Dec. File

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of HAROLD BOTELHO and STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO), Complainants, and FRANK F. FASI, Mayor of the City and County of Honolulu, Respondent.	Case No. CE-12-55 Decision No. 128

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On September 14, 1979, Harold Botelho (hereafter Botelho or Complainant) and the State of Hawaii Organization of Police Officers (hereafter SHOPO or Complainant) filed a prohibited practice petition with the Board against Frank F. Fasi, Mayor of the City and County of Honolulu (hereafter Mayor or Employer or City and County).

In said petition, SHOPO charged that the Mayor's refusal to reinstate Harold Botelho to his position with the Honolulu Police Department (hereafter HPD) pursuant to the terms of an arbitration award, constituted prohibited practices under Subsection 89-13(a)(5), (6), (7) and (8), Hawaii Revised Statutes (hereafter HRS).

After due notice to all parties, the Board held hearings on the prohibited practice charges on January 9 and 29, 1980 and on February 5, 1980. At the hearings, all parties were given a full opportunity to present oral testimony, exhibits, briefs, and oral argument. At the close of the hearings, all of the parties to the case waived their right to submit written briefs.

Upon a full review of the record herein, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Complainant Harold Botelho was, for all times relevant until May 6, 1976, a public employee, as defined in Section 89-2(7), HRS, and a member of bargaining unit 12 (police officers), as defined in Subsection 89-6(a)(12), HRS.

Complainant SHOPO is and was, at all times relevant, the exclusive representative of bargaining unit 12 (police officers), as defined in Subsection 89-6(a)(12), HRS.

Respondent Frank F. Fasi is and was, for all times relevant, Mayor of the City and County of Honolulu and a public employer within the meaning of Subsection 89-2(9), HRS, of employees of the City and County of Honolulu who are in bargaining unit 12.

SHOPO and the Mayor are parties to the Unit 12 collective bargaining agreement. An agreement, executed June 26, 1973, was in effect during the period from July 1, 1973 to June 30, 1976 (hereafter 1973-76 agreement). Article 32 of said agreement sets forth a grievance procedure to resolve disputes over the interpretation and application of the agreement. The final step of said procedure is submission of the dispute to an arbitrator. With respect to the effect of the award of that arbitrator, Article 32, Step 4e., states in pertinent part:

> e. The Arbitrator shall render his award in writing, no later than thirty (30) days after the conclusion of the hearings or if oral hearings are waived then thirty (30) days from the date statements and proofs were submitted to the Arbitrator.

> The Award of the Arbitrator shall be accepted as final and binding. There shall be no appeal from the Arbitrator's decision by either party, if such decision is within the scope of the Arbitrator's authority as described below:
>
> (1) The Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the terms of this Agreement.
>
> (2) His power shall be limited to deciding whether the Employer has violated, misinterpretated or misapplied any of the terms of this Agreement. In the case of any disciplinary action which the Arbitrator finds improper or excessive, such action may be set aside, reduced, or otherwise changed by the Arbitrator. He may, in his discretion, award back pay to compensate the employee, wholly or partially, for any salary lost.

On April 6, 1976, Complainant was served with a "Notice of Dismissal" issued by Francis Keala, Chief of the HPD, advising him of his suspension for a period of ten (10) days from receipt of the notice and thereupon his dismissal for his alleged violation of Rule B6, Article VII, Section III of HPD Rules and Regulations entitled "Commission of Any Criminal Act." This rule states, "Officers and Employees shall not commit any criminal act." The violation alleged in the notice of dismissal was an indictment of the Complainant by the Grand Jury for negligent homicide in the first degree arising out of an automobile collision on January 10, 1976 in which the driver of the other car was killed. (Bd. Ex. 1, Ex. A at 3)

On May 13, 1976, Botelho, by his exclusive representative SHOPO, filed a grievance on the above-stated dismissal, contending violations of Article 13 (Disciplinary Proceedings) and Article 32.F.3 (Grievance Procedure)

of the collective bargaining agreement. The grievance proceeded through Steps I, II and III and was thereupon submitted to arbitration before the Honorable Hiroshi Oshiro, pursuant to Article 32 of the 1973-1976 collective bargaining agreement. After holding hearings on the grievance, Arbitrator Oshiro rendered the following conclusion and award on May 14, 1979:

CONCLUSIONS AND AWARD

In summary, the Arbitrator concludes as follows:

1. A criminal violation committed by a police officer while off-duty and off the employer's premises is sufficiently related to the officer's duties and responsibilities to constitute just cause for disciplinary action under Rule B6;

2. Rule B6 does not require a judicial determination that a crime has been committed;

3. The disciplinary process under Rule B6 exists and operates independently of the judicial system and the findings and conclusions of the Court, i.e., conviction or acquittal, are not binding upon employer's disciplinary findings and decision;

4. Events occurring subsequent to the employer's disciplinary action, such as Court findings are relevant in determining the reasonableness of the penalties imposed by employer.

In the instant case, Arbitrator finds that there was just cause for employer taking disciplinary action as a result of Grievant's violation of Rule B6. In consideration of the nature of the offense, negligent homicide, and the long service and commendable record of Grievant, the employer's decision to discharge was too severe. Accordingly, the discharge is set aside and the Grievant shall be reinstated to his position in the Department. Grievant shall not however be entitled to any benefits such as pay, time in service, sick leave, etc., accruing after March 6, 1976, the date of suspension. Forfeiting of said benefits is in recognition of the valid disciplinary action imposed under the circumstances. Loss of more than 3 years of such benefits is sufficient punishment for the offense committed by Grievant. (Bd. Ex. 1, Ex. A at 17-18.)

Subsequently, on May 24, 1979, the City and County of Honolulu and HPD (Honolulu Police Department) filed motions to vacate, to modify or correct and to stay enforcement of the arbitration award issued by Arbitrator Oshiro (hereafter Oshiro award) in the First Circuit Court.

On June 26, 1979, a hearing was held on the foregoing motions before the Honorable Arthur S. K. Fong of that court. (Complainant's Ex. D) Immediately following this hearing, Curtis Uno, former General Counsel for SHOPO, spoke with Allen Hoe, Deputy Corporation Counsel for the City and County, and requested that the Complainant be reinstated to the HPD with back pay to May 14, 1979, the date of issuance of the Oshiro award. (Tr. I at 82)

On June 28, 1979, Burt Lau, former Assistant Counsel for SHOPO, telephoned Allen Hoe to request that Mr. Botelho be permitted to return to work with back pay. Mr. Hoe stated that Mr. Botelho could not get back pay because he never requested reinstatement. (Tr. I at 13)

Consequently, that same day, Lee Sode, Business Agent for SHOPO, called Major Akana, Personnel Officer for the HPD, to ask when the Complainant could report for duty. Major Akana's reply was that after HPD received official word in the form of Judge Fong's judgment, Botelho could return to work. (Tr. I at 45)

Judge Fong issued an "Order Denying Appellant's Motions to Vacate, to Modify or Correct and to Stay Enforcement of Arbitration Award," dated July 2, 1979 and filed on July 31, 1979, which stated:

> Appellant, City and County of Honolulu's motions to vacate, to modify or correct and to stay enforcement of arbitration award, filed herein on May 24, 1979, having regularly come

on for hearing before the Honorable Arthur S. K. Fong on Tuesday, June 26, 1979 and Thursday, June 28, 1979; and the Court upon due consideration of the legal memoranda submitted and oral arguments presented, being thus fully apprised and for good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Award and Decision issued by Arbitrator HIROSHI OSHIRO is found to be valid and did not exceed the powers of Arbitrator OSHIRO, nor was this Decision and Award fashioned on an issue not submitted to Arbitrator OSHIRO.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that Appellant's motions to vacate, to modify or correct and to stay the enforcement of the award are, in all respects, denied. (Complainant's Ex. D)

Upon receipt of this Order, Curtis Uno transmitted a certified copy of said Order to Allen Hoe with a cover letter, dated August 2, 1979, stating that with the denial of the City and County's motions, he would expect that Allen Hoe would advise the Employer to comply with the terms of the Oshiro award and reinstate the Complainant. (Tr. I at 84)

Despite the August 2, 1979 written demand for reinstatement, Mr. Botelho was not reinstated by the HPD. (Tr. I at 85)

Subsequent to this demand, the Complainant spoke to Major Akana of the HPD about returning to work and did not receive a satisfactory answer. In response, Major Akana stated that HPD needed Judge Fong's Order prior to Botelho's reinstatement. (Tr. I at 85) Akana then, pursuant to instructions given to him by HPD, referred the Complainant to Deputy Chief Falk.

Mr. Botelho then spoke with Deputy Chief Falk about the matter but failed to get a satisfactory response. (Tr. I at 90)

Subsequently, Mr. Uno had a telephone conversation with Allen Hoe in which he again demanded reinstatement of

Mr. Botelho with back pay. Mr. Hoe suggested during that conversation that Mr. Uno write a letter to Chief Keala.

Mr. Uno sent a letter to Chief Keala, dated August 22, 1979, which summarized the history of the Botelho dismissal, the Oshiro award, and the subsequent attempts by SHOPO and Botelho to obtain his reinstatement. In the letter, Mr. Uno once again requested an answer as to when Mr. Botelho could return to duty and receive back pay and benefits accrued from May 14, 1979. (Complainant's Ex. M)

In his reply dated September 5, 1979, Chief Keala stated that Mr. Botelho would be reinstated immediately upon the fulfillment of certain conditions. The pertinent part of said letter states:

> Sergeant Harold Botelho will be reinstated immediately following fulfillment of the conditions that he:
>
> 1. Successfully complete a psychiatric examination administered for the City and County of Honolulu.
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>   The examination will be administered by Dr. Edward F. Furukawa on Tuesday, September 11, 1979, at 1500 hours at Dr. Furukawa's office, Queen's Physicians Office Building, 1380 Lusitana Street, Suite 511.
>
> 2. Succesfully complete a physical examination administered by the City and County Physician. Physical examination will be given on Tuesday, September 11, 1979, at 0800 hours at the Health Department, 1455 South Beretania Street.
>
> It should be further understood that Sergeant Botelho will be reinstated to his former position (Sergeant) but not to his former assignment (Motorized Sergeant in District I).

On September 11, 1979, prior to the designated time for the examinations, Curtis Uno met with Mr. Botelho. At that meeting, Mr. Botelho decided not to proceed with the examinations. Immediately thereafter, Curtis Uno telephoned

Major Falk of the HPD to notify HPD that SHOPO and Botelho were of the opinion that the above-stated conditions placed upon Botelho's reinstatement were breaches of the Oshiro award, and accordingly, that the City and County should retract these conditions. Deputy Chief Falk refused to retract these conditions. Whereupon, Mr. Uno informed Falk that Mr. Botelho would not submit to the medical or psychiatric examinations, and if the Employer failed to withdraw the conditions to reinstatement, SHOPO and Botelho would file a prohibited practice charge. (Tr. I at 96-97)

The City and County failed to reinstate Mr. Botelho or to retract the conditions to the reinstatement. On September 14, 1979, SHOPO and Mr. Botelho filed the instant prohibited practice charge against the City and County.

CONCLUSIONS OF LAW

Before the onset of the hearings in this case, on October 3, 1979, the City and County submitted a written motion to dismiss the instant prohibited practice case because of untimely filing of the complaint. On November 7, 1979, the Complainant filed a memorandum in opposition to Respondent's motion to dismiss. After a full consideration of the foregoing pleadings, the Board denied the motion to dismiss on December 18, 1979 by Order No. 301. Subsequently, at the hearing, the Respondent City and County renewed its objections to the Board's jurisdiction over this prohibited practice charge based upon the untimeliness of the complaint.

Consequently, before turning to the substantive issues presented in this case, the Board will address the

issue of whether it lacks jurisdiction to entertain this prohibited practice case based upon the untimely filing of the charges. Sec. 3.02(a), HPERB Rules and Regulations, states:

> 3.02 Complaint.
>
> (a) WHO MAY FILE; TIME LIMITATION. A complaint that any public employer, public employee or employee organization has engaged in any prohibited act may be filed by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation.

The City and County contends that based upon the allegations set forth in the prohibited practice complaint, the alleged violation occurred on May 14, 1979, the date the Oshiro award was rendered. The instant prohibited practice complaint was filed on September 14, 1979. Therefore, the City and County maintains that the filing of said complaint was outside the ninety-day limitation established in Rule 3.02. The Complainants, on the other hand, assert that the prohibited practice complaint does not allege that a single, isolated action of the Employer with respect to the Oshiro award violates the prohibited practice act. Rather, the Complainants assert that the prohibited practice charges arise out of a course of conduct by the Employer in implementing said award, beginning on May 14, 1979 and continuing to the present time.

The Board is of the opinion that the May 14, 1979 issuance of the arbitration award did not form the basis for the instant prohibited practice complaint for the following reasons. First, there was no allegation made in said complaint that any prohibited practice arose out of the issuance of the Oshiro award. The prohibited practice charges stated in the

complaint are based upon the implementation of that award. Secondly, at no time prior to June 26,1979 did the Complainants request implementation of the Oshiro award nor receive any indication from HPD that the Employer would delay or place conditions upon that reinstatement.

Thus, for all these reasons, the Board finds that any alleged prohibited practices by the City and County had to occur on or after June 26, 1979. Accordingly, said violations alleged were within the ninety-day limitation period required by Sec. 3.02, HPERB Rules and Regulations, and the complaint filed by SHOPO and Botelho was timely filed.

After concluding that it has jurisdiction over the instant prohibited practice case on procedural grounds, the Board will now inquire into the merits of the dispute. In their prohibited practice complaint filed with this Board, the Complainants allege that each and the total of the Mayor's actions and the course of performance with respect to the implementation of the Oshiro award constitute prohibited practices pursuant to Subsections 89-13(a)(5), (6), (7), and (8), HRS. Said statutory subsections make it a prohibited practice for a public employer wilfully to:

> (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
>
> (6) Refuse to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in section 89-11;
>
> (7) Refuse or fail to comply with any provision of this chapter; or
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> (8) Violate the terms of a collective bargaining agreement.

Specifically, the Complainant alleges that the following actions of the City and County with respect to the Oshiro award violate the foregoing subsections:

(1) failing to reinstate Botelho pursuant to the Oshiro arbitration decision despite repeated requests for reinstatement from both SHOPO and Botelho;

(2) requiring as a condition of said reinstatement that Botelho successfully completed both a psychiatric and physical examination;

(3) refusing to assign Botelho upon said reinstatement to his former assignment as a Motorized Sergeant District I.

In its answer, the Employer generally admitted some of the allegations, denied others of the allegations, and stated that it was without sufficient knowledge to form a belief as to the truth of the allegations.

Using the above-stated prohibited practice provisions as a framework for analyzing the merits of the charges, the Board must first determine whether any of the City and County's actions enumerated above constitute a refusal to negotiate in good faith under Subsection 89-13(a)(5), HRS.

As to this allegation, SHOPO and Botelho failed to produce any evidence to support their charge that the City and County failed to negotiate in good faith with respect to implementation of the terms of the award. The Complainant's repeated requests for reinstatement of Botelho were not solicitations for negotiations but rather were in the form of demands for reinstatement. SHOPO's response following the September 5, 1979 letter from Chief Keala setting forth the conditions of reinstatement, was merely a demand that HPD retract the conditions. In short, the record is insufficient

for the Board to make a determination that a violation under Subsection 89-13(a)(5), HRS, occurred.

The Complainants also failed to demonstrate that the City and County's actions constitute a refusal to participate in the mediation, fact-finding and arbitration procedures set forth in Section 89-11, HRS, within the meaning of Subsection 89-13(a)(6), HRS, which states:

> Sec. 89-11. Resolution of disputes; grievances; impasses. (a) A public employer shall have the power to enter into written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. In the absence of such a procedure, either party may submit the dispute to the board for a final and binding decision. A dispute over the terms of an initial or renewed agreement does not constitute a grievance.
>
> (b) A public employer shall have the power to enter into written agreement with the exclusive representative of an appropriate bargaining unit setting forth an impasse procedure culminating in a final and binding decision, to be invoked in the event of an impasse over the terms of an initial or renewed agreement. In the absence of such a procedure, either party may request the assistance of the board by submitting to the board and to the other party to the dispute a clear, concise statement of each issue on which an impasse has been reached together with a certificate as to the good faith of the statement and the contents therein. The board, on its own motion, may determine that an impasse exists on any matter in a dispute. If the board determines on its own motion that an impasse exists, it may render assistance by notifying both parties to the dispute of its intent.
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> The board shall render assistance to resolve the impasse according to the following schedule:
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> (1) Mediation. Assist the parties in a voluntary resolution of the impasse by appointing a mediator or mediators, representative of

the public, from a list of qualified persons maintained by the board, within three days after the date of the impasse, which shall be deemed to be the day on which notification is received or a determination is made that an impasse exists.

(2) Fact-finding. If the dispute continues fifteen days after the date of the impasse, the board shall appoint, within three days, a fact-finding board of not more than three members, representative of the public, from a list of qualified persons maintained by the board. The fact-finding board, shall, in addition to powers delegated to it by the public employment relations board, have the power to make recommendations for the resolution of the dispute. The fact-finding board, acting by a majority of its members, shall transmit its findings of fact and any recommendations for the resolution of the dispute to both parties within ten days after its appointment. If the dispute remains unresolved five days after the transmittal of the findings of fact and any recommendations, the board shall publish the findings of fact and any recommendations for public information if the dispute is not referred to final and binding arbitration.

(3) Arbitration. If the dispute continues thirty days after the date of the impasse, the parties may mutually agree to submit the remaining differences to arbitration, which shall result in a final and binding decision. The arbitration panel shall consist of three arbitrators, one selected by each party, and the third and impartial arbitrator selected by the other two arbitrators. If either party fails to select an arbitrator or for any reason there is a delay in the naming of an arbitrator, or if the arbitrators fail to select a neutral arbitrator within the time prescribed by the board, the board shall appoint the arbitrator or arbitrators necessary to complete the panel, which shall act with the same force and effect as if the panel had been selected by the parties as described above. The arbitration panel shall take whatever actions necessary, including but not limited to inquiries, investigations, hearings, issuance of subpoenas, and administering oaths, in accordance with procedures prescribed by the board to resolve the impasse. If the dispute remains unresolved within fifty days after the date of the impasse, the arbitration panel shall transmit its findings and its final and binding decision on the

dispute to both parties. The parties shall enter into an agreement or take whatever action is necessary to carry out and effectuate the decision. All items requiring any monies for implementation shall be subject to appropriations by the appropriate legislative bodies, and the employer shall submit all such items agreed to in the course of negotiations within ten days to the appropriate legislative bodies.

(4) The costs for mediation and fact-finding shall be borne by the board. All other costs, including that of a neutral arbitrator, shall be borne equally by the parties involved in the dispute.

(c) If the parties have not mutually agreed to submit the dispute to final and binding arbitration, either party shall be free to take whatever lawful action it deems necessary to end the dispute; provided that no action shall involve the disruption or interruption of public services within sixty days after the fact-finding board has made public its findings of fact and any recommendations for the resolution of the dispute. The employer shall submit to the appropriate legislative bodies his recommendations for the settlement of the dispute on all cost items together with the findings of fact and any recommendations made by the fact-finding board. The exclusive representative may submit to the appropriate legislative body its recommendations for the settlement of the dispute on all cost items.

A review of the foregoing statutory section demonstrates that the mediation, fact-finding and arbitration procedures referred to in Subsection 89-13(a)(6), HRS, fall under subsection (b) of Section 89-11. Said subsection sets forth the procedures to be used in the event that an impasse is reached in negotiations.

In this prohibited practice case, nothing in the record indicates that the Oshiro arbitration award arose out of an impasse in negotiations over a collective bargaining agreement. Rather, the record shows that the Oshiro award was the result of a grievance brought by the Complainants. Hence, the arbitration procedures established in Subsection

89-11(b), HRS, are not relevant to the Oshiro award and the City and County's actions cannot constitute a prohibited practice under Subsection 89-13(a)(6), HRS.

Although the City and County's actions with respect to the Oshiro award may not constitute a refusal to comply with the Subsection 89-11(b) arbitration procedures, these actions may violate statutory and contract provisions for grievance arbitration procedures under Subsection 89-13(a)(7), HRS. Decision 117 at 11-12.

In this case, there was evidence presented by the Complainants that Article 32 of the 1973-76 collective bargaining agreement between SHOPO and the Employer provides for a grievance procedure culminating in final and binding arbitration. The evidence further shows that pursuant to that provision, the Complainants and the Mayor went to arbitration over the discharge of Botelho from his position with the HPD. The result of those arbitration proceedings was the Oshiro award which provided for reinstatement of Botelho to his former position with HPD. The testimony demonstrated that the City has delayed Botelho's reinstatement pursuant to the award. The exhibits further demonstrated that the City has refused to comply with that reinstatement unless certain conditions are met; namely, successful completion of both physical and psychiatric examinations and acceptance of assignment as a desk sergeant.

Subsection 89-11(a), HRS, provides that the public employer may contract for a grievance procedure culminating in a final decision to resolve disputes over implementation or interpretation of the collective bargaining agreement. Subsection 89-13(a)(7), HRS, makes it a prohibited practice

for a public employer to fail to comply with any statutory provision of Chapter 89, HRS. Consequently, based upon the interaction of these two provisions, a failure to comply with a grievance arbitration award may be a prohibited practice.

In this case, although the Complainant alleged a prohibited practice under 89-13(a)(7), and the evidence shows a violation of Article 32, grievance procedure, the Complainants failed to allege or present proof with respect to a violation of 89-11(a), HRS. Therefore, the Board is unable to find a violation of 89-11(a), HRS, or a prohibited practice under 89-13(a)(7), HRS.

The Board now turns to the final charge made by the Complainants. In this allegation, the Complainants charged that the above-stated facts are sufficient for a determination that the City and County committed a prohibited practice under Subsection 89-13(a)(8), HRS. This subsection makes it a prohibited practice for a public employer to wilfully violate the terms of a collective bargaining agreement.

As a threshold question, the Board must determine whether failure to comply with a grievance arbitration award is a prohibited practice because it is a violation of a term of the collective bargaining contract.

As stated above, the record shows that Article 32 of the 1973-76 agreement contains a grievance procedure to resolve disputes over interpretation and application of the agreement. The final step of that grievance procedure is submission of the dispute to arbitration. The effect of the resulting arbitration award is set forth in Article 32, Step 4e., which states in pertinent part:

> e. The Arbitrator shall render his award in writing, no later than thirty (30) days after the conclusion of the hearings or if oral hearings are waived then thirty (30) days from the date statements and proofs were submitted to the Arbitrator.
>
> The award of the Arbitrator shall be accepted as final and binding. There shall be no appeal from the Arbitrator's decision by either party, if such decision is within the scope of the Arbitrator's authority as described below. . . .

The Board is of the opinion that under this contract provision, failure to comply with a grievance arbitration award is a prohibited practice. The contract language "The award of the arbitrator shall be accepted as final and binding" is unequivocal. Accordingly, a failure to comply with an arbitration award is a violation of the terms of this contract provision and a prohibited practice under Subsection 89-13(a)(8), HRS.

The conclusion that failure to comply with an arbitration award is a prohibited practice because it violates the terms of a collective bargaining agreement is supported by labor board decisions from other jurisdictions. For example, Wis. Stat. §111.70(3)(a)(5) provides that it is a prohibited practice for a municipal employer

> "To violate any collective bargaining agreement previously agreed upon by the parties. . .including where previously the parties have agreed to accept such award as final and binding upon them."

Based on this statutory provision, the Wisconsin Employment Relations Commission has held in Teamsters Local 563 v. City of Neenah, Case X No. 1521, MP-107, Decision 10716-C (WERC 1973), that the public employer committed a prohibited practice for failing to reinstate a wrongfully discharged employee with back pay pursuant to an arbitration award. See also: Superior Board of Education Employees Local Union No. 1397

v. Superior Board of Education Joint School District No. 1, City of Superior et al., Case XXV No. 17155, MP-282, Decision No. 12174-A (WERC 1974); Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 73 v. Liedtke Vliet Super, Inc., Case III No. 13866 Ce 1307, Decision No. 9717-A (WERC 1971); Milwaukee District Council 48 and Local 2 v. City of Franklin, Case IV No. 15746, MP-144, Decision No. 11296 (WERC 1972). Although the Wisconsin prohibited practice act is more explicit in expressing its prohibition against failure to comply with arbitration awards, the Wisconsin statute and decisions are significant to demonstrate that a failure to comply with an arbitration award is a well-recognized violation of a contract and a prohibited practice.*

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*Still other prohibited practice acts from other jurisdictions are even more explicit in their prohibition against a public employer's failure to comply with an arbitration award.

§7-470(a)(6) of the Connecticut Municipal Employe states:

> Sec. 7-470. Prohibited acts of employers and employee organization. - (a) Municipal employers or their representatives or agents are prohibited from:
>
> (6) refusing to comply with an agreement to settle a grievance of a decision or award of an arbitration panel or arbitrator rendered under Sec. 7-472 within 30 days after such grievance settlement was reached or such arbitration award rendered, unless the State Board of Labor Relations finds, in accordance with the procedure established in subdivision of Sec. 7-471, that one or more conditions exist which would be a basis for vacating or correcting an arbitration award under Sec. 52-418 or 52-419.

§1201(a)(8) of the Pennsylvania Public Employee Relations Act provides:

> Sec. 1201. (a) Public employers, their agents or representatives are prohibited from:
>
> (8) Refusing to comply with the provisions of an arbitration award deemed binding under Sec. 903 of Article IX.

Having resolved the foregoing threshold issue, the Board can turn to the particular facts of this case and determine whether the actions of the City and County with respect to the Botelho reinstatement constitute a violation of the Oshiro award. The Oshiro award states in relevant part:

> Accordingly, the discharge is set aside and the Grievant shall be reinstated to his position in the Department.

The Complainants have asserted that the City and County violated the award by (1) failing to reinstate Botelho to the HPD pursuant to the aribtration award; (2) requiring that Botelho successfully complete both a psychiatric and physical examination prior to reinstatement and; (3) refusing to place Botelho back in his former assignment as a motorized patrol officer.

The City and County presented no evidence to contradict or dispute the evidence offered by the Complainants that the City has failed to reinstate Botelho to the HPD in compliance with the terms of the Oshiro award. Consequently, the Board finds that the City violated both the Oshiro award and Subsection 89-13(a)(8) based upon the mere showing that Botelho was not reinstated to his position with the HPD.

The Board is of the opinion, however, that there was also a prohibited practice committed by the City when it required Botelho, by the Keala letter of September 5, 1979, to successfully complete both a psychiatric and physical examination prior to his reinstatement to the HPD. The Oshiro award on its face only provided for the unqualified reinstatement of the Complainant. The Board views these conditions as an amendment of the award. If the Complainant submits to these examinations and fails to pass these examinations, there is the

possibility according to the terms of the above-stated Keala letter that the HPD could refuse to reinstate him in compliance with the award.

In addition, the Board takes the position that the Employer's refusal to reassign Botelho to his former position also is a deviation from the terms of the Oshiro award. In City of Willamantic and International Brotherhood of Police Officers, Local 340, Case No. MPP-4889, Decision No. 1795 (1979), the Connecticut State Board of Labor Relations was considering a prohibited practice complaint by the union that the Employer violated the terms of an arbitration award directing reinstatement of a discharged officer. The charge was based upon the Employer's refusal to assign the officer to his former duties and to the full range of duties ordinarily assigned to a patrolman. In ruling that the Employer did not violate the terms of the award, the board found that the Employer's decision to limit the officer's duties was exercised in good faith to protect the public, the Employer, and the officer and was not in conflict with the reasoning underlying the award. In reaching this conclusion, the board found that the award could not be construed to give the reinstated officer a clean record in light of the findings by the arbitrators that the officer was guilty of the offense upon which the discharge was based.

In this case, however, there is no evidence that the reassignment of Botelho from motorized patrol officer to desk-sergeant is motivated by a concern by the HPD for the protection of the public, of the HPD or of Botelho. Unlike the officer in the Willamantic case whose discharge from the police department was based upon a criminal offense, not only

committed while on duty (the officer brutally beat up a prisoner in his cell resulting in the death of the prisoner) but directly involved with the performance of his duties, Botelho's discharge was grounded upon an off-duty automobile accident. Accordingly, the Board is of the opinion that the City's action in reassigning Botelho violates the reinstatement directive of the Oshiro award and is, therefore, also a prohibited practice under Subsection 89-13(a)(8), HRS.

ORDER

The Employer is hereby ordered to remedy its prohibited practice by reinstating Harold Botelho forthwith to his position with the HPD and to his former assignment as a motorized field sergeant in District I in compliance with the terms of arbitration award rendered by Arbitrator Oshiro on March 14, 1979. The Board further orders that said reinstatement include back pay accruing from March 14, 1979, the date of issuance of the award.

Pursuant to the letter sent to the Board by Harold Botelho, dated January 30, 1980, stating that he wants to submit to a psychiatric examination by a panel of three (3) psychiatrists following his reinstatement to HPD in compliance with this order of the Board, the Board orders that such a psychiatric examination be conducted. Said psychiatric examination is to be performed in accordance with the procedure suggested by Mr. Botelho in that letter.

However, the Board confines the above-stated order for a psychiatric examination to the facts of this particular case. Said order is not to be interpreted as a precedent for imposition of a psychiatric examination as a standard condition

of employment or of reinstatement. Neither is this order to be construed as an amendment or modification of the terms of the Oshiro award. Said order is made at the specific request of the Complainant for such an examination to be conducted.

The Board will retain jurisdiction over the present case to insure compliance with all of the foregoing orders.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada, Chairman

James K. Clark, Board Member

John E. Milligan, Board Member

Dated: June 12, 1980

Honolulu, Hawaii

Dec.

STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of HAROLD BOTELHO and STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO), Complainants, and FRANK F. FASI, Mayor of the City and County of Honolulu, Respondent.	Case No. CE-12-55 Decision No. 128

ERRATA

The following changes to Decision No. 128 of the Hawaii Public Employment Relations Board in the above-entitled matter are to correct erroneous dates specified in the Order of said Decision. The corrections do not alter the findings, conclusions, or orders of the Board in any other respect. The corrections have been signified in the following manner: material to be deleted is bracketed; new material is underscored.

1. The first two sentences of the first paragraph in the Order section of the Decision on page 21 is corrected as follows:

> The Employer is hereby ordered to remedy its prohibited practice by reinstating Harold Botelho forthwith to his position with the HPD and to his former assignment as a motorized field sergeant in District I in compliance with the terms of arbitration award rendered by Arbitrator Oshiro on [March] May 14, 1979. The Board further orders that said

reinstatement include back pay accruing from [March] May 14, 1979, the date of issuance of the award.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada, Chairman

James K. Clark, Board Member

John E. Milligan, Board Member

Dated: June 18, 1980

Honolulu, Hawaii