STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of LEWIS W. POE, Complainant, and CALVIN M. TSUDA, Deputy Director, Department of Transportation, State of Hawaii, Respondent.	CASE NO. CE-03-220 ORDER NO. 1325 ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On April 25, 1994, Complainant LEWIS W. POE (POE) filed a prohibited practice complaint against CALVIN M. TSUDA, Deputy Director, Department of Transportation, State of Hawaii (TSUDA or Employer) with the Hawaii Labor Relations Board (Board). Complainant alleges that on April 20, 1994, he received a Notice to Essential Employees signed by Respondent TSUDA which indicated that he had not yet been scheduled to work during the strike and that he would be notified when to report to work. POE contends that the notice is not legally binding and that TSUDA thereby violated §§ 89-13(a)(1) and (7), Hawaii Revised Statutes (HRS).

POE also contends that TSUDA's notice prevents him from participating in the strike and interferes with or restrains him from exercising his rights guaranteed by § 89-3, HRS. POE further contends that TSUDA failed or refused to comply with § 89-12(c), HRS, and the specific requirements established by the Board. In addition, POE claims that pursuant to the General Orders in Board

Decision No. 351, he is entitled to standby compensation and/or standby pay.

On June 2, 1994, Respondent TSUDA filed a motion to dismiss or, in the alternative, motion for summary judgment. In his motion to dismiss, Respondent contends, inter alia, that the conclusion of the strike on April 29, 1994, effectively rendered Complainant's case moot and the complaint should therefore be dismissed. Additionally, Respondent TSUDA contends that POE lacks standing to complain because TSUDA's notice did not prohibit POE from participating in the strike since the notice was clear that POE had not yet been selected to fill an essential position, and POE chose to report for work.

Alternatively, Respondent contends that he is entitled to summary judgment as a matter of law because there are no factual issues in dispute. TSUDA submits that the notice issued to POE is clear on its face and plainly states that POE had not yet been designated to report to work as an essential employee and there is no other reasonable interpretation of the language in the notice. Any contrary interpretation by POE is wrong and cannot be proven to be right or reasonable. Furthermore, the form notice sent to POE was developed by the Department of Personnel Services (DPS), Labor Relations Division (LRD) and distributed to all departments for their use during the strike, pursuant to § 89-12, HRS, and the Board's orders issued relating to the strike. Thus, TSUDA contends that the use of the form notices does not constitute a wilful violation of § 89-13(a), HRS, where POE has alleged no facts to support his contention.

Respondent also contends that POE was not prohibited from participating in the strike. Complainant was never selected to fill an essential position and there are no facts to support POE's allegation that the notice interfered with the exercise of his right to strike. Assuming arguendo, that the notice was vague and ambiguous, Respondent contends that POE had the duty to contact his employer for clarification. TSUDA contends that POE was served with the notice on April 17, 1994, and yet did not file the instant complaint until April 28, 1994. Thus, POE had eleven days prior to filing the complaint to contact his Employer for clarification before reporting to work and there is no evidence in the record that Complainant sought or obtained such clarification.

On June 8, 1994, POE filed a Petition for Declaratory Ruling, Case No. DR-03-54, with the Board. In his petition, POE requested clarification as to when an employee legally becomes an essential employee within the meaning or scope of § 89-12, HRS. Specifically, POE requested an interpretation of §§ 89-12(c)(2)(B) and 89-12(c)(2), HRS.

On June 15, 1994, the Respondent filed a motion to consolidate Case No. DR-03-54 and Case No. CE-03-220 on the grounds that both cases involved similar or related issues and that consolidation of the cases would expedite the proceedings.

On June 21, 1994, POE filed a memorandum in opposition to TSUDA's motion to consolidate, contending that the cases were distinct and did not involve the same parties and issues.

By Order No. 1079 issued on July 6, 1994, the Board denied TSUDA's motion to consolidate the cases because the nature

of the cases were distinct and consolidation would complicate their procedural aspects.

Thereafter, on August 10, 1994, the Board held a hearing on the motion to dismiss or, in the alternative, motion for summary judgment in the instant case. All parties had full opportunity to present evidence and arguments to the Board. At the close of the hearing, the Board took the motions under advisement.

Based upon the record in this case, the Board makes the following findings of fact and conclusions of law.

LEWIS W. POE is a Tower Operator I at the Aloha Tower for the Department of Transportation, Harbors Division, State of Hawaii and a member of bargaining unit 03, composed of nonsupervisory employees in white collar positions.

CALVIN M. TSUDA is the Deputy Director of the Department of Transportation, Harbors Division, for the State of Hawaii. At times relevant herein, TSUDA is deemed to represent the public employer, as defined in Section 89-2, HRS.

The Board takes notice that on or about April 16, 1994, the Board issued Order No. 1033, Order Granting Petitioner's Motion for Interlocutory Relief Pending Issuance of Final Board Decision in Case Nos.: S-03-29a, S-04-29b and S-13-29c. The Board ordered that the positions set forth in the exhibits attached to Petitioner's motion for interlocutory relief were deemed to be essential and were required to be staffed in order to avoid imminent danger to the health and safety of the public. With regard to the instant case, three Tower Operator I positions within the Department of Transportation, Harbors Division, Oahu District

were designated as essential to work three 8-hour shifts, 24-hours per day and seven days per week.

The Board also ordered that the General Orders issued in Decision No. 351, John Waihee, III and Hawaii Government Employees Association, 5 HLRB 304 (1994), dated April 16, 1994 be incorporated by reference.

These orders read in pertinent part:

> 1. The class or position titles identified in the foregoing portion of the order are designated as essential positions.
>
> 2. The Employer may designate any or all incumbents in the essential positions as essential employees. Each incumbent in an essential position, regardless of designation as an essential employee, shall notify the Employer of his or her current residence and mailing addresses and telephone number prior to the onset of a strike by Units 03, 04 and 13 employees. The Employer shall inform incumbents in essential positions that they may be designated as essential employees and that they are required to supply this information.
>
> 3. The Employer shall designate employees to fill essential positions. Each Employer shall give notice to an essential employee in accordance with Subsection 89-12(c)(2), HRS. It is the duty and responsibility of the essential employee to contact the Employer for his or her work assignment. This duty continues throughout the duration of any strike.

The LRD developed two types of notices for employees during the public worker strike. One notice was drafted to inform employees that their positions had been declared essential by the Board and that they were scheduled to report to work during the strike. The employees were given a work schedule and notified that if they failed to report to work as specified and were not able to

show good cause for such failure, the employee could be subject to discipline or other legal action.

A second notice was developed to inform employees that they were incumbents in essential positions and could be selected to fill the essential position if the need arose but that the employees had not been scheduled to work. If and when the employee was selected to fill the essential position, the employer would notify the employee when and where to report for work. When the employee was so contacted by the employer, the employee must report for work as scheduled and a written notice would be issued to them. If the employee failed to report for work as scheduled and the employee was unable to show good cause for the failure to report, the employee could be subject to discipline or other legal action.

Both notices were entitled, "Notice to Essential Employee" and contained the salutation, "Dear Essential Employee."

The Employer selected Perry Oda, Beverly Miller[1] and

---

[1]A copy of the notice addressed to Ms. Beverly Miller was attached to POE's prehearing statement. The notice states as follows:

> Dear Essential Employee:
>
> Pursuant to Section 89-12(c), Hawaii Revised Statutes, the Hawaii Labor Relations Board (HLRB) has issued a Decision and Order designating specific classes of work at certain workplaces as positions essential to the health and safety of the public. The Department is thereby authorized to select employees to fill those essential positions in the event of a strike by your bargaining unit.
>
> <u>You have been selected to fill an essential position.</u> As an essential employee, you must work during the strike as scheduled. Your work schedule is as follows:

Jerry Nakao to fill the three Tower Operator I positions which were designated by the Board as essential in Decision No. 351. POE was not selected to fill any of the Tower Operator I positions.

Barry Kim, Oahu District Manager, Harbors Division, Department of Transportation, hand-delivered the letters notifying Miller, Nakao and Oda that they were scheduled to work during the strike on or about Sunday, April 17, 1994. The strike for bargaining unit 03 began on Monday, April 18, 1994.

On April 20, 1994, POE received a letter, dated April 17, 1994, which read as follows:

> Dear Essential Employee:
>
> Pursuant to Section 89-12(c), Hawaii Revised Statutes, the Hawaii Labor Relations Board (HLRB) has issued a Decision and Order designating specific classes of work at certain workplaces as positions essential to the health and safety of the public. The Department is thereby authorized to select employees to fill those essential positions in the event of a strike by your bargaining unit.
>
> <u>You have NOT been scheduled to work as yet.</u> However, as an incumbent to an essential position you MAY be selected to fill that essential position as the need arises. At

---

> Place: Aloha Tower
> Days: beginning April 18, 1994; and thereafter as scheduled.
> Hours: 2:30 p.m. to 10:30 p.m.; and thereafter as scheduled.
>
> If you fail to report for work as specified above and are not able to show good cause for your failure to report, you may be subject to disciplinary and/or other legal action.
>
> If you have any questions, please contact:
> Mr. Barry Kim
> 587-2100
>
> Exhibit B.

> that time, we will notify you of the place, days and hours that you are to report for work. When contacted, you must report for work as scheduled and a written notice will be given to you. If you fail to report for work as scheduled and are not able to show good cause for your failure to report, you may be subject to disciplinary and/or other legal action.
>
> If you have any questions, please contact:
> Mr. Barry Kim
> 587-2100

Exhibit A.

When POE received the notice, POE paged Kim at the number contained therein. According to Kim, POE said that he had received the notice and asked what he should do. Kim told POE to read the whole letter. Kim testified that he did not expect POE to report to work and that POE could have participated in the strike. Kim testified that POE was not required by the employer to stand by a telephone 24 hours a day. According to Kim, POE would not have been subject to discipline for not responding to the employer's telephone call.

POE testified that when he telephoned Kim, POE was instructed to call in the morning. POE testified that he informed Kim that Allen Sandry scheduled POE to work the next day. Kim only replied, "Oh." POE testified, however, that Jerry Nakao had previously told him on Sunday, April 17, 1994 that TSUDA did not want POE as an essential employee. POE also testified that on Tuesday, April 19, 1994, Sandry telephoned him and said that he was scheduled to work on the next day and to let him know if POE was going to come in or not. After speaking to Kim on April 20, POE

called Sandry and told him that he would be in on the 21st and that he had received a notice to essential employees.

Kim did not directly tell POE that he was not an essential employee; however, Kim testified that POE was not required to standby a phone 24 hours a day and that if POE did not want to answer the phone, POE would have not been subject to disciplinary action.

The record establishes that POE's Employer never notified him that he had been selected to fill an essential position. In addition, POE's Employer never told POE that he could not participate in the strike. Further, POE's Employer never told POE that he was required to be on standby as an essential employee.

On April 22, 1994, the Board issued Decision No. 352, John Waihee, III and Hawaii Government Employees Association, 5 HLRB 320 (1994), which rescinded the interlocutory order issued in that case on April 16, 1994. Based upon the Board's investigation, three Tower Operator I positions were designated as essential; one per eight-hour/shift; 24 hours/day; 7 days/week. The Board also included the General Orders referenced above in Decision No. 352.

On April 29, 1994, the HGEA strike ended.

With respect to Respondent's motion to dismiss on the grounds that the instant complaint is moot, Respondent relies upon United States Parole Com. v. Geraghty, 445 U.S. 388 (1980), where that court held "a case is moot when the issues presented are no longer live, or when the parties lack a legally cognizable interest in the outcome."

TSUDA argued that it is an undisputed fact that the strike ended on or about April 29, 1994, and that any determination by the Board as to this issue could not have any practical effect upon the controversy. Respondent argued that an action is considered "moot" when it no longer presents a justiciable controversy or because issues involved have become academic or dead. Sigma Chi Fraternity v. Regents of University of Colo., 258 F.Supp. 515, 523 (D.C. Colo. 1984).

In his affidavit dated June 7, 1994, POE argues that the complaint is not moot and that the Board retains jurisdiction over the matter, citing United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953) where the Supreme Court held that:

> Both sides agree to the abstract proposition that the voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot . . . . A controversy may remain to be settled in such circumstances, . . . e.g., a dispute over the legality of the challenged practices . . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion . . . . For today that the case has become moot means that the defendant is entitled to a dismissal as a matter of right, ... The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.

While the Unit 03 strike ended on April 29, 1994, the Board finds that it has jurisdiction over this matter because although POE can no longer legally participate in a strike as a member of bargaining unit 03, POE here questions the legality of the notice he received. Furthermore, POE claims standby pay and

the issue of whether POE should have been paid standby pay for the time period in question must be addressed.

In his motion for summary judgment, TSUDA contends that the notice was clear that POE had not yet been selected to fill the essential position and thus, the notice did not prohibit POE from participating in the strike. TSUDA submits that POE chose to report to work.

Section 89-12(a)(3), HRS, states that, "Participation in a strike shall be unlawful for any employee who . . . is an essential employee." POE contends that the title and salutation of the notice he was sent effectively made him an essential employee and under the strict construction of the law, it would be unlawful for him to participate in the strike.

On April 11, 1995, the Board issued Decision No. 365 in Case No. DR-03-54, POE's Petition for Declaratory Ruling[2]. The Board in that case interpreted the relevant statutes and determined that an employee becomes an essential employee when the employee is notified by the employer that he or she has been assigned to work during a strike. The Board reviewed the notices which are in evidence in this case stating that while the Board considered the notice POE received to be somewhat confusing given the salutation and subject line, the Board nevertheless concluded based upon a reasonable interpretation of the entire contents of the letter that POE was not an essential worker because he was not notified by the Employer that he was assigned to work. The Board also reviewed the

[2]Decision No. 365 was recently affirmed by the First Circuit Court by order entered on February 29, 1996.

record and concluded that POE was not entitled to standby compensation because he was not placed on standby status by the Employer.

In Decision No. 365, the Board held that:

> The employee becomes an essential employee when the employee is notified by the employer that he or she is designated to fill an essential position. Once the employee is notified that he or she is designated as an essential employee, pursuant to Section 89-12(c)(2), HRS, the employee is required to contact the employer for the employee's work assignment. The employee cannot participate in a strike by refusing to perform the assigned services. By contrast, an incumbent in an essential position, i.e., an employee who occupies a position which has been designated by the Board who occupies a position which has been designated by the Board as essential but has not been designated to fill an essential position, retains the right to participate in a strike.
>
> The letter received by POE is somewhat confusing in that it is entitled 'Notice to Essential Employee' and contains the salutation 'Dear Essential Employee.' However, the Board finds that despite the misleading title and salutation, which could lead a recipient to believe that he or she had been designated an essential employee, the entire content of the notice clearly indicates that the recipient of the notice had not yet been designated as an essential employee and would be so designated only after receiving notification of the 'place, days and hours' to report for work. It is apparent that the employer, in sending out the notice under discussion was attempting to comply with Board General Order No. 2 (set forth above) by informing incumbents in essential positions that they may be designated as essential employees.

Based upon the foregoing, the Board has jurisdiction over this matter pursuant to §§ 89-5 and 89-13, HRS.

The Board previously concluded in Decision No. 365 that a public employee becomes an essential employee when the employee

is notified by the employer that he or she has been designated to fill an essential position. However, POE raises allegations that the Employer constructively placed him on standby status and that he should be paid accordingly. The Board finds, however, that POE failed to produce any evidence or testimony to support his contentions. The notice issued to POE is clear on its face that POE has not yet been designated to work as an essential employee. In his testimony, POE stated that in his conversation with Kim, POE only asked, "what do you want me to do?" Tr. p. 117. POE never told Kim that he believed that the notice prevented him from participating in the strike under § 89-12(c)(2)(C), HRS. Nothing in the notice nor any other Employer communication prevented or prohibited POE from participating in the strike.

In the instant case, POE contends that the notice which he received was not legally binding and that TSUDA violated §§ 89-13(a)(1) and (7), HRS. POE contends that the notice prevents him from participating in the strike and interferes with his rights guaranteed by § 89-3, HRS. Consistent with its ruling in Case No. DR-03-54, however, the Board finds that the notice does not require POE to report to work during the strike. The notice apprises POE that he is an incumbent to a class which has been deemed to be essential; that he has not been selected to work as yet and if he is selected to work, he would be so notified by the Employer. In such event, POE would be required to work or be subject to disciplinary or other legal action.

The facts indicate that POE received the notice from TSUDA after the strike commenced and POE contacted Kim and asked

what he should do. When contacted, Kim told POE to read the notice. Kim did not state that POE was or was not an essential employee. Based upon the record in this case, the Board finds that there are no material facts in dispute in this case and the Board agrees with the Employer that he is entitled to summary judgment in his favor. The Board finds that the notice does not prohibit POE from participating in the strike since the notice does not notify POE that he has been selected to fill an essential position and he did not receive a work assignment in the notice.

Further, the Board finds that POE failed to produce any evidence or testimony to support his contentions that he was placed on standby and therefore entitled to compensation from the Employer. Thus, the Board concludes that POE failed to carry his burden of proof that he was placed on 24-hour standby by the Employer and entitled to compensation. Based upon the foregoing, the Board hereby dismisses the instant complaint.

ORDER

The Board hereby grants Respondent's motion for summary judgment.

DATED: Honolulu, Hawaii, May 2, 1996.

HAWAII LABOR RELATIONS BOARD

RUSSELL T. HIGA, Board Member

SANDRA H. EBESU, Board Member

LEWIS W. POE v. CALVIN M. TSUDA, Deputy Director, Department of Transportation, State of Hawaii; CASE NO. CE-03-220
ORDER NO. 1325
ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Copies sent to:

Lewis W. Poe
Ruth Tsujimura, Deputy Attorney General
Joyce Najita, IRC