

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)
THOMAS LEPERE,)
)
Complainant,)
)
and)
)
UNITED PUBLIC WORKERS, AFSCME,)
LOCAL 646, AFL-CIO,)
)
Respondent.)

CASE NO. CU-10-94
ORDER NO. 976
ORDER GRANTING RESPONDENTS'
MOTIONS TO DISMISS

In the Matter of)
THOMAS LEPERE,)
)
Complainant,)
)
and)
)
GEORGE SUMNER, Director,)
Department of Public Safety,)
)
Respondent.)

CASE NO. CE-10-191

ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS

On June 7, 1993, Complainant THOMAS LEPERE (LEPERE) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) in Case No. CU-10-94. Complainant alleged, inter alia, that Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union) breached its duty of fair representation when it failed or refused to represent him and other adult correctional officers (ACO's) in grievances regarding post assignments. Complainant contends that UPW thereby violated §§ 89-13(b)(2), (3), (4) and (5), Hawaii Revised Statutes (HRS).

Thereafter, on June 10, 1993, LEPERE filed a prohibited practice complaint against GEORGE SUMNER, Director Department of Public Safety (Employer) in Case No. CE-10-191. Complainant alleged that the Employer violated various provisions of the bargaining unit 10 agreement regarding work unit seniority in post assignments.

On June 30, 1993, Respondent UPW, by and through its counsel, filed a motion to consolidate Case No. CU-10-94 and CE-10-191 because the cases involved the same issues. Thereafter, on July 1, 1993, UPW, by and through its counsel, filed a motion for partial dismissal. UPW contended that LEPERE lacked standing to bring a prohibited practice charge based upon the UPW's failure to file grievances on behalf of other employees.

On July 6, 1993, the Board found that the cases involved the same parties and issues and thus, consolidated the two prohibited practice complaints for disposition in Order No. 948. The Board also scheduled UPW's motion for partial dismissal for hearing.

On July 14, 1993, UPW's motion for partial dismissal came on for hearing before the Board. The parties were given full opportunity to present arguments to the Board. Based upon a thorough review of the record, the Board granted the UPW's motion to dismiss LEPERE's allegations which related to grievances allegedly pursued by other ACO's, i.e., Mr. Kava, Mr. Directo, and Mr. Ginden. The Board found that the individuals were not before the Board and LEPERE lacked standing to bring the complaints on

their behalf since he had not been designated as their representative.

On July 19, 1993, Respondent UPW, by and through its counsel, filed a motion to dismiss with the Board. UPW contends that the instant complaint should be dismissed because LEPERE failed to state a claim for relief; lacked standing; and failed to establish a prima facie case. On July 21, 1993, at the hearing on the merits of the complaint, LEPERE presented his case to the Board. Thereafter, UPW argued its motion to dismiss. Respondent Employer, by and through his counsel, orally joined UPW's motion to dismiss and presented arguments on the motion to dismiss.

As a preliminary matter, although Respondents made a motion to dismiss the complaint for failure to state a claim upon which relief can be granted, the Board will consider the motion as one for summary judgment since matters outside the pleading were presented and the Complainant had the opportunity to present rebuttal evidence and arguments. Rule 12(b), Hawaii Rules of Civil Procedure (HRCP) provides, in part:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Pursuant to the foregoing rule, the Board may grant summary judgment based upon the facts and arguments presented if warranted.

Rule 56, HRCP, provides that a party is entitled to summary judgment if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. In deciding whether to grant a motion for summary judgment, the Board will review the record and inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion, in this case, the Complainant.

LEPERE contends that the UPW breached its duty of fair representation by refusing to process grievances regarding post assignments on his behalf. LEPERE contends that the UPW violated §§ 89-13(b)(2), (3), (4) and (5), HRS.

§ 89-13. Prohibited practices; evidence of bad faith. (b) It shall be a prohibited practice for . . . an employee organization or its designated agent wilfully to:

* * *

(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9; (3) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in section 89-11; (4) Refuse or fail to comply with any provision of this chapter; or (5) Violate the terms of a collective bargaining agreement.

The Board hereby dismisses LEPERE's claims of §§ 89-13(b)(2), (3), and (5), HRS, violations because he has no standing to raise these charges and the evidence in the record does not support such charges.

Subsection 89-13(b)(2), HRS, provides that the employee organization's refusal to bargain with the public employer as required in § 89-9, HRS, is a prohibited practice. In the instant

case, there is no evidence that the Union refused to bargain with the public employer. Moreover, the refusal to bargain charge is properly raised by a public employer who has the reciprocal duty to bargain in good faith. Thus, the Board finds that LEPERE cannot raise a refusal to bargain charge against the Union.

Subsection 89-13(b)(3), HRS, provides that the refusal to participate in mediation, fact-finding and arbitration procedures set forth in § 89-11, HRS, is a prohibited practice. The mediation, fact-finding, and arbitration procedures in § 89-11, HRS, refer to the impasse resolution mechanism for interest arbitration involving the terms of the contract rather the grievance resolution mechanism which involves the violation or interpretation of the contract. Thus, the section is inapplicable to the facts of this case.

Subsection 89-13(b)(5), HRS, provides that the violation of the collective bargaining agreement is a prohibited practice. The facts in this case do not support a charge of contract violation against the Union. The parties to the collective bargaining agreement are the public employer and the exclusive representative. Since LEPERE does not fall within the definition of "employer", he lacks standing to maintain this allegation against the Union. The only remaining allegation against the Union is the alleged violation of § 89-13(b)(4), HRS.

The Board finds that LEPERE is an ACO at OCCC and a member of bargaining unit 10. On March 10, 1993, LEPERE requested that he be retained at the community base section work unit in accordance with his work unit seniority. The request was

disapproved by Captain Randy Asher who indicated that the definition of work unit seniority considered the seniority in the whole facility and not specific sections. LEPERE contends that the Employer violated Sections 16.05, 16.01 and 1.05 of the collective bargaining agreement.

Section 16.05 of the contract states that employees with work unit or work place seniority as defined in section 16.01, shall be given first consideration for work shift assignment. Section 16.01 provides that work unit or work place seniority means an employee's continuous length of service within a work unit of a facility.

LEPERE contacted UPW by letter dated March 12, 1993, requesting the Union to file a grievance on his behalf so that he could select, on the basis of seniority, a particular duty assignment in the community base section of OCCC. LEPERE contends that the term "work shift assignment" as used in section 16.05 includes the designation of the specific post or duty assignment which an employee staffs and not merely the shift during which the employee is on duty.

The UPW contends that the Unit 10 contract gives employees the right of consideration only for "work shift" and that there is no right to select "duty assignments." In the present negotiations for a successor Unit 10 contract, the Union presented a proposal to change the current Unit 10 agreement to provide for the selection of "duty assignments" on the basis of seniority. The affidavit of Gary Rodrigues, UPW Executive Director, indicates that he met with business agent Mel Rodrigues and reviewed the contract,

relevant bargaining history, and relevant arbitration decisions. The Union determined that the Unit 10 contract did not afford bargaining unit employees the right to select "duty assignments" on the basis of seniority. LEPERE was notified by Mel Rodrigues, UPW business agent, by letter dated March 23, 1993 that his request lacked merit.

As stated above, LEPERE's remaining allegation against UPW is the violation of § 89-13(b)(4), HRS, for the breach of its duty of fair representation. LEPERE alleges that the Union wrongfully refused to process his grievance. The record, however, indicates that the Union representatives thoroughly reviewed his claims, decided that the claims lacked merit and informed him of that fact. LEPERE never filed a grievance on his own behalf. The fact that the Union also presented contract proposals in the current negotiations regarding the selection of duty assignments on the basis of seniority confirms its position that there is no current contract provision to that effect.

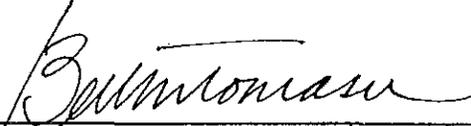
There is no evidence in the record that the Union treated LEPERE in an arbitrary or discriminatory manner so as to constitute a breach of duty under Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, 64 LRRM 2369 (1967). Hence, the Board concludes that LEPERE has failed to prove a prima facie case against the Union and the Board hereby grants UPW's motion to dismiss.

With respect to the Employer, LEPERE alleges that the Employer violated various contractual provisions and thus is guilty of prohibited practices. In most cases, a complainant's failure to exhaust his contractual remedies by not filing a grievance on his

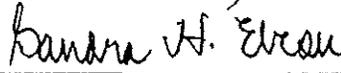
own behalf precludes relief by this Board. Moreover, in this instance the evidence in the record indicates that LEPERE's complaint lacks merit. The Board is persuaded that the language of section 16.05 of the contract, together with past practice and bargaining history, provides for consideration of seniority in the selection of work shift assignments and does not require consideration of seniority for duty assignments. Thus, LEPERE's charges of the Employer's violation of the contract are hereby dismissed.

DATED: Honolulu, Hawaii, October 15, 1993.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


RUSSELL T. HIGA, Board Member


SANDRA H. EBESU, Board Member

Copies sent to:

- Thomas Lepere
- Herbert R. Takahashi, Esq.
- Lester M.H. Goo, Deputy Attorney General
- Joyce Najita, IRC