

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-10-132
)	
THOMAS LEPERE,)	DECISION NO. 348
)	
Complainant,)	FINDINGS OF FACT, CONCLU-
)	SIONS OF LAW AND ORDER
and)	
)	
JOHN WAIHEE, Governor, State)	
of Hawaii and DEPARTMENT OF)	
CORRECTIONS, State of Hawaii,)	
)	
Respondents.)	

In the Matter of)	CASE NO. CU-10-65
)	
THOMAS LEPERE,)	
)	
Complainant,)	
)	
and)	
)	
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO,)	
)	
Respondent.)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On February 6, 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 (collectively Employer). LEPERE alleged that the Employer engaged in prohibited practices when it failed to provide him with a meal prior to pre-shift briefings and refused to participate in good faith in the mediation, fact-finding, and arbitration

procedures provided in Section 89-11, Hawaii Revised Statutes (HRS), thereby violating Sections 89-13(a)(6), (7) and (8), HRS.

Similarly, on February 6, 1990, LEPERE filed a prohibited practice complaint with the Board against Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union). LEPERE alleged that UPW engaged in prohibited practices when it refused to provide him with grievance forms, failed to process his grievance against the Employer and refused to participate in good faith in the mediation, fact-finding, and arbitration procedures provided in Section 89-11, HRS, thereby violating Sections 89-13(b)(2), (3), (4), and (5), HRS.

On March 7, 1990, the Board found that the cases involved substantially the same parties and issues and thus, consolidated the two prohibited practice complaints pursuant to Administrative Rules Section 12-42-8(g)(13) in Order No. 773.

On April 4, 1990, the Board conducted a hearing on the merits of the case. The parties submitted posthearing briefs to the Board. 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 Corrections Officer (ACO) III, at the Oahu Community Correctional Center (OCCC), DOC, and a member of bargaining unit 10.

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

Respondent UPW was at all times relevant the exclusive representative of bargaining unit 10 members as defined in Section 89-2, HRS.

Between April 1, 1989 and November 5, 1989, the Employer instituted a procedure whereby food would be removed from the OCCC mess area prior to pre-shift briefings. Transcript of hearing held on April 4, 1990 (Tr.), pp. 55-56. LEPERE alleged that the new procedure prevented him from receiving his pre-shift meals as provided by Section 51.03 of the Unit 10 collective bargaining agreement (Agreement). Subsequently, LEPERE made two visits to the UPW to obtain grievance forms.

On August 31, 1989, LEPERE went to the UPW offices and "checked in" with Rita Kamei (Kamei), the office receptionist, and asked her for grievance forms. Kamei informed LEPERE that she did not have the grievance forms but could refer him to UPW business agent, Mel Rodrigues (M. Rodrigues) Tr., pp. 102-03. LEPERE told Kamei he "[didn't] want to talk to Mel Rodrigues because Mel Rodrigues doesn't help [him] out." Id., p. 103. LEPERE spoke in a loud voice and used profanity. Id. Unaccustomed to such behavior, Kamei sought the help of Al Loughrin (Loughrin) who worked in the office's accounting section. Id., p. 104. Loughrin explained to LEPERE that the UPW staff lacked the authority to furnish Union members with grievance forms. Id., p. 105. After apologizing to LEPERE, Loughrin escorted him out of the building. Id., pp. 105-06.

On October 13, 1989, LEPERE visited UPW a second time. He checked in with Kamei again and asked her for grievance forms.

Kamei asked him who his business agent was. LEPERE responded in a loud voice, "Mel", and then yelled out, "I've been here before." Tr., p. 107. Alarmed by the yelling, UPW's Assistant Division Director for Oahu, Robert Chang (Chang), left his office and ran out to the reception area. Id., p. 128.

As he approached the reception area, Chang heard LEPERE shout out "the union isn't worth shit." Tr. p. 129. Chang also heard LEPERE shout, "the fucking Union is no good and trying to deny [me] a grievance form". Id. When Chang asked LEPERE where he worked, LEPERE responded "None of your goddamn business. All I'm here for is a copy of a grievance form." Tr., pp. 129-30. When Chang repeated the question, LEPERE responded by threatening to sue the Union and suggesting to Chang that "if the union wanted to know how unions operate, [it] should go to New York City and find out how the big boys operate." Id., p. 130. At that point, Chang asked LEPERE to leave and escorted him out of the front door. Id.

After his second visit to the UPW, LEPERE typed out his own grievance and returned to the UPW on October 16, 1989. At that time he met with M. Rodrigues. Complainant's (C's) Exhibit (Ex.) 5; Tr., pp. 136-37. The two men discussed the availability of pre-shift briefing meals at OCCC. At the end of the meeting, M. Rodrigues told LEPERE that he would "do [a] follow-up investigation and get back with him." Id., p. 138. At no time during the meeting did LEPERE ask M. Rodrigues for a grievance form or make reference to a letter he sent to UPW State Director, Gary Rodrigues (G. Rodrigues). Id.

In his letter to G. Rodrigues, dated October 16, 1989, LEPERE complained about the "unsatisfactory" assistance he received during his visits to the UPW on August 31, 1989 and October 13, 1989. The letter included a request that the Union change its procedure for providing grievance forms to Union members. C's. Ex. 4.

On the day after meeting with LEPERE, M. Rodrigues went to OCCC to "start a preliminary follow-up investigation." Id., p. 140. When he arrived at OCCC, M. Rodrigues learned that the OCCC Administrator, Jack Kellam (Kellam), was on vacation and that the Chief of Security, Kenneth Saito (Saito), was not in. Id. M. Rodrigues returned to his office and wrote a "follow-up letter" to Kellam. Id. The letter served as notification to Employer of the Union's ongoing investigation and included a request that Kellam meet with the Union. Respondent's (R's) Exhibit (Ex.) 2; Tr., p. 140.

Pursuant to Section 15.08 of the Agreement, the Employer and UPW scheduled a meeting for November 14, 1989, to informally seek a resolution to LEPERE's complaint. Tr., pp. 141-42. However, prior to that meeting, M. Rodrigues completed his investigation into the availability of pre-shift meals. Id., p. 142.

As part of his investigation, M. Rodrigues spoke to Gus Palipali (Palipali), a UPW steward at OCCC, as well as other ACOs. Id. He learned that Employer had a problem with ACOs "losing track of time while they were having their pre-shift meal" and then reporting late for briefings. Id., p. 150. To correct the

problem, Employer began removing hot entrees from the mess 15 minutes prior to the briefings. Id., p. 151. M. Rodrigues also found no violation of the Agreement since pre-shift meals were being provided within a reasonable time before briefings. Id., pp. 154-55. Despite his findings, M. Rodrigues decided to go ahead with the November 14th meeting. Id., p. 161.

In attendance at the November 14th meeting were M. Rodrigues, Saito and Palipali. Tr., p. 142. M. Rodrigues apprised Saito of LEPERE's complaint and urged him to keep the hot entrees out until five minutes prior to the start of pre-shift briefings. Id., p. 153. Saito agreed to the "five minute" time frame. Id.

Following the November 14th meeting, M. Rodrigues checked to see if OCCC had instituted the new procedure. Tr., p. 153-54. He verified that hot entrees remained out until five minutes before the start of all three pre-shift briefings. Id. After confirming that Employer had agreed to and complied with the Union's suggestion, M. Rodrigues considered the matter resolved. Id., p. 179. He attempted to contact LEPERE at the OCCC control center and left messages there for LEPERE to "get back to him." Id., p. 180. LEPERE failed to return any of the calls. Id. Approximately two months later LEPERE filed another complaint pertaining to pre-shift briefing meals.

In his complaint, LEPERE alleged that on February 3, 1990, he arrived at the official mess fifteen minutes prior to the third watch pre-shift briefing and observed a food service employee removing all the meals. C's Ex. 2; Tr., p. 69. He approached the worker on duty, William Richards (Richards), and asked him where

the food was. Id., p. 198. Richards told LEPERE that he had been instructed to remove the food between 2:30 and 2:40 p.m. Id. LEPERE responded, "What the hell am I suppose to eat if you pulled the food off the line?" Id., p. 199. Richards told LEPERE that he had placed the entree in a nearby warmer. Id., p. 202. LEPERE could not recall whether he looked into the warmer or that a warmer even existed in the mess that day. Id., pp. 73-74.

Shortly thereafter, at approximately 2:40 p.m., LEPERE filed a complaint with Acting Lieutenant Peter Skeen (Skeen). Id., p. 182. Skeen told LEPERE that he was complaining to the wrong person since he did not handle the food line. Id., pp. 182-83. Eventually, Skeen agreed to "check into it later." Id., p. 183.

At about 3:10 p.m. Skeen went to the mess to talk to Richards. Skeen informed Richards that he had "received a complaint from some of the ACOs that all the food was gone." Tr., p. 183. Richards told Skeen he had placed the main entree in the warmer, and that all the ACOs had to do was go to the warmer, open the door and serve themselves. Id. Skeen spoke to several food service workers in the area, all of whom verified Richards' story. Id., p. 184. Skeen also looked into the warmer and found three pans of roast pork or roast beef inside. Id. Skeen concluded that meals were available prior to the pre-shift briefing. Id., p. 186.

Section 51.03 of the Agreement provides for pre-shift briefing meals at OCCC and states that the time spent in the briefing is not considered time worked. The negotiations history indicates that in 1979, the ACOs at OCCC specifically wanted meals

provided instead of overtime compensation for pre-shift briefings.
Tr., p. 214.

DISCUSSION

The charges brought before the Board involve alleged violations of Sections 89-13(a)(6), (7) and (8), HRS, by the Employer; and alleged violations of Sections 89-13(b)(2), (3), (4) and (5), HRS, by the UPW.

Section 89-13, HRS, provides in pertinent part:

Prohibited practices; evidence of bad faith.

(a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

* * *

- (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.
- (b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

* * *

- (2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in Section 89-9;
- (3) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in section 89-11;
- (4) Refuse or fail to comply with any provision of this chapter; or
- (5) Violate the terms of a collective bargaining agreement.

Subsection 89-13(a)(6) HRS

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. As 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 to the instant matter. Therefore, the Board hereby dismisses LEPERE's allegations of a Subsection 89-13(a)(6), HRS, violation.

Subsections 89-13(a)(7) and (8), HRS

LEPERE's remaining charges against Employer involve alleged violations of Section 51.03 of the Agreement. The language contained in Section 51.03 is clear and unambiguous. The section provides:

Notwithstanding Sections 51.01 and 51.02, time spent by adult correctional officers at Oahu Community Correctional Center in required pre-shift briefing shall not constitute time worked, and such adult correctional officers shall be furnished a meal prior to the briefing.

C's Ex. 7; p. 145.

Where contractual language is clear and unambiguous, it must be uniformly enforced as stated by Elkouri and Elkouri, How Arbitration Works, pp. 348-349:

Language Which is Clear and Unambiguous

If the language of the agreement is clear and unequivocal, an arbitrator generally will not give it meaning other than that expressed. As Arbitrator Fred Witney has stated, an arbitrator cannot "ignore clear-cut contractual language," and he "may not legislate new

language, since to do so would usurp the role of the labor organization and employer." Even though the parties to an agreement disagree as to its meaning, an arbitrator who finds the language to be unambiguous will enforce the clear meaning.

Section 51.03 requires the Employer to furnish ACOs with meals for their "time spent" at pre-shift briefings. LEPERE charges that the Employer failed to comply with Section 51.03 on two separate occasions.

LEPERE alleged that between April 1, 1989 through November 5, 1989, the Employer failed to provide him with any pre-shift briefing meals. Tr., pp. 55-56. M. Rodrigues conducted an investigation into LEPERE's allegations. Id., p. 142. As part of his investigation, M. Rodrigues spoke to the Union steward at OCCC, Gus Palipali, as well as other staff members. Id., p. 142. He also made several visits to the mess during the various workshifts to check on whether Employer was complying with the Agreement. Id., pp. 161-64.

M. Rodrigues' investigation revealed that the mess hall remained unlocked and readily accessible 24 hours a day. Id., p. 144. Inside the mess M. Rodrigues found a salad bar filled with vegetables, a shelf stocked with fruits, a warmer containing hot meals and a cooler filled with juice and milk. Id., pp. 145-47. All of the food items were regularly available except for the hot meals, which were being removed from the mess prior to briefings. Id., p. 152.

Upon investigating why the hot meals were being removed, M. Rodrigues learned that the Employer had a problem with ACOs

reporting late to briefings because they were still eating. Id., p. 150. To correct the problem, Employer removed hot entrees from the mess fifteen minutes prior to the briefings. Id., p. 151. M. Rodrigues concluded that the Employer provided ACOs with pre-shift meals during the period in question. Id., pp. 154-55.

LEPERE further alleged that on February 3, 1990, he arrived to the official mess fifteen minutes prior to the third watch pre-shift briefing and observed a food service employee, William Richards (Richards), removing all of the meals. C's Ex. 2; Tr., p. 69. When confronted by LEPERE, Richards explained that he had been told to remove the food between 2:30 and 2:40 p.m. Id., p. 198. Richards also told LEPERE he had placed the entrees in a nearby warmer. Id., p. 202. Unhappy with Richards' responses, LEPERE filed a complaint with Acting Lieutenant Skeen. Id., p. 182.

Skeen went to the mess to investigate LEPERE's allegations. Skeen approached Richards and told him that "he had received a complaint from some of the ACOs that all the food was gone." Tr., p. 183. Richards denied the allegations and told Skeen, "he took the main entree out [of the steamer] and put it in the warmer." Id. Several food service workers spoke with Skeen and verified Richards' story. Id., p. 184. Skeen looked into the warmer and saw three trays of roast pork or beef inside. Id. Skeen concluded that meals were available prior to the pre-shift briefing. Id., p. 186.

The Board finds that Employer furnished ACOs with pre-shift meals as required under Section 51.03 of the Agreement. The

Board also finds that although the Employer removed the entrees from the mess fifteen minutes prior to briefings, it did so in accordance with Section 9 of the Agreement. Section 9 provides that:

The Employer reserves and retains, solely and exclusively, all management rights, powers and authority including the right of management to manage and direct its work forces and operations except those as may be granted under this Agreement.

C's Ex. 7; p. 11.

The record indicates that Employer had an ongoing problem with ACOs showing up late for pre-shift briefing. To correct the problem, the Employer removed hot entrees from the mess fifteen minutes prior to the briefings. Id., p. 151. Skeen stated that in the three years he has been conducting pre-shift briefings, he has had to go to the mess "quite often" to call ACOs who were late for briefings. Id., p. 187.

Under Section 9, Employer has the right to schedule pre-shift meals so that they will not conflict with management's work force and operations. During pre-shift briefings, ACOs are given their work assignments, apprised of vacant posts which may need coverage and informed of various notices and other information. Tr., p. 187. The pre-shift briefings allow for the orderly transition of personnel from one watch to another and are important enough that management may use reasonable attempts to ensure that ACOs report to briefings on time. Because of the continuous problem with "tardiness" it was reasonable for Employer to remove the entrees from the mess fifteen minutes prior to pre-shift briefings.

LEPERE failed to prove that Employer breached the Agreement at any time. Moreover, although Section 51.03 does not specify a time period as to when a pre-shift briefing meal must be furnished, Employer agreed to the UPW's suggestion that pre-shift meals be left out until five minutes prior to briefing. Tr., p. 153.

Subsection 89-13(b)(2), HRS

Subsection 89-13(b)(2), HRS, prohibits an employee organization from refusing to bargain with the public employer as required in Section 89-9, HRS. In this case, there is no evidence that the Union refused to bargain with the public employer. Furthermore, the refusal to bargain charge is properly raised by a public employer who has the reciprocal duty to bargain in good faith. As such, the Board finds that LEPERE cannot raise a refusal to bargain charge against the UPW and hereby dismisses his allegation of a Subsection 89-13(b)(2), HRS, violation.

Subsection 89-13(b)(3), HRS

Subsection 89-13(b)(3), HRS, prohibits an employee organization from refusing to participate in the mediation, fact-finding and arbitration procedures set forth in Section 89-11, HRS. The mediation, fact-finding, and arbitration procedures in Section 89-11, HRS, refer to the impasse resolution mechanism for interest arbitrations involving the terms of the contract rather than the grievance resolution mechanism which involves the violation or interpretation of the contract. The Board finds that the provision

is not applicable to the facts in this case and hereby dismisses LEPERE's allegations of a Subsection 89-13(b)(3), HRS, violation.

Subsection 89-13(b)(5), HRS

Subsection 89-13(b)(5), HRS, prohibits an employee organization from violating the collective bargaining agreement. The facts in this case do not support a charge of contract violation on the part of UPW. Parties to the collective bargaining agreement include the public employer and the exclusive representative. Since LEPERE does not fall within the definition of "Employer," he lacks standing to maintain his allegation against the UPW. Thus, the Board dismisses LEPERE's allegation of a Subsection 89-13(b)(5), HRS, violation.

Subsection 89-13(b)(4), HRS

The remaining allegation against the UPW is the alleged violation of Subsection 89-13(b)(4), HRS, for the breach of its duty of fair representation. LEPERE alleged that the Union refused to provide him with grievance forms and failed to process his grievance against Employer.

LEPERE made two visits to UPW to obtain grievance forms. His first visit was on August 31, 1989. He requested a grievance form from the receptionist. She informed LEPERE that she did not have the grievance forms but could refer him to his business agent. LEPERE became upset and agitated, raising his voice and swearing. The receptionist was frightened by LEPERE's conduct and sought the help of a co-worker. The co-worker explained to LEPERE that staff did not have the grievance forms and that it was not their job to

handle grievances. Despite this explanation, LEPERE continued with his outburst. The co-worker apologized to LEPERE and escorted him out of the building.

When LEPERE paid a second visit to UPW on October 31, 1989, he again asked the receptionist for grievance forms. When she asked LEPERE who his business agent was, LEPERE began to raise his voice. This time UPW's Assistant Division Director for Oahu, Robert Chang (Chang), came to assist LEPERE. As Chang approached the reception area, Chang heard LEPERE shout out, "the union isn't worth shit," and that "the fucking union is no good and trying to deny [me] a grievance form." Tr., p. 129. When Chang asked LEPERE where he worked, LEPERE responded "None of your goddamn business. All I'm here for is a copy of a grievance form." Id., pp. 129-30. When Chang repeated the question, LEPERE responded by threatening to sue the Union and suggesting to Chang that "if the union wanted to know how unions operate, [it] should go to New York City and find out how the big boys operate." Id., p. 130. At that point, Chang asked LEPERE to leave and escorted him out the front door.

Kamei, Loughrin and Chang were following the Union's policy when LEPERE requested the grievance forms. According to UPW State Director Gary Rodrigues (G. Rodrigues), grievance forms are not available through the receptionist or left around for anyone to pick up. The grievance forms are left with the business agents assigned to the various bargaining units. When members go to the Union hall to file a grievance, they check in with the receptionist who then directs them to their business agent. If their business agent is out, the receptionist so informs the member and tells them

that they can either come back later or speak to the "Business Agent of the Day." Id., p. 217.

G. Rodrigues indicated that the Union restricts the distribution of grievance forms to protect itself from unfair representation cases. Tr., p. 218. He explained that "if we just hand out the forms at the reception or at anyplace, you can bet your last dollar that after a grievance goes awry" for whatever reason, the grievant will file a complaint against the Union claiming that, "the union just handed me the form, they didn't tell me anything, they didn't help me at all." Id., pp. 218-19. Thus, the UPW will provide a member with a grievance form, but only after a business agent has informed the member that he is on his own and that he cannot come back at a later date and say, "I filled out the form wrong and I've lost, and now I want the union to begin a new grievance." Id., p. 218.

The Board finds, based upon the facts in the record, the Union representatives did not unreasonably refuse to furnish the grievance forms to LEPERE. Based upon the description of LEPERE's demeanor and behavior, the Union acted properly in removing him from the premises. When LEPERE later met with M. Rodrigues on October 16, 1989, LEPERE failed to ask him for a grievance form. As such, the Board finds that LEPERE could have obtained the grievance forms had he followed the Union procedures and received them from his business agent.

With respect to LEPERE's allegations that the UPW refused to process his grievance, the record indicates that UPW business agent M. Rodrigues responded to LEPERE's allegations. M. Rodrigues

initiated an investigation the next day after meeting with LEPERE. M. Rodrigues was unable to speak to the Administrator or his second in command, so he wrote to the Administrator requesting a meeting with the Union. Pursuant to Section 15.08 of the agreement, the Employer and the UPW scheduled a meeting for November 14, 1989. Section 15.08 provides in pertinent part:

A grievance shall, whenever possible, be discussed and settled informally between the grievant and his immediate supervisor. The grievant may be assisted in his request by the Union Steward or Representative.

C's Ex. 7; p. 25.

Prior to the meeting, M. Rodrigues completed his investigation into the availability of pre-shift meals at OCCC. He found that the Employer began removing hot entrees from the mess 15 minutes prior to the briefings. He concluded, however, that Employer did not violate the Agreement since pre-shift meals were being provided within a reasonable time prior to briefings. Despite his findings, M. Rodrigues decided to go ahead with the November 14th meeting.

At the November 14th meeting, M. Rodrigues met with Saito. M. Rodrigues apprised Saito of LEPERE's complaint and told Saito that he felt "they were removing the meals too early." Id., p. 153. He suggested to Saito that the hot entrees be left out until five minutes prior to briefings. Id. Saito agreed to adopt the five-minute time frame. Id.

Following the November 14th meeting, M. Rodrigues checked to see if OCCC had instituted the new procedure. Id., pp. 153-54. He verified that hot entrees remained out until five minutes before

the start of all three pre-shift briefings. Id. After finding that the Employer had instituted the "five minute" policy, M. Rodrigues considered the matter resolved. Id., p. 179. He attempted to contact LEPERE at the OCCC control center and left messages there for LEPERE to "get back to him." Id., p. 180. LEPERE failed to return any of the calls. Id. Here, the facts indicate that the Union representative responded properly to LEPERE's complaint and resolved the matter in accordance with Section 15.08 of the Agreement.

LEPERE also alleged that he was the victim of "disparate treatment." He contended that when management at the Kulani Honor Camp violated Section 51 of the Agreement, the Union filed a grievance and won "a big one for the ACOs at Kulani"; however, when OCCC violated "the same section," the Union didn't even pursue the grievance. Tr., p. 19. LEPERE claimed that he should receive the same type of compensation (overtime) which the ACOs at Kulani received for attending pre-shift briefings.

A review of the history surrounding the addition of Section 51.03 to the Agreement is instructive. Prior to the ratification of the 1979 contract the chair of the negotiating committee for Unit 10, who was an ACO at OCCC, indicated that the ACOs at OCCC wanted meals in lieu of overtime for attending pre-shift briefings. Tr., p. 213. As a result of the request, Section 51.03 was added to the agreement. Id., p. 214. Since the request for meals came specifically from OCCC, the new section applied only to that facility. Id. There have been no changes or modifications to Section 51 since 1979. Id.

The Board finds that LEPERE's claim that he is entitled to overtime compensation is contrary to Section 51.03, and therefore he has failed to make a claim for relief under the Agreement and Chapter 89, HRS. Moreover, there is nothing in the record to indicate that the Union treated LEPERE in an arbitrary or discriminatory manner so as to constitute a breach of duty under Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, 64 L.R.R.M. 2369 (1967). Thus, the Board finds that LEPERE has failed to establish a prima facie case against the Union establishing a breach of its duty of fair representation and hereby dismisses his allegations of a Subsection 89-13(b)(4), HRS, violation.

CONCLUSIONS OF LAW

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

Under Subsection 89-13(a)(6), HRS, an 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. However, the provisions of Section 89-11, HRS, are not applicable to this case. Accordingly, those allegations are dismissed.

An employer commits a prohibited practice when it wilfully breaches any of the provisions set forth in the collective bargaining agreement. LEPERE failed to establish that a breach of the Agreement occurred because Employer provided pre-shift meals within a reasonable time prior to briefings. In addition, Section

51.03 fails to specify a time period as to when a pre-shift briefing meal must be furnished.

Subsection 89-13(b)(2), HRS, requires the employee organization to bargain with the public employer in accordance with Section 89-9, HRS. There is nothing in the record to indicate that the UPW refused to bargain with the public employer. A refusal to bargain charge is inapplicable to the facts of this case and those allegations are dismissed.

Under Subsection 89-13(b)(3), HRS, the employee organization 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, does not apply to the facts of this case. Accordingly, the allegations of a Subsection 89-13(b)(3), HRS, violation are dismissed.

Under Subsection 89-13(b)(5), HRS, the employee organization commits a prohibited practice when it wilfully violates the collective bargaining agreement.

Since the parties to the Agreement are the public employer and the exclusive representative, LEPERE lacks standing to assert this allegation against the Union.

The Union breaches its duty of fair representation to a member of the bargaining unit when it treats the employee in an arbitrary or discriminatory manner. The UPW did not breach its duty to represent LEPERE by refusing to provide him with grievance forms. In the instances where he approached the Union, his behavior was such that he was escorted from the offices. Further, he failed to obtain the forms from the appropriate business agent.

Moreover, after receiving LEPERE's complaint, the UPW business agent conducted an investigation and attempted to resolve the matter. The evidence indicates that he attempted to contact LEPERE but his efforts failed.

ORDER

The prohibited practice charges in Case Nos. CE-10-132 and CU-10-65 are hereby dismissed.

DATED: Honolulu, Hawaii, February 8, 1994.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member

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