

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-12-192
)	
STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO),)	ORDER NO. 964
)	
Complainant,)	ORDER GRANTING COMPLAIN- ANT'S MOTION FOR TEMPORARY CEASE AND DESIST ORDER
)	
and)	
)	
CALVIN FUJITA, Chief of Police, County of Kauai and KAUAI POLICE DEPARTMENT,)	
)	
Respondents.)	
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ORDER GRANTING COMPLAINANT'S MOTION
FOR TEMPORARY CEASE AND DESIST ORDER

On June 29, 1993, the STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO or Union) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board). Complainant SHOPO alleged that Respondents CALVIN FUJITA, Chief of Police, County of Kauai and the KAUAI POLICE DEPARTMENT (KPD or EMPLOYER) violated Sections 89-13(a)(1), (2), (3), (4), (5), (6), (7), and (8), Hawaii Revised Statutes (HRS), by ordering the transfer of SHOPO officials on May 19, 1993.

Thereafter, on July 2, 1993, Complainant SHOPO filed a Motion for Temporary Cease and Desist Order with this Board. SHOPO requested that the Board direct Respondents to cease and desist from implementing Order 93-05 which transferred three SHOPO shop stewards from the work units which they represented.

The Board conducted a hearing on the motion on July 20, 1993. The parties were accorded full opportunity to present witnesses and arguments. The KPD, by and through its counsel, filed a memorandum in opposition to Complainant's motion on July 20, 1993. The SHOPO, by and through its counsel, filed a memorandum in support of its motion on August 6, 1993.

Based upon the testimony and arguments presented, the Board grants the requested cease and desist order as to two of the three affected SHOPO stewards pending the issuance of a final decision in this matter.

This Board has jurisdiction over this matter pursuant to Section 89-13, HRS.

The KPD is the public employer, as defined in Section 89-2, HRS, of the employees of the County of Kauai included in bargaining unit 12, composed of police officers.

The SHOPO is the exclusive representative, as defined in Section 89-2, HRS, of employees in bargaining unit 12.

The public employers and the SHOPO are parties to the Unit 12 collective bargaining agreement effective for the period July 1, 1989 to June 30, 1993. The public employers and SHOPO have entered into a written agreement extending the terms of the collective bargaining agreement to August 31, 1993.

On September 10, 1992, this Board issued Decision No. 327, in State of Hawaii Organization of Police Officers, 5 HLRB ____ (1992). In that case, the Board held that the KPD violated Section 89-13(a)(8), HRS, by attempting to transfer a SHOPO steward in violation of the applicable contract provision because it was not

part of a normal rotation. Article 7 of the contract provides in pertinent part:

The Employer shall not transfer nor reassign employees who are elected officials, employees appointed to elective positions or stewards of the Union from their present position during their terms of office because of their official capacity with the Union nor for their performance of same unless the employee requests such transfer or reassignment, the employee freely or voluntarily consents thereto, or upon prior proof by the Employer that the transfer or reassignment is due to the normal rotation (without acceleration) of officers within the unit or due to an operational need for special skills which the employee possesses or due to the inability of the employee to perform the essential tasks of his assigned duties.

At the time of the previous case, there was no formal rotational policy in existence at the KPD. The Board found that the KPD's failure to consult over the implementation of its informal rotation policy constituted a refusal to bargain in good faith in violation of Subsection 89-13(a)(5), HRS.

Subsequent to the Board's decision, the KPD drafted a rotational policy and by letter dated January 12, 1993, informed SHOPO that it wanted to meet and confer on the rotational policy. The parties met several times and the policy was modified to address SHOPO's concerns. SHOPO raised its concerns with the retroactivity clause where an officer could have his term extended at the request of the bureau commander after providing justification therefor. By letter dated March 11, 1993, SHOPO objected to the rotation proposal as violative of the acceleration clause of Article 7 of the contract. SHOPO indicated that the policy was

subject to negotiation and mutual agreement must be reached before the policy was implemented.

By letter dated March 17, 1993 to SHOPO, the KPD informed the Union that further meetings would not be beneficial since the Union indicated that mutual agreement would be necessary. The KPD informed the Union that the rotation policy would be implemented in the near future.

Thereafter, the KPD issued Administrative Notice No. 93-03, entitled Normal Rotation Practice on April 8, 1993. The KPD also issued Personnel Order No. 93-05 on May 19, 1993 which listed officers who would be transferred effective July 1, 1993. Three SHOPO stewards, Clayton Arinaga, Glenn Morita, and Kyle Okamura were transferred. The testimony indicated that Clayton Arinaga was transferred because the department was reorganized and his previous position was reassigned.

SHOPO filed a class grievance alleging violations of Articles 1, 4, 20, and 35 of the collective bargaining agreement. SHOPO also filed grievances on behalf of other affected police officers who were transferred.

The Board has adopted the following criteria in determining whether interlocutory injunctive relief should be granted. In Hawaii Government Employees Association (HGEA), Case Nos.: CE-03-170a, et seq., a case still pending before the Board, Complainant HGEA requested an interlocutory order to enjoin the Board of Education (BOE) from implementing a seven (7) day public service schedule for its public library system pending the issuance of a final Board decision. The Board relied generally upon the

standards applicable in the judicial system for interlocutory injunctive relief. The Board adopted the test for interlocutory injunctive relief proposed by the Hawaii Intermediate Court of Appeals in Penn v. Transportation Lease Hawaii, Ltd., 2 Haw.App. 272, 630 P.2d 646 (1981), that the decision maker should consider: 1) whether the party seeking the injunction is likely to prevail on the merits; 2) whether the balance of irreparable damage favors the issuance of the interlocutory injunction; and 3) whether the public interest supports the granting of the injunction.

Complainant charges that the KPD unlawfully refused to bargain in good faith and violated the terms of the applicable collective bargaining agreement and the previous Board decision by transferring the SHOPO officials without negotiation over the policy. The KPD responds that it implemented the transfers pursuant to its rotational policy after meaningful consultation with the Union.

With respect to the likelihood of success on the merits, a majority of the Board is persuaded that the retroactivity clause in the rotation policy serves merely to accelerate the rotation of the officers, including SHOPO officials, since service in their units prior to the implementation of the policy is considered in the calculation of their tenure. The policy therefore modifies Article 7 of the contract which expressly prohibits acceleration of the normal rotation with respect to SHOPO officials. The retroactivity provision of the policy states:

Upon implementation, this rotational practice shall be retroactively applied to all affected personnel. Application shall be as

near as possible to, but not less than, the full terms of the affected personnel with due consideration being given to operational needs.

The foregoing clause operates to consider the officer's prior service in calculating his or her tenure. As it violates the contract provision prohibiting acceleration, it constitutes an abridgement of expressed contractual rights which requires negotiation and mutual consent rather than consultation.

A majority of the Board further finds that there would be irreparable harm to the stewards affected. The record indicates that the Union can designate other stewards to represent the interests of the unit. In addition, the work units are also represented by other SHOPO board members. However, the officers affected have a right under Chapter 89, HRS, to be SHOPO officials and the subject rotation policy irreparably harms them since they are precluded from engaging in protected activity.

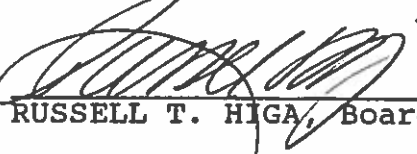
With respect to the public interest in this case, a majority of the Board is not convinced that the public interest is promoted by the rotational policy as applied to union officials. Given the legislative policy underlying Chapter 89, HRS, which recognizes the right of public employees to participate in the decision-making process affecting their wages and working conditions, a majority of the Board believes that the interlocutory relief should be granted.

Based upon the foregoing, the Board hereby issues a cease and desist order to the Employer suspending the application of its new normal rotation policy to SHOPO officials, pending a final determination of the merits of this case. The SHOPO officials

effectively transferred by the rotation policy shall be returned to their former units. As the evidence indicates that the transfer of Clayton Arinaga was due to a reorganization, his transfer is not affected by this order.

DATED: Honolulu, Hawaii, September 2, 1993.

HAWAII LABOR RELATIONS BOARD



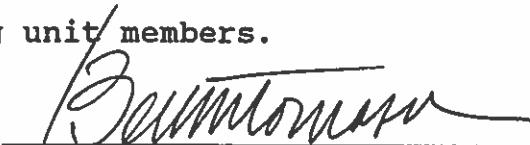
RUSSELL T. HIGA, Board Member



SANDRA H. EBESU, Board Member

Opinion of Chairperson Bert M. Tomasu, Dissenting.

I respectfully dissent from the foregoing order. In my opinion, SHOPO failed to carry its burden of proof that it is likely to prevail on the merits. Further, I am unpersuaded that there is irreparable injury suffered by the affected SHOPO stewards. If it were the case that the work units were not being represented, I would believe that injury exists. However, I am satisfied that the work units contain sufficient SHOPO representatives and further, that SHOPO is not prevented from electing other stewards to assist its bargaining unit members.



BERT M. TOMASU, Chairperson

Copies sent to:

Michael Kaneshiro, Esq.
Jay Murobayashi, Deputy Corporation Counsel
Joyce Najita, IRC