Dec. File

STATE OF HAWAII

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	
STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO) and VIRGINIA SANDERSON,	CASE NO. CE-12-66
Complainants,	DECISION NO. 161
and	
FRANK F. FASI, Mayor of the City and County of Honolulu,	
Respondent.	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 29, 1980, the Complainants STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (hereinafter SHOPO) and VIRGINIA SANDERSON (hereinafter Complainants) filed a prohibited practice complaint with this Board against the Respondent FRANK F. FASI, Mayor of the City and County of Honolulu (hereinafter Employer or Respondent).

The complaint alleged that the Employer violated Subsections 89-13(a)(5), (6), (7), and (8), Hawaii Revised Statutes (hereinafter HRS), when it failed to comply with the terms of an agreement settling a previous prohibited practice charge.

A prehearing conference was held before the Board on September 18, 1980. A hearing was held before the Board on October 8, 1980. At said hearing, the parties read the following stipulation into the record:

> If the Board will allow, the parties in HPERB Case CE-12-66, SHOPO and Sanderson versus Fasi and City and County, are in agreement that the Prohibited Practice Complaint, filed by

SHOPO and Virginia Sanderson on August 29, 1980, presents what is essentially the question of law. As such, the parties are in agreement and are prepared to stipulate to the following:

1. Facts set forth in Paragraphs 1 through 33 as allegations are not in dispute and shall be submitted into the record as evidence.

2. The documents attached to the Complaint and identified as Exhibits 1 through 26 shall be submitted into the record as evidence.

3. The judgment in Civil No. 49812, attached as Respondent's Exhibit A in Respondent's Answer dated September 16, 1980, shall be submitted into the record as evidence.

4. And the document marked as Respondent's Exhibit B, entitled "Honolulu Police Department Employment Conditions, HPD 244", shall be submitted into the record as evidence.

5. That HPERB take judicial notice of the court files in the matter of the appeal of Michael Spiker as contained in Civil No. 49812 and Supreme Court No. 7458 which, pursuant to an Order dated May 1, 1980, has been assigned to the Intermediate Court of Appeals.

* * *

That judicial notice be allowed for the purpose of permitting the parties to supplement any written arguments by utilizing the documents in the Spiker matter as exhibits in support of their arguments on the legal issues.

And that, six, the parties will submit simultaneous opening briefs on this matter and simultaneous answering briefs whereon the case can be submitted to the Board for its decision.

Now, the parties are in agreement with the specifications set forth in 1 through 6, and that for the submission of the written documents, i.e., the opening and the answering briefs will be

agreed to by the parties and filed by a letter to this Board.

Pursuant to the foregoing stipulation, the posthearing briefs were filed on March 13, 1981.

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

FINDINGS OF FACT

Complainant VIRGINIA SANDERSON was, for all times relevant until January 31, 1978, a public employee, as defined in Subsection 89-2(7), HRS, and a member of Unit 12 (police officers), as defined in Subsection 89-6(a)(12), HRS.

Complainant SHOPO is an employee organization and is the exclusive representative, as defined in Subsection 89-2(10), HRS, of Unit 12 (police officers).

Respondent FRANK F. FASI 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 Unit 12.

The SHOPO and the Mayor are parties to the Unit 12 collective bargaining agreements which were in effect during the period from July 1, 1977 through June 30, 1979 (hereinafter 1977-79 agreement) and from July 1, 1979 through June 30, 1981 (hereinafter 1979-81 agreement). The 1979-81 agreement was extended pending agreement on a new Unit 12 contract.

On January 23, 1978, Francis Keala, Chief of Police (hereinafter Chief Keala) of the Honolulu Police

Department (hereinafter HPD) sent VIRGINIA SANDERSON a letter notifying her of the termination of her initial probationary appointment to a position with HPD, effective January 31, 1978.

On February 17, 1978, SHOPO filed a request, on behalf of SANDERSON, for any and all information relevant to the grievance over said termination.

On that same date, SHOPO filed a Step II grievance on behalf of SANDERSON charging that her dismissal was in violation of Article 4, Discrimination, and Article 13, Discipline and Dismissal, of the Unit 12 agreement.

Chief Keala notified SHOPO by letter, dated February 21, 1978, of his refusal to process the SANDERSON grievance on the basis that the matter was nongrievable under Article 21, Probationary Period, of the Unit 12 agreement. In the letter, Chief Keala further denied the request for disclosure of information relevant to the SANDERSON grievance.

SHOPO requested that Chief Keala reconsider his refusal to process the SANDERSON grievance, and said request was denied on March 1, 1978.

On March 7, 1978, SHOPO filed a Step III grievance with Harry Boranian, the Director of Department of Civil Service which was denied on April 5, 1978 on the grounds that the matter was nongrievable.

On April 7, 1978, SHOPO, by letter to Director Boranian, requested Step IV arbitration of the SANDERSON dismissal.

On April 20, 1978, SHOPO, by letter to Chief Keala, requested disclosure of any and all information relevant to the SANDERSON dismissal.

By letter, dated April 27, 1978, Chief Keala denied the request for arbitration and refused to disclose relevant information stating that the matter was not arbitrable.

On May 17, 1978, SHOPO, on behalf of SANDERSON, filed a prohibited practice complaint with HPERB alleging that the Employer had violated the Unit 12 collective bargaining agreement by its actions with respect to the SANDERSON dismissal, HPERB Case No. CE-12-43.

A Settlement Agreement was filed with the Board on June 7, 1978, in Case No. CE-12-43. The agreement stated in relevant part:

> 1. Respondent hereby agrees to proceed to the arbitration of the grievance of Complainant VIRGINIA L. SANDERSON, caused to be filed on or about February 17, 1978; and
>
> 2. Respondent hereby agrees to provide the relevant information (personnel files and all other documentary evidence) thereto pertaining; and
>
> 3. Complainants shall make a motion to voluntarily withdraw, without prejudice, the complaint in the action herein.
>
> WHEREFORE, the parties pray the Board's consent hereto.

In accordance with said Agreement, the Complainants moved this Board for voluntary withdrawal, without prejudice, of the complaint on June 9, 1978.

The Board granted said motion for withdrawal by Order No. 192 on June 16, 1978. The order stated:

> The above-entitled prohibited practice charge was filed on May 8, 1978. Complainants State of Hawaii Organization of Police Officers (SHOPO) and Virginia L. Sanderson now ask this Board for leave to withdraw the complaint, without prejudice, for the

reason that Complainants and Respondent entered into a Settlement Agreement on June 7, 1978.

Complainants' motion is granted. Accordingly, the above-entitled case is dismissed without prejudice.

On July 17, 1978, Director Boranian sent a letter to HPERB requesting a list of five arbitrators for the SANDERSON grievance.

Allen Hoe, Deputy Corporation Counsel for the City and County of Honolulu, wrote a letter to SHOPO's counsel, dated May 9, 1980, to inquire whether and when SHOPO would be ready to proceed on certain enumerated backlogged arbitration cases. The SANDERSON case was omitted from that list of arbitration cases.

By letter, dated May 29, 1980, SHOPO inquired as to the omission of the SANDERSON case from the list of backlogged arbitration cases.

On June 5, 1980, SHOPO received a letter, dated June 3, 1980, from Allen Hoe stating in pertinent part:

". . .the employer considers the matter of the grievance filed by. . . Miss Sanderson. . .challenging [the] termination of initial probation as being outside the provisions of the collective bargaining agreement."

By letter, dated June 9, 1980, SHOPO requested clarification of the above-stated paragraph.

On June 12, 1980, Greg M. Sato, SHOPO General Counsel, wrote a letter confirming the substance of a conversation with Allen Hoe held on June 10, 1980. The relevant portion of this letter read as follows:

The purpose of this letter is to confirm the substance of our conversation at your office on June 10, 1980; wherein you informed me that it is Employer's position that Employer

refuses to arbitrate the [grievance] of . . .Virginia Sanderson. . .even on the limited issue of arbitrability.

Allen Hoe responded to the foregoing letter by a letter to Greg M. Sato, dated June 17, 1980, which stated:

Dear Greg:

This is in response to your letter dated June 12, 1980, pertaining to the employer's position on. . .Virginia Sanderson. . .

Clarification is in order as to the substance of the conversation that took place in my office on June 10, 1980. The discussion centered on the employer's position in regards to the rights, both at law and the Agreement, of police officers' initial probation.

Sincerely,

/s/ ALLEN K. HOE
Deputy Corporation
Counsel

On August 29, 1980, the Complainants filed the instant prohibited practice complaint with the Board.

On December 18, 1981, Complainants filed a Motion to Reopen Hearing to Admit Additional Evidence. By that Motion, Complainants sought to admit into evidence or alternatively to have the Board take judicial notice of the Memorandum Opinion of the Intermediate Court of Appeals in Michael Spiker v. Harry Boranian, et al., Civil No. 49812, rendered on October 22, 1981. On December 29, 1981, Respondent filed a Memorandum in Opposition to SHOPO's Motion to Reopen Hearing to Admit Additional Evidence. A hearing on the Motion was conducted on January 18, 1982 before the Board and the motion was taken under advisement.

CONCLUSIONS OF LAW

As a preliminary matter, the Board will dispose of Complainants' above-referenced motion to reopen hearing. Complainants seek to introduce the Spiker decision, supra, as the Intermediate Court of Appeals therein reversed the lower court's holding. Complainants correctly indicate that such holding was relied upon in Respondent's Closing Brief. Respondent, however, argues against such introduction or notice based upon Rule 20(b) of the Intermediate Court of Appeals, which limits the citation of memorandum opinions.

After consideration of the arguments and the record in this case, the Board rules that it will take judicial notice of the Intermediate Court of Appeals' decision in Spiker. In this respect we recognize that our ruling is consistent with item number 5, as stipulated to by the parties at the October 8, 1980 hearing, which states:

> That HPERB take judicial notice of the court files in the matter of the appeal of Michael Spiker as contained in Civil No. 49812 and Supreme Court No. 7458 which, pursuant to an Order dated May 1, 1980, has been assigned to the Intermediate Court of Appeals.
>
> * * *
>
> That judicial notice be allowed for the purpose of permitting the parties to supplement any written arguments by utilizing the documents in the Spiker matter as exhibits in support of their arguments on the legal issues.
>
> * * *

We believe that these items encompass the final disposition of that case and properly warrant our notice. Although we recognize the technical argument posed vigorously by counsel

for Respondent, it would work an injustice here if Respondent was able to rely on the lower court holding and Complainants were unable to point to its reversal. We believe, therefore, that ignorance of the judgment of the Intermediate Court of Appeals would be patently unfair given that Respondent relies heavily on such case in its arguments. Hence, the Board will take notice of the Intermediate Court of Appeals' decision in Spiker.

Complainants have alleged that by its actions with respect to the SANDERSON grievance Respondent has committed prohibited practices under Subsections 89-13(a)(5), (6), (7), and (8), HRS. Said Subsection provides:

> Section 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;
>
> (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
>
> (8) Violate the terms of a collective bargaining agreement.

The Complainants failed to introduce any evidence or argument into the record to support the allegation that the Respondent refused or failed to comply with any provision of Chapter 89, HRS. Accordingly, the charge that there was a violation of Subsection 89-13(a)(7), HRS, is dismissed.

With respect to the other allegations, Complainants have generally asserted that the Respondent's refusals to process SANDERSON's grievance and to disclose relevant information form the basis for the above-stated prohibited practice charges.

Respondent, on the other hand, denies that it committed any prohibited practices. The Employer argues generally in its defense that the decision of the Chief of Police to terminate an initial probationary employee such as SANDERSON, is not subject to a right of appeal. More specifically, the Employer asserts that the right of the Chief of Police to exercise such authority is found in Subsection 52-74, HRS;[1] Rule 10.4(a) of the Rules of the Civil Service Commission[2] (hereinafter CSC); Subsection 89-9, HRS;[3] and Article 21[4] of the Unit 12 agreement.

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[1]Section 52-74, HRS, states:

> §52-74 Probationary appointments of police officers. All original appointments of police officers in the police department in the city and county shall be probationary during the first year of service.

[2]Rule 10.4(a), CSC, reads as follows:

> a. A non-regular employee may be dismissed at any time without written notice and shall have no right to appeal. No reason for dismissal or non-retention need be given.

[3]Subsection 89-9(d), HRS, states in pertinent part:

> (d) Excluded from the subjects of negotiations are matters of classification and reclassification, retirement benefits and the salary ranges and the number of incremental and longevity steps now provided by law, provided that the amount of wages to be paid in each range and step and the length of service necessary for the incremental and

Refusal to Bargain in Good Faith

Complainants allege that the Employer's refusal to supply information relevant to the SANDERSON grievance and to process said grievance is a violation of its duty to bargain in good faith within the meaning of Subsection

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(footnote continued)

> longevity steps shall be negotiable. * * * The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with merit principles or the principle of equal pay for equal work pursuant to sections 76-1, 76-2, 77-31 and 77-33, or which would interfere with the rights of a public employer to (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.

[4]The relevant portion of Article 21 of the SHOPO agreement states:

> All new employees shall serve an initial probationary period of one (1) year, during which time they shall not be entitled to any seniority or tenure rights; but during this period they shall be subject to the terms and conditions of this Agreement.
>
> * * *
>
> An employee whose probationary appointment is terminated shall not be entitled to use the grievance or appeal procedure, but he shall be entitled to appeal through the grievance procedure if prejudice was a controlling factor in the termination of his promotion.

89-13(a)(5), HRS. The Board concurs with this position taken by the Complainants for the following reasons.

The instant complaint results from the Employer's refusal to comply with the terms of an agreement settling a previously filed prohibited practice case. That case arose from the Employer's refusal to process the SANDERSON grievance and to provide information with respect to that grievance. In said Settlement Agreement, Respondent specifically agreed to process SANDERSON'S grievance of her discharge to arbitration and to supply information relevant to said grievance in exchange for Complainants' promise to withdraw the prohibited practice charges filed.

In Poole Foundry and Machine Co. v. N.L.R.B., 192 F.2d 740, 29 L.R.R.M. 2105 (4th Cir. 1951), the Fourth Circuit considered a similar prohibited practice case involving a settlement agreement. In that case, the union initially filed prohibited practice charges with the National Labor Relations Board (hereinafter N.L.R.B.) alleging that the employer had discriminatorily discharged certain employees on account of their union activity. Prior to the issuance of a formal complaint by the N.L.R.B., the parties entered into a settlement of the case. In the settlement agreement the employer agreed to bargain with the union as the exclusive representative of the unit. Subsequently, a decertification petition was filed against said union, and the employer refused to bargain until the union could produce proof that it represented a majority of the employees. Whereupon, the union filed a second prohibited practice complaint with the N.L.R.B. based upon the employer's refusal to bargain. Based upon said complaint, the N.L.R.B. concluded that because the employer had agreed

in the settlement agreement to bargain with the union the employer had committed a prohibited practice by violating this obligation. On appeal, the Fourth Circuit upheld this determination by the Board. In so ruling, the court reasoned as to the effect of the settlement agreement as follows:

> [EFFECT OF AGREEMENT]
>
> We agree with Poole's contention that a settlement agreement differs from a finding by the Board that an unfair labor practice has been committed. We agree, too, with the Board's contention that a settlement agreement must, from its terms, have definite legal effect and is quite different from a dismissal of the charges. Our problem is to determine what force and effect must be given to such agreements. Oddly enough, there seems to be no reported case decided by any federal court which passes directly on our problem.
>
> We think the settlement agreement clearly manifests an administrative determination by the Board that some remedial action is necessary to safeguard the public interests intended to be protected by the National Labor Relations Act (hereinafter called the Act.) It is equally clear that the settlement agreement represents an agreement by Poole to undertake promptly the remedial action set out in the agreement rather than to be put to the trouble and expense of litigation before a trial examiner, the Board and possibly the courts.
>
> Experience has demonstrated the importance of the settlement agreement in the effective administration of the Act. There is manifest force in the Board's assertion that the contention of Poole would seriouly [sic] undermine the effectiveness of settlement agreements as a satisfactory means of closing cases involving charges of unfair labor practices prohibited by the Act. There would indeed be few of these agreements if Poole, after a solemn promise to bargain with the Union, could immediately escape this obligation by questioning whether the Union actually represents a majority of the employees in the bargaining unit.
>
> If Poole's contention be sound, this would permit an employer to commit an unfair labor

practice by refusing to bargain collectively with the Union, sign a settlement agreement undertaking to bargain with the Union, then attempt to have a new union certified when dissatisfaction with the old union arose among the employees because of the unfair labor practice. Certainly this should neither be permitted nor encouraged.

* * *

[REFUSAL TO BARGAIN]

While not an admission of past liability, a settlement agreement does constitute a basis for future liability and the parties recognize a status thereby fixed. Thus, for example, a settlement agreement providing for reinstatement of employees fixes their eligibility to vote in a Board election, and a settlement providing for the disestablishment of a dominated union necessarily affects its right to appear on a ballot. An entire structure or course of future labor relationships may well be bottomed upon the binding effect of a status fixed by the terms of a settlement agreement. If a settlement agreement is to have real force, it would seem that a reasonable time must be afforded in which a status fixed by the agreement is to operate. Otherwise, settlement agreements might indeed have little practical effect as an amicable and judicious means to expeditious disposal of disputes arising under the terms of the Act. Thus, it follows that Poole, after having solemnly agreed to bargain with the Union, should not be permitted, within three and one-half months after the agreement, to refuse so to bargain, even if, as here, the Union clearly did not represent a majority of the employees.

The petition of Poole praying that we set aside the order of the Board is denied. The petition of the Board for the enforcement of its order is granted. [Emphasis added.] Id. at 2107.

Based upon the reasoning set forth above in the Poole Foundry, supra, the Settlement Agreement executed by the Complainants and Respondent, created an obligation on the part of the Respondent to process the SANDERSON grievance to arbitration. Upon the facts presented in the instant case, there is no doubt that the Employer wilfully breached that obligation. The Board concludes that such a

breach of an employer's duty to process a grievance constitutes a wilful violation of the duty to bargain in good faith in accordance with Subsection 89-13(a)(5). In reaching such a conclusion, the Board adheres to the approach taken as to the relationship of the grievance procedure to the bargaining process set forth in Decision 145, Dennis Yamaguchi, 2 HPERB 656 (1981). With respect to that relationship, the Board there stated:

> . . . collective bargaining is a continuous process and the grievance procedure is part of that process. A grievance resolution decision should be considered as an extension of the contract. (footnote omitted) Id. at 673.

This approach is, moreover, consistent with the principles established by the United States Supreme Court in United Steelworkers of America v. Warrior Navigation Co., 363 U.S. 574, 46 L.R.R.M. 2416 (1960). In that case, the Court stated:

> The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.

Also arising out of the employer's duty to bargain in good faith is the obligation of an employer to provide information relevant to a grievance filed by union. In N.L.R.B. v. Truitt Manufacturing Co., 351 U.S. 149, 38 L.R.R.M. 2042 (1956), the United States Supreme Court established the general rule that an employer is guilty of a violation of the duty to bargain in good faith under Section 8(a)(5) of the National Labor Relations Act by failing to provide the union with information relevant to the union's role as bargaining agent. In subsequent

decisions, lower courts have broadly interpreted this duty set forth by the Court in Truitt, supra, extending it to information relevant to contract administration or grievance resolution. As the Fifth Circuit in Sinclair Refining Co. v. N.L.R.B., 290 F.2d 312, 48 L.R.R.M. 2045 (5th Cir. 1962) stated:

> Also, the duty does not terminate with the signing of the collective bargaining contract. It continues through the life of the agreements so far as it is necessary to enable the parties to administer the contract and resolve grievances or disputes.

To similar effect was the decision of the First Circuit in Puerto Rico Telephone Co. v. N.L.R.B., 357 F.2d 919, 61 L.R.R.M. 2516 (1st Cir. 1966), in which the employer was found in violation of its obligation to bargain in good faith for refusing to submit data to the union which could prove that certain disputed layoffs were due to "economic reorganization." In so ruling, the court articulated the applicable rule:

> This brings us to the issue of whether there is substantial evidence to support the Board's finding that the company violated the Act by refusing to furnish this information. To be sure, an employer is not required to furnish all the information the union thinks might be helpful in processing grievances. However, an employer violates Section 8(a)(5) and (1) of the Act by refusing during the term of a collective bargaining agreement, to furnish information requested by the union if such information is relevant to a grievance or to the administration or policing of the agreement.

See also, Transport of New Jersey, Maplewood and Elizabeth, N.J. and Local 23, Amalgamated Transit Union, 233 N.L.R.B. No. 101, 97 L.R.R.M. 1204 (1977); United-Carr Tennessee and Local No. 3-281, Oil, Chemical and Atomic Workers

Internat'l. Union, 202 N.L.R.B. 729, 82 L.R.R.M. 1795 (1973).

In view of the foregoing decisions, the Board finds that the Respondent also had an obligation to provide relevant information requested by the SHOPO with respect to the SANDERSON grievance. Accordingly, the Employer's repeated refusals to produce the requested information is a wilful violation of the terms of the Settlement Agreement and of the duty to bargain in good faith within Subsection 89-13(a)(5), HRS.

Violation of the Contract

Apart from the Subsection 89-13(a)(5) violations, Complainants have also argued that the Respondent's actions in refusing to process the SANDERSON grievance and provide relevant information in derogation of the Settlement Agreement, constitute breaches of the Unit 12 collective bargaining agreement, resulting in violations of Subsection 89-13(a)(8), HRS. The Complainants, however, have failed to demonstrate how an employer's failure to comply with the terms of an agreement settling a prohibited practice charge can be found to be a violation of a collective bargaining agreement within the meaning of Subsection 89-13(a)(8). The Board is unable to find any legal authority supporting the theory that settlement agreements of this nature are construed as extensions of collective bargaining agreements or that settlement agreements fall within the terms of collective bargaining agreements.

The Board is able to find, however, that the Settlement Agreement executed by the parties to this case can indirectly give rise to a violation of Subsection

89-13(a)(8). As noted above in the Findings of Fact, the previous prohibited practice complaint which was withdrawn by Complainants in compliance with the Settlement Agreement at issue in this case also alleged that the Respondent violated Subsection 89-13(a)(8), HRS, by its refusal to process and supply information with respect to the SANDERSON grievance. The Board finds that the Respondent's failure to comply with the terms of the settlement would result in the reinstatement of the previous Subsection 89-13(a)(8) charges filed with the Board on May 17, 1978. Support for this position is found in N.L.R.B. decisions.

In Wallace Corp. v. N.L.R.B., 323 U.S. 248, 15 L.R.R.M. 697 (1944), the employer, a C.I.O. union and an independent union had signed an agreement in settlement of a dispute. The independent union was certified as the bargaining representative after a consent election. The employer signed a union shop contract with the bargaining representative with the knowledge that said representative intended to oust C.I.O. employees from their jobs by refusing said employees memberships in the union. The employer discharged the nonmember employees. The C.I.O. union instituted an unfair labor practice proceeding and the Board ruled that the conduct of the employer constituted unfair labor practices. In making said finding, the Board considered evidence relating to the unfair labor practices occurring both before and after the settlement agreement and certification. In upholding the ruling of the Board the Court reasoned:

> It is contended that the Board's finding as to company domination has no support in the evidence because the evidence as to company domination antedated the settlement and certification, and hence

was improperly admitted. The argument is that the Board cannot go behind the settlement and certification. The petitioner does not argue that any language appearing in the Labor Relations Act denies this power to the Board, but relies upon general principles on which the judicial rule governing estoppel is based. Only recently we had occasion to note that the differences in origin and function between administrative bodies and courts "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." Federal Communications Commission v. Broadcasting Co., 309 U.S. 134, 143. With reference to the attempted settlement of disputes, as in the performance of other duties imposed upon it by the Act, the Board has power to fashion its procedure to achieve the Act's purpose to protect employees from unfair labor practices. We cannot, by incorporating the judicial concept of estoppel into its procedure, render the Board powerless to prevent an obvious frustration of the Act's purposes.

To prevent disputes like the one here involved, the Board has from the very beginning encouraged compromises and settlements. The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them. The attempted settlement here wholly failed to prevent the wholesale discard of employees as a result of their union affiliations. The purpose of the settlement was thereby defeated. Upon this failure, when the Board's further action was properly invoked, it became its duty to take fresh steps to prevent frustration of the Act. To meet such situations the Board has established as a working rule the principle that it ordinarily will respect the terms of a settlement agreement approved by it. It has consistently gone behind such agreements, however, where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a subsequent unfair labor practice. We think this rule adopted by the Board is appropriate to accomplish the Act's purpose with fairness to all concerned. Consequently, since the Board correctly found that there was a subsequent unfair labor practice, it was justified in considering evidence as to petitioner's conduct, both before and after the settlement and certification. (footnotes omitted) Id. at 699.

In N.L.R.B. v. Southeastern Stages, Inc., 423 F.2d 878, 73 L.R.R.M. 2702 (5th Cir. 1970), the U.S. Court of Appeals further interpreted the Wallace decision by stating:

> As observed by the Supreme Court, "[The Board] has consistently gone behind [settlement] agreements . . . where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a subsequent unfair labor practice. We think this rule adopted by the Board is appropriate to accomplish the Act's purpose with fairness to all concerned." Wallace Corp. v. N.L.R.B., 323 U.S. 248, 254-55, 65 S.Ct. 238, _____, 89 L.Ed. 216, _____, 15 L.R.R.M. 697. This holding of the Supreme Court has been interpreted to mean that a settlement agreement can be set aside and presettlement violations found, when there has been a breach of the agreement, or when there has been a subsequent independent violation of the Act by a party to the agreement. (Citations omitted)

Accord, N.L.R.B. v. Dressmakers Joint Council, 342 F.2d 988, 58 L.R.R.M. 2767 (2nd Cir. 1965); International Brotherhood of Teamsters v. N.L.R.B., 262 F.2d 456, 43 L.R.R.M. 2197 (D.C. Cir. 1958); N.L.R.B. v. Bangor Plastics, Inc., 392 F.2d 772, 67 L.R.R.M. 2987 (6th Cir. 1957).

Based upon the above N.L.R.B. decisions, the Board will consider in these proceedings the violations alleged against Respondent in the previous prohibited practice complaint as well as those alleged in the instant case.

The parties have stipulated to the evidence in this prohibited practice case. Based upon the stipulated evidence, it is clear that the Complainants requested that the Employer both process the SANDERSON grievance and provide relevant information at Steps II, III and IV of the

grievance procedure. There is also no doubt that the Employer had taken the position at each of those steps that the SANDERSON discharge was nongrievable based upon Article 21, Probationary Period, of the Unit 12 contract. The Employer has further taken the position in the context of these proceedings that SANDERSON, as a probationary employee, was subject to termination without any right of appeal pursuant to Section 52-74, HRS, Rule 10.4(a) of the CSC Rules and Regulations and Subsection 89-9(d), HRS.

Complainants argue that the function of the Board with respect to this issue is to determine whether Complainants are asserting a claim which on its face is governed by the contract. In support of this claim, the Complainants maintain that pursuant to Article 21, a probationary employee may appeal the dismissal through the grievance procedure if prejudice was a controlling factor therein. Complainants assert that because SANDERSON's grievance is based upon an allegation of sex discrimination that she is entitled to grieve the discharge pursuant to Article 21. Accordingly, the refusal to process the SANDERSON grievance is a violation of the Unit 12 agreement and of Subsection 89-13(a)(8). Complainants further assert that Section 52-74, HRS, and CSC Rules and Regulations 10.4(a) are irrelevant to the present prohibited practice charges because said provisions conflict with the Unit 12 agreement. Finally, Complainants argue that the terms of the Unit 12 agreement are not inconsistent with Subsection 89-9(d), HRS.

The Board is of the opinion that Article 21 of the Unit 12 agreement is not inconsistent with Subsection

89-9(d), HRS. Consequently, the Board finds that said Article supersedes Section 52-74, HRS, and Section 10.4(a).

Subsection 89-9(d)(2) prohibits the employer and union from agreeing to any proposal which would interfere with the right of the employer to discharge or take other disciplinary action against employees for proper cause. Said Subsection has been interpreted by this Board in Frank F. Fasi, 1 HPERB 548, rev'd on other grounds, Fasi v. HPERB, Civil No. 44559 (11/3/75), rev'd. and rem. on other grounds, Fasi v. HPERB, 60 Haw. 436, 571 P.2d 113 (1979). In determining whether the seniority clause at issue in that decision was illegal because of its interference with the public employer's rights under Subsections 89-9(d)(2) and (5), HRS, the Board stated:

> The answer appears to be no. Subsection 89-9(d)(2) and (5), HRS, prohibit the employers and employee organizations from agreeing to a proposal which would interfere with the right of the public employers to promote employees and to determine personnel by which the employers' operations are to be conducted.
>
> However, the rights of the petitioner and employer-intervenors to promote employees and to determine personnel by which its operations are to be conducted are not absolute as a review of all extant statutory provisions or rules and regulations on the subject reveals.
>
> The petitioner and employer-intervenors, however, appear to maintain that Sec. 89-9(d), HRS, grants an absolute management right, totally free of any union involvement, to promote or determine employees for its operations.
>
> The Board has ruled that a broad construction of the management rights provision of Sec. 89-9(d), HRS, would divest the union of its right to bargain collectively under Sec. 89-9(a), HRS, and abrogate the intent of Chapter

89, HRS, to encourage joint decision making between the employer and employee organization. Conversely, a narrow construction of Sec. 89-9(d), HRS, would divest the employer of its inherent management's rights. A difficult but necessary balance must be achieved. HSTA et al., Decision 22, Case No. CE-05-4 (October 24, 1972).

In establishing a reasonable and workable balance between a narrow or broad construction of Sec. 89-9(a) and Sec. 89-9(d), HRS, the Board has ruled that Sec. 89-9, HRS, must be considered in its entirety and not disjunctively. The HSTA et al. Decision 22, supra, the Board stated that:

> As joint decision making is the expressed policy of the Legislature, it is our opinion that all matters affecting wages, hours and conditions of employment, even those which may overlap with employer rights as enumerated in Sec. 89-9(d) are now shared rights up to the point where mutual determinations respecting such matters interfere with employer rights, which of necessity, cannot be relinquished because they are fundamental to the existence, direction and operation of the enterprise.

The seniority clause of the unit 1 contract does not appear on its face to infringe upon an absolutely unrelinquishable employer right which is so "fundamental to the existence, direction and operation" of the government. All that Sec. 16.09(d) and Sec. 16.06(c) provide for is that seniority be a criterion in the event candidates for promotion are in a category in which all other factors are equal.

Any interference with the petitioner's and employer-intervenors' right to promote or to determine employees for the operation of the governmental function, on balance, is remote and minimal at best and outside intent of Sec. 89-9(d), HRS. Id. at 553-54.

Applying the analysis set forth above, the Employer's right to discharge employees also is not absolute. All that Article 21 provides is that a probationary employee may use the contractual grievance procedure if prejudice was a controlling factor in the termination action. As with the seniority clause in the Unit 10 agreement, the Board finds that this probationary period provision similarly does not create any substantive interference with any absolute management right of the Employer to merit a declaration of invalidity.

Neither would Article 21 be declared invalid under Section 52-74, HRS, or Section 10.4(a), CSC Rules and Regulations. The employers in the Fasi case, supra, made a similar argument with respect to the seniority clause at issue in that case. The Board rejected this argument by stating:

> The petitioner and employer-intervenors additionally maintain that the promotion scheme set forth in the seniority clause is contrary to the various existing State and County personnel and civil service rules and, therefore, is null and void. Sec. 89-10(d), HRS, states:
>
> > All existing rules and regulations adopted by the employer, including civil service or other personnel regulations, which are not contrary to this chapter, shall remain applicable. If there is a conflict between the collective bargaining agreement and any of the rules and regulations, the terms of the agreement shall prevail; provided that the terms are not inconsistent with section 89-9(d).
>
> Additionally Sec. 89-19, HRS, states:

> This chapter shall take precedence over all conflicting statutes concerning this subject matter and preempt all contrary local ordinances, executive orders, legislation, rules, or regulations adopted by the State, a county, or any department or agency thereof, including the departments of personnel services or the civil service commission.
>
> In view of these two statutory provisions, it is clear that any conflict between the unit 1 seniority clause and the personnel and civil service rules, is resolved in favor of the contract provision in the absence of any inconsistency with Sec. 89-9(d), HRS. Id. at 554-555.

Hence, based upon Subsection 89-10(d), HRS, Section 89-19, HRS, and the above-stated Board's interpretation thereon, the probationary period clause in the Unit 12 agreement would supersede any conflicting provision of Section 52-74 or of Section 10.4(a).

Having resolved the possible conflict of the Unit 12 agreement with other statutory provisions, the Board now considers the issue of whether the Employer's actions with respect to the SANDERSON grievance violated the collective bargaining agreement. The Complainants have urged the Respondent to process the SANDERSON grievance to arbitration contending that the Board's ruling in State of Hawaii Organization of Police Officers (SHOPO), 1 HPERB 715 (1977) is controlling in the instant case (hereinafter Decision 79). In that case, the Board ruled that the employer may not refuse to proceed to arbitration based upon unilateral determination that a grievance is procedurally nonarbitrable because it was untimely filed. The Board further ruled that

the issue of the procedural arbitrability of the grievance must be submitted to an arbitrator for resolution.

The Board finds that the Complainants' reliance upon Decision 79 is misplaced. The instant prohibited practice case focuses on the Employer's unilateral determination that the SANDERSON grievance is substantively nonarbitrable, unlike Decision 79 which dealt with a determination by the employer that the grievance was procedurally nonarbitrable. The Board is of the opinion that the applicable case law is that of the Wisconsin Employment Relations Board in Dunphy Boat Corp. v. Wisconsin Employment Relations Board, 33 L.R.R.M. 1003 (W.E.R.B. 1953) and in District Lodge 48, International Ass'n. of Machinists and Seaman-and-Wall Corp., 49 L.R.R.M. 1609 (W.E.R.B. 1962).

In Dunphy Boat, supra, the employer refused to submit to arbitration a grievance concerning alleged changes in the method of computing incentive pay. Whereupon, the union filed a prohibited practice charge. In support of its refusal, the employer argued that the grievance did not constitute a prohibited practice under the terms of the collective bargaining agreement. The Wisconsin Employment Relations Board (hereinafter W.E.R.B.), ruled that because the collective bargaining agreement at issue in the case contained a broad arbitration clause, the employer, by its refusal to arbitrate, had violated the terms of said agreement thereby committing a prohibited practice. The Board further ruled, that the employer had violated the collective bargaining agreement by refusing to submit the grievance to arbitration and ordered the parties to arbitration. The Wisconsin Supreme Court upheld the ruling by the Board that a refusal to arbitrate is a

prohibited practice in Dunphy Boat Corp. v. Wisconsin Employment Relations Board, 64 N.W.2d 866, 34 L.R.R.M. 2321 (1954), stating:

> We are satisfied that the violation by an employer of a clause in its collective bargaining agreement which requires it to arbitrate a future dispute which may arise during the term of the contract between it and the Union, does constitute an unfair labor practice within the meaning of sec. 111.06(1)(f), Stats. What are the powers with which the legislature has invested W.E.R.B. to deal with such a violation? The answer is to be found in the provisions of sec. 111.07 Stats., and in particular in sub. (4) thereof. W.E.R.B. is authorized to entertain complaints alleging an unfair labor practice, to conduct a hearing with respect thereto, and to issue both interlocutory and final orders. Sub. (4) of sec. 111.07 specifically provides with respect to the form such final orders may take as follows:
>
> > "Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this subchapter for not more than one year, and require him to take such affirmative action, including reinstatement of employes (sic) with or without pay, as the board may deem proper. Any order may further require such person to make reports from time to time showing the extent to which he had complied with the order."
>
> Under the foregoing statutory provision, we deem that the provisions of the order entered by W.E.R.B. in the instant case were proper, and that the employer was rightly ordered not only to cease and desist from violating the arbitration provisions of the contract but also to affirmatively comply with and carry out such provisions with respect to the particular dispute at issue. Id. at 2324.

With respect to the Board's authority to order the parties to proceed to arbitration upon a determination that a prohibited practice has been committed, the Court stated:

> Counsel for the employer have been unable to point to a single statute which expressly prohibits W.E.R.B. from doing exactly that which it ordered in the case at bar. All of the arguments advanced ask this court to reach such conclusions by implication as a result of statutory construction based upon the history of the various statutes considered herein. On the other hand, the Attorney General has pointed out that in at least seven decisions, the earliest of which was rendered in 1946, W.E.R.B. found employers to have committed unfair labor practices under sec. 111.06(1)(f) Stats., by violating arbitration clauses in collective bargaining contracts, and ordered the violators to arbitrate in the manner prescribed in such contracts. We thus have a practical construction of secs. 111.06(1)(f) and 111.07(4) by W.E.R.B. extending for approximately eight years, with which practical construction the legislature has not sought to interfere. Such acquiescence of the legislature in the practical interpretation placed upon statutes by the administrative agency charged with their enforcement has often been held by this court to be entitled to great weight in construing such statutes. Estate of Stevens (1953), 266 Wis. 333, 336 _____ N.W.2d _____; Smith v. Wisconsin Department of Taxation (1953), 264 Wis. 389, 392, 59 N.W.2d 479; Wisconsin Axle Division v. Industrial Comm. (1953), 263 Wis. 529, 537b, 57 N.W.2d 696, 60 N.W.2d 383; Western Printing & Litho Co. v. Industrial Comm. (1951), 260 Wis. 124, 137, 50 N.W.2d 410. Id. at 2325.

In Seaman-and-Wall, supra, the Board had under consideration another charge by a union that the employer had committed a prohibited practice by refusing to submit to arbitration over the disciplinary layoffs of two employees. In that case, the Board also found that by refusing to proceed to arbitration, pursuant to a provision in the contract, the employer had violated the section of the Wisconsin law making it an unfair labor practice for an employer "to violate the terms of a collective bargaining

agreement (including an agreement to accept an arbitration award)." After making such a determination, the Board further interpreted the Dunphy Boat ruling with respect to the Board's authority to order arbitration to comply with the guidelines set forth by the United States Supreme Court decision in the Steelworkers trilogy. The Board's decision stated:

> The substantive law of this state, as expressed by our Supreme Court in Dunphy, Dec. No. 3588, 34 L.R.R.M. 2320, 2379, we believe is in complete harmony with the federal substantive law as reflected in the Steelworkers cases 363 U.S. 564, 574, 593, 46 L.R.R.M. 2414, 2416, 2423. In actions to enforce agreements to arbitrate, we shall give arbitration provisions in collective bargaining agreements their fullest meaning, and we shall confine our function in such cases to ascertaining whether the party seeking arbitration is making a claim, which on its face is governed by the contract. We will resolve doubts in favor of coverage.
>
> We adopt this policy for two reasons. First we believe that such an approach fully encourages the policies expressed in the Employment Peace Act with regard to the voluntary settlement of labor disputes. Secondly, we are of the opinion that if we were to apply substantive law not consistent to the federal law, in this field, we would encourage forum-shopping and thus delay the voluntary settlement of labor disputes.

After stating the scope of its general authority, the W.E.R.B. further limited its authority to determinations not reserved for the arbitrator by the language of the collective bargaining agreement:

> The Board, as a general policy will not make any determinations which are reserved for the arbitrator by the language of the agreement. However, if the parties mutually agree that the Board should determine any aspect of the dispute then the Board shall consider such agreement as a waiver of the arbitration provision, at

> least to the extent to which the parties authorize the Board to rule. The Board shall not shy from accepting such responsibility if the parties so desire. For the Board, its individual members and staff have acted as labor arbitrators and have issued approximately 400 arbitration awards. A substantial number of collective bargaining agreements executed in this state provide that the Board or members of its staff shall act as arbitrators to resolve disputes arising under collective bargaining agreements. Such designation is indicative that the parties to the agreement have confidence in the Board's knowledge of the common law of the shop and other characteristics and functions of the labor arbitrator.
>
> In the instant proceeding the employer has raised a procedural defense, claiming that the union is not now entitled to proceed to arbitration. The union has contended that such a defense should be raised in the arbitration proceeding. The parties have not mutually consented to have the Board determine this particular issue. We conclude that under the broad terms of the arbitration provision involved herein, the question of whether or not the union has complied with the time limiations (sic) with reference to arbitration is a dispute arising under the agreement and therefore should be determined by the arbitrator.

This Board adopts the approach to substantive arbitrability questions taken by the W.E.R.B. Applying this approach to the facts of the present prohibited practice case, the Board finds that similar to the arbitration provision at issue in Dunphy Boat, supra, Article 32 of the Unit 12 contract is a broad arbitration provision. Said provision provides in pertinent part:

> ARTICLE 32. GRIEVANCE PROCEDURE
>
> A. It is the sincere desire of both parties that employee grievances be settled as fairly and as quickly as possible. Employee grievances which arise out of the alleged violations, misinterpretation or misapplication

> of this Agreement shall be resolved in accordance with provisions set forth herein.

Accordingly, the Board finds that by its continued refusal to process the SANDERSON grievance both before and after the Settlement Agreement, the Employer violated Article 32, Grievance Procedure, of the Unit 12 agreement, thereby committing a prohibited practice pursuant to Subsection 89-13(a)(8), HRS.

Part d of Step IV Arbitration contained in Article 32 states:

> d. If the Employer disputes the arbitrability of any grievance under the terms of this Agreement, the Arbitrator shall first determine whether he has jurisdiction to act; and if he finds that he has no such jurisdiction, the grievance shall be referred back to the parties without decision or recommendation.

The SHOPO and the Employer have agreed by the foregoing provision to submit all disputes over arbitrability to the Arbitrator. Consequently, in accordance with Seaman-and-Wall, supra, the Board finds that the issue of the substantive arbitrability of the SANDERSON grievance should be properly raised before and resolved by the Arbitrator.

Having resolved the charge with respect to the refusal to process the SANDERSON grievance, the Board also considers the question of whether the Employer's refusal to provide information relevant to the grievance is also a violation of the collective bargaining agreement. Article 32G of the Unit 12 agreement provides:

> G. The Employer shall, upon request of the Union, make available to

> the requesting party any and all written information relevant to the grievance. Said information shall be presented within five (5) days after receipt of the request.

Based upon the premise that the employer cannot unilaterally determine that a grievance is substantively nonarbitrable, the Board also concludes that the Employer cannot withhold information relevant to that grievance upon the same ground of nonarbitrability. Hence, the Board finds that the Employer, by its refusal to provide information relevant to the SANDERSON dismissal wilfully violated Article 32 of the Unit 12 agreement, thereby violating Subsection 89-13(a)(8).

Prior to the issuance of appropriate orders consistent with the above-stated findings and conclusions, the Board takes this opportunity to comment upon the legal arguments presented in these proceedings. While sufficient evidence was introduced into the record of this case to support the prohibited practice charges alleged, with the exception of the Subsection 89-13(a)(7) violation, the development of legal arguments made by the parties was deficient with respect to every issue presented. Section 12-42-8(g)(16), Administrative Rules states:

> (16) The charging party, in asserting a violation of chapter 89, HRS, or this chapter, shall have the burden of proving the allegations by a preponderance of the evidence. The party raising any subsequent issue shall have the burden of proving that issue by a preponderance of the evidence.

This section will be interpreted by this Board to mean that the party required to carry the burden of proof, must not

only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles. Henceforth, if any party fails to present sufficient legal arguments with respect to any issue, the Board shall find that the party failed to carry its burden of proof and dispose of the issue accordingly.

ORDER

The Board finds that the Employer's refusal to submit the dispute of the arbitrability of the subject grievance to an arbitrator and to provide information relevant to said grievance constituted violations of Subsection 89-13(a)(5) and of Section 89-13(a)(8), HRS.

The Board orders the Employer to cease and desist from these prohibited practices.

Affirmatively, the Board orders the parties to submit the subject dispute, in good faith, to an arbitrator for a determination of arbitrability or jurisdiction in accordance with Article 32, Step IV, d of the contract, and further orders the Respondent to report on the extent to which he has complied with this order no later than 45 days after the date of this decision, together with proof of service of said report upon SHOPO, and to make further

reports at such future dates as the Board may hereafter order.

DATED: Honolulu, Hawaii, June 7, 1982.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada

MACK H. HAMADA, Chairperson

James K. Clark

JAMES K. CLARK, Board Member

Copies sent to:

Greg M. Sato, Esq.
Charlotte Duarte, Esq.
Joyce Najita, IRC
State Archives