

Dec.

STATE OF HAWAII  
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	)	
	)	
ELDON P. KAOPUA, State of	)	Case No. <u>CE-12-61</u>
Hawaii Organization of	)	
Police Officers (SHOPO),	)	
	)	Decision No. <u>136</u>
Complainant,	)	
	)	
and	)	
	)	
FRANK F. FASI, Mayor of	)	
the City and County of	)	
Honolulu; HARRY BORANIAN,	)	
Director of Civil Service,	)	
City and County of Honolulu;	)	
and FRANCIS A. KEALA, Chief	)	
of Police, Honolulu Police	)	
Department,	)	
	)	
Respondents.	)	
	)	

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FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER

On March 6, 1980, Complainant Eldon P. Kaopua, a police officer in the Honolulu Police Department (hereafter HPD), 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 HPD, alleging that Respondents wrongfully refused to grant Complainant's application for sick leave for the period of July 15, 1979 to and including July 22, 1979, during which period Complainant maintains he was ill with the flu, and for wrongfully refusing to process Complainant's grievance, based on the refusal to grant sick leave, through the contractual grievance procedure. The Board in HPERB Case No. S-12-7, et seq., determined

that SHOPO conducted an illegal strike beginning July 14, 1979. Testimony at hearings on the instant matter indicate that this strike action continued until July 18, 1979. Complainant alleges that Respondents, through the aforementioned conduct, have committed prohibited practices under HRS §§89-13(a)(1), (7), and (8).

After due notice to the parties, a hearing was held on May 19, 1980. All parties were afforded full opportunity to call and cross-examine witnesses and submit exhibits. At the close of oral arguments, Respondents' attorneys entered motions to dismiss and for a directed verdict (Tr. 82), which motions were denied. Tr. 96.

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

#### FINDINGS OF FACT

The State of Hawaii Organization of Police Officers (hereafter SHOPO) is the exclusive representative as defined in HRS §89-2(10), of Unit 12 and, as such, represents Complainant Kaopua herein.

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

The Board in Case No. S-12-7 declared that a mass walk-out of SHOPO members on July 14, 1979 at approximately 7:30 p.m. constituted an illegal strike. This strike lasted through July 18, 1979. Tr. 47-49.

On Friday night, July 13, 1979, Complainant Kaopua, a veteran of approximately ten years in the HPD, reported for his assigned watch at the regular starting time of 10:30 p.m. and worked through to the regular quitting time of 7:00 a.m.

the next morning, Saturday, July 14, 1979. Complainant testified at hearing that upon finishing this shift he felt "very tired." Tr. 29-30.

Complainant, a physical security officer in the Hawaii National Guard, had a conference in Hilo to attend in connection with his National Guard position, and so flew to Hilo at about 8:00 a.m. upon finishing his HPD shift on Saturday morning. Complainant returned to Honolulu Saturday afternoon between 6:00 and 6:30 p.m. Tr. 29-30, 43.

Complainant testified that upon returning from Hilo, he was completely exhausted, with body aches and fever and so called in sick instead of reporting for his HPD shift Saturday night. Tr. 30. Complainant duly notified his supervisor within the HPD to report his absence. Tr. 32. At home, Complainant treated himself by taking aspirin and cough syrup. Tr. 30.

On cross-examination Complainant indicated that upon returning from Hilo, and before going home, he attended a SHOPO general informational meeting, arriving at the meeting at about 6:00 p.m. Tr. 42-43, 57. The SHOPO flyer announcing the meeting, entered into evidence by Respondents, indicates that the meeting began at 5:00 p.m., Saturday, July 15, 1979. Resp. Ex. 1. Complainant remained at the meeting for about an hour, leaving sometime after 7:00 p.m., before the meeting was concluded. Tr. 43-44, 58.

Complainant testified that, despite his attendance at the informational meeting, which began about two and one-half hours before the mass walk-out began on Saturday, July 14, he was not aware that SHOPO intended to conduct a strike and that he first became aware of it when he saw it reported on TV. Tr. 46, 53, 57, 58.



Complainant averred that he would have gone to work during the subject period if he were not sick, regardless of the stoppage, and in spite of the fact that he was a district representative and a member of the SHOPO Oahu board of directors. Tr. 35, 39, 52-54. Complainant disavowed having any part in planning or participating in the strike. Tr. 35.

Complainant stayed off work through July 22, 1979, and returned to work on July 23, 1979. Tr. 32.

On Wednesday, July 18, Complainant went to the Kaiser Clinic in Maile and consulted Dr. Martin Redlich, reporting to Dr. Redlich symptoms of fever, body aches, and cough. Tr. 30-31. Complainant testified that he did not consult a doctor immediately upon experiencing the flu symptoms because he thought he could recover in due time, but he decided to consult a doctor when he still felt sick on Wednesday. Tr. 31-32. Dr. Redlich gave the Complainant a prescription for cough medication, which the Complainant had filled. Tr. 31.

Dr. Redlich, testifying from his notes on the Complainant's medical chart, related that he observed at Complainant's visit on July 18 that the Complainant looked pale and tired and was coughing loudly. After examining the Complainant, Dr. Redlich diagnosed the Complainant's sickness as flu or virus. Dr. Redlich recommended rest, the taking of fluids and aspirin, and prescribed a cough sedative. Dr. Redlich's examination included a taking of the Complainant's temperature, which was not elevated. Dr. Redlich related that about 50 percent of flu patients have a fever at the time of examination; some patients initially contract a high fever which subsides by the time of examination, others have a variable temperature, while others never develop a fever. Dr. Redlich based his diagnosis on the

Complainant's paleness and coughing, together with the Complainant's own description of his symptoms. Dr. Redlich stated that many such diagnoses are made on the basis of an educated guess, and that, in this case, he had no way of definitely knowing that the symptoms related to him by the Complainant were that of the flu. At the time of the examination, Dr. Redlich did not know of the occurrence of the police walk-out. Dr. Redlich made out a doctor's certificate for the Complainant, which specified a return-to-work date of July 23, 1979, and which also included the diagnosis of "flu syndrome." Comp. Ex. B. Tr. 12-26.

Upon returning to work on July 23, the Complainant submitted proper application for sick leave for the period of July 15 through July 22, 1979. In said application, Complainant requested only six days of sick leave, although he was off work for eight days, because Complainant had a regular two days-off during the period he was out. Tr. 28-29. Said application was recommended for approval by Complainant's supervisor, Captain Donald Lee, on or about August 13, 1979. Comp. Ex. B-2.

This application for sick leave was denied by Captain Lee in a memo dated August 24, 1979. Comp. Ex. C. The memo stated that requests for sick leave for the "job action period" of July 15 to July 18, 1979 would be denied, that officers would be marked AWOL for any of those days for which sick leave was requested, but that officers could, if they desired, convert the time they were marked AWOL to either vacation or "comp time." This memo was written at the instruction of Captain Lee's supervisor, Major Peter DeMello. Tr. 33, 75. Captain Lee made no attempt to explain to the Complainant or the other applicants involved why their requests for sick



leave were denied. Tr. 75-76. Complainant did not elect to make the conversion on the basis that he was genuinely sick during the period of July 15 to July 18. Tr. 33.

Of the eight days Complainant was out, he was denied pay for July 15 through July 18, 1979, granted two days of sick leave, and was granted two regular days off. Tr. 34, 51. Comp. Ex. Z.

On or about September 10, 1979 Complainant, through his representative SHOPO, filed a grievance at Step I of the grievance procedure contained in the Unit 12 collective bargaining contract, protesting the denial of sick leave. Comp. Ex. D. This grievance was returned to Complainant unprocessed and without explanation as to why it was not processed. Tr. 36, 50-51, 62.

When Complainant was unsuccessful in initiating the grievance procedure at Step I, he filed a grievance with the Civil Service Commission. The Civil Service Commission ruled that it did not have jurisdiction because of the availability to Complainant of the grievance procedure. Tr. 36-37, 62-63. This decision was affirmed on appeal to the Circuit Court. Tr. 38, 63.

SHOPO, on behalf of Complainant, wrote a letter to Chief Keala, dated September 28, 1979, requesting that Complainant's grievance be processed at Step II of the grievance procedure. Comp. Ex. F. Tr. 62. No response to this request was received. Tr. 64.

SHOPO, on behalf of Complainant, wrote a letter dated December 4, 1979 to Harry Boranian, Director of the Department of Civil Service, requesting that Complainant's grievance be taken up at Step III of the grievance procedure. Comp. Ex. G. Tr. 63-64. No response to this request was received. Tr. 63-64.

SHOPO, on behalf of Complainant, wrote a letter dated December 28, 1979 to Boranian requesting, in view of the inaction in regard to Complainant's attempts to invoke the grievance procedure, that his grievance be taken to arbitration. Comp. Ex. H. Tr. 64. No response to this request was received. Tr. 64.

#### CONCLUSIONS OF LAW

Respondents' motion to dismiss and motion for a directed verdict based on an allegedly untimely filing of the complaint having been denied at hearing (Tr. 82-96), this case is before the Board on its merits. Complainant charges that Respondents' actions in denying sick leave benefits and failing to process Complainant's grievance arising out of the denial of sick leave violates HRS §§89-13(a)(1), (7), and (8), which 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;

\* \* \*

- (7) Refuse or fail to comply with any provision of this chapter; or

- (8) Violate the terms of a collective bargaining agreement.

Complainant asserts that in failing to process his grievance, Respondents have undercut the very purpose that collective bargaining serves: the peaceful resolution of disputes. Complainant argues that the refusal to process the grievance amounts to an interference, under HRS §89-13(a)(1), with his right to collective bargaining. In violating



HRS §89-13(a)(1), Complainant further argues, Respondents have refused or failed to comply with HRS Chapter 89 and thus violated HRS §89-13(a)(7). Finally, Complainant argues that the denial of sick leave amounts to a violation of Unit 12 contract provisions pertaining to leaves of absence and discipline and dismissal, and that such violations of the terms of the collective bargaining agreement violate HRS §89-13(a)(8). Tr. 93-94.

Respondents in turn argue that Complainant has failed to carry the burden of showing any specific acts which constitute violations of HRS §§89-13(a)(1) or (7), and that no violation of HRS §89-13(a)(8) has been established because Article 38 of the Unit 12 contract provides that the parties are not bound by the grievance procedure in the event of any violation by either party of the no-strike provision contained therein. Respondents thus argue that the denial of sick leave and their refusal or failure to process Complainant's grievance were justified by the occurrence of the mass walk-out. Resp. Closing Brief, 18-19.

Neither party entered the Unit 12 contract into evidence and thus the Board is unable to determine the merits of positions taken by the parties regarding contractual provisions and their application to the circumstances of this matter. Tr. 4. Without being able to consider the contract, the Board must necessarily conclude that Complainant has failed to prove by a preponderance of the evidence that Respondents' actions in denying sick leave and failing to process Complainant's grievance amounted to prohibited practices. Even if the contract were in evidence, no prohibited practices on the part of Respondents would be made out since, insofar as the issues reduce to the question of whether the refusal to grant sick



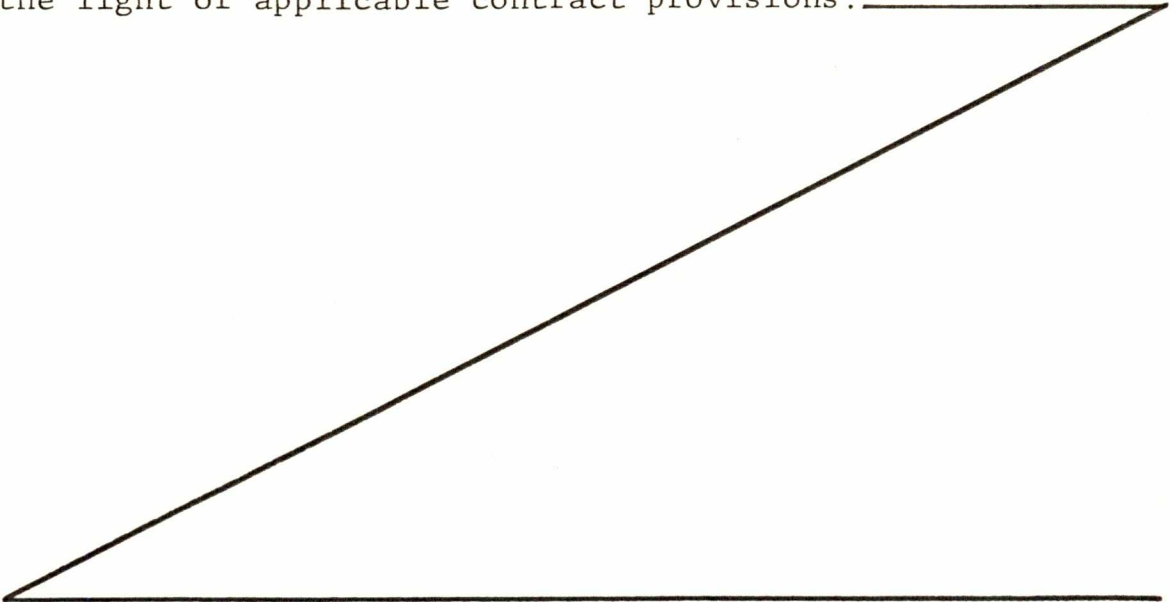
leave and refusal to process the grievance were not justified due to Complainant's bona fide illness, the evidence is less than conclusive. This being the case, it cannot be concluded that Respondents interfered, restrained or coerced Complainant in the exercise of his right to collective bargaining such as would make out a case under §89-13(a)(1); nor has any failure or refusal to comply with any provision of Chapter 89 on the part of Respondents, such as would make out a case under §89-13(a)(7), been proven. Finally, because Complainant has not shown Respondents to have been in error in refusing to process his sick leave application and grievance, it cannot be concluded that Respondents violated contract provisions pertaining to leaves of absence and discipline and dismissal, such as would make out a case under §89-13(a)(8).

Although Complainant was off-duty at the hour of the commencement of the walk-out, the day of the onset of his alleged sickness coincided with the day of the beginning of the walk-out. Complainant maintained that this circumstance was only a coincidence and that, had he not had the flu and despite the fact that he was a SHOPO director, he would have reported for duty on the day of the walk-out. Complainant in fact maintained that, despite attending the SHOPO informational meeting for about an hour up to a time less than a half-hour before the start of the walk-out, he had no knowledge of the walk-out plans until he had gone home and seen TV newscasts concerning the walk-out. Complainant's position that he was completely oblivious to any decision to walk out, or even the possibility of walking out, is difficult to accept and tends to color his claims that he was ill with the flu on the day of the start of the walk-out and for that sole reason unable to work.

Complainant's claim of sickness is only minimally supported by his treating physician, who stated that his diagnosis of flu syndrome was an educated guess based on Complainant's verbal descriptions, cough, and pale appearance.

Respondents on the other hand marked Complainant AWOL for the days he was out which coincided with the walk-out, but awarded him sick leave and regular time off for the days Complainant was out which extended past the period of the walk-out. Respondent's actions make it unclear whether they considered Complainant a participant in the strike or whether he was considered genuinely ill but necessarily marked AWOL because he claimed sick leave during an illegal job action.

The evidence being inconclusive on both sides, the Board concludes that Complainant has failed to prove by a preponderance of the evidence that Respondents' actions in denying sick leave and failing to process Complainant's grievance amounted to prohibited practices. This conclusion is made necessary for the reason that the Board is unable to determine the merits of positions taken by the parties in the light of applicable contract provisions.





ORDER

For the reasons cited in the opinion above, the prohibited practice charges brought by Complainant in Case No. CE-12-61 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 18, 1980

Honolulu, Hawaii