STATE OF HAWAII

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of JERROLD G. BROWN and THOSE SIMILARLY SITUATED, Complainants, and STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO), Respondent.	CASE NO. CU-12-41
In the Matter of BOISSE P. CORREA and THOSE SIMILARLY SITUATED, Complainants, and STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO), Respondent.	CASE NO. CU-12-42 DECISION NO. 170

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 20, 1981, Police Officer JERROLD G. BROWN and those similarly affected [hereinafter referred to as BROWN or Complainant BROWN] and Police Officer BOISSE P. CORREA and those similarly affected [hereinafter referred to as CORREA or Complainant CORREA] filed prohibited practice complaints (Bd. Exs. 1a and 1b, respectively) with the Hawaii Public Employment Relations Board [hereinafter referred to as Board] against the STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS [hereinafter referred to as SHOPO or Respondent]. The Complainants alleged SHOPO officials violated their rights guaranteed by §89-13(b)(1), Hawaii

Revised Statutes [hereinafter referred to as HRS], during the collective bargaining agreement ratification process held between August 10-17, 1981. Both Complainants BROWN and CORREA alleged that their respective rights to vote in private were violated. Additionally, Complainant BROWN alleged that at several times during the balloting, SHOPO officials stated a "No" vote would be a vote for a strike or walkout.

Thereafter, the instant complaints were consolidated with the prohibited practice complaint filed on August 17, 1981 by Joseph N. A. Ryan [hereinafter referred to as Complainant Ryan]. Bd. Ex. 4. Complainant Ryan also charged SHOPO with violations of Chapter 89, HRS, arising out of the ratification procedures. Due to procedural complexities, the instant cases were subsequently severed from the Ryan complaint. Bd. Ex. 16.

Hearings on the instant complaints were scheduled for October 5 and 6, 1981. At the hearing on October 5, 1981, counsel for Complainants BROWN and CORREA indicated that amended prohibited practice complaints would be filed forthwith. Further, at that hearing, Chairperson Mack H. Hamada informed the parties, over the objection of SHOPO's counsel, that he would preside over the remainder of the proceedings as a duly appointed Hearings Officer.

On October 6, 1981, Complainants BROWN and CORREA filed Amended Prohibited Practice Complaints which were substantively identical. In addition to the allegations previously raised, the Amended Prohibited Practice Complaints charged that specified aspects of the entire ratification procedure constituted unfair labor practices by

the union. In response to the Amended Prohibited Practice Complaints, Respondent SHOPO admitted to the allegations contained in subparagraphs two and three of paragraph four of the Amended Prohibited Practice Complaints. Respondent SHOPO further deleted the affirmative defenses contained in its Answer filed on August 31, 1981. Whereupon, Respondent SHOPO agreed not to contest the proceedings, waived a hearing on the allegations, and asked the Board to make, enter and serve upon it an order to cease and desist, pursuant to Administrative Rules §12-42-49(b).

Upon a full review of the record herein, the Board[1] hereby makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Complainant JERROLD G. BROWN is and was, at all times relevant, a public employee as defined in §89-2(7), HRS, and is included in bargaining unit 12 (Police Officers) as defined in §89-6(a)(12), HRS.

Complainant BOISSE P. CORREA is and was, at all times relevant, a public employee as defined in §89-2(7), HRS, and is included in bargaining unit 12 (Police Officers) as defined in §89-6(a)(12), HRS.

Respondent SHOPO is and was, at all times relevant, the certified exclusive bargaining representative of the employees in Unit 12 as defined in §89-6(a)(12), HRS.

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[1]At the time the complaints were filed, the Board was composed of only two members. As Board Member James R. Carras was duly appointed on June 23, 1982, the full Board considered the Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Order and the Exceptions thereto, as required by §91-11, HRS.

Pursuant to Administrative Rules §12-42-8(g)(8)(F), we take judicial notice that on or about August 6, 1981, negotiators for SHOPO, the State of Hawaii, and the various counties within the State of Hawaii tentatively agreed to the terms of a collective bargaining agreement to cover the period July 1, 1981 through and including June 30, 1983.

Additionally, pursuant to Administrative Rules §12-42-8(g)(8)(F), we take judicial notice that between August 10 and August 13, 1981, the tentative collective bargaining agreement was submitted for ratification to bargaining unit members residing in the County of Maui, the County of Hawaii, and the County of Kauai.

Also, pursuant to Administrative Rules §12-42-8(g)(8)(F), we take judicial notice that on August 14 and 15, 1981, the tentative collective bargaining agreement was submitted for ratification to bargaining unit members residing in the City and County of Honolulu. Polling was conducted at Washington Intermediate School, Kaneohe Police Station, Pearl City Police Station, and Wahiawa Police Station.

Further, pursuant to Administrative Rules §12-42-8(g)(8)(F), we take judicial notice that the ratification votes were tabulated and the results were made public on August 17, 1981. The total vote was 715-536 in favor of ratification.

Respondent SHOPO admits it violated Complainants' rights to vote in private by failing to provide voting booths.

Respondent SHOPO admits that during the actual voting process, some of its officials were able to observe Complainants' and other police officers' ballots.

Respondent SHOPO admits that its officials rendered material misinformation regarding the terms of the proposed contract and the effect of the ratification vote.

Respondent SHOPO admits that its failure to notify service fee members of their right to vote interfered with the rights of those employees.

Respondent SHOPO admits that it provided a hopelessly inadequate absentee ballot system which interfered with the rights of those employees who were not able to vote at the polling stations.

Respondent SHOPO admits that the lack of a secret ballot and the conduct of those representatives of the union administering the election coerced employees, interfered with, and restrained them in the exercise of their rights.

Respondent SHOPO admits that "informational meetings" at the polling places misinformed employees, coerced them, and restrained them in the exercise of their rights.

Respondent SHOPO admits that all of the foregoing rendered the "election" a farce and a sham which was not a valid ratification proceeding under §89-10, HRS.

Thirty police officers from the City and County of Honolulu submitted statements and/or affidavits which were received into evidence.

Officer Gary Miyakawa stated that a booth was not provided to mark the ballot in private. This statement was corroborated by Officers Bruce Weissich, Michael Foley, Andrew Speese, David Wadahara, Jeffrey Owens, Patti Row,

Mervin Asamura, T. Chun, and Michael Lafferty. Additionally, there was a SHOPO representative situated in a manner which permitted him to watch how Miyakawa voted. Finally, Officer Miyakawa stated no identification was required to obtain a ballot. This statement was corroborated by Officers Weissich, Foley, Speese, Owens, Row, Asamura, Harold Sumida, and Lafferty.

Officer Patricia Molitor stated she was on a mainland vacation for one month prior to and during the ratification vote, and was not given an opportunity to cast an absentee ballot during or after the ratification vote. Officer J. Silva also had a similar complaint.

Officer Weissich also affirmed that he was told a "No" vote was the same as a "Strike" vote. This misstatement was also mentioned in statements given by Officers John Shaw, Owens, Robert Naylor, Haig Kalauokalani, Chun, and Shad Kane. Similarly, some of these officers added that SHOPO officials made statements to the effect that if you voted "No," then sign your name on the ballot or be ready to walk the picket line.

Many officers indicated they heard comments by SHOPO officials which were intimidating and/or threatening. Officer Craig Waters stated he voted at Washington Intermediate School where he was told, "'Yes' votes in the ballot box and 'no' votes in the trash can." Similarly, Officer Owens stated there were two ballot boxes provided and he was told the ballot box on the right was for "Yes" votes and the ballot box on the left was for "No" votes. A SHOPO official then told him, "Make sure it's [the ballot] marked for the box on the right."

Sgt. Kalauokalani, who voted at Pearl City Police Station, stated he heard comments to the effect, "'Yes' votes only or there's gonna be a scrap in the parking lot."

Officer Earl White stated he got the impression from union officials that if he voted against them, he would be on his own when he needed union protection.

Officer Stewart Chun stated he voted "Yes" because he wanted to avoid an unpleasant situation and because he had spent too much time at the voting site.

In an affidavit, Officer John Hall said that a SHOPO official told the officers present at Kaneohe Police Station that, "it should not be a closed ballot, because that way the union will know who voted no, so that we can make sure they come out on the picket line."

Several officers also stated they did not vote. Officer Hall affirmed that after observing the voting process, he felt intimidated and left the meeting without voting so as not to risk a confrontation with union officials present at the scene. Similarly, Officer Leroy Chang stated he did not vote because he didn't want to be confronted by union personnel at the polls. Officer Kalauokalani stated he signed for a ballot but did not vote because he was not about to permit the union official to observe his vote.

Other officers stated they did not vote because they were not notified. These included Officers C. Forney, Silva, Marietta Pili, and Walter Ragsdale. Officer Pili also stated she still wants to cast her ballot, and Officer Ragsdale stated he is a service fee member. Officer John Pinero stated he was not given the opportunity to vote as

he was on sick leave the day of voting. However, he also stated he was informed about the voting on the previous day. Finally, Officer James Roach stated he did not vote because of inadequate notice.

With respect to notice, Officer Foley stated he did not receive notice from SHOPO. Instead, he found out about the voting through a chance conversation with a detective. Officer Michael Rehfeldt stated he was informed of the ratification when he reported to work on August 15, 1981.

Officer Bernadine Campbell stated she received notice on August 13, 1981, one day prior to the voting. However, she had plans to fly to a neighbor island on August 14, 1981 and could not change her plans without incurring additional cost. She also stated she would have changed her plans had she received notice more than one day prior to the voting.

Officer Lafferty stated he received notice from SHOPO regarding the ratification less than 48 hours before the voting.

CONCLUSIONS OF LAW

Quorum

Respondent SHOPO contends the Board lacked jurisdiction over the subject complaints because it lacked a quorum of three members as specifically required by §89-5, HRS. In support of its position, Respondent SHOPO argues 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, SHOPO insists that the Board is powerless to act and any actions taken by the Board are deemed to be illegal. We disagree.

Pertinent provisions of §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 constitute a quorum, the latter portion of the statute unambiguously provides that a vacancy in the Board shall not impair the authority of the remaining members to exercise all the powers of the Board. So, in this case, we interpret the statute to mean that the vacancy caused by Member Milligan's retirement did not foreclose the Board's operation nor did it impair the authority of the remaining board members to act on its behalf.

The quorum requirement of §89-5, HRS, is at best, ambiguous in light of the fact that the Board is composed of only three members. 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 SHOPO by its apparent recognition of the statutory ambiguity, the provisions relating to the composition of the Board 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 representatives of management, (2) two members shall be representatives of labor, and (3) a fifth member, the chairman, shall be representative of the public. [Act 171, 1970 Session Laws of Hawaii.]

Thus, the Board as originally envisioned consisted of five members with three of the members--at least one representative of management and one representative of labor--constituting a quorum. This is consistent with §92-15, HRS, which refers generally to the quorum of boards and commissions and provides that a majority of the members to which a board is entitled constitutes a quorum.

Subsequently, the law was amended in 1971 to read as it presently does, i.e., to provide for a three-member board. However, the Legislature failed to change the quorum requirement of three when it reduced the membership of the Board. 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 delete the confusing "at least" language of the statute as the Board was now only constituted of three members, 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, we hold that the Board was properly constituted at the time of the filing of the petitions and the hearings in this case and as such, had jurisdiction over these prohibited practice complaints. With the due appointment of Member Carras to the Board at this writing, the quorum issue is moot.

The Complaint

Complainants have alleged that the conduct of union officials at the polling sites during the ratification process constituted a prohibited practice under §89-13, HRS. More specifically, Complainants allege violations of §§89-13(b)(1) and (4), HRS.[2]

The first question to be addressed is whether ratification is a right guaranteed under this chapter. Rights of employees are enumerated in §89-3, HRS:

> Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of

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[2]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, . . .

> wages, hours, and other terms and conditions of employment, and to engage in lawful, concerned activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. . . . [Emphasis added.]

Section 89-10(a), HRS, specifies, in relevant part:

> 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. . . .

By reading these two sections in conjunction with each other, it is clear that ratification is a right guaranteed by statute. It is a "concerted activity for the purpose of collective bargaining or other mutual aid." See, §89-3, HRS. However, the statute itself and the legislative history is devoid of any procedures or standards applicable to ratification proceedings. Although the Legislature has specified the manner in which representation elections are to be conducted in §89-7, HRS, but has not done the same for ratification proceedings, we do not view this silence to infer that the Legislature intended ratification proceedings to be conducted in a flagrant or rank manner. Regardless of whether the matter is strictly an internal union function, the fact that ratification is an established statutory right as it was included in §89-10, HRS, is sufficient basis to believe the Legislature intended, at the very least, that ratification proceedings be conducted in a fair and reasonable manner. Any other interpretation would equate the statutory right to a meaningless exercise. We conclude ratification of the contract is a critical step in the

ongoing collective bargaining process which requires that the desires of bargaining unit members are accurately reflected.

While Complainants cite to a number of cases which seemingly impose an absolute standard for the conduct of elections, we do not find them controlling here. None of the cases relied upon by Complainants involve the ratification of a collective bargaining agreement. The elections which Complainants' cases refer to are either internal union elections governed by specific provisions of the Labor-Management Reporting and Disclosure Act (LMRDA), or representation elections governed by the National Labor Relations Act. The respective laws specifically provide procedures for the conduct of those elections, deviation from which results in violations of those laws. Since the law here is silent as to specific procedures which must be followed, we believe Respondent's conduct should be examined against a more flexible standard--i.e., whether the contract ratification proceedings were conducted in a manner so as to deprive Complainants of their rights guaranteed under Chapter 89.

Having concluded that employees are entitled to ratify the contract in a fair manner, we turn to the question of whether or not the conduct of the union officials at the polling sites served to "interfere, restrain or coerce" any employee in the exercise of this right guaranteed under Chapter 89, in contravention of §§89-13(b)(1) and (4), HRS.

In its amended answer to the amended prohibited practice complaint, SHOPO admits to various allegations, inter alia:

> [m]aterial misinformations regarding the terms of the proposed contract and the effect of the ratification vote interfered with the rights of employees; failure to notify service fee members of their right to vote and of the procedures to vote interfered with the rights of employees; provision of a hopelessly inadequate absentee ballot system interfered with the rights of employees; lack of a secret ballot and the conduct of those representatives of the union administering the election coerced employees, interfered with and restrained the exercise of their rights; and "informational meetings" at the polling places misinformed employees, coerced them and restrained the exercise of their rights; and all of the foregoing rendered the "election" a farce and a sham which was not a valid ratification proceeding under H.R.S. §89-10.

Pursuant to §89-8(a), HRS, the union, as exclusive representative of the bargaining unit, has the:

> [r]ight to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.

As such, the union owes a duty of fair representation to <u>each</u> <u>member</u> of the bargaining unit.

This case poses a particularly disturbing problem as the record is meager, at best. However, Respondent has admitted to not providing notice of the upcoming ratification process to service fee members. This fact appears to be confirmed by the statement of a service fee member who indicated that he did not receive notice of the ratification. We do not condone Respondent's failure in this regard.

It is generally accepted that service fee members are entitled to vote to ratify the tentative contract and

Respondent does not dispute this. Reasonable notice from the union, then, is an inherent right attendant to the statutory right of ratification. We find that Respondent's failure to provide notice to the service fee members constitutes interference in the exercise of their right to participate in the ratification. Additionally, as Respondent's failure to provide notice appears targeted at the service fee members, we also find that Respondent breached its duty of fair representation as to them. As stated above, the union has a duty to represent bargaining unit members fairly without regard to union membership. By failing to notify the service fee members, Respondent disparately treated that class of bargaining unit members where they, like the union members, were clearly entitled to reasonable notice and the opportunity to vote. As such, we conclude that Respondent also violated §89-3, HRS, by its failure to properly notify its service fee members.

Further, since each bargaining unit member has the right to cast a vote in the ratification process, those who cannot be present at the polling sites during the voting period are nevertheless entitled to an opportunity to cast a vote. By whatever method the union chooses to implement, the bargaining unit members should reasonably be made aware of such opportunity and be able to avail themselves of such. Under different circumstances and depending upon time constraints involved, the Board may find otherwise. However, in this case, where an absentee ballot system was admittedly provided but the members were not aware of it or of the procedures to cast an absentee ballot, the system was meaningless. And, as SHOPO admitted that their system was

"hopelessly inadequate," we can only find that this interfered with and restrained the employees in the exercise of their rights.

While a secret ballot is the ideal method of voting, the fact that voting booths were not provided does not interfere with, restrain or coerce employees in the exercise of their rights per se. However, the bargaining unit members can be afforded an opportunity to cast their votes in private and be free from union officials observing how the individuals mark their ballots and any attendant implicit intimidation by those officials.

While participation in the ratification process is voluntary on the part of each bargaining unit member, the employee has the right to make an informed choice of whether or not to ratify the contract. It is, therefore, necessary that the terms of the proposed contract and the effect of the ratification vote be presented in a clear and accurate manner. When the union presents material misinformation to the bargaining unit, the voters cannot make an informed choice. Here again, Respondent admits that material misinformation was presented to the membership. This is verified by the statements of various police officers present at the polling sites. Therefore, we find that the union's presentation of material misinformation regarding the terms of the proposed contract and the effect of the ratification vote constitutes interference with the rights of the employees.

Lastly, we recognize the need for the Union to hold meetings and present information to the bargaining unit members to explain the terms of the tentative collective bargaining agreement. Conducting such "informational

meetings" at the polling sites is not, therefore, coercive in itself. However, the bargaining unit members should not be subjected to the coercive and intimidating behavior exhibited by union officials in this instance. The behavior at issue, by Respondent's admissions and as exemplified by the statements of the police officers, clearly created a hostile atmosphere which was coercive and restrained and interfered with their right to vote. Such behavior by union officials has no place in the ratification process as it results in the suppression of free choice which the voting is supposed to ascertain.

It has been the Board's position that in order to find a prohibited practice under §89-13(b), HRS, a conscious, knowing, and deliberate intent to violate the provisions of Chapter 89, HRS, must be proven. Aio, 2 HPERB 458 (1980). In recent decisions, the Board has found the requisite wilfulness where a violation of the act was a natural consequence of Respondent's actions. See, Yamaguchi, 2 HPERB 656 (1981). Thus, when Respondents admit to the allegations, as in this case, and where the natural consequence of the union's conduct was the deprivation of rights guaranteed by Chapter 89, HRS, we conclude that the conduct of the union officials constituted a wilful violation of provisions of Chapter 89, HRS, and therefore, prohibited practices in violation of §§89-13(b)(1) and (4), HRS.

The Remedy

As a remedy for the prohibited practices committed against them, Complainants have requested (1) that the election be declared invalid as a ratification procedure nunc

pro tunc, (2) that a new election be ordered, and (3) that Complainant(s) be awarded costs and attorneys' fees.

The Board's remedial authority is grounded in §377-9(d), HRS, and Administrative Rules §12-42-50. While the Board has broad discretion in fashioning remedies, it must be restricted to undoing the effects of the prohibited practice committed.

As this is a case of first impression, the remedy must be fashioned in a manner which reflects the Board's responsibility of protecting the public's interest in maintaining stability of labor relations in public employment. Given the egregious circumstances, we cannot sustain a ratification vote which does not accurately reflect the views of the entire bargaining unit. And, after digesting the admissions which SHOPO made, we do not agree with the union that a cease and desist order from conducting similar actions in the future would be an adequate remedy. Therefore, the Board hereby orders a new ratification vote in this case.

As the public's interest in stable labor relations militates against a Board determination that the collective bargaining agreement presently in existence between the State, Counties, and SHOPO is invalid or unenforceable nunc pro tunc, the validity of the existing collective bargaining agreement will be determined as of the date of the new ratification vote. Should the collective bargaining agreement be ratified by the members of the bargaining unit, then such ratification will relate back to the date on which the existing collective bargaining agreement became effective so that contractual relations between the public

employer and the employee organization may continue uninterrupted.

In formulating this remedy, we have also considered the fact that ratification procedures are not specifically detailed in the statutes or in the SHOPO contract. However, as it appears the union is not able to conduct a ratification proceeding in an organized fashion, the Board orders Respondent to establish guidelines for the new ratification vote.

Complainants have also asked that they be awarded costs and attorneys' fees. We deny the request.

We are cognizant of the fact that the instant complaint and that of a prior case, Ryan, 3 HPERB _____ (1982), arose from the same ratification procedure. As the complaints in both cases were filed within days of each other, the Board consolidated the cases. However, Complainant Ryan subsequently amended his complaint to include different parties and different issues. As the allegations were then significantly different, the Board, upon motion, severed the cases. The Ryan case proceeded to a full hearing, and after considering all argument and the entire record, the Board granted the various motions to dismiss, thereby disposing of the case.

Although we are aware of the principle that administrative agency decisions should be made with consistency, we are also mindful that decisions must be based on the record of each case. Where, as here, two separate cases stem from the same situation but proceed on different theories and evidence, it can be expected the record of each case could be significantly different, and therefore not be resolved in the same manner.

Moreover, it is a general principle of law that an administrative agency may refuse to follow its prior ruling when such action is not oppressive or the agency does not act arbitrarily, unreasonably, or capriciously. University of Kansas Faculty v. Public Employment Relations Board, 2 Kan.App.2d 416, 581 P.2d 817 (1978); Warburton v. Warkentin, 185 Kan. 468, 345 P.2d 992 (1959). Given the significantly different record in this case, we do not believe that our action is unwarranted or oppressive. Based on the foregoing, we therefore are not bound by the doctrine of stare decisis to render the same decision in this instance as that in Ryan, supra.

We have also considered the arguments raised in Employers' amicus curiae brief and do not find them persuasive in the instant case.

ORDER

To implement the general policies of Chapter 89, HRS, the STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO) shall:

(1) Cease and desist from excluding bargaining unit members who are not union members from procedures to ratify collective bargaining agreements;

(2) Cease and desist from interfering with, restraining, or coercing bargaining unit members in any like or related manner, in the exercise of rights guaranteed to them under Chapter 89, HRS;

(3) Take the following affirmative action:

(a) Submit to the Board within 10 days written procedures detailing the manner in which the new ratification is to be

conducted which shall be subject to approval and/or modification by the Board;

(b) Conduct a ratification vote forthwith in a manner not inconsistent with this decision and subject to the Board's supervision; and

(c) Immediately post copies of this decision on every bulletin board or designated space provided by the Employer for union material and leave said decision posted for a period of sixty consecutive days.

DATED: Honolulu, Hawaii, March 4, 1983.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

MACK H. HAMADA, Chairperson

JAMES R. CARRAS, Board Member

Dissenting Opinion

I dissent from the majority opinion because there are pertinent factors of the case which I believe have not been accorded the proper weight and consideration. The following factors, if properly weighed, militate against the findings of prohibited practice violations by SHOPO and the imposition of a penalty as harsh as a new ratification vote.

Statutory Requirements

In Hawaii's collective bargaining law for public employees (Chapter 89, HRS), contract ratification is mentioned only once as provided in §89-10(a), HRS. That subsection states that any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned. Unlike representation elections which have statutory requirements of secret ballots and procedures which govern the conduct of such elections, §89-10(a), HRS, is silent in providing procedural guidance for ratifications. This conspicuous absence of procedures relative to ratification in the statutory framework is intentional in my view because the ratification process is traditionally (and totally) an internal union matter. Thus, the Legislature deliberately declined to set forth procedures because ratification is a matter between the exclusive bargaining agent and the employees it represents.

The only consideration before this Board then is whether the union committed prohibited practices in violation of §89-13(b)(1), HRS, by interfering, restraining or coercing any employee in the exercise of any right guaranteed under Chapter 89.

SHOPO, for whatever reason, admits to all charges brought against it by Officers BROWN and CORREA notwithstanding its successful defense in the Ryan case. The Board must however fashion a remedy commensurate with true and properly weighed evidence. I submit that this was not done.

Inconsistencies with the Ryan Case

Although the complaints in the Ryan case and this case were filed at approximately the same time, the Ryan complaint was later amended to include charges against the Public Employers. The Board first joined and upon motions, then separated these cases and afforded each a separate hearing. The Ryan case, however, is important to this case because all charges made by Complainants BROWN and CORREA were also included in the Ryan case. The major difference between the two cases was that SHOPO elected to contest the Ryan case. In addition, some witnesses who submitted affidavits in this case also testified in the Ryan case and under cross-examination, could not sufficiently justify their allegations. It is very interesting to note that this same Board which ruled against Ryan is now coming around full circle and ruling against SHOPO based on the same evidence only because SHOPO admitted to all allegations whether they were bona fide or not.

Should not this Board exhaust all avenues in reaching the truth? Certainly, no weight should be given to statements made by individuals who should not have been allowed to submit them in a prohibited practice case in the first instance. An example is the testimony by Officer Patricia Molitor in the Ryan case. She stated she did not receive an absentee ballot and was not able to vote by absentee ballot. Under cross-examination, she testified that at no time had she left a mainland forwarding address while on vacation nor had she informed SHOPO of her scheduled vacation. However, in this case SHOPO admitted that it provided a "hopelessly inadequate" absentee ballot system which interfered with the right of those employees who were

not able to vote at the designated polling stations. NOTE: Of the two employees (one of them Molitor) who testified as to this specific charge, both admitted that they did not contact SHOPO to request absentee ballots nor did they leave forwarding addresses where they could be reached.

An apparently more serious allegation is that SHOPO failed to notify service fee members of their right to vote in the ratification of the new contract. While the majority finds otherwise in this case, based on testimony taken in the Ryan case, the Board there found that SHOPO did indeed send out ratification notices to all Unit 12 members. Further, the notices were sent by first class mail to their last known addresses. I cannot resolve this clear inconsistency.

More importantly, however, there is no statutory requirement which requires the exclusive bargaining representative to specifically inform service fee members of their right to participate in the ratification process. Hawaii's collective bargaining law was passed in 1970. I am of the strong opinion that employees who opt to be service fee members and pay an agency shop fee are very sensitive to how these dues are spent. Since the dues must be directly related to collective bargaining activities, service fee members should know that they, like union members, have to live within the meaning of such contract and thus are entitled to ratify or reject such an agreement. The evidence submitted also shows that of the eight persons testifying as to this specific complaint, three did indeed vote.

The Lack of Secret Ballots

Another charge brought against SHOPO in both the Ryan case and this case was the lack of secret ballots. More specifically, the absence of voting booths. I am of the strong opinion that the lack of voting booths is not a violation of Chapter 89 and certainly not a prohibited practice. While it is conceivable that persons could possibly view how another voted there was no evidence that those suspected of viewing were indeed SHOPO officials. The Ryan case showed that all eligibles who requested a ballot were visually identified and given a ballot. This was done following a full explanation of the tentative agreement. Employees were then allowed to vote anywhere within the meeting area. Thus, I conclude that the bargaining unit members are not entitled to secret ballots under Chapter 89, HRS, and SHOPO's actions do not constitute restraint of any right or prohibited practices.

Informational Meetings

Another charge made in this case was that informational meetings were held before the actual voting and that spokesmen misinformed voters, thereby coercing them and restraining them in the exercise of their rights.

In the Ryan case, the spokesman's remarks, "a no vote is a strike vote," "we won't go back to the table," or words to this effect, in my view, are true assessments of the bargaining situation at the time. In effect, Mr. Chun, who was a member of the negotiating team, made this statement after being interrupted while explaining the contract. I interpret his remarks to mean that in his opinion, further negotiations to improve the contract would be futile. "Not

going back to the table," in union terminology means basically that they, the Union, would be in an impasse situation where either a strike or arbitration route would be taken. I treat these comments, then, as we did in the Ryan case, as an accurate description of the bargaining situation which does not constitute a prohibited practice.

Standard to be Applied

While proper adherence to the Ryan case would lead one to conclude that no prohibited practices occurred during the ratification, I maintain that the wrong standard is being used in fashioning a remedy here. I would properly consider whether any alleged improprieties stopped or prevented a person from voting. Did anyone come forth and state that he did not vote the way he wanted to? Is the impact of the statements during the actual voting strong enough to warrant the invalidation of an entire ratification? The record says "no" especially if the Ryan case is given correct weight. The Ryan case preceded this case and the results are public. How then can it be completely ignored notwithstanding SHOPO's decision not to contest and admit to all charges? In my view, SHOPO's decision to admit to all of the allegations and to not contest this case does not mean they are amenable to a new ratification vote on a statewide level.

As ratification meetings are internal union affairs, anything can be said by the exclusive bargaining agent if he deems it necessary and in the best interests of his membership. The question here is whether eligibles were actually prevented from voting and whether what was said

really and truly interfered with their right to vote. No one has proven this to my satisfaction.

Summary and Conclusion

In summary, I am convinced that the most important factor present in the ratification process, besides the actual vote, is the opportunity for the designated speaker to thoroughly and accurately outline for his members what was tentatively agreed upon by employer representatives and union officials. It now must be understood that the prime interest here is to sell this agreement to the membership. How they do it is their own business.

Among the "harsh" violations SHOPO has admitted to are the following: "The lack of a secret ballot and the conduct of those representatives of the union administering the election coerced the employees, interfered with, and restrained them in the exercise of their rights." The record does not show this especially when twenty of the thirty statements used to justify the re-ratification decision were mere written statements and not in affidavit form. While it is true that no voting booths were provided, there is absolutely no statutory language or rule that requires them. As for restraining a person from voting, the evidence received in the Ryan case shows that the union correctly refused the issuance of ballots before a full briefing of the negotiated contract was completed.

The material misinformation allegation refers directly to statements made by one of the spokesmen at a ratification meeting -- a no vote is a strike vote and that we won't go back to the table and negotiate. Could not this

statement have been a true assessment of the negotiations scene? In my opinion it could have been.

The hearings officer in this case allowed thirty written statements by police officers to be placed in evidence to support Complainants' case. Of the thirty witnesses who filed statements, none of them showed that they were actually refused ballots and none gave any indication that they did not vote in the way they intended to vote. Of the thirty, only ten were notarized. I conclude that undue evidentiary weight was given to the remaining twenty statements. They should be treated as hearsay evidence, and not admitted. Without actually seeing a person on the witness stand and under cross-examination, it is my strong belief that the recommendation of the hearings officer and the subsequent majority decision of the Board must be questioned, especially when substantially the same witnesses and statements were so unsuccessfully used in the Ryan case. When correctly evaluated in conjunction with the Ryan case, the weight given to the twenty hearsay statements made by witnesses and the actual impact they had on this case, I can only conclude that the remedy handed down by the majority Board members is faulty.

In conclusion, permit me to say, there is absolutely no justification for the ordering of a new statewide ratification. In the counties of Hawaii, Maui and Kauai there were no alleged violations or complaints. It is my feeling that the complaints found and made in this case, if given proper credence, should first of all relate directly to the named Complainants. At best, the remedy should be

restricted to the City & County of Honolulu where the alleged violations occurred.

DATED: Honolulu, Hawaii, March 4, 1983.

James K. Clark

JAMES K. CLARK, Board Member

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