

Dec 7 file

STATE OF HAWAII
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)	
STATE OF HAWAII ORGANIZATION)	Case No. <u>CE-12-29</u>
OF POLICE OFFICERS (SHOPO),)	
)	Decision <u>79</u>
Petitioner,)	
)	
and)	
)	
FRANK F. FASI, Mayor of the)	
City and County of Honolulu,)	
)	
Respondent.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDERS

On July 28, 1976, the State of Hawaii Organization of Police Officers (hereinafter SHOPO), petitioner, filed with this Board a prohibited practice charge alleging that Frank F. Fasi, Mayor of the City and County of Honolulu (hereinafter Employer),¹ in his refusal to arbitrate a grievance, violated Article 32 of the then existing collective bargaining agreement for Unit 12 (police officers). SHOPO contends that such action constitutes a prohibited practice under Section 89-13(a)(8), Hawaii Revised Statutes (hereinafter HRS), which states that:

Section 89-13. Prohibited practices;
evidence of bad faith. (a) It shall be a
prohibited practice for a public employer
or its designated representative wilfully
to:

* * *

(8) Violate the terms of the collec-
tive bargaining agreement.

¹This Board will use in all decisions the correct names of public employers as defined by Section 89-2(9), Hawaii Revised Statutes, rather than referring to employers by designations such as "the City."

After due notice to the parties, a hearing was held in the Board's hearing room on October 1, 1976. All parties were afforded full opportunity to call and cross-examine witnesses, submit exhibits and present briefs and oral arguments to this Board. The Employer submitted its brief on November 22, 1976. The Board granted SHOPO an extension to file its closing brief inasmuch as it was without legal counsel and was in the process of retaining an attorney. SHOPO subsequently filed its brief on April 5, 1977.

Upon a full review of the transcripts, exhibits and briefs submitted by the parties, this Board hereby makes the following findings of fact, conclusions of law, and orders.

FINDINGS OF FACT

The following facts were stipulated to by the parties and are hereby adopted by the Board.

SHOPO is the exclusive representative of bargaining unit 12 as defined in Section 89-2(10), HRS.

Mayor Fasi is the public employer as defined in Section 89-2(9), HRS. (See footnote 1)

SHOPO represents the police officers named in the grievance: Darrell Lum Lee, Derek Kenison, Nicholas Oducado, Jr., and Warren Sugano (hereinafter grievants). Grievants are police officers employed by the Honolulu Police Department (hereinafter HPD), City and County of Honolulu.

Grievants were all suspended for fifteen working days, and were so notified by individual letters.

By letter dated October 7, 1975, Officer Lum Lee was suspended from October 14, 1975 through November 5, 1975.

By letter dated October 8, 1975, Officer Kenison was suspended from October 17, 1975 through November 5, 1975.

By letter dated October 10, 1975, Officer Oducado was suspended from October 14, 1975 through November 5, 1975.

By letter dated October 10, 1975, Officer Sugano was suspended from October 15, 1975 through November 4, 1975.

Grievants appealed the suspension pursuant to Article 32 of the collective bargaining agreement.

On October 29, 1975, Officer Lum Lee filed a grievance which was denied at Step I by Patrol Major Roy Kaaa on October 30, 1975.

On October 30, 1975, Officer Kenison filed a grievance which was denied by Major Kaaa on October 30, 1975.

On October 31, 1975, Officer Oducado filed a grievance which was denied by Major Kaaa on November 3, 1975.

On November 4, 1975, Officer Sugano filed a grievance which was denied by Major Kaaa on November 4, 1975.

By letters dated November 13, 17, and 20, 1975, Mr. Stanley Burden, Executive Director of SHOPO, on behalf of the grievants, appealed the denials by Major Kaaa to Step II of the grievance procedure.

On January 9, 1976, and January 16, 1976, a hearing at Step II was held for the grievants.

On January 26, 1976, Mr. Burden was notified by letter dated January 21, 1976, from Chief of Police Francis Keala, of the denial of the grievances at Step II.

By letter dated February 10, 1976, Mr. Burden requested Mr. Harry Boranian, Director of the Department of Civil Service, City and County of Honolulu, to convene a

Step III hearing for the grievants to appeal the denial of the grievances at Step II.

During the Step III hearing conducted before Harry Boranian, Mr. Boranian requested that SHOPO Business Agent Curtis Wilmington provide additional relevant information for his consideration. By letter dated April 27, 1976, Mr. Wilmington responded by sending Harry Boranian extensive additional information.

In a letter, dated May 13, 1976, Mr. Boranian denied the grievances, noting, among other things, that "the grievance was not timely filed to the Step III level. It is, therefore, our position that this grievance cannot be pursued to arbitration."

Mr. Burden requested arbitration of the grievance, Step IV, in a letter to Mr. Boranian dated May 26, 1976. This letter was received by Mr. Boranian on May 27, 1976.

Mr. Boranian, in a letter dated June 3, 1976, reaffirmed the position that the grievance, having been untimely filed at Step III, could not proceed to Step IV, arbitration.

In addition to these stipulated facts, this Board also finds that at the time of the alleged prohibited practice, there was a collective bargaining agreement in effect between the Employer and SHOPO. This agreement was effective from July 1, 1973 to June 30, 1976.

CONCLUSIONS OF LAW

Article 32 of the collective bargaining agreement between the Employer and SHOPO in effect at the time of the

dispute provides for informal airing of a grievance, as well as a four-step formal procedure for grievance resolution.

The Employer has refused to submit the dispute to Step IV of the grievance procedure (arbitration). He bases his refusal on his assertion that the request for the Step III hearing was untimely and that this excuses him from any obligation to proceed further under the contractual grievance resolution procedures. The Step III procedure is defined in Article 32:

Step III. If the matter is not satisfactorily settled at Step II, the grieving party may file a letter of appeal specifying the reasons for the appeal with the Employer or his representative within ten (10) days after the receipt of the decision in Step II.

If a representative is designated by the Employer, the name of such person shall be provided to the grieving party.

After the presentation of the grievance, the grieving party and the Union representative shall be offered an opportunity to meet with the Employer or his representative in an attempt to settle the grievance.

The decision of the Employer or his representative shall be in writing and shall be transmitted to the grieving party within ten (10) days after receipt of the grievance unless extended by mutual consent.

If the grievance is not satisfactorily settled at Step III, the Union may exercise its right to arbitrate the grievance.

The other portions of Article 32 which are relevant provide:

F. . . . There shall be no obligation by the Employer to consider any grievance not filed within the specified time limit stated in each step unless extended by mutual consent.

Step IV. Arbitration. . . . g. Notwithstanding any provision herein, the limitations on time set forth in Step I through Step III, inclusive, shall be extended for a period not

to exceed ten (10) days in the interest of the Employee or Employer upon presentation of a reasonable explanation for said delay.

There is no question that the grievants' request for a Step III hearing was made after the ten-day period after receipt of the Step II decision had passed.

The Employer contends that under Article 32 F of the agreement, he need not consider any grievance which is untimely filed. The Employer also points out that there has been no extension of time because of reasonable delay, as described in Step IV g, supra.

SHOPO, for the grievants, argues that although the request for a Step III hearing was late, the Employer unjustifiably determined that it was untimely. SHOPO also contends that the Employer waived any objections based on timeliness by his past practice of disregarding deadlines, and by his implicit recognition of the timeliness of grievants' petition by holding a hearing. In support of its position, SHOPO relies, in part, on the decision in Suffern Distributors, Inc. v. Local 153, 80 LRRM 3467, 331 NYS 2d 876 (1972) wherein the New York Supreme Court, Appellate Division, held that:

Questions of compliance with step-by-step grievance procedures, prior to arbitration of matters relating to a collective bargaining agreement are questions of procedural arbitrability to be passed upon by the arbitrator upon consideration of the merits of the matter. 80 LRRM at 3468.

To similar effect are the decisions in John Wiley & Sons, 376 U.S. 543, 55 LRRM 2769 (1964); Willink v. Howard, 49 App. Div. 2d 683, 370 NYS 2d 747, 90 LRRM 2495 (1975). The holdings in these cases provide a correct resolution of

the issue herein concerning whether it was for the Employer or an arbitrator to rule on the timeliness of the filing and the arbitrability of the dispute.

The Unit 12 collective bargaining agreement describes the grievance procedure leading to arbitration in detail. Article 32 of the agreement between SHOPO and the Employer states:

Step IV. Arbitration.

d. If the Employer disputes the arbitrability of any grievance under the terms of this Agreement, the Arbitrator shall first determine whether he has jurisdiction to act; and if he finds that he has no such jurisdiction, the grievance shall be referred back to the parties without decision or recommendation.

Under this contractual provision, and pertinent decisional law, the Employer in this case may not unilaterally determine the arbitrability of the subject grievances which is what, in fact, he attempted to do by unilaterally determining that the matter could not go to arbitration. The decision on arbitrability is for the arbitrator to make. When the issue of the arbitrability of the grievances is submitted to an arbitrator, then the Employer may raise his assertions that noncompliance with the time limits renders the grievances nonarbitrable.

The Employer's failure to utilize the total grievance procedure as outlined in the contract is a prohibited practice under Section 89-13(a)(8), HRS.

Considerations proper to disposition of cases of this sort were well stated by Arbitrator Harry Shulman:

. . . In the first place, what appears to one party to be a clear violation may not seem so at all to the other party. Neither party can be the final judge as to whether the contract has been violated. The determination of that

issue rests in collective negotiation through the grievance procedure. But, in the second place, and more important, the grievance procedure is prescribed in the contract precisely because the parties anticipated that there would be claims of violation which would require adjustment. That procedure is prescribed for all grievances, not merely for doubtful ones. Nothing in the contract even suggests the idea that only doubtful violations need be processed through the grievance procedure and that clear violations can be resisted through individual "clear" violation and a "doubtful" one is that the former makes a clear grievance and the latter a doubtful one. But both must be handled in the regular prescribed manner. Ford Motor Co., 3 LA 779, 781 (1944).

ORDERS

The Board finds that the Employer's refusal to submit the dispute of the arbitrability of the subject grievances to an arbitrator constituted a violation of the terms of the Unit 12 collective bargaining agreement and was a wilful violation of Section 89-13(a)(8), HRS.


The Board orders the Employer to cease and desist this prohibited practice.

Affirmatively, the Board orders the parties to submit the subject dispute, in good faith, to an arbitrator to permit him to determine his jurisdiction in accordance with Article 32, Step IV, d. of the contract, and further orders the Employer to report on the extent to which he has complied with this order no later than 45 days after the date of this decision, together with proof of service of said report upon SHOPO, and to make further reports at such future dates as the Board may hereafter order.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


James K. Clark, Board Member


John E. Milligan, Board Member

Dated: July 29, 1977

Honolulu, Hawaii