STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO, Complainant, and JOHN WAIHEE, Governor, State of Hawaii, Respondent.	CASE NO. CE-01-122 DECISION NO. 309 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On February 27, 1989, Complainant UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW, Complainant or Union), filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board).

The Complainant alleges that Respondent JOHN WAIHEE, Governor, State of Hawaii (Respondent or Employer), violated Subsections 89-13(a)(1), (4), (5), (7) and (8), Hawaii Revised Statutes (HRS), by interfering with, restraining, or coercing Howard Pitnam, Patricia Sabourin, and Joseph Dela Cruz in the exercise of their rights guaranteed under Chapter 89, HRS. Complainant also alleges that Respondent discriminated against Mr. Pitnam, Ms. Sabourin, and Mr. Dela Cruz by denying their subsequent promotion applications because they complained and

testified at their grievance meetings. Complainant further alleges violations of the collective bargaining agreement.

On March 16, 1989, the Board issued Order No. 723 granting, in part, Respondent's Motion for Particularization of Complaint, and Complainant timely filed a Statement of Particularization of Complaint with this Board on March 20, 1989.

A prehearing conference was held on April 25, 1989, and a hearing on this complaint was held on August 29, 1989.

On August 15, 1989, the Respondent filed a Motion to Dismiss. This motion was denied by the Board. Transcript (Tr.), p. 28.

All parties were afforded full opportunity to call and cross-examine witnesses, submit exhibits and present oral arguments. Post-hearing briefs were submitted by UPW and Respondent, respectively, on September 11 and 12, 1989.

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

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

Respondent is the public employer as defined in Section 89-2, HRS, of members of bargaining unit 10.

On September 17, 1987, the Department of Corrections (DOC) posted Vacancy Notice No. 87-227 for nine Adult Corrections Officer (ACO) IV positions at the Women's Community Correctional Center (WCCC), Security Section. Complainant (Comp.) Exhibit 1.

On December 1, 2, and 3, 1987, 19 applicants were interviewed for the ACO IV promotions pursuant to Vacancy Notice No. 87-227. All applicants were examined and evaluated according to a point scoring system. Comp. Exhibits 2 and 3.

Alberta Sanders was an ACO IV, sergeant, at the time of the position vacancy announcement. She placed second among the 19 applicants based upon the promotion score sheet, dated December 11, 1987. Comp. Exhibit 3; Tr., p. 91.

Respondent (Resp.) Exhibit 1 indicates that Alberta Sanders applied for a lateral transfer to one of the vacant positions. Sanders was recommended for a transfer by the DOC Branch Administrator on December 11, 1987. Notice of her selection for a lateral transfer to Position No. 35598 was issued on January 26, 1988. The appointment to the position took effect on February 3, 1988. A second notice of selection was issued on February 5, 1988 indicating the appointment was effective February 1, 1988.

Three applicants who were not selected for the nine vacancies filed Step 1 grievances under Section 15.10 of the Unit 10 Collective Bargaining Agreement (Unit 10 Agreement). Comp. Exhibit 5; Tr., p. 50. Howard Pitnam filed a grievance

on February 5, 1988. Patricia Sabourin and Joseph Dela Cruz filed grievances on February 23 and 24, 1988, respectively. At the time of their non-selection, Dela Cruz and Sabourin held ACO III positions at WCCC. Pitnam held an ACO III position at the Oahu Community Correctional Center (OCCC). The grievances alleged violations of Section 16.06(i), Unit 10 Agreement. Comp. Exhibits 6, 7, and 8.

Respondent and UPW were unable to resolve the grievances at Steps 1 and 2. On August 15, 1988, Respondent proceeded to Step 3. Comp. Exhibits 15, 16 and 17; Tr., p. 51. On September 9, 1988, Step 3 grievance meetings were scheduled with the Department of Personnel Services (DPS), Personnel Management Specialist, Walter Harrington, and UPW's Business Agent, Mel Rodrigues. Individual meetings were held for each Grievant. Tr., p. 52.

Based upon the discussions at the Step 3 meetings, Mr. Harrington determined that an investigation of the DOC selection process should be conducted. Harrington concluded that the DOC selection process was deficient and recommended to the Director of DPS to redo the promotion process for the vacancies that were announced in Vacancy Notice No. 87-227. Tr., pp. 88-89.

During this period of Harrington's investigation, there were several discussions between Harrington and Mel Rodrigues concerning the redoing of the selection process. Upon direct examination of Harrington by Respondent's attorney,

counsel raised the question concerning the status and transfer of Alberta Sanders. Harrington offered the following testimony:

> Q. [by Ms. Racuya-Markrich]: . . . did you have discussions with Mr. Rodrigues concerning the transfer of Miss Alberta Sanders?
>
> A. [by Mr. Harrington]: We had discussions concerning all the selectees in that how we best handle it because in my investigation I found out that the process that they used, as I stated in the letter, the Department of Corrections used, to determine most qualified as inadequate and therefore all the positions that were--all the III's that were promoted would have to be redone.
>
> In the process of discussing it and prior to that, in the process of my investigation, I inquired into the Department of Corrections as to whether Alberta Sanders was treated as a promotion or did they in fact transfer her. They brought up the documents at that particular time.
>
> This is almost the same time that this letter came out when I was discussing with Mel. He had pointedly asked me that about Alberta Sanders, and I told him that I would have to check and see and if she was in fact a transfer, then she would remain at the Women's Facility, we're not going to move her back to O-triple-C. Tr., pp. 89-90.

Mr. Rodrigues, on the other hand, testified that he did not recall discussing Alberta Sanders in this redo process with Harrington. Tr., pp. 54, 75, 78 and 79.

In line with this subject concerning Ms. Sanders, the Board's Chairperson questioned Mr. Harrington as follows:

> Q: Mr. Harrington, did there ever come a time when you had a conversation with Mr. Rodrigues or anybody else in the union when you told them, in effect, with regard to the grievance or Step 3 that, OK, all these people, those eight positions will be vacated but Alberta Sanders, she's

not going to be--her position is not going to be vacated, when you made it clear to them that this is the decision of the Department of Personnel Services?

A: Was there any time? Yes.

Q: When did that take place?

A: When we were going over the list as to--when they were to be moved, the people at O-triple-C were to be moved back that were selected as sergeants. You know, there's Lake (phonetic) and someone else that were ACO III's at O-triple-C that put in for promotion at WCCC.

Q: Tell me about that.

A: At that particular time, when we were discussing that, Mel and I were discussing that, he had asked me what about Alberta Sanders. I said if it's a transfer, she's going to remain and if it's--if she had filled out the paperwork properly for a transfer, then she will remain at the Women's Facility.

Q. [By Mr. Machida]: This is prior to your November 15th letter?

A. Yes.

Tr., pp. 113-114.

On November 15, 1988, the Director of DPS sent a proposal to UPW to resolve the grievances at the Step 3 level. The letter in pertinent part reads:

> In reviewing the pertinent facts and merits of this case with DOC, we found that the selection process was inadequate and cannot be relied upon to determine the best qualified for the ACO IV position.
>
> In light of the above, and in fairness to all the applicants, we are directing the Department of Corrections to redo the promotions referred to in the Vacancy Notice No. 87-227.
>
> * * *

> The present positions indicated on the Vacancy Notice No. 87-227 shall be vacated and the selectees shall return to their former ACO positions. The vacated positions shall be filled in accordance with the Bargaining Unit 10 Agreement, Section 16.04.

Comp. Exhibit 18.

This letter was drafted by Harrington for the Director's signature. Respondent's counsel questioned him as to the intention of DPS and DOC regarding Alberta Sanders' position. His testimony reads:

> Q: So in terms of the promotions that were going to be vacated by the Department of Corrections, what was your understanding in terms of Alberta Sanders' position?
>
> A: You mean in this letter?
>
> Q: Right.
>
> A: That position would remain.
>
> Q: So she in fact was not included in terms of redoing the promotions.
>
> A: Yes. Her number shouldn't have been. I could have made it a lot more clear, the response.

Tr., p. 91.

On February 1, 1989, Harold Falk, Director of DOC, issued a grievance settlement directive--stating that DPS has directed the following be done: "(1) positions indicated in that notice be vacated, (2) all selectees be returned to their former ACO positions, and (3) positions be filled in accordance with Section 16.04 of the Bargaining Unit 10 Agreement." Comp. Exhibit 19.

On or about February 5, 1989, eight of the nine positions listed in Vacancy Notice No. 87-277 were vacated by the selectees as ordered by DOC. The position held by Alberta Sanders was not vacated based on DPS and DOC's position that Ms. Sanders was a lateral transfer and not a promotion as defined and applied under Title 14, Administrative Rules, Department of Personnel Services (DPS Rules) which in pertinent part provides:

> 14-3-26 Transfers. (a) Intra-departmental, interdepartmental, and inter-jurisdictional transfers may be made when the following conditions are met:
>
> (1) The employee meets the minimum qualification requirements for the position which the employee seeks movement;
>
> (2) A qualified person is not available on the select priority list;
>
> (3) The employee is a regular employee and the movement is from a position in which the employee last held permanent appointment; and
>
> (4) The transfer shall require the prior approval of the director and the appointing authorities concerned.
>
> (b) Additional conditions which shall be met for inter-jurisdictional transfers are:
>
> (1) The person seeking transfer into the state government is a regular employee of the jurisdiction from where transfer is sought and the movement is from a position in which the employee last held a permanent appointment;

(2) An appropriate promotional eligible list does not exist for the vacancy; and

(3) There is no appropriate open-competitive examination announcement or eligible list for the specific vacancy; provided that the director may, for good cause, waive the foregoing limitation.

(c) The director may require a person seeking transfer to qualify on a non-competitive examination if the position to which the employee seeks transfer requires skills, knowledges, and abilities not present in the current position. [Historical Note omitted.]

14-3-28 Non-competitive promotions. Promotions without a certification of eligibles may be made in accordance with section 76-23, HAWAII REVISED STATUTES, when the following conditions are met:

(1) The employee to be promoted is a regular state civil service employee and the movement is from a position in which the employee last held permanent appointment;

(2) The employee meets the minimum qualification requirements including the experience, education, licensing, and other special requirements prescribed in the class specification as essential for performance of the class of work to which the employee is to be promoted;

(3) The promotion is to a position in a class in the same or related series as the position from which movement is sought;

(4) The employee has not received a non-competitive promotion during the preceding twelve-month period other than a temporary non-competitive promotion;

(5) A qualified person is not available on the select priority list; and

(6) The employee with the longest current continuous civil service employment within the executive branch of the State shall receive first consideration when there is no material difference between the qualifications of employees concerned. [Historical Note omitted.]

Resp. Exhibit 2.

On February 27, 1989, UPW filed a prohibited practice complaint with the Board.

CONCLUSIONS OF LAW

The Complainant alleges that Respondent violated Subsections 89-13(a)(1), (4), (5), (7) and (8), HRS. These subsections in pertinent part provide:

> Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:
>
> (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
>
> * * *
>
> (4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization;

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

* * *

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

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

The gist of UPW's complaint is based on an agreed proposal between the Union and Respondent to resolve three grievances filed at Step 3. The proposal to settle the grievances was summarized in a letter drafted by Mr. Harrington for DPS Director, Alfred Lardizabal's signature, dated November 15, 1988. Complainant argues that Respondent agreed to vacate all nine positions listed in Vacancy Notice No. 87-227. Whereas, Respondent avers that it did not intend to vacate Position No. 35598, because it was filled by a lateral transfer of Alberta Sanders and that this was not a promotion--unlike the other eight selectees.

Accordingly, the dispositive issue before the Board is to ascertain the intent of the parties herein based upon the evidence adduced at the hearing.

The Board's Administrative Rules Section 12-42-8(g)(16) states:

(16) The charging party, in asserting a violation of chapter 89, HRS, or this chapter, shall have the burden of proving the allegations by a preponderance of the evidence. The party raising any subsequent issue shall have the burden of proving that issue by a preponderance of the evidence.

The Board held in Decision No. 161, SHOPO and Virginia Sanderson, 3 HPERB 25 (1982), at p. 46:

> This section will be interpreted by this Board to mean that the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles. Henceforth, if any party fails to present sufficient legal arguments with respect to any issue, the Board shall find that the party failed to carry its burden of proof and dispose of the issue accordingly.

As the Complainant, UPW bears the burden of proof, including the burden of persuasion. UPW is required to persuade the Board by a preponderance of the evidence that the fact more probably exists than it does not or is "more probably true than not." See, McBaine, Burden of Proof: Degrees of Belief, 32 Calif. L. Rev. 242 (1944).

The Complainant and Respondent each produced one witness to testify as to what the proposed settlement was meant to be. The burden of proof, including the burden of persuasion, rests upon UPW. Mel Rodrigues, Business Agent with UPW, testified upon the Union's behalf.

As noted in the Board's Findings of Fact, supra, two divergent sets of testimony were presented by Rodrigues and Harrington concerning the status and position of Alberta Sanders in this case. Basically, the testimony of Rodrigues indicates that he did not recall whether any conversation took place relating to the Sanders' position. Harrington, however, stated that: "He [Rodrigues] had pointedly asked me what about Alberta

Sanders, and I told him that I would have to check and see and if she was in fact a transfer, then she would remain at the Women's Facility, we're not going to move her back to O-triple-C." Tr., p. 90.

In the application and interpretation of the specific term or provisions of the November 15, 1988 letter from the DPS Director to Mel Rodrigues, and as to the factual issue of whether there were any discussions between Rodrigues and Harrington relating to the Sanders' position, we follow the guidelines as stated by the Hawaii Supreme Court in Hawaii State Teachers Association v. Hawaii Public Employment Relations Board, 60 Haw. 361 (1979), at 368 which reads:

> Where reasonable minds may fairly differ as to whether certain evidence establishes a fact in issue, the fact-finder is free to select that interpretation of the evidence which, in its sound judgment, most reasonably reflects the intent of the parties. [Citations omitted.]

Applying the foregoing principles to the facts adduced at the hearing, the Board finds and concludes that the weight of the evidence reasonably infers that there were discussions between Harrington and Rodrigues regarding the Sanders' position. In fact, Mr. Harrington, under cross-examination, testified as follows:

> We had many discussions on Alberta Sanders. We had discussions before this letter and we had discussions after the letter on Alberta Sanders and what we're going to do with her. I said if the paperwork checks out, then she remains as a transfer. The union insisted that

> we vacate her position because of this letter, but these are promotion vacancies, not lateral transfers.

Tr., p. 100. The testimony of Harrington is unequivocal as to the intention of DPS and DOC not to include the lateral transfer of Sanders when it proposed to resolve the Step 3 grievances.

In retrospect, the problem arose in this case because the letter of November 15, 1988 to Mel Rodrigues contained some imprecise language. The letter refers to "promotions" in the vacancy notice. The intent of the parties over this issue should have been resolved at the time they had the Step 3 grievance meetings. Tr., p. 26.

Based upon the evidence adduced in this case, we hold that Complainant failed to carry its burden of proving the allegations by a preponderance of the evidence as required under Administrative Rules Section 12-42-8(g)(16). We hold that Respondent met its burden of proof by explaining their intent to vacate eight positions. As Harrington testified, the filling of Position No. 35598 by Sanders fell within the meaning of Section 14-3-26, DPS Rules, regarding transfers rather than Section 14-3-28, DPS Rules, covering non-competitive promotions. Tr., p. 92; Resp. Exhibit 2. The Board concludes that Sanders was an ACO IV, sergeant, transferring laterally as a sergeant within the ACO IV class. She was not promoted as defined and applied under the DPS Rules, supra.

At the hearing, no evidence was presented by the Complainant to establish that Respondent interfered with,

restrained, or coerced Pitnam, Sabourin, and Dela Cruz in the exercise of their rights guaranteed under Chapter 89, HRS. The DOC conducted a new selection process and the Grievants were given the opportunity to reapply and be considered for promotions in accordance with the terms of the Unit 10 Agreement.

We find no evidence that Respondent discriminated against Pitnam, Sabourin, and Dela Cruz by denying their subsequent promotion applications because they complained and testified at their grievance meetings.

UPW has failed to present any evidence of DOC's refusal to bargain collectively in good faith to constitute a prohibited practice under Subsection 89-13(a)(5), HRS.

The Complainant has also charged that Respondent, by refusing and failing to comply with the provisions of Sections 89-1, 89-3, 89-10(a), and 89-11(a), HRS, has committed a prohibited practice under Subsection 89-13(a)(7), HRS. There was no evidence to prove that the DOC refused or failed to comply with the State's public policy regarding collective bargaining as stated in Section 89-1, HRS. Complainant has also failed to present evidence to establish that the Respondent precluded its employees from exercising their right of self-organization and from forming, joining, or assisting any employee organization for the purpose of bargaining collectively, as set forth in Section 89-3, HRS. Further, there was no evidence adduced at the hearing to prove that the Respondent refused or failed to ratify a collective bargaining agreement or reduce such an

agreement to writing to be executed by both parties, as required under Section 89-10(a), HRS. We also conclude that there was no evidence to establish that the Respondent has refused or failed to comply with the provisions of Section 89-11(a), HRS, relating to grievance procedures.

The Board concludes the Complainant has also failed to prove that Respondent has wilfully violated the terms of the Unit 10 Agreement, as prohibited under Subsection 89-13(a)(8), HRS. We find that the Unit 10 Agreement does not cover how interdepartmental "transfers" are to be handled. The Unit 10 Agreement specifically addresses how promotions should be determined. Therefore, DPS Rules and Regulations regarding transfers govern the actions of the employer in this case. By sustaining the lateral transfer of Sanders, the DOC did not violate the terms of the Unit 10 Agreement.

Finally, as an obiter dictum observation, we note that this problem regarding transfer and promotion procedures arose because DOC did not have a consistent policy in terms of filling vacancies. As Board Member Machida stated: " . . . I cannot see . . . lateral transfers going through this whole interview process and being rated and given a score and competing with a person who is trying to get promoted. I cannot see the relevance of it." Board Member Machida also suggested the following policy: "I would hope that . . . [DOC] would adopt a consistent policy so we won't have this kind of a problem in the future. But the semantics plays a great part in the problem that faces

[us] today. But I think it's nothing that cannot be corrected." Tr., pp. 110-111.

ORDER

For the foregoing reasons, the prohibited practice charges brought by Complainant are hereby dismissed.

DATED: Honolulu, Hawaii, September 6, 1990.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

GERALD K. MACHIDA, Board Member

RUSSELL T. HAGA, Board Member

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