

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of	)	CASE NO. CE-12-143
	)	
STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS,	)	DECISION NO. 327
	)	
Complainant,	)	FINDINGS OF FACT, CONCLU- SIONS OF LAW, AND ORDER
	)	
and	)	
	)	
KAUAI POLICE DEPARTMENT, COUNTY OF KAUAI,	)	
	)	
Respondent.	)	
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FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

On July 27, 1990, the STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS (SHOPO) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) against the KAUAI POLICE DEPARTMENT, County of Kauai (KPD or Employer). Complainant alleged that Respondent violated Subsections 89-13(a)(1), (2), (3), (4), (5), (7) and (8), Hawaii Revised Statutes (HRS), by refusing to recognize and bargain with duly elected and appointed officials of SHOPO. The issue presented is whether the KPD violated Chapter 89, HRS, by attempting to transfer a Union steward from his work unit.

A hearing was conducted on October 26, 1990 in Lihue, Kauai and post-hearing briefs were filed on December 31, 1990. Based upon a complete review of the record, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Complainant SHOPO was at all times relevant the exclusive bargaining representative of employees of the counties included in bargaining unit 12.

Respondent KAUAI POLICE DEPARTMENT, County of Kauai, was at all times relevant the public employer as defined in Section 89-2, HRS, of employees of Kauai included in bargaining unit 12.

On July 8, 1990, SHOPO Kauai Chapter Chair Samuel Sheldon and KPD Deputy Chief Kenneth Robinson met with Kauai Personnel Director Allan Tanigawa to discuss the forthcoming election of SHOPO officials. Sheldon stated that the stewards had not yet been named. Transcript (Tr.) p. 76. SHOPO Board members vote for shop stewards after nominations are received from the different divisions. Tr. p. 13. Previously, each work unit was not represented by a steward; the new SHOPO Board restructured the system so that every unit would be represented by a steward. Tr. pp. 29-30.

Norman Holt was mentioned as a possible steward. Robinson advised Sheldon to consider that in naming a steward, the KPD had been using a new rotational system since August 1989. Under this system, a newly promoted sergeant or officer with an SR-21 designation would be assigned to the Investigative Services Bureau and the officer with the most longevity of service in the Bureau would be transferred out. The system was in effect for approximately one year. Tr. pp. 19, 31. As the officer with the longest service in the Bureau, Holt would be the next officer transferred.

On July 12, 1990, Sheldon met with Robinson to present the names of the Union stewards. Tr. pp. 29-30. Police Officer Buddy Wilson and SHOPO General Counsel Michael Kaneshiro also attended the meeting. Norman Holt was named as the steward of the Investigative Services Bureau. Robinson stated that Detective Norman Holt would not be recognized as a SHOPO steward. Robinson indicated that as the officer with the longest service in the Bureau, Holt would be the next officer transferred out of the unit pursuant to the rotational policy. Tr. pp. 22, 77. Kaneshiro asked Robinson to forward a copy of the formal rotational policy to him. Tr. p. 78.

Robinson considered Kaneshiro's request for a formal written rotational policy. As there was no formal policy in existence, Robinson drafted a transfer policy for SHOPO's consideration. The draft was discussed with the Chief and later sent to Tanigawa and Peter Morimoto, Deputy County Attorney. Tr. pp. 78-79.

Chief of Police Calvin C. Fujita sent a letter, dated July 23, 1990, to Kaneshiro acknowledging receipt of the July 12, 1990 letter naming the various stewards. The letter further states:

We wish to bring to your attention that we cannot recognize Officer Buddy Wilson as a "union official, representative or steward" in his capacity as the "stewards coordinator". We also point out our previous discussions with Kauai Chapter Chairman Samuel Sheldon on June 8, 1990, and again with both of you on July 12, 1990, concerning the appointment of Detective Norman Holt to a stewardship. As we discussed, he is next in line to be transferred out of the Investigative Services



Bureau due to his longevity within the Bureau and in keeping with the practice of past sergeant promotions initiated in September of 1989.

SHOPO and the Employer are parties to a collective bargaining agreement effective July 1, 1989 to June 30, 1993. Complainant's Exhibit B. Article 7 of the contract, entitled Union Officials, Stewards and Representatives, reads as follows:

The Employer recognizes and agrees to deal with Union officials, stewards and representatives in all matters covered by this Agreement. Matters relating to grievances arising out of alleged violations of this Agreement or disputes on the interpretation or application of this Agreement shall be in accordance with the provisions of Article 32, Grievance Procedure. Union stewards shall be allowed time off to represent an employee at any grievance proceeding.

The election or appointment of Union stewards is the function of the Union; provided, however, that the number of stewards shall be governed by the following formula:

1. One (1) authorized steward to each operating unit with twenty (20) or less assigned employees.

2. One (1) additional authorized steward for each additional twenty (20) employees, or major fraction of twenty (20).

Steward coverage provided by the Union shall be subject to consultation between the Union and the Employer.

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.

The Union shall provide the Employer with a list of Union officials, stewards and representatives and maintain its currency. [Emphasis added.]

Complainant's Exhibit A.

Kauai Personnel Director Tanigawa represented the Employer during the negotiation of the SHOPO contract. Tr. p. 38. Tanigawa stated that under Article 7 management can transfer or reassign a Union official when it is consistent with an established rotational policy; when it is a request for reassignment made by that steward; when it is due to an operational need for special skills which the employee possesses; or due to the inability of that employee to perform the essential duties of the position. Tanigawa is aware that the KPD interprets the section differently. Tr. pp. 38, 41. The parties negotiated paragraph 6 of Article 7 in 1979 with the intent to prevent "union busting" by management. Tr. pp. 42, 58-59. At that time, SHOPO officials in Honolulu County were reluctant to be active within the Union because they were routinely transferred from their work positions. The article has not changed considerably since it was first negotiated. Tr. p. 42.

Tanigawa reviewed Robinson's draft of the rotational policy in August of 1990. Tr. p. 44. Tanigawa believed the rotational policy would be subject to consultation. Tr. pp. 50-51. Tanigawa stated that there may be a past practice established where previously, the most senior person was transferred out of the Bureau. Tr. p. 51.

At the hearing, Robinson disagreed with Tanigawa over the interpretation and application of Article 7, paragraph 6 of the contract. Tr. pp. 41, 85. Robinson interprets the contract to



permit the transfer of a Union official as long as it is not done because of the steward's official capacity. Tr. p. 80. Robinson stated that Respondent had no rotational policy as referenced by paragraph 6 of Article 7. Tr. p. 79. He stated that Respondent did not need a rotational policy. Tr. p. 86. Robinson nevertheless drafted a policy in response to Kaneshiro's request and circulated the draft to Tanigawa and Morimoto. He did not receive any feedback from either. Robinson later decided not to formalize the draft or implement the policy because several ranking officers were expected to leave the department. Tr. pp. 78-79. In addition, Robinson confirmed that there was no consultation with the Union when the practice was initiated in September of 1989. Since that time, two officers had been promoted and assigned to the Investigative Services Bureau and the officers with the longest service in the Bureau were transferred. Tr. p. 87.

Prior to the hearing, the Employer and the Union entered into a stipulation that Buddy Wilson would be recognized as a Kauai Chapter Board Member as opposed to the steward's coordinator and would be afforded all entitlements under the collective bargaining agreement. Tr. pp. 36-37.

#### DISCUSSION

Complainant SHOPO alleges that the Employer violated Section 89-13(a), HRS, by attempting to transfer SHOPO steward Norman Holt from the Investigative Services Bureau of the KPD without following the operative contract provision. We agree with the Union's position.

Section 89-13(a), HRS, provides as follows:

Prohibited practices; evidence of bad faith.

(a) 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;
- (2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;
- (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;
- (4) Discharge or otherwise discriminate 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;
- (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9, . . .
- (7) Refuse or fail to comply with any provision of this chapter; or
- (8) Violate the terms of a collective bargaining agreement.

Specifically, SHOPO contends that Respondent interfered with Holt's rights which are protected by Section 89-3, HRS, and violated Subsection 89-13(a)(1), HRS, by threatening to transfer Holt and eliminating him from consideration as a steward. SHOPO further alleges that the Employer violated Subsection 89-13(a)(2), HRS, by interfering with the steward selection process and attempting to dominate the Union. Complainant alleges that the Employer violated Subsections 89-13(a)(3) and (4), HRS, by discriminating against Holt because of his Union membership. Complainant also alleges that Subsection 89-13(a)(5), HRS, was violated when Respondent failed to bargain in good faith with SHOPO



over Robinson's interpretation of Article 7. In addition, SHOPO argues that the Employer violated Subsection 89-13(a)(7), HRS. Complainant also argues that the Employer violated Subsection 89-13(a)(8), HRS, by violating Article 7 of the contract.

The Employer in response, submits that in 1989, the KPD instituted a practice of assigning the newly promoted sergeants to the Investigative Services Bureau and transferring the officer with the greatest length of service in the Bureau to another work unit. This was intended to give the newly promoted sergeants experience in investigating cases on their own and to get them used to the idea of being sergeants rather than patrol officers. In addition, the Employer contends Holt was not selected for transfer because of his official capacity but because of his length of service in the Bureau. The Employer submits that its actions were in accord with the contract and SHOPO has failed to establish any wilfulness on KPD's part.

Subsection 89-13(a)(8), HRS

Subsection 89-13(a)(8), HRS, provides that the violation of the collective bargaining contract constitutes a prohibited practice. SHOPO contends that the correct interpretation of paragraph 6 of Article 7 is that a Union official can only be transferred from a position for the reasons enumerated in the contract. Accordingly, Union officials may be transferred where the officer consented or volunteered to the transfer; the transfer was part of a normal rotation (without acceleration) within the work unit; where the officer possessed special skills which were



needed for operational purposes or the officer lacked the ability to perform essential tasks of the assigned duty.

The KPD, on the other hand, contends that the official can be transferred so long as it is not because of the official's capacity with the Union or because of the performance of Union duties. The Employer submits that the Union's interpretation ignores that contract provision. The fallacy with the KPD's position is that such a reading would likewise render the rest of paragraph 6 meaningless.

The Board agrees with the interpretation by the Union. We find the testimony of Tanigawa to be persuasive in this regard. Tanigawa, the Employer's negotiator, agreed with SHOPO's interpretation that the Union official could only be transferred for the four reasons cited in the contract, including pursuant to a normal rotation. The KPD initially stated that Holt's impending transfer was pursuant to the newly instituted rotational policy. However, Robinson testified that there was no formal rotational policy in existence at the KPD. Tr. p. 79. When Kaneshiro requested a copy of the rotational policy, Robinson admitted that he drafted a policy after the meeting and sent it to other County departments for review. After learning about the possible retirements of ranking officers, Robinson decided not to formalize or implement the rotational policy. The KPD, however, never rescinded its intention to transfer Holt.

The Employer raises an issue as to whether there has been a past practice established as to the use of the rotational policy. The past practice doctrine is limited to ascertain the intent of

the parties "which otherwise would remain unascertainable." In re AMF Western Tool, Inc. and United Automobile, Aerospace and Agricultural Implement Workers of America, 49 LA 719 (1967). The Board has previously relied upon In Re Celanese Corp. of America and Textile Workers Union of America, Local 1093, 24 LA 168, 172 (1954) which holds that past practice, to be binding on the parties, must be:

(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

SHOPO, 3 HPERB 47, 67 (1982). Under the foregoing standard, the evidence in the record does not support a finding of a past practice. There is no evidence that the practice is clear and unequivocal. In addition, it was not established as a practice which was accepted by both parties. Moreover, in this case, the contract terms appear to be ambiguous, but the intent of the provision as explained by Tanigawa is clear.

The Board concludes that there was no rotational policy in existence to justify Holt's transfer under the applicable contract provision. Thus, KPD's attempt to transfer Holt, a Union steward, was violative of the contract and constitutes a prohibited practice.

Subsections 89-13(a)(1) and (2), HRS

SHOPO also argues that Holt's transfer constitutes a prohibited practice because it interfered with his rights guaranteed under Chapter 89, HRS, and interfered with the administration of the employee organization. Based upon our holding that the KPD



violated the contract by its attempt to transfer Holt without an operative rotational policy in effect, we find that the KPD's refusal to further recognize Holt as a Union steward interfered with Holt's right to be so recognized and likewise, interfered with the administration of the Union to select its officials. This constitutes violations of Subsections 89-13(a)(1) and (2), HRS.

Subsection 89-13(a)(5), HRS

SHOPO also contends that the KPD violated Subsection 89-13(a)(5), HRS, by failing to bargain over Robinson's interpretation of the contract. SHOPO argues that Article 1 of the contract requires that in order for Respondent to modify the matters covered by the contract, SHOPO's mutual consent to the alteration is required.

KPD responds that the rotational practice was implemented in August of 1989. Robinson informed SHOPO at the July 12, 1990 meeting that the KPD was in the process of reducing the policy to writing for SHOPO's review. Thereafter, KPD found it became impractical to implement the policy as written. Therefore, no attempt was made to send the formal policy to SHOPO for review. In any event, the Employer submits that Robinson was acting in good faith, hence, no prohibited practices were committed.

The KPD ignores the fact that the KPD never consulted nor negotiated with the Union over the rotational policy. The issue is not only whether the Employer's representatives were acting in good faith. Chapter 89, HRS, requires that there be negotiations over negotiable subjects and at least consultation over matters to which the duty to negotiate does not extend. In this case, according to

Robinson, there was no consultation over the policy before its implementation in 1989. Tanigawa testified that the policy was subject to consultation before implementation. The Board has held that the unilateral implementation of policies which affect working conditions without negotiation constitutes a refusal to bargain. Hawaii Government Employees Association, 1 HPERB 570 (1975). The evidence in the record clearly indicates that there was no consultation over the policy before it was implemented. This renders the rotational policy invalid and constitutes a violation. Subsections 89-13(a)(3), (4), and (7), HRS

Subsection 89-13(a)(3), HRS, provides that discrimination in regard to any term of employment to discourage Union membership is a prohibited practice. The Board finds that there is insufficient evidence in the record to establish any intent on KPD's part to discourage membership in the Union by its attempt to transfer Holt. In the same way, the evidence fails to support a violation of Subsection 89-13(a)(4), HRS. The Board further finds a Subsection 89-13(a)(7), HRS, violation to be merely cumulative at this point. These charges are therefore dismissed.

#### Wilfulness

The Employer raises the issue of whether the prohibited practices were wilfully committed. The Employer relies upon the Supreme Court's decision in Aio v. Hamada, 66 Haw. 401, 664 P.2d 727 (1983), and the discussion of "wilfulness". In that case, the Supreme Court affirmed the Board's interpretation that wilfulness required a "conscious, knowing, and deliberate intent to violate the provisions of chapter 89, HRS." However, since the Aio case,



the Board indicated that it will find the requisite wilfulness where the violation of the act was a natural consequence of Respondent's actions. Brown and Correa, 3 HPERB 137 (1983).

The evidence in this case establishes that Robinson knew of Tanigawa's interpretation of the contract but nevertheless took the position that Holt could be transferred so long as it wasn't due to his Union capacity. Robinson chose to continue to disagree with Tanigawa's interpretation. We find that the contract violation and the deprivation of Holt's rights were a natural and obvious consequence of Robinson's actions and satisfy the statutory requirements for wilfulness.

#### CONCLUSIONS OF LAW

Pursuant to Sections 89-5 and 89-13, HRS, the Board has jurisdiction over these complaints.

An Employer's wilful violation of the collective bargaining agreement provisions constitutes a prohibited practice under Subsection 89-13(a)(8), HRS.

The KPD violated Article 7 of the collective bargaining agreement by attempting to transfer a Union official when it was not part of a normal rotation nor in compliance with the applicable contract provision.

The KPD violated Subsections 89-13(a)(1) and (2), HRS, by refusing to recognize Norman Holt as a Union steward of the Investigative Services Bureau and attempting to transfer him out of the work unit.

The KPD violated Subsection 89-13(a) (5), HRS, by refusing to bargain in good faith with the Union over the implementation of the rotational policy. At the least, the policy was subject to consultation and this admittedly did not occur.

ORDER

Respondent is directed to cease and desist from violating the rights of the employee and the Union by refusing to recognize Norman Holt as the Union steward of the Investigative Services Bureau.


If the Employer desires to promulgate and implement a rotational or transfer policy, it shall bargain over the terms of such policy insofar as consultation or negotiation may be required.

Respondent shall immediately post copies of this decision on every bulletin board or designated space provided by the Employer for Union material and leave said decision posted for a period of sixty consecutive days.

SHOPO's request for attorneys' fees and costs is denied.

DATED: Honolulu, Hawaii, September 10, 1992.

HAWAII LABOR RELATIONS BOARD

  
BERT M. TOMASU, Chairperson

  
GERALD K. MACHIDA, Board Member

  
RUSSELL T. HIGA, Board Member



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POLICE DEPARTMENT; COUNTY OF KAUAI; CASE NO. CE-12-143  
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