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STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-10-153
)	
THOMAS LEPERE,)	DECISION NO. 349
)	
Complainant,)	FINDINGS OF FACT, CONCLU-
)	SIONS OF LAW AND ORDER
and)	
)	
JOHN WAIHEE, Governor, State)	
of Hawaii and DEPARTMENT OF)	
PUBLIC SAFETY, State of Hawaii,)	
)	
Respondents.)	
)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On January 16, 1991, 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 PUBLIC SAFETY (DOPS), State of Hawaii (collectively Employer). LEPERE alleged that the Employer retaliated against him for initiating grievances with this Board. LEPERE alleged that the Employer involuntarily transferred him from his assignment in Annex 2 of the Oahu Community Correctional Center (OCCC), that the Employer failed to discipline the Unit Team Manager for allegedly making false statements to the police, and that the Employer improperly convened a committee to investigate the charges against him thereby violating Subsections 89-13(a)(1), (4), (5), (6), (7) and (8), Hawaii Revised Statutes (HRS).

The Board conducted hearings on the merits of the case on February 27 and March 6, 1991, and the parties filed posthearing briefs 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, at the OCCC, DOPS.

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

This case involves an incident that occurred on December 20, 1990, for which Complainant LEPERE received a written reprimand on February 20, 1991.

On December 20, 1990, Michael Cavanaugh of the DOPS' Consent Decree Office conducted an inspection of the Annex 2 kitchen. Respondent's (R's) Exhibit (Ex) 1. Unit Team Manager An Nguyen accompanied Cavanaugh during the inspection. Cavanaugh asked Nguyen to unlock the Annex 2 refrigerator. Nguyen retrieved the key from a key box and unlocked the refrigerator door. Transcript of hearing held on March 6, 1991 (Tr. II), pp. 63-64. During the inspection, Cavanaugh received a telephone call at the control station. Id., p. 64. Nguyen waited nearby. R's Ex. 1, p. 6.

LEPERE entered the Annex 2 kitchen and grabbed the refrigerator key from the refrigerator door. Complainant pointed at Nguyen and yelled that she had left the key in the lock and that he would write her up. Tr. II, pp. 66-67.

While on his way to the key box, LEPERE observed Cavanaugh returning to the kitchen. LEPERE approached Cavanaugh and asked him if he had used the refrigerator key. Cavanaugh told LEPERE he did not use the key. Id., pp. 67-68. After speaking to LEPERE, Cavanaugh terminated the inspection and left the area. LEPERE then approached Nguyen and told her she was stupid, incompetent and that he would "take [her] down". Id., p. 69. He also placed the point of his pen in front of Nguyen's face. Id., pp. 69-70. Nguyen testified that when LEPERE spoke to her, "His body shook. His teeth grind and his forehead . . . just like a bulldog." Id.

Afraid that LEPERE would strike her, Nguyen asked Sergeant Donald Jorgensen to intervene. Sergeant Jorgensen escorted LEPERE out of the control station and told him "you never, ever, you know, get into a shouting match with other staff." Transcript of hearing held on February 27, 1991 (Tr. I), p. 85. Sergeant Jorgensen testified that he intervened because Nguyen and LEPERE were "getting loud" and there were inmates in the area. Id.

Later that afternoon, Nguyen reported the incident to Acting Community Base Administrator Harry Tanouye. Tr. II, p. 72; R's Ex. 1. Nguyen told Tanouye she felt threatened and intimidated by LEPERE's actions. Id., p. 72. Tanouye told her to submit an incident report. However, since it was already late in the day and Nguyen had an evening class, she left work without turning in the report. Id.

The next day, Nguyen went to see Tanouye to explain why she had not submitted her report and told him that she wanted to

report the incident to the police because she felt her life was in danger. Id., p. 73. Tanouye told Nguyen that as a private citizen she could call the police but that she should inform Central Control before doing so. Id. Nguyen contacted Sergeant Jerry Roberts at Central Control and explained the situation. Sergeant Roberts told Nguyen she could call the police on her own. Id. Nguyen thereafter called the Honolulu Police Department (HPD) to report the incident. Id.

Later that afternoon, Police Officer Waldrop arrived at OCCC to investigate Nguyen's complaint. Officer Waldrop told Nguyen to file a harassment charge because there was no physical contact to substantiate a terroristic threatening complaint. Id., p. 74. Before leaving OCCC, Officer Waldrop also received a statement from LEPERE. The Officer submitted the harassment case pending further investigation. Id.

On Monday, December 24, 1990, Nguyen submitted an incident report to Tanouye and to Clayton Frank, then Acting Administrator for OCCC. Tr. I, p. 215. Frank was concerned with the seriousness of Nguyen's allegations and whether the parties were still working together. Id., p. 219. Frank decided that for the protection of both parties, one of them should be temporarily reassigned until an investigation could be completed. Id. He instructed Ken Saito, Chief of Security, to reassign LEPERE and to explain the reason for the transfer to him. Id., p. 220.

On January 2, 1991, Frank learned that LEPERE was questioning the reason for his transfer. Frank told Saito to contact

the watch commander and have him bring LEPERE to his office. However, since LEPERE's days off fell on January 2 and 3, Frank did not speak to LEPERE until January 4th. Id., pp. 220-21.

At the January 4th meeting, Frank told LEPERE that he had been temporarily transferred for his own safety as well as for the safety of Nguyen. When LEPERE asked why he had been transferred and not Nguyen, Frank explained that (1) Nguyen had initiated the complaint and (2) because of the gender difference between the two parties it would be in the best interest of everyone involved to reassign LEPERE on a temporary basis. Id., p. 222.

Following the meeting with LEPERE, Frank instructed Saito to conduct an investigation of the incident. Saito then assigned Sergeant Roberts to handle the investigation. Tr. II, p. 4. Sergeant Roberts began his investigation by reviewing Nguyen's report, the reports of ACO Charles Rhine and Sergeant Jorgensen and the preliminary report of Rhonda Sasaki who was Acting Community Base Administrator when Tanouye was on vacation. Id., pp. 6-7. He also conducted interviews with LEPERE, Nguyen, Cavanaugh, Rhine, Jorgensen and two inmates. R's Ex. 1. Based on the reports and interviews, Sergeant Roberts found that although LEPERE acted improperly when he yelled at Nguyen in front of the staff and inmates, he did not threaten her. Sergeant Roberts also suggested that Nguyen be counseled about her control of the keys. Id., p. 9; R's Ex. 1. Roberts submitted his findings and the investigation report to Saito, who in turn submitted his own findings and report to Frank. R's Ex. 4.

After reviewing the investigation report, Frank instructed Community Base Administrator Miles Murakami to proceed with an employee meeting to permit the employees the opportunity to present their side of the events with their representatives present. Tr. I, p. 217. Frank indicated that the employee meetings were required for any type of disciplinary action except for verbal counseling. Id., p. 218.

Murakami first assembled a committee made up of Unit Manager Harry Tanouye, Wayson Tanouye and Sergeant Kenneth Lucht. Murakami selected Harry Tanouye to chair the committee. According to Murakami, the committee members were chosen on the basis of availability, avoidance of overtime, and non-involvement in the investigation. Id., p. 170. Murakami notified LEPERE about the meeting. R's Ex. 8.

At the meeting, LEPERE objected to the selection of Harry Tanouye as the committee chairman because he didn't feel that Harry Tanouye would be objective. Id., p. 138. Harry Tanouye then recused himself. Id., p. 165. Murakami scheduled another employee meeting for the next day and notified LEPERE of the second meeting. R's Ex. 11.

Murakami chaired the second committee. The other members on the committee included Sergeants Ken Lucht and Jose Morillo. The committee members were selected using the same criteria Murakami had used to select the first committee. Id., p. 170. LEPERE appeared at the meeting along with his Union representative, Mel Rodrigues and union steward, Gus Palipali. Id., p. 169. They were given the opportunity to review the reports which

the committee used to make its findings. Id. The committee also provided LEPERE with the opportunity to tell his side of the story.

Based on Sergeant Roberts' investigation and findings, the reports submitted, and the statement given by LEPERE at the meeting, the committee recommended to Frank that LEPERE be given a written reprimand. R's Ex. 14. Frank reviewed the committee's findings, as well as LEPERE's prior disciplinary record, before accepting the committee's recommendation. Id., pp. 223-24. Frank also cited Nguyen for her negligent control of the refrigerator key. R's Ex. 7. Frank asked Murakami for his recommendation concerning the type of disciplinary action to take against Nguyen. Murakami informed Frank that, "based on the lack of any prior disciplinary action against Nguyen, she should be given a verbal reprimand." Id. p. 180. Frank concurred with Murakami's recommendation.

On February 1, 1991, LEPERE received a written reprimand. The reprimand cited LEPERE's act of yelling at Nguyen in front of other staff and inmates. LEPERE refused to sign the written reprimand. R's Ex. 15.

By letter, dated December 28, 1990, Complainant wrote to George Sumner, DOPS Director, complaining of various matters. C's Ex. 9. Sumner considered the complaint as a grievance and forwarded the complaint to Eric Penarosa for processing. C's Ex. 8.

DISCUSSION

Complainant contends that Respondents improperly transferred him from Annex 2, convened a panel to investigate an incident report, failed to discipline Unit Team Manager Nguyen

because of the key incident, and refused to acknowledge receipt of his complaints. Complainant alleges that Respondents are retaliating against him for filing complaints with this Board. Complainant alleges that the Respondents committed prohibited practices in violation of Sections 89-13(a)(1), (4), (5), (6), (7), and (8), HRS.

Prior to the start of Complainant's case, Respondents' counsel requested the Board's ruling on several motions that were made at a prehearing conference held on February 20, 1991. Respondents sought to dismiss the allegations of Sections 89-13(a)(5), (6) and (8), HRS, violations. The Board granted Respondents' motion to dismiss the allegations of the Subsection 89-13(a)(6), HRS, violation, but denied the rest of Respondents' motion. 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. Since 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 found the statute to be inapplicable to the instant case. Accordingly, the Board dismissed the Complainant's Subsection 89-13(a)(6), HRS, allegations.

After reviewing the entire record, the Board also dismisses Complainant's charges of a Subsection 89-13(a)(5), HRS, violation for lack of proof. 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. Section 89-9, HRS, sets forth the scope of negotiations between the employer and the exclusive representative. The Board finds that LEPERE failed to provide any evidence to demonstrate Employer's wilful refusal to bargain collectively in good faith with the exclusive representative, United Public Workers, in this case. Thus, the Board dismisses Complainant's allegations of a Subsection 89-13(a)(5), HRS, violation.

Complainant LEPERE charges that the Employer discriminated or retaliated against him because he filed prohibited practice complaints with this Board. Complainant alleges that Respondents violated Sections 89-13(a)(1), (4), and (7), HRS.

Subsection 89-13(a)(1), HRS, provides that an employer commits a prohibited practice when the employer interferes, restrains or coerces any employee in the exercise of any right guaranteed under Chapter 89. Subsection 89-13(a)(4), HRS, prohibits the employer from discharging or otherwise discriminating 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. Subsection 89-13(a)(7), HRS, states that an employer shall not refuse or fail to comply with any provision of Chapter 89, HRS.

Employer concedes that LEPERE's filing of complaints and grievances is a protected activity under the statute. Employer contends, however, that in order for LEPERE to prevail he must present a prima facie case proving that his filing of complaints

served as the motivating factor in the Employer's decision to discipline him. Employer points out that the burden is on LEPERE to show first, that there was an improper motive, second, that there was a causal connection between the improper motive and the decision to take 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, v. Hawaiian Milling Corporation, 4 HLRB 568 (1988), the Board considered whether the discipline of an employee constituted unlawful discrimination in violation of Section 377-6, HRS, a provision similar to Subsection 89-13(a)(4), HRS. In rendering its decision in United Food, the Board relied on the analysis of the U.S. Court of Appeals for the First Circuit in NLRB v. Wright Line, 662 F.2d 899, 108 L.R.R.M. 2513 (1981). The Board relies upon the same analysis for consideration of discrimination cases filed 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 the 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 this case, Complainant LEPERE failed to establish any improper motive on the part of the Employer for its actions. In cases where violations have been found, the employee provided clear and convincing evidence of some improper motive. In Southern Bleacher & Print Works, Inc., 40 L.R.R.M. 1174 (1957), a supervisor testified that he considered an employee's testimony at Board hearings to be an act of hostility toward the company and its policies. Southern Bleacher defended its practice of discharging employees who testified at Board hearings by claiming that the employees failed to perform supervisory duties. However, the employees were able to demonstrate that their immediate supervisors were never consulted and had no prior knowledge of the discharges. In addition, the employees' records contained only praise for their work and they were otherwise satisfactory employees.

In the instant case, there is no evidence in the record which supports Complainant's assertion that Respondents retaliated against him because of his filing complaints with this Board. Improper motive cannot be inferred from the mere possibility that the employer treated the employees more harshly than other employees. Viracon, Inc. v. NLRB, 116 L.R.R.M. 3124 (1984). Suspicion alone is insufficient evidence on which to base illegal discrimination. Western Lace & Line, 105 NLRB No. 114, 32 L.R.R.M. 1348 (1953).

The Board finds that LEPERE failed to meet his burden of showing that his protected conduct, the filing of complaints and grievances against Employer, was a substantial or motivating factor

in the decision to discipline him. NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). The Board also finds that even if Complainant proved his prima facie case, the Employer showed by a clear preponderance of the evidence that its actions in handling the key incident would have been taken even if the protected activity had not occurred.

LEPERE alleged that Employer engaged in acts of retaliation by: (1) forcing him to accept an involuntary transfer; (2) failing to discipline Nguyen for calling the police and filing an allegedly false complaint against him; (3) disciplining him for yelling at Nguyen in front of staff and inmates; and (4) conducting an employee meeting in front of a committee comprised of members who were biased against him.

1. Complainant's transfer.

The record indicates that Clayton Frank decided to temporarily transfer LEPERE after learning about the seriousness of Nguyen's allegations against LEPERE. Tr. I., p. 219. At a meeting held on January 4, 1991, Frank explained to LEPERE the reasons for his temporary transfer. Id., p. 222. Frank also informed LEPERE's Union representative, Mel Rodrigues, of the temporary transfer and the reasons behind it. Id., p. 220. Frank reasoned that in a situation where one employee threatens another, it would be unwise to allow the situation to escalate by having them continue to work together. Id., p. 219. Frank indicated that LEPERE's transfer was not disciplinary in nature and was intended to be temporary pending the outcome of an investigation. Id., pp. 219-20.

Frank stated that he did not know about LEPERE's involvement with the Board prior to ordering the transfer. In fact, he did not know who LEPERE was. Id. p. 227. He only learned about LEPERE's filing of grievances and complaints while conversing with Mel Rodrigues. However, Rodrigues did not give Frank any details about the actions initiated by LEPERE. Id.

Given the facts in the record, the Board finds that Frank acted reasonably and within the scope of his duties and responsibilities as an administrator. Considering the gravity of the charges by Nguyen against LEPERE, Frank determined that it was preferable to separate the two employees rather than have them work in close proximity to one another. The Board concludes that LEPERE failed to prove by a preponderance of evidence that he was transferred in retaliation for his filing of complaints with this Board. The Board finds Employer's actions to be reasonable and not tainted by improper motive.

2. The alleged refusal to discipline Nguyen for calling the police.

According to Nguyen, she believed that LEPERE intended to assault her because of his demeanor and the anger displayed. She also stated that LEPERE placed the point of a pen in her face. Tr. II, pp. 69-70. Feeling threatened, she asked Sergeant Jorgensen to intervene. Tr. 8, p. 85. The next day, Nguyen told Harry Tanouye that she felt threatened by LEPERE's actions and wanted to call the police, Tanouye told her that it was her choice as a citizen. Id., p. 73.

Nguyen's actions following the confrontation with LEPERE support her claim that she was frightened and intimidated by his actions. She asked for Sergeant Jorgensen's assistance in calming LEPERE down and she went to see Tanouye to get his permission to call the police. Finally, she filed a harassment case with HPD. As such, the Board finds that Nguyen's decision to call HPD was based on a legitimate concern for her well being and not because of Lepere filing his complaints with the Board. The Board finds based upon the record that Nguyen's statements were not so false as to warrant any discipline by the Employer.

3. Disciplinary action taken against Complainant.

Complainant was given a written reprimand for yelling at Nguyen in front of other staff and inmates. While being interviewed by the investigating officer, Sergeant Jerry Roberts, LEPERE admitted that he did get loud with Nguyen. R's Ex. 1, p. 4. Sergeant Jorgensen confirmed LEPERE's loud behavior by stating that he "stepped in" between Nguyen and LEPERE because they were getting loud and there were inmates in the area. Tr. I, p. 85. Complainant himself testified that he "never denied being loud at any time, because it's just [his] nature to be very open." Id., pp. 146-47.

The Board recognizes LEPERE's right and duty to report any negligence on the part of Nguyen. The Board is also aware that Nguyen raised her voice during her verbal exchange with LEPERE. However, Nguyen attempted to alleviate the situation by asking Sergeant Jorgensen to intervene. Despite her attempt to calm the situation, LEPERE continued to yell at Nguyen until Sergeant

Jorgensen pulled him aside and counseled him on his behavior towards the staff.

LEPERE's filing of complaints with this Board does not shield him from the responsibility of conducting himself as a professional ACO who is entrusted with the safety of the public and inmates. In the Board's view, LEPERE's actions in this case would have subjected him to discipline taken against him regardless of the grievances and complaints he has filed with this Board.

4. The committee members were allegedly biased against Complainant.

Complainant objected to the composition of the committee members at the first employee meeting held on January 23, 1991. Tr. II, p. 28. Another meeting was held on January 24, 1991 with a different committee. Miles Murakami served as the committee chairman for the second meeting, which included members Kenneth Lucht and Jose Morillo. The members were chosen on the basis of availability, avoidance of overtime, and non-involvement in the investigation. Tr. I, pp. 170-71. LEPERE objected to Murakami's presence on the committee because he failed to discipline Nguyen. R's Ex. 11. However, the record indicates that Nguyen received verbal counseling for her negligent handling of the refrigerator keys. R's Ex. 7.

LEPERE objected to Lucht's presence on the committee on the basis that he had been biased by Harry Tanouye while sitting on the first committee. Lucht indicated that the first committee did not discuss the case. Tr. II, p. 29. Lucht also stated that he

did not know about LEPERE's involvement with the Board's proceedings.

LEPERE objected to Morillo's presence on the committee because Morillo told various people that LEPERE should not be assigned to Annex 2. According to Morillo, however, these statements were made after the meeting with LEPERE. Id., p. 50. Morillo stated that he had concerns about LEPERE working in Annex 2 because he posed a danger to himself as well as other staff members if he remained there. Id., pp. 57-59.

Although the committee members played a role in the disciplinary action taken against LEPERE, the final decision to discipline rested with Clayton Frank. Frank made the final decision as to whether the disciplinary action would be imposed and if so, the type of discipline to be imposed. Tr. II, p. 223.

Frank reviewed everything the committee members used in making their recommendation. Id., p. 223. Frank had the authority to concur with or ignore the committee's recommendation and to impose either a more or less severe form of discipline. Id., p. 223. There is nothing in the record to demonstrate that Frank was biased or that his actions were in retaliation for LEPERE's filing of complaints and grievances.

Frank initiated employee meetings as a means of providing the employees with the opportunity to present their side of the story with their representatives present. Id., p. 218. Prior to the implementation of the employee meetings, employees could be disciplined without the opportunity to meet with the employer. Id., p. 164. At the meeting, the committee gave LEPERE the

opportunity to make a statement. The committee also provided LEPERE's union representative, Mel Rodrigues and union steward, Gus Palipali, an opportunity to review the reports which the committee used to make its recommendations.

The Board finds that the Employer did not act with improper motive in constituting the employee panel to conduct the meeting. The Board further finds no evidence that the Employer discriminated against LEPERE because of the filing of his complaints with the Board. Thus, the Board dismisses LEPERE's allegations of Sections 89-13(a)(1), (4), and (7), HRS, violations.

With respect to the Subsection 89-13(a)(8), HRS, charge, the Board dismisses those allegations for failure to exhaust his contractual remedies.

In Santos v. State, 64 Haw. 648 (1982), an employee who failed to receive a promotion appealed to the Civil Service Commission rather than file a grievance pursuant to the collective bargaining agreement. The Commission declined jurisdiction over the case indicating that the employee's proper form of recourse was the grievance process. Since the time limits for filing a grievance had expired, the employee filed a complaint with the Board.

The Board found that the State committed a prohibited practice when it violated the terms of the collective bargaining agreement. The Hawaii Supreme Court reversed the Board's decision. The Court cited the Intermediate Court of Appeal's decision in Winslow v. State, 2 Haw.App. 50 (1981) which stated:

[W]e hold that where the terms of public employment are covered by a collective bargaining agreement pursuant to HRS Chapter 89

and the agreement includes a grievance procedure to dispose of employee grievances against the public employer, an aggrieved employee is bound by the terms of the agreement.

Id. at 55.

The facts in the record indicate that Complainant LEPERE sent a letter dated December 28, 1990 to the Director of DOPS, George Sumner complaining of a number of incidents. C's Ex. 9. Sumner considered LEPERE's letter to be a grievance and forwarded it to Eric Penarosa for processing. C's Ex. 8. The letter complained of various matters but did not address any disciplinary action against LEPERE since none had been imposed at that time. Given these facts, the Board dismisses the allegations of a Subsection 89-13(a)(8), HRS, violation related to the disciplinary action taken on February 1, 1991 since discipline is a grievable matter and that process must be exhausted prior to filing a Section 89-13(a)(8), HRS, complaint with the Board.

Finally, LEPERE contends that his letter dated December 28, 1990, to Sumner constitutes a step three grievance of his involuntary transfer. The Board takes official notice of the terms of the applicable Unit 10 agreement on file with the Board in accordance with Administrative Rules Section 12-42-8(g)(8). According to Section 15 of the Unit 10 contract, the grievance must proceed through steps one and two before reaching step three. There is nothing in the record to indicate that this grievance has proceeded through the necessary procedural steps. As such, the Board dismisses the allegations of a Section 89-13(a)(8), HRS, violation relating to the temporary transfer of Complainant.

CONCLUSIONS OF LAW

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

Subsection 89-13(a)(5), HRS, states that an employer commits a prohibited practice by wilfully refusing to bargain in good faith with the exclusive representative as required in Section 89-9, HRS. Section 89-9, HRS, sets forth the scope of negotiations between the employer and the exclusive representative. Complainant failed to present evidence to support his allegation of a Subsection 89-13(a)(5), HRS, violation.

Subsection 89-13(a)(6), HRS, provides that 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. Complainant failed to demonstrate the applicability of Section 89-11, HRS, to this case.

Subsection 89-13(a)(8), HRS, provides that the violation of a collective bargaining agreement is a prohibited practice. Complainant failed to exhaust his contractual remedies prior to raising this claim with the Board.

An employer commits a prohibited practice by retaliating against an employee for engaging in protected activity under Chapter 89, HRS. Subsection 89-13(a)(4), HRS, provides that it is a prohibited practice for an employer to discipline or otherwise

discriminate against an employee for filing complaints with this Board.


Complainant failed to prove that the Employer had an improper motive for transferring and disciplining him and therefore failed to establish a prima facie case of retaliation under Sections 89-13(a)(1), (4), and (7), HRS.

ORDER

The prohibited practice charges contained in Case No. CE-10-153 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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