

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

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|---------------------------------|---|---------------------------|
| In the Matter of |) | CASE NO. CE-12-238 |
| |) | |
| STATE OF HAWAII ORGANIZATION OF |) | DECISION NO. 377 |
| POLICE OFFICERS (SHOPO), |) | |
| |) | FINDINGS OF FACT, CON- |
| Complainant, |) | CLUSIONS OF LAW AND ORDER |
| |) | |
| and |) | |
| |) | |
| LINDA CROCKETT LINGLE, Mayor, |) | |
| of the County of Maui and MAUI |) | |
| POLICE DEPARTMENT, County of |) | |
| Maui, |) | |
| |) | |
| Respondents. |) | |
| |) | |

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On October 20, 1994, Complainant STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against the MAUI POLICE DEPARTMENT, County of Maui (MPD, County or Employer). SHOPO alleged that police sergeants Ramsay Anakalea and Tivoli Faaumu approached police officers Avanel Kalalau and Craig Bajadali and attempted to dissuade and discourage both officers from pursuing their grievances in violation of Sections 89-13(a)(1) and (8), Hawaii Revised Statutes (HRS).

In addition, SHOPO alleged that the Employer transferred several police officers without properly considering seniority in violation of Articles 1, 4, 11, 20, 23 and 35 of the Unit 12 collective bargaining agreement (contract), thereby violating Sections 89-13(a)(7) and (8), HRS.

On November 10, 1994, SHOPO filed an Application to Take Depositions with the Board. By Order No. 1138, dated December 30, 1994, the Board denied the application.

On November 15, 1994, the Complainant filed a Motion to Continue Prehearing Conference. By Order No. 1123, dated November 15, 1994, the Board granted the motion.

On December 7, 1994, the Employer filed a Motion to Defer the Hearing on Complainant's Prohibited Practices [sic] Complaint. On December 13, 1994, Complainant filed a Memorandum in Opposition to Respondent's Motion to Defer the Hearing of Complainant's Prohibited Practices [sic] Complaint. A hearing on the motion was scheduled for January 4, 1995.

On December 16, 1994, Complainant filed a Motion to Amend Prohibited Practices [sic] Complaint. In its motion, SHOPO sought to (1) delete allegations regarding the transfer of Grant Gordon; (2) amend the title of the action to name LINDA C. LINGLE, Mayor of the County of Maui (County or Employer) as Respondent; and (3) include a prayer for specific relief. There being no opposition to the motion by Respondent's counsel, by Order No. 1137, dated December 30, 1994, the Board granted the motion to amend the complaint.

At the hearing on the Employer's Motion to Defer the Hearing on Complainant's Prohibited Practices [sic] Complaint held on January 4, 1995, the Board denied the motion sua sponte. While the Board is cognizant of its long-settled policy regarding the deferral to the contractual grievance process, the Board nevertheless retains concurrent jurisdiction in matters arising

from specific contractual violations pursuant to Section 89-13(a)(8), HRS. The Board further reserves the right to decide whether it shall exercise that jurisdiction on a case-by-case basis especially in a case such as this where there are attendant alleged statutory violations and allegations that the contractual grievances are not being properly processed.

One of the Board's concerns deals with the fact that where grievances have already been filed, as is the case here, two separate tracks have evolved for resolution of essentially the same dispute, which could conceivably result in two different outcomes. In this regard, the Union represented to the Board that it will abide by the Board's decision. Another concern raised by the Union deals with the Employer's alleged delay in processing the grievances. In addition, the significance and magnitude of the issues presented must also be considered by the Board in applying its discretion to defer or hear the complaint. In the instant complaint, the Board considers the application of seniority to be of such significant magnitude that it touches and concerns a fundamental concept of collective bargaining. Thus, the Board will not defer this complaint to the arbitral process.

Hearings were held in Wailuku, County of Maui, on January 9 and 10, 1995. Based upon a thorough review of all exhibits, testimony presented at the hearings and arguments, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

SHOPO is an employee organization and the exclusive representative, as defined in Section 89-2, HRS, of employees in bargaining unit 12.

Respondent LINDA CROCKETT LINGLE is the Mayor of the County of Maui and a public employer as defined in Section 89-2, HRS.

SHOPO and the County of Maui are parties to a multi-employer contract covering bargaining unit 12 employees for the period July 1, 1989 to June 30, 1993. The contract was extended by mutual agreement and was in effect at the relevant times herein.

Article 1 of the contract provides:

RECOGNITION

The Employer recognizes the Union as the exclusive representative for public employees in the police officers unit, both supervisory and non-supervisory, except for officers and employees who are excluded or may be excluded from the bargaining unit by law and/or the Hawaii Labor Relations Board.

The Employer agrees to furnish a copy of the Agreement to all employees hired after the signing of the Contract and other personnel not within the bargaining unit but charged with the administration of the Agreement.

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 4 of the contract provides:

DISCRIMINATION

The Employer and the Union agree that neither party will discriminate against any employee because of Union membership or non-membership or lawful activity in the Union or on the basis of race, color, creed, sex, age, marital status, or lawful political activity.

The Employer and the Union agree that they will not interfere with the right of any employee to join or refrain from joining the Union. Employees will secure no advantage nor

more favorable consideration or any form of privilege because of membership or non-membership in the Union.

* * *

Article 11 of the contract provides:

RIGHTS OF THE EMPLOYER

The Employer reserves and retains, solely and exclusively, all management rights and authority, including the rights set forth in Section 89-9(d)(1)-(5), Hawaii Revised Statutes, except as specifically abridged or modified by this Agreement.

* * *

Article 20 of the contract provides:

TRANSFERS

The placement of employees within each police department shall be the responsibility of the respective police chiefs.

In transferring or reassigning employees, the police department will insofar as practicable consider grade seniority when making such transfer or reassignment. In addition, due consideration shall be given for cases involving personal hardship.

Employees may submit written requests for transfer to another district, division or unit and shall receive written acknowledgment of such request from the Department. Such requests shall be given full consideration by the Department. Upon the request of a Union

representative, he shall be given access to the transfer list.

Whenever an employee is transferred or reassigned for disciplinary reasons, he shall be given written notification of such action.

Intergovernmental transfers of employees may be permitted when made in conformance with civil service laws and rules.

No employee shall be required to live in the district where he is assigned his tour of duty. The only exception will be employees required to work on the Islands of Lanai, Molokai, or in the district of Hana.

* * *

Article 23 of the contract provides:

SENIORITY

A. There shall be established by the Employer of each county a master seniority list which shall be maintained on a yearly basis. The list shall be posted each year from January 1 until January 31, in each department and each station, in a conspicuous place, and a copy thereof shall be delivered to the Union. Objections to the seniority lists shall be reported to the respective Employer on or before February 15 of each year, or said seniority lists shall stand as posted.

B. The master lists shall contain each employee's name, departmental seniority, present grade, and grade seniority. For purposes of this Agreement, departmental seniority shall be determined as of the date of last continuous hire within the county, as a police officer/police cadet, subject to (1) through (9) below.

For purposes of the Agreement, grade seniority shall be determined as of the effective date of appointment to the employee's present grade, subject to (1) through (9) below:

1. Employees who have been granted authorized leaves of absence, and who then return to active duty within the police department shall be credited the time of such leave of absence towards all seniority rights.

2. An employee who resigns or whose employment is otherwise terminated and who thereafter is re-employed shall lose all

seniority rights accrued to the date of termination of the prior employment.

3. Periods of suspension and unauthorized leaves of absence shall not be credited toward seniority rights.

4. Temporary assignment to higher rank shall not be a basis of the accumulation of any grade seniority at the higher rank.

5. Employees with the same date of employment shall have departmental seniority determined by their rank on the eligible list from which appointed.

6. Employees with the same date of promotion shall have their grade seniority determined by their departmental seniority.

7. In cases of a demotion, voluntary or otherwise, the demoted employee shall enter the lower grade with credit for any prior grade seniority which the employee previously earned within said grade.

8. In all cases of a promotion, the employee shall enter the higher grade with credit for any grade seniority previously earned within said grade.

9. For employees who did not successfully complete their promotional probationary periods #8 shall not apply.

* * *

Article 35 of the contract provides:

PRIOR RIGHTS

Nothing in this Agreement shall be construed as abridging, amending or waiving any rights, benefits or perquisites presently covered by statutes, rules or regulations of each jurisdiction that the employees have enjoyed heretofore except as specifically superseded by the terms of this Agreement.

It is agreed, however, that the aforementioned perquisites are subject to modifications or termination by the Employer, as conditions warrant, after prior consultation with the Union. When the Employer takes such action and the employee or the Union believes that the reason or reasons for the change is or are unjust he or it shall have the right to process such grievance through the Grievance Procedure set forth in Article 32, herein.

On or about June 27, 1994, Maui Police Chief Howard Tagomori (Tagomori) issued Personnel Order 94-18 which made the following relevant transfers:

PERSONNEL ORDER 94-18

Date of Issue: Effective date: Revision Date:
06/27/94 As specified
 in order

* * *

2. Police Detective I, PO-11, PD-0121, GREGORY B. MONIZ of the Criminal Investigation Division will be transferred and assigned to the Vice Division, Gambling Section, PD-0063, effective July 1, 1994.
3. Police Officer II, PO-07, PD-0312, DEAN M. RICKARD of District 4, Lahaina, will be transferred and assigned to the Vice Division, Narcotics Section, PD-0321, and Temporarily Reallocated Police Officer III, PO-09, effective July 1, 1994.

* * *

6. Police Officer II, PO-07, PD-0045, DENNIS G. LEE of District 1, Wailuku, will be transferred and assigned to the Vice Division, Narcotics Section, PD-0354, and Temporarily Reallocated Police Officer III, PO-09, effective July 16, 1994.
7. Police Officer II, PO-07, PD-0041, TOD R. WONG of District 1, Wailuku, will be transferred and assigned to the Vice Division, Canine Handler, PD-0329, and Temporarily Reallocated Police Officer III, PO-09, effective July 16, 1994.

* * *

HOWARD TAGOMORI
Chief of Police

Distribution "B"

Complainant's Exhibit (C's Ex.) 2.

On or about July 18, 1994, SHOPO filed grievances regarding Personnel Order 94-18, on behalf of twenty (20) police officers including detectives Wallace Tom, Randall Bell, Milton Matsuoka; officers Cerilo Agarano, Avanell Kalalau, and Craig Bajadali. Stipulation of Facts submitted on 1/9/95 (Stip.).

On or about October 18, 1994, police sergeants Ramsay Anakalea and Tivoli Faaumu questioned two of the named grievants, officers Bajadali and Kalalau. Bajadali was questioned by both sergeants, behind closed doors in an office which may have been perceived as a coercive environment. Bajadali was questioned as to his awareness of, and agreement with, the filing of the grievance. He was also informed of various reasons for his non-selection, including a three-year commitment, the selection of a more youthful officer, and a discussion of his career goals. Stip.; Transcript II, January 10, 1995, pages (Tr. II. pp.) 186-88.

Kalalau was questioned as to her awareness of, and agreement with, the filing of the grievance. She was also informed of various reasons for her non-selection, including her physical appearance which seemed intimidating, and the rigorous physical requirements of the job. Her career goals were also discussed. Stip.; Tr. II, pp. 192-98.

Tagomori, while retaining ultimate authority to approve or disapprove of transfers within the MPD, delegated substantial authority to subordinates to process and effectuate transfers within the MPD, with instructions to 1) avoid taking care of friends; 2) follow contractual provisions; and 3) receive input

from the section commanders. Transcript I, January 9, 1995 (Tr. I), pp. 117-18.

Tagomori testified that he had always relied on the requirements relating to Transfers and Rotations enumerated in MPD General Order (G.O.) 202.6(VI), even prior to its last issuance on October 20, 1994 and Personnel Order 94-18. G.O. 202.6(VI) which pertains to transfers to specialized units, provides, in pertinent part:

VI. TRANSFER TO SPECIALIZED UNITS OR DESIGNATIONS:

A. Specialized Units and Designations
are made to the following components:

* * *

2. Investigative Services Bureau

* * *

c. Vice Division

B. Selection process

1. Assistant Chiefs of Police will be responsible for selecting and recommending officers to specialized units and designations to the Chief of Police.

2. In the selection process, consideration shall be given to seniority, merit, skills, knowledge, attendance and ability.

C. Additional selection requirements

Because of the complexity and sensitive nature of their duties, the following specialized units will have these additional selection requirements.

1. Selection to the Vice Division will be made using the following criteria:

- a. The officer must have demonstrated maturity and dependability necessary for operation in the independent assignment.
- b. The officer must possess personal characteristics that lend themselves to vice related assignments.
- c. The officer's training record shall be reviewed to identify specific skills, knowledge, and abilities that would enhance performance in the assignment.
- d. Recommendation by supervisor (sergeant and/or lieutenant).
- e. The officer must agree to be on-call for assignments by:
 - (1) Carrying a pager
 - (2) Return pager calls

R's Ex. 3; Tr. I pp. 164-68.

Assistant Chief Kenneth DeLima (DeLima), head of the Investigative Services Bureau, was responsible for making recommendations to Chief Tagomori on transfers to the Vice Division. Tr. I, pp. 119-22.

DeLima, in turn, delegated the responsibility for making transfer recommendations to Captain Richard Nakashima. Tr. II, pp. 187, 210.

For purposes of filling the vacant sergeant's position in the Vice Division, the ranking of the top six detectives on the

transfer list on the basis of grade seniority included Wallace Tom, Randall Bell, Timothy Gapero, Milton Matsuoka, Randal Leval, and Gregory Moniz. Matsuoka was tied with Bell and Timothy Gapero for the second spot in terms of grade seniority; however, after application of departmental seniority, Bell, Gapero and Matsuoka ranked second, third and fourth, respectively. Moniz ranked sixth on the list in grade seniority. Stip.

DeLima ultimately recommended Moniz to fill the Vice Sergeant's position. R's Ex. 6. DeLima testified that he felt all sergeants on the list were qualified, but as bureau commander he wanted to pick the best candidate for the job. Tr. I, p. 197. He felt Moniz was aggressive and the fact that he had no experience in Vice was a positive attribute. Moniz was not substantially superior to the other candidates. Tr. I, pp. 197-98.

Wallace Tom was disqualified from consideration because he had a laid-back attitude, according to DeLima. Id., p. 195. Tom had previous experience in Vice-Gambling as an officer. Id., p. 200. Nakashima testified that Tom would have been his third choice. Tr. II, p. 234.

Randall Bell was a good detective, according to DeLima, and he preferred that Bell remain in the Criminal Investigation Division (CID). Tr. I, pp. 209-10. Nakashima testified that Bell would have been his second choice, and informed DeLima of the same. Tr. II, pp. 234, 241.

Timothy Gapero was disqualified because, during a previous assignment to Vice, he had problems with co-workers, and was a loner in a unit which relied upon teamwork, according to

DeLima. Id., pp. 200-05. Nakashima also testified that Gaperio, during his previous assignment with Vice, had a conflict with fellow officers. Id., pp. 215-16.

Milton Matsuoka was disqualified because he had a personal friendship with Nakashima, and the department was sensitive to the perception that too many sergeants of Japanese ancestry were in charge of gambling over the past few years. Tr. I, pp. 213-14. Nakashima testified that he felt Matsuoka was the most qualified candidate for the position. Tr. II, p. 211. Nakashima further testified that he based his assessment of Matsuoka on a previous work relationship and personal knowledge, not on friendship. Id., p. 234.

There were four vacant police officer positions within the Vice Division, although we are concerned here with only three: one position each in Vice-Narcotics, Vice-Airport Interdiction, and Vice-Canine.

Sergeant Faaumu was responsible for making a recommendation as to who would be transferred to the Vice-Narcotics officer position. Tr. I, pp. 6-9; Tr. II, pp. 219-20. For purposes of filling the vacant position, the ranking of the top six officers on the transfer list on the basis of grade seniority included Cerilo Agarano, Avanell Kalalau, Eugene Saffrey, Craig Bajadali, Robert Stuhr, and Dean Rickard. Rickard ranked sixth on the list in grade seniority. Stip.; C's Ex. 2. Faaumu recommended that Rickard be selected to fill the Vice-Narcotics position. R's Ex. 6. Saffrey was selected for a position in Vice-Gambling.

Faaumu testified that Agarano was disqualified from consideration because of rumors and allegations that he previously used marijuana. Tr. II, pp. 15-21. Nakashima testified that an officer should not be disqualified from being considered for a transfer because of rumors. Id., p. 246. Agarano testified that he has never been investigated by the department for using drugs and, while serving in the Crime Reduction Unit subsequent to these rumors, personally investigated cases involving drug activity. Id., pp. 178-79.

Kalalau was disqualified from consideration because of her weight and the pattern of her use of sick leave. Id., pp. 24-26, 42. Faaumu never reviewed Kalalau's sick leave record. Id., p. 26. Kalalau previously demonstrated physical agility during an incident involving climbing a cliff. Id., pp. 89-94.

Both Bajadali and Stuhr were disqualified because of the patterns of their usage of sick leave, based on comments from their co-workers. Id., pp. 34-37, 42. Faaumu never interviewed Agarano, Kalalau, Bajadali and Stuhr prior to or during the selection process. Id., pp. 13-14.

Sergeant Anakalea was responsible for making a recommendation as to who would be transferred to the Vice-Airport Interdiction officer position. Tr. I, p. 63. For purposes of filling the vacant Vice-Airport Interdiction position, Dennis Lee, who ranked 16th in grade seniority, was selected for the position. Stip. C's Ex. 2.

Based on Anakalea's training and experience, he developed a profile of the ideal candidate to serve in the Airport

Interdiction officer position, without regard to seniority. Tr. II, pp. 69-70, 105-08, 129. Anakalea testified that Lee possessed those attributes which fit the profile of the ideal officer for the position. Lee was not intimidating in terms of size, body language and verbal skills. He handled himself well, thereby, displaying maturity, and was articulate in report writing. In addition, Lee was reliable and did not call in sick all of the time. Id., pp. 68-72.

Agarano was disqualified from consideration because he was physically intimidating in both size and body language, and was not very articulate in report writing. Id., pp. 73-81.

Although the preferred candidate for the Airport Interdiction position is a female, Kalalau was more physically intimidating than Lee. Her sick leave usage called into question her reliability. Kalalau was, however, a good report writer. Id., pp. 86, 130. Bajadali, based on Anakalea's previous work experience with him, was not articulate in report writing. Id., p. 102.

Anakalea was also responsible for making a recommendation as to who would be transferred to the Vice-Canine officer position. Id., pp. 112, 219-20. For purposes of filling the vacant Vice-Canine position, Tod Wong, who ranked tied for fourth in grade and departmental seniority, was selected for the position. Stip.; C's Ex. 2.

Anakalea testified that the qualities necessary for selection to the position included good report writing, reliability, capability, dedication and commitment to the program

for three years. Tr. II, pp. 118-20. Based on Anakalea's training and experience, Wong was the best candidate for the position. Id., p. 115. Officers Stuhr, Agarano, Souza, Kanemitsu, Martinez and Kubo were not considered for the canine position. Id., pp. 113-15.

DISCUSSION

Section 89-13(a), HRS, provides in pertinent part:

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;

* * *

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

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

SHOPO contends that the Employer violated Sections 89-13(a)(1) and (8), HRS, by attempting to dissuade the police officers from pursuing their grievances. The record indicates that sergeants Anakalea and Faaumu were instructed by their commanders to meet with the police officers regarding the grievance. While the Employer contends that the questioning of officers Kalalau and Bajadali was not meant to be intimidating, the manner in which the discussions took place, e.g., two superior officers who had recommended the transfers involved spoke to the officer about the selections and the grievance behind closed doors, lends credence to the perception of a hostile and coercive atmosphere surrounding the discussions. Moreover, both officers

testified that they felt that the sergeants attempted to discourage them from pursuing their transfer requests.

Once an employee invokes his or her right to file a grievance through the Union, all further discussions and correspondence concerning the grievance should be directed to the exclusive representative. Any attempt by the employer to discuss the merits of, or motives behind, the grievance with the individual grievants, without due notice to the union is per se impermissible unless the grievant initiates the discussion. Thus, the Board finds under the facts in this case that the Employer's discussions with the grievants which appear to be an interrogation of the employees interfered with or restrained the officers' right to pursue their grievance. The employees' right to pursue their grievance without interference or harassment from the Employer is fundamental to Chapter 89, HRS. Hence, the Board finds that the Employer thereby violated Section 89-13(a)(1), HRS.

SHOPO also contends that the Employer violated various contract provisions by ignoring seniority in the transfers at issue. Based on the record, it appears that the selection process for transfers was seriously flawed. Personnel records were not reviewed and interviews were not conducted prior to the selections. The Employer failed to establish and follow a uniform and consistent policy or guidelines for making the selections. It appears that the only criteria used was a subjective one, based on the personal preferences of those making the recommendations, comments from co-workers and supervisors, and even anonymous rumors. Although testimony was received that seniority was

considered, such statements without more cannot support a finding that it was in fact considered.

Article 11 of the contract, read in conjunction with Section 89-9(d), HRS, confers upon the Employer wide latitude and discretion in the manner in which employees are transferred. Article 11 does, however, modify and temper this discretion, through the application of Article 20, which requires the Employer to ". . . insofar as practicable consider grade seniority when making such transfer or reassignment." C's Ex. 1.

There is little doubt that seniority is a significant factor and must be considered when making transfers. The question is to what degree is seniority a factor, i.e., what is the appropriate weight to be given to seniority?

The Employer argues that seniority is considered and applied when practicable or feasible, and was in fact applied in the subject transfers. The Employer asserts other factors, such as attitude, initiative, experience, training, sick leave usage, physical fitness and suitability for particular tasks were also considered and led to the transfer of less senior officers.

The Union contends that seniority should be given substantial consideration when making transfers. SHOPO Business Manager Michael Joy, who was involved in the initial SHOPO contract negotiations, testified that the intent of inserting the seniority provision in Article 20 was to give seniority value in making transfers. Tr. I, p. 14. The Union does not dispute that other factors may and should be given consideration, however, the Union contends that the senior officer should be given first

consideration, absent some basis which can be articulated and documented that would lead to the officer's disqualification.

The Board agrees with the Union's position that, while many factors may be used to determine who is most suitable for transfer, seniority should be given substantial consideration in the selection process, unless the senior candidate is subject to disqualification because of substantial deficiencies. To find otherwise would essentially render the seniority provision of Article 20 nugatory. However, there may be instances where the application of seniority is not practicable.

In applying the concept of substantial consideration to seniority in the instant case, the Board finds that Wallace Tom should have been transferred to the sergeant's position in Vice. The only deficiency cited against Tom was his so-called "laid-back attitude." Tom should be given the opportunity to prove himself in his new job. If it later becomes evident that he is not performing up to minimal standards, the Employer may take whatever action is necessary to remedy the problem, subject to limitations imposed by departmental rules and regulations, and the contract.

No deficiency was cited as to Randall Bell. He was disqualified from consideration because he was doing a good job as a detective in CID. While DeLima's intentions are certainly laudable, an employee's desire to seek a transfer to another unit cannot be disregarded simply because he has performed admirably in his current job.

Timothy Gapero was disqualified because he could not get along with others during a previous stint in Vice. His inability

to work well with others, especially in a small unit such as Vice, does pose a problem and would give rise to a substantial deficiency sufficient to merit disqualification from consideration, notwithstanding his seniority.

As to Milton Matsuoka, while the Board is mindful of the image the department desires to maintain within the community concerning perceived racial preferences, Article 4 of the contract, and indeed Constitutional and statutory law, expressly prohibits discrimination against an employee solely because of his or her race. Race is an impermissible basis upon which to disqualify a candidate for transfer. Moreover, his alleged relationship with Captain Nakashima does not constitute a substantial deficiency for purposes of disqualification. While the Board is cognizant of the department's desire not to create the perception that friends are taken care of, a long time personal relationship between an employee and his or her prospective supervisor should not be the basis for exclusion from consideration, nor should it merit any special or preferential consideration.

With respect to Cerilo Agarano, the Board majority finds that he should not have been disqualified for transfer to two of the three Vice positions for which he applied: Vice-Narcotics officer and Canine officer. The only alleged deficiency cited against Agarano were unfounded, unsubstantiated rumors of previous drug use. These rumors are repugnant and have cast an ugly cloud over Agarano's reputation and career. Mere rumors and gossip fail to give rise to a substantial deficiency for purposes of disqualification. The Board majority, however, finds that the

department acted properly in not considering Agarano for the Airport Interdiction position because of his intimidating physical size. The term "insofar as practicable" as contained in Article 20 of the contract, limits application of the seniority provisions under certain circumstances. The position of the Vice-Airport Interdiction Officer is a prime example of a situation where the use of seniority is not practicable. Sergeant Anakalea's profile of the ideal person should be given deference and must take preference over seniority considerations if the program's mission, in this case obtaining voluntary consent to search passenger luggage, is to be successful.

Likewise, the Board majority finds that Avanele Kalalau's alleged intimidating physical size is a valid basis for disqualifying her from the Airport Interdiction position. The Board finds, however, that Avanele Kalalau should not have been disqualified from transfer to the Vice officer position. Three deficiencies were cited as grounds for disqualifying Kalalau. Her physical size and, therefore, presumed lack of physical agility, was cited as a substantial deficiency. The record, however, indicates that she is physically competent to undertake the field tasks required of a Vice officer.

Kalalau's sick leave record, which was not reviewed by either Faaumu or Anakalea, should not disqualify her from consideration for the position. While it is clearly in the interest of the department, and all employees for that matter, to have employees with good attendance records, sick leave is an accrued benefit which cannot be used in an adverse light. On the

other hand, sick leave abuse, and not the fact that leave has been used on numerous occasions, may give rise to a substantial deficiency which merits disqualification. If suspected, sick leave abuse should be thoroughly investigated and appropriate disciplinary action taken to address the problem.

Likewise, Stuhr and Bajadali should not have been disqualified from consideration because of the department's perception of excess sick leave usage. Stuhr should not have been disqualified from consideration for transfer to the Vice-Canine position.

In Decision No. 194, United Public Workers, AFSCME, Local 646, AFL-CIO, 3 HPERB 507 (1984), the Board held that wilfulness of respondent's actions can be presumed where the violation of Chapter 89, HRS, occurs as a natural consequence of the respondent's actions. Here, the Board finds based upon the evidence before it that the natural consequence of the Employer's actions in failing to accord seniority its proper weight in the consideration of the subject transfers was a violation of the applicable contract provision and Sections 89-13(a)(7) and (8), HRS. Article 20 of the contract provides that seniority shall be applied insofar as practicable. Here, the Employer was unable to articulate legitimate, non-discriminatory, non-arbitrary job-related reasons why seniority was not controlling with regard to the transfers into positions other than the Airport Interdiction position.

In the same way, the Board finds that the Employer's agents wilfully interfered with the employees' rights under Chapter 89, HRS, to file a grievance contesting the transfers in question

by questioning the employees as to their motives. The Employer placed the employees in an apparently coercive environment and the violation of Section 89-13(a)(1), HRS, occurred as natural consequence of the Employer's actions.

CONCLUSIONS OF LAW

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

An Employer commits a prohibited practice under Section 89-13(a)(1), HRS, when it interferes, restrains, or coerces an employee in the exercise of any right guaranteed under Chapter 89.

The Employer wilfully interfered with the rights of Avaneil Kalalau and Craig Bajadali when its agents, sergeants Ramsay Anakalea and Tivoli Faaumu, questioned the two officers about a grievance, to which they were parties, filed by the Union against the Employer.

An Employer commits a prohibited practice under Sections 89-13(a)(7) and (8), HRS, when it violates the terms of a collective bargaining agreement.

The Employer wilfully violated Article 4 of the contract when it discriminated against Milton Matsuoka on the basis of race. The Employer wilfully violated Article 20 of the contract when it failed to give substantial consideration to seniority when making transfers to the four positions in Vice, pursuant to Personnel Order 94-18. The Union failed to prove that the Employer violated Articles 1, 11, 23 and 35 of the contract.

ORDER

The Employer is ordered to cease and desist from committing the instant prohibited practices.

Because of the unique nature and circumstances of this case, the Board hereby orders the department to take the following action:

1. The Employer shall offer Wallace Tom a transfer to the sergeant's position (PD-0063) in Vice-Gambling. If Tom declines, the offer of transfer shall be extended to Randall Bell; if he declines, Matsuoka shall be given the same opportunity.

2. The Employer shall offer Cerilo Agarano the choice of transfer to either the Vice-Narcotics officer position (PD-0321) or Vice-Canine Handler position (PD-0329). If Agarano declines both positions, the same offer shall be extended to Avanell Kalalau. If Agarano selects one position, the other position shall be offered to Kalalau. If Agarano and Kalalau decline both positions, Craig Bajadali shall be offered the Vice-Narcotics officer position and Robert Stuhr shall be offered the Vice-Canine position.

3. All incumbents in positions affected by this order shall be transferred back to their previous positions within the department or, if unavailable, to positions comparable to their previous positions.

The Employer shall immediately post copies of this decision in conspicuous places at its worksites where employees of the bargaining unit assemble, and leave such copies posted for a period of sixty (60) consecutive days from the initial date of posting.


The Employer shall notify the Board within thirty (30) days of the receipt of this order of the steps taken by the Employer to comply herewith.

DATED: Honolulu, Hawaii, May 31, 1996.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member

OPINION, CONCURRING IN PART, DISSENTING IN PART

I agree with the Board majority that the Employer in this case violated the contract by failing to accord seniority its proper weight in the subject transfers. However, I also believe that senior officers Cerilo Agarano and Avanele Kalalau should not be disqualified from consideration and selection because of their physical size. The evidence in the record indicates that Sergeant Anakalea developed a profile of an ideal Airport Interdiction officer which largely depends upon the physical appearance of the officer. In his opinion, Agarano and Kalalau were too physically imposing to perform the airport job duties effectively since their appearance could be intimidating to potential persons being interviewed and thus may jeopardize their investigations. I question whether the physical appearance or demeanor of the individual officers can be modified to perform the job duties required. Moreover, the Employer's assessment of Agarano's and

Kalalau's appearance does not take into account that the officers are qualified to perform the other Vice-Narcotics duties while not on duty at the airport. Therefore, I believe these officers should have the opportunity to pursue airport interdiction duties and be evaluated on their skills and performance rather than a preconceived bias against their physical proportions.

Sandra H. Ebesu
SANDRA H. EBESU, Board Member

Copies sent to:

Randal A. Yoshida, Esq.
Howard M. Fukushima, Deputy Corporation Counsel
Joyce Najita, IRC
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