Decision

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of THOMAS LEPERE, Complainant, and JOHN WAIHEE, Governor, State of Hawaii and DEPARTMENT OF CORRECTIONS, State of Hawaii, Respondents.	CASE NO. CE-10-138 DECISION NO. 329 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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CONCLUSIONS OF LAW AND ORDER

On March 5, 1990, Complainant THOMAS LEPERE (LEPERE) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondents JOHN WAIHEE, Governor, State of Hawaii and the DEPARTMENT OF CORRECTIONS (DOC), State of Hawaii (hereafter Employer). LEPERE alleged that the Employer, specifically the management of the community-based section of the DOC, engaged in reprisals against him for initiating grievances or actions with this Board. LEPERE alleged that the Employer disciplined him for rule violations involving unprofessional behavior and the improper enforcement of inmate telephone privileges, thereby violating Sections 89-13(a)(1), (4), (5), (6), (7), and (8), Hawaii Revised Statutes (HRS).

On May 31, 1990, Respondents filed a Motion to Dismiss the case with the Board on the grounds that Complainant failed to exhaust his contractual grievance remedies prior to bringing this

complaint and the Board therefore lacks jurisdiction over this matter. A hearing was held on June 18, 1990. In Order No. 817, issued on December 28, 1990, the Board held that the Complainant failed to file a grievance with his Employer and thus failed to exhaust his contractual grievance remedies. The Board therefore dismissed Complainant's Subsection 89-13(a)(8), HRS, breach of contract allegations.

Hearings on the merits of the case were conducted on February 20 and 27, 1991 and posthearing briefs were filed on April 26, 1991. Based upon a thorough review of the record, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Complainant LEPERE was at all times relevant an Adult Correctional Officer (ACO) III, sergeant, at the Oahu Community Correctional Center (OCCC), DOC.

Respondents DOC and WAIHEE were at all times relevant the public employer as defined in Section 89-2, HRS, of LEPERE.

This case involves two incidents which resulted in LEPERE receiving two counsel warnings or verbal reprimands on February 23, 1990. On November 21, 1989, Michael Cavanaugh and Bob Webb of the Department of Public Safety (previously DOC) Consent Decree Office were conducting an inspection of Annex 2 at OCCC. Transcript of hearing held on February 20, 1990 (Tr. II), p. 142. Cavanaugh and Webb inspected all state facilities for compliance with the consent decree entered into between the State and the American Civil

Liberties Union (ACLU). Id., p. 145. Unit Team Manager An Nguyen accompanied the inspectors through the kitchen and feeding areas of Annex 2. The ice scoop was found on top of the ice machine and Webb stated that the ice scoop, if left outside, could become contaminated. Id., p. 171. According to Nguyen, LEPERE interjected in a loud and inappropriate tone of voice that if the ice scoop was placed in the machine, it would become buried in the ice which would be contaminated upon retrieval. Id.

Cavanaugh, meanwhile, was inspecting the report containing food temperature recordings since the Consent Decree requires food to be served to inmates at a certain temperature. He noted that the temperature of the food increased 38 degrees in 15 minutes. He felt that a dramatic increase in temperature in a short amount of time could indicate a dangerous situation. Id., pp. 147-48. He noticed a "skirmish" at the ice machine and drew an arrow on the report to remind him to talk to Nguyen about it later. The report indicates that Cavanaugh initialled the arrow. When LEPERE saw the arrow on the report, he accused Cavanaugh of altering and falsifying the report. Cavanaugh described LEPERE as going "completely berserk", pointing his finger in his chest and "flapping around like a chicken." Id,. p. 150. LEPERE told Cavanaugh that he didn't know what he was doing and didn't understand the law of physics. Id., pp. 151, 157. Cavanaugh said that LEPERE had a bad attitude and someone should talk to him. Id., p. 159.

Nguyen reported the incident to Community Base Administrator Miles Murakami. Respondents' (Rs') Exhibit (Ex.) 3.

Murakami asked Sergeant Wayson Tanouye to conduct an investigation of the incident. Id., pp. 128-29. Tanouye interviewed Webb, Cavanaugh, Nguyen and Complainant. He found that Complainant's behavior was inappropriate towards the inspectors and Nguyen. Id., p. 129. Tanouye recommended that Complainant be given a verbal warning. Id., pp. 80-81; Rs' Ex. 3.

Nguyen issued the verbal reprimand to LEPERE on February 23, 1990. Captain Asher advised Nguyen to have a sergeant present because LEPERE had a reputation for verbal outbursts; Sergeant Peter Wade was therefor present during the counseling. Id., p. 108. The warning indicated that Complainant was hostile and abrasive towards the inspectors. Rs' Ex. 3. LEPERE refused to sign the confirmation of counseling form. Id., p. 178.

The second incident involved events occurring on or about February 6 and 7, 1990. On February 6, 1990, LEPERE threatened to report inmate Stephen Lincoln because he had been on the telephone for twenty-five minutes. Complainant's (C's) Exhibit (Ex.) 1. Thereafter, on February 7, 1990, after inmate Lincoln had talked on the telephone for ten minutes, Complainant ordered him to get off the telephone since he had exceeded his allotment by ten minutes the previous day. C's Ex. 1. ACO IV William M. Hanyard noted that the inmate was becoming aggressive at the time of the telephone call and intervened between the inmate and LEPERE. Hanyard told the inmate to get off the telephone. The inmate said he was allowed 15 minutes; Hanyard said he wasn't aware that there was a fifteen minute telephone limit. He told LEPERE that they should see Nguyen about it. They did so but Nguyen was unable to produce

a memo at the time. Nguyen said that she would give Hanyard a copy of the Policies and Procedures regarding long distance telephone calls later. Tr. from hearing held on February 27, 191 (III), pp. 7-8, 20.

LEPERE told Nguyen that she didn't know what she was doing, that she doesn't follow the rules and regulations and always takes the side of the sentenced felons. Tr. II, p. 175. Nguyen xeroxed the policy and procedure and gave it to Hanyard. Rs' 2. She considered Complainant's behavior to be inappropriate. Tr. II, p. 176-177.

There is a conflict in the DOC rules and policies governing long-distance telephone calls. According to the DOC Policies and Procedures Manual, Policy 493.15.03 provides guidelines for long-distance telephone calls for inmates/wards to immediate family members who do not reside on the island on which the inmate is incarcerated. Each departmental facility is responsible for establishing the overall frequency and scope of long-distance phone calls. At a minimum however, the inmate is entitled to one long distance call per week; a minimum of 15 minutes per call is allowed. Rs' Ex. 2. According to the Annex 2 Inmate Rules and Information, however, an inmate may request a total of two, ten-minute long distance call per month via a telephone request form. Rs' Ex. 1. Hanyard testified that the practice at the facility is to permit inmates two ten-minute long distance calls per month. Tr. III, p. 9. When Hanyard explained the practice to Nguyen, she shook her head and said no. Hanyard felt that LEPERE was acting appropriately. Tr. III, pp. 13.

On February 23, 1990, LEPERE received a Confirmation of Counseling/Warning, dated February 13, 1990, which indicated that LEPERE did not know the DOC Policy and Procedures. The counselling noted the inconsistency of allowing Lincoln to use the telephone for twenty-five minutes on one day and permitting him only ten minutes the next day. Nguyen indicated that LEPERE's demeanor with inmates should remain professional and that he should defuse rather than escalate tense situations. C's Ex. 2.

DISCUSSION

The charges remaining for the Board's consideration are violations of Sections 89-13(a)(1), (4), (5), (6), and (7), HRS. At the close of Complainant's case, Respondents' counsel moved to dismiss the allegations of Section 89-13(a)(5) and (6), HRS, violations because of the lack of evidence. The Board hereby grants that motion.

Section 89-13(a), HRS, provides as follows:

> 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;
> (6) Refuse to participate in good faith in the mediation, fact-finding, and arbitration

> procedures set forth in Section 89-11;
> (7) Refuse or fail to comply with any provision of this Chapter; . . .

Subsections 89-13(a)(5) and (6), HRS

Subsection 89-13(a)(5), HRS, provides that the employer commits a prohibited practice by wilfully refusing to bargain in good faith with the exclusive representative as required in section 89-9, HRS, regarding the scope of negotiations. Based upon the facts contained in the record, the Board finds that Complainant failed to present any evidence which supports this allegation.

Similarly, Subsection 89-13(a)(6), HRS, prohibits the public employer from 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, relates to the dispute resolution mechanism intended to address impasses in negotiations over the terms of an initial or renewed collective bargaining agreement. The Board finds that the provision is not applicable here. Thus, Complainant's allegations of a Subsection 89-13(a)(6), HRS, violation are hereby dismissed.

Subsections 89-13(a)(1), (4), and (7), HRS

Complainant LEPERE's remaining allegations charge that the Employer discriminated or retaliated against him because he filed prohibited practice complaints with this Board. The Employer does not dispute that LEPERE's filing of numerous complaints and grievances is protected activity under the statute. However, to prevail before the Board on a retaliation theory, the Employer contends that Complainant must make a prima facie showing that his

filing of complaints was a motivating factor in the Employer's decision to discipline him.

Complainant must first show that there was an improper motive; second, that there was a causal connection between the improper motive and the decision to take the disciplinary action; and third, that the improper motive was a motivating factor in the decision to take disciplinary action.

In United Food and Commercial Workers Union, Local 480, 4 HLRB 568 (1988), the Board relied upon the analysis of the First Circuit Court of Appeals set forth in NLRB v. Wright Line, 662 F.2d 899, 108 LRRM 2513 (1st Cir. 1981) to consider whether the discipline of the employee constituted discrimination in violation of Subsection 377-6(3), HRS. We rely upon the same analysis for consideration of discrimination cases under Subsection 89-13(a)(4), HRS. As stated in United Food, supra, at p. 286:

> Under the Wright Line test, the proponent initially must demonstrate that anti-union animus contributed to the decision to discharge the employee. If this burden is satisfied, the Employer must then show by a preponderance of the evidence that the employee would have been discharged even if he had not been engaged in protected activity. We note here, that a union advocate does not cloak himself with protection from discipline or discharge by his involvement with the union. While Respondent's union animus may be apparent from the record, this does not mean that Respondent cannot discharge a union adherent so long as the discharge was not based on the adherent's union activity.

In that case, the employee was an active union supporter involved heavily in negotiations. In addition, the employee testified before the Board in unfair labor practice proceedings

against the employer approximately two to three weeks prior to his discharge.

In this case, Complainant LEPERE failed to introduce any evidence of other grievances or prior proceedings before the Board. The Board however, takes administrative notice of its files pursuant to Administrative Rules Section 12-42-8(g)(8)(F). The Board notes that this complaint was filed with the Board on March 5, 1990. Prior to the filing of this case, LEPERE filed two prohibited practice complaints against the Employer on February 6, 1990 in Case No. CE-10-132 and Case No. CE-10-133, respectively. Neither of these cases involve specific allegations against Nguyen, Tanouye, Murakami or Asher. He also filed a prohibited practice charge against the Employer on February 21, 1990 in Case No. CE-10-136.

The verbal reprimands in this case are both dated February 13, 1990 documenting counselling which took place on February 23, 1990. The Board issued the Notice to the Respondents in Case No. CE-10-136 on February 28, 1990 and according to the return receipts attached to the certified delivery of the notices, the offices of Respondents George Iranon and the Governor received the notice on March 1, 1990. As the discipline was imposed prior to that time the filing of Case No. CE-10-136 is irrelevant for our consideration.

As to Case No. CE-10-132 and Case No. CE-10-133, the Board files indicate the Notices to Respondents of the Prohibited Practice Complaint were issued by the Board on February 9, 1990. According to the return receipts attached to the notices, they were

received by Iranon's and the Governor's offices, respectively, on February 12, 1990. Although the administration may have been cognizant of the filing of the prohibited practice complaints filed by LEPERE on February 23, 1990 it appears that the Nguyen's documentation was prepared on February 13, 1990.

Moreover, the underlying incident for the first reprimand occurred on November 21, 1989. The matter was investigated by Sergeant Tanouye who recommended that Complainant be given a verbal warning. On January 2, 1990, Miles Murakami issued a memo route slip to Nguyen instructing her to administer the verbal warning. Rs' Ex. 3. Hence, the decision to discipline LEPERE for the first incident was made well prior to his filing of the complaints on February 6, 1990.

The incident giving rise to the second reprimand occurred on or about February 7, 1990, approximately the same date that LEPERE's complaints were filed with the Board. Further, while LEPERE charges Nguyen's actions, supported by Tanouye, Miles Murakami and Captain Asher, constituted the retaliation, these complaints, Case No. CE-10-132 and CE-10-133, are not against them. Given the timing of the reprimands and the filing of the complaints the Board finds that Complainant failed to establish that his filing of prohibited practice complaints with the Board was a motivating factor in the Employer's decision to discipline him. The Board finds the Complainant failed to provide any clear evidence of some improper motive on the part of the Employer. The Board further finds that there was no causal connection between any alleged improper motive on the part of the prison administration,

namely An Nguyen, and the decision to discipline LEPERE. LEPERE has failed to carry his burden in showing that his protected conduct, the filing of complaints with the Board, was a substantial or motivating factor in the disciplinary action. NLRB v. Transportation Management Corp., 462 U.S. 393, (1983).

However, assuming arguendo, that Complainant proved his prima facie case, the Board finds the Employer clearly established that the disciplinary action would have been taken even if the protected activity had not occurred.

Complainant was disciplined for his inappropriate conduct towards the inspectors. Rs' Ex. 3. The two inspectors, Cavanaugh and Webb, were performing their duties when LEPERE interrupted them at the ice machine when the ice scoop was put into the ice machine. Thereafter, Cavanaugh reviewed the food temperatures and noted an unusual rise of temperatures. Tr. II, pp. 144, 146. He drew an arrow noting the rise in temperature to remind himself to discuss the situation with Nguyen. Id., p. 149. He felt a sudden rise in food temperatures was a potentially dangerous situation for the inmates. LEPERE created a disturbance which interrupted the inspection with his hostile comments and behavior. According to Cavanaugh, LEPERE "went completely berserk and was poking his finger in my chest. . . .So he was so upset about it and was going ballistic and flapping around like a chicken." Id., p. 150. "Of course the problem was that it was loud, out of control, and there was no way I could calm him down. Everything I said made him mad." Id., p. 151.

Nguyen, who accompanied the inspectors, wrote an incident report. Rs' Ex. 3. Miles Murakami, then Community Base Administrator, received Nguyen's report and had Sergeant Wayson Tanouye conduct an investigation into the incident. Id., p. 128. Both Cavanaugh and Webb reported the incident to Annex I as they were very upset with Complainant's behavior. Id., p. 136. Their recollection of events matched what Nguyen had written in her report. Id., p. 137. Tanouye spoke with Cavanaugh, Webb, Nguyen and LEPERE and issued his report. Id., p. 128; Rs' Ex. 3. In speaking with LEPERE, LEPERE denied that he raised his voice and denied all the accusations that Nguyen made in her report. Tanouye nevertheless found that LEPERE's conduct was inappropriate towards both the inspectors and Nguyen. "It also appears that he was very rude and the sarcastic remarks were uncalled for and unprofessional." Rs' Ex. 3. Tanouye recommended that LEPERE be issued a verbal warning.

In the second incident, LEPERE was disciplined for not following rules and regulations about inmate telephone use. LEPERE was determined to have been inconsistent in the application of the telephone time by inmates. He was also counselled about his interaction with inmates because it appeared that he escalated the situations, rather than defused them. C's Ex. 2.

While the Employer concedes that there is a discrepancy regarding the long distance telephone policy at Annex 2, there was no evidence presented whether inmate Lincoln indeed was talking to an immediate family member who resided on a different island. The evidence before the Board is insufficient to conclude which rule is applicable.

If the lack of knowledge of the rules and regulations was the only reason for the discipline and the matter had been properly grieved, perhaps the discipline would have been modified at a higher level. However, LEPERE was also disciplined for his demeanor and unprofessional behavior. C's Ex. 2.

Although Hanyard testified that LEPERE was not abusive or unprofessional, he also testified that he had to intervene between the Complainant and the inmate on the phone because the situation was becoming aggressive. Tr. III, pp. 8, 12, and 20. Hanyard's testimony although outwardly supportive of LEPERE, also supports Nguyen's perception that the situation with the inmate was escalating rather than being defused.

Upon asking for copies of the policy, Complainant stated to Nguyen, "You don't know what you are doing. You don't follow rules and regulations and you don't pay attention and you always take side with the sentenced felons, the criminal." Id. Nguyen testified that LEPERE was very loud and there were inmates and other ACOs in the area. Id., p. 176.

In a paramilitary organization like the prison system where order must be maintained for the safety of the inmates, the staff and the general public, the attitude and demeanor of the correctional officers towards their superiors is critical. LEPERE's filing of complaints with this Board does not shield him from his responsibility to conduct himself as a professional ACO who is entrusted with the safety of the public and the inmates. In the Board's view, LEPERE's actions in this case would have

subjected him to some form of discipline regardless of the pendency of his prohibited practice complaints with this Board.

CONCLUSIONS OF LAW

The Board has jurisdiction over this complaint pursuant to Sections 89-5 and 89-13, HRS.

The employer commits a prohibited practice by wilfully refusing to bargain in good faith with the exclusive representative as required in section 89-9, HRS, regarding the scope of negotiations. Subsection 89-13(a)(5), HRS.

Complainant failed to present evidence which would support an allegation of a Subsection 89-13(a)(5), HRS, violation.

The employer cannot refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in section 89-11, HRS.

Section 89-11, HRS, relates to the dispute resolution mechanism intended to address impasses in negotiations over the terms of an initial or renewed collective bargaining agreement. Section 89-11, HRS, is not applicable to this case.

An employer commits a prohibited practice by retaliating against an employee engaging in protected activity under Chapter 89, HRS, such as by disciplining the employee for filing prohibited practice complaints against the employer with this Board.

Complainant failed to establish a prima facie case of retaliation because he failed to prove that there was an improper motive underlying the discipline. Nevertheless, the Employer

convincingly proved that Complainant would have been disciplined regardless of the filing of the complaints with the Board.

ORDER

The prohibited practice charges contained in Case No. CE-10-138 are hereby dismissed.

DATED: Honolulu, Hawaii, January 27, 1993.

HAWAII LABOR RELATIONS BOARD

BERT M. TOMASU, Chairperson

GERALD K. MACHIDA, Board Member

RUSSELL T. HIGA, Board Member

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