

STATE OF HAWAII

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	
)	
STATE OF HAWAII ORGANIZATION)	CASE NO. CE-12-71
OF POLICE OFFICERS (SHOPO))	
and GEORGE DAMAS, JR.,)	
)	DECISION NO. 160
Complainants,)	
)	
and)	
)	
FRANK F. FASI, Mayor of the)	
City and County of Honolulu,)	
)	
Respondent.)	
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FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

On September 16, 1980, Complainants STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO) and GEORGE DAMAS, JR., filed a prohibited practice complaint with this Board against Respondent FRANK F. FASI, former Mayor of the City and County of Honolulu.

In their complaint, Complainants allege that Respondent committed a prohibited practice within the meaning of Section 89-13(a), Hawaii Revised Statutes (HRS), when the Honolulu Police Department (HPD) refused to process Petitioner DAMAS' contractual grievance contesting his dismissal from the HPD.

Hearings were held on December 15, 1980, and January 22 and 28, 1981, with the parties being afforded full opportunity to present evidence, examine witnesses, and present oral arguments. Complainants and Respondent submitted written briefs to the Board on April 16 and April 20, 1981, respectively.

Based on a full consideration of the entire record in this case, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Complainant SHOPO is and was, at all times relevant, the exclusive representative, as defined in Section 89-2(10), HRS, of bargaining unit 12, as defined in Section 89-6(a)(12), HRS.

GEORGE DAMAS, JR., was, prior to his discharge, a police officer in the HPD and a public employee as defined in Section 89-2(7), HRS.

Complainant DAMAS was, at all times relevant, included in bargaining unit 12.

On June 24, 1977, Respondent and Complainant SHOPO executed a collective bargaining agreement for the period July 1, 1977 through June 30, 1979 (Agreement), covering employees of Unit 12. Bd. Ex. 1A.

On or about March 26, 1978, DAMAS was placed on indefinite suspension, effective March 24, 1978, pending the outcome of an administrative investigation into his possible involvement in a theft incident which occurred at the HPD receiving desk sometime between March 14 and March 16, 1978. R.'s Ex. 1, 1A, 1B, 1C, 1D.

On September 7, 1978, DAMAS was convicted by a First Circuit Court jury of first degree theft for his role in said receiving desk incident. Cs'. Ex. 6; Tr. 1/22/81, p. 97.

On or about September 11, 1978, the Chief of Police of HPD, Francis A. Keala, notified DAMAS, by letter, that he was suspended and would be terminated from the HPD,

effective ten days from the receipt of the notice, for violating HPD Rules and Regulations, Article VII, Section B, Rule 1, Standard of Conduct, based upon the finding of the Departmental Disciplinary Review Board that he removed money from the property package of a prisoner in police custody for which he was later arrested and charged for theft. Bd. Ex. 1C.

On or about September 18, 1978, SHOPO, on behalf of DAMAS, filed a Step II grievance alleging that DAMAS' termination was a violation of Article 13, Discipline and Dismissal, of the Agreement, in that said termination was "unfair, unjust, unwarranted, capricious and in violation of SHOPO contract Article 13." The grievance sought "reinstatement and restoration of all rights, benefits, allowances and wages lost as a result of the indefinite suspension" and his subsequent dismissal, that the grievant "be made whole," and that the Employer "comply with all provisions" of the SHOPO contract. Bd. Ex. 1D.

On or about October 26, 1978, DAMAS appealed his conviction and the Intermediate Court of Appeals, in a decision filed June 5, 1980, reversed DAMAS' conviction for first degree theft. Cs.' Ex. 6.

In a letter to Chief Keala, dated June 18, 1980, Herman Brandt, then SHOPO business agent, on behalf of DAMAS, requested that a date and time be scheduled to hear DAMAS' grievance at Step II of the grievance process, the initial step under the Agreement at which to hear dismissal cases. Bd. Ex. 1E, 1A, Article 32 (D).

In a letter to Ollie Burkett, SHOPO Business Manager, dated June 20, 1980, Chief Keala informed SHOPO that HPD refused to meet and discuss the DAMAS grievance

because SHOPO had allegedly failed to take any action on the grievance other than the initial filing on September 18, 1978. As a result, the Employer viewed SHOPO's action as a "constructive withdrawal" of DAMAS' grievance. SHOPO's request to meet was thus refused for the alleged failure to "pursue the grievance". Bd. Ex. 1F.

Brandt, on behalf of DAMAS, in a letter to Harry Boranian, then Director of the Department of Civil Service, City and County of Honolulu, dated June 26, 1980, requested Director Boranian to process DAMAS' grievance at Step III of the grievance procedure, as the previous response received was deemed to be unsatisfactory and contrary to the provisions of Article 32 of the Agreement. Bd. Ex. 1G.

Brandt received a letter from Director Boranian, dated July 1, 1980, informing SHOPO of his position that SHOPO's "two years of silence" regarding the DAMAS matter constituted "constructive withdrawal" of the grievance. Bd. Ex. 1H.

Brandt, on behalf of DAMAS, wrote a letter, dated July 7, 1980, to Director Boranian disputing his refusal to process DAMAS' grievance at Step III of the grievance procedure. Said letter further informed Director Boranian that it was SHOPO's understanding that an informal agreement had been reached with Deputy Chief Harry Falk to hold the DAMAS grievance in abeyance, pending the results of DAMAS' criminal appeal. Said letter also contended that HPD's unilateral decision to refuse to entertain DAMAS' grievance was a violation of the grievance procedure provisions of Article 32 of the Agreement and contrary to HPERB's Decision No. 79. Brandt thus requested Director Boranian to process DAMAS' grievance at Step

IV of the grievance procedure, i.e., arbitration. Bd. Ex. 1I.

Brandt received a letter, dated July 17, 1980, from Director Boranian in which Boranian denied that an informal mutual agreement to hold DAMAS' case in abeyance pending the resolution of his criminal case was struck between HPD and SHOPO. Boranian also requested more facts to establish the circumstances surrounding the conversation with Falk. Bd. Ex. 1J.

Brandt wrote a letter, dated July 29, 1980, to Director Boranian in which he indicated that the only documentation of the conversation were some personal notes. He reiterated SHOPO's contentions regarding the alleged informal agreement to hold the grievance in abeyance, and stated that the repeated refusal to process the DAMAS grievance left SHOPO with no alternative but to seek resolution by a third party. SHOPO thus again expressed its desire to proceed to arbitration under the contract grievance procedure. Bd. Ex. 1K.

On September 16, 1980, Complainants filed the instant prohibited practice complaint seeking relief from the Employer's failure, neglect, and refusal to arbitrate DAMAS' grievance which contested DAMAS' termination.

The circumstances regarding the delays in the processing of the DAMAS grievance, as they emerged at hearing, appear as follows:

Major William Jones, Executive Assistant to the Chief and HPD labor liaison, stated that the usual procedure of HPD in processing a dismissal grievance is, first, for him to check the grievance to see that applicable time

limitations¹ have been adhered to; he then contacts the hearings officer for dates and times available for Step II hearings. He then sets a date with the hearings officer. Tr. 1/22/81, pp. 62-63.

With regard to the DAMAS grievance, Jones testified that, from the time of DAMAS' suspension in late March of 1978 up until the filing of the grievance by SHOPO in mid-September 1978, whenever he wished to discuss the DAMAS case with SHOPO, he would contact Dayton Nakanelua, SHOPO's Acting Business Manager from about July of 1978 to January of 1979. Jones further testified that when he received the DAMAS grievance, signed by Herman Brandt, he contacted Brandt, but was referred by Brandt back to Nakanelua. Tr. 1/22/81, pp. 102-103. After "several attempts" to set a date and time for hearing with Nakanelua, Jones talked to Nakanelua three more times between the filing of the grievance and October of 1978; the last of these conversations being outside of Deputy Chief Falk's office after an unrelated grievance hearing in October of 1978. Jones stated that after his talk, he had the impression that the union would advise him when it wished to proceed further on the grievance. Tr. 1/22/81, pp. 63-66, 78, 104-105.

¹Article 32, "Step 1" of the Agreement, provides:

The grievance shall be in writing and served within twenty (20) days after the occurrence of the alleged violation, or if it concerns an alleged continuing violation, then it must be filed within twenty (20) days after the alleged violation first became known or should have become known to the grieving party. Bd. Ex. 1A, p. 36.

Nakanelua had no recollection of any conversation with Jones regarding the setting of Step II hearings in the DAMAS case. Tr. 12/15/80, p. 15.

The next occasion that HPD and SHOPO attempted to communicate to act on the DAMAS case was on December 8, 1978, when Herman Brandt telephoned Major Jones. Brandt stated that this call was occasioned by SHOPO's termination of John Awai, a SHOPO business agent from November of 1977 to December 8, 1978, and the person Brandt claimed was the SHOPO agent responsible for handling the DAMAS grievance after the initial filing by Brandt. Brandt, testifying from his phone notes, stated that he called Major Jones to request that the DAMAS case be held in abeyance (1) pending resolution of his criminal appeal, and (2) because of the termination of Awai. Brandt stated that Jones did not object to this proposal. Tr. 12/15/80, pp. 22-26.

Awai testified that his role in the DAMAS grievance was limited to picking up "relevant information" from HPD regarding the grievance just after the initial filing; he did not recall having any conversation with Major Jones regarding a Step II hearing for DAMAS, and never attempted to drop the DAMAS grievance. Tr. 1/22/81, pp. 5-9.

Major Jones confirmed in testimony that he talked on the phone with Brandt on December 8, 1978 regarding a continuance in the processing of the DAMAS case, but he testified that they agreed to hold the case in abeyance only to give Brandt time to familiarize himself with the facts in the case, since Awai had been fired. Tr. 1/22/81, pp. 66, 84-85, 103, 106-107. Major Jones also stated that at no time did he tell Brandt he would hold the grievance in

abeyance pending the outcome of a criminal trial. Tr. 1/22/81, p. 101. Major Jones thus never set a hearing date. Tr. 1/22/81, pp. 82-83.

Brandt also testified that on February 12, 1979, after a "gas overage" meeting, in speaking to Deputy Chief Falk, he proposed or brought up the possibility of the DAMAS grievance being held in abeyance pending resolution of the criminal case, and that Falk "didn't object to that." Tr. 12/15/80, p. 28. Brandt also testified that similar communications took place between him and Falk subsequent to February, 1979. Tr. 12/15/80, p. 29.

Falk testified that he never agreed with Brandt to continue DAMAS' Step II hearing pending the outcome of his criminal case. Tr. 1/28/81, p. 5. Falk also testified that other grievances had been filed without subsequent Step II hearings for the reason that sometimes the union reconsiders and, "after some time," withdraws the grievance. Tr. 1/28/81, p. 9. He also testified that "many" dismissal cases have taken three or four years to reach arbitration. Tr. 1/28/81, p. 11.

Brandt testified that between February 12, 1979 and June 6, 1980, when he was notified of DAMAS' acquittal in his criminal case, he was not contacted by anyone from HPD regarding the status of the DAMAS case or to set a date for a hearing. Tr. 12/15/80, p. 32.

Major Jones testified that the next occasion he had to discuss the DAMAS case with SHOPO, after talking to Brandt on the phone on December 8, 1978, was upon being informed by Brandt of DAMAS' acquittal in June of 1980. Tr. 1/22/81, pp. 67, 70, 107-108.

Under Article 32, paragraph D of the Agreement, grievances involving dismissals of employees are initiated at Step II of the grievance procedure (department or agency head). Under the "Step II" heading of the grievance procedure provisions of the contract, it is provided that:

After the presentation of the grievance, the grieving party and the Union representative shall be offered an opportunity to meet with the department or agency head or his designee in an attempt to settle the grievance.

On the HPD grievance form, there is an item reading, "Grievant and union representative are to be offered opportunity to meet and discuss grievance.

Was meeting held? _____ Yes/_____ No Date of meeting _____." On DAMAS' grievance form, the question is unanswered. Bd. Ex. 1A, pp. 36-37; Bd. Ex. 1D; Tr. 12/15/80, pp. 42-43; Tr. 1/22/81, p. 81. Brandt testified that no such opportunity was offered DAMAS or SHOPO. Tr. 12/15/80, pp. 42-43.

Jones testified that the pertinent section of the grievance form regarding the opportunity to meet was not filled because it is customarily filled in by the hearings officer after the meeting has taken place. Tr. 1/22/81, p. 82.

Respondent, setting forth its position in (1) a letter dated June 20, 1980, drafted by Major Jones and signed by Chief Keala, which indicated HPD's refusal to process the grievance (Bd. Ex. 1F), and (2) by the testimony of Jones and Falk, took the position that the processing of administrative charges for violations of rules and regulations proceed separately from related criminal charges, and thus the pendency of DAMAS' criminal case

would not have affected the scheduling for the processing of his grievance. Consequently, HPD would have rejected any union request to defer administrative processing pending a criminal determination. Administrative and criminal investigations are thus "completely separate." Tr. 1/22/81, pp. 88-90; Tr. 1/28/81, p. 5. Moreover, HPD's Internal Affairs Division handles administrative investigations, and the Disciplinary Review Board uses only reports from Internal Affairs in acting on disciplinary matters. Tr. 1/22/81, p. 89; Tr. 1/22/81, p. 110. Internal Affairs investigations begin, according to Major Jones, after the Criminal Investigation Division work is complete. Tr. 1/22/81, pp. 90-91. Thus an employee who is not found guilty of a crime may yet be terminated on the basis of administrative findings by the Disciplinary Review Board. Tr. 1/22/81, pp. 91, 94.

No written policy reflects this separation of functions. Tr. 1/22/81, p. 91. The Agreement, however, in Articles 12 and 48 provides separate policies and procedures in administrative investigations and interrogatories of police officers (Article 12) and criminal investigations and interrogatories of police officers (Article 48). These articles, however, do not address the nature of the relationship, if any, between the two types of investigations.

Falk testified that he thought the separate investigations policy was the unwritten policy of the Disciplinary Review Board beginning around 1973 or 1974. Tr. 1/28/81, p. 10.

DAMAS was dismissed after his criminal conviction, following a suspension of 184 days. Cs'. Ex. 9;

Tr. 1/22/81, p. 97. SHOPO never withdrew the DAMAS grievance, according to Brandt. Tr. 12/15/80, p. 43.

CONCLUSIONS OF LAW

Complainants allege that, in refusing to process Complainant DAMAS' grievance, Respondent has violated Subsections 89-13(a)(5), (7), and (8), HRS. These provisions read:

[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:

- (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

* * *

- (7) Refuse or fail to comply with any provision of this chapter; or
- (8) Violate the terms of a collective bargaining agreement.

Complainants allege that Subsection 89-13(a)(5), HRS, has been violated on the basis that the duty to bargain collectively in good faith is an ongoing duty that extends beyond the negotiating and signing of a collective bargaining agreement, and that part of this ongoing duty to bargain in good faith is the obligation of the employer to process and to arbitrate grievances.

Complainants allege that Subsection 89-13(a)(7), HRS, has been violated in that SHOPO and Respondent entered into a collective bargaining agreement which sets forth a grievance procedure culminating in final and binding arbitration (Article 32). Section 89-11(a), HRS, provides that a public employer shall have the power to enter into

a written agreement with the exclusive representative setting forth such a grievance procedure. Complainants allege that in refusing to process the grievance, Respondent has violated the collective bargaining agreement, which in turn is a violation of Section 89-11(a), HRS, and, thus a violation of Section 89-13(a)(7), HRS, which prohibits employers from refusing or failing to comply with any provision of Chapter 89, HRS.

Complainants further allege that in failing to process the grievance, Respondent has violated the collective bargaining agreement in contravention of Subsection 89-13(a)(8), HRS.

Respondent alleges that the doctrine of laches, i.e., neglect, omission or unreasonable delay in enforcing a right accompanied by a disadvantage or prejudice to the adverse party, should be applied against Complainants. SHOPO, Respondent argues, through negligence and omissions on the part of its employees, was itself directly responsible for the unreasonable delays in pursuing the DAMAS grievance through Steps II, III and IV of the grievance procedure.

Respondent additionally alleges that the statute of limitations has run in this matter and that Complainants are without standing to present this action before the Board.

Respondent further alleges that SHOPO, through words and conduct, has waived its right to demand arbitration of the DAMAS grievance, and made a "constructive withdrawal" of the grievance.

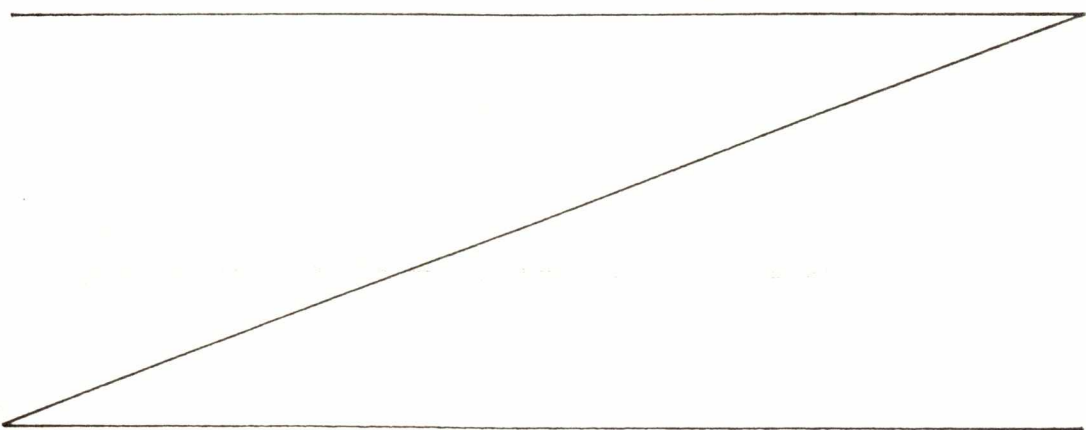
Respondent also argues that the collective bargaining agreement "does not present a remedy that can be granted" under the present factual situation.

The initial issues in this case are (1) whether Complainant SHOPO or Respondent is responsible for the delays in the processing of the DAMAS grievance after its initial filing on September 18, 1978, and (2) whether such delays are a legally sufficient basis upon which Respondent could conclude that a "constructive withdrawal" had occurred and could thus refuse to schedule a hearing as requested on June 18, 1980 and to otherwise process and ultimately arbitrate the grievance. The circumstances of this case make it unclear as to whether, between the initial grievance filing on September 18, 1978, and Brandt's phone request to Jones on December 8, 1978 that the case be held in abeyance, either party took positive steps to see that the case advance through the grievance process.

Article 32 of the Agreement, Grievance Procedure, provides in paragraph D that:

Grievances involving a dismissal of an employee shall be heard at Step II. Any step may be by-passed by mutual consent of the parties. Bd. Ex. 1A, p. 35.

The contract, however, is silent as to any internal time limitations applicable to the setting of a



Step II hearing in a dismissal case once the grievance has been filed.² Both Brandt and Falk agreed that the contract specifies no such internal time limits. Tr. 12/15/80, p. 21; Tr. 1/28/81, p. 20.

Under Article 32, the burden is on Respondent to set the Step II machinery in motion by offering the grievant and union an opportunity to meet. Furthermore, Respondent is to issue a written decision within ten days of receipt of the grievance "unless extended by mutual consent."

Article 32, "Step II" of the contract states:

After the presentation of the grievance, the grieving party and the Union Representative shall be offered an opportunity to meet with the department or agency head or his designee in an attempt to settle the grievance. The decision of the department or agency head or his designee shall be in writing and shall be transmitted to the grieving party within ten (10) days after receipt of the grievance unless extended by mutual consent.

It is not clear that Respondent offered Complainants an opportunity to meet, or that, if such offers were made, whether processing of the grievance was postponed by mutual consent. Further, if such a mutual agreement was struck, it is not clear for what period of time it was agreed to postpone the Step II hearing.

²Under the heading of "Step I" in Article 32, it is provided that the "institut[ing]" of a formal grievance shall occur within twenty days after the occurrence of the alleged violation." Bd. Ex. 1A, p. 36. Since dismissal grievances are initiated at Step II, the applicability of this provision is subject to question. This question need not be answered however since DAMAS' grievance was filed on September 18, 1978, about a week after Chief Keala notified him by letter, dated September 11, 1978, that he was to be terminated effective September 24, 1978, and thus the Step I time limitation for initial filing, applicable or not, was met. Bd. Ex. 1C, 1D.

SHOPO at hearing brought out on cross-examination of Major Jones that the "yes/no" blank on DAMAS' grievance form after the question "Grievant and union representative are to be offered an opportunity to meet and discuss grievance. Was meeting held?" was not checked. Herman Brandt, who filed DAMAS' grievance, also testified he was offered no such opportunity. Major Jones testified that that section of the grievance form is filled in after such a meeting occurs, by the hearings officer. Deputy Chief Falk was not questioned by either party on this point. Major Jones, however, testified regarding "several attempts" to set a hearing date with Nakanelua before his December 8, 1980 phone conversation with Brandt. These conversations with Nakanelua left Major Jones with the "impression" that the union would contact him when it wanted to proceed. Nakanelua, however, had no recall of any conversation with Major Jones regarding the setting of Step II hearings in the DAMAS case. Moreover, John Awai, who assisted SHOPO in the limited capacity of picking up "relevant information" from HPD regarding the Damas case, had no such recall. The evidence is thus inconclusive as to whether Respondent fulfilled its obligation to offer Complainants an opportunity to meet.

The relatively greater detail of Major Jones' testimony regarding his alleged conversations with Nakanelua as compared to Nakanelua's simple lack of recall, would appear to tip the balance in favor of the view that conversations between the two regarding a DAMAS Step II hearing did occur. Major Jones' testimony, nonetheless, is offset by Nakanelua's denial and

the unmarked grievance form question pertaining to whether a meeting was held. Although the question only goes to the issue of whether or not a meeting was held, the lack of a definitive answer suggests a neglect which may well have extended back to the antecedent matter of the offer to meet. It would also appear, considering Major Jones' testimony only, that if his alleged conversations with Nakanelua did in fact occur, some manner of agreement by mutual consent to postpone processing resulted from those conversations, with Nakanelua agreeing that he would inform HPD when he wished to proceed. Thus it appears that if an opportunity to meet was afforded Complainants, it was extended by mutual consent. The Board finds, however, the evidence on the matters of the offer to meet and of the extension by mutual consent to be equivocal and inconclusive.

In the face of the inconclusive evidence, the fact that no written decision or any other document in the nature of a status report on the case issued within ten days after the presentation of the grievance makes it appear that either no offer to meet was made or that a mutual extension of deadlines did in fact occur. Since under the Agreement, the clear burden of acting, i.e., to offer to meet, and to issue a written decision, is on Respondent, the responsibility for inaction, in the face of the inconclusive evidence, must fall on the Respondent, and no waiver of rights can be construed to have been made by Complainants or laches to have been committed during the period from the filing of the grievance on September 18, 1978 to December 8, 1978.

As to the period of December 8, 1978, when Brandt assumed responsibility for the DAMAS case, up to the close

of hearings, the question of the nature of the mutual agreement to postpone the Step II hearing arises.

Brandt, at hearing, testifying from his own SHOPO phone log, stated that Major Jones agreed over the phone on December 8, 1978 to hold the DAMAS case in abeyance pending resolution of his criminal case. Brandt testified that he received a similar agreement from Deputy Chief Falk on February 12, 1979 and subsequent thereto. Major Jones testified that in this phone conversation with Brandt he only agreed to hold the case in abeyance for the period it took Brandt to become familiarized with the case, which Brandt was taking over for John Awai (though Awai disclaimed substantive responsibility for handling the case). Falk also denied agreeing with Brandt to continue the DAMAS case pending the outcome of the criminal trial.

While there is evidence of a mutual agreement between Brandt and Jones to continue the DAMAS case, the evidence is inconclusive as to the period agreed upon.

Respondent contended that it is an HPD policy that criminal and administrative investigations proceed entirely separately; thus it was contended that Respondent would not have agreed to extend matters pending the resolution of DAMAS' criminal appeal. Respondent's argument, however, is of little evidentiary value. Assuming the argument to be valid, it only shows what the parties did not, rather than did, agree to. Further, the consistency in the application of the policy is put in doubt by the fact that the policy is an unwritten one. All that can reasonably be inferred is that an agreement was reached to continue the case for some unascertained period. Thus, for the time period of December 8, 1978 to the close of hearings (on January 28,

1981), Respondent, by virtue of a mutual agreement to postpone processing, has not been relieved of its contractual responsibility to process the grievance at Step II. The contract language placing the burden on Respondent to act controls and Complainants cannot be denied access to the grievance procedure for a failure to request a Step II hearing.

Complainants cannot be viewed as having "constructively withdrawn" or waived, orally or in writing, their complaint in a situation where they did not have the burden of acting after making the initial filing. Thus Complainants' alleged failure to pursue the grievance cannot be viewed as making SHOPO's request for hearing on June 18, 1980 untimely or otherwise invalid. Respondents at that point had a contractual obligation to process the grievance pursuant to Article 32, Step II of the Agreement.

The Board is not unmindful of the substantial period of inactivity on the part of both Respondent and Complainant SHOPO with regard to the subject grievance, but cannot impose or imply an applicable time limit for the processing at Step II in the face of (1) clear testimony by both parties that no time limit existed for the scheduling of Step II hearings in dismissal cases, (2) the contract's silence on the matter, and (3) the fact that other dismissal cases have taken "three or four years" to reach arbitration. Tr. 1/28/81, p. 11.

Also noted is the fundamental labor policy, as enunciated in dicta in Steelworkers v. Warrior Navigation Co., 363 U.S. 574, 46 L.R.R.M. 2417 (1960), (a case dealing

with the arbitrability of employees' objections to the employer's contracting out of work), in favor of settling disputes of parties through the machinery of arbitration, and providing that doubts as to the coverage of such procedures should be resolved in favor of coverage. 46 L.R.R.M. at 2419-2420. See also: Globe-Wernicke Co., 33 L.A. 553 (1959), an arbitration decision dealing with the applicability of express grievance-processing contractual time limits, in which it is noted that any doubtful question of interpretation as to the applicability of such contractual time limits on grievance processing should be resolved against forfeiture rather than in its favor. Id. at 555.

The Board having determined (1) that Complainants waived no rights to demand the processing of Complainant DAMAS' grievance, and (2) that the doctrine of laches is inapplicable to Complainants' conduct in the instant matter, it is concluded that the refusal of Respondent to process the grievance was and is contrary to Section 89-13(a), HRS.

In this regard, the Board views the grievance procedure as a part of the continuous collective bargaining process. Steelworkers v. Warrior Navigation Co., supra, 46 L.R.R.M. at 2419. As the violation of Subsection 89-13(a) (5), HRS, is the natural consequence of Respondent's act, the wilfulness of the action is presumed. Respondent's refusal to process the DAMAS grievance, constitutes a wilful violation of its duty to bargain collectively in good faith as required by Subsection 89-13(a) (5), HRS.

The applicable unit 12 collective bargaining agreement sets forth the grievance procedure culminating in arbitration. Article 32, "Step II" of the contract

cited supra at page 9, indicates that the grieving party and the Union Representative shall be offered an opportunity to meet with the agency head or designate. Thereafter, a written decision rendered by the agency head or designee must be transmitted to the grievant within ten days after the grievance unless mutually extended.

Under the applicable contractual provision, the responsibility to offer to meet is on the Employer. Thereafter, the Employer is obligated to issue a decision within ten days. Given the equivocal and confusing circumstances in this case as discussed above, the Employer wrongfully refused to process the grievance in accordance with the applicable contract provisions. Respondent's wilfulness is presumed since a violation of the contract is the natural consequence of its actions. Hence, the Board finds that the Respondent wilfully violated Subsection 89-13(a)(8), HRS, by refusing to process the DAMAS grievance.

The Board, however, dismisses the Complainants' charge of a violation of Section 89-13(a)(7), HRS, prohibiting the failure or refusal to comply with any provision of Chapter 89 (in this case the provision of Section 89-11(a) giving the Employer "the power" to enter into a written agreement with the exclusive representative setting forth a grievance procedure) on the basis that the failure to follow the contractual grievance procedure established pursuant to the permissive language of Section 89-11(a), HRS, does not constitute a violation of that section.

ORDER

In accordance with the foregoing, the Board hereby orders and directs the following:

(1) The prohibited practice charge alleging violations of Subsection 89-13(a)(7), HRS, shall be dismissed;

(2) The prohibited practice charges alleging violations of Subsections 89-13(a)(5) and (a)(8), HRS, are sustained;

(3) Respondent is directed to cease and desist from such practices and to resume the processing of the grievance filed by Complainant SHOPO on behalf of GEORGE DAMAS on September 18, 1978 at Step II of the applicable grievance procedure; and

(4) Respondent shall post copies of this decision immediately and leave it posted for a period of sixty (60) consecutive days in conspicuous places at all worksites where employees of unit 12 customarily assemble.

DATED: Honolulu, Hawaii, June 7, 1982.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


MACK H. HAMADA, Chairperson


JAMES K. CLARK, Board Member

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