

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-12-403
)	
STATE OF HAWAII ORGANIZATION)	DECISION NO. 396
OF POLICE OFFICERS,)	
)	FINDINGS OF FACT, CONCLU-
Complainant,)	SIONS OF LAW, AND ORDER
)	
and)	
)	
MARYANNE KUSAKA, Mayor, County)	
of Kauai and GEORGE FREITAS,)	
Chief, Kauai Police Department,)	
County of Kauai,)	
)	
Respondents.)	
)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

On August 12, 1998, Complainant STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against MARYANNE KUSAKA, Mayor, County of Kauai and GEORGE FREITAS, Chief, Kauai Police Department, County of Kauai (collectively County or Employer).

In its complaint, SHOPO alleges that the County implemented Kauai Police Department Special Order No. 98-14, entitled "District Court Appearance" (hereafter S.O.) without its consent. SHOPO alleges that the assignment of police duties to off-duty officers who are subpoenaed to testify in court pursuant to the S.O. constitutes a material change in wages, hours, and other terms and conditions of employment requiring negotiations prior to implementation. SHOPO contends that the Employer's

unilateral implementation of the S.O. modifies the existing Unit 12 Collective Bargaining Agreement (contract) and violates Sections 89-13(a)(5), (7), and (8), Hawaii Revised Statutes (HRS).

On August 28, 1998, SHOPO filed a motion for interlocutory relief with the Board. SHOPO requested that the Board grant preliminary injunctive relief pending the issuance of a final order in this case. SHOPO contends that the Employer violated contract provisions and on balance, SHOPO and its members will suffer irreparable harm if the motion is not granted.

On September 23, 1998, the Employer filed a memorandum in opposition to Complainant's motion for interlocutory relief with the Board. The Employer contends that the Officer in Court Program does not change the wages, hours or other conditions of work of the officers. The Employer also contends that the program is a test program and of limited scope and duration, thus, the opportunity for irreparable harm to the officers is non-existent.

On September 25, 1998 the Board conducted a hearing at Lihue, Kauai. At the outset of the hearing, Board Member Chester Kunitake disclosed to the parties that his brother currently occupies an officer position within SHOPO and queried whether any party objected to his continued presence in hearing the case. None of the parties objected. At the hearing, both parties were afforded a full opportunity to present witnesses, evidence and arguments on behalf of their respective positions. After a thorough review of the record in the case, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

MARYANNE KUSAKA was, at all times relevant, the Mayor of the County of Kauai and a public employer, as defined in Section 89-2, HRS, of employees of the County in bargaining unit 12.

GEORGE FREITAS was, at all times relevant, the Chief of Police for the Kauai Police Department and a public employer, as defined in Section 89-2, HRS, of employees of the County in bargaining unit 12.

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

On or before May 27, 1998, the County transmitted a copy of the S.O. to SHOPO. The S.O. listed an implementation date of June 1, 1998. The order provided in pertinent part:

All Patrol Services Bureau personnel subpoenaed by District Court will report to the respective District Commander, for assignment prior to reporting to Court.

COURT COORDINATORS DUTIES: (Lt. Kelly ITO or his designate)

Will obtain subpoena list from the Records Section and forward it to the respective District Commanders one day prior to the court date.

DISTRICT COURT BAILIFF DUTIES:

One half hour prior to the required court appearance of the Officer(s) the District Court Bailiff will notify the respective District Commanders.

DISTRICT COMMANDERS DUTIES:

Maintain a log of all officers attending court.

District Commanders will assign duties to personnel during the interim period prior to attending court.

Establish contact with Court Bailiff, Ms. Charlene ADRIC, of the District Court, telephone number 246-3317, and inform her that an officer is available for court attendance.

Ensure that officers report to Court upon being notified by Ms. ADRIC or her designate.

As this is a trial period only, application only pertains to DISTRICT COURT appearances.

Protocol has not been established for FAMILY OR CIRCUIT COURT.

/s/Harris T. MORIGUCHI
Harris T. MORIGUCHI
Acting Bureau Cmdr, PSB

Prior to implementation of the S.O., officers who were subpoenaed to appear in court on their scheduled day off proceeded directly to court and waited at the courthouse. While waiting at the courthouse, the officers reviewed their reports and at times, conferred with prosecutors. Police district commanders were responsible for ensuring that subpoenaed officers reported to court.

Under the S.O., officers are required to report to their district commanders at the substations prior to appearing in court. District commanders are required to ensure that subpoenaed officers are prepared for court, ensure that officers complete other reports and citations, and may assign the officers additional tasks including service of legal documents. Thus, in addition to reviewing their reports, officers may be assigned additional duties such as completing outstanding or rejected police reports and citations, serving legal documents including subpoenas, bench

warrants and temporary restraining orders, and completing citizen survey forms.

By letter dated May 27, 1998, from SHOPO Business Manager Clifford KANEIAKALA to FREITAS, SHOPO informed the Employer that the S.O. was subject to the meet and confer provision contained in Article 14 of the contract and requested that the S.O. be rescinded until after the parties conducted a meet and confer meeting on the policy.

On or about May 28, 1998, SHOPO, by and through its business agent, Russell VALPARAISO, filed a class grievance referenced as SHOPO Case No. K-98-006, at Step 2 of the grievance procedure with the Employer. The grievance alleged violations of Articles 1, 14, and 35 of the contract. As a remedy, the grievance requested the Employer to rescind the S.O. until such time as a meet and confer meeting had taken place and to cease and desist from violating the contract.

Shortly thereafter, SHOPO received a fax transmission from Acting Inspector Harris Moriguchi that the Employer rescinded the S.O.

On or about July 9, 1998, the parties held a meet and confer discussion. Present at the meeting were VALPARAISO and Stanley Kua, SHOPO Kauai Chapter Chairman; Acting Inspector Harris Moriguchi; Acting Captain Clayton Arinaga; Michael Soong, Kauai County Prosecuting Attorney; and Ernest Borreira, Courts Administrator. With regard to on-duty officers, SHOPO was only concerned that officers stay on their beat until notified for court appearance. However, SHOPO objected to the assignment of police

duties to off-duty officers as a violation of the contract and a change in working conditions which required mutual agreement of the parties.

By letter dated July 20, 1998, from VALPARAISO to FREITAS, SHOPO Case No. K-98-006 was officially withdrawn. VALPARAISO indicated that after meeting with the Employer regarding the grievance SHOPO understood that the issuance of the S.O. was a mistake and the Employer had intended to request a meet and confer meeting with SHOPO. Further, a meet and confer meeting was held between the parties and others on July 9, 1998.

By letter dated July 21, 1998, from FREITAS to KANEAIKALA, SHOPO was informed that, subsequent to the meet and confer meeting, the Employer found that the S.O. did not constitute a change in working conditions but rather a change in personnel practice which required consultation under the contract. Therefore, the Employer advised SHOPO that the S.O. would be implemented on August 1, 1998.

By letter dated August 7, 1998, which was received by SHOPO on August 25, 1998, the Employer, by Deputy Chief Paul S. Hurley responded to the Step II grievance in Case No. K-98-06. After discussing the grievance, the Employer found that the remedies sought by the grievance had been granted since a meet and confer meeting had taken place. The Employer further found no violations of the contract.

By letter dated August 31, 1998, from VALPARAISO to Deputy Chief of Police Paul Hurley, SHOPO acknowledged receipt of a Step 2 response in SHOPO Case No. K-98-006, and questioned the

response as it addressed alleged contractual violations not raised by the Union in its grievance. SHOPO reiterated that the grievance had been withdrawn after a meet and confer meeting had been conducted on the S.O. and further requested a meet and confer to remedy the situation.

By letter dated September 7, 1998, from FREITAS to KANEAIKALA, the Employer informed SHOPO that the Step 2 response dealt with alleged contractual violations contained in both the grievance form as well as matters raised during the Step 2 meeting.

By letter dated September 9, 1998, from VALPARAISO to Deputy Chief Hurley, SHOPO again questioned the Employer's Step 2 response as the initial grievance was not amended to include articles mentioned in the decision. SHOPO also restated that the grievance became moot after the meet and confer meeting was held. SHOPO also indicated that another class grievance was filed in response to FREITAS' July 21, 1998 letter indicating the implementation of the S.O.

According to VALPARAISO, the second grievance is still pending discovery.

DISCUSSION

SHOPO alleges that the Employer's implementation of the S.O. violates the provisions of Sections 89-13(a)(5), (7), and (8), HRS, which provide in pertinent part:

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

* * *

(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;

* * *

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

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

With respect to SHOPO's contention that the S.O. violates Articles 1.D. and 15.A. of the contract, and is therefore a violation of Section 89-13(a)(8), HRS, in Santos v. State of Hawaii Dept. of Transportation, Kauai Division, 64 Haw. 648, 646 P.2d 962 (1982), the Hawaii Supreme Court held:

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 655.

In Decision No. 22, Hawaii State Teachers Association v. Department of Education, 1 HPERB 253, 261 (1972), this Board's predecessor, the Hawaii Public Employment Relations Board (HPERB) stated that:

It shall be the policy of this Board to attempt to foster the peaceful settlement of disputes, wherever appropriate, and application by deferral of matters concerning contractual interpretation to the arbitration process agreed to by the parties.

In the instant case, both SHOPO and the Employer are parties to a collective bargaining agreement which provides for a grievance procedure, culminating in arbitration, to resolve disputes involving alleged contractual violations. Further, the

evidence in the record indicates that SHOPO filed a second grievance challenging the S.O. and the grievance is presently pending. Thus, in keeping with the foregoing policy, the Board defers those claims alleging contractual violations to the grievance arbitration process and accordingly, dismisses those claims alleging contractual violations under Section 89-13(a)(8), HRS.

SHOPO contends that the use of police officers who are subpoenaed to court on their scheduled days off to perform police duties in addition, but not directly related, to their appearance in court constitutes a change in wages, hours or other terms and conditions of work. SHOPO therefore contends that negotiations culminating in mutual consent is required to implement such a change.

The Employer maintains that the assignment of additional police duties does not constitute a material and significant change in wages, hours and other terms and conditions of work and therefore implementation of the S.O. is not subject to mutual consent.

In Decision No. 84, Hawaii Government Employees' Association, 1 HPERB 763 (1977), the Board established a test to determine whether a matter is subject to negotiation prior to implementation, e.g., whether the subject matter has a material and significant effect or impact on terms and conditions of employment.

With respect to wages, no evidence was presented to support a finding that implementation of the S.O. would have an adverse impact on the manner in which the officers' compensation is

calculated. Consequently, the Board finds that the S.O. does not have an impact on wages.

As to the distinction raised between situations involving the Employer calling an off-duty officer back to duty and the Court issuing a subpoena to compel the officer's presence, when an officer is called back to duty, the Employer has primary control over the officer who is required to perform police related duties at the direction of the Employer. When an officer is subpoenaed by the Court, the Court exerts primary control over the officer. Beyond compelling the officer's appearance in court at a designated time, however, the Court exercises no control over the officer and the Employer is free to direct the employee to perform police related duties.

Based on the evidence, the Employer discussed the S.O. with a representative of the Court as well as the Prosecuting Attorney. Apparently, neither the court nor prosecutor representatives expressed problems with the assignment of additional tasks to these officers under the new program so long as these tasks did not interfere with their ability to appear in court. Thus, no evidence was presented to establish that implementation of the S.O. interferes with an officer's ability to appear in Court.

The Board finds that the S.O. has an impact on conditions of employment. Officers can no longer proceed directly to court as has been the practice but must first report to their district commanders. Officers are no longer able to spend their time at the courthouse simply waiting to testify, but may be assigned

additional tasks by their district commanders. Performance of these tasks have, in certain situations, caused officers to work longer hours because of travel time and booking procedures.

While these additional tasks are clearly associated with services routinely performed by police officers, they do represent a change in terms and conditions of employment. While it may appear that assignment of additional tasks to an officer who would otherwise sit idle at court constitutes a substantial change, the Board majority is not persuaded that the changes have a material and significant impact on terms and conditions of employment to the extent that negotiations culminating in mutual consent is required prior to implementation. Nevertheless, policies which do have an impact require the Employer to comport with the consultation or meet and confer provisions of the contract prior to implementation.

The record is clear that SHOPO requested, and the Employer agreed to, a delay in implementation of the S.O. until a meet and confer meeting was held. Such a meeting occurred on or about July 9, 1998. A series of subsequent letters from SHOPO to the Employer confirms that the meet and confer requirements were met and that the grievance was therefore rendered moot.

Based on the evidence presented, the Board majority finds that the assignment of these additional police duties pursuant to the S.O. does not have a material and significant impact on wages, hours, or other terms and conditions of employment. Consequently, the Employer may direct officers to perform these additional police related duties when subpoenaed to appear in court during the officer's days off.

The Employer further asserts that it is merely exercising a management right pursuant to Section 89-9(d), HRS, in order to maintain efficiency of government operations, thus rendering the subject matter non-negotiable.

FREITAS testified that the Employer struggled to ensure service of legal documents. He also testified that observing officers waiting at the courthouse motivated him to explore ways in which to utilize their services "to lighten everybody's load." The S.O. does appear to promote the efficiency of police operations by maximizing the use of officers who would otherwise stand idle at the courthouse waiting to testify. However, inasmuch as the Board finds that implementation of the S.O. does not pose a material and significant impact on wages, hours, or other terms and conditions of employment and is therefore not subject to negotiation and mutual consent, the Board need not reach the issue of whether the S.O. constitutes a valid exercise of management's rights under Section 89-9(d), HRS, which would override negotiability.

In view of the Board's decision in this case, the Board hereby denies SHOPO's motion for interlocutory relief.

CONCLUSIONS OF LAW

The Board has jurisdiction over the instant prohibited practice complaint, pursuant to Sections 89-5 and 89-14, HRS.

The Board has the discretion to defer allegations of contractual violations to the contractual grievance procedure as set forth in the collective bargaining agreement between the parties.

The Board exercises its policy of deferral to the contractual grievance procedure as set forth in the collective bargaining agreement between the parties and dismisses those claims arising under Section 89-13(a)(8), HRS.

Any new policy which poses a material and significant effect or impact on wages, hours, or other terms and conditions of employment requires negotiation and mutual consent between the Employer and Union prior to its implementation.

The implementation of the S.O. does not pose a material and significant effect or impact on wages, hours, or other terms and conditions of employment and is therefore not subject to negotiation and mutual consent.

The subject policy does, however, require the Employer to engage in meaningful consultation with the Union prior to its implementation. The Employer has met the requirements of meaningful consultation.

The Board concludes that the Employer's refusal to negotiate over the S.O. does not constitute a prohibited practice under the provisions of Sections 89-13(a)(5) and (7), HRS.

ORDER

The instant prohibited practice complaint is hereby dismissed.

DATED: Honolulu, Hawaii, December 1, 1998.

HAWAII LABOR RELATIONS BOARD



RUSSELL T. HIGA, Board Member


CHESTER C. KUNITAKE, Board Member

CONCURRING OPINION


Although I concur with the Board majority that the complaint in this case should be dismissed I cannot agree with the conclusion that the change in procedure under Special Order No. 98-14 (S.O.) for police officers who are subpoenaed to testify on their scheduled days off does not constitute a sufficiently material and significant change on terms and conditions of employment so as to render implementation of the change non-negotiable.

Prior to implementation of the S.O., officers subpoenaed for court appearances on their scheduled days off were never assigned to perform duties unrelated to their court appearance. They would report to the courts and wait until called to testify and then return home without ever checking in with their supervisors in the police department. Under the new procedure, officers must report to their District Commander for assignment before reporting to the courts and may be assigned duties unrelated to their court appearance to be performed during the waiting period prior to being called to testify. I believe a change from having no duties except testifying in court to being assigned other duties represents a significant change on terms and conditions of employment.

Notwithstanding the foregoing, I would dismiss the complaint without prejudice and defer to arbitration under the

collective bargaining contract. SHOPO contends that the plain and unambiguous language of Article 15 A.2.c. of the contract makes clear that subpoenaed officers are only required to attend court and perform court duties. Therefore, according to SHOPO, assigning such officers non-court related duties violates the contract. The Employer contends that the collective bargaining history suggests that Article 15 does not limit the duties to which an officer may be assigned but merely serves to indicate the time period for which the officer is compensated and the rate of pay. Based on that interpretation of the contract, the Employer goes on to argue that the S.O. does not significantly impact on terms and conditions of work and that the so called "management rights" clause of Section 89-9(d), HRS, renders implementation of the S.O. non-negotiable.

Initially then, this dispute turns on a matter of contract interpretation, i.e., whether or not the provision in question limits the duties of a subpoenaed police officer. All of the alleged violations of Chapter 89 flow from the basic disagreement as to the meaning of the contract. Moreover, there is no evidence that the Employer or SHOPO has acted in any way to frustrate the grievance process or that the matter is of such basic importance to the collective bargaining process that the Board should not defer to the grievance procedure. Therefore, I would defer to the grievance procedure and dismiss the complaint without prejudice.


BERT M. TOMASU, Chairperson

STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS and MARYANNE
KUSAKA, Mayor, County of Kauai; et al.; CASE NO. CE-12-403
DECISION NO. 396
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