

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NOS.: CU-12-53
)	CE-12-104
DANNY L. CREAMER,)	
)	DECISION NO. 238
Complainant,)	
)	FINDINGS OF FACT, CONCLU-
and)	SIONS OF LAW AND ORDER
)	
STATE OF HAWAII ORGANIZATION)	
OF POLICE OFFICERS, and TONY)	
T. KUNIMURA, Mayor of the)	
County of Kauai,)	
)	
Respondents.)	
_____)	

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

On December 9, 1985, Complainant DANNY L. CREAMER [hereinafter referred to as Complainant] filed a prohibited practice complaint with the Hawaii Labor Relations Board [hereinafter referred to as HLRB or Board]. In his complaint, Complainant alleged that the County of Kauai violated Section 89-13(a)(8), Hawaii Revised Statutes [hereinafter referred to as HRS], when it terminated his employment with the Kauai Police Department on the alleged bases of discrimination and degradation and in bad faith.

Complainant also alleges that the STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS [hereinafter referred to as SHOPO or Union], the exclusive representative for Unit 12, violated Sections 89-13(b)(1), (2), (3), (4) and (5), HRS, when it refused to take Complainant's grievance contesting his termination to

arbitration pursuant to Article 21 of the Unit 12 Collective Bargaining Agreement.

A hearing was held on August 5, 1986, at which time Complainant's charges against SHOPO were heard. Case No. CE-12-104, Complainant's case against the County of Kauai, was held in abeyance pending resolution of the claims against SHOPO.

FINDINGS OF FACT

Complainant was a member of bargaining unit 12 as defined in Section 89-6(a), HRS, at all times relevant herein.

SHOPO is, and was, at all times relevant herein, the exclusive representative as defined in Section 89-2(10), HRS, of bargaining unit 12.

Mayor TONY T. KUNIMURA, Mayor of the County of Kauai, is, and was, at all times relevant herein, the employer as defined in Section 89-2(9), HRS, of Complainant.

Apparently by letter from Kauai Chief of Police Calvin C. Fujita, dated June 14, 1985, Complainant's probationary appointment was terminated effective June 17, 1985. No reasons were given for the termination. Complainant, a black recruit, became the first probationary employee ever to be terminated by the Kauai Police Department [hereinafter referred to as KPD]. Complainant's [hereinafter referred to as Comp.] Brief, p. 6.

At the hearing, counsel for SHOPO and Complainant stipulated to the following facts:

Complainant filed a grievance against the KPD appealing his termination. Complainant, in his grievance, alleged that his

termination was "unfair, unjust and in violation of the SHOPO contract," Articles 13 and 21. Comp. Exhibit [hereinafter referred to as Ex.] 1.

By letter dated August 5, 1985, Wilhelm S. Cordes, SHOPO Business Manager, amended the grievance statement to allege an additional violation of Article 4, Discrimination. Comp. Ex. 4.

Following the filing of the grievance, Nelson K. Moku, Jr., then SHOPO's Business Manager, requested relevant information concerning Complainant's case from Fujita. Comp. Ex. 2.

Two days later, on July 3, 1985, Moku asked that the grievance be held in abeyance "until we are able to further clarify the intent of Article 21 of the Agreement." Comp. Ex. 3.

SHOPO was apparently aware of the disputed interpretation given Article 21, Probationary Period, at a very early date as evidenced by Moku's letter and testimony of Gordon Chun, then President of SHOPO, but it chose to represent Complainant in his appeal to Step III of the grievance procedure. Transcript [hereinafter referred to as Tr.], pp. 29-32.

Subsequent to the Step II hearing on August 8, 1985, Hearings Officer Deputy Chief Fritz Klattenhoff issued a decision summarizing SHOPO's contentions:

Article 21, "Probationary Period."

Grievant and union contend that the Article was violated because the grievant was terminated without cause and prejudice was a controlling factor in the termination. They claim that the grievant was a "cultural

victim" and that his termination was based on his racial background and his sex.

Article 13, "Discipline and Dismissal."

Grievant and union contend that this Article was violated because the letter of termination is not specific as to the cause for which the dismissal was based upon.

Article 4, "Discrimination."

Both the grievant and union contend that this Article was violated in that the employee was terminated because of his race, color and sex.

The employer concluded that "at no time was prejudice involved in the termination process" and upheld the dismissal of Complainant. Comp. Ex. 7.

SHOPO's representative subsequently requested additional information on behalf of Complainant "pursuant to Article 32.G" and asked that a Step III hearing be set. Comp. Exs. 6 and 8.

The Step III hearing was held on September 27, 1985. Mayor TONY T. KUNIMURA's decision to sustain the termination was not issued until November 1985. Comp. Ex. 9. The decision confirms that the Union relied on Article 21 as the basis for grieving the termination.

Shortly after the Step III decision was issued, SHOPO reversed its position for the first time and refused to take the case to arbitration. The Union took the position that Article 21 now prohibited SHOPO from representing Complainant further. Comp. Ex. 10.

On November 8, 1985, SHOPO held its monthly State Board of Directors meeting, at which time Complainant's grievance was

discussed. The Board of Directors unanimously decided that the grievance process was not available to Complainant because of his probationary status. Tr. at p. 35.

Chun indicated in his testimony that SHOPO has a basic unwritten policy that initial probationary employees are not covered by the grievance procedure. Tr. at p. 40.

Article 21 of the Unit 12 contract, at all times relevant herein, provided:

Article 21. PROBATIONARY PERIOD

All new employees shall serve an initial probationary period of one (1) year, during which time they shall not be entitled to any seniority or tenure rights; but during this period, they shall be subject to the terms and conditions of this Agreement. If an initial probationary employee takes an approved leave of absence he may, upon recommendation of the appointing authority, be granted credit for the period of leave towards the probationary period, otherwise, he shall be required to serve an additional number of days equivalent to the period of leave to complete his initial probationary period. Upon satisfactory completion of the initial probationary period such employees shall be known as regular employees and shall be credited with seniority and tenure from the date of hire which shall be considered a part of employee's seniority rights as set forth in Article 23.

New probationary periods shall be for six (6) months and may be extended for an additional period not to exceed six (6) months. An employee whose promotion is terminated or whose new probationary period is extended during his probationary period shall be informed in writing of the specific reasons therefor prior to or upon the effective date of said action.

An employee whose appointment is terminated shall not be entitled to use the grievance or appeal procedure, but he shall be

entitled to appeal through the grievance procedure, if prejudice was a controlling factor in the termination of his promotion.

The Employer and the Union agree that the new promotional probationary period is an extension of the examination process and will be used to evaluate the employee's overall job performance in the new position. [Emphasis added.] Comp. Ex. 12.

Chun indicated that SHOPO had mistakenly interpreted this language to allow an initial probationary employee to grieve a termination where prejudice was a controlling factor in the termination. Apparently, on this basis, the Union had decided to proceed with the subject grievance. Tr. at p. 25. Although he was aware that Union employees were filing grievances on behalf of terminated initial probationary employees and was aware that SHOPO had represented Complainant in the subject grievance, he stated that Article 21 had been interpreted in 1983 to prohibit "handling initial probations" and that this "was always [his] contention." Tr. at pp. 25, 28-30.

When Chun was notified of SHOPO's position in Complainant's case, he did nothing to withdraw Union support for Complainant's grievance. He let the grievance run on the basis that Complainant "still had a chance." Tr. at p. 32.

Chun testified that to his knowledge no formal change of policy ever occurred and no amendment of Article 21 was made denying representation to initial probationary employees. Tr. at pp. 25, 40.

Chun indicated that he, besides being president of SHOPO, was the chief negotiator of the contract. He testified that in 1983 a proposal from the employer attempted major changes

in Article 21 limiting the appeal rights of initial probationary employees. He testified that the employer contended that the Article was never meant to give probationary employees the right to grieve the termination of their probationary period. Chun testified that he, too, believed such a policy to be correct. Hence, instead of rewording Article 21, the parties "reaffirmed" that initial probationary employees have no rights through the grievance process. Tr. at pp. 27-28.

In its posthearing brief, SHOPO alleges that four grievances were filed just prior to the 1983 negotiations on behalf of initial probationary employees and won in 1986 for a regular tenured employee. SHOPO states that in three of the four grievances, one employee was incorrectly listed in SHOPO files as an initial probationer, another withdrew his grievance and proceeded to the Civil Service Commission, and the third had his grievance withdrawn when he refused to cooperate with SHOPO's request for information and returned to the Mainland. The fourth case, SHOPO relates, was filed by SHOPO in October of 1981 on behalf of Milton Yukitomo on facts similar to the case at hand. The arbitrability of the grievance was challenged by employer on the grounds that the employee was an initial probationer and the issue was submitted to arbitration. The arbitrator discussed Article 21 and concluded that, two types of employees were covered by the Article, i.e., new employees who never worked for the employer before, initial employees, and current employees who were promoted, promoted employees. The arbitrator, according to SHOPO in its brief, cited Article 21 which provided:

"An employee whose probationary appointment is terminated shall not be entitled to use the grievance or appeal procedure, but he shall be entitled to appeal through the grievance procedure, if prejudice was a controlling factor in the termination of his promotion "

The crucial question, the arbitrator stated, was whether this provision applied to both initial and promoted employees or only to promoted employees. The arbitrator tentatively concluded that the paragraph was applicable to both categories of employees since there were no limit in terms to define employee. However, the arbitrator noted the exception stated in that provision and concluded that:

The more logical interpretation is that initial employees could not grieve their termination during their probationary period and promoted employees could grieve only if they could show prejudice was the controlling factor in the termination of his promotion. In the Matter of SHOPO, on behalf of Milton Yukitomo vs. HPD and City and County of Honolulu, at 6 (1983) (Minami, Arbitrator).

SHOPO's Posthearing Brief, pp. 5-6.

This conclusion is also supported by the arbitration decision in In the Matter of Arbitration Between SHOPO and HPD, Department of Civil Service, City and County of Honolulu, on behalf of Peter Toro, at 14 (1983) (Kenny, Arbitrator), where it is stated, "The Agreement does not provide an appeal process for initial employment probationary workers."

Complainant notes, however, that SHOPO in the past has represented other initial probationary employees. Chun stated that although he felt such action was mistaken, SHOPO had represented such initial probationary employees under the authority of

Article 21. Tr. at pp. 20, 24-25. In both SHOPO and Sanderson vs. Fasi, 3 HPERB 25 (1982), and SHOPO and Toro vs. Fasi, 3 HPERB 71 (1982), SHOPO took the position that a probationary employee may appeal a dismissal through the grievance procedure if prejudice was a controlling factor therein and that the employer violated the collective bargaining agreement by refusing to arbitrate complainant's grievance over the dismissal.

As to the question of interpretation of Article 21, Chun testified that he, as chief negotiator, is in a position to interpret the correct meaning of the provision or to speak for SHOPO on the matter so that the unwritten policy of nongrievability where an initial probationary employee is terminated is valid policy. Tr. at pp. 34-35, 40. The two decisions cited above, SHOPO argues in its Brief, reflect SHOPO's prior mistaken belief that initial probationers were covered by the grievance process. SHOPO argues that in 1983, negotiators for the employer and SHOPO reaffirmed the position that Article 21 provides that initial probationary employees are without appeal rights through the grievance procedure on questions of termination. Tr. at pp. 27-28. With this reaffirmation, SHOPO argues, the negotiators did not feel it was necessary to change or rewrite Article 21. Both the Sanderson and Toro cases, SHOPO argues, were prior to the 1983 negotiations and the reaffirmation which resulted. SHOPO's Posthearing Brief, pp. 6-7.

Leon Gonsalves, a Kauai Chapter Board member between 1973 and 1981 and chairman of the SHOPO Board from 1976 and 1981, testified that his understanding is that an initial probationary

employee is entitled to use the grievance procedure in terminations where prejudice is a controlling factor. Tr. at p. 48. He testified that he was not aware of any change in this interpretation since he left the SHOPO Board. Tr. at p. 49.

On cross-examination, however, Gonsalves stated that he was without knowledge of negotiations since 1981 and had not participated as a negotiator since that time. Tr. at p. 53. He also stated that he did not participate in the initial negotiations for the collective bargaining agreement. Tr. at p. 64. Gonsalves' interpretation that initial probationary employees may use the grievance process is based on the view that a promotion occurs when Police Services Officers, SR-15, in recruit positions are converted to Police Officers, SR-18. Tr. at p. 56.

CONCLUSIONS OF LAW

By withdrawing its representation of Complainant after Step III, Complainant alleges that SHOPO has precluded Complainant from obtaining an impartial determination as to whether employer has violated any provisions of the collective bargaining agreement.

Sections 89-13(b)(1), (4) and (5), HRS, 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; or
- (5) Violate the terms of a collective bargaining agreement.

The union's duty of fair representation is set forth in Subsection 89-8(a), HRS, which provides in pertinent part:

[89-8] Recognition and representation; employee participation. (a) The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right 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 . . .

Complainant contends that by refusing to take Complainant's grievance to arbitration after having committed itself to representation during Steps I through III and having represented other members similarly situated, SHOPO acted in an arbitrary, discriminatory and capricious manner in violation of Subsections 89-13(b) (1), (4), (5) and 89-8(a), HRS. Posthearing Brief at p. 5.

Article 32, Grievance Procedure, of the Unit 12 contract, gives the union the right to decide whether to proceed to arbitration. Petitioner's Exhibit 12. It is clear that an employee has no absolute right to arbitration and that a union has discretion as to whether any grievance should be arbitrated. Such discretion must be exercised in a nonarbitrary fashion. As

stated by the U. S. Supreme Court in Vaca vs. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 Law.Ed.2d 842 (1967):

A breach of the statutory duty of fair representation occurs only when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. 386 U.S. at 190.

The exclusive agent's statutory obligation to serve all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion in complete good faith and honesty, and to avoid arbitrary conduct. Id. at 177.

As stated by this Board:

While [SHOPO] is not required under the Unit 12 contract or under Chapter 89, HRS, to take every grievance to arbitration, its processing of each grievance must be done in a fair and impartial manner. Moreover, any of its decision not to proceed to arbitration must be based on objective rational criteria. Bruce J. Ching and SHOPO, et al., 2 HPERB 23 (1978).

The Board also notes that the duty of fair representation can be violated although the union acts in good faith:

Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or an action that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation. A union may refuse to process a grievance or handle the grievance in a particular manner for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority. A union must especially avoid capricious and arbitrary behavior in the handling of a grievance based on a discharge--the industrial equivalent of capital punishment. Griffin vs. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, 469 F.2d 181, 183 (4th 2d 1972).

The union violates its duty of fair representation when its conduct in representing its members is arbitrary, discriminatory or in bad faith. In the case at hand, the Board must conclude that the Union did not violate its duty of fair representation, on the basis that the reading of Article 21 of the collective bargaining agreement as advanced by Chun in his testimony is the correct reading, and is apparent after a close reading of the Article.

Article 21 draws a distinction between two types of probationary appointments. The first is the initial probationary appointment, applicable to employees hired for the first time by the employer. These employees become "regular" employees upon the satisfactory completion of the initial probationary period. The second type is the new probationary appointment, applicable to those employees promoted to a new class, after the initial appointment. Article 21 states that an employee whose probationary appointment is terminated shall be entitled to use the grievance procedure if prejudice was a controlling factor in the termination of his promotion. Thus, the ambiguity created by the phrase "probationary appointment," as to whether the phrase includes both initial and new probationers, or is restricted to new probationers, is resolved by the last clause which states that the provision refers only to actions regarding terminations of promotion. This interpretation, restricting access to the grievance procedure where prejudice is a controlling factor in a termination, to cases involving promotions but not initial appointments is apparent from the face of the provision. The

use of the word "promotion" is clear and not subject to significant difference in interpretation. The Board is unpersuaded by Gonsalves' testimony that initial probationers who are terminated have been denied promotion. The Board sees a significant and clear distinction between initial probationers and regular employees.

Given the Board conclusion that the Union's reading of Article 21 is sound, it follows that the Union's decision to not take Complainant's case to arbitration is not arbitrary, discriminatory or in bad faith. The decision not to proceed to arbitration must be regarded as being based on objective rational criteria. Bruce J. Ching and SHOPO, et al., 2 HPERB 23 (1978).

The Board is mindful that the Union's decision to file the grievance and to process it through Step III, and then to refuse to arbitrate the grievance gives the appearance that the union acted in a capricious manner. However, the Board concludes that Chun's stated opinion that the grievance continued to be processed through Step III on the basis that the employer could at some point decide to capitulate to Complainant's demands is colorable and suggests that the Union's actions in this regard were reasonable.

The Board is also mindful of the fact that Complainant may be subject to hardship by his reliance on the grievance process in his efforts to obtain employment given the factual situation at hand. However, the Board must note that exhaustion of contractual remedies would have to be undertaken by Complainant

to pursue further redress, and that Complainant may also resort to remedies through civil service or federal statutes.

Further, the Board finds that Complainant's reliance on two prior Board decisions, SHOPO and Sanderson v. Fasi, 3 HPERB 25 (1982), and SHOPO and Toro v. Fasi, 3 HPERB 71 (1982) is misplaced. Both cases focused on the employer's decision to refuse arbitration regarding termination of probationary employees and found that Article 21 granted probationary employees the right to use the grievance procedure where, in the Sanderson case at least, prejudice was alleged to be a controlling factor in the termination. However, the Board holdings in Sanderson, and its companion case Toro, do not have significant precedential value for the instant case for two reasons. Firstly, the Board in Sanderson did not engage in a full consideration of the language of Article 21. While both Sanderson and Toro were referred to as initial probationers, the Board in its ultimate conclusion on the issue merely stated that "all that Article 21 provides is that a probationary employee may use the contractual grievance procedure if prejudice was a controlling factor in the termination action." 3 HPERB at 39. This statement does not address the issues of the differing rights of initial and new probationers, and the issue of what sort of personnel actions are being contested, i.e., initial hirings or promotions. Secondly, both Sanderson and Toro centrally involved the issue of the employer's duty to bargain in good faith as required by Section 89-13(a)(5), HRS. The present complaint regards the union's duty to fairly represent its bargaining unit members, which duty, as delineated in cases cited,

supra, is characterized by a significant discretionary factor to be exercised by the exclusive representative. The duty to bargain, in contrast, is subject to less discretion. For these two reasons, the Sanderson and Toro cases are not determinative on the issues in the instant matter.

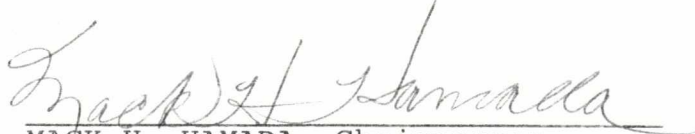
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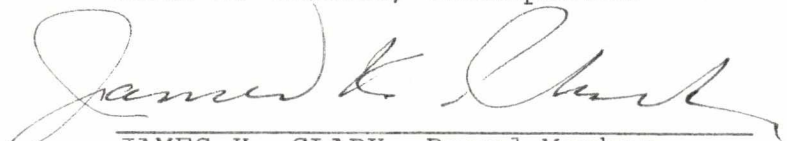
The complaint against SHOPO is dismissed for failure to establish a violation of the duty to fairly represent Complainant.

Case No. CE-12-104 shall be set for hearing upon motion of the parties to the case.

DATED: Honolulu, Hawaii, January 22, 1987.

HAWAII LABOR RELATIONS BOARD


MACK H. HAMADA, Chairperson


JAMES K. CLARK, Board Member


JAMES R. CARRAS, Board Member

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