

## STATE OF HAWAII

## HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	)	CASE NO. CE-12-76
	)	
ROBERT BURNS and STATE OF	)	DECISION NO. 169
HAWAII ORGANIZATION OF	)	
POLICE OFFICERS (SHOPO),	)	
	)	
Complainants,	)	
	)	
and	)	
	)	
EILEEN R. ANDERSON, Mayor	)	
of the City and County of	)	
Honolulu,	)	
	)	
Respondent.	)	
	)	

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FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER

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On February 24, 1982, Complainants ROBERT BURNS and Milton Matsumoto, police officers in the Honolulu Police Department [hereinafter referred to as HPD] and the STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS [hereinafter referred to as SHOPO], filed a prohibited practice complaint against Respondent EILEEN R. ANDERSON, Mayor of the City and County of Honolulu. The complaint alleged that Respondent wrongfully refused to grant Complainants BURNS' and Matsumoto's applications for sick leave for July 16 and 17, 1979, and July 15, 16 and 17, 1979, respectively, during which period Complainants BURNS and Matsumoto maintain they were ill. The complaint further alleged that Respondent wrongfully refused to process Complainants' grievances based on the refusal to grant sick leave, through the contractual grievance procedure.

Complainants allege that Respondent, through the foregoing conduct, has committed prohibited practices in

violation of Subsections 89-13(a)(5), (7), and (8), Hawaii Revised Statutes [hereinafter referred to as H.R.S.].

After due notice to parties, a hearing was held on July 14, 1982. At the outset of the hearing, Milton Matsumoto was withdrawn as a Complainant in this case, pursuant to SHOPO's oral motion. Thereafter, all parties were afforded full opportunity to call and cross-examine witnesses and submit exhibits.

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

#### FINDINGS OF FACT

ROBERT BURNS is and was for all times relevant, a public employee, as defined in Subsection 89-2(7), H.R.S., and a member of Unit 12 (Police Officers), as defined in Subsection 89-6(a)(12), H.R.S. BURNS is and was for all times relevant employed by the HPD.

SHOPO is the exclusive representative, as defined in Subsection 89-2(10), H.R.S., of employees in Unit 12 and, as such, represents Complainant BURNS herein.

Mayor ANDERSON is the public employer, as defined in Subsection 89-2(9), H.R.S., of employees of the City and County of Honolulu who are in Unit 12.

The Board in Case No. S-12-7 declared that a mass walk-out of police officers on July 14, 1979 at approximately 7:30 p.m. constituted an illegal strike under Subsection 89-12(b), H.R.S. Judicial notice of Case No. S-12-7 was taken by the Board in the instant matter. Transcript of hearing [hereinafter referred to as Tr.], p. 34.

Complainant BURNS has been employed as a police officer for approximately 15 years. His assignment during July of 1979 was in District 2 (Wahiawa), on the third watch (2:30 p.m.-11:15 p.m.). Tr. p. 6.

On Saturday, July 14, 1979, the day of the commencement of the strike, BURNS was taking his regular day off. BURNS testified that he and his wife attended a baby luau at the Makakilo Bunkers from about 1700 hours until about 2100 hours (5:00 p.m. to 9:00 p.m.). He and his wife went from the luau to their home to retire for the night. Tr. p. 7.

BURNS testified that he awoke early some time on Sunday morning to use the bathroom and felt "low," fatigued and suffering from diarrhea. Tr. p. 8. BURNS' wife, Rose Marie, also testified that she awoke early Sunday morning, slightly before her husband, and she also felt sick, with what she felt was a stomach virus. Tr. p. 31.

BURNS remained at home sick on Sunday, July 15, also a regular day off for him. BURNS did not consult a doctor for his condition as he said it was not customary for him to do so when sick, and would only consult a doctor for his annual check-up. Neither did he take any medication. Tr. p. 8.

BURNS testified that on Monday, July 16, he felt worse, with body aches, fatigue, and diarrhea, and so remained at home. As he was scheduled to work on this day, he called the Wahiawa station at 1100 hours (11:00 a.m.) to give notice of his sickness, but the phone was busy. After about a half hour of attempting to contact the station, he relented and phoned the Pearl City station and gave notice



of his sickness to "a Major DeMello." Tr. p. 9. BURNS testified that it is normal procedure to phone the district commander to give such notice if the watch commander cannot be contacted. Tr. p. 25.

BURNS testified that on Tuesday, July 17, he felt better, but stayed at home although he was scheduled to work. He called the Wahiawa station and spoke to his commander, Lieutenant Trepte, informing him that he would be back to work the next day. Tr. pp. 9-10.

Upon returning to work BURNS submitted an application for sick leave with pay for July 16 and 17. Cs' Ex. X. This application was returned to him several days later by Lieutenant Trepte. On his pay stub covering this period was the notation "2-," meaning he had been docked two days' pay. Cs' Ex. 4. BURNS never attempted to get a doctor's slip to verify his sick leave request, as he reasoned that, given his recovery, a doctor could not confirm his prior illness. Tr. p. 22.

SHOPO, on behalf of BURNS and "others similarly situated," filed a Step II grievance under the applicable contract (July 1, 1979-June 30, 1981; Bd. Ex. 5, item 1) protesting the denial of sick leave. Ex. C, attached to Complaint; Bd. Ex. 1. This grievance was denied, as were subsequent requests to process the grievance at Steps III and IV of the grievance procedure. Bd. Ex. 5; Exs. 1, 2, 3, 4, 5, 6, 7.

BURNS averred that if he were not sick on July 16 and 17, he would have reported to work for his regular shift. Tr. p. 14. BURNS also testified that his lieutenant, Captain Chow, called him, and gave him an "ultimatum" about

returning to work. He said that Chow asked him if he was sick and he replied that he was. Tr. p. 21. Asked why, in answering Respondent's interrogatories on the question of his activities on July 14, 1979, he replied he was "[a]t home with a fever" but did not mention attending the baby luau, BURNS testified that when he filled out the interrogatories, he was confused and did not recall exact dates and days, and "thought Saturday was Sunday." Tr. p. 20.

When questioned as to why, given the fact of the possibility of a strike, he did not get verification of illness from his doctor, BURNS maintained that it was not necessary since he was out only two days, and, under applicable rules and statutes, a doctor's verification is required for absences due to illness of five days or more. Tr. pp. 25-26, 27. BURNS' understanding is in fact correct. Bd. Ex. 5, items 14, 15; Exs. 12, 13, Rules of the Director of Civil Service, City and County, Rule 3.10(a); Section 79-8, H.R.S.

#### CONCLUSIONS OF LAW

Complainants charge that Respondent's actions in denying BURNS' sick leave benefits and failing to process the resulting grievance arising out of the denial of sick leave violates Subsections 89-13(a)(5), (7), and (8), H.R.S., which provides as follows:

[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;

\* \* \*

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

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

Complainants argue that the refusal to process the grievance amounts to an interference with the right to collective bargaining, under Subsection 89-13(a) (5), H.R.S.

In addition, by refusing to process BURNS' grievance, Complainants allege that Respondent violated Article 32<sup>1</sup> of the collective bargaining agreement providing for the Grievance Procedure, thereby violating Subsection 89-13(a) (8), H.R.S.

Complainants also argue that the denial of sick leave amounts to a violation of Unit 12 contract provisions pertaining to leaves of absence,<sup>2</sup> and prior rights,<sup>3</sup> and thereby also violates Subsection 89-13(a) (8), H.R.S. Post-Hearing Brief at 6.

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<sup>1</sup>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.

<sup>2</sup>Article 25. LEAVES OF ABSENCE WITH PAY

Leaves of absence with pay shall be in accordance with the then existing rules, regulations, and statutes except those supplemented herein.



In violating the foregoing provisions of Chapter 89, H.R.S., Complainants further argue, Respondent has refused or failed to comply with Chapter 89, H.R.S., and thus has violated Subsection 89-13(a)(7), H.R.S. Post-Hearing Brief at 6.

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(Footnote 2 Continued)

A. Leave for Death in the Family

When death occurs to a member of an employee's immediate family, he shall be entitled to three (3) days leave with pay.

For the purpose of this section, immediate family is defined as: parents, brothers, sisters, spouses, natural or legally adopted children, step-parents, parents-in-law, grandparents and grandchildren, or any individual who becomes a member of an immediate family through the Hawaiian "Hanai" custom. Provided, however, an individual affected by the "Hanai" relationship shall be entitled to utilize funeral leave only for those members of his immediate family resulting from the "Hanai" relationship. If the death or funeral occurs outside the State of Hawaii, the employee shall be granted, upon request, a reasonable number of additional days of accumulated vacation leave, compensatory time off, or leave without pay for travel to attend the funeral; or participate in the funeral arrangements for a funeral in the State of Hawaii.

Death in family leave shall be granted on the days or shift designated by the employee provided it is taken within a reasonable period of time after such a death.

B. Personal Leave

An employee shall, whenever operationally possible, be permitted three (3) days personal leave with

Respondent in turn argues that Complainants have failed to carry the burden of showing any acts which constitute violations of Subsections 89-13(a)(5), (7), or (8), H.R.S. Respondent maintains that Complainants have relinquished the right to invoke the grievance procedure since Article 38<sup>4</sup> of the Unit 12 contract provides that the parties are not bound by the grievance procedure in the

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(Footnote 2 Continued)

pay per year which shall be charged against the employee's vacation credits. Additional personal leave with pay may be granted upon request based on justifiable need whenever operationally possible and shall also be charged against the employee's vacation credits.

<sup>3</sup>Article 35. PRIOR RIGHTS

Nothing in this Agreement shall be construed as abridging, amending or waiving any rights, benefits or perquisites presently covered by statutes, rules or regulations of each jurisdiction that the employees have enjoyed heretofore except as specifically superseded by the terms of this Agreement.

It is agreed, however, that the aforementioned perquisites are subject to modification or termination by the Employer, as conditions warrant, after prior consultation with the Union. When the Employer takes such action and the employee or the Union believes that the reason or reasons for the change is or are unjust he or it shall have the right to process such grievance through the Grievance Procedure set forth in Article 32, herein.

<sup>4</sup>Article 38. NO STRIKE; NO LOCKOUT

The Union agrees that during the life of this Agreement, neither the Union, its agents, nor its members will authorize, aid or assist, instigate, or engage in any work stoppage, slow-down, sick out, picketing, refusal to work or strike against the Employer.



event of violation by either party of the no-strike provision contained therein.

Respondent thus argues that the denial of sick leave and the refusal or failure to process Complainants' grievance were justified by the occurrence of the mass walk-out. Closing Brief at 4.

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(Footnote 4 Continued)

The Union agrees that during the life of the Agreement the Union, its agent and members will not support, aid, or assist any other labor organization, or any of its members acting individually, in a labor dispute by any effort relative to any work stoppage, slow-down, sick out, picketing, refusal to work or strike.

Refusal to cross any picketline in the performance of duty shall be a violation of this Agreement and may be considered a basis for disciplinary action.

Upon any notification confirmed in writing by the Employer to the Union that certain of its members are engaged in an action prohibited by this Article 38, entitled No Strike; No Lockout, the Union shall immediately order, in writing, such members to return to work immediately, provide the Employer with a copy of such an order, and a responsible official of the Union shall publicly order them to return to work. Such orders shall be given immediately by the Union and shall be based on the representations, in writing, of the Employer regarding the aforesaid prohibited activity. In the event that a wildcat strike occurs, the Union agrees to take all reasonable and affirmative action to secure the members' return to work as promptly as possible. Failure of the Union to issue such orders and/or take such action shall be considered in determining whether or not the Union was instrumental, directly or indirectly, in the prohibited activity. After the Union disavows the prohibited activity, if the prohibited activity continues, the Employer may impose penalties or

Viewing the case in light of a straightforward application of applicable rules, procedures and law, the Board is in agreement with Complainants that Officer BURNS was not a participant in the strike and is deserving of sick leave for July 16 and 17, 1979.

BURNS testified in a credible manner to the onset, progress and abatement of his illness. Furthermore, his wife corroborated his testimony as to his illness and further strengthened his position by her testimony regarding her own illness. Further, BURNS gave due notice of his illness in accordance with accepted procedures in his phone contacts with Major DeMello and Lieutenant Trepte. He testified that but for his illness he would have reported to work.

The contradictions Respondent points to as between BURNS' answers to interrogatories as to his activity on July 14, 1979 and his testimony at hearing, appear to be adequately dispelled by BURNS' simple response that, at the time he filled out the interrogatories, he could not recall

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(Footnote 4 Continued)

sanctions against the participants as prescribed by law or departmental regulations.

The Employer agrees that there shall be no lockout during the term of this Agreement.

The parties further agree that neither party shall be bound by the provisions of Article 32 of this Agreement entitled Grievance Procedure in the event of any violation by either party of this Article 38 entitled No Strike; No Lockout. In the event of such violation the aggrieved party may immediately pursue such remedies as are prescribed. [Emphasis added.]



days and dates, and was confused. Such confusion could easily be dispelled by a simple check of a calendar and a more concentrated recall of basic events. The Board finds nothing irregular in the manner in which BURNS' confusion was dispelled before testifying at the hearing such as would detract from his credibility as a witness.

Moreover, BURNS' failure to obtain doctor's verification of his illness detracts little from his stance before the Board. BURNS gave three explanations for this failure: 1) his habitual abstention from medical consultation; 2) his belief that a doctor could not confirm his illness after the fact; and 3) his belief that a doctor's verification was only necessary for illness lasting five days or more. The Board finds his explanations for this failure to be reasonable and valid.

The Board thus concludes by a preponderance of the evidence that BURNS was in fact genuinely ill on July 16 and 17, 1979.<sup>5</sup>

Respondent argues that, by virtue of SHOPO's staging of an illegal strike during the time period in which BURNS claims sickness, the Employer was free to disregard the grievance procedure, pursuant to Article 38's proscription against strikes. Closing Brief at 8-11. This argument

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<sup>5</sup>In concluding that BURNS, in proving himself ill, is deserving of sick leave, the Board of course does not intend to abrogate the no-strike provision of the contract. It merely adopts a rational approach under which it is recognized that physical illnesses occur independent of "political" events. Given the availability of the present procedures to ascertain the legitimacy of claims of illness, no useful or rational purpose would be served by denying compensation for such illness to public employees.



is not to the point. The essential question in the instant controversy is whether Officer BURNS, by virtue of his absence from work, was a participant in the strike, the occurrence of which is not contested. None of the accumulated evidence indicates that BURNS was a participant in the strike. The Board has concluded, by a preponderance of the evidence, that BURNS' absence was due to illness and not strike participation. Thus, the provisions of Article 38 which would have rendered BURNS unable to invoke the grievance procedure had he participated in the strike, are not applicable here. Respondent Employer therefore cannot properly rely upon that contract provision to excuse her refusal to process BURNS' grievance.

The Board has previously recognized that the duty to bargain is an ongoing responsibility of the parties and goes beyond the negotiation and execution of the collective bargaining process. Dennis Yamaguchi, 2 HPERB 656 (1981). The duty to bargain in good faith includes the obligation of the Employer to process grievances in accordance with the contractual procedures. State of Hawaii Organization of Police Officers, 3 HPERB \_\_\_\_ (1982) [Case No. CE-12-68; Decision No. 163]. By refusing to process BURNS' grievance resulting from the denial of sick leave, the Board concludes that Respondent refused to bargain collectively, in violation of Subsection 89-13(a)(5), H.R.S.

Complainants further argue that the Employer's refusal to process the BURNS' grievance constitutes a violation of Article 32 of the contract and therefore, a violation of Subsection 89-13(a)(8), H.R.S. In Decision No. 161, State of Hawaii Organization of Police Officers,

3 HPERB \_\_\_\_ (1982), the Board held that the refusal of the employer to process the grievance of Police Officer Virginia Sanderson violated the broad arbitration provision of Article 32, Grievance Procedure, of the applicable SHOPO contract. The Board notes that the arbitration clause at issue in the foregoing case is identical to the provision before us here. Thus, in a similar way, the Employer's refusal to process the BURNS' grievance constitutes a violation of the contractual obligation to resolve alleged violations of the contract through the grievance mechanism. The Board therefore concludes that Article 32 was violated by Respondent's acts in refusing to process the instant grievance thereby committing prohibited practices in violation of Subsection 89-13(a)(8), H.R.S.

Respondent contends that BURNS is prevented from pursuing his remedy before this Board because the matter should have been pursued before the Civil Service Commission. The Board rejects Respondent's contentions. Subsection 89-13(a)(8), H.R.S., gives the Board jurisdiction over contract violations which may also constitute prohibited practices. Since Article 25, supra, of the contract pertains to leaves of absence with pay, the Board concludes that BURNS may properly pursue his remedy here and the Board has jurisdiction to resolve the instant dispute.

Additionally, Complainants contend that Respondent violated the sick leave provisions of Section 79-8, H.R.S. and Rule 3 of the Rules of the Director of Civil Service (Bd. Ex. 5, items 14 and 15, Exs. 12 and 13), thereby violating Articles 25 and 35 of the contract. Article 25, cited in full, supra, provides in relevant part:

Leaves of absence with pay shall be in accordance with the then existing rules, regulations, and statutes except those supplemented herein.

As the immediately following contractual provisions refer to funeral and personal leaves, the provisions in the statutes and regulations referring to sick leave remain applicable. It is apparent that the only reason that the Employer denied BURNS' sick leave request was because it was assumed that BURNS participated in the illegal strike activity because his sick days coincided with the days of the job action. Nothing in the evidence indicates that the circumstances of BURNS' case was individually considered or verified by the Employer prior to the denial of sick leave. As the Board has factually determined, supra, that Complainant BURNS was genuinely ill in this case, under the provisions of Section 79-8, H.R.S., BURNS was entitled to and should have been granted sick leave.

Thus, the Board holds, in refusing to grant sick leave to BURNS for the period at issue Respondent abrogated the sick leave provisions of Section 79-8, H.R.S. and Rule 3 of the Rules of the Director of Civil Service (Bd. Ex. 5, items 14 and 15; Exs. 12 and 13), and thereby violated Article 25 of the contract and therefore, Subsection 89-13(a)(8), H.R.S. The prior rights clause, Article 35, insures that, as nothing in the contract supercedes the right to such leave benefits, these statutory benefits are fully owing to Complainant BURNS.

The wilful nature of these violations is presumed as the violations occurred as a natural and foreseeable consequence of Respondent's acts or refusals to act. As such, the Board is persuaded that Respondent's actions



constituted violations of Subsections 89-13(a)(5) and (8), H.R.S.

Complainants further allege that violations of Subsections 89-13(a)(5) and (8), H.R.S., warrant a finding of a Subsection 89-13(a)(7), H.R.S., violation. The Board disagrees. Subsection 89-13(a)(7), H.R.S., provides that violations of Chapter 89 constitute prohibited practices. These statutory violations must occur independently of Section 89-13, H.R.S. Any other interpretation would render Subsection 89-13(a)(7), H.R.S., meaningless and redundant. Hence, the Board concludes that Complainants have failed to prove a Subsection 89-13(a)(7), H.R.S., violation. Accordingly, that charge is dismissed.

ORDER

The Board finds that the Employer's refusal to process the BURNS grievance through the applicable contract grievance procedure and the denial of BURNS' sick leave request constitute violations of Subsections 89-13(a)(5) and (8), H.R.S.

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

Affirmatively, the Respondent is directed to forthwith grant Complainant BURNS' request for sick leave for the period of July 16 and 17, 1979, in accordance with the prevailing practices of the HPD and the City and County of Honolulu.

DATED: Honolulu, Hawaii, November 30, 1982.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

  
MACK H. HAMADA, Chairperson

ROBERT BURNS and STATE OF HAWAII ORGANIZATION OF POLICE  
OFFICERS (SHOPO) and EILEEN R. ANDERSON; CASE NO. CE-12-76  
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

  
JAMES K. CLARK, Board Member

  
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