EFiled: Jun 03 2016 01:27PM HAST
Transaction ID 59097071
Case No. CE-12-875

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

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| In the Matter of<br><br>STATE OF HAWAII ORANIZATION OF POLICE OFFICERS,<br><br>Complainant,<br><br>and<br><br>BERNARD CARVALHO, Mayor, County of Kauai; and DARRYL D. PERRY, Chief of Police, Kauai Police Department, County of Kauai; and COUNTY OF KAUAI,<br><br>Respondents. | CASE NO. CE-12-875<br><br>DECISION NO. 481<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER |

## FINDINGS OF FACT, CONCLUSION OF LAW, AND DECISION AND ORDER

The question presented to the Hawaii Labor Relations Board (Board) by Complainant STATE OF HAWAI'I ORGANIZATION OF POLICE OFFICERS (SHOPO) and Respondents BERNARD P. CARVALHO, JR., Mayor, DARRYL D. PERRY, Chief of Police (Chief Perry), and COUNTY OF KAUAI (collectively, County) is: Does the implementation of a body worn camera system (BWCS) policy adopted by the Kaua'i Police Department (KPD) require SHOPO's consent pursuant to the terms and conditions of SHOPO Agreement effective July 1, 2011 through June 30, 2017 (CBA)?[1] The Board's answer is "No".

[1] SHOPO alleged that it reached agreement with KPD on the final version of GO-41.17 (Version 13), but sought KPD's agreement that any changes or amendments to GO-41.17 would be subject to the "mutual consent" requirement rather than a "consultation" requirement. Thus, SHOPO proposed the SUP (defined below) for KPD's adoption. *See*, Complaint, Attachment B at Paragraph 57. Thus, the terms and conditions of GO-41.17 are not in dispute. What is in dispute is whether the implementation of GO-41.17 is a subject of negotiation with SHOPO.

## I. PROCEDURAL BACKGROUND.

On January 11, 2016, SHOPO filed its Prohibited Practice Complaint (Complaint) against the County alleging, among other things, that:

A. After reviewing various drafts of a proposed BWCS Policy, the parties appeared to reach agreement on "Version 13 of KPD GO 14-04 BWCS."[2] SHOPO delivered to Chief Perry a "proposed Supplemental Agreement ('SUP') Regarding Body-Worn Camera System."[3] Chief Perry responded that "[a]fter further review and assessment, the language of the SUP suggest that KPD agrees that the BWCS program falls under the purview of 'Mutual Consent' *which is not the case*." (Italics added.)[4] Although SHOPO made revisions to the SUP as requested by Chief Perry, he allegedly "refused to sign the SUP as amended and presented, and refused to acknowledge the policy was a meet and consent issue. Chief Perry made clear that the Employer was refusing to recognize or consider the camera issue as a negotiable meet and mutual consent issue, in complete contradiction to the representations he had made to the Kauai County council."[5] SHOPO further alleged that:

> "Body-Worn Cameras constitute a condition of work, and are thus, necessarily a subject to mandatory bargaining that requires the mutual consent of both parties. The Employer's purported camera policy requires police officers to wear the Body-Worn Cameras throughout their shift, requiring minute by minute decisions on whether to activate or not, consider privacy issues, emergencies, etc., and subjects them to disciplinary action for violations of working requirements associated with the usage of

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2 *Id.*

3 *Id.* The Supplement Agreement K-2015-02 shall be referred to as the SUP. A true and complete copy of the SUP was admitted into evidence as Exhibit J-50.

4 Complaint, Attachment B at Para. 58.

5 Complaint, Attachment B at Paragraph 60.

> cameras. The policy also dictates when and where the camera is required to be used and not used; when the camera is to be turned on and off; duplication of recordings; downloading, securing and storing of recordings; where the camera is to be positioned in the office during on-duty hours; what disclosures are to be made by an officer to the member of the public that may be the subject of a recording; whether the public can review a recording at a scene; and what types of reports are to be generated by an officer making a recording."[6]

SHOPO then alleged that the foregoing was a wilfull violation of the CBA and of Hawaii Revised Statutes (HRS) Sections 89-9, 10, 13(a)(1), (2), (5), (7) and (8), all of which constitute a prohibited practice pursuant to HRS Sections 89-9, 10 and 13(a)(1), (2), (5), (7) and (8).[7] The County filed its Answer to Prohibited Practice Complaint on January 27, 2016, and denied engaging in any wrongful acts as alleged in the Complaint.[8]

B. In its Notice to Respondent(s) of Prohibited Practice Complaint; Notice of Prehearing Conference; and Notice of Hearing on the Prohibited Practice Complaint filed on January 15, 2016, the Board notified the parties, among other things, that the hearing on the merits would be held on February 18, 2016, with a prehearing conference scheduled for February 5, 2016. At the prehearing conference (after filing their prehearing statements on February 2, 2016), the parties requested that an additional day be scheduled for the hearing on the merits, and agreed to certain prehearing deadlines. The Board then issued its Notice of Hearing and Prehearing Schedule on February 5, 2016, setting certain prehearing deadlines and adding an additional hearing day (February 19, 2016).

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[6] Complaint, Attachment B at Para. 64.

[7] Complaint, Attachment B at Paras. 66-69.

[8] In Order No. 3141 filed on January 25, 2016, the County was granted an extension of time to respond to the Complaint.

C. On February 9, 2016, the County filed its Motion to Continue Hearing, and SHOPO filed its Statement of No Objection to the Motion to Continue. The Board then filed, on February 10, 2016, its Order No. 3144 granting the Motion to Continue Hearing, and resetting the hearing dates for March 10 and 11, 2016, and resetting the prehearing deadlines.

D. On March 3, 2016, the County and SHOPO filed their Joint Exhibit List with attached Exhibits J-1 through J-64, and agreed that the joint exhibits would be deemed admitted into evidence. On March 4, 2016, the County filed its Supplemental Prehearing Brief (County Brief), witness and exhibit lists and County Exhibits C-1 and C-2, and SHOPO filed its Supplemental Prehearing Brief (SHOPO Brief) and witness list (SHOPO did not identify any additional exhibits). County Exhibits C-1 and C-2 were admitted into evidence.

The hearing on the merits was held on March 10, 2016 (Hearing). At the close of the evidentiary portion of the Hearing, the Board set a post-hearing briefing schedule. Post-hearing briefs were to be filed by the close of business (4:30 p.m.) thirty (30) calendar days from the Board's receipt of the transcripts for the hearing.

On May 5, 2016, post hearing briefs were received by the Board from the County (County Post Hearing Brief) and SHOPO on (SHOPO Post-Hearing Brief).

## II. HEARING ON THE MERITS.

The Hearing commenced and concluded on March 10, 2016. During the Hearing, the parties (1) identified and entered into evidence Joint Exhibits J-1 through J-65, and County Exhibits C-1 and C-2 and (2) called four (4) witnesses, Michael Contrades (Contrades), Troy Sakaguchi (Sakaguchi), Darryl Perry (Chief Perry) and Barbara Wong (Wong).

The parties agreed that the official record of the Hearing would be the transcript provided by the certified court reporter present at the Hearing.

For the most part, the parties do not have a factual dispute.[9] It is undisputed that (1) KPD consulted with SHOPO over the BWCS and General Order (GO) 14.04 (as defined below), the policy which implemented the BWCS, (2) drafts of GO 14.04 were reviewed by SHOPO and the "vast majority" of SHOPO's suggested changes were adopted and (3) although the implementation of BWCS hit "bumps," KPD and its officers adjusted and the program is getting better.

The issue in this case is whether KPD must sign the SUP (as defined below) because the CBA and HRS Chapter 89 require KPD and SHOPO to negotiate over any proposed amendments or changes to the BWCS and GO 14.04 as bargainable topics. For the most part, the resolution of this issue is dependent upon the application of the terms of the CBA and applicable provisions of HRS Chapter 89 to the undisputed facts.

## III. FINDINGS OF FACT; CONCLUSIONS OF LAW; DECISION.

Based on (1) all of the matters which are part of the record in this case (e.g., all transcripts, pleadings, declarations, exhibits, notices and orders filed with the Board), (2) all exhibits admitted into evidence at the Hearing, (3) the testimony of each witness (whether elicited on direct, cross or redirect examination) and the Board's determination of the credibility, and the weight to be given to the testimony, of each witness, (4) the arguments of counsel (including the arguments made in their respective post hearing briefs), and (5) such other matters which the Board is allowed to consider, including any matters which the Board is allowed to take notice of pursuant to HRS Chapters 89, 91 and 377[10], the Board adopts and

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[9] *See*, County and SHOPO Closing Briefs.

[10] Pursuant to HRS Section 91-10(4), for example, the Board "may take notice of judicially recognized facts." The Board has not taken notice of any "generally recognized technical or scientific facts within [its] specialized knowledge", and therefore, the notice requirement of HRS Section 91-10(4) is not applicable.

enters the following Findings of Fact, Conclusions of Law and Decision (if it should be determined that any finding of fact should be considered as a conclusion of law or any conclusion as a finding or as mixed finding and conclusion, then they shall be treated to be as such):

A. Findings of Fact.

(1) SHOPO was, and is, at all times relevant herein (a) an employee organization within the meaning of HRS Section 89-2, and (b) the duly certified exclusive bargaining representative of police officers within the State of Hawaii (Bargaining Unit 12 or BU 12).

(2) Each of the following respondents is an "employer" within the meaning of HRS Section 89-2: Bernard P. Carvalho, Jr., Mayor, Darryl D. Perry, Chief of Police, and the County of Kaua'i.

(3) The applicable collective bargaining agreement is the CBA.[11]

(4) Section 1.C (Consultation) of the CBA provides that:

> "The Employer agrees that it shall consult the Union Prior to the final formulation and implementation of personnel policies and practices affecting employee relations or wages, hours or conditions of employment."

(5) Section 1.D (Mutual Consent) of the CBA provides that:

> "No changes in wages, hours or other conditions of work contained herein may be made except by mutual consent."

(6) Section 2.L (Discipline) of the CBA provides that:

> "Discipline - shall mean the administrative action taken against an employee for violation of a department rule, Standard of Conduct, directive, policy, or for other just

[11] A true and complete copy of the CBA was admitted into evidence as Exhibit J-1.

cause but shall not include the use of forms utilized to record the evaluation or counseling of an employee."

(7) Article 10 (Negotiating Committee) of the CBA provides that:

"A. Notice of Time Off - Members of the Negotiating Committee shall be allowed sufficient and reasonable time off to participate in the collective bargaining process, to include preparation for negotiations, conducted by the Union during regular working hours without loss of regular salary or wages in accordance with Chapter 89, HRS. The Union shall give the Employer reasonable prior notice when requesting such time off.

B. Negotiating Committee Members - The Union shall provide the names of its Negotiating Committee members to the Employer; likewise, the Employer shall provide the names of their representatives to the Union.

C. Joint Labor-Management Workshops - To facilitate and enhance communication between management and the Union, a joint meeting shall be held no more than four (4) times a year to discuss issues of mutual concern. Attendance shall include but not be limited to the chiefs and/or deputy chiefs of police, the directors of personnel and/or civil service of the four counties and the Union's negotiating committee. The parties shall mutually agree to an agenda for each meeting at least two (2) weeks before the meeting is held. Representatives from the Employer and the Union shall develop the agenda for each meeting at least two (2) weeks before the meeting is held."

(8) Article 11 (Rights of the Employer) of the CBA provides that:

"The Employer reserves and retains, solely and exclusively, all management rights and authority, including the rights set forth in Section 89-9(d)(1)-(8), Hawaii Revised Statutes, except as specifically abridged or modified by this Agreement."

(9) Article 12 (Police Officer's Protection - Administrative Investigations and Interrogations) provides that:

"A. Applicability of Article - This Article shall apply only to administrative investigations or interrogations of an employee conducted by the Chief of Police or the Chief's

authorized representatives related to any incident which:

1. Occurred during the employee's on-duty or off-duty hours, and/or

2. Could lead to discipline, demotion, or dismissal of any employee for a violation of any departmental rule, regulation, order or command.

B. Administrative Investigations and Interrogations Internal and External Complaints

1. Definition and Scope - Except for a criminal investigation or interrogation, an investigation or interrogation shall be considered to be of an administrative nature whenever such investigation or interrogation is conducted to determine the possibility of or to establish a basis for discipline or dismissal of an employee, regardless of whether such investigation or interrogation originated by an internal or external complaint. An administrative investigation or interrogation is to be used for internal departmental purposes only, and not for official criminal investigations. This Article shall not apply to communications between the employee and the employee's present chain of command, except that in the case of counties which do not have a specific internal investigative unit, when the Employer appoints a special investigator or interrogator from within the employee's chain of command to conduct a third party administrative investigation or interrogation which could result in such employee's discipline or dismissal, i.e., as when the Honolulu Police Department's Internal Affairs Division participates in an administrative investigation, communications shall be subject to the limitations set forth below.

2. Limitations:

a. Internal / External Complaints - Internal complaints which may result in disciplinary suspension, disciplinary transfer, demotion, dismissal, written reprimand or any combination thereof, shall be in writing, except as provided by law. All external complaints shall be in writing and sworn to by the complainant, except as provided by law.

b. Notification of Investigation - The employee shall be informed of the nature of the investigation or interrogation and shall be given a copy of the written complaint. The employee shall then be afforded a reasonable time to answer such complaints in writing.

c. Personnel File - No materials containing a complaint shall be entered in any personnel file of the employee in cases where the employee has been

exonerated or in which the complaint is determined to be unfounded.

d. Personal Accountability - An employee is required to account only for the employee's own time and shall not be disciplined for lack of such knowledge of the activities of other employees.

e. Polygraph Examination - no officer shall be asked or be required to subject to a polygraph examination.

f. Interrogation Requirements - The interrogation of an employee shall be conducted at a reasonable hour, preferably at a time when an employee is on duty with reasonable notice being given, unless the seriousness of the investigation is of such a degree that an immediate interrogation is required, and if such interrogation does occur during the off-duty time of the employee being interrogated, the employee shall be compensated for such off-duty time in accordance with Article 15.

g. Location of Interrogation - The interrogation shall take place at the office of the command of the investigating officer, the local station, bureau, unit in which the incident allegedly occurred as designated by the investigating officer, or any other place agreeable to all parties.

h. Interrogation Procedures - The employee prior to an interrogation shall be informed of the rank, name, and command of the officer in charge of the investigation, and of the interrogating officer(s). No persons other than the interrogator(s), the employee, and the employee's representative(s) shall be permitted at the interrogation except for mutual agreement. All questions directed to the employee being interrogated shall be asked by and through no more than one interrogator at a time; provided, however, the employee may request and shall be entitled to have present on representative of the employee's choice for each interrogator present. The employee's representative(s) present shall limit the employee's representative(s) involvement to the consultations between the employee's representative and the employee being interrogated and shall not become involved in asking or answering questions with the investigator or interrogator nor interfere with or interrupt the proceedings other than engaging in consultations with the employee.

i. Answering Questions During Interrogation - Each employee shall answer only those

questions specifically, directly, and narrowly relating to the employee's duties and actions while performing in the official capacity of the Police Department.

j. Time Limit on Interrogation Sessions - Interrogation sessions shall be for reasonable periods and shall be timed to allow for such personal necessities and rest periods as are reasonably necessary provide that no period of continuous questioning shall be longer than thirty (30) minutes of duration without the employee's consent.

k. Offensive Conduct During Interrogation - The employee being interrogated shall not be subjected to offensive language or threatened with transfer, or other disciplinary action. No promise of reward shall be made as an inducement to answering any question. Nothing herein is to be construed as to prohibit the investigating officer from informing the said employee that any disrespectful conduct during the interrogation can become the subject of disciplinary action.

l. Record of Interrogation - The complete interrogation of the employee, including notations indicating the beginning and ending of all recess periods, shall be recorded, and there shall be no unrecorded questions or statements except by mutual agreement. At the written request of the employee, a transcribed copy of the interrogation, if transcribed, shall be furnished to the employee within five (5) working days after the request. If a tape recording is made of the interrogation, the employee shall, upon written request, have access to the tape. The original tape shall remain the property of and in the custody of the Police Department. Expenses incurred in the reproduction of tape and/or transcription of the interrogation(s) shall be borne by the employee as occasioned by the employee's request. Copies shall be made only by the Employer and shall be certified to be true. The employee may, at the employee's option, have the interrogation session recorded on the employee's personal tape recorder.

m. Statute of Limitations - No employee shall be subjected to an administrative investigation of a complaint that has been filed more than one (1) year of the date of the alleged incident, unless otherwise provided for by law. However, administrative investigations involving criminal conduct may be initiated at anytime within the criminal statute of limitations as provided by law.

n. Psychological and/or Psychiatric Evaluation - The Employer may require an employee to

submit to a psychological and/or psychiatric evaluation when the Employer has reason to believe the employee is not fit for duty. Such evaluation shall be at no cost to the employee and shall be conducted by qualified personnel.

Whenever an employee is evaluated, the reasons for referring the employee for such evaluation shall be provided to the employee. Psychological and/or psychiatric evaluations shall not be used to justify disciplinary action or considered a disciplinary action.

Psychological and/or psychiatric evaluations shall be kept confidential. All such reports filed with the Chief of Police or the departmental psychologist, as applicable. Such reports shall be limited to the use of determining whether an officer is fit or not fit for duty, may include recommended plan of action for the employee to retain full duty status, and shall be in accordance with federal and state medical privacy laws.

o. Garrity Rights - Prior to any administrative investigation or interrogation of an employee, the Employer shall inform the employee in writing of the employee's Garrity Rights as follows:

*It is my understanding that this statement is made for administrative, internal Police Department purposes only and will not be used as part of an official criminal investigation. This statement is made by me after being ordered to do so by lawful supervisory offices. It is my understanding that refusing to obey an order to make this statement that I can be disciplined for insubordination and that the punishment for insubordination can be up to and including termination of employment. This statement is made only pursuant to such orders and the potential punishment that can result for failure to obey that order.* (Italics in original.)

*Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967).*

In the event an employee is scheduled in advance by the Employer or the Employer's representative for an interview or investigation which the employee reasonably feels may lead to disciplinary action, the employee may request to have a Union representative present to advise the employee of employee's Garrity Rights prior to the interview and/or interrogation of the employee by the Employer.

C. Critical Incidents

1. The departments shall consult with the Union to develop policies and procedures governing a Critical Incident Protocol, which include, but not be limited to the following incidents:

a. Whenever a firearm is discharged at a suspect(s) by the employee; or

b. Whenever the employee inflicts death or serious bodily injury to a person; or

c. Whenever the employee is seriously injured and requires immediate medical attention; or

d. Whenever the employee is involved in a vehicle pursuit or on duty motor vehicle collision that results in death or serious bodily injury of any person; or

e. Whenever the employee is involved in an in-custody incident result in death or serious bodily injury.

2. An employee directly involved in a critical incident as provided in C.1. shall not be required to submit a written administrative or police report until the officer has had a reasonable time, not to exceed four (4) hours, to consult with counsel of choice or a Union representative.

3. No disciplinary action shall be imposed on an employee for failing to submit a written administrative or police report in accordance with departmental rule, regulation, policy or procedure, if the delay was as a result of C.2. above, or at the direction of the assigned investigator. However, the employee shall be required to provide sufficient verbal information at the scene in order to establish probable cause, or information necessary to initiate an investigation and/or preserve the crime scene (such as suspect information, vehicles involved, etc.). The Employer may require additional interrogation(s) after a reasonable period of time has elapsed as provided for in C.2. above. When and employee is identified as a suspect, the employee shall be afforded Miranda rights.

(10) Article 13 (Discipline and Dismissal) of the CBA provides that:

"A. Discipline Shall be For Cause - the discipline and/or discharge of regular employees shall be for cause. When it becomes necessary for the Employer to initiate and impose disciplinary actions against any employee, such actions shall be administered in a fair and impartial manner, with due regard to the circumstances of the individual case. Discipline shall be deemed to include

written reprimands, suspensions, dismissals, disciplinary transfers and disciplinary demotions.

B. Immediate Discipline - The Employer may immediately discipline any employee if the Employer, after considering the circumstances of each individual case, deems it necessary that prompt disciplinary action be administered. In a case where the employee suffers unusual hardship because of a loss of wages or other economic benefits, the Employer may, after considering the circumstances of the case, give additional consideration in effectuating discipline.

C. Written Reprimand / Employee's File - When it becomes necessary to enter a written reprimand of any nature whatsoever into an employee's file, such employee shall be given a copy of the reprimand. The employee shall acknowledge the delivery of said copy, by the employee's signature. An employee shall be permitted to file a written statement as to any disagreement with the facts relating to such written reprimand, which shall be filed in such employee's file.

D. Disciplinary Procedures - Notwithstanding any other provision herein when an employee is disciplined, the following procedure shall be followed:

1. Disciplinary Notice / Acknowledgment - The employee and the Union shall be furnished the reason(s) therefor in writing including the allegations or charges, rule(s) or regulation(s) upon which the discipline or dismissal is based, on or before the effective date of the discipline or dismissal. Upon service thereof, the employee shall acknowledge receipt thereof by the employee's dated signature. Where the need to impose disciplinary action is immediate, the employee and the Union shall be furnished the foregoing within 48 hours after the action has been taken.

2. Effective Date - All written notifications of disciplinary actions involving discipline and discharge shall include the effective dates of the penalties to be imposed as may be applicable.

3. Written Notice of Conditions - Any conditions placed upon the employee upon which return to work from a suspension or dismissal is contingent shall be included in such written notification.

4. Confidentiality - All matters under this article, including investigations, shall be considered confidential.

*COMMENTARY*

*The parties acknowledge that this section may conflict with the provisions of Chapter 92F, HRS, and may be subject to legal challenge.* (Italics in original.)"

(11) Article 14 (Changes in Departmental Rules) of the CBA provides that:

"A. Written Notice - The Employer agrees to furnish the Union and the respective chapter chairperson with a written notice of the Employer's intention to make changes in departmental rules, policies or procedures that *would affect the wording conditions of employees or equipment peculiar to police work*, and a copy of such proposed changes. Such notice shall be mailed no later than thirty (30) days before the starting date of the intended change; however, the change may be implemented earlier upon agreement by the parties. The Employer shall also provide the Union with copies of available resource materials studies, or data relating to the merits of the proposed changes. (Italics added.)

B. Meet and Confer / Response Time - *If the Union wishes to meet and confer* on the proposed changes, it shall respond in writing within ten (10) working days of the receipt of the Employer's written notice. Should the Union respond within ten (10) working days from the date of receipt of such notice, the Employer agrees to *meet and confirm with the Union* within ten (10) days after receiving the Union's request to meet to freely exchange information, opinions and proposals relating specifically to the proposed changes prior to their enactment. If the Union does not respond in writing within ten (10) working days of the date of receipt of such written notice, the Employer may assume that the Union does not wish to meet and confer on the proposed changes. (Italics added.)"

(12) Section 17.A (Uniform and Equipment Committee) of the CBA provides that:

"There shall be established a Uniform and Equipment Committee in each County. Said committee shall be charged with the responsibility for evaluating proposed changes in appearance standards, dress, the standards and

> specifications of uniforms, motor vehicles, and *personal police equipment*, and for making *recommendations* which shall be given directly to the Chief of Police of the respective county for *consideration and action.* The Committee will be informed of the *Police Chief's decision.* (Italics added.)"

(13) KPD's interest in the BWCS dates back to 2012 after KPD personnel attended an International Associations of Chiefs of Police Conference where there was a presentation of the use of the BWCS.[12] After internally reviewing the use of the BWCS in Kaua'i County, KPD conducted a month long test program involving five (5) officers. The test program was conducted pursuant to GO 14-04, Body-Worn Cameras (GO-14.04).[13] On September 5, 2014, a copy of GO-14-04 was presented to SHOPO "[p]ursuant to Article 14, CHANGES IN DEPARTMENTAL RULES," and "[i]f SHOPO does not respond in writing within ten (10) working days from the date of receipt of this notice, the Kaua'i Police Department will assume the union does not wish to *meet and confer* on the proposals and will implement them accordingly."[14] Apparently, GO-14.04 was revised by KPD to "include sections from the Rialto PD's General Order," but KPD decided that the changes would not be made for the test phase and would be proposed during the "next SHOPO meet and confer."[15] In other words, the rules regarding the BWCS would continue to be reviewed and refined by KPD.

(14) At a briefing before the County of Kaua'i Council's Committee on Public Safety on January 14, 2015, the following matters, among other things, were discussed:

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[12] Transcript of Hearing on the Merits (TR.) Page (P.) 16, Lines (L.) 15-19.

[13] Exhibit J-18, p. J000396 et seq.

[14] Exhibit J-17.

[15] Exhibit J-18.

(a) Pursuant to GO-14.04, the test program was conducted from September 27, 2014 to October 27, 2017, using KPD officers and the Taser Axon Flex cameras.[16] During the test or pilot program, "an officer who had been wearing a body-worn camera at the time of an incident was cleared of wrongdoing in two (2) days because the video provided the citizen complaint allegations were false."[17] Without the BWCS, "the KPD Office of Professional Standards' investigations of police behavior triggered by complaints from individuals typically last two (2) to three (3) months."[18]

(b) Chief Perry also made clear that, based on the test program, "implementation may occur in 2015, but KPD must work with [SHOPO], and revise the implementation policy that was developed prior to the Pilot Program. Chief Perry stated that SHOPO was concerned about 'witch hunting,' and therefore language was inserted into the policy stating: 'it shall be deemed a violation of this policy for a supervisor to review recordings for the sole purpose of searching for violations of department policy or law not related to a specific complaint or incident. (Brackets added.)'"[19]

(c) SHOPO's Kaua'i Chapter Chairman, Jesse Guirao, "commended KPD for their work," and advised that "requiring body-worn cameras constitutes a policy officer working condition that needs to be negotiated with SHOPO."[20] Wong (SHOPO General

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16 Exhibit J-22 at p. J000404.

17 Exhibit J-22 at pp. J000404-405.

18 *Id.*

19 *Id.*

20 Exhibit J-22 at p. J-000407.

Counsel) also stated that the BWCS was "subject to collective bargaining, and therefore must go through the Labor Management meeting process."[21]

(d) After thanking KPD and other resource persons for their input, the briefing concluded and:

> "Committee Chair Hooser stated that the American Civil Liberties Union (ALCU) had some concerns about privacy, but overall believes use of the technology is positive. Committee Chair Hooser stated his hope that the County budget can be benefitted by a decrease in lawsuits and complaints against officers."[22]

(15) After the 30-day trial or pilot project, KPD started drafting a permanent BWCS policy using many elements of the policy used during the Pilot Project. At the same time, KPD's Uniform and Equipment Committee (UEC) recommended moving forward with the BWCS.[23] In addition, KPD and SHOPO continued to discuss whether the adoption and implementation of BWCS was subject to the "consultation" requirement or the "mutual consent" requirement.[24] It is clear that neither party was accepting the position of the other party. However, it is also clear that KPD's attitude was to continue to consult and work with SHOPO on the rules and policies for the implementation of the BWCS. As stated by Chief Perry on October 27, 2015:

> "We should have our policy completed with the next few days--*with the inclusion of the majority of recommendations suggested by Barbara [Wong].*

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21 *Id.*

22 Exhibit J-22 at p. J000408.

23 TR. P. 61, L. 2-11 and Exhibit C-1. There is no dispute that the UEC can only make recommendations to the KPD Police Chief, and it is the Chief who makes the final decision regarding police equipment such as the BWCS. CBA Article 17.

24 *See*, Exhibits J-23 through J-31.

> While SHOPO has taken an unreasonable and adversarial position in this matter, *we will continue to work together in accordance and in compliance with the CBA* to provide our officers and your members with equipment that [has] been proven to offer protection from unwarranted and malicious complaints; *equipment in which the majority of officers are in favor.* (Italics and brackets added.)"[25]

(16) Although there was no agreement on the "consultation" versus "mutual consent" dispute, KPD and SHOPO continued to work on finalizing the BWCS policies by working on several of drafts of GO-14.4. On November 2, 2015, KPD sent SHOPO a revised version of GO-14.04 pursuant to CBA Article 14, which incorporated a "vast majority" of the changes suggested by Wong on behalf of SHOPO.[26] In fact, it is clear that this latest version of GO-14.04 (Version 11) had "gone through extensive modifications which includes an unprecedented 95% of the recommendations made by SHOPO."[27] Thereafter, the dispute over whether the "consultation" requirement or the "mutual consent" requirement applied to the BWCS grew more "heated." On November 16, 2015, KPD, after an exchange of correspondence and e-mails with SHOPO's counsel, proposed three dates and times when KPD would be willing to meet with SHOPO "on the policy and implementation of the Body Worn Camera program."[28] Further, even with the increase of disputes over the "mutual consent" requirement, KPD advised SHOPO that:

> "With all due respect to everyone, I want to again remind you and all SHOPO officials and representatives, that I shall not deviate from the 'meet and confer' past practice protocol with regard to the November 25, 2015, Wednesday, meeting; that the agenda is to review the BWC

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[25] Exhibit J-32.

[26] TR. P. 23, L. 13-25 and Exhibit J-33. Apparently, this was Version 11 of GO-14.04. *See*, Exhibit J-34.

[27] Exhibit J-45.

[28] Exhibit J-40.

> policy, and as with all 'meet and confer' meetings held over the years, *we will attempt to reasonably alleviate and address legitimate concerns SHOPO may have that's directly related to the policy.* (Italics added.)"[29]

(17) After the November 25, 2015 meeting, on November 27, 2015, KPD provided SHOPO with Version 12 of GO-14.04, and advised SHOPO that:

> "All the changes that were suggested were made (please double check for accuracy), with the exception of VII.C.6.d. After further thought the Chief does not want to change this section as suggested as the office, for no reason other than their own desire, can say 'no' to the use of the video. There has to be a legitimate reason as the use of the video in training may save other officers.
>
> We have no intention of showing any video that would embarrass one of our officers or place them in negative light, especially in front of their peers or anyone for that matter. To change the language was suggested in the meeting would mean the officer has sole determination whether the video is used for training purposes, for any reason. That decision should be left to the Chief of Police (or the person entrusted by the Chief) to ultimately determine. Our suggested changes are noted; *however we are open and welcome to further suggestions from the Union.* (Italics added.)"[30]

Section VII.C.6.d dealt with the use of BWCS videos for training purposes. While not accepting SHOPO's proposed changes, KPD did not stop working with SHOPO and proposed including the following language to alleviate SHOPO's concerns:

> "In a situation where the officer or employee objects because of concerns over embarrassment, the Chief of Police or designee will give strong consideration in not using the video for training purposes."[31]

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[29] Exhibit J-47.

[30] Exhibit J-49.

[31] Exhibit J-49 at p. J000534.

(18) As of December 9, 2015, both SHOPO and KPD reached agreement on the BWCS policy (what had been called GO-14.04). KPD made "several modifications to our BWCS policy based on recommendations suggested by [SHOPO's] General Counsel Barbara Wong [and] that a decision was to be made by SHOPO's executive board with regard to KPD moving forward. [Brackets added.]"[32] Throughout the process, KPD felt that "[w]hile this has been a controversial issue, SHOPO and KPD [have] stood side-by-side in agreement that this new technology benefits the community and our officers. [Brackets added.]"[33]

(19) Although SHOPO and KPD reached agreement on the BWCS policy after KPD incorporated "95% of the recommendations made by SHOPO," on December 9, 2015, SHOPO presented KPD with the SUP.[34] On the same day, Chief Perry responded and noted that "the language in the SUP suggests that KPD agrees that the BWC program falls under the purview of 'Mutual Consent' *which is not the case*. [Italics added.]" Chief Perry was concerned because the SUP provided, among other things, that:

(1) The BWCS would be implemented pursuant to the agreed upon permanent KPD policy or general order regarding the BWCS.

(2) If there are any changes to the permanent BWCS policy or general order, then the changes must be made "pursuant to amendments to this Supplemental Agreement."[35]

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[32] Exhibit J-52.

[33] *Id.*

[34] *Id.*

[35] Exhibit J-50. Consultation does not require the agreement of the parties. As stated by the Board in *In the matter of HGEA, AFSCME, Local 152, AFL-CIO, Complainant, and Linda Lingle, et al., Respondents*, Decision 468 (June 13, 2007) at p. 9 (adopting the position taken in, and quoting from, *Hawaii Nurses Association*, 2 HPERB 218 (1979):

(20) In effect, the SUP required SHOPO and KPD to mutually agree to any further changes to GO-14.4, the draft of the general order implementing the BWCS. Since it was anticipated that the BWCS program would require further changes to accommodate actual, real world conditions,[36] the SUP would effectively convert a "consultation" requirement to a "mutual consent" requirement. After reiterating his position that the BWCS was not a "mutual consent" issue, Chief Perry then suggested removing the two "WHEREAS" clause referring to "mutual consent" which would "alleviate any confusion."[37]

(21) On December 10, 2015 (the next day), Chief Perry advised SHOPO that, even with the revisions he suggested, after "extensive review of the SUP with our Human Resources Director and the Kauai County Attorney's Office, I must notify you that I am unable to sign the [SUP] because if [I] signed it would be recognized as a matter relating to 'mutual consent' and thus become part of the collective bargaining agreement ... I believe that the implementation of the body-worn camera system falls under the purview of 'meet and confer'

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> "Matters of consultation do not require a resolution of differences. 'All that is required is that the employer inform the exclusive representative of the new or modified policy and that a dialogue as to the merits and disadvantages of the new or proposed policy or policy change take place.' Cites omitted."

The Board, then confirmed its adoption of the test articulated in Decision No. 394, *Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO*, VI HLRB 1 (1978), that requires management to comply with the following factors:

> "(1) [N]otice to the union, (2) or proposed personnel practices and policies of a major, substantial and critical nature, other than those requiring negotiations, (3) in reasonable completeness and detail, (4) requesting the opinion, advice or input of the Union thereto, (5) listening to, comparing views and deliberating together thereon (i.e., 'meaningful dialog'), and (6) without requirement of either side to concede or agreement on any differences or conflicts arising or resulting from such consultation."

Here, KPD did, in fact, engage in appropriate consultation over the adoption of the BWCS and GO 14.04, and the implementation of BWCS in accordance with GO 14.04. SHOPO did not dispute the foregoing.

[36] As Sakaguchi testified, the implementation of the BWCS required adjustments and changes, which were done and which improved the use of the BWCS.

[37] *Id.*

under Article 14, Changes in Departmental Rules, of the collective bargaining agreement. [Brackets added.]"[38] Therefore, KPD refused to sign the SUP even after SHOPO agreed to make changes to the draft SUP as suggested by Chief Perry.[39] It is clear to the Board that Chief Perry mistakenly believed that, by removing the two "Whereas" clauses referring to the mutual agreement provision of the CBA, he would not be agreeing to SHOPO's position. However, he was mistaken (as advised by his human resources director and the County Attorney,) and this misapprehension was immediately corrected by Chief Perry.[40] SHOPO suffered no detriment as a result of Chief Perry's misapprehension.

(22) This was a situation where "consultation" worked. Even if they could not reach agreement on the "consultation" versus "mutual consent" issue, KPD and SHOPO, after a series of meetings and discussions, were able to reach agreement on the final set of rules and policies for the implementation of the BWCS. In fact, KPD eventually adopted "95% of the recommendations of SHOPO." In essence, both parties, in spite of their disagreements, worked diligently and cooperatively to complete what eventually became GO-14.17. Discussions were conducted in the spirit, and with the goal, of finalizing an acceptable set of policies, with the knowledge that, as the BWCS was implemented, changes and adjustments would have to be made from time to time. This is the essence of collective bargaining -- the "harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government." HRS § 89-1(b) Thus,

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[38] Exhibit J-54.

[39] *See*, Exhibits J-52 to J-54.

[40] *Id.*

SHOPO's involvement was positive, and there was no feeling that SHOPO was, in fact, trying to "stall' the implementation of the BWCS.

(23) After further discussions and revisions after November 25, 2015, KPD adopted the final version of GO-14.4 (Version 13) as General Order No. 41.17 (GO-41.17) regarding Body-Worn Cameras with an issuance date of December 12, 2015.[41] GO-41.17 was adopted to "provide officers with instructions on the use of the Body-Worn Camera System (BWCS) so that officers may record their activities and contacts with the public in accordance with law."[42] GO-41.17 addressed a number of issues (some of which were raised by SHOPO) including:

(a) Advising officers that "[i]t is the policy of the Kaua'i Police Department (KPD) that officers activate the BWCS at times when in the performance of his/her official duties, where recordings are consistent with this policy and the law."[43] Thus, the BWCS and GO-14.17 are applicable to police officers when they are performing their "official duties." Accordingly, thus, the Board finds that (1) the BWCS is equipment "peculiar to police work" and (2) GO-14.17 (or any changes to GO-14.17) is a rule, policy or procedure "that would affect the working conditions of employees or equipment peculiar to police work."[44]

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[41] A true and complete copy of GO-41.14 was admitted into evidence as Exhibit J-55. GO-14.17 was taken from Version 13 of the draft policies discussed with SHOPO.

[42] GO-41.17 at Section I.A.

[43] GO-41.17 at Section III.A.

[44] The phrase "peculiar to police work" modifies both "working conditions" and "equipment" in CBA Section 14.A. Otherwise, CBA Section 14.A could be read to mean that rules, policies and procedures may be changed even though it affects any type of working condition, and not just working conditions that are "peculiar to police work." If this was the intention of CBA Section 14.A, then all of SHOPO's arguments would be baseless since KPD could affect "working conditions" by just changing its rules and policies irrespective of whether the working conditions related to non-police work. The Board does not believe this was intended by the parties when drafting CBA Section 14.A.

(b) By outlining the primary objective of the use of the BWCS, KPD did not include the disciplining of officers as a goal.[45] GO-41.17 specifically provides that:

> "It shall be deemed a violation of this policy for a supervisor to review recordings for the sole purpose of searching for violations of department policy or law not related to a specific complaint or incident."[46]

KPD specifically stated in GO-14.17 that KPD cannot use the BWCS to search for violations of GO-41-17 or any other department policy or law "*not related to a specific complaint or incident.*" As suggested by SHOPO during the "consultation" process, KPD agreed that the purpose of GO-41.17 is not to oversee and discipline officers or to conduct a "witch hunt" or to go "fishing" for police officer violations.[47]

(24) In the short time the BWCS was used, it was effective in exonerating KPD officers in five out of five citizen complaints. In other words, the BWCS was doing what it was intended to do -- capture police officer interaction with members of the public so that there was a record of the encounters which streamlined the resolution of any citizen complaints arising from such encounters. In addition, the BWCS and GO-14.17 are "works in progress." GO-14.17 was not perfect when implemented but changes are being made as KPD experiences issues and difficulties with the BWCS.[48] Therefore, since December 2015, the implementation

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[45] GO-41.17 at Section IV.A.

[46] GO-41.17 at Section V.B.1. In addition, it was made clear that an officer could not record "[c]ommunications with other police personnel without the permission of the Chief of Police, except under exigent circumstances to include in-progress or hot pursuit circumstances," and in other circumstances as outline in GO-41.17 at Sections V.B.(2) through (4) (e.g., personal activities, where individuals have a reasonable expectation of privacy).

[47] Chief Perry testified that the purpose of the BWCS and GO 14.04 was not to conduct "witch hunts." TR. P. 156, L. 20-P. 157, L. 3.

[48] Troy Sakaguchi, a SHOPO witness, testified that (1) he was involved in the pilot program (TR. P. 101, L. 11-18), (2) he attended the train-the-trainer program (TR. P. 101, L. 5-10) and (3) was part of the rollout of the BWCS and was involved in training the patrol officers (TR. 101, L. 5-10). Officer Sakaguchi also testified that the BWCS had bugs and bumps but "we're slowly getting better and working out the bugs (TR 130, L. 2-14)" and

and use of the BWCS pursuant to GO-14.17 has improved and will continue to improve as KPD and SHOPO continue to discuss this topic.

(25) There is no dispute that, if a KPD officer does not follow the dictates of GO-41.17, she or he could be disciplined.[49] However, there is nothing in GO-41.17 which amends, changes or otherwise adds to or subtracts from the provisions of the CBA, including, but not limited to Article 12, Police Officer's Protection - Administrative Investigations and Interrogations, and Article 13, Discipline and Dismissal.

(26) There is also no dispute that BWCS is a part of the equipment used by KPD police officers, and that it will be used only "in the performance of his/her official duties, where recordings are consistent with this policy and the law."[50] As stated by SHOPO, "requiring body-worn cameras constitutes a police officer working condition." Thus, the BWCS is no different from a police officer's weapon, hand-held radios, Tasers with built-in cameras, in-car dashboard cameras, baton and uniforms and the rules and policies adopted by KPD relating to the use of such equipment. Each is a piece of equipment used by officers in their day-to-day work as law enforcement officers. SHOPO, when KPD adopted its rules and policies regarding the use of these items of equipment, never argued that the "mutual consent" requirement applied.

(27) In addition, new equipment or advanced technology, like the BWCS, dashboard cameras and cameras mounted on weapons (e.g., Tasers), are a growing trend in law enforcement. According to the U.S. Department of Justice, from 2000 to 2013, in-car camera

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"we're kind of hitting the bumps and addressing as best as we can (TR. P. 132, L. 1-2)."

[49] CBA Section 2.L provides that "discipline" is "administrative action taken against an employee for violation of a department rule, Standard of Conduct, directive, policy or for other just cause."

[50] GO-14.14 at Section I.A.

use increased from 38% of all police departments to 68%, and as of 2013, 1/3 of all departments are using BWCS.[51] This has resulted in a reduction of complaints against officers, and have cleared officers more often than not.[52] Thus, BWCS serves to protect the interests of both citizens and officers by providing clear evidence of what happened. This ultimately fosters the ability of KPD to maintain and improve the efficiency and productivity of its officers, while at the same time protecting the interests of the public. Both Chief Perry and Contrades testified that the use of the BWCS was, in effect, transformative in policing -- KPD would have a video record of its officers' contacts with the public.

(28) Based on the foregoing and the stated purpose of the BWCS (i.e., to record police officer encounters with the public), the Board finds and holds, as a factual matter, that BWCS is "equipment peculiar to police work," and because GO-14.17 is a rule or policy implementing the use of police equipment, it is a rule, policy or procedure which affects working conditions of its officer and equipment "peculiar to police work." Therefore, neither the adoption of the BWCS as a piece of equipment nor the adoption and implementation of GO-14.17 is a bargainable topic.

(29) The CBA provides that KPD shall consult with SHOPO "prior to the final formulation and implementation of personnel policies and practice affecting *employee relations on wages, hours or conditions of employment*."[53] Mutual consent is required if changes are proposed regarding "wages, hours or other conditions of work *contained herein*."[54]

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[51] Exhibit J-10.

[52] Exhibit J-11.

[53] CBA Section 1.C. KPD did, in fact, consult with SHOPO prior to the permanent adoption and implementation of the BWCS pursuant to GO-14.17.

[54] CBA Section 1.D.

Thus, if, for example, "conditions of work" are specifically addressed in the CBA, then any change to such "conditions of work" are subject to the "mutual consent" requirement.

(30) Although the CBA does not contain any provision specific to the BWCS, it does address the issue of working conditions or equipment "peculiar to police work."[55] Since the BWCS is equipment "peculiar to police work", GO-14.17 embodies rules or policies which affect working conditions and equipment (the BWCS) "peculiar to police work." In CBA Article 17, SHOPO agreed that the adoption of new equipment (which requires that the UEC review and provide a recommendation to the police chief) is subject only to the "consultation" requirement since the police chief ultimately decides equipment issues. In CBA Article 14, SHOPO agreed that any changes to rules or policies regarding equipment or working conditions "peculiar to police work" are subject to the "consultation" requirement, and not the "mutual consent" requirement.

(31) The CBA preserves KPD's (and the County's) management rights as required by HRS Section 89-9(d). CBA Article 11 provides that KPD's management rights are preserved except as specifically provided in the CBA. With regard to rules and policies affecting working conditions and equipment "peculiar to police work," the CBA specifically provides, that KPD need only consult with SHOPO on any police equipment (CBA Article 17) and any rules or policies affecting working conditions or equipment "peculiar to police work" (CBA Article 14). Thus, both Articles 17 and 14 preserve KPD's management rights with respect to adopting and implementing the BWCS pursuant to GO-14.17. Therefore, KPD (and the County) had no obligation to bargain over the BWCS, GO-14.17 or the SUP.[56]

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[55] *See*, CBA Articles 14 and 17.

[56] *See, also*, HRS Sections 89-9(d)(6) and (7). In addition, Chief Perry testified that the "implementation and distribution of body-worn cameras and its policy actually change the very nature of policing." TR. P. 154,

(32) SHOPO admitted that KPD consulted properly consulted over the adoption and implementation of the BWCS. At most, KPD did not agree to negotiate the terms of the SUP and refused to execute the same. However, pursuant to the CBA and HRS Section 89-9(d), because the SUP sought to make KPD's management rights (i.e., adoption and implementation of new equipment and rules and policies affecting working conditions and equipment "peculiar to police work") bargainable, KPD was not required to (and pursuant to HRS Section 89-9(d), could not) bargain over the terms of, or sign, the SUP.

(33) SHOPO's factual arguments are not supported by the evidence in this case. SHOPO argues that the implementation of the BWCS pursuant to GO-14.17 is subject to the "mutual consent" requirement because officers may be subject to discipline for any violation of GO-14.17. The Board rejects SHOPO's position because:

(a) SHOPO agreed in the CBA that "discipline" would include any violation of "a department *rule, Standard of Conduct, directive, policy*, or for other just cause. (Italics added.)"[57] SHOPO also agreed that any changes to "departmental rules, policies or procedures that would affect the *working conditions of employees or equipment peculiar to police work*" are subject to the "consultation" requirement, and not the "mutual consent" requirement.[58] Therefore, for any matter which involved working conditions or equipment

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L.6-9. However, rather than supporting SHOPO's arguments, Chief Perry recognized that the BWCS was important to KPD's policing operations. In other words, the BWCS, because of national attention given to police by the community, became a necessary part of police equipment. Thus, it is clear that both the BWCS and GO 14.04 were "peculiar to police work" and therefore, were not subject to the mutual consent requirement pursuant to CBA Article 14.A.

[57] CBA Section 2.L.

[58] CBA Articles 14 and 17. Although SHOPO argued that a violation of GO-14.17 would also be a violation of a Standard of Conduct, which presumably would not be covered by the provisions of CBA Article 14, the Board rejects this argument since its adoption would create an exception to Article 14 which would render Article 14 useless. This is simply because any violation of a particular rule or policy could be considered to be a violation of the Standards of Conduct. The better and more reasoned approach is to treat Article 14 as applicable to Standards of Conduct and directives since the intent of Article 14 was to preserve KPD's management rights

"peculiar to police work," SHOPO agreed that KPD could add to or change its rules or policies even if it may result in discipline for the violation of new or changed rules or policies without going through the bargaining process. SHOPO cannot now attempt to amend or change KPD's management rights as specifically set forth in the CBA without KPD's agreement. Thus, SHOPO cannot insist that KPD agree that the permanent implementation of BWCS pursuant to GO-14.17 or that any change to GO-14.17 be subject to "mutual consent" as a precondition to the use of the BWCS. In other words, SHOPO had no right to require KPD to sign the SUP or to bargain over its terms.

(b) SHOPO's argument also fails because HRS Section 89(d)(4) specifically provides that KPD and SHOPO cannot agree to any proposal that would "interfere with the rights and obligations of a public employer to . . . suspend, demote, discharge, or take other disciplinary action against employees for proper cause" except that "procedures and criteria on . . . suspensions, terminations, discharges, or other disciplinary actions as a permissive subject to bargaining during collective bargaining negotiations or negotiations over a memorandum of agreement, memorandum of understanding, or other supplemental agreement." Here, even if the adoption of GO-14.17 and the permanent implementation of BWCS were directly related to disciplinary issues (which they are not), SHOPO cannot "force" KPD to negotiate over disciplinary issues. There is no indication that the adoption and implementation of BWCS and GO-14.17 even remotely involved procedures and criteria for discipline. There is nothing in GO-14.17 which changes either the definition of "discipline" (CBA Section 2.L) or the procedures (CBA Article 13) or criteria (CBA Section 13.A which provides "discipline . . . shall be for cause") used in disciplinary matters. In CBA Article 14,

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with respect to police work.

SHOPO already agreed that KPD may change its rules regarding "working conditions of employees or equipment peculiar to police work" without complying with the "mutual consent" requirement. Thus, merely because a violation of GO-14.17 may result in discipline (pursuant to CBA Article 13) does not convert a "consultation" requirement to a "mutual consent" requirement. SHOPO agreed that any changes to rules, policies or procedures affecting working conditions or equipment "peculiar to police work" were not subject to the "mutual consent" requirement, and SHOPO should not be allowed to try to "get around" the specific and unambiguous language of the CBA.

(c) In addition, since KPD cannot agree to any proposal that would interfere with its management rights to (i) deal with disciplinary matters (HRS Section 89-9(d)(4)), (ii) that maintain efficiency and productivity , including maximizing the use of advanced technology (HRS Section 89-9(d)(6)) and (iii) determining what methods, means and personnel to use in its operations (HRS Section 89-9(d)(7)), SHOPO cannot sustain any argument that the County wrongfully refused to negotiate over a bargainable topic in violation of HRS Section 89-9(a). Simply put, any refusal by the County to negotiate the terms of the SUP is consistent with HRS Section 89-9(d) because (i) the County could not, for example, negotiate any proposal affecting it ability to discipline its personnel and (ii) any negotiations over procedures and criteria regarding, for example, discipline is a permissive, and not a mandatory, subject of negotiation. Thus, the County did not breach its obligation to negotiate over bargainable topics.

(d) Finally, even if the Board agreed that the adoption and implementation of BWCS amounted to a change in working conditions, SHOPO cannot prevail. The CBA clearly provides that changes to "working conditions . . . peculiar to police

work" are not a "mutual consent" or bargainable topic.[59] In fact, the unambiguous language of CBA Section 14.B ("if the Union wishes to *meet and* confer on the proposed changes" to any rules, policies or procedures that would affect working conditions or equipment peculiar to police work) clearly evidences SHOPO's agreement that the adoption and permanent implementation of the BWCS pursuant to GO-14.17 are specifically subject to the "consultation" or "meet and confer" requirement, and not the "mutual consent" requirement.[60] Thus, SHOPO cannot now argue that the adoption and permanent implementation of BWCS and GO-14.17 should be subject to the "mutual consent" requirement or bargaining.

(34) SHOPO also failed to prove that KPD (or the County) acted wilfully. At most, SHOPO and KPD had a sharp, but good faith, disagreement over whether the adoption and permanent implementation of the BWCS or GO-14.17 were bargainable issues -- SHOPO said "yes" and KPD said "no." There was a similar good faith disagreement on whether KPD was required to negotiate over and sign the SUP. There were good faith discussions over the BWCS and what ultimately became GO-14.17. Neither side accused the other of reprehensible actions with respect to those discussions. Only when it came to the SUP, and KPD's adamant refusal to sign the same because of a genuine issue over bargainability, did SHOPO file the Complaint. Under these circumstances, the Board finds that SHOPO failed to prove that KPD (and the County) wilfully engaged in a prohibited practice.

(35) Based on the foregoing, the Board finds that:

(a) The County did not wilfully (or otherwise) violate the terms of the CBA or HRS Sections 89-9, 10, 13(a)(1), (2), (5), (7) and (8). Given the terms and

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[59] CBA Section 14.A.

[60] CBA Article 14.

conditions of the CBA, there are simply no facts to support SHOPO's allegations and assertions.

(b) Consequently, SHOPO did not demonstrate by a preponderance of the evidence that the County wilfully engaged in any acts or omissions that constituted a prohibited practice pursuant to HRS Sections 89-9, 10 and 13(a)(1), (2), (5), (7) and (8).

B. Conclusions of Law.

(1) The Board has jurisdiction over the claims alleged in the Complaint pursuant to HRS Section 89-14 and HRS Section 377-9. Since SHOPO alleged violations of Sections 89-9, 10, 13(a)(1), (2), (5), (7) and (8), and not solely a violation of HRS Section 89-13(a)(8), the Board has "exclusive original jurisdiction over such a controversy."[61]

(2) The sole issue before the Board is whether the permanent implementation of the BWCS pursuant to GO-14.17 is bargainable such that KPD should have executed the SUP. The resolution of this issue turns on whether GO-14.17 embodies rules, policies or procedures affecting working conditions and equipment "peculiar to police work." If it is, then the use of BWCS and the adoption and implementation of the BWCS pursuant to GO-14.17 are not bargainable topics pursuant to CBA Articles 14 and 17.

(3) SHOPO did not present evidence to show that the BWCS is equipment "peculiar to police work." Likewise, the adoption of GO-14.17 was required to adopt and implement the BWCS (an item of police equipment for use by KPD's officers in interacting with the public), and therefore, the adoption of GO-14.17 is a change or addition to "departmental rules, policies or procedures that would affect the working condition of

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[61] HRS Section 89-14. Since neither party raised the exhaustion requirement, the Board does not address the same, except to note that, if SHOPO had alleged a breach of the CBA as the only reasonable basis for its prohibited practice claim, the Board may have, *sua sponte*, considered the exhaustion requirement. The Board will not do so in this case.

employees or equipment peculiar to police work." Thus, pursuant to CBA Articles 11, 14 and 17, both are not subject to the "mutual consent" requirement outlined in CBA Section 1.D. Rather, they are subject to the "consultation" requirement generally outlined in CBA Section 1.C, and specifically addressed in CBA Articles 14 and 17. In other words, SHOPO agreed in the CBA that the adoption of new police equipment and new rules or policies to implement the same would not be bargainable. Thus, SHOPO had no legal basis to force KPD to execute the SUP as a condition to the permanent implementation of the BWCS pursuant to GO-14.17, and KPD had not duty to bargain over this topic.

(4) In addition, the permanent adoption and implementation of the BWCS and GO-14.17 were an appropriate exercise of KPD's (and the County's) management rights pursuant to CBA Articles 11, 14 and 17. HRS Sections 89-9(d)(4), (6) and (7) specifically prohibit the employer and exclusive representative from agreeing "to any proposal which would . . . interfere with the rights and obligations of the public employer to" (a) discipline its employees, (b) *maintain efficiency and productivity (including maximizing the use of advanced technology)* or (c) determine the means, methods and personnel to be used in conducting the public employer's operations. (Italics added). The BWCS is "advanced technology" and does "maintain efficiency and productivity," and GO-14.17 addresses how (means, methods and personnel) the BWCS will be used by KPD's officers in recording their encounters with the public such that KPD may timely respond to and resolve citizen complaints (e.g., providing evidence of what actually occurred in any incident rather than depending upon witness statements), which is the primary purpose of adopting the BWCS.[62] Therefore, the adoption and implementation of BWCS and GO-14.17 (whether or not the violation of GO-14.17 may

[62] GO-41.17 at Section I.A.

result in discipline) are not bargainable topics in accordance with the terms of the CBA and HRS Section 89-9(d).

(5) Pursuant to HRS Sections 89-9(d)(4), (d)(6) and (d)(7), the County is not required to negotiate, and is prohibited from agreeing to, any proposals that would interfere with the County's rights to:

(a) "Suspend, demote, discharge, or take other disciplinary action against employees for proper cause;"

(b) "Maintain the efficiency and productivity, including maximizing use of advanced technology, in government operations;" or

(c) "Determine methods, means, and personnel by which the employer's operations are to be conducted."

HRS Section 89-9(d), also provides that a public employer and exclusive representative may voluntarily and permissively negotiate "procedures and criteria on promotions, transfers, assignments, demotions, layoffs, suspensions, terminations, discharges, or other disciplinary actions as a permissive subject of bargaining during collective bargaining or negotiations over a memorandum of agreement, memorandum of understanding, or other supplemental agreement." None of these categories of permissive bargaining are applicable to either the BWCS or GO-14.17. The fact that a violation of GO-14.17 may lead to discipline does not change the Board's findings and conclusions. At most it is a peripheral issue in this case, and while it may touch upon disciplinary issues, it is not sufficient to invoke the "mutual consent" requirement. In addition, SHOPO's argument that a violation GO-14.17 may give rise of officer discipline is not enough to make the adoption and implementation of GO-14.17

bargainable.[63] In fact, GO-14.17 does not include any provisions regarding discipline except that it is specifically provided that it is a violation of GO-14.17 for a supervisor to review a video solely for the purpose of determining whether a violation occurred except in connection with a complaint or incident (i.e., no "witch hunts" or "fishing" expeditions). GO-14.17 does not attempt to modify any of the existing terms of the CBA and does not affect the procedures in place for the investigation of any officers (CBA Article 12) or the discipline procedures (Article 13).

(6) Thus, based on the foregoing, the adoption and implementation of the BWCS pursuant to GO-14.17 were not bargainable topics. The BWCS is equipment peculiar to police work. Similarly, GO-14.17 is a rule or policy which affects working conditions and equipment peculiar to police work. In effect, whether viewed as a contractual agreement or statutory requirement, by adopting and implementing the BWCS and GO-14.17, KPD (and the County) exercised its management rights. Thus, KPD (and the County) had no duty or obligation to bargain over either the use of the BWCS or the adoption (or future amendments) of rules and policies (i.e., GO-14.17) which "would affect the working conditions of employees or equipment peculiar to police work." Thus, there was no showing that the County wrongfully refused to bargain over the BWCS, GO-14.17 or any changes or amendments to GO-14.17, or that the County wrongfully refused to bargain over and execute the SUP.

(7) *University of Hawaii Professional Assembly v. Tomasu*, 79 Hawaii 154 (1995) (Tomasu Case), is not applicable to this case. In the Tomasu Case, the Hawaii Supreme Court determined that:[64]

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[63] *See*, the Board's discussion of *United Pub. Workers, Local 646 v. Hanneman*, 106 Hawaii 359, 364 (2005), below.

[64] The Board does not address SHOPO's reliance upon *In re Matter of United Public Workers, AFSCME,*

"Therefore, when the employer attempts to promulgate a policy that will *affect bargainable subjects* the employer cannot do so without first initiating bargaining on such topics.

Second, the duty to bargain also arises if a union unilaterally demands 'midterm' bargaining, that is, bargaining midway through an active applicable collective bargaining agreement on *bargainable subjects* such as wages, hours, or terms of employment. (Cites omitted; italics added.)"[65]

The Tomasu Case then held that:

"We therefore hold that, to the extent that the policy statement constitutes compliance with the DFWA, it is not bargainable. However, we also hold that, because the

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*Local 646, AFL-CIO and Mufi Hanneman, et al.* (UPW Case), No. 27962 (Haw.App. 3/19/2010) (Haw.App., 2010), since it is not applicable. This case was cited by SHOPO to counter the County's argument that the BWCS is not subject to the "mutual consent" requirement since it is not specifically mentioned in the CBA. Without ruling on the merits of the County's position, the Board found that the CBA addressed the issue of equipment and rules affecting equipment which would affect equipment and working conditions "peculiar to police work," and thus, treated the BWCS as an item of equipment, and GO-14.17 as a rule or procedure affection working conditions, that are "peculiar to police work." Thus, it was not necessary to reach the issue raised by the County. The Board does note, however, that the case cited by SHOPO was a memorandum decision, and pursuant to the Hawaii Rules of Appellate Procedure Rule 35(c)(2), memoranda opinions are "not precedent, but may be cited for persuasive value." Thus, in the appropriate case, this case would have no precedential value.

Irrespective of the foregoing and even if the Board were to treat it as persuasive, the UPW Case is not applicable factually. In the UPW Case, the Intermediate Court of Appeals (ICA) was dealing with a drug testing policy mandated by federal law. UPW sent a letter to the City and County of Honolulu (City) requesting negotiations to a change to the collective bargaining agreement regarding retaining discharged or suspended (more than 30 days) personnel in the random drug testing program, which was an issue not addressed in the collective bargaining agreement. The ICA held that "[t]his issue involves a term or condition of employment affecting working conditions. Thus once UPW sent its letter advising Employer of UPW's desire to negotiate and consult over this issue, Employer had a duty under HRS Section 89-9(a) and Section 1.05 of the CBA to negotiate and consult with UPW." UPW Case, 2010 Haw.App. LEXIS 152 at pp. 35-36. Clearly, in the UPW Case, drug testing was a condition of work, and the issue of random drug testing of discharged or suspended personnel was not addressed in the collective bargaining agreement. However, in this case (unlike the UPW Case), matters relating to equipment and rules and policies affecting equipment and working conditions "peculiar to police work" were specifically addressed in the CBA, and SHOPO agreed that these were not bargainable (i.e., subject to the "consultation" requirement and not the "mutual consent" requirement). In fact, the parties engaged in extensive discussions (but not negotiations) over the BWCS and the drafts of GO-14.17, all in accordance with CBA Articles 14 and 17, and it was only when SHOPO required KPD to sign the SUP that discussions were terminated. Since the adoption of the BWCS and its implementation pursuant to GO-14.17 were part of KPD's management rights (as confirmed by SHOPO's agreement that even working conditions which are "peculiar to police work" are not bargainable), KPD had no duty to bargain over the SUP or its terms. Thus, the UPW Case is not applicable to this case, and there is no breach of KPD's duty to collectively bargain a bargainable topic.

[65] Tomasu Case, 79 Hawaii at p. 159.

> DFWA inherently mandates implementation, the UHPA need not wait until BOR attempts an implementation of an apparatus to effectuate the policy. *Because implementation will affect bargainable topics*, UPHA may initiate bargaining at any time upon such topics. Thus, the BOR's duty to bargain with the UHPA is triggered by the UHPA's demand. (Italics added.)"[66]

In essence, the Court looked at whether a particular topic touched upon or affected a bargainable subject (in the Tomasu Case, the bargainable subject affected was discipline) in determining whether the public employer had an obligation to negotiate. This Board then interpreted "the [Court's] holding in *Tomasu* [entitled] it to conduct a balancing test to determine whether collective bargaining was required for the City's transfer proposal. The [Board] weighed the effect of the transfer on the 'working conditions' of the refuse collectors under HRS Section 89-9(a) against the interests of the City in preserving its management rights under HRS Section 89-9(d)."[67] This balancing test was rejected in the Hanneman Case.[68] Instead, the Court in the Hanneman Case read the Tomasu Case as standing for the proposition that:

> "[I]n reading HRS Sections 89-9(a), (c) and (d) together, parties are *permitted and encouraged to negotiate all matters affecting wages, hours and conditions of employment as long as the negotiations do not infringe upon an employer's management rights under section 89-9(d)*. In other words, the right to negotiate wages, hours and conditions of employment is subject to, *not* balanced against, management rights. Accordingly, in light of the plain language of HRS Section 89-9(d), we hold that the HLRB erred in concluding that the City's proposed transfer

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66 Tomasu Case, 79 Hawai'i at p. 163.

67 *United Pub. Workers, Local 646 v. Hanneman*, 106 Hawaii 359, 364 (2005) (Hanneman Case).

68 *Id.*

was subject to collective bargaining under HRS Section 89-9(a). (Italics added)"[69]

The Hawaii Supreme Court in the Tomasu Case referred to the possibility of discipline as a factor in determining whether the implementation of a federal mandate gave rise to an obligation to bargain. In the Hanneman Case, however, the Hawaii Supreme Court revisited the issue and held that, if a topic falls within a "management right," there is no obligation to negotiate. "To the extent that the Tomasu Case implied that all matters *affecting* wages, hours or working conditions must be bargained, the Hanneman Case clarified the situation and stated all parties are encouraged to negotiate "as long as the negotiations do not infringe upon an employer's management rights under section 89-9(d)."

As determined above, the adoption and permanent implementation of the BWCS pursuant to GO-14.17 are not bargainable topics -- in the CBA, the parties agreed that these topics (equipment and working conditions "peculiar to police work") were within KPD's management rights as outlined in HRS Sections 89-9(d)(4), (6) and (7). Thus, the Tomasu Case is not applicable here because KPD was exercising its management rights as set forth in both the CBA and HRS Section 89-9(d), and was not required to bargain with SHOPO over the implementation of either the BWCS or GO-14.17, or the terms of the SUP.[70]

(8) *City of Mountlake Terrace*, Decision 11702-A (PECB, 2014) (Mountlake Decision) is not applicable to this case. As stated by the Washington Public Employment Relations Commission:

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[69] Hanneman Case, 106 Hawaii at p. 365.

[70] Consistent with the Hanneman Case, here the implementation of the BWCS and GO-14.14 was the exercise of management rights. Whether seen as a program to maintain efficiency or productivity through the use of advanced technology (BWCS) or as determining the methods and means of its operations, the BWCS was a matter relating to KPD's police operations -- it was equipment or working conditions "peculiar to police work." As such, it was, and is, not a bargainable topic.

> "In deciding whether a duty to bargain exists, the Commission *applies a balancing test* on a case-by-case basis. The Commission balances two principal considerations: (1) 'the relationship the subject bears to wages, hours, and working conditions' of employees, and (2) 'the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative.' (Cites omitted, italics added.)"[71]

However, as noted above, the Hanneman Case specifically rejected the "balancing test" in determining whether a topic is bargainable. Clearly, the Board cannot, and should not, engage in any balancing to determine whether a topic is bargainable.

(9) Based on the foregoing, SHOPO failed to prove by a preponderance of the evidence[72] that KPD, by adopting and permanently implementing the use of the BWCS pursuant to GO-14.17, wilfully engaged in a prohibited practice. In addition, SHOPO failed to prove by a preponderance of the evidence that KPD, by refusing to bargain over, or execute, the SUP, wilfully engaged in a prohibited practice.

(10) Because SHOPO failed to provide that KPD (and the County) wilfully engaged in any prohibited practice, the Board finds for the County, and against SHOPO on all claims and allegations contained in the Complaint and its attachments.

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[71] Mountlake Decision at p. 4. A copy of the Mountlake Decision was admitted into evidence as Exhibit J-8.

[72] HRS § 91-10(5) provides that "[e]xcept as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence." *See, also*, Hawaii Administrative Rules (HAR) § 12-42-8(g)(16). The Board has further interpreted this section "to mean that the party required to carry the burden of proof, must not only produce sufficient evidence but also support that evidence with arguments in applying the relevant legal principles. Henceforth, if any party fails to present sufficient legal arguments with respect to any issue, the Board shall find that the party failed to carry its burden of proof and dispose of the issue accordingly." State of Hawaii Organization of Police Officers (SHOPO) v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982).

## IV. ORDER.

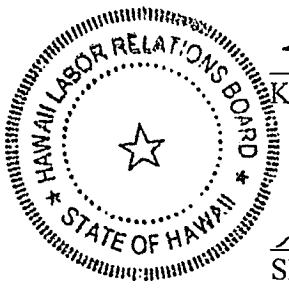
Based on the foregoing findings of fact and conclusions of law, the Board orders that:

A. The Complaint, and all claims and allegations set forth in the Complaint (and all attachments to the Complaint), be and hereby are dismissed.

B. This case is deemed to be closed.

DATED: Honolulu, Hawaii, June 3, 2016.

HAWAII LABOR RELATIONS BOARD




KERRY M. KOMATSUBARA, Chair

SESNITA A.D. MOEPONO, Member

ROCK B. LEY, Member

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