

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-10-86
THOMAS LEPERE,)	ORDER NO. 1160
)	
Complainant,)	ORDER GRANTING RESPONDENT'S
)	MOTION TO DISMISS
and)	
)	
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO,)	
)	
Respondent.)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

On December 9, 1992, Complainant THOMAS LEPERE (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, inter alia, that the UPW failed to pursue several bona fide grievances he filed with the Union. In addition, LEPERE alleged that the UPW posted notices at the Oahu Community Correctional Center (OCCC) indicating that the Union would not act upon the grievances because they were submitted to the Union on "falsified" grievance forms. Thus, LEPERE alleges that UPW arbitrarily and capriciously breached its duty of fair representation to the Adult Correctional Officers (ACOs) and violated the Unit 10 Agreement, thereby violating §§ 89-13(b)(2), (3), (4) and (5), Hawaii Revised Statutes, (HRS).

On December 23, 1992, LEPERE filed a Motion for Interlocutory Order Pending Issuance of Final Board Decision with the Board. LEPERE requested that the Board issue orders requiring

the Respondent to recognize as bona fide any and all grievances submitted to the Union on behalf of ACOs in Unit 10 regardless of style or format.

The Board conducted hearings on the instant complaint on January 27 and 29, February 10, and March 3, 1993. At the close of Complainant's case at the hearing held on March 3, 1993, counsel for Respondent indicated that he intended to file a motion to dismiss the complaint. Transcript of the hearing held on March 3, 1993 (Tr. IV), p. 151.

On August 27, 1993, Respondent UPW, by and through its counsel, filed a motion to dismiss the complaint. The Union contends that the instant complaint should be dismissed on the following grounds:

- (1) under the doctrine of res judicata and/or collateral estoppel certain claims and issues cannot be relitigated;
- (2) the board lacks jurisdiction over several matters;
- (3) complainant lacks standing on certain claims;
- (4) complainant has failed to establish a prima facie case and has failed to satisfy his burden of proof; and
- (5) the complaint fails to state a claim for relief in certain respects.

On September 14, 1993, LEPERE filed a memorandum in opposition to Respondent's motion to dismiss. Thereafter, on September 29, 1993, the Board conducted a hearing on UPW's motion to dismiss. All parties had full opportunity to present evidence and arguments to the Board. Based upon a thorough review of the record, the Board makes the following findings.

THOMAS LEPERE is employed by the State of Hawaii as an ACO at OCCC and is a member of bargaining unit 10.

The UPW is the exclusive representative, as defined in § 89-2, HRS, of employees of the State of Hawaii who are included in bargaining unit 10.

LEPERE contends that the UPW breached its duty of fair representation by refusing to process several grievances on behalf of the ACOs at OCCC. In addition, LEPERE contends that the UPW accused the grievants of filing the grievances on "falsified" grievance forms. LEPERE contends therefore that the UPW violated §§ 89-13(b)(2), (3), (4) and (5), HRS.

Section 89-13, HRS, provides in pertinent part:

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, HRS;
- (3) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in section 89-11, HRS;
- (4) Refuse or fail to comply with any provision of this chapter; or
- (5) Violate the terms of a collective bargaining agreement.

At the outset, the Board dismisses LEPERE's claims of §§ 89-13(b)(2), (3), and (5), HRS, violations because he lacks

standing to raise these charges and the evidence in the record does not support such charges.

Subsection 89-13(b)(2), HRS, provides that an employee organization's refusal to bargain in good faith with the public employer as required in § 89-9, HRS, is a prohibited practice. The Board has previously held that a refusal to bargain charge against the union is properly raised only by a public employer who has the reciprocal duty to bargain in good faith. See, Order Granting Respondents' Motions to Dismiss or for Summary Judgment, Thomas Lepere and United Public Workers, AFSCME, Local 646, AFL-CIO and Thomas Lepere and John Waihee and Department of Corrections, Case Nos. CU-10-66 and CE-10-133 (consolidated), June 13, 1994. Thus, since LEPERE is neither an employer nor an employer representative, the Board finds that LEPERE is precluded from raising a refusal to bargain charge against the Union.

Subsection 89-13(b)(3), HRS, provides that an employee organization's refusal to participate in the mediation, fact-finding and arbitration procedures in § 89-11, HRS, is a prohibited practice. The Board has previously held that the mediation, fact-finding and arbitration procedures in § 89-11, HRS, refer to the impasse resolution mechanism for interest arbitrations involving the terms of the contract rather than the grievance resolution mechanism which involves the violation or interpretation of the contract. Thomas Lepere, 5 HLRB 123 (1993). The Board finds therefore that the provision does not apply to the facts of this case and hereby dismisses the allegations of a § 89-13(b)(3), HRS, violation.

Subsection 89-13(b)(5), HRS, provides that an employee organization commits a prohibited practice when it violates the terms of the collective bargaining agreement. The Board has previously recognized that the parties to the collective bargaining agreement include the public employer and the exclusive representative and an employee cannot enforce the provisions of the collective bargaining agreement against the Union. See, Thomas Lepere and United Public Workers, AFSCME, Local 646, AFL-CIO and Thomas Lepere and John Waihee and Department of Corrections, supra. Moreover, the facts in this case do not support a charge of a contract violation by the UPW. As such, the Board dismisses LEPERE's allegations of a § 89-13(b)(5), HRS, violation.

The remaining allegation against the UPW is the alleged violation of § 89-13(b)(4), HRS, for the breach of its duty of fair representation. LEPERE alleges that the Union refused to pursue eight grievances he filed with the Union and wrongfully accused ACOs of filing the grievances on "falsified" grievance forms.

Based upon the facts in the record, the Board finds that LEPERE submitted a number of complaints to the Union. Seven complaints were presented on a form similar to the contract grievance form used by the UPW and were addressed to Gary Rodrigues, the State Director of the UPW and Mel Rodrigues, a UPW business agent. While the Union considered the complaints to be false grievances, the UPW State Director testified that he reviewed each complaint to determine whether valid concerns were raised under the contract. Tr. IV, p. 97. Those concerns which the State Director determined had merit were pursued by the Union. Based

upon the facts in the record, the Board finds that the Union did not breach its duty of fair representation to LEPERE with regard to the eight complaints.

Grievance #1.

On December 10, 1990, the UPW filed a grievance over the employer's failure to provide rest periods for ACOs at OCCC. On September 1, 1992, in a stipulated arbitration decision and award Arbitrator Wayne Yamasaki (Yamasaki) sustained the grievance and found that the employer violated the contract by failing to consistently endeavor to provide such rest periods and awarded compensatory time off to the employees from December 1, 1988 to the date of the award. Respondent's (R's) Ex. M.

On November 18, 1992, LEPERE submitted a grievance to the Union seeking to extend the retroactivity date of Yamasaki's arbitration award to May 1988 and beyond. Complainant's (C's) Ex. 9.

The UPW considered LEPERE's complaint but did not pursue it. UPW State Director Gary Rodrigues testified that during the arbitration the Union suggested the Arbitrator use the date of the commencement of the contract as the applicable retroactivity date. Tr. IV, p. 55. Since the Union filed its grievance on December 10, 1990, the commencement date of the contract, July 1, 1990, was considered the applicable retroactivity date. R's Ex. N. However, the Union considered five months of retroactive compensation to be inadequate and was successful in obtaining a two-year retroactivity date for the award. Tr. IV, p. 55. By doing so, the Union

obtained an additional nineteen months of compensation for the employees at OCCC.

Based upon the record, the Board is not persuaded that the Union was under an obligation to relitigate the retroactivity date of the class grievance regarding compensation for rest and meal periods. On November 19, 1992, the UPW posted a notice at OCCC notifying ACOs of Yamasaki's arbitration award and the terms provided therein. See Complainant's Particularization of Complaint (C's Particularization) Ex. A.

Grievances #2 and #8.

On November 23, 1992, LEPERE submitted another class grievance to the Union seeking to prevent the employer from implementing a change in watch schedules and post assignments. C's Ex. 10. LEPERE contended that the new watch schedule reduced post assignments which in turn created an unsafe working environment for ACOs and inmates. Transcript of hearing held on January 29, 1993 (Tr. II), p. 67.

LEPERE also submitted a letter complaining of the new watch schedule to the Union on December 5, 1992, his eighth grievance. C's Ex. 15. Because both grievances raise substantially the same claims, the following discussion considers both grievances.

The facts in the record establish that the employer notified the UPW of a proposed change in the watch schedule at OCCC on September 4, 1992. R's Ex. K. The UPW, by letter dated September 22, 1992, indicated that it would file a grievance if the employer implemented the new watch schedule. Id. The employer

considered the UPW's concerns and delayed implementation of the watch schedule. Id.

The employer then notified the UPW of a proposed change in the watch schedule on December 4, 1992. R's Ex. L. Once again, the UPW warned the employer that a grievance would be filed if it implemented the new watch schedule. Id. In February 1993, the employer implemented the new schedule and the Union filed a grievance. Tr. IV, p. 138.

LEPERE filed his grievances over the change in watch schedule prior to the employer's implementation of the new schedule. The Union refused to process these grievances because they were premature. Id. When the schedule was implemented, the Union filed a grievance against the employer. Id. At the time of the hearing, the grievance was at the third step of the grievance process. Transcript of hearing held on September 29, 1993, (Tr. V), p. 10.

Grievances #3 and #5.

On November 23, 1992, LEPERE submitted a third complaint to the UPW contending that the employer improperly instituted a new overtime policy. C's Ex. 10A. LEPERE alleged that the new policy prohibited ACOs from working overtime assignments immediately after returning from sick leave. Id.

LEPERE also made a similar claim in his fifth grievance filed with the UPW on November 27, 1992. C's Ex. 12. LEPERE alleged that the employer denied him overtime because of his use of sick leave prior to the overtime opportunity. Transcript of hearing held on February 10, 1993 (Tr. III), pp. 125-26.

On November 30, 1992, UPW business agent Mel Rodrigues filed a grievance with the employer contending that the employer instituted a new overtime policy without consulting with or obtaining the mutual consent of the Union. R's Ex. P. The policy required ACOs at OCCC to be back at work on regular status before they could be eligible for overtime opportunities. Id. The Union filed the grievance on the basis that the legitimate use of sick leave benefits should not result in adverse action to the employees. Tr. V, p. 11.

In addition to filing a grievance, the Union posted notices at OCCC on December 1 and December 3, 1992, informing the ACOs that a grievance had been filed over the new overtime policy. C's Particularization, Exs. C and D. The grievance was at the third step of the grievance process at the time of the hearing in this case. Tr. V, p. 12.

Given the facts in the record, the Board finds that LEPERE did not meet his burden of proving that the Union violated its duty of fair representation with respect to the subject grievances.

Grievance #4.

On November 24, 1992, LEPERE filed a fourth grievance with the UPW. C's Ex. 11. LEPERE alleged that the employer violated the Unit 10 contract when it implemented a new policy where non-ACOs would be responsible for completing job performance reports (JPRs) on ACOs. Id.

Gary Rodrigues testified that since nothing in the contract permits the Union to decide who performs the JPRs of

employees, the employer has the right to make that designation. Tr. IV, pp. 139-40. Thus, the Union reviewed the matter and found no violation of the Unit 10 contract. Id. However, if an employee receives a JPR which he or she feels is inaccurate or negatively biased, the employee can file a grievance under the discipline article of the contract. Id.

At the hearing, LEPERE indicated that neither he nor anyone else who signed his complaint had received an adverse JPR by a non-ACO. Tr. II, pp. 80-82; Tr. III, p. 113. Thus at the time that LEPERE filed his complaint, the matter was premature since no one had been evaluated under the new procedure.

Grievance #6.

On November 30, 1992, LEPERE filed his sixth grievance where he alleged that the employer violated the contract when it instituted a departmental grievance procedure allegedly designed to confuse employees. C's Ex. 13. LEPERE alleged that the employer could undermine a Union member's ability to file a proper grievance by providing the employee with a grievance form used by excluded employees. Tr. III, pp. 134-35.

Gary Rodrigues testified that the employer implemented a departmental grievance procedure for employees who were excluded from collective bargaining under Chapter 89. Tr. IV, p. 142. The grievance procedure was designed to cover employees who have attained the rank of Captain and above. Id.

LEPERE stated that he is not covered by the civil service grievance procedure. Tr. III, p. 132. He also indicated that none of the signatories to the grievance had filed a civil service

grievance nor claimed that there had been a violation of civil service laws. Id. at 137. According to Gary Rodrigues, the Union has no jurisdiction over civil service grievance procedures and therefore decided not to process LEPERE's grievance. Tr. IV, p. 142.

Based upon the foregoing, the Board finds that the UPW reviewed LEPERE's grievance and properly decided not to pursue the matter because it lacked merit.

Grievance #7.

On December 1, 1992, LEPERE filed a seventh grievance alleging that the employer failed to provide ACOs with the proper uniforms required under § 22.01 of the Unit 10 contract. C's Ex. 14. LEPERE alleged that ACOs were being issued uniform pants that did not have properly-sized belt loops. Tr. III, p. 154.

The Union conducted an investigation and found that some of the pants issued by the employer had belt loops which were too small for an ACO's work belt. Tr. IV, p. 143. The Union also learned that a company on the mainland, not the employer, manufactured the defective pants. Id. at 143-44.

Pursuant to § 15.08 of the contract, the Union proceeded to resolve the belt loop problem at the informal stage of the grievance procedure. Id. at 143. In February of 1993, the Union and the employer reached an agreement whereby the employer agreed to repair the defective belt loops. Tr. V, pp. 19-20.

According to Gary Rodrigues, the Union decided to resolve the problem informally because if the employer had to replace all of the defective uniforms, the employees would have had to pay for

twenty-five percent of the new uniforms. Tr. IV, p. 144. By handling the matter informally, the employer agreed to pay for the entire cost of the uniforms. Id. at 145.

In view of the foregoing, the Board concludes that the UPW acted reasonably in reviewing the complaints submitted by LEPERE and pursuing those claims which the Union determined had merit. The Board finds that the complaints which were not pursued lacked merit because they were premature or otherwise defective.

Lastly, LEPERE claims that the Union committed a prohibited practice when it posted notices at OCCC indicating that the class grievances were on "falsified" Unit 10 grievance forms.

The Union contends that the grievance forms drafted by LEPERE do not conform to the requirements of grievances under the contract. Gary Rodrigues testified that the Union's grievance form is addressed to the employer (R's Ex. A), while LEPERE's form, is addressed to the UPW and more specifically, to Gary Rodrigues and Mel Rodrigues. C's Exs. 9 through 14; Tr. IV, p. 91. Gary Rodrigues stated that such form does not constitute a grievance since the Union did not violate the contract. Tr. IV, p. 91. Gary Rodrigues further indicated that under § 15.05 of the contract, the grievance had to be filed with the employer or its representative--not with the Union. Id. at 91-92.

Regardless of how the Union referred to LEPERE's complaints, Gary Rodrigues states that he personally reviewed each document submitted and filed grievances wherever legitimate claims were found. Id. at 96-97. Since the complaints were properly

considered by the Union, the Board finds that the Union's actions were not unreasonable nor arbitrary.

Moreover, the record indicates that LEPERE lacked standing to file class grievances on behalf of Unit 10 members. The Union recognizes that under § 15.03 of the contract, any employee has the right to present his or her individual grievance to the employer at any time. Tr. II, p. 16. However, according to the UPW, class grievances may only be brought by representatives of the Union.

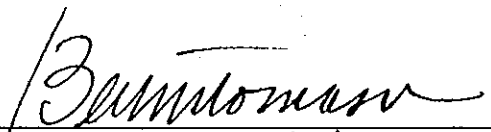
LEPERE cites § 15.02 of the contract as the authority under which he may serve as a representative for Unit 10 members. Id. at 77. However, § 15.02 provides only a definition of the term "grievance" and does not authorize any member of Unit 10 to serve as a Union representative and bring a class grievance. The record establishes that LEPERE has never been elected as a Union representative nor served as a steward. Id. at 76. LEPERE has never been a member of any joint committee. Id. at 77. In fact, he has never been authorized by the Union to serve in a representative capacity for Unit 10 members. Id.

Thus, after consideration of the facts in the record and the arguments submitted, the Board concludes that the evidence does not support a finding that the Union treated LEPERE in an arbitrary or discriminatory manner so as to constitute a breach of duty under Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, 64 LRRM 2369 (1967). Based on the foregoing, the Board dismisses LEPERE's claim of a § 89-13(b)(4), HRS, violation.

Accordingly, based upon the foregoing, the Board also denies LEPERE's motion for interlocutory order.

DATED: Honolulu, Hawaii, March 2, 1995.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member

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