

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-03-162
	)	(ON REMAND)
HAWAII GOVERNMENT EMPLOYEES	)	
ASSOCIATION, AFSCME, LOCAL 152,	)	ORDER NO. 1362
AFL-CIO,	)	
	)	ORDER DISMISSING PROHIBITED
Complainant,	)	PRACTICE COMPLAINT
	)	
and	)	
	)	
DEPARTMENT OF PUBLIC SAFETY,	)	
State of Hawaii,	)	
	)	
Respondent.	)	

ORDER DISMISSING PROHIBITED PRACTICE COMPLAINT

On February 5, 1992, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) filed the instant prohibited practice complaint with the Hawaii Labor Relations Board (Board). Complainant alleged that Respondent DEPARTMENT OF PUBLIC SAFETY, State of Hawaii (Employer or Department) refused to release a copy of an Attorney General's (AG's) investigative report during the grievance procedure challenging Deputy Sheriff Richard Andrade's termination, effective February 19, 1991. Complainant contended that the Employer's actions violated §§ 89-13(a)(1), (a)(7) and (a)(8), Hawaii Revised Statutes (HRS).

Respondent filed a motion to dismiss the complaint for failure to state a claim. Respondent Employer contended that the Attorney General had been asked to review the case against Andrade for possible criminal charges. After reviewing the report, the Deputy Attorney General recommended that criminal charges not be

filed and the Union was so notified. The Employer thus contended that the report was never in Respondent's possession and was not relied upon in the Employer's decision to terminate the grievant. The Employer maintained that the decision to terminate the grievant was based upon an internal investigation conducted by the Department.

Complainant called the AG's investigator as a witness during the hearing on the motion to dismiss the complaint. Based upon the evidence presented, the Board found, in Order No. 922, dated January 27, 1993, that the Employer made the decision to discipline Andrade after conducting an internal PSD investigation. Although the AG's investigator was conducting a simultaneous investigation for possible criminal violations, the decision to discipline Andrade was made prior to the time the decision not to prosecute was relayed to the Department. Since the AG's report was neither in the possession of the Department nor relied upon during the grievance process, the Board found that the report was not relevant to the disciplinary decision and the subsequent grievance process. The Board therefore granted Respondent's motion to dismiss the complaint.

Upon appeal, the Honorable Wendell K. Huddy affirmed the Board's Order No. 322 after hearing arguments on May 16, 1994. The Court found that the AG's investigative report was relevant information under Article 11 of the Unit 03 collective bargaining agreement. However, the Court found that the Employer did not have possession of the investigative report at the time that it made its decision to terminate Andrade. Thus, the Court affirmed the

Board's Order Granting Respondent's Motion to Dismiss, dated January 27, 1993. The Court's order, however, was not filed until August 1, 1994.

Thereafter, on August 12, 1994, Complainant filed a motion for reconsideration of the Court's order presenting the Court with newly discovered evidence from the arbitration of Andrade's grievance and alleging that the Employer fraudulently misrepresented the facts of the case. During the arbitration hearings held in June and July, 1994, the Department's Internal Affairs investigator testified that he had reviewed a copy of the AG's report prior to completing his report. The report was then filed in the Internal Affairs office. The Arbitrator thus ordered the Employer to produce the report which was found in the Department's Internal Affairs Office.

After receiving the newly presented evidence, the Court thereupon found that the Employer, in fact, had possession of the AG's investigative report at the time it made the decision to terminate Andrade. The Court therefore found that the Employer was required to produce the investigative report pursuant to Article 11. Accordingly, the Court set aside its order affirming the Board's Order and on October 3, 1994, the Court remanded the case to the Board for further proceedings.

The Employer contends on remand that Complainant failed to prove that the Employer wilfully committed a prohibited practice and therefore the complaint should be dismissed. The Employer argues that Department Director George Iranon stated that he never saw the report and that the report was not relied upon in

determining discipline nor during the grievance process. Moreover, Calvin Shishido, supervising Sheriff of the Special Services Division of the Department, stated that his recommendation was based upon the Internal Affairs' investigation and not the AG's report. According to the evidence adduced at the subsequent arbitration, however, Internal Affairs investigator Cedric Roldan, who could have been called as a witness before the Board, testified that only he had a copy of the AG's report. Thus, the Employer contends that the Board could not logically conclude that the Employer wilfully refused to provide a document which it did not know it possessed.

In addition, the Employer contends that the instant complaint is moot since the AG's investigative report was provided to Complainant on July 21, 1994, pursuant to a ruling by Arbitrator Philip S. Uesato.

Complainant, however, maintains that the case is not moot because it initially requested an order that Respondent Employer produce the report, find that the Respondent engaged in a prohibited practice and require the Employer to post the Board's order. Complainant contends that only the request for production of the investigative report is moot. Thus, Complainant contends that it is still entitled to, among other things, a finding that the Respondent engaged in a prohibited practice and a posting of the Board's order confirming the misconduct.

Complainant also argues that this case falls within the exception to the application of the mootness doctrine because it is capable of repetition yet evading review. Application of Thomas,

73 Haw. 223, 832 P.2d 253 (1992). In addition, Complainant contends that the matter affects the public interest that similar issues may arise in the future.

After reviewing the record and the arguments presented, the Board finds that the matter before the Board is moot because the Arbitrator already ordered the Department to release the report to the Complainant. Complainant initially requested that the Department release a copy of the AG's report and also requested the AG's Office indicate in writing that there will be no further action taken against Andrade.<sup>1</sup> At this stage of the proceedings, the case has lost its character as a present, live controversy. Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 734 P.2d 161 (1987). Complainant has obtained the relief it sought before the Board from Arbitrator Uesato.

In Wong v. Board of Regents, University of Hawaii, 62 Haw. 391, 616 P.2d 201 (1980), a student who was subject to disciplinary actions for alleged misconduct while attending the University of Hawaii challenged the actions against him. Following the lower court's ruling on various motions, the University agreed to terminate its disciplinary proceedings against Wong and to keep his school record free from mention of the proceedings. The Hawaii Supreme Court dismissed the action on grounds of mootness, stating:

The mootness doctrine is said to encompass the circumstances that destroy the justiciability of a suit previously suitable for determination. Put another way, the suit must remain alive throughout the course of

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<sup>1</sup>Before the Board, counsel for the Employer consistently indicated that criminal actions would not be initiated against Andrade by the Attorney General.

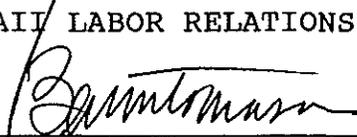
litigation to the moment of final appellate disposition. Its chief purpose is to assure that the adversary system, once set in operation, remains properly fueled. The doctrine seems appropriate where events subsequent to the judgment of the trial court have so affected the relations between the parties that the two conditions for justiciability relevant on appeal -- adverse interest and effective remedy -- have been compromised.

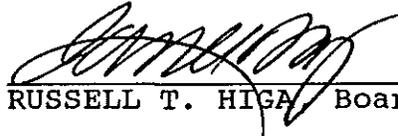
62 Haw. 391, 394.

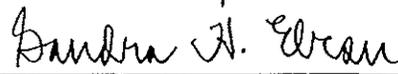
In this case, the conditions for justiciability have been compromised by the events subsequent to the initial Board proceeding, i.e., the matter has proceeded to arbitration and based upon evidence which was not presented to the Board, the Arbitrator ordered the Department to release the report to the Union. The Board concludes there is no actual controversy between the parties and there is no effective remedy that it may impose in this matter at this stage. Accordingly, the Board hereby dismisses the instant complaint.

DATED: Honolulu, Hawaii, September 13, 1996.

HAWAII LABOR RELATIONS BOARD

  
BERT M. TOMASU, Chairperson

  
RUSSELL T. HIGA, Board Member

  
SANDRA H. EBESU, Board Member

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