

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of )  
THOMAS LEPERE, )  
Complainant, )  
and )  
UNITED PUBLIC WORKERS, AFSCME, )  
LOCAL 646, AFL-CIO, )  
Respondent. )

CASE NO. CU-10-66

ORDER NO. 1076

ORDER GRANTING RESPONDENTS'  
MOTIONS TO DISMISS OR FOR  
SUMMARY JUDGMENT

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In the Matter of )  
THOMAS LEPERE, )  
Complainant, )  
and )  
JOHN WAIHEE, Governor, State )  
of Hawaii and DEPARTMENT OF )  
CORRECTIONS, State of Hawaii, )  
Respondents. )

CASE NO. CE-10-133

ORDER GRANTING RESPONDENTS'  
MOTIONS TO DISMISS OR FOR SUMMARY JUDGMENT

On February 6, 1990, Complainant THOMAS LEPERE filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondent UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW or Union). LEPERE alleged that the UPW failed to process his suspension grievance to arbitration, failed to initiate grievances regarding violations of § 18 of the Unit 10 collective bargaining agreement (contract) and failed to grieve other violations of the contract. LEPERE thus charged that the UPW

violated §§ 89-13(b)(2), (b)(3), (b)(4) and (b)(5), Hawaii Revised Statutes (HRS).

On the same day, LEPERE filed a prohibited practice complaint with the Board against Respondents JOHN WAIHEE, Governor, State of Hawaii and the DEPARTMENT OF CORRECTIONS (DOC), State of Hawaii (collectively Employer). LEPERE alleged that the Employer suspended him without just cause and failed to provide community workline supervisors with duty free meals and rest periods. LEPERE alleged that the Employer thus violated §§ 89-13(a)(6), (7) and (8), HRS.

On March 5, 1990, UPW filed a Motion to Dismiss the case for lack of jurisdiction on grounds that the complaint was untimely filed. Thereafter, Employer also filed a Motion to Dismiss on similar grounds.

On March 7, 1990, the Board determined that the foregoing complaints involved substantially the same parties and issues and consolidated the cases in Order No. 772, pursuant to Administrative Rules § 12-42-8(g)(13).

The Board conducted a hearing on Respondents' motions to dismiss on March 15, 1990. After a thorough review of the record, the Board held that LEPERE's prohibited practice charges arising from his suspension grievance were barred by the Board's ninety-day statute of limitations and granted Respondents' motions to dismiss in Order No. 841. The Board, however, restricted its holding to the specific charge against the UPW for failing to process LEPERE's suspension grievance and the charge against the Employer for unjustly suspending him for sleeping on duty. The Board indicated

that remaining charges relating to alleged violations of § 18 of the contract would be resolved by a separate decision.

On March 30, 1990, Employer filed a motion for summary judgment with the Board. Employer contends that there are no genuine issues of material fact in the record and that the Employer is entitled to judgment as a matter of law. Employer submits that it is undisputed that LEPERE is an Adult Corrections Officer (ACO) at the Oahu Community Correctional Center (OCCC) and a member of Unit 10 which is represented by the UPW. There is also no dispute that LEPERE was not provided a duty free meal period. Employer contends that as a community workline supervisor, LEPERE is not entitled to a duty free meal period under the Unit 10 contract because he receives a free meal in lieu of the rest period.

On April 11, 1990, the Board conducted a hearing on the merits of LEPERE's complaint. UPW moved to dismiss the case on grounds that LEPERE lacked standing to file the complaint, failed to state a claim upon which relief could be granted and failed to comply with the statute of limitations for filing complaints with the Board.

The Employer, by and through its counsel, orally joined UPW's motion to dismiss and presented arguments in support of the motion.

Based upon a thorough review of the record, the Board makes the following findings of fact, conclusions of law and order.

LEPERE is an ACO at OCCC and a member of bargaining unit 10.

The UPW is the exclusive representative as defined in § 89-2, HRS, of employees included in Unit 10.

JOHN WAIHEE and DOC are the employer as defined in § 89-2, HRS, of LEPERE.

LEPERE normally worked an eight-hour shift, from 7:00 a.m. to 3:00 p.m., at OCCC. Transcript 4/11/90 (Tr.), p. 46. LEPERE was assigned to the community work line where the ACOs basically supervise inmates while they clean the highways and clear areas. Tr., p. 48. LEPERE has not been assigned to perform work on the community work line with inmates nor observed any work on a community work line since May 31, 1988. Tr., pp. 54-55. LEPERE did not receive a duty free meal period on the community work line but was provided with a free meal. Tr., p. 51. The practice at OCCC is that the ACOs work an eight-hour day without a scheduled duty free, non-paid meal period but they receive a free meal. Tr., p. 61.

LEPERE contends that the UPW breached its duty of fair representation when it failed to initiate grievances on his behalf alleging violations of § 18 and other provisions of the contract. LEPERE alleges that UPW violated §§ 89-13(b)(2), (b)(3), (b)(4) and (b)(5), HRS, which provide in pertinent part:

Section 89-13. Prohibited practices; evidence of bad faith.

\* \* \*

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

\* \* \*

(2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in Section 89-9;

(3) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in Section 89-11;

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

(5) Violate the terms of a collective bargaining agreement.

The Board hereby dismisses LEPERE's claims of §§ 89-13(b)(2), (b)(3), and (b)(5), HRS, violations because he lacks standing to raise these charges and the evidence in the record does not support the charges.

Subsection 89-13(b)(2), HRS, prohibits an employee organization from refusing to bargain with the public employer as required in § 89-9, HRS. There is no evidence in the record to support a finding that the Union refused to bargain with the public employer. Moreover, the refusal to bargain charge is properly raised by a public employer who has the reciprocal duty to bargain in good faith. Thus, the Board finds that LEPERE lacks standing to raise a refusal to bargain charge against the Union and dismisses the § 89-13(b)(2), HRS, charges.

Subsection 89-13(b)(3), HRS, prohibits an employee organization from refusing to participate in the mediation, fact-finding and arbitration procedures set forth in § 89-11, HRS. The mediation, fact-finding and arbitration procedures in § 89-11, HRS, refer to the impasse resolution mechanism for interest arbitration involving the terms of the contract rather than the grievance resolution mechanism which involves a violation or interpretation of the contract. As such, the Board finds this

section inapplicable to the facts of this case and dismisses the charges on that basis.

Subsection 89-13(b)(5), HRS, prohibits an employee organization from violating the collective bargaining agreement. In this case, the facts do not support a charge of contract violation against the Union. The parties to the collective bargaining agreement are the public employer and the exclusive representative. Since LEPERE does not fall within the definition of "employer", he lacks standing to maintain this charge against the Union.

Thus, the remaining allegation against the Union is the alleged violation of § 89-13(b)(4), HRS. This charge arose from an incident which resulted in LEPERE receiving a ten-day suspension on July 26, 1988. Since the Board dismissed the charges relating to LEPERE's suspension grievance because of LEPERE's failure to comply with the applicable statute of limitations period, the only charge remaining is the Union's alleged failure to initiate grievances over violations of § 18 of the contract.

At the hearing, the UPW argued that this claim is time-barred and LEPERE lacks standing to raise a contract violation which was no longer applicable to him. The UPW contends that it is undisputed that LEPERE has not worked on the community workline since May 31, 1988. Thus, UPW argues LEPERE lacks standing to raise a claim of a contract violation of § 18 as it pertains to community workline supervisors.

The instant prohibited practice complaint was filed on February 6, 1990. At the time the complaint was filed and during

the preceding ninety days, LEPERE was not assigned to the community workline and the contract provision was not applicable to him as a workline supervisor. The Board concludes that LEPERE lacks standing to raise a breach of duty of fair representation charge relating to the Union's failure to process a grievance based on a contract violation which was not applicable to him. Thus, the Board hereby dismisses LEPERE's charges of § 89-13(b)(4), HRS, violation.

However, assuming arguendo that LEPERE had standing to properly raise these charges, the evidence in the record indicates that the UPW in fact filed a grievance over the alleged violations and the Union responded promptly to LEPERE's allegations.

On July 26, 1988, Employer sent a letter to LEPERE informing him of his ten-day suspension. See Exhibit (Ex.) B of Respondent UPW's Motion to Dismiss filed with the Board on March 5, 1990. On July 28, 1988, LEPERE went to the UPW and spoke with UPW business agent Mel Rodrigues (M. Rodrigues) about grieving the suspension. Tr., p. 54. The two men discussed the Employer's alleged violations of § 18 of the contract. Id. M. Rodrigues filled out a "Labor Agreement Grievance Form." LEPERE reviewed the form and signed it. Tr., pp. 53-54. M. Rodrigues filed the grievance on LEPERE's behalf, alleging violations of Sections 1.05, 11.01, 18.01 and 56.04 of the contract. Rs' Ex. 2.

After filing the grievance, M. Rodrigues conducted an investigation into the incident which led to LEPERE's suspension. In his investigation, M. Rodrigues found LEPERE's statements to be inconsistent because at first LEPERE claimed he was reading a book

and not sleeping, while seated in a workline van. LEPERE then took the position that he was taking an authorized break as provided in the contract. See Ex. F of Respondent UPW's motion to dismiss.

M. Rodrigues also disputed LEPERE's claim that the "sleeping incident" had been fabricated by an ACO who disliked LEPERE. M. Rodrigues could not reconcile the fact that other witnesses, who did not have a "personality problem" with LEPERE, also observed LEPERE asleep in the van. Id. M. Rodrigues submitted his findings to G. Rodrigues via a memo dated November 15, 1988. Id. Based on these findings, G. Rodrigues decided not to arbitrate LEPERE's grievance.

There is no evidence in the record to support a finding that the UPW treated LEPERE in an arbitrary or discriminatory manner so as to constitute a breach of its duty of fair representation under Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, 64 LRRM 2369 (1967). Thus, even if LEPERE had standing to raise the contract violation before the Board, the Board would find that LEPERE's complaint was without merit.

With respect to the Employer, LEPERE contends that the Employer's failure to provide community workline supervisors with duty free meal and rest periods violated §§ 89-13(a)(6), (a)(7) and (a)(8), HRS, which provides in pertinent part:

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:

\* \* \*

(6) Refuse to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in Section 89-11;



- (7) Refuse or fail to comply with any provision of this chapter;
- (8) Violate the terms of a collective bargaining agreement; . . .

With respect to LEPERE's claim of a § 89-13(a)(6), HRS, violation, the Board finds that LEPERE failed to state a claim for which relief can be granted because the evidence in the record does not support such a charge.

Subsection 89-13(a)(6), HRS, prohibits the public employer from refusing to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in § 89-11, HRS. As stated previously, § 89-11, HRS, relates to the dispute resolution mechanism intended to address impasses in negotiations over the terms of an initial or renewed collective bargaining agreement and the Board finds that the provision does not apply to the instant matter. Therefore, the Board dismisses LEPERE's allegations of a § 89-13(a)(6), HRS, violation.

The remaining charges against the Employer involve alleged violations of §§ 89-13(a)(7) and (a)(8), HRS. LEPERE contends that the Employer engaged in prohibited practices when it failed to comply with §§ 18.03, 18.04 and 18.05 of the contract.

Section 18.03 provides in pertinent part:

A duty free, non-paid meal period of at least twenty (20) minutes but not exceeding forty-five (45) minutes during each work shift shall be allowed employees.

Section 18.04 provides:

Whenever an employee is not allowed a duty free, non-paid meal period of at least twenty (20) minutes, the entire meal period shall be considered as time worked.

Section 18.05 provides in pertinent part:

Whenever an employee is not allowed a duty free, non-paid meal period which starts no later than five (5) hours after the start of the workday, (1) such meal period shall be considered as time worked and (2) such employee shall be credited with overtime from the end of the fifth hour of work until the time a twenty (20) minutes paid meal period is granted or the end of the workday which ever comes first.

Unit 10 Agreement, July 1, 1989 - June 30, 1993; Respondents (Rs') Joint (JT) Exhibit (Ex.) 2; pp. 42-43.

Based upon the foregoing provisions, the Board finds that § 18.03 requires the Employer to provide ACOs with a 20-45 minute meal period during each work shift. When none is provided, § 18.04 requires that the entire meal period be considered time worked and the ACOs credited with overtime as provided by § 18.05.

LEPERE claims that §§ 18.03, 18.04 and 18.05 are applicable in this case; however, a thorough review of § 18 indicates the contrary.

Section 18.06 of the contract states:

Present practices allowing an employee to work an eight-hour shift, or workday without a scheduled duty free non-paid meal period, and as applicable the providing of free meals shall be continued except as modified by mutual agreement between the Union and the Department, provided that Sections 18.03, 18.04 and 18.05 shall not be applicable to such an employee.

Unit 10 Agreement, July 1, 1989 - June 30, 1993; Rs' JT Ex. 2; p. 43.

Under § 18.06, if an ACO is provided with a free meal when working an eight-hour shift without a duty free non-paid meal period under a prior practice at OCCC, then §§ 18.03, 18.04 and 18.05 are not applicable to the employee.

LEPERE testified that he has been employed at OCCC for approximately three years. Tr., p. 40. During that time, LEPERE observed the community workline supervisors at OCCC work an eight-hour shift without being provided "duty free" meal periods. Tr., p. 42. When LEPERE was assigned to supervise community worklines, he always received a free meal during his eight-hour work shift. Tr. II, p. 51.

The record indicates that the practice at OCCC is to have community service workline supervisors work an eight-hour day without a duty free non-paid meal period. To compensate for the missing meal period, the Employer furnishes the ACOs with a free meal. Thus, the Board finds that under § 18.06 of the contract, §§ 18.03, 18.04 and 18.05 do not apply.

The Board also finds that under the previous contract covering the period July 1, 1987 to June 30, 1989, the Union and the Employer recognized that practices at certain facilities provide for a free meal in lieu of a scheduled meal period. The contract allowed such practice to continue unless modified by mutual agreement.

Section 18.03 of the prior agreement provides in pertinent part:

Present practices allowing an employee to work an eight-hour shift without a scheduled meal period and the providing of free meals shall be continued except as modified by mutual agreement between the Union and the Department.

Unit 10 Agreement, July 1, 1987 - June 30, 1989; Rs' JT Ex. 1; p. 44.

In the successor contract, the parties retained the meaning of the foregoing section in a new section § 18.06, which also clarified the parties' intent to have §§ 18.03, 18.04 and 18.05 inapplicable to those ACOs receiving free meals.

In addition, LEPERE testified that he normally works from 7:00 a.m. to 3:00 p.m. (eight hours) and he argues that he is entitled to a duty free meal period under the contract. The Board takes notice, however, that most state and county employees work from 7:45 a.m. to 4:30 p.m. and have a 45-minute meal period. While these employees are entitled to a 45-minute duty free meal period, the employees work a total of eight hours and forty-five minutes.

Finally, as a matter of policy when a public employer is responsible for taking twelve to twenty inmates out of secured facilities and into the community to work under supervised release, the employer must take steps to ensure the health and safety of the inmates, staff and the community in general. Having two ACOs supervise twelve to twenty inmates while a third ACO is on a 20-45 minute duty free non-paid meal period compromises the safety of the staff and the community. The numerical advantage the inmates possess over the ACOs is enough to warrant a policy where maximum staffing be available at all times.


Thus, the Board concludes that LEPERE was not entitled to a duty free meal period under the Unit 10 contract because he receives a free meal in lieu of a scheduled meal period. This is the practice at OCCC which is recognized in § 18 of the contract.

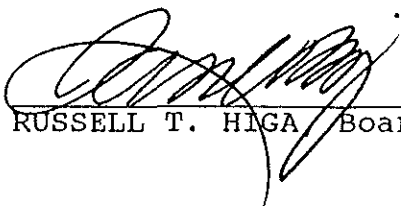
The Board hereby dismisses LEPERE's allegations of §§ 89-13(a)(7) and (a)(8), HRS, violations.

Based upon the foregoing, the instant prohibited practice complaints are dismissed.

DATED: Honolulu, Hawaii, June 13, 1994.

HAWAII LABOR RELATIONS BOARD

  
BERT M. TOMASU, Chairperson

  
RUSSELL T. HIGA, Board Member

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