

STATE OF HAWAII

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	
)	
JOSEPH N. A. RYAN, JR.,)	CASE NOS.: CU-12-40
)	CE-12-74
Complainant,)	
)	
and)	DECISION NO. 164
)	
STATE OF HAWAII ORGANIZATION)	
OF POLICE OFFICERS (SHOPO);)	
GEORGE R. ARIYOSHI, Governor)	
of the State of Hawaii; EILEEN)	
ANDERSON, Mayor of the City)	
and County of Honolulu;)	
HERBERT T. MATAYOSHI, Mayor)	
of the County of Hawaii;)	
HANNIBAL TAVARES, Mayor of the)	
County of Maui; EDUARDO E.)	
MALAPIT, Mayor of the County)	
of Kauai,)	
)	
Respondents.)	

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

On August 17, 1981, JOSEPH N. A. RYAN, JR. filed with this Board a prohibited practice complaint alleging violations of Subsections 89-13(b)(1) and (4), Hawaii Revised Statutes [hereinafter HRS], and Section 89-3, HRS, because of Respondent State of Hawaii Organization of Police Officers [hereinafter SHOPO] agents' conduct during the ratification of the applicable collective bargaining agreement. (Case No. CU-12-40.) Similarly, on August 20, 1981, Jerrold G. Brown and Boisse P. Correa filed prohibited practice charges on their own behalf and others similarly affected, against SHOPO, alleging a violation of Subsection 89-13(b)(1), HRS, in that SHOPO officials denied their right of privacy in voting during the contract ratification process. (Case Nos. CU-12-41 and CU-12-42.) As these

complaints involved substantially the same parties and issues, the Board consolidated the cases for disposition by Order No. 422, dated September 4, 1981.

However, on September 15, 1981, Complainant JOSEPH N. A. RYAN, JR., filed an Amended Prohibited Practice Complaint naming as Respondents, in addition to previously named SHOPO, GEORGE R. ARIYOSHI, Governor of the State of Hawaii; EILEEN ANDERSON, Mayor of the City and County of Honolulu; HERBERT T. MATAYOSHI, Mayor of the County of Hawaii; HANNIBAL TAVARES, Mayor of the County of Maui; and EDUARDO E. MALAPIT, Mayor of the County of Kauai. Moreover, additional factual allegations were included in the Amended Complaint. (Case Nos. CU-12-40 and CE-12-74.)

By Order No. 425, dated September 15, 1981, the Board granted Complainant's amendment of the prohibited practice charge and accordingly served the Amended Prohibited Practice Complaint upon Respondents.

On September 16, 1981, Respondent SHOPO filed an Application for Taking Deposition Upon Oral Examination and For Issuance of Subpoenas. By its application, SHOPO sought leave of the Board to take the depositions of JOSEPH N. A. RYAN, JR., Jerrold G. Brown and Boisse P. Correa. Upon review of the written and oral arguments, the Board denied SHOPO's application by Order No. 428, dated September 30, 1981.

Also, at the continued prehearing conference held on September 23, 1981, counsel for Respondent HANNIBAL TAVARES, orally moved to sever Complainant RYAN's Case Nos. CU-12-40 and CE-12-74 from Complainants Brown's and Correa's Case Nos. CU-12-41 and CU-12-42 due to the addition of

Respondents and resulting procedural complexities. This motion was granted by Order No. 429, dated September 30, 1981.

In addition, on September 30, 1981, the Board issued Order No. 431, granting, in part, Respondents' Motions for Particularization of the Amended Complaint. Complainant RYAN thereafter filed the Particularization of Complaint on October 2, 1981.

On October 13, 1981, Respondent SHOPO filed a Motion to Strike portions of the instant complaint on the grounds that the Complaint was redundant, immaterial, impertinent, scandalous or that Complainant lacked standing to assert such violations. At the hearing on the motion held on October 27, 1981, SHOPO's motion to strike was denied. Additionally at that hearing, the Board granted SHOPO's Motion to Amend Answer filed on October 16, 1981 and denied SHOPO's motions for particularization of the cross-claims filed on October 16, 1981.

On October 27, 1981, counsel for the counties of Maui and Kauai filed motions to amend their answers to the prohibited practice charge and the particularization of complaint. Counsel for Respondent City and County of Honolulu filed a similar motion on October 28, 1981 and counsel for Hawaii County filed its motion to amend answer on November 5, 1981. By their motions, Respondent Employers sought to include in their respective answers, the defense that Complainant lacked standing before the Board.

On November 10, 1981, a hearing was held on SHOPO's motion to strike the respective Respondent Employer's cross-claim. After hearing arguments, the motion to strike was

denied. The Board further granted the above-referenced motions filed by certain Respondent Employers to amend their answers.

On November 13, 1981, SHOPO filed a Motion for Partial Summary Judgment alleging that there were no issues of material fact existing as to paragraphs eleven (11), fourteen (14) and fifteen (15) of the Amended Complaint filed on September 15, 1981, and paragraphs ten (10) and twelve (12) of the Particularization of Complaint filed on October 2, 1981, and that SHOPO was entitled to judgment thereupon as a matter of law. SHOPO contended that: the inclusion of regulations regarding outside employment within the collective bargaining agreement did not constitute a prohibited practice; the collective bargaining agreement did not discriminate against the seniority rights of veteran employees; and the failure to provide for a cost of living allowance [hereinafter COLA] did not constitute a prohibited practice. Complainant RYAN filed a Memorandum in Opposition to Motion for Partial Summary Judgment on November 25, 1981. Thereafter, the remaining Respondents joined in SHOPO's Motion for Partial Summary Judgment.

On November 30, 1981, after hearing arguments on SHOPO's Motion for Partial Summary Judgment, the Board granted summary judgment on the above-referenced three items. Also, on that date, the Board heard arguments on SHOPO's Motion to Dismiss filed on November 16, 1981. That motion was taken under advisement. In addition, the Board denied, in part, SHOPO's Motion to Dismiss for Lack of Jurisdiction, as joined in by the Respondent Employers, on the grounds that the Board was without jurisdiction to regulate contract ratification procedures since it was

allegedly an internal union matter. The Board took under advisement, SHOPO's Motion to Dismiss on the grounds that the Board lacked a quorum, which was joined in by the Respondent Counties, pending the issuance of a written Attorney General Opinion.

A hearing on this prohibited practice complaint commenced on December 2, 1981 and was continued on December 8, 9 and 14, 1981. At the hearing, all parties were represented by counsel and afforded the opportunity to present witnesses and arguments.

At the close of Complainant RYAN's case on December 9, 1981, Respondents SHOPO, ARIYOSHI, ANDERSON, MATAYOSHI, TAVARES and MALAPIT moved for dismissal for failure to present a prima facie case. After hearing arguments, the Board granted the motions to dismiss made by Respondents ARIYOSHI, TAVARES, MALAPIT and MATAYOSHI. The respective motions made by Respondents SHOPO and ANDERSON were denied. Whereupon, the hearing resumed with the remaining Respondents presenting their case before the Board.

At the close of evidence on December 14, 1981, Respondent SHOPO orally moved to dismiss the complaint and was joined therein by Respondent ANDERSON. After the presentation of arguments and based upon the evidence adduced, the Board granted the motion. As an attendant matter, the Board recognized a stipulation which had been entered into between Respondents SHOPO, TAVARES, MALAPIT, and MATAYOSHI for the dismissal of the cross-claims without prejudice, thus resolving SHOPO's Motion to Dismiss filed on November 16, 1981 and which had been taken under advisement.

Upon motion by SHOPO, the cross-claim filed by Respondent ANDERSON was also dismissed without prejudice.

The Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Complainant JOSEPH N. A. RYAN, JR., is and was, for all times relevant, a public employee as defined in Subsection 89-2(7), HRS, and is included in bargaining unit 12 (Police officers) as defined by Subsection 89-6(a)(12), HRS.

Respondent SHOPO is and was, at all times relevant, the certified exclusive bargaining representative, as defined in Subsection 89-2(10), HRS, of the employees in Unit 12.

Respondent GEORGE R. ARIYOSHI is and was, for all times relevant, Governor of the State of Hawaii and a public employer within the meaning of Subsection 89-2(9), HRS.

Respondent EILEEN ANDERSON is and 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 included in Unit 12.

Respondent HERBERT T. MATAYOSHI is and was, for all times relevant, Mayor of the County of Hawaii and a public employer within the meaning of Subsection 89-2(9), HRS, of employees of the County of Hawaii who are included in Unit 12.

Respondent HANNIBAL TAVARES, is and was, for all times relevant, Mayor of the County of Maui and a public

employer within the meaning of Subsection 89-2(9), HRS, of employees of the County of Kauai who are included in Unit 12.

On or about August 6, 1981, the negotiating teams for SHOPO and the Public Employers reached a tentative agreement as to the terms of the Unit 12 collective bargaining agreement for the period July 1, 1981 through June 30, 1983. Tr. IV, p. 87; Tr. VI, p. 16.¹

Between August 10 and August 13, 1981, the tentative bargaining agreement was submitted to bargaining unit members residing in the County of Maui, the County of Hawaii and the County of Kauai for ratification. Tr. IV, pp. 26-37.

On August 14 and 15, 1981, the tentative bargaining agreement was submitted to bargaining unit members residing in the City and County of Honolulu for ratification. Polling was conducted at Washington Intermediate School, Kaneohe Police Station, Pearl City Police Station, and Wahiawa Police Station. Tr. IV, pp. 37, 42, 45 and 47.

On August 17, 1981, Complainant RYAN filed the instant prohibited practice complaint seeking relief from alleged improprieties in the ratification process. Complainant also alleged that certain terms of the collective bargaining agreement constituted prohibited practices.

The testimonies at the hearing indicated the following:

¹As used herein the citation to Tr. IV refers to transcript volume no. IV of the hearing held on December 2, 1981. Accordingly, Tr. VI is from the hearing held on December 8, 1981; Tr. VII is from the hearing held on December 9, 1981; and Tr. VIII is from the hearing held on December 14, 1981. There is no volume V.

Wallace Kunioka, Director of Civil Service for the City and County of Honolulu, represented the City and County during the negotiation of the subject collective bargaining agreement. Tr. IV, p. 9. Upon reaching a tentative agreement with SHOPO on the terms of the 1981-1983 contract, he was asked by either Gordon or Grover Chun for leave with pay for Steven Burke and two others to attend the ratification elections. As he felt that the request was reasonable, he granted permission and relayed the information to Major William Jones. Tr. IV, pp. 13-16.

Kunioka was notified by letter dated August 17, 1981 from Acting Business Manager, Nelson Moku, that the SHOPO tentative agreement had been ratified. City and County Ex. 1. Based upon such representation, the Public Employers proceeded to schedule the signing of the agreement. On August 20, 1981, the agreement was signed and the cost items transmitted to the City Council for appropriations. Prior to the signing of the contract, the City and County did not receive any notice of an improper ratification. Although he was aware of the pending petition before the Board, the Employers were not party to the proceedings at that time. Tr. VIII, pp. 56-59.

Kunioka further testified that the employer does not participate in conducting ratifications. Tr. VIII, pp. 65-66. Thus, the City and County never placed restrictions on the methods of ratification because they felt powerless to do so. Tr. VIII, p. 74.

Kunioka clarified that the ratification meeting in this case was not a stop-work educational meeting which may be held for the bargaining unit once per quarter. Tr. VIII, p. 67. The reference to "informational meeting" in this

case pertained primarily to an explanation of contract terms. Tr. VIII, pp. 62 and 67. In this regard, this meeting would not have been considered one of the four informational quarterly meetings. Tr. VIII, p. 68.

James Bell, Sergeant with the Honolulu Police Department [hereinafter referred to as HPD] and SHOPO shop steward, traveled to Maui, Hawaii and Kauai to conduct the contract ratification. He was accompanied by Gordon Chun, Grover Chun, Steven Burke and Patrick Malala. Tr. IV, pp. 21-23. Bell was a member of the SHOPO Ways and Means Committee in the years 1980-1981. The Committee was a supplement to the shop steward program to permit the dissemination of information to the membership. Tr. IV, pp. 24-25.

The ratification voting on Maui was conducted between 8:00 a.m. to 4:00 p.m. with a lunch break. At approximately 8:00 a.m., the Maui Chapter Chairperson conducted a meeting for police officers present at the polling site. Tr. IV, pp. 26-27. Bell was present to see that there was a peaceful decorum and no disturbance in the ratification process. Tr. IV, p. 25.

The voting thereafter was conducted in Kona, Kamuela and Hilo on the island of Hawaii and subsequently on the island of Kauai. Tr. IV, pp. 30-37.

On August 14, 1981, the ratification process started in Honolulu. Bell participated in the process at Washington Intermediate School where voting was conducted from 8:30 a.m. to 11:30 a.m. and from 1:00 p.m. to 5:00 p.m. Tr. IV, p. 37. At the school, Gordon Chun, President of SHOPO, conducted the information session held in the morning. Tr. IV, p. 74. The essence of the meeting was to explain the terms of the contract and how the contract had

come about. A SHOPO official and SHOPO attorneys assisted in "registering" and distributing ballots to the police officers. Tr. IV, pp. 38-39.

While he was at Washington Intermediate School, Bell carried around an "old-type shade" which he used as a pointer for items in the proposed contract that were being discussed. At no time did he intend to intimidate or coerce the voters. Tr. IV, pp. 40 and 55. Also, while at Washington Intermediate School, Bell made a statement to the voters to the effect that, "A yes note [sic] goes in the ballot box, a no vote goes in the thrash [sic] can." Tr. IV, p. 41.

On August 15, 1981, Bell also participated in the voting held in the courtroom adjacent to the Kaneohe Police Station. Tr. IV, p. 42. Again, an informational meeting was conducted about 8:00 a.m. At that site, Bell made the statement to the effect, "If you're going to vote no, get out of here." Tr. IV, p. 44. The statement was directed at Complainant because another officer had asked a question and that person was being deprived of the right to hear the answer to the question without interruption. Tr. IV, pp. 53-55. Bell interpreted Complainant's interruption as an attempt to stop the meeting. Tr. IV, p. 54. He also could tell that RYAN would vote no by the way he asked for a ballot. Tr. IV, p. 60.

During the afternoon of August 15, 1981, voting was held at the Wahiawa Police Station from 12:00 p.m. to 2:00 p.m. and at the Pearl City Police Station from 3:00 p.m. to 5:00 p.m. Tr. IV, pp. 45 and 47.

Detective Gordon Chun, President of SHOPO during 1981, indicated that although the Ways and Means Committee

was formed in 1976, it was never really activated. Tr. IV, p. 63. He also indicated that SHOPO by-laws do not set forth procedures for the ratification of a collective bargaining agreement. Tr. IV, p. 62. During the 1981 ratification process, Chun assigned Sergeant James Bell as the sergeant-at-arms at the meetings. Tr. IV, pp. 64-65. Chun requested that Bell be permitted to attend the ratification, along with the aforementioned Burke and Malala. Tr. IV, pp. 65-66.

The informational meetings were conducted at the polling place to keep costs down and for the convenience of the voters. Tr. IV, p. 71. Chun conducted the informational session at Washington Intermediate School but was not present at the Kaneohe, Wahiawa or Pearl City voting sites. Tr. IV, pp. 74 and 76. During the meeting, the union did not attempt to prevent dissidents from expressing their opinions. Tr. IV, p. 91. Charts were used to explain the various articles of the contract. Police officers signed for ballots and were visually identified. Tr. IV, pp. 88-89. The procedures of the 1981 ratification process were based upon similar procedures followed in 1973, 1976 and 1977. Tr. IV, pp. 71-72. Police officers were free to vote anywhere in the room and the union received no complaints about the lack of voting booths. Tr. IV, p. 92. Chun had, however, received a telephone call from Complainant RYAN about possible improprieties in the ratification vote. Tr. IV, p. 73.

Negotiations for the 1981-1983 collective bargaining agreement began in February and continued through August. During this period, SHOPO sent out approximately three flyers to its membership to keep them informed of the

progress of negotiations. The first two flyers were sent out on or about June 14, 1981, and June 26, 1981. SHOPO Exs. 1 and 2. After the tentative agreement was reached on August 6, 1981, flyers were sent by first-class mail to SHOPO members and service fee members on August 7, 1981. Tr. IV, pp. 84-87.

Patricia Molitor, a police officer for three-and-one-half years and a SHOPO member, left for a mainland vacation on July 17, 1981. Upon her return on August 15, 1981, she found a SHOPO newsletter stating that a ratification vote would be conducted on specific dates. As those dates had already passed, she did not vote in the ratification process. Tr. VI, pp. 8-9. Molitor did not call the SHOPO office to inquire about voting and further, had not previously left her mainland address with SHOPO nor informed SHOPO that she would be going on vacation. Tr. VI, pp. 9-10.

Karen Unabia, Executive Secretary of SHOPO, testified that this was the third ratification she assisted with since she began work at SHOPO in 1977. Tr. VI, p. 15. On August 10, 1981, she mailed 1,520 flyers via first class mail to SHOPO members and service-fee members on Oahu informing them of the upcoming ratification. Tr. VI, pp. 17 and 22. She testified that SHOPO did not receive any written or telephonic complaints regarding a lack of notice. Tr. VI, p. 22. Although she indicated that there was an absentee ballot system, she did not mail out any absentee ballots nor were any absentee ballots cast or counted. Tr. VI, pp. 17-18, 21, and 24.

Bernardine K. Campbell, an officer for six-and-one-half years and a member of SHOPO, received a notice

of the scheduled ratification vote on August 13, 1981. On August 14, 1981, she was scheduled to leave for a trip to the island of Hawaii at 8:00 a.m., when voting was to commence. On her notice, there was no mention of an absentee ballot system. As she was unable to change her flight plans without incurring additional cost, she was not able to vote in the ratification. Tr. VI, pp. 29-31.

Michael Rehfeldt, an officer for five-and-one-half years and a member of SHOPO, first received notice of the ratification procedure on August 15, 1981 when he arrived at his working place, the Kailua Police Station. At 6:30 a.m., he was told by his sergeant that one officer at a time would be able to vote at the Kaneohe Police Station. When Rehfeldt arrived at Kaneohe Police Station about 8:25 a.m., he was not able to vote because the contract was being explained. No one was voting at the time. Tr. VI, pp. 36-37. He noticed that Complainant RYAN requested a ballot and the extremely irritated response RYAN received from the SHOPO officials. Tr. VI, pp. 38 and 43. The officers were also told to sign their names on the ballot if they voted "no" so that they would be put on the strike line, but Rehfeldt did not sign his name on the ballot. Tr. VI, pp. 57-58. The statements made by the SHOPO officials did not appear to be funny. Tr. VI, pp. 42-43.

Rehfeldt testified that at prior ratification elections, officers weren't forced to stay and listen to the informational meeting. They were allowed to cast their ballots and leave. Tr. VI, pp. 49-50. Moreover, Rehfeldt did not feel that the proposed contract was proper or sufficient; and part of his reason for testifying was to see a new contract come about. Tr. VI, p. 49.

Sergeant Bruce Weissich, an officer for nine-and-one-half years and a SHOPO member, received notice of the ratification through the mail. Tr. VI, pp. 62 and 63. Weissich voted at the Kaneohe Police Station where Grover Chun made the presentation of contract terms. Tr. VI, pp. 63-64. He was told that a "no" vote was a "strike" vote and asked the officials whether the negotiating team would return to the bargaining table if the contract was not ratified. The official replied that they would not return to the table. Tr. VI, pp. 65-66. This was inconsistent with what he believed to be true. Tr. VI, p. 80. He was also told that if he marked the ballot "no," he should sign his name on it, but he did not. Tr. VI, p. 82. Weissich was dissatisfied with some of the terms of the contract but not necessarily all. Tr. VI, pp. 68-70.

Grover Chun, Sergeant at HPD and Secretary of the SHOPO Board, was a member of the SHOPO negotiating team. As such, he also helped explain the contract in the informational session at the ratification sites. Tr. VI, pp. 82-83. Chun made a statement during the meeting at the Kaneohe polling site to the effect that a "no" vote was a "strike" vote. He explained that he felt an obligation to inform the membership of the consequences of non-ratification as the negotiating team would have to go back to the bargaining table and the parties would be at impasse. Tr. VI, pp. 89-90. His belief was based upon the fact that prior to reaching the tentative agreement, the parties had held firm to their positions for two to three weeks. Tr. VI, p. 101.

Chun also told the officers that if they voted "no," to put their names on the ballot so they could be

called for picket duty. Tr. VI, pp. 89-90. He indicated that he was angry and frustrated and wanted the membership to know that if they voted against the contract, they should be prepared to help the union. He did not expect the officers to identify themselves on their ballots. Tr. VI, p. 102.

In response to Complainant RYAN's request for a ballot, he told Complainant "to please step forward, pick up his ballot, vote, and to leave, because he was disrupting the meeting." Tr. VI, p. 91.

Complainant RYAN, an officer for almost ten years and a member of SHOPO, testified that his base pay after almost ten years of service was \$1,559 per month. He did not believe this sum was adequate to support a wife and three children. He believes that his wage rate is low in comparison to that of other metropolitan police officers. Tr. VI, pp. 111-113.

Complainant arrived at the Kaneohe Police Station about 8:50 a.m. on August 15, 1981. Upon his arrival, he noticed officers weren't voting because the informational session was being conducted. After waiting a few minutes, it appeared the meeting wasn't going to end, so he raised his hand. Tr. VI, pp. 116-117. At that time, Eldon Kaopua told Complainant to "wait a minute" and proceeded to answer someone else's question. However, upon completion of the answer, they ignored Complainant which caused him to interrupt again. At this time, Sergeant Bell told Complainant that if he was going to vote "no" to get out. Tr. VI, pp. 117-118.

Complainant then went to the front of the room to talk with Kaopua (after observing another officer vote) and

asked for a ballot. He asked Kaopua three times for a ballot before being allowed to sign for a ballot and vote. Tr. VI, p. 118.

William F. Jones, Sr., a major in HPD and a member of SHOPO, testified that as Executive Assistant to the Chief of Police, his duties consist of coordinating activities between the divisions, seeing that department policies are carried out, making recommendations on managerial practices to the chief, and serving as the liaison between the department and the several unions representing its employees. Tr. VII, pp. 4-5.

In August of 1981, Jones discussed with Kunioka the need for representatives of SHOPO to travel to neighbor islands to inform the membership of the collective bargaining agreement. Tr. VII, p. 7. Jones also said that usually not more than ten percent of a unit's strength is allowed vacation at any given time. Tr. VII, p. 8. While there are approximately 1,580 officers in the department, the coordination of vacation is not centralized nor is SHOPO provided with such a schedule. Tr. VII, pp. 8-9.

Cameron Deal, Jr., an officer with HPD for ten years, voted at Kaneohe Police Station at approximately 8:15 a.m. while the informational meeting was being conducted because he was leaving for Maui shortly. No one there told him to wait for the contract explanation and he was not intimidated by anyone. Tr. VIII, pp. 10-12.

Elmer Tadly, an officer with HPD for ten years, voted at the Wahiawa Police Station and was able to do so before the informational meeting was completed. Tr. VIII, pp. 18-19. He was not asked to listen to the presentation

and indicated that there were no disturbances or coercion. Tr. VIII, p. 20.

Leroy Fujishige, an officer with HPD for five-and-one-half years, voted at the Pearl City Police Station between 3:00-4:00 p.m. after being notified via a flyer in the mail. Tr. VIII, pp. 27 and 32. He testified he received notice from SHOPO a couple of weeks prior to the voting. Tr. VIII, pp. 32-33. Although he noticed a disturbance during the contract explanation, he did not believe that Kaopua attempted to intimidate the officers to vote in a particular way. Tr. VIII, pp. 29-30.

Charles H. Turner, an employee of the Honolulu Advertiser since 1953, testified that he was the labor writer for the newspaper. Tr. VIII, p. 36. As such, he was notified at home when a tentative collective bargaining agreement had been reached for the police officers. Tr. VIII, p. 38. Turner wrote one article, identified as SHOPO Ex. 6, and assisted in writing another article, SHOPO Ex. 5, regarding the tentative collective bargaining agreement and the pending ratification. Tr. VIII, pp. 51-52.

CONCLUSIONS OF LAW

As a preliminary matter, the Board addresses the quorum issue raised by Respondents' motions to dismiss. Although these motions were taken under advisement pending the issuance of an Attorney General Opinion, the Board, at this point, sees no necessity to continue to delay the issuance of this decision.

Respondents SHOPO and the respective County Employers contend that this Board lacks jurisdiction over the subject complaint because it lacks a quorum of three

members as specifically required by Section 89-5, HRS. In support of their position, Respondents argue that the Legislature intended that a quorum of the Board consist of a delicate balance of interests representative of labor, management and the public. Thus, without the required third member, Respondents insist that this Board is powerless to act and any actions taken by the Board are deemed to be illegal.

We disagree.

Pertinent provisions of Subsection 89-5(a), HRS, state:

Any action taken by the board shall be by a simple majority of the members of the board. All decisions of the board shall be reduced to writing and shall state separately its finding of fact and conclusions. Three members of the board, consisting of the chairman, at least one member representative of management, and at least one member representative of labor, shall constitute a quorum. Any vacancy in the board, shall not impair the authority of the remaining members to exercise all the powers of the board. The governor may appoint an acting member of the board during the temporary absence from the state or the illness of any regular member. An acting member, during his term of service, shall have the same powers and duties as the regular member. [Emphasis added.]

Although admittedly the foregoing provision indicates that three members of the board shall constitute a quorum, the statute goes on to unambiguously provide that a vacancy in the board shall not impair the authority of the remaining members to exercise all the powers of the board. Thus, in this case, the vacancy caused by Member Milligan's retirement does not foreclose this Board's operation nor does it impair this Board's authority.

The quorum requirement of Section 89-5, HRS, is at best, ambiguous in light of the fact that the board is composed of only three members. Curiously, the statute refers to the quorum as "consisting of the chairman, at least one member representative of management and at least one member representative of labor." [Emphasis added.] A plain reading of this provision would indicate that the board was previously composed of more than three members.

In considering the Legislature's intent in its composition of the quorum, as urged by Respondents by their apparent recognition of the statutory ambiguity, the subject provision as originally enacted in 1970 provided as follows:

There is created a Hawaii public employment relations board composed of five members of which (1) two members shall be representative of management, (2) two members shall be representative of labor, and (3) a fifth member, the chairman, shall be representative of the public.

Subsequently, the law was amended in 1971 to read as it presently does, i.e., to provide for a three-member board. Notwithstanding, however, the decrease in the composition of the board, the Legislature failed to change the quorum requirement of three persons. A review of the applicable legislative committee reports does not specifically reveal whether this omission was intentional or inadvertent. However, in view of the fact that the Legislature did not conform the quorum provision to the reduced size of the board, by deleting the superfluous words, it is reasonable to infer that the failure to change the quorum requirement was merely an oversight. Nevertheless, since the statute unambiguously provides that a vacancy in the board will not

impair its operation, this Board is properly constituted and as such, has jurisdiction over this prohibited practice complaint.

A. Violation of Subsections 89-13(b)(1) and (4), HRS

Complainant alleges that the conduct of SHOPO officials at the polling sites during the ratification process was tantamount to a prohibited practice, in violation of Subsections 89-13(b)(1) and (4), HRS. In pertinent part, these subsections provide:

[§89-13] Prohibited practices; evidence of bad faith.

* * *

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

* * *

(4) Refuse or fail to comply with any provision of this chapter; ...

For this Board to find a prohibited practice, it is clear that Complainant has the burden of proving his allegations by a preponderance of the evidence.

Administrative Rules Section 12-42-8(g)(16) provides in pertinent part:

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.

Turning to the ratification process, Complainant's allegations of improprieties include the fact that

informational meetings were conducted during balloting hours, that SHOPO refused to distribute ballots during balloting hours as posted, that SHOPO arbitrarily closed voting to prevent members from voting, and that Sergeant James Bell made a statement at the Kaneohe polling site to the effect that, "if you're going to vote 'no', no vote. Get the _____ out."

SHOPO admits it conducted meetings at the same time and place of the balloting. However, it argues this practice has been conducted in the past, that it is a common practice, and that there have never been complaints prior to this.

No one disputes that ratification of the contract is an employee right provided by statute.² While mere past practice does not, in itself, legitimize Respondent SHOPO's conduct of the informational sessions, the Board is of the opinion that presentation and explanation of the contract terms to the membership prior to voting are integral to the ratification process. We find nothing in Chapter 89, HRS, which prohibits the explanation simultaneously during voting hours given the fact, infra, that the officers were able to cast their ballot and leave.

²Subsection 89-10(a), HRS, provides in pertinent part as follows:

Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned. The agreement shall be reduced to writing and executed by both parties. The agreement may contain a grievance procedure and an impasse procedure culminating in final and binding arbitration, and shall be valid and enforceable when entered into in accordance with provisions of this chapter.

SHOPO contends that it did not refuse to distribute ballots or arbitrarily close voting. Evidence was presented which showed that officers were allowed to secure ballots without listening to or participating in the informational meeting. Therefore, the Board concludes SHOPO did not refuse to distribute ballots or arbitrarily close voting.

Further, SHOPO does not deny that an exchange of words took place between Complainant and Sergeant Bell. However, the union posits it was not designed to prevent Complainant from voting nor intimidate him in voting. According to Complainant's testimony, he did vote and the incident did not make him change his mind or alter his vote. Thus, although Bell's conduct may properly warrant a reprimand, the Board concludes that Complainant was not coerced or intimidated by Bell.

Complainant also alleges material misinformation presented to the officers constituted a prohibited practice. These included the statements that a "no" vote was a "strike" vote and that the union would not return to the table for further negotiations if the contract was not ratified.

The testimony of Sergeant Weissich indicated he understood this statement to be inconsistent with collective bargaining law. In a situation such as this, where a bilateral agreement has been reached between the union and the employer, the law clearly specifies the tentative bargaining agreement must be submitted to the membership for ratification. The union cannot call for a strike vote at this point in time.

In his testimony, Grover Chun elaborated on the circumstances giving rise for his statement. He indicated that he felt an "obligation" to inform the officers of the consequences of non-ratification. In his opinion, the union and the employer were at a semi-impasse, e.g., both had held firm negotiating positions for the last two to three weeks. Thus, if this contract was not ratified and the SHOPO negotiators returned to the bargaining table, he believed an impasse would result. He did not intend for the statement to intimidate anyone.

On the other hand, Complainant did not present any evidence showing that understanding of this misstatement caused officers to vote contrary to their beliefs. Neither was any evidence presented to show officers were intimidated to change their votes or ultimately, to not exercise their right to vote. Thus, based upon the evidence presented, the Board is unable to conclude that the statements made by the SHOPO officials influenced the membership to vote in a particular way.

Complainant further alleges SHOPO provided inadequate notice to its members, failed to inform service fee members of their right to vote, and failed to provide absentee ballots. Complainant presented testimony by Officer Molitor stating she did not receive timely notice of the ratification as she was on vacation on the mainland when the notices were mailed out. The notice had been sent to her residence as she had not otherwise instructed SHOPO. Officer Molitor returned to Oahu from the mainland on August 15, 1981 and did not thereafter attempt to contact SHOPO about her right to vote.

Similarly, Officer Campbell testified she was not able to vote because she received her notice the evening before she was leaving on a trip. Evidence was presented showing that Officer Campbell made no attempt to contact SHOPO about the procedure for absentee balloting.

SHOPO, in response, presented testimony by Gordon Chun and Karen Unabia indicating that notice of the ratification was sent out by first class mail to the last known addresses of all SHOPO members and service fee members on Oahu. The testimony of Unabia also indicated that some notices were returned, but she was not able to recall the exact number.

Further, there were no complaints received, oral or written, protesting the short lapse between notice and voting. SHOPO also argued the pending ratification was a subject of discussion at the various police stations and was publicized in the various media.

Further, Unabia testified an absentee ballot system was provided for and the procedure for obtaining a ballot was similar to those used at the polling sites.

Thus, the Board concludes that an absentee ballot system had been devised although Complainant's witnesses did not avail themselves of such opportunity. It seems somewhat unreasonable to blame the union for inadequate notice where notices were sent to the last available addresses and the persons involved also failed to communicate their change of status to the union.

Complainant further alleges the union did not exercise adequate control over the ballots, i.e., the identification of those requesting ballots was not checked.

However, Gordon Chun testified that police officers signed for their ballots and were visually identified.

Complainant failed to present any evidence to refute this or demonstrate that voters who should not have been allowed to vote, were permitted to vote.

Thus, based on the facts and evidence presented, the Board concludes Complainant did not prove the allegations by a preponderance of the evidence. Although the Board agrees that the procedures utilized in this ratification process could be greatly improved to ensure the confidence of the membership, the Board is not convinced by the evidence and arguments presented by Complainant, that Respondent SHOPO's conduct constituted a prohibited practice. Accordingly, the Board dismisses these charges.

B. Violation of Subsection 89-13(a)(8),
HRS

Complainant RYAN alleges that the Employer violated Article 9 of the collective bargaining agreement of July 1, 1979-June 30, 1981, as extended by mutual agreement, by permitting SHOPO to conduct illegal educational and informational meetings on its property during the designated ratification voting hours without proper notification and approval. The allegations of the Amended Complaint, filed on September 15, 1981, indicate that Complainant charges the Employer's failure to file a grievance over the alleged Article 9 violation constituted condonation, ratification and participation in the alleged unfair labor practices.

At the outset, the Board notes that Complainant failed to introduce the applicable collective bargaining agreement into evidence. Without the applicable contract

provision properly before us, the Board is unable to consider the merits of Complainant's arguments. Hence, the Board necessarily concludes that Complainant failed to prove by a preponderance of evidence that Respondent violated Article 9 of the collective bargaining agreement. Section 12-42-8(g)(16), Administrative Rules. The Board is unable to conclude that the Employer in any way condoned any allegedly illegal actions by Respondent SHOPO. Hence, the above charge is dismissed.

However, even if the applicable contract was properly in evidence, the Board would find the testimony of Wallace Kunioka to be persuasive. Kunioka testified that the ratification meeting was not considered a stop-work informational or educational meeting within the meaning of the law and under most collective bargaining contracts. The ratification meetings in this case were held primarily to explain the terms of the contract tentatively agreed to and would not have been considered one of the quarterly meetings the union is entitled to conduct. Therefore, the procedure to request and seek the Employer's approval to conduct meetings, allegedly contained in Article 9, is not applicable. The Board would concur with Kunioka's interpretation and find no basis for a prohibited practice charge.

Moreover, the Board notes that many grievance procedures define "grievance" in a manner which permits filing of a complaint by an employee or by the union only. Customarily, the grievance procedure is the mechanism by which an employee or union seeks redress from the Employer's actions. In such a case, the Employer would not have the right to file a grievance on its own behalf. Thus, an Employer's failure to file a grievance would be

inconsequential and not a proper basis for a prohibited practice charge.

C. Violation of Subsections 89-13(a)(1), (5) and (6), and Section 89-3, HRS.

Complainant additionally argues that the Employer adopted, ratified and participated in the alleged prohibited practices committed by SHOPO. Complainant contends that the Employer's signing of the allegedly illegal collective bargaining agreement with knowledge of such illegality, constituted practices violative of the above statutory provisions.

As discussed supra, however, based upon the evidence and arguments presented, the Board held that Complainant had failed to prove that SHOPO committed prohibited practices in the instant contract ratification process. Not having initially proven the illegality in SHOPO's conduct, Complainant's theory of the Employer's knowing participation in said conduct also fails.

However, in this regard, the Board finds that the Employer, after receiving written notice from the SHOPO Acting Business Manager of the contract ratification, proceeded to process the collective bargaining agreement to signature and funding of the cost items. Kunioka testified that prior to the signing of the contract, he had not received any notice that the contract was improperly ratified. Although he was aware of the prohibited practice charge which was pending before the Board, the Employers continued to process the contract as the City was not at that time party to the proceedings. Given these facts, the Board concludes that the Employer was not properly charged

with knowledge of an illegality. In any event, given the requirements of Subsections 89-10(a) and (b), HRS, requiring the execution of the agreement by both parties and transmittal of the cost items to the appropriate legislative bodies within ten days of ratification, the Employer would, in all probability, have been subject to a prohibited practice charge if it failed to process the agreement as it did.

Having found no violation of the above-referenced statutory provisions, the Board therefore dismisses the Complainant's allegations with regard thereto.

D. Violation of Subsections 89-9(a) and 89-13(b)(2), HRS

Complainant further contends that Respondent SHOPO refused to bargain in good faith on behalf of Complainant and other HPD employees by stating that a "no" vote was a "strike" vote and if the tentative agreement was not ratified, SHOPO would not return to the bargaining table.

While the substance of these statements have been addressed supra, the Board does not concur with Complainant's theory that these statements constitute a prohibited practice vis-a-vis the Employer. The evidence presented by Complainant does not indicate that these representations were even made to the Employer. In addition, nothing indicates that these isolated statements by Grover Chun, while he was admittedly on the SHOPO negotiating team, expressed the sentiments of the SHOPO Board or the position of the negotiating team. He indicated in his testimony, rather, that the statements were uttered out of frustration rather than to be representative of the negotiating team.

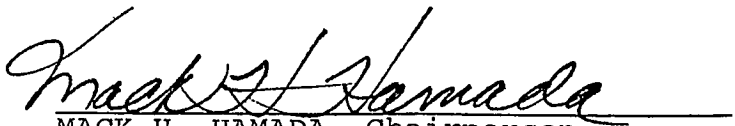
Moreover, the actions of SHOPO in executing the contract on August 20, 1981 would militate against a conclusion that SHOPO had called for a strike vote. As such, the Board is not convinced that these statements in context indicate a failure to bargain in good faith with the Employer. Accordingly, this charge is dismissed.

ORDER

For the reasons set forth above, the prohibited practice charges brought by Complainant are hereby dismissed.

DATED: Honolulu, Hawaii, June 22, 1982.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


MACK H. HAMADA, Chairperson


JAMES K. CLARK, Board Member

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