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Case No. 18-CE-12-910

STATE OF HAWAI‘I

HAWAI‘I LABOR RELATIONS BOARD

In the Matter of STATE OF HAWAI‘I ORGANIZATION OF POLICE OFFICERS, Complainant, and SUSAN BALLARD, Chief of Police, Honolulu Police Department, City and County of Honolulu and CITY AND COUNTY OF HONOLULU, Respondents.	CASE NO. 18-CE-12-910 ORDER NO. 3442 ORDER GRANTING RESPONDENTS' MOTION FOR JUDGMENT ON PARTIAL FINDINGS AGAINST COMPLAINANT

ORDER GRANTING RESPONDENTS'
MOTION FOR JUDGMENT ON PARTIAL FINDINGS AGAINST COMPLAINANT

On April 6, 2018, Respondents SUSAN BALLARD, Chief of Police, Honolulu Police Department, City and County of Honolulu (Chief Ballard) and CITY AND COUNTY OF HONOLULU (City and County) (collectively, Respondents) filed RESPONDENTS' MOTION FOR JUDGMENT ON PARTIAL FINDINGS (Respondents' Motion) with the Hawai‘i Labor Relations Board (Board). Respondents' Motion was based on Hawai‘i Administrative Rules (HAR) § 12-42-8 and Hawai‘i Rules of Civil Procedure (HRCP) Rule 52(c).

On April 13, 2018, SHOPO filed COMPLAINANT SHOPO'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION FOR JUDGMENT ON PARTIAL FINDINGS (Complainant's Opposition).

Any conclusion of law that is improperly designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact that is improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

I. BACKGROUND AND FINDINGS OF FACT

A. Procedural Background

On February 5, 2018, STATE OF HAWAI'I ORGANIZATION OF POLICE OFFICERS (SHOPO or Complainant) filed a Prohibited Practice Complaint (Complaint) against SUSAN BALLARD, Chief of Police, Honolulu Police Department, City and County of Honolulu (Chief Ballard) and the CITY AND COUNTY OF HONOLULU (City and County) (collectively, Respondents) with the Hawai'i Labor Relations Board (Board). The Complaint alleged, among other things, that Respondents violated Hawai'i Revised Statutes (HRS) §§ 89-13(a)(1)-(5), (7), and (8), as well as Tenari Ma'afala's (Ma'afala) privacy rights.

On February 6, 2018, the Board notified Respondents of receipt of the Complaint and scheduled the prehearing conference, Hearing on the Merits (HOM), as well as various deadlines, and on February 21, 2018, Respondents filed RESPONDENTS' ANSWER TO PROHIBITED PRACTICE COMPLAINT.

On March 1, 2018, the Board held a prehearing conference, at which time the Board *sua sponte* dismissed SHOPO's HRS § 89-13(a)(8) claim due to lack of jurisdiction, based on SHOPO's failure to exhaust its remedies under the Unit 12 collective bargaining agreement (CBA). SHOPO and the Board also clarified that SHOPO was not asking the Board to grant relief based on the State Constitution's Article I, Section 6 right to privacy and that it was not asking the Board to enforce the penalty provision set forth in HRS § 92F-17. After those claims were dismissed and clarified, the claims set for the hearing on the merits were narrowed to SHOPO's claims based on HRS §§ 89-13(a)(1)-(5) and (7).

The Board held the HOM on March 16, 2018 and received oral arguments on the merits of the case. At the end of SHOPO's case-in-chief, Respondents orally moved for a dismissal based on SHOPO's failure to present sufficient evidence to meet its burden of proof, and the Board directed Respondents to submit their motion in writing.

B. Findings of Fact

Based on the record in this case, the Board finds:

1. Parties

At all relevant times in the instant case, SHOPO was and is an employee organization[i] as defined in HRS § 89-2 and was the exclusive representative[ii] and collective bargaining agent for bargaining unit 12 (Unit 12), defined in HRS § 89-6(a)(12) as "Police officers".

On or about October 25, 2017, Chief Ballard was selected as the Honolulu Police Department's (HPD) new Chief of Police, and she was sworn in as Chief of Police on or about

November 1, 2017. Chief Ballard was and is, at all relevant times in the instant case, the duly appointed Chief of Police for the HPD. In that capacity, Chief Ballard was and is, as "any individual who represents one of these employers or acts in their interest in dealing with public employees[,]" an "employer" or "public employer"[iii] as defined under HRS § 89-2.

"[T]he respective mayor[]" of the City and County[iv] at all relevant times in the instant case, was and is an "employer" or "public employer"[v] as defined under HRS § 89-2 (Employer).

SHOPO and the Employer are, and have been, for all relevant times, parties to the Unit 12 CBA.

At all relevant times, Ma'afala was a member of Unit 12, and President of SHOPO; Malcom Lutu (Lutu) was a member of Unit 12, and Vice President of SHOPO; Michael Cusumano (Cusumano) was a member of Unit 12, and Secretary of SHOPO; Don Faumuina (Faumuina) was a member of Unit 12, and a member of the Board of Directors of SHOPO; Michael Tamashiro (Tamashiro) was a member of Unit 12, and the Elections Officer for SHOPO (collectively Officers).

2. Peer Support Unit

In the mid-1990s, HPD formed the Peer Support Unit (PSU), which was set up to function with officers providing peer support on a volunteer basis. A sergeant and lieutenant position were assigned full-time to the PSU to handle the responsibilities of the unit, including scheduling debriefings of officers and ensuring proper training for the volunteer officers.

In October of 2018, the PSU had three officers assigned to it, namely Ma'afala, Faumuina, and Tamashiro (collectively PSU Officers).

In November of 2018, Chief Ballard presented a plan for the HPD moving forward, entitled "A New Beginning." As part of this plan, Chief Ballard decided to revamp the PSU and turn it into a unit that was more like its original concept in the mid-1990s.

3. Transfers of Officers

When Chief Ballard was sworn into office on November 1, 2018, Ma'afala, Faumuina, and Tamashiro were assigned to the PSU, and Lutu and Cusumano were assigned to the Criminal Intelligence Unit (CIU).

On or about November 3, 2018, the PSU Officers were notified that they would be transferred to other assignments. Although the HPD's standard practice was to conduct department wide transfers on designated "push" dates, the PSU Officers were transferred effective December 1, 2017, prior to the next scheduled "push" date of January 28, 2018.

Maʻafala was transferred to District 6 of Honolulu; Faumuina was transferred to patrol in District 1 of Honolulu; and Tamashiro was transferred to the Criminal Investigation Division (CID).

In November 2018, Lutu and Cusumano were also notified that they would be transferred to other assignments, effective December 2018 and prior to the scheduled "push" date. Lutu was transferred to CID; and Cusumano was transferred to the receiving desk.

None of the Officers filed a grievance or complained about their respective transfers.

4. Chief Ballard's Comments to Civil Beat; Civil Beat Article

On or about December 22, 2017, Nick Grube (Grube), a reporter for Civil Beat, published an article entitled, "New Police Chief Reassigns Union President to Patrol Shift" (the Article). The Article included quotes from Chief Ballard, which she gave to Grube when he approached her, unscheduled, to ask questions.

The Article included information regarding the PSU, the transfers of the Officers, and included additional information regarding Maʻafala and his position as SHOPO President. The quotes from Ballard in the Article do not mention Maʻafala's position as SHOPO President, and they focus primarily on the PSU and her planned revamp of the unit. The quotes from Ballard in the Article do not mention any of the other Officers.

5. Letters After the Article

On or about January 11, 2018, SHOPO sent a letter to Ballard asking her to, among other things, publicly retract the statements attributed to her in the Article and issue a written apology to SHOPO and Maʻafala (January 11, 2018 Letter). In the January 11, 2018 Letter, SHOPO stated that if Ballard did not comply with their requests, they would pursue legal options including filing a prohibited practice complaint.

On or about January 18, 2018, Ballard wrote a letter to SHOPO stating, among other things, that her intention when speaking with Grube was not to offend or demean Maʻafala (January 18, 2018 Letter). The January 18, 2018 Letter did not include the written apology that SHOPO had requested. Ballard also did not retract any statements attributed to her in the Article as requested by SHOPO.

II. STANDARDS OF REVIEW AND CONCLUSIONS OF LAW

A. Motion for Judgment on Partial Findings

HAR § 12-42-8(g)(3) provides in relevant part:

(3) Motions:

(A) All motions made during a hearing shall be made part of the record of the proceedings.

***

(C) All motions other than those made during a hearing shall be subject to the following:

(i) Such motions shall be made in writing to the board, shall briefly state the relief sought, and shall be accompanied by affidavits or memoranda setting forth the grounds upon which they are based.

(ii) The moving party shall serve a copy of all motion papers on all other parties and shall, within three days thereafter, file with the board the original and five copies with certificate of service on all parties.

(iii) Answering affidavits, if any, shall be served on all parties and the original and five copies, with certificate of service on all parties, shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise.

(iv) The board may decide to hear oral argument or testimony thereon, in which case the board shall notify the parties of such fact and of the time and place of such argument or the taking of such testimony.

HAR § 12-42-8 has no provision comparable to HRCP Rule 52(c) (Rule 52(c)), which Respondents rely on for Respondents' Motion. When the Board rules are silent or ambiguous on procedural matters, the Board then may look for guidance to similar provisions of court rules. Ballera v. Del Monte Fresh Produce Hawaii, Inc., Board Case No. 00-1 (CE), Order No. 1978 at *5 (January 11, 2001).

Rule 52(c), Judgment on partial findings, states:

> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision(a) of this rule.

Rule 52(c) was based on Rule 52(c) of the Federal Rules of Civil Procedure (FRCP). The Hawai‘i Supreme Court (Court) has held that "where we have patterned a rule of procedure after an equivalent rule within the FRCP[], interpretations of the rule by the federal courts are deemed

to be highly persuasive in the reasoning of this court." Furuya v. Apartment Owners of Pacific Monarch, Inc., 137 Hawai'i 371, 382-83, 375 P.3d 150, 161-62 (2016).

Unlike in cases for summary judgment, "Rule 52(c) expressly authorizes the [Board] to resolve disputed issues of fact. In deciding whether to enter judgment on partial findings under Rule 52(c), the [Board] is not required to draw any inferences in favor of the non-moving party; rather the [Board] may make findings is accordance with its own view of the evidence." Ritchie v. United States, 451 F.3d 1019, 1023 (9th Cir. 2006) (Ritchie) (citations omitted).

When a motion for judgment of partial findings is made, the non-moving party has been fully heard on the issue. Rule 52(c). Because the non-moving party has been fully heard on the issue, the Board must find in that party's favor on the issue for the claim to survive. Id. Given that the Board is not required to draw any inferences in favor of the non-moving party, the non-moving party must have met its burden of proof on the issue. Ritchie, 451 F.3d at 1023.

B. Burden of Proof

HRS § 91-10(5) states:

> (5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

HAR § 12-42-8(g)(16) of the Board's rules states:

> (16) The charging party, in asserting a violation of chapter 89, HRS, or this chapter, shall have the burden of proving the allegations by a preponderance of the evidence. The party raising any subsequent issue shall have the burden of proving that issue by a preponderance of the evidence.

See also: Mamuad v. Nakanelua, Board Case No. CU-10-331, Order No. 3337F *28 (May 7, 2018) (Mamuad); HGEA v. Keller, Board Case No. CE-13-597, Decision No. 456, 6 HLRB 421, 429 (2005).

The preponderance of the evidence "'directs the factfinder to decide whether the existence of the contested fact is more probable than its nonexistence.'" Minnich v. Admin. Dir. Of the Courts, 109 Hawai'i 220, 229 (*citing* Masaki v. Gen. Motors Corp., 71 Haw. 1, 14 (1989)). Further, the party who is required to carry the burden of proof must produce sufficient evidence and support the evidence with arguments in applying relevant legal principles. United Public Workers, AFSCME, Local 646 v. Waihee, Board Case No. CE-01-122, Decision No. 309, 4 HLRB 742, 750 (1990).

The Board has stated that this section means that the party required to carry the burden of proof must both produce sufficient evidence and support that evidence with arguments in applying the relevant legal principles; further, if a party fails to present sufficient legal arguments with respect to an issue, the Board will find that the party did not carry its burden of proof and will dispose of the issue accordingly. Mamuad, Order No. 3337F at *25. *See also*: State of Hawaii Organization of Police Officers v. Fasi, Board Case No. CE-12-66, Decision No. 161, 3 HPERB 25, 46 (1982).

C. Standard of "Wilfullness"

HRS § 89-13 states, "It shall be a prohibited practice for a public employer or its designated representative wilfully to…[.]" Accordingly, to find a prohibited practice, the Board must conclude that the violation was wilfull. *See* United Public Workers, AFSCME, LOCAL 646, AFL-CIO v. Okuma-Sepe, et al., Board Case No. CE-01-509, Decision No. 449, 6 HLRB 383, 385 (June 15, 2004) (Okuma-Sepe).

Complainant cites to a definition of wilfullness used by prior Boards, namely that wilfullness can be presumed if a violation occurs as a "natural consequence" of a party's action. *See e.g.*, Okuma-Sepe, 6 HLRB at 385 (*citing* United Public Workers, AFSCME, Local 646, AFL-CIO, Decision No. 374, 5 HLRB 570, 583 (1996)). However, the Court has confirmed that the appropriate criteria for determining wilfullness is a showing that there was a "conscious, knowing, and deliberate intent to violate the provisions of HRS chapter 89." HGEA v. Casupang, 116 Haw. 73, 99, 170 P.3d 324, 350 (2007) (Casupang) (*citing* Aio v. Hamada, 66 Haw. 401, 410, 664 P.2d 727, 734 (1983)).

The Board has tended to follow the Court's guidance in this matter, following Casupang's definition of wilfullness in subsequent cases. *See e.g.*, Hawaii State Teacher's Ass'n v. Board of Education, Board Case No. CE-05-672, Order No. 2541 at *11 (August 6, 2008); United Public Workers, AFSCME Local 646, AFL-CIO v. Char, Board Case No. CE-10-744, Order No. 2697 at *12-13 (April 12, 2010). Although the Board recognizes the "natural consequence" standard was previously used, the Board finds that it is inconsistent with the Court's "conscious, knowing and deliberate intent" standard and thus defers to the Court's rulings.

III. DISCUSSION AND CONCLUSIONS OF LAW

As stated above, the allegations remaining before the Board are alleged violations of HRS §§ 89-13(a)(1)-(5) and (7).

The Board has jurisdiction over the claims alleged in the Complaint under HRS § 89-14 and HRS § 377-9.

A. Introductory Issues

The dispute in this case boils down to the fact that SHOPO wanted Chief Ballard to give into their request to publicly disavow the Article and the quotes attributed to her in the Article and that Chief Ballard refused to do so. While SHOPO also brings up the issue of the transfers of the Officers, only one of the Officers (Ma‘afala) testified as to the transfers, and he stated that he viewed the transfer "like a sense of relief." Further, none of the Officers complained or filed a grievance about the transfers.

Additionally, the Board has no jurisdiction over the HPD's standards of conduct, supervisory principles, or the Uniform Information Practices Act (UIPA). While the Board does have jurisdiction over disputes arising from the CBA, the Board previously dismissed SHOPO's allegation of an HRS § 89-13(a)(8) for failure to exhaust contractual remedies. Therefore, alleged violations of any of the listed items are not relevant to the Board's decision.

B. HRS § 89-13(a)(1)

HRS § 89-13(a)(1) states that it is a prohibited practice for a public employer or designated representative to wilfully "[i]nterfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter." HRS § 89-13(a)(1). To test this, the Board must look at if the employer engaged in wilfull conduct that reasonably tended to interfere with the free exercise of employee rights. *See*, United Public Workers, AFSCME, Local 646, AFL-CIO v. Takushi et al., Board Case Nos. CE-01-374a, CE-01-374b, Decision No. 404, 6 HLRB 72, 74-75 (2000) (UPW) (*citing* Ralph's Toys, Hobbies, Cards & Gifts, Inc., 272 NLRB 164 (1984)).

In UPW, the Board discussed HRS § 89-13(a)(1) as follows:

> …in Decision No. 50, Hawaii Federation of College Teachers, Local 2003, 1 HPERB 464 (1974)…the Board held that an employer had the right to express opinions…under the First Amendment as part of the exercise of freedom of speech…as long as the expression was not coupled with coercion. The Board stated:
>
> > Section 89-13(a)(1), HRS, is patterned after Section 8(a)(1) of the National Labor Relations Act. Congress was dissatisfied with the NLRB's rulings in the free speech area based on Section 8(a)(1) and enacted more definitive language under Section 8(c) to clarify that an employee is interfered with, restrained or coerced when the employer expresses views, argument or opinion ***only if*** the expression contains a threat of reprisal or force or promise of benefit…

(emphasis added) (internal citations omitted).

Complainant argues two primary violations of HRS § 89-13(a)(1), first regarding the reassignments of Ma‘afala, Faumuina, Lutu, and Cusamano, and second regarding Chief Ballard’s statements to Grube.

However, SHOPO provided no evidence in its case-in-chief showing that the reassignments interfered, restrained, or coerced an employee in the exercise of a right protected under Chapter 89. The evidence shows that Chief Ballard simply reassigned these Officers. There was no evidence that in doing so, Chief Ballard made any “threat of reprisal or force or promise of benefit”. Additionally, as noted above, the only one of the Officers to testify, Ma‘afala, stated that he had no problem with the transfer, and he did not state that the transfer in any way prohibited him from continuing as SHOPO President. Therefore, the Board must find against SHOPO on this count.

The second alleged violation focuses on Chief Ballard’s statements to Grube. In Complainant’s Opposition, SHOPO argues that Chief Ballard’s statements affected Ma‘afala’s ability to lead SHOPO by “damag[ing] the trust his members had in him and the Union” and by undermining Ma‘afala by implying that “SHOPO…ha[d] a ‘corrupt’ and weak Union leader who was driven by self-interest and greed.” Additionally, Complainant argues that “False accusations coming from a Chief of Police directed at SHOPO’s top leader…goes to the very core of shaking a member’s trust in their leader and thus interfering and disrupting the Union’s organization and functioning…[and] intimidate[es] and thus restrain[s] a member from speaking out or exercising their collective bargaining rights in fear of retaliation…[and] coerc[es] and restrain[s] a member from wanting to become active in the Union for fear of retaliation…”

At the core of these arguments, SHOPO is asking the Board to conclude that Chief Ballard’s statements about the PSU and Ma‘afala’s leadership of the PSU were consciously, knowingly, and deliberately made with the intention of undermining Ma‘afala in his role as SHOPO president. Based on the evidence presented to the Board, the Board cannot make such a determination for three reasons.

1. Wilfullness

First, SHOPO has not met its burden of proof regarding the Casupang wilfullness standard of “conscious, knowing, and deliberate intent to violate the provisions of HRS chapter 89.” To meet this burden, SHOPO would have needed to present evidence that Chief Ballard consciously, knowingly, and deliberately intended to violate HRS Chapter 89 through her comments. Even if we assume that the Complainant has met its burden in proving that Chief Ballard’s comments had the “chilling” effect that SHOPO contends they had, SHOPO has not proved that such statements were made with the conscious, knowing, and deliberate intent to violate HRS Chapter 89.

2. Reasonable Relation Between Comments and SHOPO

Second, even if SHOPO met the wilfullness standard, the Board is not convinced that Chief Ballard's statements about Maʻafala's job at the PSU are reasonably related to his role as SHOPO president. Complainant argues that Maʻafala must always be perceived as both police sergeant and SHOPO president and thus, any comment about Maʻafala's role as a police sergeant must also be about his role as SHOPO president. Additionally, Complainant implies that Maʻafala, as SHOPO president, is SHOPO itself. The Board declines to reach such conclusions.

SHOPO cites to cases where the employer denigrated or undermined the union. Nowhere in the article at the core of this case does Chief Ballard speak about SHOPO or even mention that Maʻafala is the leader of SHOPO; rather, her comments are about the PSU and its members, who happen to include Maʻafala. Grube may have added commentary about SHOPO and identified Maʻafala as the president of the union, but this commentary does not appear to come from Chief Ballard.

While it is true that Maʻafala always wore "two hats"—as police sergeant and as union president—this does not necessitate a finding that speaking about his role as one automatically implies that the same applies to his position as the other. Maʻafala's ability to perform his job as SHOPO president is not touched upon in the article, and the Board is unable to find that discussion of alleged negative statements regarding Maʻafala's work in the PSU and performance as a police sergeant can logically be interpreted as diminishing or undercutting his position stature as SHOPO president.

SHOPO makes the argument that "Chief Ballard's actions mimic the infamous union-busting technique referred to as the 'Mohawk Valley Formula' that was employed in the 1930s." The Board cannot find any merit in this argument.

Firstly, SHOPO neglects to note that this formula was a strikebreaking formula, not a union-busting technique. *See* In re Remington Rand, Inc., 2 NLRB 626, 664 (January 1, 1937) (Remington Rand) ("When a strike is threatened, label the union leaders as "agitators" to discredit them…" (emphasis added)).

Secondly, even if the Board accepts that the formula existed and was used in the 1930s, the Board cannot find similarities to this case. Under the Mohawk Valley Formula, propaganda was used to "falsely stat[e] the issues involved in the strike…" and the publicity barrage was to promote the theme "that the plant [wa]s in full operation and that the strikers were merely a minority." The allegations in this case have nothing to do with a strike or any exercise of protected rights.

Additionally, while SHOPO cites to many cases where employers spoke out directly against the union, in this case, Chief Ballard said nothing about SHOPO itself. At most, Chief Ballard spoke about officers who happen to also be union officials, not the union itself, and did not discuss the union officials in terms of their union activity. Chief Ballard's comments were not touching on any protected activities, unlike in the cases that Complainant cites. Therefore, there

is no reasonable tendency that Chief Ballard's comments would cause the "turmoil, inner dissention, [] chilling effect, and [] fear of retaliation" as SHOPO contends.

3. No Threat or Promise

Thirdly and finally, as stated above, an employee is "interfered with, restrained or coerced when the employer expresses views, argument or opinion ***only if*** the expression contains a threat of reprisal or force or promise of benefit." UPW, 6 HLRB at 74-75 (emphasis added) (internal citations omitted). SHOPO has presented no evidence that Chief Ballard's statements included either such a threat or such a promise. Without such evidence, the Board cannot find that Chief Ballard's statements rose to the level of a violation of HRS § 89-13(a)(1).

C. HRS § 89-13(a)(2)

Under Chapter 89, it is a prohibited practice for a public employer or designated representative to wilfully "[d]ominate, interfere, or assist in the formation, existence, or administration of any employee organization." HRS § 89-13(a)(2).

SHOPO argues that HRS § 89-13(a)(2) "is similar to HRS § 89-13(a)(1). However, the two sections have historically been applied very differently and without similarity.

HRS § 89-13(a)(2) is patterned after National Labor Relations Act (NLRA) § 8(a)(2). Therefore, the Board has historically applied the National Labor Relations Board's (NLRB) interpretation of NLRA § 8(a)(2) in determining whether a violation occurred.

A violation of this section requires either a showing that the employer's acts of assistance ***for*** a union interferes with the employees' right to choose their exclusive representative or circumstances where an employer refuses to recognize a union representative or initiates discussions and direct dealing with an employee without their union representative. Idao v. Department of Commerce and Consumer Affairs, Case Nos. CE-13-841 and DR-13-107, Order No. 3082 at *18-19 (July 30, 2015); *see also*, UPW, 6 HLRB at 75-76; State of Hawaii Organization of Police Officers v. Kauai Police Department, 5 HLRB 104, 111 (1992); and Stucky v. Board of Education, 6 HLRB 386, 392-93 (2004).

SHOPO argues that Chief Ballard's actions have interfered with the proper administration of SHOPO, but no evidence has been presented that Chief Ballad's actions show any of these circumstances. Additionally, there has been no showing that any such potential actions were done with the "conscious, knowing, and deliberate intent" required to show the required "wilfullness." Therefore, the Board cannot find that Respondents violated HRS § 89-13(a)(2).

D. HRS § 89-13(a)(3)

HRS § 89-13(a)(3) states that is a prohibited practice for a public employer or designated representative to wilfully "[d]iscriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization." Only discrimination affecting the employee exercise of a protected right, may be the subject of a prohibited practice charge under the statute. Hawaii State Teacher's Ass'n v. Hawaii Pub. Employment Relations Bd., 60 Haw. 361, 364, 590 P.2d 993, 996 (1979).

As a preliminary matter, the Board is unable to find that SHOPO has proved any wilfull, "conscious, knowing, and deliberate intent," with regard to any alleged discrimination. However, even if SHOPO could prove wilfullness, their claim of a violation of HRS § 89-13(a)(3) still fails for the following reasons.

There are two types of discriminatory employer conduct that adversely affect employees' rights, "inherently destructive" or "comparatively slight." NLRB v. Great Danes Trailers, Inc., 388 U.S. 26, 33-34 (1967). "Inherently destructive" conduct "carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.'" Id. at 33, citing Labor Board v. Erie Resistor Corp., 373 U.S. 221, 228, 231 (1963) (Erie). If the harm to employee rights is comparatively slight, however, and a substantial and legitimate business end is served, the Complainant must affirmatively show improper motivation. Id. at 34, citing Labor Board v. Brown, 380 U.S. 278, 289 (1965).

To find that employer conduct was "inherently destructive," the inference of the conduct's unlawful intention must be so compelling that the employer's protestations are justifiably disbelieved. Fresh Fruit & Vegetable Workers Local 1096 v. NLRB, 539 F.3d 1096-97 (9th Cir. 2008), citing Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311-12 (1965). This conduct must have far reaching effects that would hinder future bargaining and create continuing obstacles to the future exercise of employee rights. Id., citing Portland Wilamette Co. v. NLRB, 534 F.2d 1331, 1334 (9th Cir. 1976).

According to the Complainant, Chief Ballard's statements to Civil Beat were "inherently destructive." The Board disagrees that her comments were a part of any alleged "[d]iscriminat[ion] in regard to hiring, tenure, or any term or condition of employment." Even if Chief Ballard's statements to Civil Beat were, for the sake of argument, discriminatory, those statements did not affect the union officials' "hiring, tenure, or any term or condition of employment." Therefore, the Board cannot find that Chief Ballard's statements to Civil Beat constituted "inherently destructive" conduct.

The Board turns next to the reorganization of the PSU and the transfers of the union officials. There is no question that transfers of a work assignment is a "term or condition of employment." However, the Board is unable to find a violation of HRS § 89-13(a)(3).

The Board finds that the reorganization of the PSU and the transfers of the union officials do not rise to the level of "inherently destructive" conduct because any far-reaching effects of these actions do not hinder future bargaining or create continuing obstacles to the future exercise of employee rights. Any negative effects on the union from the reorganization and transfers do not rise to the level of the types of situations that have been found to be "inherently destructive." *See e.g.*, Erie, 373 U.S. 221 (where replacement workers and workers who broke the strike were given twenty years of superseniority); and Metro. Edison Co. v. NLRB, 460 U.S. 693 (1983) (where the employer disciplined striking union officials more severely than other employees who were also striking).

Given that Chief Ballard's conduct was not "inherently destructive" to employee rights, the Board looks at whether the record shows a "substantial and legitimate business end" in its analysis of alleged "comparatively slight" discrimination. Chief Ballard's vision for the department when she became Chief of Police included reorganizing the PSU and restoring it to its original vision as set up in the mid-1990s. Based on the evidence, the Board finds that the evidence shows that Chief Ballard's conduct was *prima facie* lawful.

SHOPO makes the argument that Chief Ballard's vision was simply a pretext for her discriminatory intent. However, the evidence in the record regarding this alleged discriminatory intent is based on supposition and innuendo and not on facts. Without those facts in the evidentiary record, the Board cannot find that SHOPO has met its burden of proof on this issue.

Even assuming Chief Ballard's conduct was "inherently destructive" or that SHOPO could affirmatively prove wilfull discriminatory intent, the Board still cannot find in SHOPO's favor on this issue. As stated above, if the alleged discrimination does not affect the employee exercise of a protected right, there is no prohibited practice charge. Here, SHOPO has made no showing that either type of alleged discrimination relates to the employees exercising a protected right. Therefore, there cannot be a prohibited practice charge, and the Board must find against SHOPO on this count.

E. HRS § 89-13(a)(4)

An employer commits a prohibited practice when it wilfully "[d]ischarge[s] or otherwise discriminate[s] against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because the employee has informed, joined, or chosen to be represented by any employee organization." HRS § 89-13(a)(4). A violation of this section is based on retaliation against an employee who engages in protected activity, such as signing or filing a petition or complaint under Chapter 89. *See* Weiss v. Bratt, Board Case No. CE-05-452, Decision No. 425, 6 HLRB 188, 191 (2001) (Weiss).

To establish a *prima facie* case of retaliation under HRS § 89-13(a)(4), the complainant must "show by a preponderance of evidence that 1) there was an improper motive; 2) that there

was a causal connection between the improper motive and for engaging in protected activity…; and 3) that the improper motive was a motivating factor for taking action adverse to [the complainant]." Weiss, 6 HLRB at 191.

SHOPO argues that Chief Ballard's improper motive was to "'bust,' undermine, and weaken the union and its officials by targeting its president and other top officials." However, as stated above, the only evidence that has been offered is based on supposition and innuendo. To the contrary, the record shows that Chief Ballard's statements were specifically about the issues raised by the PSU, its reorganization, and Ma'afala's role in the PSU unit and not directed at his role as SHOPO president or at SHOPO itself. The Board cannot make a ruling of improper motive without direct evidence of such a motive.

Even if SHOPO could prove an improper motive, there has been no showing of a causal connection between the improper motive and engaging in protected activity. There is no evidence that any of the officers in this case engaged in protected activity. SHOPO seems to argue that the status of the officers in this case as union officials automatically shows protected activity. The Board disagrees.

Protected activity includes actions such as "inform[ing], join[ing], or cho[osing] to be represented by any employee organization." HRS § 89-13(a)(4). However, each of these actions—informing, joining, and choosing—is an act. The Board finds that, to find protected activity, there must be an act that is protected under Chapter 89.

If, for example, one of the officers became a union official when previously they were not a union official, the act of becoming a union official would be a protected activity. If there was a causal connection between an improper motive and the act of becoming a union official, there may be a violation of HRS § 89-13(a)(4). There is no such act in this case.

Even if SHOPO could prove that there was a protected act and an improper motive, there has been no showing that there was any adverse action taken against any of the officers. Adverse actions are not limited to discharge and can include suspensions, demotions, reductions in hours, denials of pay, etc. However, there is no question that statements to a reporter do not qualify as an adverse employment action; therefore, the Board finds no violation due to Chief Ballard's statements to Grube.

Transfers can be adverse actions under certain circumstances, such as when a transfer is made that puts the employee into a less advantageous or desired position. *See e.g.*, Marshall Durbin Poultry Co. v. NLRB, 39 F.3d 1312 (5th Cir 1994) (where, due to her protected activities of testifying on behalf of a union, an employee was transferred to increasingly more strenuous positions where she faced injury and unpleasant tasks). However, not every transfer will be considered an adverse action.

Chief Ballard stated that after the transfers, none of the officers raised any objection, refused the transfer, filed a grievance, filed a complaint, grumbled, or pushed back in any way. There have been no documents or testimony that contradicts this.

In fact, of the officers who were transferred, only one testified in this case, Ma‘afala. In his testimony, Ma‘afala admitted that he did not mind being transferred out of the PSU. He stated, "I actually looked at it as…it was like a sense of relief." Ma‘afala also admitted that the statement that the officials were transferred into undesirable position was not true.

Based on the evidence, there is no evidence that the transfers were adverse actions taken against the officers. Complainant also has not shown that Chief Ballard's statements constituted an "adverse action." Without a finding of an adverse action, the Board cannot consider whether the actions were wilfull or not and cannot find a violation of HRS § 89-13(a)(4).

F. HRS § 89-13(a)(5)

HRS § 89-13(a)(5) provides that it is a prohibited practice for an employer wilfully to "[r]efuse to bargain collectively in good faith with the exclusive representative as required in section 89-9."

HRS § 89-9 provides for the scope of negotiations and consultation and states in relevant part:

> (a) The employer and the exclusive representative…shall negotiate in good faith with respect to wages, hours…and other terms and conditions of employment which are subject to collective bargaining…
>
> (b) The employer or the exclusive representative desiring to initiate negotiations shall notify the other party in writing, setting forth the time and place of the meeting desired and the nature of the building to be discussed, sufficiently in advance of the meeting.
>
> ***
>
> (d) …The employer and the exclusive representative shall not agree to any proposal…which would interfere with the rights and obligations of a public employer to:
>
> ***
>
> (3) Hire, promote, transfer, assign, and retain employees in positions;
>
> ***

> This subsection…shall not preclude negotiations over the procedures and criteria on…transfers…
>
> Violations of the procedures and criteria so negotiated may be subject to the grievance procedure in the collective bargaining agreement.
>
> ***

Transferring employees is undoubtedly a management right under the statute. The statute does, however, consider the procedures and criteria for transferring employees to be a negotiable issue.

Under the CBA, Chief Ballard was required to consider seniority and hardship before any transfer. SHOPO argues that, because she did not consider these prior to the transfers of the Officers, she "unilaterally rewrote an agreed upon provision in the CBA."

If SHOPO was concerned that the transfers of the Officers would have effects on "wages, hours…and other terms of conditions of employment which are subject to collective bargaining," and they desired to negotiate as to those changes, they had the right and obligation to notify the employer in writing to discuss the changes. There is no evidence that SHOPO ever attempted to contact the employer to discuss any alleged changes that required negotiation. *See* Midcenter, Mid-South Hospital v. Hotel & Restaurant and Bartenders Internat'l Union, Local 847, 221 N.L.R.B. 670, 678-79 (1975) (*citing* American Buslines, Inc., 164 NLRB 1055 (1967)).

Based on that lack of contact, at most, the lack of consideration of seniority and hardship may have constituted a violation of the CBA under HRS § 89-13(a)(8); however, as discussed above, the Board has already ruled that SHOPO failed to exhaust its remedies and thus cannot pursue an HRS § 89-13(a)(8) claim. SHOPO cannot argue an HRS § 89-13(a)(5) violation to cure its failure to exhaust, and therefore, the Board must find against SHOPO on this count.

As for SHOPO's argument that Chief Ballard violated the HPD Standards of Conduct, these Standards of Conduct do not fall under the Board's Chapter 89 jurisdiction, which focuses on collective bargaining. Thus, any alleged violations of these standards cannot be considered by the Board.

G. HRS § 89-13(a)(7)

If an employer "[r]efuse[s] or fail[s] to comply with any provision of" Chapter 89, they have committed a prohibited practice.

SHOPO identifies HRS § 89-13 as the statute violated under its HRS 89-13(a)(7) claim. However, the Board has long held that statutory violations under HRS 89-13(a)(7) must occur independently of HRS § 89-13. *See* Burns etc., v. Anderson, Board Case No. CE-12-76, Decision

No. 169, 3 HPERB 114, 123 (1982). In its complaint, SHOPO did not allege any statutory violations other than violations of HRS § 89-13(a). Therefore, even if the Board were to find a violation of HRS § 89-13, the Board cannot find a violation of HRS § 89-13(a)(7).

ORDER

For all of the reasons set forth above, the Board grants Respondents' Motion for Judgment on Partial Findings. This case is hereby dismissed and closed.

DATED: Honolulu, Hawai'i, January 17, 2019.

HAWAI'I LABOR RELATIONS BOARD

MARCUS R. OSHIRO, Chair

SESNITA A.D. MOEPONO, Member

J N. MUSTO, Member

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Molly A Stebbins, Esq.
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[i] HRS § 89-2 Definitions defines "employee organization" as:

> "Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, amounts of contributions by the State and counties to the Hawaii employer-union health benefits trust fund, and other terms and conditions of employment of public employees.

[ii] HRS § 89-2 Definitions defines "exclusive representative" as:

> "Exclusive representative" means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

[iii] HRS § 89-2 Definitions defines "employer" or "public employer" as:

> "Employer" or "public employer" means…the respective mayors in the case of the counties…and any individual who represents one of these employers or acts in their interest in dealing with public employees.

[iv] Although the named Respondent is listed as the "City and County of Honolulu", for the purposes of consistency with the statute, the Board will interpret the "City and County of Honolulu" to mean "the respective mayor[]…of the [City and] [C]ount[y]." *See* Endnote 3.

[v] *See* Endnote 3.