

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-09-411
)	
HAWAII GOVERNMENT EMPLOYEES)	DECISION NO. 400
ASSOCIATION, AFSCME, LOCAL 152,)	
AFL-CIO,)	FINDINGS OF FACT, CONCLU-
)	SIONS OF LAW, AND ORDER
Complainant,)	
)	
and)	
)	
DEPARTMENT OF HEALTH, State of)	
Hawaii and DR. BEVERLY A. COX,)	
Chief, Hawaii State Hospital,)	
Department of Nursing, State of)	
Hawaii,)	
)	
Respondents.)	
)	

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

On September 16, 1998, the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against the DEPARTMENT OF HEALTH (DOH), State of Hawaii, and DR. BEVERLY A. COX (COX), Chief of the Department of Nursing at the Hawaii State Hospital, DOH (collectively Employer). The HGEA alleges that COX denied Union steward Lani Tsuneishi (Tsuneishi) the opportunity to have a Union agent present at a meeting which subsequently led to a letter of discipline being issued to Tsuneishi. The Union contends that the Employer's denial of Union representation constitutes a violation of Section 89-3, Hawaii Revised Statutes (HRS) and that such violation constitutes a

prohibited practice under the provisions of Sections 89-13(a)(1), (2), (3), (7), and (8), HRS.

On October 28, 1998, the Employer filed a motion to dismiss the instant complaint contending that the Union previously filed a grievance, which is still ongoing, contesting the alleged letter of discipline. Inasmuch as the grievance is still viable, the Employer maintains that the Union has failed to exhaust its remedies under the contractual grievance procedure prior to filing the instant complaint.

On November 30, 1998, the Board conducted a hearing on Respondents' motion to dismiss the complaint. Thereafter, on December 4, 1998, the Board issued Order No. 1683, Order Granting, in Part, and Denying, in Part, Respondents' Motion to Dismiss Complaint. As the record reflected the existence of a pending grievance challenging discipline taken against Tsuneishi and the HGEA did not seek review of the disciplinary action under just cause standards, the Board deferred resolution of the alleged contractual violations, i.e., the merits of the alleged disciplinary action, including the alleged denial of Union representation, to the grievance process and dismissed the alleged violations of Section 89-13(a)(8), HRS. The Board, however, retained jurisdiction over the remaining alleged violations of Sections 89-13(a)(1), (2), (3), and (7), HRS.

On December 17, 1998 and January 8, 1999, the Board held hearings on the complaint. All parties were afforded full opportunity to present evidence and arguments before the Board. After a thorough review of the record in the case, the Board issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The HGEA is the exclusive representative, as defined in Section 89-2, HRS, of employees of the Employer included in bargaining unit 09.

The DOH is a representative of a public employer as defined in Section 89-2, HRS.

COX is the Chief of the Department of Nursing at the Hawaii State Hospital, DOH and a representative of a public employer as defined in Section 89-2, HRS.

Tsuneishi is a Registered Professional Nurse III at the Hawaii State Hospital and an employee, as defined in Section 89-2, HRS, included in bargaining unit 09. At all relevant times, Tsuneishi was the Nursing Quality Improvement (QI) Coordinator, directly supervised by COX. As a nurse, Tsuneishi reviews patients' charts to ensure nursing practices comply with existing standards and external regulatory requirements. Tsuneishi also chairs a Policy and Procedures (P & P) committee composed of nurses from the various units and which is responsible to recommend revisions to hospital policies and procedures to COX.

Tsuneishi also served as a Union steward from March 1995 and is presently the chief steward at the hospital. As a steward, Tsuneishi attends monthly Union meetings, disseminates information to the bargaining unit members, and assists Unit 09 employees in disciplinary meetings and other matters dealing with the Union.

Sometime prior to September 1, 1998, HGEA Field Services Officer Randy Perreira (Perreira) informed Tsuneishi that as a result of a grievance filed earlier by the Union on behalf of its members, two employees at the hospital would be reinstated to their

former positions. Perreira testified that he asked Tsuneishi to inform the staff of the resolution of the disputes involving the two employees.

On or about August 31, 1998, Tsuneishi conducted a P & P committee meeting with other nurses at the hospital. As the meeting was concluding, Tsuneishi mentioned that two employees, Katrina Alabanza and Candice Sullivan,¹ would be returned to their former positions at the hospital. Fe Baltao (Baltao), another Union steward, was upset at the announcement because she would be displaced by one of the employees. Baltao complained to COX that Tsuneishi had announced the return of the two employees at the meeting.

On September 3, 1998, COX met with Tsuneishi purportedly to discuss the hospital's strategic plan.² COX asked Tsuneishi which projects she was working on and Tsuneishi asked which projects COX was concerned with. COX asked Tsuneishi for the minutes of the P & P meeting. Tsuneishi indicated that she did not have the minutes but could get them for her in about one week. COX then asked Tsuneishi for the agenda and whether Tsuneishi had revealed sensitive and confidential material during the course of the meeting. COX said that a person attending the meeting reported

¹Tsuneishi had previously attended meetings to assist Candice Sullivan.

²By memorandum dated September 1, 1998, COX requested Tsuneishi to proceed with work on the strategic plan. COX also requested that Tsuneishi gather relevant literature and make an appointment to review her progress for Thursday (September 3, 1998). By memorandum dated September 3, 1998, Tsuneishi transmitted the literature she had gathered for the meeting to COX and reminded COX that she had to determine whether the goals Tsuneishi had previously assigned to the various positions were appropriate.

that Tsuneishi had announced that the two nurses would be reinstated. Tsuneishi explained that she had made a comment at the close of or after the meeting when getting up to leave, to the effect, "did you hear that Katrina and Candy might be coming back?" Tsuneishi was unaware that Baltao would be displaced by one employee's reinstatement. COX told Tsuneishi that she should not presume to speak for management. Tsuneishi said that she did not discuss managerial issues and that the subject was not sensitive and confidential in her mind.

Tsuneishi believed the meeting with COX to be disciplinary in nature and requested Union representation. COX insisted that she was coaching Tsuneishi which COX considered nondisciplinary and did not permit Tsuneishi to contact her Union representative. Tsuneishi asked COX to reschedule the meeting and COX said that she was not having the discussion anymore. COX also told Tsuneishi that she would write her up.

Thereafter, by Memorandum for Personnel File, dated September 8, 1998, COX confirmed her directive to Tsuneishi. The memorandum stated:

Further to our recent meeting, I am confirming in writing my directive to you which is intended to clarify your understanding of activities related to your professional role and assignments at the hospital, and your role as a union steward. It was reported to me that you recently used the occasion of a departmental committee meeting to share privileged information concerning two staff members. As you have acknowledged, this information came to you via the union. As I pointed out to you, any discussion of managerial issues, especially matters of sensitivity and confidentiality, are not within your scope of activity. Indeed, it is my impression that the union would not have authorized you to release this information on

their behalf. In any event, the report of your comments came to me by way of other members of the union who found the discussion offensive, particularly in regard to the manner in which you conducted this discussion in front of several other staff.

Please be advised that you are not to combine your union role with your professional activities here at the hospital. You are not to presume to speak for the management of the hospital, nor are you to represent to others that you have confidential information about the administration's deliberations with the union.

I trust you will comply with this directive as further noncompliance may result in disciplinary action.

According to COX, she documented her discussion with Tsuneishi in the memorandum but maintained that it was not intended to be disciplinary. COX had indicated that she would put the matter in writing, not that she would "write Tsuneishi up." COX maintained that during the September 3, 1998 meeting she attempted to clarify what she believed to be discrepancies in the events as related by Baltao and Tsuneishi. COX believed that Tsuneishi had disclosed the outcome of sensitive negotiations concerning the two personnel matters, one involving an administrative investigation and the other resulting from a grievance, during the meeting. The senior administrative group at the hospital had previously discussed the decisions and the process to meet with and inform the staff. COX considered the matter to be confidential because the dissemination of information is part of the administrative responsibility to inform and communicate and implement decisions that are agreed upon. By announcing the return of the employees, Tsuneishi informed Baltao, the person who would be displaced, who was allegedly very distressed by the announcement and complained to

COX. COX further felt it was inappropriate for Tsuneishi to make the announcement at the meeting since there is a procedure for the dissemination of Union information on a regular basis.

COX issued an identical memorandum to Tsuneishi, dated September 8, 1998, which included an acknowledgment line for Tsuneishi.

By memorandum, dated September 16, 1998, Tsuneishi submitted a rebuttal to COX's previous Memorandum for Personnel File to correct what she felt were inaccuracies. Tsuneishi felt that COX called a disciplinary meeting under false pretenses of discussing other work-related issues. Tsuneishi also felt that COX violated her rights by denying her Union representation during a disciplinary meeting. Tsuneishi reiterated that she expressed an opinion after the meeting and did not presume to speak for management of the hospital.

Based upon the foregoing facts, the Board finds that Tsuneishi, the chief steward for Unit 09 at Hawaii State Hospital, announced the return of two employees who received Union assistance at the close of a meeting she was conducting with other nurses. The HGEA Field Services Officer had informed Tsuneishi of the nurses' return and told her she could inform the membership. After Tsuneishi's announcement, a nurse who would be displaced by one of the returning employees complained to COX. After investigating the matter, COX gave Tsuneishi a written warning regarding her dissemination of privileged information about the administration's negotiations on the personnel matters.

COX knew that Tsuneishi had gotten the information from the Union and wrongly assumed that the Union would not have

authorized the release of the information. In addition, COX warned Tsuneishi about commingling her roles as a steward and a perceived representative of management and COX clarified that Tsuneishi had no right to represent management's views. COX warned that further breaches could subject Tsuneishi to disciplinary action.

While COX views her meeting with Tsuneishi and subsequent documentation as nondisciplinary because she characterizes it as "coaching," the Board finds that any distinction is illusory, in that the memorandum is a clear warning to Tsuneishi not to disseminate information from the Union to the members during committee meetings. The Board finds that Tsuneishi was disseminating information from the Union to the membership and COX clearly perceived a conflict in her Union activities and her responsibilities to the administration.

Based on these facts, the Board finds that Tsuneishi was engaged in protected activity in her role as a Union steward in disseminating information when she was confronted, interrogated, and then chastised by her supervisor.

DISCUSSION

The Union alleges that Tsuneishi was engaged in proper union activity when she relayed information about the status of the two employees which was given to her by the Union staff intended for her use as a Union chief steward. The Union contends that any limitations or restrictions placed on Tsuneishi's conduct by COX in her Memorandum for Personnel File interferes with and restrains Tsuneishi's right to engage in protected union activity under Section 89-3, HRS. The Union also argues that COX interfered with

the Union's right to disseminate information by her Memorandum and administer its organization. Thus, the Union contends that COX's Memorandum violates Section 89-13(a)(2), HRS. The Union also contends that the Employer discriminated against Tsuneishi in the exercise of her rights by requiring her to report her Union activities on a weekly basis to COX thereby violating Section 89-13(a)(3), HRS.³ The Union further argues the Employer violated Section 89-13(a)(7), HRS, by violating Sections 89-3, 89-13(a)(1), (2), and (3), HRS.

In addition, the Union addresses at length in its closing brief that COX violated Tsuneishi's right to Union representation in disciplinary proceedings as established in NLRB v. J. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959 (1975). However, in view of the Board's Order No. 1683, supra, the Board deferred the issue to the pending grievance process along with the contractual claims of unjust discipline and will not address the issue further.

Respondents do not dispute that Tsuneishi has the right to disseminate Union information to other bargaining unit members when she is acting as a steward. However, Respondents contend that Complainant failed to establish that Tsuneishi was engaged in protected activity at the time she announced that the two

³The Union contends that the COX required Tsuneishi to report on her Union activities on a weekly basis and this conduct constitutes a violation of Section 89-3, HRS. However, the Board notes that this allegation was not contained in the instant complaint nor was the complaint amended to include this charge. Thus, while the Board views very seriously such allegations of Union surveillance, the Board cannot consider these allegations as a basis of this prohibited practice complaint because they were not properly made part of the complaint.

disciplined employees were being reinstated. Respondents contend that Tsuneishi denied that she was conducting a Union meeting, carrying out Union directions to disseminate information, acting as a Union steward, or in any way acting on behalf of the Union. Respondents argue that COX believed that Tsuneishi was acting in a management capacity when she divulged the information about the reinstatements but mistakenly believed that the Union did not want the information disclosed. Respondents thus contend that COX made an honest mistake and her conduct does not rise to the level of a prohibited practice.

Section 89-13, HRS, provides in relevant 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;
- (2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;
- (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;

* * *

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

Section 89-3, HRS, refers to the rights of employees and provides as follows:

Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in

lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. . . .

In addition, Article 7 - Union Representation Rights, of the Unit 09 collective bargaining agreement, paragraph D, sets forth the agreement with the Employer regarding the stewards:

The Union shall appoint a sufficient number of stewards from among the Employees whose function shall be to investigate complaints, handle grievances, and assure that the Agreement is being properly administered in their work areas, during working hours without loss of pay or benefits. The Employer assures privacy to the steward and the Employee while discussing the Employee's grievance.

As discussed supra, contrary to the Respondents' arguments, COX warned Tsuneishi not to speak on behalf of management, not to imply possession of confidential information, and not to disseminate such information during work time, otherwise disciplinary action may be taken. In the instant case, the Union provided Tsuneishi information regarding the status of two personnel actions for dissemination to the membership. The dissemination of this information was clearly within the scope of Tsuneishi's responsibilities in her capacity as a Union steward. Tsuneishi, in fact, had assisted one of the employees in this case. The Employer's interference with Tsuneishi's rights to participate in the collective bargaining process constitutes a violation of the Tsuneishi's rights recognized in Section 89-3, HRS.

In United Public Workers, AFSCME, Local 646, AFL-CIO, 3 HPERB 507, (1984), the Board held that wilfulness can be inferred from the circumstances of the case and can be presumed where the violation occurred as a natural consequence of the party's actions.

Based upon the evidence in the record, the Board finds that the natural consequence of COX's interrogation and warning to Tsuneishi regarding her role as a steward violated her rights. Thus, the Board concludes that the Employer has committed a prohibited practice under the provisions of Sections 89-13(a)(1) and (7), HRS.

The Union also argues that COX's Memorandum For Personnel File interferes with its right to disseminate information in violation of Section 89-13(a)(2), HRS, because it attempts to speak for the Union and determine what was acceptable or not acceptable behavior for Tsuneishi. The Union argues that the Memorandum interferes with the Union's right to administer its own organization.

After considering the arguments of the Union, the Board is unable to conclude on this record that COX's memorandum interfered with administration of the Union. Any such conclusion would be based on speculation since there is no evidence to establish such interference. Therefore, the Board concludes that the Union failed to carry its burden of proving that Respondents violated Section 89-13(a)(2), HRS.

CONCLUSIONS OF LAW

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

An Employer commits a prohibited practice in violation of Section 89-13(a)(1), HRS, when it interferes with the rights of employees acting in the capacity of a Union official, which is guaranteed by Chapter 89, HRS.

An Employer commits a prohibited practice in violation of Sections 89-3 and 89-13(a)(7), HRS, when it interferes with the employee's rights to participate in the collective bargaining process without Employer interference, restraint, or coercion.

ORDER

The Employer is ordered to cease and desist from committing the instant prohibited practices and is ordered to comply with the requirements of Section 89, HRS.

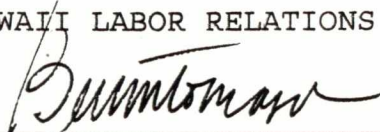
The Employer shall rescind the Memorandum to Personnel File, dated September 8, 1998, issued to Tsuneishi and all copies of such letter shall be removed from her personnel file and destroyed.

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

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

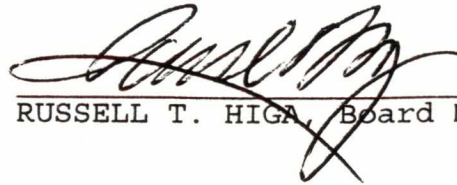
DATED: Honolulu, Hawaii, September 3, 1999.

HAWAII LABOR RELATIONS BOARD

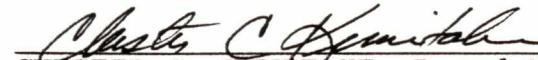


BERT M. TOMASU, Chairperson

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and DEPARTMENT OF HEALTH, State of Hawaii, et al.
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RUSSELL T. HIGA, Board Member



CHESTER C. KUNITAKE, Board Member

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