STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of DEAN M. CABATBAT, TERRILL HARRISON, and PETER WONG, Complainants, and UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Respondent.	CASE NO. CU-10-63 DECISION NO. 305 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On July 10, 1989, Complainants DEAN M. CABATBAT, TERRILL HARRISON and PETER WONG (CABATBAT, HARRISON, and WONG) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board).

The Complainants allege that Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW, Respondent or Union) violated Subsections 89-13(b)(2) and (3), Hawaii Revised Statutes (HRS), by refusing to bargain collectively in good faith with the public employer and refusing to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in Section 89-11, HRS.

A prehearing conference was held on August 8, 1989, and a hearing on this complaint was held in Hilo, Hawaii on August 16, 1989.

All parties were afforded full opportunity to call and cross-examine witnesses, submit exhibits and present briefs and oral arguments.

On August 21, 1989, a post-hearing brief was submitted by UPW.

Upon a full review of all exhibits, testimony presented at the hearing, and arguments made orally and in writing, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Complainants are and were, for all times relevant, Adult Corrections Officers (ACOs) at the Kulani Correctional Facility (Kulani) located on the island of Hawaii, and are members of bargaining unit 10 as it is defined in Subsection 89-6(a), HRS.

Respondent UPW is the exclusive representative as defined in Section 89-2, HRS, of bargaining unit 10.

On or about May 23, 1984, the Corrections Division of the Department of Social Services and Housing (DSSH or Employer) decided to take over the management of Kulani by replacing the administrators and transferring a number of ACOs from the Halawa High Security Facility (Halawa) to Kulani. The takeover lasted approximately 20 months. Respondent's (Resp.) Exhibit 9.

On May 23, 1984, the Union filed a class grievance on behalf of the Halawa ACOs, stating that Sections 1.05, 25, 26, and 44 of the collective bargaining agreement had been violated by the Employer. The Union explained the nature of the Complaint as follows:

> On or about 5/23/84, the Union was informed of the movement of employees from Halawa High Security Facility to Kulani Correctional Facility. By this action, the Employer violated the above sections of the Unit 10 Collective Bargaining Agreement.

The Union sought as a remedy:

> An unconditional and complete retraction of the Employer's action and Employer adhere to the conditions of employment as stated and provided for in the Unit 10 Collective Bargaining Agreement. Employee's [sic] to be compensated at the overtime rate until such time the affected employees are returned to their regular work place, Halawa High Security Facility. Resp. Exhibit 2. Transcript (Tr.), pp. 141-142.

In May 1985, Joyce M. Najita was selected by the UPW and DSSH to determine by arbitration the class grievance concerning the Kulani take-over by the Halawa ACOs. The parties attempted to resolve their differences during this period. Because the negotiation process was not successful, the Union invoked the jurisdiction of the Arbitrator. Hearings were held on July 29 and August 1, 1986. On November 20, 1986, Najita issued her arbitration decision and award in the Halawa grievance on the change-of-shift issue. Resp. Exhibit 9.

Arbitrator Najita summarized the Union's basic position in the following manner:

> The crux of the Union's claim is to be found in the following statement taken from the testimony of the UPW State Director Gary Rodrigues:
>
> Q. Now, as the negotiations were in progress on this particular case, Mr. Rodrigues, what was your understanding of what the State was willing to do to so-called rectify the situation?
>
> A. The State was willing to pay overtime from the seventh day on under the back-to-back schedule.
>
> Q. What was the union's position?
>
> A. The union's position was we want overtime for the 12 hour workdays, the entire 12 hour workdays because that is the first sin, the 12 hour workday. The subsequent sin of seven continuous days is not the question because that is clear. But the fact that the 12 hour day days [sic] was put in existence is a violation and the penalty should be, as overtime is not a reward.
>
> We all know the history of overtime, it's not a reward for working late. It is a punitive action for the employer to have employees work beyond the workday. That's the history of overtime. So if the employer is not given punitive or punished for creating a 12 hour shift, the whole thing is lost. (Tr. 225)
>
> In sum, the Union argues that under the cover of "emergency" the Employer, not only seeks to relieve itself of its contractual obligations, but also to unilaterally alter the terms of the collective bargaining agreement. The Union seeks a make-whole remedy awarding premium pay for all hours worked to uphold the integrity of the principle of joint decision-making.

Id. at pp. 12-13.

Instead of awarding the Union premium pay for all hours worked, Najita decided to make the following award:

> The Employer's actions have not been exemplary. At the same time, a severe make-whole remedy would be improper and inappropriate. The Arbitrator believes the parties' best interests would be served by the avoidance of remedies that are punitive in monetary or exemplary nature in order that parties can continue to bargain collectively and maintain the integrity of the joint decision making process.
>
> [I]t is the decision of this Arbitrator that the Employer violated provisions of the Unit 10 collective bargaining agreement when it instituted the changes in hours of work during the workday and the workweek for Halawa ACOs involved in the Kulani take-over. The grievance is sustained to the extent that the Employer is directed within 30 days from receipt of the Award to:
>
> * * *
>
> 2. Negotiate with the Union, as provided for under Section 25.01, in reference to changes instituted by the Employer in hours of work during the workday and the work-week of Halawa ACOs involved in the Kulani take-over.

Id. at pp. 13, 15.

On or about September 24, 1985, UPW Business agent Ann Delos Santos learned from the Acting Administrator, Elena Young, that the Kulani ACOs were working 12-hour shifts. The 12-hour shifts took effect on February 3, 1985. Delos Santos filed a grievance on September 25, 1985, citing a violation of Sections 1.05, 25 and 26 of the Unit 10 agreement. The Union demanded that the "ACOs be compensated with overtime for each hour of work performed retroactive to the date employer changed to a 2-shift operation." Resp. Exhibits 1 and 3; Tr. p. 157.

During the grievance process, DSSH officials explained the reasons for Employer's actions--stating that the change in staff pattern was a temporary measure to ensure the security of the facility as well as the safety and health of the staff and inmates. This action also afforded the facility to better utilize its security staff for further training in program related activities. Resp. Exhibit 2.

The Director of DSSH also explained the relevant understanding regarding the change-of-work schedule by the following statement:

> Furthermore, we understand that there were open discussions on the matter between the KCF administration and staff. In fact, the employees acknowledged their understanding of the matter by signature and the work schedules were posted accordingly. The Union, however, was not contacted on the matter.

Id. at p. 2.

Gary Rodrigues, State Director of the UPW, testified that none of the Kulani ACOs filed written complaints when the 12-hour shifts took effect on February 3, 1985. Tr. pp. 144 and 157.

At Step 4 of the grievance procedure, James Takushi, Director of Personnel Services, raised the issue regarding the timeliness of the filing of the Kulani grievance. His conclusion reads as follows:

> We find that the initial filing of this grievance was not filed in a timely manner as required by Section 15.11 of the Unit 10 Agreement. Our review reveals that this grievance was filed by the Union on

> September 25, 1985, whereas, the two, twelve-hour shift operation went into effect on February 3, 1985. As relayed to you by the Department of Social Services and Housing in an earlier grievance correspondence, the ACO's at Kulani were well-aware of the schedule change and acknowledged their understanding of the matter by signing the twelve-hour shift schedules prior to February 3, 1985.
>
> We, therefore, find your grievance was not filed in a timely matter and are returning it without action. Resp. Exhibit 5.

Notwithstanding the Employer's challenge of arbitrability, the Union decided on August 21, 1986 to submit the Kulani grievance for arbitration. Since the Halawa and Kulani grievances were basically identical, the Union and Employer agreed to select Arbitrator Najita to hear the Kulani grievance. Resp. Exhibits 6 and 7; Tr. pp. 146-47.

On July 30, 1987, a settlement agreement was finally reached on the Halawa grievance. The Halawa ACOs were compensated with four hours of straight time pay for the first work day of each four-week posted schedule of deployment from May 23, 1984 to January 17, 1985. Resp. Exhibit 10, Tr. p. 152.

As a matter of background in the resolution of the Kulani grievance, Rodrigues testified that the Kulani grievance was handicapped by the arbitrability challenge raised by the Employer. Rodrigues elaborated that the late filing of the grievance deprived the Union to "use the hammer, as I referred

to it, to pound the Department into submission . . . for what we thought was a meaningful settlement." Tr. p. 157.

Rodrigues further testified why the Union did not proceed to take the Kulani grievance to arbitration. His testimony reads as follow:

> . . . So our hammer was eliminated because of the 14-day requirement. And the Department would have -- was planning to challenge us the day the arbitration began.
>
> . . . Being that I have the expertise to know about settling grievances and handling arbitrations, there was no use of going into arbitration and fighting the arbitrability. Once the arbitrator would say to us, "This case cannot be arbitrated because untimely filing," we would then have given up our right to negotiate any settlement on behalf of Kulani. So we didn't proceed to arbitration. Tr. p. 159.

Rodrigues also indicated that the Union decided not to proceed to arbitration on the Kulani case because the matter would have involved the same contract and the same identical issue presented to the same arbitrator--who had previously rejected the remedy of premium pay for each hour of work on the 12-hour shift. Tr. pp. 150-51.

Rodrigues indicated that the timing of settlement negotiations and the final resolution of the Kulani grievance were affected by certain conditions which resulted from the creation of a new Department of Corrections in 1987. Major problems involving delays in obtaining individual hours of work and rates of pay were encountered by the Union during this period of reorganization. Different administrators were placed

in charge, and the Union alleged that it couldn't find someone who could make a decision. "It was chaos within the Department," stated Rodrigues. Tr. pp. 154-56.

After the Najita award was issued on November 20, 1986, Rodrigues assigned Dayton Nakanelua, UPW's Executive Assistant, to work with the Employer to negotiate a settlement of the Kulani case. During the Kulani negotiation process, the Employer offered to settle the case on the same terms as the Halawa settlement agreement of July 30, 1987. See page 7, supra, Resp. Exhibit 10; Tr. p. 160.

Upon direct examination of Rodrigues by UPW's attorney, counsel raised the question as to what conclusions, if any, Rodrigues reached after evaluating the Employer's proposal concerning the Kulani ACOs. Rodrigues offered the following testimony:

> We calculated the number of 4-hour shifts from February of '85 to the time we filed the grievance, September. It was approximately 9 times that a 4-hour shift would occur -- I mean four-week schedule would occur. So the settlement for Kulani people would have been simply 4 hours times 9, so each worker who worked during that period would have received 36 hours of straight time pay.
>
> I said no. I told Dayton, "We will not accept this settlement, even though it's identical to Halawa. Try and squeeze some more out," knowing that again we didn't have a hammer. So Dayton went back, negotiated some more. We then convinced the employer that, "Look. This is what would settle the case. Pay us 4 hours for each day for this period of time," and the period ended up as the exhibit -- our Exhibit 13, which included that period from

September through -- September 6 to October 12. Resp. Exhibit 13; Tr. p. 161.

On June 20, 1989, a final settlement was reached between the Employer and Union. The pertinent provision of the settlement agreement relevant to this complaint reads as follows:

> 1. The EMPLOYER will compensate the ACOs who were affected by the shift schedule change with overtime pay of four (4) hours of straight time pay for each regular work day of each period of the shift schedule changes. The compensation shall be calculated from 14 working days prior to the date of the grievance of September 25, 1985 to the close of business date of the two (2), twelve (12) hour schedule. According to the 1985 calendar, such period of calculation shall be from September 6, 1985 to October 12, 1985. Resp. Exhibit 13 at p. 2.

The testimony of each Complainant established the fact that they were working on a 12-hour shift beginning on February 3, 1985. Tr. pp. 10, 104-105, and 122. Further, each Complainant received compensation with 8 hours of straight time pay and the balance of 4 hours at time-and-one-half premium rates. Tr. pp. 30-31, 105-106, and 122. Also, each Complainant received overtime pay for pre-shift and post-shift briefing time. Resp. Exhibit 14.

Apparently, the Complainants were dissatisfied with their pay and work schedule. Yet, none of them notified the Union about their alleged predicament. Tr. p. 157. On or about April 28, 1989, each Complainant received what they characterized as an "unjust minimum" 23 days overtime payment

in their pay checks. The bottom line of their complaint was that they wanted to get paid time-and-one-half for the full 12-hour shift--beginning February 3, 1985 through October 12, 1985. Board Exhibit 1; Tr. p. 115.

The Complainants perceived that the Union, by accepting to "settle for whatever the State has to offer" violated Subsection 89-13(b)(2), HRS. They were not aware of the Najita award concerning the Halawa ACOs nor were they aware of the Employer's challenge of arbitrability. Also, the Complainants felt that the Union deliberately and repeatedly failed to inform them of the status of the Kulani grievance. Board Exhibit 1; Tr. p. 200.

During the period of settlement negotiations between the Employer and Union, the Kulani ACOs, by majority vote, chose to change their Union representation in October, 1987. According to PETER WONG's testimony, the Complainants felt that UPW's representatives were "beating around the bush" by not offering any information concerning the Kulani grievance. WONG testified about the animosity arising from the election results stating that: "[T]hey didn't want to have nothing [sic] to do with us because of this Teamsters was coming up." Tr. pp. 14-15 and 167. In response to UPW counsel's questioning as to whether the timing or the terms of the grievance settlement was in any way affected by Complainants' sentiment against the UPW, Rodrigues stated that: "It was affected only in their minds, but not in ours." Tr. p. 176. Rodrigues further testified

that the Union spent approximately $250,000 pursuing grievances arising from the Kulani take-over through arbitration. Resp. Exhibits 15-20; Tr. p. 175.

Complainants nevertheless allege that the UPW failed to inform them of the status of the Kulani grievance; the length of time or delay in arriving at a settlement was unreasonable; and in essence, that UPW failed to represent them adequately in the grievance process against their Employer. Board Exhibit 1; Tr. pp. 6-7 and 200-201.

CONCLUSIONS OF LAW

Complainants CABATBAT, HARRISON, and WONG appeared Pro Se at the hearing in this case.

The Complainants allege that Respondent UPW violated Subsections 89-13(b)(2) and (3), HRS, by refusing to bargain collectively in good faith with the Employer and refusing to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in Section 89-11, HRS.

UPW contends that the complaint should be dismissed because it was filed beyond the applicable statute of limitations. The applicable statutes and rules require complaints to be filed within 90 days of the occurrence of the alleged prohibited practice. See Sections 89-14 and 377-9(1), HRS and Administrative Rules Section 12-42-43. See also, Alvis Fitzgerald, 3 HPERB 186 (1982). In Sharon Kotaka, 2 HPERB 1 (1978), the Board found that in cases alleging improprieties in

the execution of a grievance settlement agreement, any alleged misrepresentations would have occurred, if at all, at the time the settlement agreement was signed and accepted. In this case, Complainants testified that they first realized the effects of the settlement between the Employer and the UPW on or about April 28, 1989, when they received their paychecks containing payments pursuant to the settlement agreement. The facts also indicate that the final settlement was reached regarding the Kulani ACO's on June 20, 1989. As Complainant's allegations concern the propriety of the settlement agreement and the conduct of the Union regarding such settlement, the Board concludes that the filing of the subject prohibited practice complaint on July 10, 1989 was timely.

Also, at the outset we dismiss Complainants' charge that the Union violated Subsection 89-13(b)(3), HRS, by refusing to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in Section 89-11, HRS. Section 89-11, HRS, refers to mediation, fact-facting and arbitration in the context of an interest arbitration arising from an impasse over the terms of an initial or renewed agreement. The facts in this case do not involve the foregoing provision as the complaint deals with a grievance arbitration. Therefore, the Board dismisses Complainants' charges in reference to a Subsection 89-13(b)(3), HRS, violation.

With respect to whether the UPW breached its duty of fair representation in its processing of the Kulani grievance

against the Employer, we hold that there are insufficient facts in this case to support a breach of duty by the UPW. Complainants here, appearing on their own behalf, failed to carry their burden of proving the allegations by a preponderance of the evidence as required under Administrative Rules Section 12-42-8(g)(16).

In Decision No. 89, Bruce J. Ching, 2 HPERB 23 (1978), this Board addressed the issue of a union's duty of fair representation to a union member. It cited the case of Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed.2d 842 (1967), wherein the Supreme Court held:

> . . .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. (Emphasis added).

With specific reference to the question of discretionary arbitration, the Vaca court continued:

> Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the collective bargaining agreement. . . 386 U.S. at 191.

In its application of Vaca to the case in Decision 89, this Board elaborated:

> Under the principles set forth in Vaca, it is clear that SHOPO, as the exclusive representative of employees in bargaining Unit 12, is required by Chapter 89, HRS, to serve the interests of all of its

> members without discrimination, to act in good faith and to avoid arbitrary conduct. While it 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 decisions not to proceed to arbitration must be based on objective, rational criteria.
>
> Vaca emphasized that a union's mere refusal to take a grievance to arbitration does not, in itself, constitute a breach of the duty of fair representation. Similarly, in this case, we believe that the fact that SHOPO ultimately refused to take Complainant's grievance to arbitration is not, without more, a breach of the duty of fair representation. The issue here is whether or not SHOPO's processing of Complainant's grievance, and withdrawal of its request for arbitration, was arbitrary, discriminatory or in bad faith. Decision 89 at 17. [2 HPERB No. 89 at 34]

Section 15.23 of the collective bargaining agreement in this instant case provides, in pertinent part:

> 15.23 Step 5. Arbitration. If the matter is not satisfactorily settled at Step 4, and the Union desires to proceed with Arbitration, it shall serve written notice on the Employer or his representative of its desire to arbitrate within fifteen (15) days of receipt of the decision of the Employer or his designated representative. (Emphasis added). Resp. Exhibit 1.

It is clear that, under the contract, the decision to proceed with arbitration lies with the Union. In examining the Union's case, the Board finds that the Union did not act arbitrarily.

UPW State Director, Gary Rodrigues, testified that the Union's decision not to pursue the Kulani grievance to

arbitration was based on its belief that arbitration would not be successful. The Employer had raised the issue of timeliness regarding the filing of the Kulani grievance. This challenge by the Employer was perceived by the Union to prevent it from utilizing the arbitration process and would further jeopardize the Union's attempt to negotiate any fair settlement. Tr. p. 159. Further, the Union believed that arbitration would be futile in the Kulani case because the Najita award involved the identical issues on the overtime payment dispute, and this question would be presented to the same arbitrator. Tr. pp. 150-51.

Thus, the Union had made definite attempts in the past to get the remedy of premium pay for each hour of work on the 12-hour shift and had failed. In the Board's opinion, the Union's consequent decision against proceeding to arbitration was neither arbitrary, discriminatory nor in bad faith.

Addressing Complainants' allegation against the Union for not informing them about the status of the Kulani grievance, the Board empathizes with the Complainants' problems. Surely, the Union by its representatives, could have provided some basic information concerning the status of this grievance; why the delay in the negotiation process; and generally explain to the Complainants the impact arising from the Najita award and its effect on the Kulani ACOs' grievance.

In most organizations, there is a common bond of interdependence, mutual concern, and interlocking contributions. This common bond is maintained and strengthened by requiring good and open communication. The right to know is basic. Moreover, it would appear better to err on the side of sharing some vital information than risk leaving someone like the Complainants in this case in the dark.

Nevertheless, we must decide the question of whether UPW breached its duty of fair representation when it allegedly failed to inform the Complainants about the status of the subject grievance in light of the Board's precedent involving similar circumstances.

The Board held in Decision No. 89, Bruce J. Ching, supra, at pp. 34-35:

> In Whitten v. Anchor Motor Freight, 521 F.2d 1335 (6th Cir. 1975), a union which failed to notify a grievant of its determination that his case lacked sufficient merit for arbitration was held not to have breached its duty of fair representation. Even though the union had not advised the grievant of its decision, and failed to respond to his letters asking about the status of his grievance, the court concluded:
>
> > . . .[W]e have found no evidence in the record to suggest that Whitten's grievance was processed by the Union differently than grievances of other union members. The Union may have acted negligently or exercised poor judgment in failing to keep Whitten informed of the status of his grievance, but this is not enough to

> support a claim of unfair representation. [Citations omitted] 521 F.2d at 1341.
>
> In Breish v. Auto Workers, Local 771, 84 LRRM 2596 (E. D. Mich. 1973), the grievant was discharged for theft. In processing his grievance, the union failed to affirmatively seek out information which might have been favorable to him and to present it to the employer. It did not notify grievant of the hearing, did not present witnesses to substantiate his story, and it gave him erroneous information regarding the grievance procedure. However, the court concluded that these shortcomings on the union's part did not breach its duty of fair representation in the absence of any discriminatory or hostile motivation. . .

This Board is of the opinion that there is insufficient evidence in the record to conclude that UPW's actions in handling Complainants' request for information about the status of this grievance falls outside the standard of permissible conduct described in the foregoing cases. While it appears that UPW could have been more diligent in providing information surrounding the Kulani grievance, the record does not support a claim of personal hostility to the Complainants or any other discriminatory motive. Based upon the evidence adduced in this case, we hold that Complainants failed to carry their burden of proving the allegations by a preponderance of the evidence.

In conclusion, after considering the record as a whole, the Board holds that UPW did not breach its duty of fair

representation, and therefore, has not violated Subsection 89-13(b), HRS.

ORDER

The prohibited practice charge against Respondent Union is hereby dismissed.

DATED: Honolulu, Hawaii, June 25, 1990.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

GERALD K. MACHIDA, Board Member

RUSSELL T. HIGA, Board Member

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