's RA-1 form pertaining to the requested gate key had been received on December 3, and that her request for a gate key as an employment accommodation was denied. That letter contained the reasons for denial. (Employer's Ex. D) By letter dated December 16, Ms. Schimmelfennig acknowledged receipt of Grievant's letter dated December 9 pertaining to certain questions Grievant raised pertaining to the gate key and reiterated Grievant's request is denied. (ER's Ex. E)

On January 22, 2010, the Union filed a Step 1 grievance, alleging, *inter alia*, that:

"... additional requests for accommodation based on the same physical disability status have not been made..." (Union Ex. 6)

On February 1, 2010, Employer acknowledged receipt of the Union's Step 1 grievance. (Union Ex. 7) On February 18, the Step 1 grievance was amended to add another allegation that stated:

"Revision: 2/18/10: A recent incident of discrimination/retaliation is the closing of Ms. Ott's Lotus Notes account which restricts the communication options available to Ms. Ott." <sup>51</sup>

On March 22, 2010, a Step 1 meeting was held. Because the Union had not received any Step 1 determination from Employer as of July 1, 2010, by letter dated July 1, the Union filed a Step 2 grievance as is permitted by Article V, Section F (d) of the Bargaining Agreement. (Union Ex. 9)

On August 19, 2010, a Step 2 meeting convened. Present at this meeting were Grievant, her Union representative Ms. Yamanaka, and the Superintendent's designated representative, Mr. Rapoza.

By letter dated October 5, 2010, Employer denied the Step 2 grievance. As Employer's rationale for its denial, Mr. Rapoza wrote:

"The issue of a hostile workplace does not stem from the relationship between Principal Burgess and the Grievant per se, rather from the Department's rejection of the Grievant's requests for reasonable accommodation. The fundamental question is whether or not providing the Grievant a gate-key so that she can park closer to her classrooms on weekends is a reasonable request. The Department's CRCO found that it was not, and I am in agreement.

*The request for a gate key is unreasonable because the request is for weekend access to the campus.* The Department does not require teachers to work on weekends, and is contractually prohibited to do so. Though as a testament to their professionalism, many

<sup>51</sup> Several days before the Arbitration hearing began, the Arbitrator queried the Union to determine whether the matter regarding the "closing" of Grievant's Lotus Notes e-mail account was an issue for the Arbitrator to consider, since the Pre-Arbitration Statements submitted by the parties on October 19, 2011 identified only the gate key denial as in issue. The Union responded that Grievant's access to her Lotus Notes e-mail account had been restored by the current School principal, and thus that Grievance amendment was moot for purposes of this Arbitration hearing.

teachers prepare for upcoming lessons during off-hours. Here, *it is not reasonable to grant the accommodation for work where that accommodation does not occur during work time.* . . .

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**Conclusion:** Upon review of all the information presented, it is determined that the request for a gate key for the Grievant is not a reasonable accommodation. . . .” (Emphasis Added)  
(Union Ex. 11)

By letter dated October 25, 2010 addressed to Employer, the Union made a Demand for Arbitration. (Union Ex. 12) By letter dated May 31, 2011, acknowledged as received by Employer in its June 6, 2011 letter, Employer was notified that the Union’s Board of Directors authorized the matter to proceed to arbitration. (Union Ex. 13)

By letter dated June 3, 2011, the undersigned was contacted and agreed to serve as Arbitrator.

## V. POSITIONS OF THE PARTIES

### A. The Union’s Position

The Union contends that as a Disabled Person, Grievant is entitled to make requests for reasonable accommodations. Her request that she be allowed a gate key for the School Year is a reasonable accommodation request because the provision of a gate key does not impose “undue hardship” upon Employer, since it is neither a financial burden nor operationally disruptive. The Union also contends that Principal Burgess’ reason for discontinuing the gate key policy because of computer thefts was not articulated as the reason for denying Grievant’s request, and does not in any event, constitute an “undue hardship” if the request were approved.

### B. The Employer’s Position

Employer contends that a request for employment accommodation may be denied when such request constitutes an “undue hardship” and asserts that Grievant’s request constituted “undue hardship” because the thefts of computer equipment raised serious campus security concerns.

Employer additionally contends the accommodation Grievant seeks, does not pertain to her ability to perform the “essential functions” of a classroom teacher because that activity is to be performed during the period specified by the Collective Bargaining Agreement. Employer submits the primary function of a teacher is to teach students, and the Agreement dictates the number of minutes of both instructional time and preparation time that teachers are required to work during the work week, and further dictates the number of hours within a teacher’s workday

and the number of workdays within a work week. Employer therefore asserts that because Grievant chose to work during a time outside the time period authorized under the Agreement and teaches no students on the weekend, Employer properly denied her employment accommodation request.

## **VI. RELEVANT TESTIMONY**

### **A. Teddy Burgess**

Mr. Burgess testified about the gate key policy that existed when he began as School Principal, why that policy was changed, why he considered Grievant's request not reasonable, and that he did not require classroom teachers to work beyond normal work hours nor forbid them from going to their classrooms on the weekends. (Transcript p. 41-42, Vol. 1)

Principal Burgess testified he started his tenure as School Principal in January of School Year 2007-2008, and served as principal until the end of School Year 2010-2011. He currently serves as principal at Konawaena Middle School. (Tr. 14-15) At the time he began his tenure as School Principal, the School Administrative Services Assistant ("SASA") and Head Custodian already had gate keys. (Tr. 43) He obtained a key for himself, and provided one for the School's Vice-Principal. During his tenure, he identified having a different vice-principal every School Year, and in School Year 2010-2011, there were two vice-principals assigned concurrently to the School. Both vice-principals were assigned gate keys. (Tr. 45)

Principal Burgess recalled there were between 2-to-5 gate keys available for use by both the School staff and community organizations. (Tr. 22) For the School staff – which included classroom teachers, educational assistants, the cafeteria manager, and custodians (Tr. 40) – the policy that was that the Staff member would ask the SASA to use the key, and the SASA would "sign-out" the key to that Staff member. For community organizations, the requestor was required to complete a DOE "use of facilities" form before the decision whether to release the key was made. (Tr. 18)

Principal Burgess stated he terminated the gate key sign-out policy for the School staff because of thefts of computers from the School's computer lab and from some classrooms. (Tr. 19) He recalled there were two or three police reports filed because of these thefts. (Tr. 22) He stated it was his decision to "discontinue" the gate key checkout policy for School staff and that the termination of that policy "specifically coincided with the thefts of our computer inventory". (Tr. 19, 39) He reasoned:



“So my thought as the principal at the time was it’s reasonable to limit the number of keys that were going out because we were losing literally thousands of dollars of inventory, and we were unable to determine who was responsible for that, but . . .the break-ins did happen after-hours and on weekends, where we were losing equipment. So my action was to discontinue the gate key checkout at that point.” (Tr. 19)

The policy allowing community organizations to obtain a gate key was not terminated, because there were no inventory losses from the cafeteria or gymnasium facilities, or from the one classroom used by a church community organization. (Tr. 20-21)

Principal Burgess indicated he did not consider Grievant’s gate key request as reasonable under the circumstances, stating:

“I don't think it was reasonable based on the fact that we were losing thousands of dollars of inventory, and I had serious concerns with the security of the campus. So in my mind, it [her request] made it an unreasonable request because anytime I hand out a key, I'm allowing one more potential avenue for someone to take things and things disappear.” (Tr. 25)

Principal Burgess was unable to identify the date he terminated the gate key policy for the School staff, other than to recall its termination coincided with the computer thefts and that it occurred during the fall semester of School Year 2009-2010. (Tr. 28) He testified that as a school principal, he had the authority to rescind the key gate sign-out policy and did not need prior approval from his superiors – however he did notify the Complex Area Superintendent of his decision. (Tr. 46-47)

#### **B. Vanessa Ott**

Ms. Ott testified about the nature of her physical impairment, how it affects her ability to work as a classroom teacher, the reason she sought a gate key, her perception of the sequence of events surrounding the denial of her gate key request, and her contentions why her request is a reasonable employment accommodation and her belief that she was the subject of discrimination.

Ms. Ott testified she experiences chronic back pain, attributable to a physical condition that affects her balance causing her to use a cane for mobility assistance. She describes the pain as of a “cumulative nature” which increases with certain activities and progresses as she maintains her activities. (Tr. 51) As a result, her capacity to work steadily for an extended period of time is diminished, she is likely to require a longer time period to complete certain

tasks, and needs a longer time to recuperate.<sup>61</sup> (Tr. 66-67) When asked why she felt she needed to work on the weekend, rather than stay longer at school during the school day, she stated:

“I always work at least nine hours a day as it is. So I am putting in extra time, and that’s about [all] what I can handle in one day. So if I can go home and rest and come in on the weekend, that buys me another five hours of time during the week. . . . . So me needing to come in on the weekend is getting extra time for me to do my job better. (Tr. 42, Vol. 2)

She stated that used to work most weekends on campus, both Saturday and Sunday. For School Year 2011-2012, she estimated working about every other weekend, and only day rather than two. (Tr. 75-76) As she explained:

“I’ve become very de-motivated about trying to accomplish this because my experience has been that it’s really very difficult to deal with this whole thing of dragging my stuff.

\* \* \* \* \*

. . . . . I would prefer to do more because there is so much work that has to be done. I don’t have my exemplary student work hanging up on my bulletin board because I don’t have time to put it up. I would prefer to do more so I could do a better job. I think I do a good job now, but I’m a perfectionist and would prefer to do a better job . . . (Tr. 75-76)

Ms. Ott testified she requested a gate key to enable her to park her automobile closer to her classroom to enable her to continue working on the weekends. (Tr. 64) If she were not allowed vehicle access into the campus, she would have to park alongside the main road outside the fence surrounding campus and would have to pull a two-wheel cart containing her school materials from where she parked, through a constructed opening in the fence, then across the playground and then into her assigned classroom. If she had the gate key, she could park in a paved lot adjacent to the main building.<sup>71</sup>

At the time Grievant requested the gate key on November 17, 2009, she was on authorized medical leave, which she testified began in the first week of November. (Tr. 44) She

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<sup>61</sup> Her diminished capacity caused Grievant to seek certain employment accommodations.. After her first year teaching at the School, Ms. Ott testified she requested that the cleaning of her classroom by the custodial staff be moved from the traditional time just before student instruction begins in the Fall to an earlier date, in order that she have more time to prepare her classroom for the incoming students. (Tr. 51, 80) That request was denied and a grievance was filed. Discussions with the administration followed resulting in the Disability Accommodation Agreement, dated February 9, 2009. Thereafter that grievance was withdrawn.

<sup>71</sup> Before the hearing at Na’alehu Elementary School began, the Arbitrator was shown the location where Grievant typically parked her vehicle when she went to her classroom on the weekend. He walked the described area. Grievant typically parked near the stop sign shown in Union Ex. 20 which is located at the corner of the campus access road and Mamalahoa Highway, and crossed the flat grass playground fronting the main building where the School’s office is located. Grievant’s 3<sup>rd</sup> grade classroom was located at one corner of the main building, and could be accessed by a constructed ramp from a concrete sidewalk that separated the playground from the main building.

Grievant currently teaches 6<sup>th</sup> grade math and science. (Tr. 49) Her classroom is the end-unit of the recently constructed concrete-block air-conditioned building. When the security gate is locked, this location may be accessed from where she would park on Mamalahoa Highway, by walking along the paved campus access road.

stated the medical leave was extended for two additional weeks. She stated she was then placed on DOE directed leave because of an investigation, and when that investigation was completed in March or April 2010, she remained on DOE directed leave pending yet another investigation – accordingly, she did not work as a classroom teacher from the first week of November through the end of SY 2009-2010. (Tr. 44)

Ms. Ott stated there was no gate key sign-out policy at the time she made her gate key request in November 2009. (Tr. 57, 58) She based that contention upon what transpired in SY 2008-2009. According to her, another teacher who was in a wheelchair because of an automobile accident asked the Association Policy Committee (“APC”) for assistance in obtaining a key gate, because that teacher’s request had been denied. Ms. Ott was a member of the APC at that time. (Tr. 56) She further stated that when Principal Burgess notified the School staff via e-mail on November 25, 2009 that the gate key would no longer be available, the reason provided was “safety”, not campus security. (Tr. 60) She testified that it was not until the APC’s chairman issued a message, clarifying that teachers are not barred from coming onto the School campus during non-school hours, did she learn in an e-mail message from Principal Burgess, that campus security due to concerns about thefts, were among the reasons for the denial of her gate key request. (Tr. 60)

Ms. Ott testified there is no gate key sign-out policy for SY 2011-2012, and that she has not asked the current School principal for a gate key. (Tr. 81)

### **C. Beth Schimmelfennig**

Ms. Schimmelfennig testified she has been the DOE’s Civil Rights Compliance Officer since 2002, and during her 32 year tenure with the DOE, has held various teaching and administrative positions. She testified she was the person who drafted the letters dated December 1 and December 15, 2009 that was signed by the DOE’s Director of the Civil Rights Compliance Office and which disapproved Grievant’s requests for a gate key. (TR. 10, Vol. 2)

In referencing the December 1, 2009 letter, Ms. Schimmelfennig stated that prior to drafting that letter, she spoke with Principal Burgess who expressed his concerns

“ . . . . about health, safety, and liability issues, as well as campus security in after hours, meaning on the weekends. . . .” (Tr. 10)

While testifying, she referred to notes she had taken during that telephone conversation. In referencing her December 15, 2009 letter, she stated that she took Grievant’s gait impairment into consideration when disapproving the RA-1 form Grievant filed. (Tr. 12) She also testified

about receiving a similar request for a gate key to access an Oahu school, which was also denied for the same reasons of safety and campus security. (Tr. 13-14)

During cross-examination Ms. Schimmelfennig was questioned why the gate key would not be considered a reasonable accommodation, given the School's recognition in the February 2009 Accommodation Agreement that Grievant may need a longer time to accomplish tasks involving walking, lifting or bending, and is therefore to provide Grievant sufficient notice or to adjust the deadlines for her to accomplish the particular task. She responded that the gate key request was not a reasonable accommodation request

“ . . . because there is ample time within each work day for her to accomplish those tasks. She's given reasonable accommodations during the legitimate business days, on work days, to accomplish the tasks of increased time to do walking, bending, lifting, and any of the other things that are addressed in her medical report. . . . (Tr. 22)

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The request for a gate key is not necessary for her to be able to do her work. There aren't even students on the weekends at the school, and her job as a teacher requires students. Certainly there's preparation, and she's provided preparation time at work, but there's also time before and after [the] work day for her to access the campus, as all the other teachers can. (Tr. 25)

## VII FINDINGS OF FACT

1. Grievant's Status: For the purposes of this grievance, Grievant is a “qualified individual” and “an individual with a disability”, as defined within the DOE Superintendent's brochures, dated June 2008 and July 2010 (Union Ex. 25 and 26). She is entitled to request reasonable employment accommodations. The February 9, 2009 Accommodation Agreement evidences Employer's recognition of Grievant's status.
2. The School's Gate Key Sign-Out Policy. At the time Principal Burgess became the School administrator in January 2008 (SY 2007-2008), a Gate Key Policy was in effect. There were 2 components to the Policy – one component allowed School Staff to obtain (i.e. “sign-out”) a gate key upon request from the School's SASA; the other component allowed community organizations to obtain a key, provided the DOE's use of facilities form was completed and the request for the key was approved. On or about November 25, 2009, Principal Burgess rescinded that part of the Policy that allowed School Staff to request and sign-out a key. The Policy did not change with respect to community organizations.
3. Grievant's Request For a Gate Key. On November 17, 2009, while on authorized medical leave, Grievant requested a gate key be assigned to her for her exclusive use for the remainder of

School Year 2009-2010. She based her request upon her understanding that there was only one gate key available for all teachers who sought a key for a particular date<sup>8/</sup>, and because of her disability status and because she should “not be expected to coordinate [her] movements with others so that they can have access” (Union Ex. 4). On November 24, 2009 Grievant sent a follow-up e-mail since she received no answer to her November 17 request. On November 25, which was a day before the start of the School’s Thanksgiving recess, Grievant was one of the recipients of an e-mail sent by Principal Burgess to the School’s staff informing the staff that “For your safety, a key to the gate will no longer be made available. . . .” (Union Ex. 4) This change in the Policy was the first time the Policy had changed since Principal Burgess became School administrator in January 2008.

4. The Gate Key Sign-out Policy for School Staff was Changed for a Legitimate Reason.

No evidence was presented contradicting Principal Burgess’ testimony he rescinded the sign-out policy because he had campus security concerns due to recent computer thefts that occurred. There is no evidence to support the proposition that Principal Burgess rescinded the sign-out policy to impede Grievant’s access to her classroom during non-school hours.

On November 30, the day School resumed following the Thanksgiving recess, Principal Burgess responded to Grievant’s earlier e-mail sent that morning, identifying that “safety, liability and campus security (especially [because of] the recent thefts at our school” were the reasons he discouraged employees from coming onto the School campus during non-school hours. (Union Ex. 4) Ms. Schimmelfennig’s testimony that she spoke with Principal Burgess before she drafted the December 1, 2009 letter to Grievant corroborates his testimony.

5. Grievant’s Request for a Gate Key as a Reasonable Employment Accommodation was made on December 2, 2009 for School Year 2009-2010.

Grievant’s requests for a gate key sent via e-mail before December 2, 2009 do not constitute a Request for an Employment Accommodation. The brochures issued by the DOE Superintendent, cited above, clearly state that such a request is initiated by the DOE’s RA-1 form and sets forth the process and identifies the CRCO as the action office. Grievant submitted Form RA-1 on December 2.

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<sup>8/</sup> While Grievant had the belief that there was only one gate key available for School Staff use on a “sign-up” system, that may not be factually accurate. Principal Burgess testified there were between 2 to 5 keys available for use. And the testimony indicated that before the sign-up policy was rescinded, a number of teachers would be on campus on the weekends, which tends to indicate that more than one teacher had the ability to enter the campus through the security gate, which indicates more than one gate key was available for Staff use.

Grievant submitted two RA-1 forms dated December 1, 2009. One Form requested, “. . . a key to the gated signed out to her *for the school year* so that she may have closer and safer access to her classroom with her car when working on the weekends and after hours.” (Emphasis added)

The other Form requested:

“. . . modifications to her Disability Accommodations Agreement . . . so that the process of acquiring reasonable accommodations to eliminate physical barriers is simplified, and access to a gate key is codified.”

Three modifications were sought: First, the Agreement be changed to reflect the Agreement to be between the Department of Education and Grievant, rather than between Principal Burgess and Grievant; Second, the Agreement be changed to reflect that any future modifications be between the School administration and Grievant so as to eliminate the need for the CRCO’s involvement; and Third, the Agreement be modified to reflect that providing Grievant a gate key constitutes an employment accommodation.

Employer addressed the first RA-1 requesting a gate key, in its letter signed by Director Kitsu, dated December 15, 2009, and denied the request. (ER Ex. D). It is unclear from the evidence presented, whether Employer formally denied the RA-1 requesting modifications to the Disability Accommodations Agreement. The e-mail messages in evidence do not show that Principal Burgess denied Grievant’s gate key request.

6. Grievant Did Not Work At Na’alehu Elementary School During the School Year In Which Her Request For Reasonable Employment Accommodation was made.

Grievant was on authorized medical leave since early November 2009. Such leave was extended for two additional weeks, after which she was placed on directed leave for the remainder of School Year 2009-2010. Finding of Fact No. 5, identifies the date Grievant requested a gate key as an employment accommodation and the duration for which it was sought.

7. An Essential Function<sup>9/</sup> of a Classroom Teacher is To Teach Students.

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<sup>9/</sup> The factors considered in determining what are essential functions of a position are contained in Appendix A, which is an extract from the Appendix to CFR Title 29, Part 1630 (Union Ex. 21) Employer defines the term “Essential Job Functions” to mean” “Tasks that are fundamental and necessary for the position, and do not include incidental duties and must be performed with or without an accommodation (this may include the time spent on a task or duty). The DOE has the right to determine essential job functions.” (Union Ex. 25)

## VIII DISCUSSION AND OPINION

### 1. Alleged Violations of Certain Provisions of the Collective Bargaining Agreement.

The Union's Post-Hearing Brief identifies several provisions of the Agreement which it contends were violated in conjunction with Article II, Sections C and D. The Arbitrator rejects such contentions because they are either irrelevant or immaterial to the issue before the Arbitrator.

Article VI Section L (Teaching Conditions and Hours; Preparation Equipment). Although the Union correctly contends this provision recognizes that teachers may be on school campus during non working hours, the Union's contention that the lack of a gate key prevents Grievant from accessing "preparation equipment" is not in derogation of the Article's requirement for a "check-out system" to access "preparation equipment" before and after regular school hours. Grievant's lack of a gate key does not bar or prohibit her from being on campus during non-work hours, since she still has the ability to access her classroom and presumably to access the preparation equipment.

Article X Section B (Teacher Protection; Working under unsafe or hazardous conditions or performing tasks which imminently endanger health or safety). Read in its entirety, Section B appears to apply to work activity performed during regular school hours. Additionally, the Union's Brief does not identify how this provision pertains to Grievant's gate key request, especially since Grievant was not at work during the School Year in which the gate key was sought.

Article XX Section B (Miscellaneous; Individual Contract made subject to and consistent with Agreement). The Union queries why the Disability Accommodation Agreement between Grievant and Principal Burgess does not apply to other instances when disability accommodations are needed. The short answer is because the requested gate key must first be approved as a reasonable employment accommodation, and the Employer had not granted approval.

Article XXI (Maintenance of Benefits). The Union identified 4 matters which it contends were abridged. None of those four matters involve her request for a gate key, nor are they the focus of this arbitration.

2. The RA-1, dated December 1, 2009, requesting the gate key as a reasonable employment accommodation, is technically moot.

As identified in Finding of Fact #5, Grievant's RA-1 form requested that a gate key be provided her for the school year. As determined by Finding of Fact #6, even before the date of Grievant's RA-1, Grievant was on authorized DOE leave of absence and did not work for the remainder of that School Year. Moreover, the School Year for which she sought the gate key ended.

3. This issue is capable of, and is likely to recur.

Although technically moot, so long as the metal gate remains padlocked after school hours and Grievant continues teaching at the School, the question whether Grievant's request for a gate key is a reasonable employment accommodation is likely to recur with the submission of another RA-1 form. In judicial proceedings, if the controversy which initiated a dispute is no longer alive "but is capable of repetition yet evading review", the court may in the interest of justice still consider the case. *Alaka'ina Keiki, Inc. v. Hamamoto* (No. 29742, Hawaii Intermediate Court of Appeals, May 24, 2011). This record provides the Arbitrator sufficient information to assess whether another RA-1 form requesting a gate key, constitutes a reasonable employment accommodation.

4. An employment accommodation request is not necessarily "unreasonable", solely because the request is for an essential job function that takes place during non-work hours.

The basic question is whether a request for an employment accommodation, requires the sought-after accommodation to occur only during the regular work day or during school hours. Although there is an apparent distinction between what constitutes a "regular work day" and "school hours"<sup>10/</sup> for purposes of this discussion the distinction is immaterial. And that is because the critical inquiry is what is the "essential function" of a classroom teacher.

As Employer stated in its Post-Arbitration Brief, "The most essential function of a teaching position [is the] teaching of students. . . .". Although the phrase "teaching of students",

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<sup>10/</sup> Article VI, Section D. 1. identifies that a "work day" consists of 7 hours, and is the amount of time teachers are required to be present at their assigned place of work, during such days as determined by the Employer. Article VI, Section D. 2.c. indicates that while Employer may modify the regular work day through the use of a flexible work time schedule, in no case would the flexible work day extend beyond 4:30 p.m.

The term "school hours" is referenced in the Agreement, but does not appear defined. In this grievance, Na'alehu Elementary's "school day", was associated with the time the school gate was opened and closed by Principal Burgess – which was from about "5:30 to 5:45 in the morning" to typically "5:00 at night". (Tr. 41, Vol. 1)



standing alone, is ambiguous, the Department of Education identifies what it considers as the “Duties of a Teacher”, and the criteria by which it continually evaluates and periodically rates teacher performance. In collaboration with the Union, the Department developed The Professional Evaluation Program for Teachers (“PEP-T”). The Superintendent’s Message is the PEP-T Manual’s preamble, a portion of which states:

“The Duties of a Teacher establishes for every professional, a clearly defined focus upon the learner and *the desired educational outcome of developing independent students who are self-responsible, literate, competent thinkers and problem-solvers who work well with others and produced quality work.*” [Emphasis Added]

The teaching of students is more than rote memorization of facts and principles. The first three Duties for which teachers are responsible, are to: (1) Design and Implement Effective Strategies to Develop Self-Responsible / Independent Learners; (2) Create and Maintain a Positive and Safe Learning Environment; and (3) Use Assessment Data. It is clear that the role of the classroom teacher in performing his or her essential function of teaching students encompasses planning, preparation, collaboration and analytical activities to achieve the desired goal of developing self-responsible students who are competent thinkers and problem solvers and who work well with others and produce quality work. Can these activities be accomplished within the Agreement defined “regular work day”, or the typical school hours?

The Collective Bargaining Agreement in at least two separate Sections, expressly recognizes that teachers engage in employment related activity during after school hours. For example, Article VI, Section AA recognizes the amount of time involved in instructional preparation.

“AA. School-Related Activities

The parties recognize that teachers, as part of their professional obligations, must devote considerable time outside of school hours to prepare for instruction.”<sup>11/</sup>

This sentence appears to memorialize the accepted reality that a teacher’s use of time to plan and prepare for classroom instruction may extend beyond the regular “work day” or typical “school day”. It is not difficult to envision that the extent and the quality of instructional preparation, or lack thereof, affects job performance. And job performance, *i.e.* Duties of a Teacher, is a criteria by which a teacher’s continued employment is judged, and by which

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<sup>11/</sup> Article VI, Section X.1. provides that classroom teachers shall have one daily preparation period during a regular work day, and Section X.2. defines a “preparation period” to be for the “pursuit of personally initiated school tasks in preparing for instruction, evaluating students and performing other instructionally related activities”, and is not for personal or Union related business or activities.

teachers who choose to excel can be measured. Another example is Article VI, Section L, which identifies that teachers are permitted to work after school hours. Said Section states, in part:

“The teachers and principal in each school shall develop a check-out system in order to provide individual teachers access to preparation equipment *before and after regular school hours*. Teachers should take appropriate steps to insure their personal safety when working before and after school hours.” [Emphasis added]

While Employer contends that “the essential functions of a teacher are dictated to occur within the bargained for hours of work” defined by Article VI, sections D.1 and D.2.c.2, and Article VII, section CC, which identifies how the work day’s time within a work week is distributed among certain activities to both define and restrict what Employer may expect teachers to do, the Arbitrator rejects the notion that job related activity performed outside of that designated time period (i.e. “after-hours” or “on the weekend”) lose their characterization of being an integral part of a teacher’s essential function. For the Agreement contains provisions, cited above, that recognize the performance of job related work activities outside of regular school hours.

Instructional preparation which includes classroom preparation, is an integral part of a classroom teacher’s essential function in teaching students. Under the circumstances of this case, to limit an employment accommodation solely to activities that could be done during the “work day” or during “school hours”, fails to fully recognize that classroom teachers perform job-related activities of instructional and classroom preparation, during non-school hours “on their own time”, and overlooks the Agreement’s expressed provisions relating to after-hour work.

Accordingly, an employment accommodation request may apply to a job-related activity deemed a part of the essential function of a classroom teacher, performed during non-school hours on school property. However, the “reasonableness” of the request must still be judged in relation to the nature of the request, as well as to the job-related activity involved.

5. Grievant’s request for a gate key is a reasonable employment accommodation request.

Given Grievant’s testimony about the nature of her physical impairment and limitations, her lack of capacity for prolong work during the course of a school day, her reason for wanting to be on the School campus during the weekends, and considering the relative ease in implementing her gate key request as compared against whether such request poses undue

Employer hardship, Grievant's request for a gate key is a reasonable request for an employment accommodation.

However, in approving her request, Employer may still consider whether any of the following is appropriate or whether the School's current campus security situation warrants other reasonable conditions when granting the approval:

- a. The duration of time the key is assigned to Grievant, before Grievant is to submit a renewal request. For example, Employer may wish to consider how often Grievant uses the gate key within a given period, so as to judge whether continued exclusive use is warranted; or whether the gate key, though designated for Grievant's exclusive use, is to be returned to a particular person or particular location after use on the weekend;
- b. Whether a waiver of liability form, as a condition to obtaining gate key for after hours school campus access, is warranted;
- c. Other conditions based upon particular safety, liability or campus security conditions or concerns.

Employer may also wish to consider whether the absence of the gate key Sign-Out Policy for all School Staff remains appropriate, given the campus security reason for Policy's termination in November 2009 and the current campus security situation.

## **IX DECISION AND AWARD**

1. Employer's Denial of Grievant's Request for a gate key for School Year 2009-2010 is allowed to stand, on the grounds that Grievant was not working after she submitted her request for employment accommodation, because she was on authorized leave of absence for the duration of the School Year, and not on the grounds that her Request was an unreasonable employment accommodation request.
2. Should Grievant file a Reasonable Accommodation Request and Approval Form for School Year 2011-2012 or any portion thereof, and if the same request that was made for School Year 2009-2010 is again articulated, then Employer shall consider such Request as a reasonable request for an employment accommodation; subject, however, to such reasonable conditions as the Employer may deem appropriate under the existing School campus security, safety or liability concerns.

ORDERED, this 30<sup>th</sup> day, December, 2011.



Frank Yap, Jr., Arbitrator  
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## APPENDIX A

### Section 1630.2(n) Essential Functions

The determination of which functions are essential may be critical to the determination of whether or not the individual with a disability is qualified. The essential functions are those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation.

The inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential. For example, an employer may state that typing is an essential function of a position. If, in fact, the employer has never required any employee in that particular position to type, this will be evidence that typing is not actually an essential function of the position.

If the individual who holds the position is actually required to perform the function the employer asserts is an essential function, the inquiry will then center around whether removing the function would fundamentally alter that position. This determination of whether or not a particular function is essential will generally include one or more of the following factors listed in part 1630.

The first factor is whether the position exists to perform a particular function. For example, an individual may be hired to proofread documents. The ability to proofread the documents would then be an essential function, since this is the only reason the position exists.

The second factor in determining whether a function is essential is the number of other employees available to perform that job function or among whom the performance of that job function can be distributed. This may be a factor either because the total number of available employees is low, or because of the fluctuating demands of the business operation. For example, if an employer has a relatively small number of available employees for the volume of work to be performed, it may be necessary that each employee perform a multitude of different functions. Therefore, the performance of those functions by each employee becomes more critical and the options for reorganizing the work become more limited. In such a situation, functions that might not be essential if there were a larger staff may become essential because the staff size is small compared to the volume of work that has to be done. [Citation Omitted]

A similar situation might occur in a larger work force if the workflow follows a cycle of heavy demand for labor intensive work followed by low demand periods. This type of workflow might also make the performance of each function during the peak periods more critical and might limit the employer's flexibility in reorganizing operating procedures. [Citation Omitted]

The third factor is the degree of expertise or skill required to perform the function. In certain professions and highly skilled positions the employee is hired for his or her expertise or ability to perform the particular function. In such a situation, the performance of that specialized task would be an essential function.

Whether a particular function is essential is a factual determination that must be made on a case by case basis. In determining whether or not a particular function is essential, all relevant evidence should be considered. Part 1630 lists various types of evidence, such as an established job description, that should be considered in determining whether a particular function is essential. Since the list is not exhaustive, other relevant evidence may also be presented. Greater weight will not be granted to types of evidence included on the list than to the types of evidence not listed.

Although part 1630 does not require employers to develop or maintain job descriptions, written job descriptions prepared before advertising or interviewing applicants for the job, as well as the employer's judgment as to what functions are essential are among the relevant evidence to be considered in

determining whether a particular function is essential. The terms of a collective bargaining agreement are also relevant to the determination of whether a particular function is essential. The work experience of past employees in the job or of current employees in similar jobs is likewise relevant to the determination of whether a particular function is essential. [Citations omitted.]

The time spent performing the particular function may also be an indicator of whether that function is essential. For example, if an employee spends the vast majority of his or her time working at a cash register, this would be evidence that operating the cash register is an essential function. The consequences of failing to require the employee to perform the function may be another indicator of whether a particular function is essential. For example, although a firefighter may not regularly have to carry an unconscious adult out of a burning building, the consequence of failing to require the firefighter to be able to perform this function would be serious.

It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, or to require employers to lower such standards. [Citation Omitted] If an employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why an inaccurate work product, or a typing speed of 65 words per minute, would not be adequate. Similarly, if a hotel requires its service workers to thoroughly clean 16 rooms per day, it will have to show that it actually imposes such requirements on its employees in fact, and not simply on paper. It should also be noted that, if it is alleged that the employer intentionally selected the particular level of production to exclude individuals with disabilities, the employer may have to offer a legitimate, nondiscriminatory reason for its selection.