

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-03-162
)	
HAWAII GOVERNMENT EMPLOYEES)	ORDER NO. 922
ASSOCIATION, AFSCME LOCAL 152,)	
AFL-CIO,)	ORDER GRANTING RESPONDENT'S
)	MOTION TO DISMISS
Complainant,)	
)	
and)	
)	
DEPARTMENT OF PUBLIC SAFETY,)	
State of Hawaii,)	
)	
Respondent.)	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

On February 5, 1992, Complainant HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO (HGEA) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against Respondent DEPARTMENT OF PUBLIC SAFETY, State of Hawaii (PSD or Employer). Complainant alleged that Deputy Sheriff Richard Andrade was terminated for threatening to shoot a colleague. Complainant alleged that two investigations of the incident were conducted; one investigation was conducted by PSD and another by the Attorney General's (AG's) Office. Complainant further alleged that the AG's Office found no basis upon which to discipline Andrade and indicated that Andrade would not be criminally prosecuted. Complainant filed a grievance on Andrade's behalf and requested a copy of the AG's investigative report. Respondent PSD refused to release a copy of the AG's report.

Complainant alleges that the Employer's actions violate Sections 89-13(a)(1), (7), and (8), Hawaii Revised Statutes (HRS).

On March 5, 1992, Respondent filed a motion to dismiss the complaint on grounds that the complaint fails to state a claim upon which relief can be granted. Respondent's motion is supported by a memorandum, exhibits and the affidavits of witnesses. A hearing was held on the motion on June 24, 1992. Complainant did not file any memorandum in opposition to the motion but argued the matter orally. Based upon a complete review of the record, the Board makes the following findings of fact, conclusions of law and order.

Richard Andrade was for all times relevant a deputy sheriff employed by the Special Services Division, PSD, and included in bargaining unit 3.

Complainant HGEA was for all times relevant the exclusive representative of bargaining unit 3.

Respondent PSD was for all times relevant the public employer, within the meaning of Section 89-2, HRS, of Andrade.

On September 24, 1990, Andrade allegedly threw another deputy's radio into a trash can and stated, "If I catch this radio plugged in again, I'll throw it in the air and shoot it and shoot you too." Andrade denied the threat but two sheriff dispatchers confirm hearing the remark. Exhibit F.

Calvin Shishido, supervising sheriff of the Special Services Division, conducted an internal PSD investigation of the incident. Based on his investigation, he recommended to PSD Director George Sumner through Deputy Director George Iranon that

Andrade be disciplined for the incident. See Affidavit of Calvin Shishido.

Andrade was dismissed for treating the Deputy Sheriff III with disrespect and threatening the deputy with bodily harm. The Employer found his actions violated General Orders and departmental rules. The termination letter, dated February 7, 1991, indicated the termination was effective on February 19, 1991. Exhibit A.

Judge John Bryant, then a Deputy Attorney General assigned to the Criminal Justice Division, received information regarding Andrade in early January 1991. He was assigned to investigate the incident and the possibility of bringing criminal charges against Andrade. He reviewed the file and conducted interviews and made a recommendation to his supervisor on or about February 8, 1991 that criminal charges not be filed against Andrade. He notified PSD Deputy Director George Iranon by letter dated February 19, 1991 that the Department of the Attorney General (AG) would not be filing criminal charges against Andrade. To the best of his recollection, no reports or notes regarding Andrade's case were sent to anyone outside the AG's department. See Affidavit of Judge John Bryant.

Iranon states that he and Shishido decided to take the disciplinary action against Andrade. Iranon states that he never saw the AG's investigative report; no such report was used or relied upon in determining the discipline or during the grievance process. See Affidavit of George Iranon.

Donald Wong, the AG's investigator who conducted the investigation at issue, testified at the hearing on the motion to

dismiss. Wong interviewed several witnesses, completed his report and submitted it to his supervisor and forwarded a copy to the Criminal Justice Division to Deputy AG Bryant. Transcript p. 42. Wong did not send the report to PSD. Tr. p. 43.

As a preliminary matter, although Respondent filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted, the Board will consider the motion as one for summary judgment since matters outside the pleading were presented and the Complainant had the opportunity to present rebuttal evidence and arguments. Rule 12(b), Hawaii Rules of Civil Procedure (HRCPP) provides:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Pursuant to the foregoing rule, the Board may grant summary judgment based upon the facts and arguments presented if warranted.

Rule 56, HRCPP, provides that a party is entitled to summary judgment if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. In deciding whether to grant a motion for summary judgment, the Board will review the record and inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion, in this case, the Complainant.

Complainant contends that Respondent violated Chapter 89, HRS, and relevant contract provisions by failing to provide Complainant with a copy of the AG's investigative report regarding possible criminal violations by Andrade.

Section 89-13(a), provides in relevant part:

It shall be a prohibited practice for a public employer or its designated representative wilfully to:

(1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;

* * *

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

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

Article 11 of the HGEA Unit 3 Bargaining Agreement states:

Any relevant information specifically identified by the grievant or the Union in the possession of the Employer needed by the grievant or the Union to investigate and process a grievance, shall be provided to them upon request within seven (7) working days.

The Board has previously held that the failure to produce relevant documents during the grievance procedure was a prohibited practice. In Manuel Veincent, Jr., 2 HPERB 494 (1980), the Board found that employer should have released the tally sheets used by panel members in a promotion case and the employees' annual performance reports during the grievance process. The Board found these documents to be the basic documents from which the employer made its promotion decision and therefore were relevant and necessary to the subject grievance.

Here, Respondent contends that there was no violation of either the contract or Chapter 89, HRS, for failure to produce the AG investigative report because it was never in Respondent's possession and was not a factor in the decision to terminate or during the grievance process.

Based upon a review of the record in this case, the Board concludes that there is no genuine issue as to any material fact and Respondent Employer is entitled to summary judgment as a matter of law. The Board finds that the Complainant has failed to establish that the Respondent committed a prohibited practice by refusing to release the AG's investigative report.

The undisputed facts indicate that Shishido and Iranon made the decision to discipline Andrade after conducting an internal PSD investigation. Although the AG's investigator was simultaneously conducting an investigation for possible criminal violations, the Employer's decision to discipline Andrade was made prior to the time the decision not to prosecute was relayed to PSD. The AG's report was neither in the possession of PSD nor relied upon during the disciplinary or grievance process. We find that the report was not relevant to the disciplinary decision and the subsequent grievance process. We conclude that the Respondent did not commit a prohibited practice by refusing to release the AG's investigative report.

DATED: Honolulu, Hawaii, January 27, 1993.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson

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and DEPARTMENT OF PUBLIC SAFETY; CASE NO. CE-03-162
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GERALD K. MACHIDA, Board Member


RUSSELL T. HIGA, Board Member

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