Dec file

STATE OF HAWAII

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	)	
	)	
STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO) and PETER TORO,	)	CASE NO. CE-12-68
	)	
	)	DECISION NO. 163
Complainants,	)	
	)	
and	)	
	)	
FRANK F. FASI, Mayor of the City and County of Honolulu,	)	
	)	
Respondents.	)	
	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On September 3, 1980, Complainants STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (hereinafter SHOPO) and PETER TORO (hereinafter TORO) filed with this Board a prohibited practice complaint against FRANK F. FASI, Mayor of the City and County of Honolulu (hereinafter City, Employer or Respondent). In said complaint, the Complainants alleged that the City had violated the Unit 12 collective bargaining agreement, thereby committing prohibited practices by refusing to arbitrate TORO's grievance over his dismissal from the Honolulu Police Department (hereinafter HPD).

A prehearing conference was held on September 25, 1980. A hearing was held on October 10, 1980. At said hearing, the parties stipulated to the following:

> As such the parties have agreed and are prepared to stipulate to the following, one, facts set forth in paragraphs 1 through 25 as allegations are not in dispute and shall be submitted into the record as evidence. Documents attached to the Complaint and

identified as Exhibits A through R shall be submitted into the record as evidence.

Number three, that the Judgment in Civil No. 49812 attached as Exhibit A to Respondent's Answer dated September 16, 1980 -- September 18, 1980 shall be submitted into the record as evidence.

The document marked as Respondent's Exhibit A, which I offer at this time, entitled Honolulu Police Department Employment Conditions, HPD-244 shall be submitted into the record as evidence.

Number five, that HPERB take judicial notice of the documents in the matter of the appeal of Michael Spiker as contained in Civil No. 49812 and Supreme Court Case No. 7458, which has been assigned to the Intermediate Court of Appeals. And the Respondent offers that as Exhibit B, that judicial notice be allowed for purposes of permitting the parties to supplement their written arguments by utilizing the docoments in the Spiker matter as exhibits in support of their positions.

Number six, the parties will submit simultaneous opening briefs and simultaneous answering briefs whereon the case will be submitted to the Board for its decision.

Now, the dates of the submission of the written arguments will be agreed to by the parties and filed by a letter with this Board.

Subsequently, pursuant to the above-stated agreement, simultaneous posthearing briefs were filed on March 13, 1981.

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 PETER TORO was, at all times relevant until April 6, 1977, a public employee as defined in Subsection 89-2(7), Hawaii Revised Statutes (hereinafter HRS).

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

Respondent FRANK F. FASI, was for all times relevant, the Mayor of the City and County of Honolulu, and a public employer as defined in Subsection 89-2(9), HRS.

Complainant SHOPO and Respondent FRANK F. FASI were parties to the Unit 12 collective bargaining agreements, which were in effect during the periods from July 29, 1976 through June 30, 1977 (hereinafter Unit 12 agreement), from July 1, 1977 through June 30, 1979 and from July 1, 1979 through June 30, 1981.

By letter, dated March 29, 1977, Complainant TORO was notified that his initial probationary period was terminated as of April 6, 1977.

On April 12, 1977, SHOPO filed a Step II grievance on behalf of TORO alleging that his termination was in violation of the Unit 12 agreement.

SHOPO was notified by a letter from Chief Keala, dated April 13, 1977, that the TORO grievance was denied at Step II because pursuant to Article 21, Probationary Period, of the Unit 12 agreement, the dismissal was a nongrievable matter.

On April 19, 1977, SHOPO requested that Harry Boranian, Director of Civil Service, process TORO's grievance at Step III.

Director Boranian also denied the TORO grievance at Step III as nongrievable relying upon Article 21 of the Unit 12 agreement by letter, dated May 4, 1977.

Whereupon, on May 6, 1977, SHOPO requested that the TORO matter be submitted to Step IV, Arbitration.

On May 11, 1977, Director Boranian notified SHOPO of the City's refusal to process the TORO dismissal grievance at Step IV, Arbitration, on the grounds that a dismissal during an initial probationary period is non-grievable and, therefore, nonarbitrable.

On May 20, 1977, SHOPO wrote a letter to Director Boranian expressing the position that even if the TORO grievance was nongrievable based on Article 13, Discipline and Dismissal, and Article 21, Probationary Period, the grievance was arbitrable based upon Article 4, Discrimination. SHOPO's allegation based upon Article 4 is that TORO's initial probationary period was terminated because he had previously filed a grievance appealing a one-day suspension.

Director Boranian responded to said letter by letter, dated June 23, 1977, in which he refused to process the TORO grievance and stated that the dismissal at issue was not related to the one-day suspension.

On August 8, 1977, Curtis Uno, former General Counsel of SHOPO, wrote a letter to Allen K. Hoe, Deputy Corporation Counsel, requesting reconsideration of the refusal to process the TORO dismissal grievance. In support of the request for reconsideration, Mr. Uno cited HPERB Decision No. 79, Case No. CE-12-29. Attached to the letter was the following agreement which read:

> We reverse our prior position refusing to arbitrate the above-identified grievances and agree to proceed to arbitration on same.

Said agreement was executed by Mr. Hoe on August 9, 1977.

Also, noted by hand on the August 8, 1977 letter is the following:

> Note: No signature obtained from H. Boranian due to unavailability: negotiating firefighter's contract. However, since Boranian's signature more of a courtesy than a requirement, A. Hoe has signed and acknowledges as binding on C/C or its representative, and that once Step III completed, arbitrability is out of Boranian's hands, and decision to go forward or not is corp. counsel decision. B/c stipulation obtained, no prohibited practice charge filed with HPERB.
>
> 8/9/77 CKU
>
> 8/10/77: Allen Hoe advised that Boranian has okayed arbitration.
>
> CKU

On May 9, 1980, Mr. Hoe wrote a letter to SHOPO inquiring when SHOPO would proceed to arbitrate certain backlogged grievances. The TORO grievance was not included on the list of backlogged cases.

SHOPO responded to said inquiry with a letter, dated May 28, 1980, inquiring as to the omission of the TORO case from the list.

On June 3, 1980, Mr. Hoe responded to the letter from SHOPO by letter which states in relevant part:

> The employer's position regarding termination of an employee during the initial probationary period is unchanged, in that he is not covered by the grievance procedures under the collective bargaining agreement. In this regard, the employer considers the matter of the grievance filed by Mr. Toro . . . challenging [the] termination of initial probation as being outside the provisions of the collective bargaining agreement.

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 that 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 Peter Toro . . . even on the limited issue of arbitrability.

Allen Hoe responded to the foregoing letter by a letter to Gregory 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 Peter Toro . . .
>
> 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 September 3, 1980, the Complainants filed the instant prohibited practice complaint.

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

The Board will first address Complainants' above-referenced motion to reopen hearing. Complainants seek to introduce the Spiker decision, supra, rendered by the Intermediate Court of Appeals which reversed the lower court's holding. Complainants correctly indicate that the 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 its memorandum opinions.

After consideration of the arguments presented and the record in this case, the Board rules that it will take judicial notice of the Intermediate Court of Appeals' decision in Spiker, if relevant. In this respect, the Board recognizes that this ruling is consistent with item number five, stipulated to by the parties at the October 10, 1980 hearing. The pertinent provisions state:

> Number five, that HPERB take judicial notice of the documents in the matter of the appeal of Michael Spiker as contained in Civil No. 49812 and Supreme Court No. 7458, which has been assigned to the Intermediate Court of Appeals. And the Respondent offers that as Exhibit B, that judicial notice be allowed for purposes of permitting the parties to supplement their written arguments by utilizing the documents in the Spiker matter as exhibits in support of their positions.

We believe that the final disposition in the Spiker case is properly encompassed within the above stipulation. Although we recognize some merit in the argument posed by counsel for Respondent, it appears patently unfair for Respondent to, on the one hand rely upon

the lower court's holding while maintaining that complainants are technically precluded from relying on the appellate court's reversal of that case. Thus, the Board will take notice of the Court of Appeals' decision in Spiker, if applicable.

As to the merits of this case, Complainants, in their Post-Hearing Brief, argue that Respondents' treatment of the TORO grievance, by refusing to process the grievance and by refusing to disclose relevant information constitutes prohibited practices in violation of Subsections 89-13(a)(5), (6), (7) and (8), HRS. Said Subsections provide in pertinent part:

> 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 Respondent, however, denies that it committed any prohibited practices in violation of Subsection 89-13(a), HRS. The Employer argues generally, that the decision of the Chief of Police to terminate the initial probation of an employee such as TORO, is not subject to

appeal. The Employer specifically 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 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.

At the outset, the Board finds that Complainants' allegation of Respondent's wrongful refusal to disclose relevant information about the TORO grievance is totally unsubstantiated in the evidence presented. Hence, that allegation is hereby dismissed as the basis for a prohibited practice violation.

Additionally, the Board finds that Complainants failed to introduce evidence or legal argument to support their allegations that Respondent committed a prohibited practice by violating Subsection 89-13(a)(6), HRS. Accordingly, the Board dismisses such charge as Complainants have failed to carry their burden of proving by a preponderance of evidence that Respondent refused, in good faith, to participate in the mediation, fact-finding and arbitration procedures set forth in Section 89-11, HRS. Section 12-42-8(g)(16), Administrative Rules.

Moreover, Complainants premise their allegations of a violation of Subsection 89-13(a)(7), HRS, upon an alleged noncompliance with Subsection 89-11(a), HRS.

(Footnote Continued)

[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.

Although Complainants recognize that pursuant to Subsection 89-11(a), HRS, an employer may enter into an agreement containing a grievance procedure that culminates in final and binding arbitration, Complainants argue that the refusal to process a grievance is violative of Subsection 89-11, HRS. Complainants appear to cite Decision No. 117, George R. Ariyoshi, 2 HPERB 312 (1979), in support of its proposition.

The Board, however, is unable to ascertain how that decision supports Complainants' contentions. The Board has never held that the failure to process a grievance through the contractual procedure is violative of Subsection 89-11(a), HRS. That statutory provision merely authorizes the public employers to include such a procedure within the collective bargaining contract. Thus, an alleged failure to comply with the terms of the negotiated procedure does not constitute a violation of Subsection 89-11(a), HRS. Accordingly, the Board is of the opinion that Complainants have failed to convincingly support and argue their allegations of a Subsection 89-13(a)(7), HRS. Hence, that charge is dismissed.

Refusal to Bargain in Good Faith and the Violation of Contract

Complainants allege that the Respondent's refusal to process TORO's grievance to arbitration constitutes a breach of its duty to bargain in good faith within the meaning of Subsection 89-13(a)(5), HRS. Complainants argue that the duty to bargain is an ongoing responsibility of the parties which goes beyond the mere negotiation and execution of the collective bargaining agreement. Part of this duty,

Complainants submit, is the obligation of the employer to process grievances.

The Board agrees with these contentions put forth by Complainants. The facts of this case are very similar to those presented to the Board in Decision No. 161, State of Hawaii Organization of Police Officers (SHOPO), No. CE-12-66 (June 7, 1982). In the SHOPO case, supra, Virginia Sanderson, an employee serving her initial probationary period with the HPD, was terminated. Thereafter, the employer refused to process Sanderson's grievance to arbitration on the basis that the termination was nongrievable. Based upon such refusal, SHOPO instituted a prohibited practice charge with the Board, Case No. CE-12-43. The complaint was withdrawn without prejudice, however, pursuant to a Settlement Agreement in which the Employer agreed to process the grievance to arbitration and to supply relevant information about the grievance which had been previously requested but denied. After the passage of approximately two years, the Employer again asserted the nongrievability of the termination action. Upon the filing of a second prohibited practice complaint, Case No. CE-12-66, alleging, inter alia, violations of Section 89-13(a)(5) and (8), HRS, the Board held that the Settle-ment Agreement created an obligation for Respondent to process the case to arbitration. Thus, the Employer's refusal to process the grievance constituted a wilful violation of Subsection 89-13(a)(5), HRS, given the view that collective bargaining is a continuing process and the grievance procedure is part of that process to which the duty of bargain in good faith attaches. Dennis Yamaguchi, 2 HPERB 656 (1981).

The Board also held in the SHOPO case, supra, that the Respondent had violated applicable provisions of the Unit 12 agreement, by refusing to process the grievance upon its unilateral determination that the grievance was substantively nonarbitrable. The Board in that case recognized that Article 32 of the Unit 12 contract is a broad arbitration provision and that Article 32, Arbitration, Step IV(d) clearly provides that the determination of the arbitrator's jurisdiction was to be properly raised before and decided by the arbitrator. By the specific terms of the collective bargaining agreement then, the SHOPO and the Employer had agreed to submit all disputes over arbitrability to the Arbitrator. Thus, the Board held that the Employer's refusal to comply with the contract terms constituted a prohibited practice in violation of Subsection 89-13(a)(8), HRS.

Based upon the finding of violations in that case, the Board ordered the Respondent to cease and desist from the wrongful refusals to proceed to arbitration and affirmatively, to proceed to the arbitration of the grievance to determine the arbitrability of the subject matter.

The Board finds that the principles enunciated in the SHOPO case are equally applicable to the instant prohibited practice complaint. In this case, the Employer terminated TORO during his initial probationary period. Although Complainant SHOPO pursued the grievance at each applicable step in the procedure on behalf of TORO, the Employer refused SHOPO's request to proceed to arbitration of the case alleging nonarbitrability. While there were representations made by counsel for Respondent that the

grievance would indeed be processed to arbitration, this position was later reversed and Respondent reasserted non-arbitrability as the reason for not proceeding to arbitration. Notwithstanding the effect of the reversal of the Employer's position in this case upon the future credibility of Respondent and his counsel in the collective bargaining process, Respondent continued to refuse arbitration of the TORO grievance. The Board moreover concludes that the absence of a written Settlement Agreement in this case does not detract from the Employer's duty to conduct the bargaining process in good faith. Thus, the Board finds that the Employer's repeated refusals to process the TORO grievance to arbitration based upon its unilateral determination of arbitrability constitutes a prohibited practice in violation of Subsection 89-13(a)(5), HRS. As the natural consequence of Respondent's action was the violation of the above provision, Respondent's intent is presumed and constitutes the requisite wilfulness.

As to the alleged violation of the Unit 12 contract, the Board adopts the position previously taken in the SHOPO case.

Article 32 of the Unit 12 contract is a broad arbitration provision which states in part:

> 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.

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

> 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.

Thus, the SHOPO and the Employer have agreed in the above provision to submit all disputes over arbitrability to the arbitrator. The Board finds that the Respondent wrongfully refused to process the grievance to arbitration upon the belief that the subject matter was nongrievable. Under the clear meaning of the foregoing contractual provision, the substantive arbitrability issue should have been raised before and resolved by the arbitrator. As the violation of the collective bargaining agreement is clear, the Board finds that Respondent's actions constitute a prohibited practice under Subsection 89-13(a)(8), HRS. Again, the violation of Section 89-13, HRS, being a natural consequence of Respondent's actions, Respondent's wilfulness is presumed.

ORDER

The Board finds that the Employer's refusal to process the TORO grievance through the applicable contract grievance procedure constitutes violations of Subsection 89-13(a)(5) and (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 of compliance 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 hereafterorder.

DATED: Honolulu, Hawaii, June 21, 1982.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

Mack H. Hamada

MACK H. HAMADA, Chairperson

James K. Clark

JAMES K. CLARK, Board Member

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