

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-01-120
)	
STEPHEN K. YAMASHIRO, Mayor,)	ORDER NO. 1369
County of Hawaii,)	
)	ORDER GRANTING RESPONDENTS'
Complainant,)	MOTIONS TO DISMISS PROHIBITED
)	PRACTICE COMPLAINTS
and)	
)	
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO, et al.,)	
)	
Respondents.)	

In the Matter of)	CASE NO. CU-01-122
)	
BRADLEY SILVA,)	
)	
Complainant,)	
)	
and)	
)	
UNITED PUBLIC WORKERS, AFSCME,)	
LOCAL 646, AFL-CIO; et al.,)	
)	
Respondents.)	

ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS PROHIBITED PRACTICE COMPLAINTS

On February 13, 1996, STEPHEN K. YAMASHIRO, Mayor, County of Hawaii (County or Employer), by and through his counsel, filed a prohibited practice complaint against the UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW), GARY W. RODRIGUES, CLIFFORD UWAIN, and HERBERT R. TAKAHASHI (collectively Union) in Case No. CU-01-120 with the Hawaii Labor Relations Board (Board). Complainant alleged that during an arbitration hearing, Respondents introduced a copy of an employee's confidential job performance

evaluation from the Department of Parks and Recreation, County of Hawaii, into evidence over the County's objection. The Arbitrator denied the County's motion for protective order based upon a commitment by the UPW to keep the arbitration documents confidential and limit their distribution. Thereafter, the County alleged that Respondents printed an article in its November-December 1995 issue of its official, bi-monthly publication Malama Pono, which refers to the documents from the employee's personnel file and specifically quoted from the employee's job performance report. The County alleged that the information contained in the employee's confidential job performance report would be distributed statewide and to all of the employees of the County.

The County alleged that Respondents' release of confidential information and Respondents' failure to notify BRADLEY SILVA (SILVA) that his records had been obtained and would be released constituted violations of § 89-13(b)(4), Hawaii Revised Statutes (HRS). The County also alleged that Respondents misrepresented their intentions concerning SILVA's personnel file and defied the Arbitrator's order in violation of § 89-13(b)(3), HRS. Thus, the County alleged that the Respondents committed prohibited practices in violation of §§ 89-13(b)(3) and (b)(4), HRS.

On February 21, 1996, Respondents TAKAHASHI, RODRIGUES, UWAINNE and UPW filed motions to dismiss the complaint and/or for summary judgment with the Board, respectively. Respondents contend that the instant complaint should be dismissed because Complainant

County lacks standing, the complaint fails to name indispensable parties, the complaint fails to state a claim for relief and further, that there are no genuine issues of material fact in dispute and Respondents are entitled to judgment as a matter of law.

On March 20, 1996, BRADLEY SILVA, by and through his representative, filed a prohibited practice complaint against the same Respondents with the Board in Case No. CU-01-122. Complainant SILVA alleged that Respondents disclosed that he had received an unsatisfactory job performance rating in the UPW paper, Malama Pono, in violation of § 89-16.5, HRS. In addition, SILVA alleges that the UPW should have filed charges against the County on his behalf if the Employer first published the information.

On March 25, 1996, Respondent TAKAHASHI filed a motion to dismiss complaint and/or for summary judgment with the Board. TAKAHASHI contends that the claim is barred by the 90-day statute of limitations and relies upon the arguments contained in his motion to dismiss filed in Case No. CU-01-120. Further, Respondents contend that there are no genuine issues of material fact in dispute and Respondents are entitled to judgment as a matter of law.

On March 27, 1996, Respondents RODRIGUES, UWAINÉ and UPW filed a similar motion to dismiss complaint and/or for summary judgment.

On April 4, 1996, the Board consolidated the foregoing complaints because the Board found that the complaints involved substantially the same parties and the same central issues.

Thereafter, the Board held a hearing on the motions by conference call on April 10, 1996. Based upon the record in this case, the Board hereby dismisses the instant complaints.

FINDINGS OF FACT

STEPHEN K. YAMASHIRO, is the Mayor of the County of Hawaii and a public employer, as defined in § 89-2, HRS.

The UPW is the exclusive representative, as defined in § 89-2, HRS, of employees of the County of Hawaii who are included in Unit 01.

GARY W. RODRIGUES is the State Director of the UPW.

CLIFFORD UWAINE for all times relevant was the editor for Malama Pono, the UPW's newsletter.

HERBERT R. TAKAHASHI, Esq., is an attorney who represented the UPW in the arbitration of a class grievance filed against the County of Hawaii involving a hiring freeze imposed by the employer. TAKAHASHI also represented the UPW in Case No. CE-01-204 before the Board.

BRADLEY SILVA is employed by the Department of Parks and Recreation, County of Hawaii and is an employee within the meaning of § 89-2, HRS. SILVA is a member of Unit 01 and the UPW.

On or about February 16, 1994, an arbitration hearing was held before Arbitrator Phillip Uesato on a class grievance filed by the UPW challenging a freeze on hiring, promotions, and temporary assignments imposed by YAMASHIRO. The County produced the personnel records of BRADLEY SILVA and others at the hearing pursuant to UPW's subpoena. During a further hearing on March 9, 1994, TAKAHASHI sought to introduce evidence regarding the

performance evaluations of SILVA and Manlinguis. The County sought a protective order pursuant to § 92F, HRS, because of confidentiality concerns. TAKAHASHI argued that the evidence should be received and that the County waived its right to object to the documents since it initially failed to move to quash the subpoena. TAKAHASHI also argued that the County had failed to object to the introduction of a related exhibit, UU. In response to the Arbitrator's inquiry as to the Union's procedure for the handling of the personnel records, TAKAHASHI stated as follows:

Based on the information that's given me by the state director, this is the procedure that's used by the UPW: when a case is in litigation, the records are retained in the lawyer's office subject to review by the state director to assist during the course of litigation. When the case is completed, all the records that are obtained during the proceedings are transmitted to the state director's office, and then he reviews the information and determines whether there needs to be -- and this review is ongoing -- whether there needs to be additional grievances filed or other actions taken.

When the case is completed and award is issued, the state director has in the past prepared commentary for newsletter for dissemination to the membership. However, the documents are retained in his office and are not subject to copying and distribution upon request of members. So they are in the possession of the state director.

Now, if those documents become relevant or material to other ongoing grievances or litigation, they're used. That's the procedure. So what I'm saying is if that procedure is acceptable, we're prepared to follow that procedure. We're not going to copy and xerox material and hand it over to coworkers in light of the concerns raised.

After considering the arguments presented, the Arbitrator denied the County's motion for protective order and requested the

Union to follow its stated procedure with respect to documents obtained through the arbitration proceedings.

The Board takes notice that in Case No. CE-01-204 before the Board involving similar issues, a proceeding open to the public under § 89-16, HRS, the UPW entered SILVA's job performance report into evidence as part of Exhibit No. DD without objection from the County. The County also entered a letter into evidence which referred to SILVA's unsatisfactory job performance. Testimony was elicited during the hearing from various witnesses which referred to SILVA's unsatisfactory job performance. Thereafter, UPW submitted its Memorandum of Fact and Law to the Board which states: On or about November 12, 1993, SILVA was evaluated as "less than satisfactory" in four of five categories.

The Malama Pono is the UPW newsletter which is disseminated statewide to UPW members. The November/December 1995 edition of the Malama Pono, contains an article entitled, "Bradley Silva and Lance Manliauis (sic) Cases of Yamashiro's Political Favoritism." The article states, inter alia, that on November 12, 1993, Silva was evaluated as "less than satisfactory" by the parks maintenance division.

According to TAKAHASHI's affidavit, SILVA's personal records were not made available to the Union because the County appealed the Circuit Court's confirmation of the arbitration award to the Supreme Court.

According to RODRIGUES' affidavit, RODRIGUES prepared the Malama Pono article which was based on UPW's Memorandum of Fact and Law submitted to the Board in Case No. CE-01-204 and the

information provided in the proceedings before the Board. RODRIGUES states that the documents from the arbitration case have not been sent to the Union from TAKAHASHI.

DISCUSSION

In its motion to dismiss and or for summary judgment, the UPW contends that YAMASHIRO lacks standing to enforce § 89-16.5, HRS, since he is not aggrieved by the alleged violation. The UPW argues that YAMASHIRO may have legal obligations under Chapter 92F, HRS, but that he lacks the requisite interest to enforce the provisions of § 89-16.5, HRS.

Section 89-16.5, HRS, provides as follows:

Exclusive representatives shall be allowed access to an employee's personal records which are relevant to the investigation or processing of a grievance. The exclusive representative shall not share or disclose the specific information contained in the personal records and shall notify the employee that access has been obtained.

The UPW also contends that BRADLEY SILVA is an indispensable party to this action and that therefore YAMASHIRO's complaint should be dismissed. However, as the instant complaints have been consolidated, the Board finds that this argument is no longer applicable.

Respondent TAKAHASHI also contends that he is not a proper party and Complainants failed to state a claim against him. TAKAHASHI argues that he is not an exclusive representative within the meaning of § 89-2, HRS. Thus, the obligations imposed under § 89-16.5, HRS, do not extend to him. TAKAHASHI further contends

that § 89-13(b)(3), HRS, is inapplicable because the provision does not apply to an arbitration proceeding.

Respondents further argue that summary judgment should be rendered in their favor because there are no genuine issues of material fact in dispute. Respondents submit that County's counsel in Case No. CE-01-204 submitted SILVA's performance evaluation into evidence and also disclosed the contents of SILVA's personnel file through a County witness. Respondents argue that the disclosure of SILVA's personnel record became a matter of public record and the Union was free to write an article in the Malama Pono.

YAMASHIRO contends that the Employer has standing to bring this charge because he has a statutory duty to protect the privacy interests of its employees in their personnel files and records and to enforce the provisions of § 89-16.5, HRS. YAMASHIRO also argues that he has an interest in maintaining an effective and efficient workplace and the County is in the best position to enforce the requirements of § 89-16.5, HRS, as the employer and custodian of the records.

The UPW contends that the Complainant failed to state a claim for relief under § 89-13(b)(3), HRS, as those provisions refer to the mediation, fact-finding and arbitration proceedings involving the resolution of impasses. The County, however, contends that § 89-13(b)(3), HRS, applies to the instant case since the statute is not expressly limited in scope to impasse mediation, fact-finding and arbitration and that such an interpretation is absurd.

Section 89-13(b)(3), HRS, provides that it shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in § 89-11, HRS. The Board has consistently held that the mediation, fact-finding and arbitration procedures in § 89-11, HRS, refer to the impasse resolution mechanism for interest arbitrations involving the terms of the contract rather than the grievance resolution mechanism which involves the violation or interpretation of the contract. Mediation and fact-finding have no relevance to the grievance arbitrations. Thus, the Board has dismissed allegations of § 89-13(b)(3), HRS, violations where the central issues involve grievance arbitrations. Thomas Lepere, 5 HLRB 123 (1993); Charles Kimo Davidson, Order No. 1111 (9/30/94). Based upon the foregoing, the Board hereby dismisses the allegations of § 89-13(b)(3) HRS, violations raised in YAMASHIRO's complaint as the instant case involves a grievance arbitration.

With respect to the allegations of § 89-13(b)(4), HRS, violations arising from a violation of § 89-16.5, HRS, the Board finds that the statutory provision is not applicable to the present case. That section expressly provides that the exclusive representative shall be allowed access to an employee's personal records which are relevant to the investigation or processing of a grievance. The exclusive representative thereafter may not disclose the information contained in the records and must notify the employee that access has been obtained. Complainants contend

that the UPW failed to obtain SILVA's consent and violated the section by publishing the confidential information in the UPW newsletter.

In the present case, the information being objected to was contained in SILVA's job performance evaluation which was obtained by the Union pursuant to a subpoena issued during an arbitration. It was not obtained as a matter of right pursuant to the statute or upon request from the Employer during the processing or investigation of the class grievance. While it is arguable that the arbitration hearing is an extension of the processing of a grievance under the provision cited above, there is no dispute that the Union here obtained the information pursuant to the Arbitrator's subpoena. Presumably the UPW sought the information because it would lead to discoverable evidence or would be introduced into evidence during the hearing. The foregoing statutory provision if applicable, however, would prevent the disclosure of the information even to the Arbitrator. The Union would have access to the records but the record could not be further released. This would lead to an absurd construction of the statute; the statute is applicable to the investigation stage or processing of a grievance, not the arbitration hearing. Thus, the Board concludes that the instant complaints fail to state a claim for relief under § 89-16.5, HRS.

The Board makes no further findings or conclusions as to whether the release of information constitutes violations of other statutes which are not within the Board's jurisdiction.

CONCLUSIONS OF LAW

The Board has jurisdiction over the instant prohibited practice complaints.

Section 89-13(b)(3), HRS, refers to the refusal to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in § 89-11, HRS. The Board concludes that the statute refers to interest arbitrations as compared with grievance arbitrations. Thus, Complainant failed to state a claim of a § 89-13(b)(3), HRS, violation.

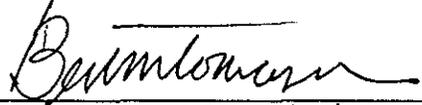
Section 89-16.5, HRS, prohibits the release of information which is obtained during grievance processing and investigation by the exclusive representative. The instant information was not obtained as a matter of right in the grievance processing but rather, was obtained pursuant to a subpoena in a grievance arbitration. Thus, the Board concludes that the instant statutory provision is not applicable and was not violated in this case.

ORDER

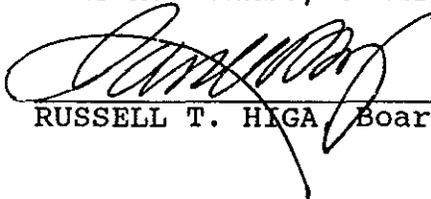
The instant complaints are dismissed for failure to state a claim for relief.

DATED: Honolulu, Hawaii, September 30, 1996.

HAWAII LABOR RELATIONS BOARD



BERT M. TOMASU, Chairperson



RUSSELL T. HIGA, Board Member

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BRADLEY SILVA v. UNITED PUBLIC WORKERS, AFSCME, LOCAL 646,
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COMPLAINTS

Sandra H. Ebesu

SANDRA H. EBESU, Board Member

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