

D

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-12-163
)	
STATE OF HAWAII ORGANIZATION)	DECISION NO. 333
OF POLICE OFFICERS (SHOPO),)	
)	FINDINGS OF FACT, CON-
Complainant,)	CLUSIONS OF LAW AND
)	ORDER
and)	
)	
MAUI POLICE DEPARTMENT,)	
County of Maui,)	
)	
Respondent.)	
_____)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On March 19, 1992, the STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO, Complainant or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against the COUNTY OF MAUI POLICE DEPARTMENT (MPD, Respondent or Employer). SHOPO alleges that Respondent violated Subsections 89-13(a)(1), (5), (6), (7) and (8), Hawaii Revised Statutes (HRS), by failing to negotiate in good faith with SHOPO prior to implementing a change in work schedule.

A prehearing teleconference was held on April 16, 1992, and a hearing on this complaint was held on May 22, 1992.

All parties were afforded a full opportunity to call and cross-examine witnesses, submit exhibits and present oral arguments. Post-hearing briefs were submitted by SHOPO and Respondent on July 16, 1992.

FINDINGS OF FACT

SHOPO is the exclusive representative as defined in Section 89-2, HRS, of bargaining unit 12.

The MPD is the public employer as defined in Section 89-2, HRS, of members of bargaining unit 12.

SHOPO and the County of Maui are parties to a collective bargaining agreement (contract) for Unit 12, Police Officers, effective July 1, 1989 through June 30, 1993. Complainant's (C's) Exhibit (Ex.) 1. The parties entered into a Memorandum of Agreement (Memorandum), dated April 19, 1991, which is referred to as the Seventh Day Provision agreement. The Memorandum modifies Article 15A(2)(g) of the contract relating to Overtime. C's Ex. 1.

The Uniformed Services Bureau of the MPD uses a rotating work schedule where employees work four consecutive days and are off from work for the next two days (4-2). Transcript (Tr.) p. 144.

The Employer determined that a five days on, two days off (5-2) work schedule increases efficiency and decreases employee burnout by more evenly distributing the number of employees on duty than the 4-2 schedule. Respondent's (R's) Exs. K, P; Tr. pp. 102, 119, 141, 147. The Employer found that the 4-2 schedule creates overloads on Mondays and Fridays and lesser coverage throughout the rest of the week. Tr. pp. 103, 131, 147. The staffing overload on Mondays and Fridays became more evident as personnel increased. Tr. p. 147. The 4-2 and 5-2 work schedules both provide for a

forty (40) hour work week; eight (8) hours per day, five (5) days per week. Tr. pp. 111, 147.

The Union representatives indicated that overtime is earned faster under the 4-2 than on a 5-2 work schedule. Tr. p. 63. In addition, the SHOPO members felt that they had more time off under the 4-2 schedule. Tr. pp. 87-88.

Over the past four years, the parties have met, discussed and corresponded with each other over the proposed implementation of a 5-2 work schedule for the MPD, including the island of Molokai. R's Exs. F, G, H, I, J, K, L, M, N, O and P; Tr. pp. 58, 81, 125, 140-142. The 5-2 schedule was implemented on a trial basis on Molokai in 1988 with SHOPO's consent. R's Exs. B, D, E; Tr. pp. 105-108.

By letter dated September 26, 1989, Chief Howard H. Tagomori (Tagomori) informed SHOPO that the Employer was contemplating a change in the work schedule from 4-2 to 5-2. The Employer offered to meet and confer on the work schedule change. C's Ex. F. After receiving no response from SHOPO, Tagomori again wrote to SHOPO on January 9, 1990, informing the Union of the Employer's desire to meet with representatives to discuss any concerns. Tagomori also indicated that the Employer preferred a backward rotation on the days off rather than a forward rotation as required under the contract. C's Ex. G. SHOPO responded by letter dated January 23, 1990, appointing officers to represent SHOPO in discussions regarding the work schedule. SHOPO indicated that Article 27 of the contract was affected by the work schedule change

and mutual agreement was required before implementation of the new work schedule. C's Ex. H.

There were two meetings between the parties' representatives; the first on February 14, 1990 and the second on March 6, 1990. C's Ex. G. SHOPO Business Agent Wilhelm Cordes, Jr. wrote to Tagomori on March 20, 1990, indicating that SHOPO saw no significant benefit in the 5-2 schedule. C's Ex. J. By letter dated March 30, 1990, Tagomori responded that the staffing of officers was more evenly distributed under the 5-2; the distribution of staff was standardized week-to-week; there was no change to the 40-hour week, 8-hour a day schedule; and the 5-2 conformed to the contract. C's Ex. K.

On December 27, 1991, SHOPO's Maui Chapter Vice Chair William G. Myers wrote to Tagomori objecting to the implementation of the 5-2 watch schedule on Molokai effective January 5, 1992 and the impending implementation of the 5-2 schedule in Wailuku and Lahaina. C's Ex. L. The parties met thereafter on January 6, 1992 and it was agreed that a poll would be taken and SHOPO would provide alternative schedules to the Employer. C's Ex. M. The poll indicated that ninety (90) percent of the officers were against implementation of the 5-2 schedule. Tr. p. 91.

On April 8, 1992, Assistant Chief Glen Nakashima sent a memorandum to the Watch Commander of the Uniformed Services Bureau reflecting the Employer's intent to proceed with the implementation of the 5-2 schedule during the week of May 3, 1992. Nakashima indicated that the seven schedules proposed by SHOPO did not evenly distribute the officers as compared with the 5-2 schedule. Nakashima further indicated that the work schedule would be uniform

Nakashima further indicated that the work schedule would be uniform for a five-week period. The first 4 weeks would be a 5-2 schedule and the fifth week would be a 6-2 work week which was necessary to rotate the days off in a forward manner as set forth in the contract. C's Ex. 3.

The Communications Division, DUI Traffic Division, and the Criminal Investigation Division (CID) of the MPD are currently on a 5-2 work schedule. Tr. pp. 104, 127, 128. There is no evidence of any written agreements between the parties to evidence either the establishment of the 4-2 or the 5-2 watch schedules. The Employer, however, indicated that in 1990, the MPD sought to have the 5-2 schedule implemented throughout the whole MPD. Tr. p. 129. Other jurisdictions, such as Kauai County and the City and County of Honolulu have 9-5 (nine hours per day, five days per week) and 5-2 work schedules, respectively. Tr. p. 144. Hawaii County also uses a 4-2 work schedule. Id.

DISCUSSION

SHOPO contends that the MPD's unilateral implementation of the 5-2 work schedule in its Uniformed Services Bureau without negotiation violates Subsections 89-13(a)(1), (5), (6), (7) and (8), HRS. Those sections provide:

89-13 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;

* * *

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

In its complaint, SHOPO alleges that the MPD violated Subsection 89-13(a)(6), HRS, i.e., by refusing to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in Section 89-11. The procedures set forth in Section 89-11, HRS, relate to impasses in bargaining over the terms of a collective bargaining agreement and interest arbitration procedures. The Board finds that the foregoing provisions are inapplicable to this case and since SHOPO fails to address this issue in its written arguments, the Board dismisses SHOPO's allegations involving a violation of Subsection 89-13(a)(6), HRS.

The gravamen of SHOPO's complaint is that the Employer violated SHOPO's statutory rights and the contract by implementing the 5-2 work schedule without first negotiating with, and obtaining mutual consent from the Union. The charges of Subsections 89-13(a)(1), (5), and (7), HRS, violations pertain to rights provided in Sections 89-1, 89-3, and 89-9, HRS, which SHOPO argues makes it mandatory to bargain in good faith with respect to wages, hours, and conditions of employment.

The Employer, on the other hand, maintains that implementation of a 5-2 work schedule is subject only to consultation and is non-negotiable.

In Decision No. 22, Hawaii State Teachers Association, 1 HPERB 253 (1972), the Board recognized that all matters affecting wages, hours and working conditions are negotiable and bargainable, subject only to the limitations set forth in Subsection 89-9(d), HRS. Subsection 89-9(d), HRS, is the management's rights clause which excludes from the subjects of negotiations matters which would interfere with the rights of the employer to:

(1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reasons; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.

The test as to whether the subject is a condition of employment and a mandatory subject of bargaining is determined by the nature of the impact of the matter on terms and conditions of employment, i.e., whether it has a material and significant effect on terms and conditions of employment. Hawaii Government Employees Association, 1 HPERB 763 (1977).

In the Hawaii Government Employees Association case, supra, the Board indicated that there must be a conclusive showing of the impact of an issue on the employment relationship to compel

negotiation and adopted the National Labor Relation Board's interpretation of a similar provision of the National Labor Relations Act. A mere remote, indirect or incidental impact is not sufficient. In order for a matter to be subject to mandatory collective bargaining it must materially and significantly affect the terms and conditions of employment.

In Decision No. 26, Department of Education, 1 HPERB 311 (1973), the Board found a work load proposal which would have fixed the maximum number of students per teacher or team of teachers to be non-negotiable. The Board referred to its previous holding in Decision No. 22 stating:

In that case, we held that "wages, hours and other terms and conditions of employment" which are negotiable, and the rights of the employer reserved in Section 89-9(d) were not mutually exclusive categories. We found that class size was a hybrid issue; it involved both policy making and had a significant impact on working conditions.

We determined therein that the provision calling for a reduction in the average class size ratio throughout the statewide educational system by approximately one student was negotiable. In reaching our decision, this Board balanced the employer's broad right to establish educational policy, unfettered by a collective bargaining agreement on the one hand, against the direct impact the average class size ratio had on the teachers' working conditions. Notwithstanding its admitted relation to educational policy, we found in that instance that the element of impact on teachers' working conditions was great, while the imposition of an average, statewide class size ratio had minimum impact on the DOE's right to establish educational policy.

While we held that Section 89-9(d) should not be narrowly construed so as to negate the purposes of bargaining, we concomitantly expressed the view that said section should

not be too liberally construed so as to divest the employer of its managerial rights and prevent it from fulfilling its duty to determine policy for the effective operation of the public school system. Therefore, we further found that other issues raised in that case, which dictated the number of teachers the employer was to hire in order to implement the reduction and which dictated the assignment of teachers to specific roles, were in violation of Section 89-9(d).

* * *

Here, again, we are faced with a hybrid proposal, which involves both educational policy making and has a significant impact on working conditions. Therefore, while the work load proposal is admittedly a significant term and condition of employment, we must determine, nevertheless, whether the proposal so interferes with management's right to establish educational policy and operate the school system efficiently as to render it non-negotiable under Section 89-9(d).

* * *

Therefore, it is our opinion that the specific proposal on work load which is here at issue, while admittedly concerned with a condition of employment because it may affect the amount of work expected of a teacher, nevertheless, in far greater measure, interferes with the DOE's responsibility to establish policy for the operation of the school system, which cannot be relinquished if the DOE is to fulfill its mission of providing a sound educational system and remaining responsive to the needs of the students while striving to maintain efficient operations. Hence, the DOE and the HSTA may not agree to the subject work load proposal because such agreement would interfere substantially with the DOE's right to determine the methods, means, and personnel by which it conducts its operations and would interfere with its responsibility to the public to maintain efficient operations.

Id. at p. 321.

Also significantly, in Decision No. 26, the Board found the Union's reopening proposal which entailed the scheduling of preparation periods during the instructional day to be non-negotiable. In its discussion, the Board stated:

While we find that preparation periods constitute a condition of employment, the specific issue herein concerns the scheduling of preparation periods. It is our opinion that the scheduling of preparation periods is, in effect, the scheduling of work, which has been, and should remain, the right of the DOE as an employer. Inasmuch as preparation periods are periods of work like any other for which teachers are being compensated, the DOE should continue to have the freedom to schedule preparation periods in the same manner as any other period of work, at any time during the teachers' work day (whether within or outside of the students' instructional day) as it deems feasible.

* * *

Therefore, we find that the portion of the reopening proposal on preparation periods, which calls for the scheduling of such periods within the students' instructional day, would interfere with the employer's rights to assign employees and to determine the methods, means, and personnel by which it operates the public school system in a manner necessary to maintain efficient operations. Hence, that particular portion of the proposal on preparation periods may not be agreed to by the parties.

Id. at pp. 323-24.

In Decision No. 102, Hawaii Fire Fighters Association, 2 HPERB 102 (1979), the Board held that the Union's company staffing proposal for the various firefighting installations would require adopting minimum staffing standards for each fire station. The Board found that the proposal would directly interfere with management's rights to determine personnel by which its operations

are to be carried out, assign and transfer its personnel, relieve employees because of lack of work and maintain efficient operations so as to preclude negotiations on the subject. The Board stated:

This ruling is made with full appreciation that manning levels obviously have an impact on working conditions. However, in striking a balance between the mandate in Subsection 89-9(a), HRS, that working conditions be negotiated and the prohibitions on agreements on certain subjects contained in Subsection 89-9(d), HRS, it is clear that the scales tip heavily against negotiability in this case because of the magnitude of interference with management's rights the HFFA minimum manning proposal would present and the absence of a showing by the HFFA of sufficient justification for such interference as would warrant a different conclusion.

Id. at p. 213.

It is clear that the change from a 4-2 to a 5-2 work schedule impacts on terms and conditions of employment. The first issue presented is whether the change constitutes a material and substantial impact on working conditions.

The Union contends that there will be a loss of overtime compensation for the employees under the 5-2 schedule and the officers feel that they have more time off under the 4-2 schedule. The Employer, on the other hand, argues that the 5-2 work schedule will distribute the staff more evenly in a standardized fashion. The schedule therefore promotes more efficient operations by reducing the overload of officers on Mondays and Fridays. The Employer also contends that the 5-2 schedule as devised will comply with the contract in that the schedule will rotate in a forward fashion as opposed to the backwards fashion of the 4-2 schedule.

The Board finds that the implementation of a 5-2 schedule does not affect the eight-hour per day, five-day work week for the employees. Police patrol officers work in three eight-hour shifts to provide 24-hour per day coverage. Police patrol officers perform shift work as a condition of their employment. Work schedules include provisions for rotating shifts and days off. In essence, the very nature of police patrol work lends itself to the constant adjustment of work hours. R's Exhibit Q.

The Board concludes that the evidence fails to establish that a change in the work schedule from a 4-2 to a 5-2 system would be so disruptive as to constitute a material and significant impact on terms and conditions of employment. Thus, it is unnecessary to proceed with the analysis to determine whether the matter interferes with management's rights to the extent which would render the matter non-negotiable.

Moreover, the Employer's diligent and thorough dialogue with the Union, including committee meetings to discuss operational aspects of the proposed work schedule change as well as informal polls to gather input from employees, embodies the very essence of meaningful consultation. The Board finds that the Employer fulfilled its obligations under Chapter 89, HRS, to consult regarding the implementation of the 5-2 schedule.

Hence, the Board finds that SHOPO failed to prove that the matter was negotiable as a matter of law and that the Employer unlawfully refused to negotiate the change in work schedules. Therefore, the Board dismisses SHOPO's claims of Subsection 89-13(a)(1), (5) and (7), violations.

Turning to the issue of whether there were contract provisions which were violated by the implementation, SHOPO cites Articles 1 and 27. Article 1, Recognition, of the contract provides in part:

The Employer agrees that it shall consult the Union prior to the final formulation and implementation of personnel policies and practices affecting employee relations on wages, hours or conditions of employment. No changes in wages, hours, or other conditions of work contained herein may be made except by mutual consent.

Article 14, Changes in Departmental Rules, provides, in part:

The Employer agrees to furnish the Union with a written notice of the Employer's intention to make changes in departmental rules, policies or procedures that would affect the working conditions of employees or equipment peculiar to police work. . . .

Article 27, Hours of Work, provides:

The normal work week for each unit member shall be not more than forty (40) hours.

Such work week shall consist of five (5) eight (8) hour work days or any other arrangement agreeable to the Union and the Employer and not detrimental to the efficient rendering of police service.

An Agreement may be entered into between the Union and the Employer to modify the limitation of an 8-hour day and a 40-hour week for an employee or a group of employees of a work unit.

All employees who do not have regular weekends off shall have their days-off rotated in a forward manner at least once a month or in any other manner agreed upon by the Union and the Employer.

SHOPO contends that Article 1 of the contract requires that the 5-2 work schedule be negotiated and agreed to by the Union prior to its implementation. According to the specific language of

Article 1, no changes can be made in wages, hours, or other conditions of work contained in the contract without mutual consent of the parties. However, there is no provision in the contract which specifically establishes a 4-2 schedule for Maui County.

Article 27 provides that the normal work week is not more than forty hours; consisting of five eight-hour work days or any other arrangement agreeable to the parties and not detrimental to the efficient rendering of police services. The 5-2 schedule proposed by the Employer consists of five eight-hour work days. As explained by Nakashima in his memorandum to the watch commanders, in order to rotate the days off in a forward manner in compliance with Article 27, the schedule changes to a 6-2 schedule after five weeks. C's Ex. 3. Thus, the implementation of the 5-2 schedule does not constitute a change in hours or conditions of work contained in the contract which requires mutual consent.

SHOPO's witness, George Kahoochanohano testified that the 4-2 schedule is recognized in the Memorandum containing the Seventh Day provision. The Seventh Day provision was referred to as the enhanced overtime provision. Contrary to SHOPO's contentions the provision does not refer to Maui County and its established 4-2 watch schedule. The provision merely recognizes that consecutive days off may involve one (1), two (2) or three (3) days and consecutive work days may involve four (4), five (5) or six (6) days in a scheduled work week. Again, the proposed 5-2 work schedule does not modify or change the provisions of the Memorandum.

SHOPO argues that the 5-2 schedule will be affected when the Seventh Day provision is applied. While the 5-2 schedule may delay the application of the overtime provisions, its implementation in no way modifies the terms of the Memorandum so as to require the mutual consent of the Union. The Board therefore concludes that SHOPO has failed to carry its burden of proving a violation of Subsection 89-13(a)(8), HRS.

CONCLUSIONS OF LAW

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

An Employer commits a prohibited practice when it refuses to participate in good faith in the mediation, fact-finding, and arbitration procedures of Section 89-11, HRS.

Complainant failed to carry its burden of proving that the Section 89-11, HRS, procedures were applicable to this case and failed to argue the issue in its brief.

An Employer commits a prohibited practice when it attempts to implement a policy which has a material and significant impact on terms and conditions of employment, and fails to negotiate the policy with the Union.

Complainant failed to prove by a preponderance of the evidence that the implementation of the 5-2 work schedule has a material and significant impact on terms and conditions of employment.

The Employer fully complied with the meet and confer provisions of Article 14 of the contract.

An Employer commits a prohibited practice by violating the contract if it changes wages, hours or other conditions of employment contained therein without the consent of the Union.

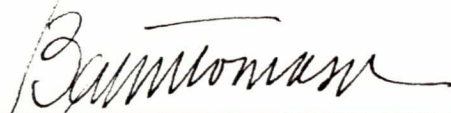
Complainant failed to prove by a preponderance of the evidence that the 5-2 work schedule changes hours or conditions of employment set forth in the contract to require the Union's consent prior to its implementation.

ORDER

The prohibited practice charges in the instant complaint are hereby dismissed.

DATED: Honolulu, Hawaii, April 1, 1993.

HAWAII LABOR RELATIONS BOARD


BERT M. TOMASU, Chairperson


GERALD K. MACHIDA, Board Member


RUSSELL T. HIGA, Board Member

Copies sent to:

Michael K. Kaneshiro, Esq.
Marlene Q.F. Young, Deputy Corporation Counsel
Joyce Najita, IRC
Robert Hasegawa, CLEAR
State Archives
University of Hawaii Library
Publications Distribution Center
Richardson Law Library
Library of Congress