

STATE OF HAWAII
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of)
BRUCE J. CHING,)
Complainant,)
and)
STATE OF HAWAII ORGANIZATION)
OF POLICE OFFICERS,)
Respondent,)
and)
HAWAII GOVERNMENT EMPLOYEES')
ASSOCIATION, LOCAL 152,)
AFSCME, AFL-CIO,)
and)
HAWAII STATE TEACHERS)
ASSOCIATION,)
Intervenors.)

Case No. CU-12-15

In the Matter of)
BRUCE J. CHING,)
Complainant,)
and)
FRANK F. FASI, MAYOR OF THE)
CITY AND COUNTY OF HONOLULU;)
HARRY BORANIAN, DIRECTOR OF)
CIVIL SERVICE, CITY AND)
COUNTY OF HONOLULU,)
Respondents.)

Case No. CE-12-25

Decision No. 89

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

These prohibited practice charges against Frank F. Fasi, Mayor of the City and County of Honolulu, and Harry Boranian, Director of Civil Service, City and County of

Honolulu (hereinafter the Employer); and the State of Hawaii Organization of Police Officers (hereinafter SHOPO or the Union), were filed by Complainant Bruce Ching on June 7, 1976.

The petitions, as amended, charge that the Employer violated Sections 89-13(a)(1), (5), (7) and (8), Hawaii Revised Statutes (hereinafter HRS), and Article 32 of the collective bargaining agreement for Unit 12, by improperly discharging Complainant from the Honolulu Police Department (hereinafter HPD) and improperly refusing to permit arbitration of Complainant's grievance in the absence of union representation. They further charge that SHOPO failed to represent Complainant fairly, in violation of Sections 89-13(b)(1), (2) and (5), HRS.

Hearings on these consolidated charges were originally scheduled to commence on August 16, 1976. Subsequently, after the charges had been amended and particularized (see Orders No. 69, dated August 15, 1976, and 70, dated August 6, 1976), Respondent SHOPO filed a motion to dismiss a subpoena duces tecum issued to its custodian of records. Pursuant to a hearing on September 13, 1976, the Board partially denied the motion in Order No. 90 (December 2, 1976). SHOPO also filed a motion to dismiss on October 19, 1976, and a motion to amend its answer on November 4, 1976. A hearing on these two later motions was held on November 10, 1976. The Board denied both motions in Order No. 94 (January 3, 1977). By request of the parties, the hearings in these cases were re-scheduled for June 6, 1977; and were held on June 6, 7, 13, 14, 28, 29, July 5 and 8, 1977. All parties were afforded full opportunity to call and cross-examine witnesses, submit exhibits and present briefs and oral arguments to the Board.

On July 19, 1977, the Board issued Order No. 136, granting a petition for intervention filed by the Hawaii Government Employees' Association (hereinafter HGEA), on the issue of the validity of a contract provision restricting the right to arbitrate a grievance to the Union. The Board also granted to the Hawaii State Teachers Association (hereinafter HSTA) intervenor status on the same issue in Order No. 140 (August 3, 1977).

The parties submitted closing briefs on November 21, 1977. Oral argument, initially scheduled for December 21, 1977, was held on February 2, 1978. The Board received the final transcript in these cases on March 6, 1978.

Based on its full review of the transcripts, exhibits and briefs submitted by the parties, this Board hereby makes the following findings of facts, conclusions of law, and orders.

FINDINGS OF FACT

Complainant Ching was a public employee pursuant to Section 89-2(7), HRS, and was included in bargaining unit 12 (police officers).

Respondent SHOPO is the exclusive representative of employees in Unit 12.

Respondents Frank F. Fasi, Mayor of the City and County of Honolulu, and Harry Boranian, Director of Civil Service, collectively constitute the public employer, as that term is defined in Section 89-2(9), HRS.

SHOPO and the Employer are parties to the Unit 12 collective bargaining agreement. Article 32 of the Unit 12 contract (in effect between July 1, 1973 and June 30, 1976)

contained a four step grievance procedure culminating in arbitration. Under this procedure, an individual grievant can process his grievance up through Steps 1-3 with or without the assistance of a SHOPO representative. At Step 4, however, Article 32F provides that:

If the grievance is not satisfactorily settled at Step 3, the union may exercise its right to arbitrate the grievance.

Step 4. Arbitration

a. If the matter is not satisfactorily settled at Step 3, and the union desires to proceed with arbitration, it shall within twenty (20) days of receipt of the decision rendered at Step 3, serve written notice on the Employer or his representative of his desire to arbitrate.

Intervenors HGEA and HSTA are employee organizations, as defined in Section 89-2(8), HRS, and are parties to collective bargaining agreements whose grievance procedures are similar to that found in the above quoted Unit 12 contract.

On June 16, 1974, Complainant arrested a suspect after finding a brown leather pouch containing marijuana in his possession. He radioed for assistance, and several other police officers, including Officers John Woo and Lawrence Gealon, arrived at the scene of the arrest. While Complainant discussed the preparation of his arrest report with his supervising sergeant, Officers Woo and Gealon searched the arrestee's vehicle. Officer Gealon then found four plastic bags, or lids, containing additional marijuana and a jar of hashish oil in the vehicle, and indicated to Complainant that he wanted them. Complainant initially consented, but before leaving the scene of the arrest, he requested and obtained the additional marijuana and hashish oil from Officer Gealon. In the

meantime, Officer Woo had released the arrestee's companions because he was unaware that additional drugs had been found in the vehicle.

On the way to the receiving desk of the police station, Officer Gealon radioed Complainant to pull over to the side of the street. He thereupon asked for the marijuana, which he had found, and took the hashish oil and half of the marijuana with him. Officer Gealon then dropped Complainant's arrestee off at the receiving desk, and left without submitting the marijuana and hashish oil as evidence. Complainant also failed to turn in the marijuana he had obtained from Officer Gealon, and he did not mention it in his arrest report. He took it home, and later testified during the Board's hearings that he had given it away. He submitted only the brown pouch of marijuana he had found on the suspect as evidence.

On June 18, 1974, the individual arrested by Complainant filed a complaint with the Honolulu Police Commission. In it he alleged that Complainant had used unnecessary force in subduing and arresting him. On October 9, 1974, the Commission determined that there was sufficient evidence for a finding of use of unnecessary force by Complainant. Complainant first learned of the Police Commission's findings over the radio, although the Commission told him that SHOPO was to have notified him. He stated that SHOPO business agent Dayton Nakanelua later told him that they had attempted to contact him, but were unable to do so prior to the newscast.

During the Police Commission and Disciplinary Review Board investigations, the arrestee's companions alleged that a total of five lids of marijuana and one container of hashish oil had been confiscated. The discrepancy between this amount

and the amount that Complainant actually submitted as evidence led to further investigation of the June 16, 1974 incident by HPD's Internal Affairs Division.

At the conclusion of these investigations, Complainant and Officer Woo were dismissed from the Honolulu Police Department, effective February 16, 1975, for failing to turn in the additional marijuana confiscated on June 16, 1974.

Complainant then contacted SHOPO for assistance in filing a grievance over the discharge. He testified that SHOPO business agent Dayton Nakanelua advised him of the futility of going through Step 1 because a grievance filed by fellow officer Woo on the same issue had already been denied at Step 1.

On February 18, 1975, Complainant dictated a statement (hereafter also referred to as February 18, 1975 statement) regarding the June 16, 1974 incident to Nakanelua and SHOPO's executive secretary. In the statement, Complainant related that Officer Gealon had originally found the marijuana, and had withheld a portion of it rather than submitting it as evidence for the June 16, 1974 arrest. He further stated that he had retained some of the marijuana, but had thrown it away in a trash can before entering the police station.

Complainant made the February 18, 1975 statement to exonerate Officer Woo, since Officer Woo had not participated in withholding the marijuana. He also made the statement because Nakanelua had advised him that his best course of action was to tell the truth even though his chances of being reinstated were slim.

Shortly after giving SHOPO his statement, Complainant met with HPD's Deputy Chief Fletcher to discuss the possibility of reinstatement. At this meeting, he gave the Deputy Chief a

letter he had prepared on February 19, 1975, which explained that he had not turned in the marijuana because he had been protecting another police officer. Deputy Chief Fletcher advised Complainant to take advantage of the grievance process, as well as other legal processes open to him. He also informed him that unless there was something substantial to show that the facts were not as they appeared to be, there was very little hope of reinstatement.

Around February 24-25, 1975, SHOPO consulted its legal counsel regarding the ramifications of submitting Complainant's statement as part of his grievance. After being advised of the attorney's comments, Complainant nevertheless authorized Nakanelua to submit the February 18, 1975 statement with his grievance. Complainant's grievance was filed on February 28, 1975.

On March 3, 1975, Complainant's grievance was denied at Step 1. On March 13, 1975, SHOPO asked to proceed to Step 2 of the grievance procedure.

On March 21, 1975, the Employer notified SHOPO that it was reinvestigating the June 16, 1974 incident because of the additional information provided in Complainant's statement. Scheduling of Complainant's Step 2 hearing was held in abeyance pending completion of the reinvestigation. Complainant testified that the Union did not inform him of this development, even though he had made numerous attempts during April-August, 1975 to contact Nakanelua by telephone.

On March 21, 1975, Detective Toyofuku of HPD's Internal Affairs Division interviewed Complainant at SHOPO's offices, in Nakanelua's presence. During the interview, Complainant substantiated his February 18, 1975 statement. He did not, however, disclose that he had given away the marijuana that he withheld.

In April, 1975, Detective Toyofuku interviewed Complainant regarding a visit which Officer Gealon and another police officer had made to Complainant's home. Although Complainant's home address was unlisted, Officer Gealon had obtained it from SHOPO without Complainant's knowledge or consent. At this meeting, Officer Gealon apparently sought to convince Complainant to withdraw his statement and to obtain outside legal counsel to handle his grievance.

After the reinvestigation, Officer Woo was reinstated as a police officer; Officer Gealon was dismissed. Complainant's dismissal was sustained.

On July 7, 1975, the Employer advised SHOPO that Complainant's Step 2 hearing was scheduled for July 10, 1975. Complainant was not notified of the hearing, however, and did not attend.

The Step 2 hearing was then rescheduled for August 1, 1975. SHOPO attempted to notify Complainant by telephone, and left a message with Complainant's younger brother. Complainant did not receive this message, and therefore missed the second Step 2 hearing. SHOPO agent Nakanelua explained that because of limited advance notice in scheduling, SHOPO often notified grievants of their hearings by telephone. He also stated that it was not uncommon to leave messages with the families or spouses of grievants when SHOPO was unable to reach the police officers directly. On August 4, 1975, the grievance was denied at Step 2.

On August 20, 1975, SHOPO requested proceeding to Step 3. The Step 3 hearing was held on September 5, 1975, before Director of Civil Service Harry Boranian. Complainant testified that he discussed the case with Nakanelua for only about 10-15 minutes prior to the hearing. During the hearing

itself, Nakanelua's main argument was that the penalty of dismissal was too harsh. He did not call any witnesses in presenting Complainant's case; however, Nakanelua later testified that SHOPO usually does not call witnesses until the grievance is presented at Step 4.

On September 23, 1975, the grievance was denied at Step 3. SHOPO asked to proceed to Step 4 arbitration on October 13, 1975.

On October 31, 1975, SHOPO notified the Employer of the withdrawal of its request for arbitration, stating as follows:

With regards to the formal grievance of Mr. Bruce Ching and our letter to you, dated October 13, 1975, we wish to inform you of our intentions to withdraw from Step 4 Arbitration. SHOPO will not be representing Mr. Ching in any further proceedings relative to his discharge from the Honolulu Police Department.

However, Mr. Ching has been advised of his right to pursue this matter on his own, whereby any further costs incurred would be credited to him. Indications are that he may still continue and retain private legal counsel to represent him.

We believe our October 13, 1975 letter to you will suffice in providing Mr. Ching the opportunity to have the merits of his case arbitrated.

During the hearings held before the Board, SHOPO Executive Director Stanley Burden testified that the Union routinely requests proceeding to Step 4 in order to assure that such requests are timely filed. If SHOPO subsequently determines that a particular grievance lacks sufficient merit to warrant arbitration, it can then withdraw the request.

As far as Complainant's grievance was concerned, SHOPO decided not go to arbitration because it believed that an arbitrator would sustain the Employer's action, and because it questioned Complainant's credibility.

On November 10, 1975, the Employer advised SHOPO of its position that Complainant could not proceed to arbitration without union representation.

After learning of SHOPO and the Employer's conflicting positions regarding his right to go to arbitration without a union representative, Complainant retained private counsel to represent him. During January-February, 1976, Complainant's attorney sought to convince SHOPO and the Employer to permit arbitration of his grievance.

The Employer then agreed to permit arbitration if SHOPO participated as co-representative or exclusive representative.

On March 2, 1976, SHOPO advised Complainant's attorney that it would not participate in arbitration as co-representative.

On March 5, 1976, the Employer sent Complainant's attorney copies of its notes from the 1973 Unit 12 contract negotiations. The notes revealed that the Employer's proposal, which would have permitted access to arbitration by the individual employee or the Union, had been modified to conform with SHOPO's proposal for limiting access to arbitration to the Union alone. In the Board hearings, SHOPO admitted that it has now adopted the Employer's interpretation of Article 32F.

On April 6, 1976, SHOPO again refused a request by Complainant's attorney that the Union participate as co-representative in arbitration. The Employer likewise refused to go to arbitration when it learned of the Union's refusal.

On June 7, 1976, Complainant filed these prohibited practice charges with the Board.

CONCLUSIONS OF LAW

The subject cases have presented several issues of first impression before this Board. These include the question of whether, on the facts of this case, the Union breached its duty of fair representation to Complainant and whether an individual grievant under a contract such as the Unit 12 contract has the right to proceed to arbitration without union representation. Although the two issues are interrelated, the Board finds it appropriate to discuss them separately, in the context of the charges against the Employer and those against the Union.

In Case No. CE-12-25, Complainant alleged that the Employer improperly discharged him and refused to permit arbitration of his grievance, in violation of Article 32 of the Unit 12 contract and Sections 89-13(a)(1), (5), (7) and (8), HRS. The Employer, on the other hand, has contended that Complainant's charges were untimely filed with this Board and that its refusal to go to arbitration did not constitute a violation of rights guaranteed under Chapter 89, HRS. The Board agrees with the Employer's contentions.

Section 377-9(1), HRS, which is incorporated by Section 89-14, HRS, states:

No complaints of any specific unfair labor practice shall be considered unless filed within ninety days of its occurrence.

Rule 3.02, HPERB Rules and Regulations, also provides that:

A complaint that any public employer, public employee or employee organization has engaged in any prohibited act may be filed by a public employee, employee organization, public employer, or any party in interest or their representatives within ninety days of the alleged violation.

Under these provisions, the preliminary issue with respect to the charges filed with this Board against the Employer is whether these prohibited practice charges were timely filed. Complainant's discharge became effective on February 16, 1975. His meeting with Deputy Chief Fletcher and the interview with Detective Toyofuku all occurred in February and March, 1975. The Step 2 and Step 3 hearings occurred during the period July-September, 1975. However, the prohibited practice charges were not filed until June 7, 1976. It is obvious that those events which occurred in 1975 are outside the Board's 90-day statute of limitations period, and cannot serve as the basis for any prohibited practices violations by the Employer.

During the period of November, 1975 to April, 1976, the Employer took the position that Complainant could not proceed to arbitration without SHOPO's participation, because it interpreted Article 32F of the Unit 12 contract as reserving the right to proceed to arbitration to the Union. Complainant, on the other hand, has argued that the Employer's interpretation of Article 32F violates Section 89-8, HRS, as well as his constitutional rights to due process and equal protection. Constitutional challenges to the validity of a provision in the Unit 12 contract, or to provisions of Chapter 89, HRS, are not within this Board's jurisdiction; however, as to Complainant's first contention, the Board concludes that the Employer's interpretation of Article 32F of the Unit 12 agreement does not conflict with Section 89-8, HRS.

Section 89-8(b), HRS, provides that:

(b) An individual employee may present a grievance at any time to his employer and have the grievance heard without intervention of an employee organization; provided that the exclusive representative is afforded

the opportunity to be present at such conferences and that any adjustment made shall not be inconsistent with the terms of an agreement then in effect between the employer and the exclusive representative.

The foregoing language is similar to that found in Section 9(a) of the Labor Management Relations Act (hereinafter LMRA), 29 U.S.C. §159(a), which states, in part:

...[A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect...

Section 9(a) of the LMRA has been construed as merely granting to an individual employee the privilege of individually approaching his employer for an adjustment of his grievance, rather than the absolute right to have that grievance adjusted by the employer. Thus, where an individual employee sought to compel arbitration of his grievance pursuant to Section 9(a), the court in Black-Clawson Company, Inc. v. International Association of Machinists, Lodge 355, 313 F. 2d 179 (2nd Cir. 1962), examined the legislative history of the provision and ruled as follows:

"...We hold that section 9(a) does not confer upon an individual grievant the power, enforceable in a court of law, to compel the employer to arbitrate his grievance.

...Despite Congress' use of the word 'right', which seems to import an indefeasible right mirrored in a duty on the part of the employer, we are convinced that the proviso was designed merely to confer upon the employee the privilege to approach his employer on personal grievances when his union reacts with hostility or apathy. Prior to the adoption of this proviso in section 9(a), the employer had cause to fear that his processing of an individual's grievance without consulting the bargaining representative would be an unfair labor practice; section 9(a) made

the union the exclusive representative of the employees in the bargaining unit, and section 8(a)(5) made a refusal to bargain with the exclusive representative an unfair labor practice. The proviso was apparently designed to safeguard from charges of violation of the act the employer who voluntarily processed employee grievances at the behest of the individual employee, and to reduce what many had deemed the unlimited power of the union to control the processing of grievances." 313 F. 2d at 184-85.

See also Broniman v. Great Atlantic and Pacific Tea Company, 353 F. 2d 559, at 561-562 (6th Cir. 1965). In the Black-Clawson case, the court reasoned that:

"Our conclusion is dictated not merely by the terms of the collective bargaining structure, and history of section 9(a), but also by what we consider to be a sound view of labor-management relations. The union represents the employees for the purposes of negotiating and enforcing the terms of the collective bargaining agreement. This is the modern means of bringing about industrial peace and channeling the resolution of intra-plant disputes. Chaos would result if every disenchanted employee, every disturbed employee, and every employee who harbored a dislike for his employer, could harass both the union and the employer by processing grievances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration in the face of clear contractual provisions intended to channel the enforcement remedy through the union." [Citations omitted]... 313 F. 2d at 186.

We believe that the foregoing interpretation of Section 9(a) and the County's rationale have applicability here, as a means of effectuating the policies expressed in Sections 89-1 and 89-11(a), HRS. In view of the similarity between Section 9(a) of the LMRA and Section 89-8(b), HRS, the Board holds that Section 89-8(b), HRS, does not grant an individual employee the right to compel his employer to arbitrate his grievance. It thereby follows that the terms of Article 32F, which reserve the right to demand arbitration solely to

the union, do not conflict with Section 89-8(b), HRS. The Board further finds that the Employer's consistent adherence to the provisions of Article 32F of the Unit 12 contract did not violate Section 89-8(b), HRS; and its interpretation of that contractual provision did not constitute prohibited practices under Sections 89-13(a)(1), (5) or (7), HRS. For these reasons, the Board will dismiss the prohibited practice charges against the Employer in Case No. CE-12-25.

We turn now to the merits of the prohibited practice charges against the Union to determine whether or not SHOPO breached its duty of fair representation in its processing of Complainant's grievance. We hold that, under the specific facts of this case, SHOPO did not breach its duty.

A union's duty of fair representation arises from its status as exclusive bargaining representative of all the employees in the bargaining unit. In Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967), the Supreme Court defined the nature of that duty as follows:

It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining...[citations omitted], and in its enforcement of the resulting collective bargaining agreement....Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

...A breach of the statutory duty of fair representation occurs only when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. (Emphasis added) 386 U.S. at 177, 190.

There an employee who had been discharged for poor health sought reinstatement. The contract, however, provided that only the union could proceed to arbitration; and the union refused to refer his grievance to arbitration. In the employee's suit against the union for breach of the duty of fair representation, the Supreme Court specifically upheld the validity of the contract provision:

Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the collective bargaining agreement... 386 U.S. at 191.

It further concluded that a union's refusal to take a case to arbitration was not, in itself, a breach of the duty of fair representation:

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. . . This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully. (Citations omitted) It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedure of the kind encourages [sic] by L.M.R.A. §203(d), if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration. Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration. For these reasons, we conclude that a union does not

breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration. (Emphasis added) 386 U.S. at 191-92.

Under the principles set forth in Vaca, it is clear that SHOPO, as the exclusive representative of employees in bargaining unit 12, is required by Chapter 89, HRS, to serve the interests of all of its members without discrimination, to act in good faith and to avoid arbitrary conduct. While it is not required under the Unit 12 contract or under Chapter 89, HRS, to take every grievance to arbitration, its processing of each grievance must be done in a fair and impartial manner. Moreover, any of its decisions not to proceed to arbitration must be based on objective, rational criteria.

Vaca emphasized that a union's mere refusal to take a grievance to arbitration does not, in itself, constitute a breach of the duty of fair representation. Similarly, in this case, we believe that the fact that SHOPO ultimately refused to take Complainant's grievance to arbitration is not, without more, a breach of the duty of fair representation. The issue here is whether or not SHOPO's processing of Complainant's grievance, and withdrawal of its request for arbitration, was arbitrary, discriminatory or in bad faith.

In Whitten v. Anchor Motor Freight, 521 F. 2d 1335 (6th Cir. 1975), a union which failed to notify a grievant of its determination that his case lacked sufficient merit for arbitration was held not to have breached its duty of fair representation. Even though the union had not advised the grievant of its decision, and failed to respond to his letters asking about the status of his grievance, the court concluded:

...[W]e have found no evidence in the record to suggest that Whitten's grievance was processed by the Union differently than grievances of other union members. The Union may have acted negligently or exercised poor judgment in failing to keep Whitten informed of the status of his grievance, but this is not enough to support a claim of unfair representation. [Citations omitted] 521 F. 2d at 1341.

In Breish v. Auto Workers, Local 771, 84 LRRM 2596 (E.D. Mich. 1973), the grievant was discharged for theft. In processing his grievance, the union failed to affirmatively seek out information which might have been favorable to him and to present it to the employer. It did not notify grievant of the hearing, did not present witnesses to substantiate his story, and it gave him erroneous information regarding the grievance procedure. However, the court concluded that these shortcomings on the union's part did not breach its duty of fair representation in the absence of any discriminatory or hostile motivation. Similarly, in Int'l. Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, and Mallett, 194 NLRB No. 188, 79 LRRM 1300 (1972), the NLRB held that a union official's mistaken interpretation of a contractual grievance limitations period was not, in addition to other circumstances, a breach of the duty of fair representation. See also Bazarte v. United Transportation Union, 429 F. 2d 868 (3rd Cir. 1970); Teamsters, Local 692 (Great Western Unifreight), 209 NLRB No. 52, 85 LRRM 1385 (1974).

This Board is of the opinion that SHOPO's actions in handling Complainant's grievance fall within that category of conduct described in the foregoing cases. It is true that SHOPO did not notify Complainant personally of the two Step 2 hearings, and it did not call witnesses or seek out additional

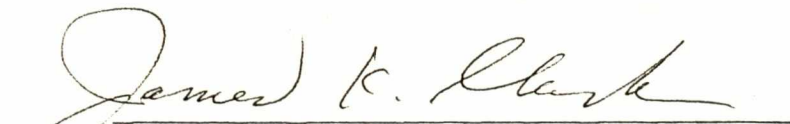
information to support Complainant's case at the Step 3 hearing. Furthermore, its initial request for and subsequent withdrawal from arbitration was confusing and misleading, particularly since the Union adhered to an erroneous interpretation of the contract. However, we find that these actions resulted from inefficiency and inexperience rather than from personal hostility to Complainant or any other discriminatory motive. In view of the foregoing, we hold that SHOPO did not breach its duty of fair representation and therefore has not violated Section 89-13(b), HRS. The charges against the Union in Case No. CU-12-15 accordingly are dismissed.

ORDER

Case No. CE-12-25, against the Employer, and Case No. CU-12-15, against the Union, are hereby dismissed.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


Mack H. Hamada, Chairman


James K. Clark, Board Member

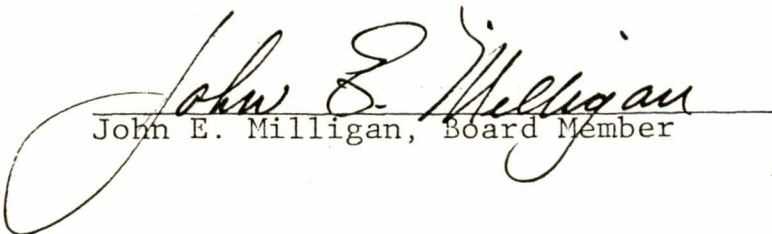
Dated: June 2, 1978

Honolulu, Hawaii

CONCURRING OPINION

I concur with my colleagues in so far as the Findings of Fact, Conclusions of Law and Order is concerned. I do not, however, feel that the Board is competent nor has authority to make judgments relative to the efficiency of the management of an employee organization. The majority has made such judgment in which I do not wish to join.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD


John E. Milligan, Board Member

Dated: June 2, 1978

Honolulu, Hawaii