STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of CARL H. LEDWARD and STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO), Complainants, and FRANK F. FASI, Mayor of the City and County of Honolulu, and FRANCIS A. KEALA, Chief, Honolulu Police Department, Respondents.	Case No. CE-12-60 Decision No. 135

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On December 26, 1979, Complainant Carl H. Ledward, a police officer in the Honolulu Police Department at the times material herein, filed a prohibited practice charge against Respondents Frank F. Fasi, Mayor of the City and County of Honolulu; Harry Boranian, Director of the Department of Civil Service of the City and County of Honolulu; and Francis A. Keala, Chief of Police of the Honolulu Police Department (hereafter HPD). Complainant alleges that: (1) Respondent Fasi and his designated representatives wrongfully refused to grant his application for sick leave for the period July 14-17, 1979, when Complainant alleges he was ill with a recurrent ulcer condition; (2) wrongfully made a deduction from Complainant's pay and accrued compensatory time (hereafter "comp time") and issued a written reprimand, such actions taken as disciplinary measures for abandoning his assignment; and (3) wrongfully refused to process Complainant's grievance, contesting the disciplinary measures taken against him, through the contractual grievance procedure.

The Board in HPERB Case No. S-12-7 et seq. determined that the State of Hawaii Organization of Police Officers (hereafter SHOPO) conducted an illegal strike during the 4-day period when Ledward alleges he was ill.

Ledward, who suffered loss of pay and other rights, benefits and privileges for the aforementioned period, alleges that Respondents, through the aforementioned conduct, committed prohibited practices under HRS §89-13(a)(1), (7), and (8).

After due notice to the parties, a hearing was held in the Board's hearings room on March 20, 1980. All parties were afforded full opportunity to call and cross-examine witnesses and submit exhibits. At the close of oral arguments, Respondents' attorney entered an oral motion for directed verdict. Tr. p. 171. The motion was taken under advisement pending the Board's receipt from the parties' counsel briefs on the issues involved in the motion for directed verdict and the questions as to the timeliness of the filing of Complainant's charge.

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

FINDINGS OF FACT

SHOPO is the exclusive representative, as defined in HRS §89-2(10), of employees in Unit 12 and, as such, represents Complainant Ledward herein.

Mayor Fasi is the public employer, as defined in HRS §89-2(9) of the employees in Unit 12.

There existed at all times relevant herein a valid and binding collective bargaining agreement, dated November 29,

1979, between SHOPO, as exclusive representative of Unit 12 employees, and Mayor Fasi, as public employer thereof, for the period July 1, 1979 to June 30, 1981. Said agreement contains provisions entitled Article 1, "Recognition"; Article 13, "Discipline and Dismissal"; Article 14, "Changes in Departmental Rules"; Article 25, "Leaves of Absence With Pay"; Article 30, "Salaries"; Article 32, "Grievance Procedure"; Article 34 "Miscellaneous Provisions"; Article 35, "Prior Rights"; and Article 38, "No Strike; No Lockout."

HPERB Case No. S-12-7, supra, was initiated upon a petition filed by Mayor Fasi for a declaration that a walkout at 7:00 p.m. on July 14, 1979, by 110 out of the 119 Honolulu police officers who reported for duty on the third watch constituted an illegal strike under HRS §89-12(b). At hearing on July 15, 1979, the Board Chairman declared that an illegal strike presenting imminent danger to public safety was in progress, and that grounds existed for the Board to seek appropriate injunctive relief. S-12-7, Tr. p. 31. The Board at hearing of the instant matter took judicial notice of this case. Tr. pp. 133-134.

Testimony at hearing of the present matter was that the strike occurred over the period of July 14, 1979 to July 18, 1979. Tr. p. 76.

On July 14, 1979, a Saturday, Complainant Ledward reported for his assigned watch, the third watch (Tr. p. 54), at Honolulu International Airport at the normal starting time of 1:30 p.m. Ledward testified that earlier that day between 11 and 12 o'clock he had experienced stomach pains; he had taken ulcer medication, and the pain had subsided sufficiently so that he could report to work. Ledward further testified

that at work at about 7:00 p.m. (Tr. p. 44), the two patrolmen then working under him notified him that they were not feeling well and were going to go home sick. Ledward testified that at about the same time, he himself experienced a recurrence of stomach pains and also decided to go home sick. He attempted to telephone his immediate supervisor, Lieutenant Harry Chinn, to notify him that he was going home sick, but Lieutenant Chinn was not home. He then telephoned the main station to talk to the "captain or the major or whoever was there" (Tr. p. 45) but was only successful in contacting the lieutenant in charge of dispatch. He notified this lieutenant of his intention of going home sick and proceeded home without being relieved of his command. He also notified the airport supervisor of this intent and told the supervisor he would "have to rely" on the Hawaii Protective Association, a private security firm. Tr. pp. 42-45, 59. Complainant testified that the sole reason he left work was because of his ulcer condition. He would have remained at work otherwise, but being the sole remaining officer on duty, he would not have been able to cope with the situation or service complaints efficiently. Tr. p. 73.

At hearing, counsel for Respondents introduced into evidence a two-page typewritten xeroxed flyer with the heading "THIRD WATCH & OTHER UNITS AT WORK DURING 'BLUE FLU.'" Resp. Ex. 7. The sheet contains several paragraphs with instructions as to how and when to call in sick, what information to give, what to do with HPD vehicles after calling in sick, and information regarding doctor's certificate. The first paragraph reads:

1. THIRD WATCH "B", 4TH PLATOON, WILL BE WORKING -- AT 1930 HOURS THEY WILL BE TOLD TO CALL SICK BY INFORMING THEIR SUPERVISOR (DESK SGTS, ETC.) BY PHONE WHILE ON THE BEAT. AFTER CALL IS MADE THEY WILL GO HOME. THERE WILL [sic] NO CONFRONTATIONS.

Ledward stated that he did see a flyer "similar to" this one around the time the two officers under him reported sick or a little after that time, that is, sometime between 7:00 and 8:00 p.m. on July 14, 1979. Tr. pp. 66, 70, 79, 85.

Ledward testified that the next day, Sunday, July 15, the stomach pains persisted so he continued medication and notified Lieutenant Chinn of his condition and the fact that he was on sick leave. Tr. p. 46.

The next day, Monday, July 16, Ledward remained off work and went to see Dr. Kikuo Kuramoto because of the stomach pains. Dr. Kuramoto recommended that he continue his medication and that he go home and rest. Tr. pp. 46-47.

Ledward's ulcer condition was first diagnosed in January or February of 1973 by Dr. Chew Mung Lum. He continued seeing Dr. Lum for all of 1973, approximately every two weeks for a period of six months, then approximately every month thereafter. The condition subsided but then recurred during an unspecified period in late 1974 or early 1975 at which time Ledward returned to Dr. Lum and continued seeing him through 1975. Tr. pp. 38-39, 72. Ledward testified that the condition "comes and goes. You don't know when it will come." Tr. p. 39.

Ledward did not consult a doctor regarding his ulcer after visiting Dr. Lum in 1975 until July of 1979 when he visited Dr. Kuramoto. There was testimony, however, that he either did not report to work or left work before the

end of his shift on a few occasions, probably in mid- or late 1976, because of his ulcer condition. Tr. pp. 53, 72-73, 75-76, 79-81. During the period Ledward was on airport duty, since May 1, 1977 (Tr. p. 53) through 1979 (Tr. p. 69), he never left work because of his ulcer condition prior to July of 1979. Tr. p. 81.

According to Dr. Kuramoto, Ledward's visit to his office on July 16, 1979, constituted his first opportunity to treat him for ulcers. Ledward had consulted Dr. Kuramoto sometime in 1972 about a cold. Tr. p. 28. At the July 16 visit, Dr. Kuramoto made no positive diagnosis that Ledward was suffering the effects of a recurrent ulcer, but recommended continuation of his medication, dietary precautions, and rest on the basis that Ledward's complaints of nausea and stomach pains fit the diagnosis of an ulcer and on the basis of Ledward's relating to him Dr. Lum's diagnosis, based on X-rays, of a duodenal ulcer in 1973. Dr. Kuramoto's examination revealed no major complication related to ulcers such as bleeding or an acute perforation. Complainant submitted into evidence the certificate Dr. Kuramoto filled out containing the diagnosis of "recurrent ulcer." Comp. Ex. A. Upon Ledward's return to Dr. Kuramoto's office on July 18, Dr. Kuramoto cleared Ledward to return to work. Tr. pp. 23-36.

Ledward thus missed 3 hours of work on July 14 and 8 hours of work on July 15, 16, and 17. Tr. p. 41.

Upon return to work on July 18, Ledward filed an application for sick leave, and submitted it to his immediate supervisor, Lieutenant Chinn. The application was returned to Ledward about a week later unprocessed, with the word "void"

written across it; and the words "sick out" inscribed in the section provided for remarks of the Authorized Supervisor, which section contains the signature "Major Gordon Moore" in the space provided for the signature of the authorized supervisor. Comp. Ex. B, p. 3. Ledward submitted another sick leave application. Resp. Ex. 1. Under the section provided for remarks of the "Authorized Supervisor" a notation as follows is typed in: "Participated in work stoppage. 3 hours AWOL for 7-14 Disciplinary Action. The following three days temporarily being marked AWOL." The remark is signed by Major Gordon Moore and dated 8-2, 1979. Tr. 56-58.

Following the work stoppage of July 14 to July 18, 1979, and before August 8, 1979, the HPD offered participants in said work stoppage the opportunity to convert the time for which such participants were marked AWOL and for which they claimed sick leave, to vacation time or comp time. Ledward informed Major Moore that his position was that he was making a bona fide claim for sick leave, would refuse the conversion, and would file a grievance to protest disciplinary action denying the sick leave. Tr. pp. 55-56, 68, 71-72, 78-79, 110-111. Ledward also testified that he did not want to draw on any of his vacation time because he wanted to receive pay for it upon his impending retirement. Tr. pp. 69, 111.

On August 8, 1979, Ledward received a written reprimand from Major Gordon Moore, Tactical Operations Division, for violating a Honolulu Police Department Rule providing that officers and employees are to remain at their assignment and on duty until properly relieved. The reprimand states that "On 7-14-79 at 1930 hours, you abandoned your assignment and

left the airport station without proper relief." The reprimand further provided that Ledward was AWOL 3 hours on July 14 and would forfeit 8 hours of comp time. Comp. Ex. C, Tr. pp. 49-50, 100-102.

Ledward contested the disciplinary action taken against him by having SHOPO file a Step I grievance, dated August 21, 1979, under the Unit 12 collective bargaining agreement, with Major Moore, Commander, Tactical Operations Division. In said grievance, Ledward charged that the allegation of the rules violation, and denial of pay and comp time were unjust and violative of the bargaining agreement. Comp. Ex. E.

In a letter signed by Harold Falk, Deputy Chief of Police, dated August 24, 1979, on behalf of Francis Keala, Chief of Police (Tr. p. 38), but drafted by Major William Jones, executive assistant to the Chief (Tr. p. 122), the grievance was "not accepted. . .in accordance with the provisions of Article 38" of the unit contract. Comp. Ex. F. Article 38, "No Strike; No Lockout" of the July 1, 1979 to June 30, 1981 contract provides:

> Article 38. No Strike; No Lockout
>
> The Union agrees that during the life of this Agreement, neither the Union, its agents, nor its members will authorize, aid or assist, instigate, or engage in any work stoppage, slow-down, sick out, picketing, refusal to work or strike against the Employer.
>
> The Union agrees that during the life of the Agreement the Union, its agent and members will not support, aid, or assist any other labor organization, or any of its members acting individually, in a labor dispute by any effort relative to any work stoppage, slow-down, sick out, picketing, refusal to work or strike.
>
> Refusal to cross any picketline in the performance of duty shall be a violation of

this Agreement and may be considered a basis for disciplinary action.

Upon any notification confirmed in writing by the Employer to the Union that certain of its members are engaged in an action prohibited by this Article 38, entitled No Strike; No Lockout, the Union shall immediately order, in writing, such members to return to work immediately, provide the employer with a copy of such an order, and a responsible official of the Union shall publicly order them to return to work. Such orders shall be given immediately by the Union and shall be based on the representations, in writing, of the Employer regarding the aforesaid prohibited activity. In the event that a wildcat strike occurs, the Union agrees to take all reasonable and affirmative action to secure the members' return to work as promptly as possible. Failure of the Union to issue such orders and/or take such action shall be considered in determining whether or not the Union was instrumental, directly or indirectly in the prohibited activity. After the Union disavows the prohibited activity, if the prohibited activity continues, the Employer may impose penalties or sanctions against the participants as prescribed by law or departmental regulations.

The Employer agrees that there shall be no lockout during the term of this Agreement.

The parties further agree that neither party shall be bound by the provisions of Article 32 of this Agreement entitled Grievance Procedure in the event of any violation by either party of this Article 38 entitled No Strike; No Lockout. In the event of such violation the aggrieved party may immediately pursue such remedies as are prescribed. (Emphasis added)

Said letter of August 24, 1979 stated that the grievance filed in protest of disciplinary action taken when Ledward "abandoned his duties and responsibilities as a police officer to participate in an illegal sick out" would not be accepted in accordance with said Article 38. Comp. Ex. F., Tr. pp. 122-123. Deputy Chief Falk signed the letter on the basis of his knowledge of the Board's determination that an illegal

strike was conducted by HPD employees and of the provisions of Article 38. Tr. 141.

In response to the aforementioned letter SHOPO, through its then-General Counsel Curtis K. Uno, sent a letter dated August 28, 1979 to Chief Keala, acknowledging receipt of said letter, and putting Chief Keala on notice of the grievant's and the Union's disagreement with the decision to refuse to process the grievance. The letter requested that Chief Keala reconsider said decision, and notified him of SHOPO's intent to file the grievance at Step III of the grievance procedure should the HPD not reassess its position and agree to process the grievance. The letter further disputed the applicability of Article 38 to the matter, disputed the contention in Deputy Chief Falk's letter that the disciplinary action before levied was discussed with SHOPO representatives and their concurrence gained, and requested that the statements regarding SHOPO's concurrence in disciplinary action to be taken be substantiated. Comp. Ex. G. Chief Keala made no response to this letter and took no action pursuant to it. Tr. p. 148.

In a letter dated September 6, 1979 to Harry Boranian, Director of the Department of Civil Service for the City and County of Honolulu, SHOPO, through its Business Agent Herman L. K. Brandt, requested that Complainant's grievance be processed at Step III of the grievance procedure. Comp. Ex. H. Boranian took no action on the letter and could not recall what, if any, action was taken on the letter by his staff. Tr. pp. 155-157, 161.

In a letter dated October 1, 1979 to Boranian, SHOPO, through its president, Louis L. Souza, requested that Complainant's grievance be processed at Step IV.

Comp. Ex. I. Boranian did not recall what action he took on this letter, but he did know that the case was not taken to arbitration. Tr. p. 158, 161. In a letter dated November 9, 1979 to Souza, Boranian suggested that there was no legal recourse in regard to "departmental action" taken as a result of SHOPO members' strike activities, and that the matter should be considered closed. The letter did not address requests for processing Complainant's grievance through Step III or IV. Comp. Ex. J, Tr. pp. 159-160.

CONCLUSIONS OF LAW

Respondents contest the Board's jurisdiction in the instant matter on the basis that the 90-day* period provided by law in which to file a prohibited practice charge expired before Complainant filed his charge with this Board on December 26, 1979. Respondents assert that the event triggering the 90-day period occurred on or about August 24, 1979 when Complainant was informed in the letter signed by Deputy Chief

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*§89-14 Prevention of prohibited practices. Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9. All references in section 377-9 to "board" shall include the Hawaii public employment relations board and "labor organization" shall include employee organizations.

§377-9 Petition of unfair labor practices.

* * *

(1) No complaints of any specific unfair labor practice shall be considered filed unless filed within ninety days of its occurrence.

HPERB Rule 3.02(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.

Falk that Complainant's grievance would not be accepted for processing; therefore, the complaint having been filed with the Board in excess of 90 days from that event, the complaint is void, and a dismissal of the complaint in order.

It is a well-settled legal doctrine that exhaustion of contractual remedies is a prerequisite to extra-contractual remedies and that a cause of action accrues when a grievant has exhausted those steps in the grievance procedure which the employee has the power to invoke. Butler v. Local Union 823, Int. Bro. of Teamsters, 514 F. 2d 442 (8th Cir. 1975), n. 11, p. 450. Complainant having requested to proceed to Step IV in a letter dated October 1, 1979, it is apparent that his charge as filed on December 26, 1979, was timely filed and that the Board thus has jurisdiction over the matter.

The Board turns now to the motion for a directed verdict entered by counsel for Respondents. Respondents contend that Complainant failed to present evidence sufficent to withstand said motion in support of his allegations that HRS §89-13(a), (1), (7), and (8) were violated. These provisions provide as follows:

> §89-13 Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
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> * * *
>
> (7) Refuse or fail to comply with any provision of this chapter; or
>
> (8) Violate the terms of a collective bargaining agreement.

On motions for a directed verdict, the evidence and the inferences drawn therefrom must be considered in the light most favorable to the party against whom the motion is directed,

and if the evidence and inferences viewed in that manner are such that reasonable persons may reach different conclusions upon a crucial issue, then the motion should be denied. Farrior v. Payton, 57 Haw. 620, 626 (1977). The Board holds this standard applicable in the instant matter. See Superior Oil Company v. Railroad Commission of Texas, 519 S.W.2d 479 (Civ. App. Tex. 1975) at 483, where it is noted that general procedural principles are applicable to administrative agencies.

In the instant matter, the "crucial issue" is the question of whether or not Complainant can be said to have participated in the strike activities of July 14-18, 1979. Since the Board in the instant matter has taken judicial notice of its own action determining that an illegal strike under HRS §89-12(b) occurred during that period, the provision in Article 38 of the Unit contract, providing that neither party shall be bound to follow the grievance procedure in the event of a strike against the employer, becomes operative. Thus, if it is determined that Complainant participated in the strike, Respondents would have committed no prohibited practice by refusing to process Complainant's grievance. According to the testimony of Respondent Keala's executive assistant, Major William Jones, who acts as HPD's union liaison, violations of Article 38 give the employer cause to refuse to process grievances arising out of such violations only, not all grievances arising out of actions taken during the period of such violations, regardless of their connection to such violations. Tr. pp. 123-125, 127.

Viewing the evidence and inferences drawn therefrom in the light most favorable to Complainant, the motion for a directed verdict must be denied on the basis that a reasonable person could conclude that Complainant was actually sick as

claimed and left and remained away from work because of that sickness. Such a conclusion would be based on an assumption that Complainant left work at the same time as other striking employees simply due to a recurrence of his ulcer condition brought on by the stress of being left to handle all police duties at the airport alone, and not because of an intent to participate in the strike. It would further have to be assumed that Complainant did all he could to notify his superiors of his sickness and left his watch without being relieved of his command because of the severity of his sickness. It would also have to be assumed that Complainant consulted a doctor other than the one who made the initial ulcer diagnosis, on a date two days after allegedly falling ill, in good faith, and not merely to obtain a doctor's certificate to corroborate a claim of illness. Giving Complainant the benefit of the doubt on such questions, the conclusion can reasonably be reached that Complainant was in fact ill and did not participate in the strike, and that Complainant thus has a legitimate case based on Respondents' refusal to process his grievance. Because a difference of opinion as to Complainant's participation in the strike could reasonably arise when the evidence and inferences drawn therefrom are viewed in a light favorable to Complainant, the motion for a directed verdict is denied.

Having denied the motion for a directed verdict, the Board now reviews the case on its merits. Accordingly, the evidence and inferences drawn thereform are to be viewed objectively and the burden of proof placed on Complainant to prove his charges by a preponderance of the evidence. Board rule 1.08(g)(23). Under this standard of review, the Board concludes that Complainant has failed to carry his burden of

proving by a preponderance of the evidence that Respondents acted wrongfully in denying Complainant sick leave and in failing to process his grievance. The doubts surrounding Complainant's alleged illness convince the Board that Respondents legitimately refused to process Complainant's application for sick leave and grievance and undertook other disciplinary action because Complainant was a participant in the strike.

It is the Board's conclusion that the only reasonable inference to be drawn from the evidence is that Complainant participated in the strike despite his claim that his absences from work were due to illness. Considering the evidence in its totality, the conclusion cannot be escaped that, whether Complainant was at least partially ill due to ulcers or not, his leaving and remaining way from work July 14 through 17 was motivated by an interest in participating in the strike effort to the extent that it would be proper to consider him a participant in the strike.

Complainant's leaving work at the same time as other strike participants is, of course, the primary factor in the Board's conclusion. Complainant's testimony that he experienced a recurrence of stomach pains at the time appointed for the walk-out is difficult to attribute to coincidence. The Board must also question how much stress Complainant, a veteran of over 30 years service with the HPD, would feel as a result of being left by two subordinates to handle the airport assignment alone, and so must question whether an ulcer attack was brought on by such stress. Moreover, if Complainant had no intent to further the strike activities, it is more than reasonable to assume that he would not leave his watch without first ensuring that it was not being left unattended by some

employee of the HPD. However, Complainant only notified the airport supervisor and the dispatch office of his intent to leave, and did so, rendering the airport without police protection. It must be further questioned why, if Complainant had no intent to participate in the strike, he did not remain to the end of his shift, which had begun about six hours before he left, or why, if he was sick before work, he reported for work at all. (The Board also notes the fact that since May 1, 1977 when Complainant began airport duty, he had never left work because of his ulcer condition.)

Furthermore, doubt is cast on the legitimacy of Complainant's illness by the fact of his going to a doctor, unfamiliar with his ulcer history, two days after falling sick for treatment and a certificate. The certificate Complainant received from Dr. Kuramoto adds minimal support to Complainant's contention of genuine illness because it was granted by Dr. Kuramoto on the sole basis of Complainant's verbal description of his ailments.

Considered in its totality, the evidence leads the Board to hold that Complainant's actions during the period in question indicate that the Complainant left and subsequently stayed away from his assigned duties due to his participation in an illegal strike rather than illness. Respondents and their agents were clearly remiss in failing to make inquiries with Complainant's treating physician regarding the nature and severity of his ulcer condition, but the evidence of participation in the strike being preponderant, this failure cannot affect the Board's holding herein. It follows that the disciplinary measures taken against Complainant in connection with the police sick-out of July of 1979 were proper; that under the

Unit 12 contract, Respondents had no obligation to process Complainant's grievance; and that no prohibited practice occurred when Respondents failed to process the grievance.

ORDER

For the reasons cited in the opinion above, the prohibited practice charges brought by Complainant in Case No. CE-12-60 are dismissed.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada, Chairman

John E. Milligan, Board Member

I abstain from the majority opinion.

James K. Clark, Board Member

Dated: September 5, 1980

Honolulu, Hawaii